

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

James C. Williams, Circuit Court Judge

Appellate Case No. 2014-000118

John T. Lucas, Sr. as Trustee of the John T. Lucas Revocable Trust and Carolyn C. Lucas
Revocable Trust, Appellant,

v.

The Bristol Condominium Property Owners Association, Respondent,

and

The Bristol Condominium Property Owners Association, Plaintiff,

v.

John T. Lucas St. as Trustee of the John T. Lucas Revocable Trust Dated November 10,
2004, and Carolyn C. Lucas Revocable Trust Dated November 10, 2004,
Defendants/Counterclaim Plaintiffs,

v.

The Bristol Condominium Property Owners Association, Counterclaim Defendant.

RECORD ON APPEAL
Volume One

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STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Bristol Condominium Property Owners' Association,)

Plaintiffs,)

v.)

Brittlebank Condominiums, LLC, The)
Beach Company, FSP Development, LLC,)
Gulf Stream Construction Company, Inc.,)
Niles Bolton Associates, Inc., Andersen)
Windows, Inc., Buck Lumber & Building)
Supply, Inc., Ferst Plastering, Inc., Superior)
Surfaces of Charleston, Inc., Cisson Interiors)
Inc., Superior Structures, Inc., ABG)
Caulking Contractors, Inc., Glasgow)
Roofing Company, Inc., Donald Barr d/b/a)
Barr & Barr Services, Gerald Watford,)
Watford Tile Company, Watford Tile, Inc.,)
and Alumtech Co., Inc.,)

Defendants,)

Gulf Stream Construction Company, Inc.,)

Third-party Plaintiffs,)

v.)

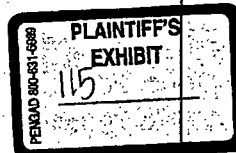
Merchants Bonding Company and)
Contractors Bonding and Insurance)
Company,)

Third-party Defendants)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2007-CP-10-612-
(60)

ORDER

FILED
2009 MAR 10 PM 1:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY *BP*



STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 07-CP-10- 607

Janice L. Landry, David B. Landry, John)
M. Jordan, Jr., Mary J. Jordan, Daniel,)
Longfellow Warner, Co-Trustee and Derek)
Longfellow Warner Co-Trustee of The)
David W. Warner and June J. Warner)
Qualified Personal Residence Trusts,)
Jack A. Dill, Karen A. Dill, Olga)
Valldejuli-Puig, Elizabeth Ashley Middleton)
Daniel B. Carr, Justine M. Carr, Emily B.)
Mohr as Trustee of the Emily B. Mohr)
Revocable Trust, Bradley Dean Sherlock,)
John C. Hamma, Peggy P. Neale, Charles,)
Edward DeRose as Trustee of The Charles)
DeRose Family Trust U/A, Betty L. Rhye,)
Larry M. Rhye, Troy W. Herndon, Linda)
H. Herndon, Constance K. Franzblau,)
Samuel N. Coble, Rosalie S. Orvin, Ann M.)
Peterson, Craig R. Tallberg, Gerald E.)
Newkirk, Gail E. Newkirk, Norris Preyer,)
Lucy Preyer, William M. Tunno, Elisa)
O. Tunno, Alex Cole Ebert and Elizabeth)
Hark Ebert as Trustees of The Alex Cole)
Ebert Revocable Trust, Morris D. Rosen,)
Christopher Clement, Ernest L. Zinkowski,)
Robert B. Miller, Jane M. Miller, Loretta W.)
Nickel as Trustee of The Loretta W. Nickel)
Living Trust, Jayne D. Harmon, James H.)
Frey and Jacqueline Frey as Trustees of)
The Frey Family Revocable Trust, W. Allen)
Woods, Rebecca C. Hyer, James Darrell,)
Kelley, Carole P. Kelley, Access Charleston)
Office, LLC, Frank Eastman, Joannes)
G. M. Prins, Maria T. M. Sindram, Frances)
Lieber, Maria von-Vivis Panella, David)
Weeks Scates, Dennis E. House, Steven.)
L. Hyatt, Virginia E. Hyatt, H. B. Campbell,)
Janet B. Turner and H. J. Turner, III,)

Plaintiffs,)

v.)

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Brittlebank Condominiums, LLC, The Beach)
Company, FSP Development, LLC, Gulf)
Stream Construction Company, Inc., Niles)
Bolton Associates, Inc., Andersen Windows,)
Inc., Buck Lumber & Building Supply, Inc.,)
Ferst Plastering, Inc., Superior Surfaces of)
Charleston, Inc., Cisson Interiors, Inc.,)
Superior Structures, Inc., ABG Caulking)
Contractors, Inc., Glasgow Roofing)
Company, Inc., Donald Barr d/b/a Barr &)
Barr Services, Gerald Watford, Watford)
Tile Company, Watford Tile, Inc. and)
AlumTech Co., Inc.,)

Defendants.)

Gulf Stream Construction Company, Inc.,)

Third-party Plaintiffs,)

v.)

Merchants Bonding Company and)
Contractors Bonding and Insurance)
Company,)

Third-party Defendants.)

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Kenneth Hanger, Morton Ellison,)
Patricia Ellison, Butler Derrick,)
Carl Wrenn, Sandy Wrenn,)
and Marilyn Durkee, Individually)
and On Behalf of All Others)
Similarly Situated Plaintiffs,)

Plaintiffs,)

IN THE COURT OF COMMON PLEAS)
FOR THE NINTH JUDICIAL CIRCUIT)

CASE NO.: 05-CP-10-3029)

(Consolidated into Case No.: 07-CP-10-607))

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39

v.

Brittlebank Condominiums, LLC, The
Beach Company, FSP Development, LLC,
Gulf Stream Construction Company, Inc.
Niles Bolton Associates, Inc., Andersen
Windows, inc., Buck Lumber & Building
Supply, Inc., Ferst Plastering, Inc., and
Superior Surfaces of Charleston, Inc.; ABG
Caulking Contractors, Inc.; Glasgow
Roofing Company, Inc.; Donald Barr d/b/a
Barr & Barr Services; Gerald Watford,
Watford Tile Company, Watford Tile, Inc.;
and AlumTech Co., Inc.,

Defendants.

This matter came before the Court on Defendants Gerald Watford, Watford Tile Company, and Watford Tile, Inc.'s (collectively the "Watford Defendants") Motion for Summary Judgment: (1) as to certain claims asserted by the Bristol Condominium Property Owners' Association (hereinafter "Bristol POA"), related to unit showers, shower bench seats, and shower infrastructure; (2) as to claims asserted by Plaintiffs Craig Tallberg and Ann Peterson (Unit 4005) and Ernest Zinkowski (Unit 4012) related to unit showers, shower bench seats, and shower infrastructure; (3) as to claims asserted by the remaining individual unit owner Plaintiffs related to unit showers, shower bench seats, and shower infrastructure; and (4) as to cross-claims asserted by Gulf Stream Construction Company, Inc. ("Gulf Stream") related to unit showers, shower bench seats, and shower infrastructure. A hearing was held on February 27, 2009 at which time arguments were made by all parties affected by the motion. The Court has reviewed the pleadings, motions, memorandums and evidence presented on the issue, considered the oral

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arguments raised at the hearing, and hereby issues an Order granting the motion, in part, and denying the motion, in part, for the reasons set forth at the hearing and as otherwise explained below.

On and at all times before May 6, 2008 and June 26, 2008, the dates that these suits were filed against the Watford Defendants (the former date for the *Landry* and *Bristol* POA suits and the latter for the *Hanger* suit), the Master Deed for the Bristol Horizontal Property Regime (hereinafter "Master Deed") and amendments thereto provided that the individual unit owners owned and had the duty to maintain the unit showers, shower bench seats, and shower infrastructure contained within their individual units. The Bristol POA had no ownership of or duty to maintain any of those components of the units. As a result, the individual unit owners, not the Bristol POA, has the sole right to assert claims related to unit showers, shower bench seats, and shower infrastructure. This fact was conceded by counsel for Plaintiffs at the hearing on the merits. The Watford Defendants are entitled to summary judgment as to this issue.

The Watford Defendants also are entitled to summary judgment for all claims brought by Defendants Tallberg/Peterson (Unit 4005) and Zinkowski (Unit 4012) based upon the application of the statute of limitations. South Carolina Code Section 15-3-530 mandates that a claimant bring a cause of action for damage to real property within three years. The statute begins to run when a party is on "notice that some right of his has been invaded or that some claim against another party might exist". *Epstein v. Brown*, 610 S.E.2d 816 (S.C. 2005). In determining when the limitations period begins to run, "the proper focus is upon the date of discovery of the injury, not the date of the discovery of the wrongdoer." *Brown v. Pearson*, 483 S.E.2d 477, 482 (S.C. App. 1997). "[T]he discovery rule focuses upon whether the complaining party acquired knowledge of any existing facts sufficient to put said party on inquiry, which, if developed, will

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disclose the alleged [wrongdoing]" *Berry v. McLeod*, 492 S.E.2d 794, 799 (S.C. App. 1997). The claimant need only be on notice of a potential claim. It is not necessary that there be evidence to support the claim or a determination of the extent of injury or damage. *Bayle v. SC Dep't of Transp.*, 542 S.E.2d 736 (S.C. App. 2001); *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 332 S.E.2d 555 (S.C. App. 1985). The evidence presented in support of the Watford Defendants' motion demonstrated that the owners of Units 4005 and 4012 were on notice of a potential claim related to their unit showers, shower bench seats, and/or shower infrastructure in 2004. No evidence was submitted to rebut this claim, other than the argument that the extent of the problem and the extent of the potential damage were not discovered until an expert engineering review, including destructive testing, was performed in late 2007 and early 2008. This argument is unpersuasive. The statute of limitation as to either unit would have expired in 2007. The Watford Defendants were not sued on these claims until 2008. Thus, the statute of limitation bars these claims.

At the hearing on the merits, counsel for the Bristol POA conceded that the individual Bristol unit owners, not the Bristol POA, have ownership rights to the unit showers, shower bench seats, and shower infrastructure. This concession makes the portion of the motion requesting summary judgment as to the Bristol POA based upon expiration of the statute of limitation moot.

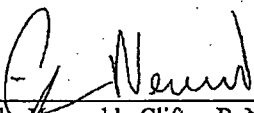
At the hearing on the merits, counsel for the Watford Defendants and counsel for Gulf Stream agreed on the record that Gulf Stream's cross-claims sounding in breach of contract and breach of implied warranty would be withdrawn and dismissed. The Watford Defendants withdrew their Motion for Summary Judgment as it related to Gulf Stream's claims for contractual and equitable indemnity.

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As to the remaining grounds set forth in the Watford Defendants' Motion for Summary Judgment, such are denied at this time.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED and DECREED that summary judgment be granted as to the Bristol POA's claims against the Watford Defendants as such claims relate to the unit showers, shower bench seats, and shower infrastructure. Summary judgment is also granted as to the claims of Defendants Tallberg, Peterson, and Zinkowski for damage to the showers, shower bench seats, and shower infrastructure in Units 4005 and 4012 based upon the statute of limitation. The summary judgment ground based on the statute of limitation as against the Bristol POA is moot. Gulf Stream has agreed to withdraw and dismiss its cross-claims based in breach of contract and breach of implied warranty, making the Watford Defendants' motion moot as to those cross-claims. The Watford Defendants withdrew their Motion for Summary Judgment as it related to Gulf Stream's contractual and equitable indemnity cross-claims. All other grounds set forth in the Watford Defendants' Motion for Summary Judgment are denied.

IT IS SO ORDERED.


The Honorable Clifton B. Newman
Presiding Judge

Charleston, South Carolina

March 10, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: ~~2011-CP-10-2232~~

2013-CP-10-1066
~~2010-CP-10-3240~~

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust and
Carolyn C. Lucas Revocable Trust,

Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Defendant.

FINAL ORDER

-and-

The Bristol Condominium Property
Owners' Association,

Plaintiff,

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust
Dated November 10, 2004, and
Carolyn C. Lucas Revocable Trust
Dated November 10, 2004,

Defendants/
Counterclaim Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Counterclaim Defendant.

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JULIE J. ARMSTRONG
CLERK OF COURT
BY 

This matter was tried before me sitting as a Special Referee on May 22nd and 23rd,
2013. In addition to two days of live testimony from the plaintiff John Lucas, Jan
Landry, John DeWitt and Lona Vest, the Court reviewed the deposition transcripts of



numerous witnesses including the plaintiff John Lucas, and reviewed numerous exhibits consisting of, among other things, the defendant's Master Deed, correspondence between the defendant and homeowners, the minutes of board meetings, repair estimates, cost estimates for windows and doors, and other documentation offered by each party in support of their respective positions, as more fully would appear in the record of the proceeding.

PROCEDURAL HISTORY

This matter was initially filed by the plaintiff Dr. John Lucas as Trustee for the John T. Lucas Sr. Revocable Trust and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust. The Case Number for the original action was 2010-CP-10-3240. Thereafter, the defendant, Bristol Condominium Property Owner's Association, filed a separate action to foreclose on the plaintiffs' condo for unpaid assessments and fees. That action bore case number 2011-CP-10-2232. The Lucases counterclaimed in that matter by asserting all of the same causes of action as they had brought in the earlier filed case. In addition, they asserted counterclaims for abuse of process, alleging that the foreclosure was merely retaliation for filing suit against the Association.

With the consent of both parties, the two actions were consolidated into one under the case number of the earlier filed case, 2010-CP-10-3240. As of the trial, the plaintiffs' surviving causes of action were for negligence, breach of fiduciary duty, fraud/constructive fraud and abuse of process.

With regard to the foreclosure, the plaintiffs do not dispute that they have not paid certain fees and assessments. Rather, at the trial, they set forth substantive arguments why they believed the fees and assessments were imposed improperly and argued that

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they should not be required to pay those fees and assessments. In light of the plaintiffs' position, the parties consented to the Association's presenting its foreclosure case via written submissions to the Court, subject to the Court's determination of the other issues before it, including the validity and appropriateness of the fees and assessments at issue and whether the filing of the foreclosure action was in fact an abuse of process.

As a preliminary matter, the defendant made two pre-trial motions, which the Court took under advisement at that time and again at the directed verdict phase. The first motion was premised on the argument that all of the plaintiffs' claims should have been brought as a shareholder derivative suit because the plaintiffs were not claiming independent individual harm such that they would have standing to sue in their individual capacities. The second motion was premised on the argument that, absent a motion to amend the pleadings, the plaintiffs, were regulated to seeking the relief that was requested in their Amended Complaint. The defendant argued that because the factual underpinnings for all of the plaintiffs surviving causes of action dealt with the physical removal of the original windows from the plaintiffs' condo, that the entire case was essentially moot.

The Court finds it unnecessary to rule on these motions at this juncture because it prefers to address the substance of the case head on, giving full deference to the plaintiffs with regard to these procedural issues. Taking that approach, the Court finds in favor of the Defendant on all counts.

p3 *[Signature]*

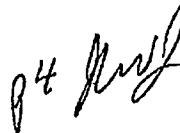
FINDINGS OF FACT

This matter arises out of the plaintiffs' ownership of a condo at the Bristol Condominiums in Charleston, South Carolina. The Bristol was developed by the Beach Company and built by Gulf Stream Construction, an affiliated entity.

Around 2004, residents at the Bristol began to notice problems with water intrusion into the building. While the Bristol Property Owners Assoc was still under the developer's control, certain unit owners hired experts to conduct investigations into the source of the water intrusion. These experts opined that there were numerous construction defects contributing to the problems.

Several owners filed suit against the Beach Company, Gulfstream and others in July 2005. One year later, control of the project was turned over the unit owners who constituted a new board of directors. Shortly thereafter, the Bristol Association filed its own suit against the Beach Company Gulfstream and others in February 2007. The third lawsuit was filed simultaneously by another sub-set of homeowners, who were represented by the same attorneys who filed suit on behalf of the Association. All three cases were subsequently consolidated for purposes of discovery and trial.

During the pendency of the litigation, the court ruled that the Bristol Property Owners Association could not bring an action on behalf of the homeowners for damages to the windows and doors of individual units because those items were property of the individual owners and not common property. Additionally, the Bristol Board was advised by several insurance professionals that because the exterior doors and windows at the Bristol were the property of the unit owners and not common elements under the Master



Deed, complications could arise such as gaps in coverage or inconsistent coverage in the event of a catastrophic storm that did extensive damage to the building.

The insurance professionals recommended that the Association amend the Master Deed to redefine the windows and doors as common elements. The Board acted on this advice by invoking a streamlined procedure for amending the Master Deed for occasions in which the regular procedures would be too slow or inefficient under the circumstances. Pursuant to the Master Deed, the Board sent notice of its recommendations to change the status of the windows and doors to all unit owners. The notice stated that any objections or questions should be submitted to the Board within 20 days or the amendment would automatically pass. Plaintiff John Lucas testified that he received this notice by certified mail, but that he was on vacation when the envelope arrived at his home in Travelers Rest, South Carolina. Although he received the letter within the twenty days, he did not bother to read it until after the 20 days had passed. In fact, no objections were received and the Master Deed Amendment took effect.

In March 2009, the judge assigned to the Association's construction design defect case granted summary judgment against the Association as to any claims related to the exterior doors and windows, finding that at the time the suit was filed, the Association did not have standing to raise claims to those components because they were not yet common elements. Most unit owners elected to assign their claims to the Association or to join the cases as individual plaintiffs. Not being aware of any leaking issues with their own windows and doors, the Lucases did neither. Dr. Lucas testified that he initially did not actively follow the litigation but that he did so once settlement and reconstruction issues arose. The Association and Landry suits were settled on March 19, 2009, the day

p5 NWL

the trial was set to start. The settlement was approved by the Board using the requisite procedures set forth in the Bristol's governing documents. Following the settlement, the Board solicited bids from various repair contractors and eventually hired Cooper River Construction.

The Board then created a repair committee to oversee the repairs to the building. The scope of repair was defined by expert architects and engineers retained by the Association. At their recommendation, the Board, through its subcommittee, determined that it was necessary to replace all of the exterior windows and doors in order to meet all applicable building codes and to have a full new warranty. The committee chose to replace all the windows and doors with new ones instead of treating damaged windows to solve the issue. The unit owners were given several opportunities to ask questions about the various replacement windows that were under consideration and to give their input on the decision. The plaintiffs did not participate in those question and answer sessions. After the decisions regarding the repair had been made, the Board determined that a special assessment would be necessary to cover the costs of replacing the windows and doors throughout the building.

The plaintiffs claimed to have no damage to their windows and doors. Additionally, the plaintiffs requested through their attorney information regarding the settlement. Furthermore, the plaintiffs claimed they were never provided the requested documentation until they filed their lawsuit. The plaintiffs refused to pay their portion of the special assessment. Even though the plaintiffs contended that their windows did not need to be replaced, their expert's report, which is part of the record of this case, shows that at least two of the plaintiffs' windows did have a leakage issue.



In addition to these criticisms of the Bristol's leadership, the Plaintiffs argued that the Board of the Bristol failed to communicate with the members of the Association regarding the progress of the litigation while it was pending. However, the record of this case is replete with emails, memos and letters from the Board and its committees doing just that. In fact, the only specific example pointed to by the Plaintiffs in support of this position, was that the Board did not inform the members that Andersen Windows had presented the option of retrofitting the original exterior windows with kits to make them code compliant as an alternative to full window replacement. However, the record shows that the Board with consultation from its outside expert advisors had already determined that the retrofit option did not represent significant cost savings or sufficiently address the prospect of future water intrusion.

Additionally, the Plaintiffs disagreed with the Board's decision as to how to use a refund of flood insurance premiums to the Association. Specifically, the Board opted to replenish the Association's capital reserve fund, otherwise depleted by the cost of litigation with the refund. While Dr. Lucas testified that he believed that the refund should have been divided amongst the unit owners, he also testified that he took issue with the fact that the capital reserve fund was underfunded for a time. The Court finds these positions inconsistent with one another. However, they are generally indicative of the plaintiffs' disagreement with the leadership of the Association.

CONCLUSIONS OF LAW

As stated above, the Court chooses not to address the questions of the plaintiffs standing to sue or the propriety of suing the Bristol Association rather than individual

Lucas v. Bristol Condominium Property Owners' Association, et al.
2011-CP-10-2232
Final Order
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p7 [signature] 7

Board members. However, while the named defendant is the Bristol Association, the entirety of this case deals with the propriety of the actions of several boards of directors who have made decisions with which plaintiff has disagreed. As such, the Court finds that the law that sets the standard for the conduct of directors of non-profit entities is applicable here.

S. C. Code Ann. § 33-31-830 reads as follows:

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

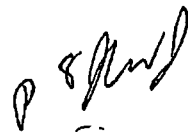
(b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented.



(c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

(e) A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including without limit, property that may be subject to restrictions imposed by the donor or transferor of the property.

(f) An action against a director asserting the director's failure to act in compliance with this section and consequent liability must be commenced before the sooner of (i) three years after the failure complained of or (ii) two years after the harm complained of is, or reasonably should have been, discovered. This limitations period does not apply if the failure to act in compliance with this section has been fraudulently concealed.

It is within this context that the Court finds:

1. The plaintiffs do not appear to understand that the members of horizontal property regime give up certain individual rights in order to enjoy the benefits of shared ownership. They seem to have the belief that every issue which came before the Bristol Board should have been submitted to a vote by the homeowners.

2. The plaintiffs have not met their burden of proof that:

- (a) The Board has demonstrated bad faith in its management of The Bristol's business;
- (b) There has been an attempt to hide the actions of the Board or to keep the homeowners ignorant of The Bristol's business. (To the contrary, the evidence shows a concerted effort to keep the homeowners informed);
- (c) There has been fraud committed by the Board directed toward anyone;
- (d) There has been a breach of any duty by the Board;

p 9 *Hand* ⁹

- (e) There has been mismanagement of The Bristol's affairs by the Board.

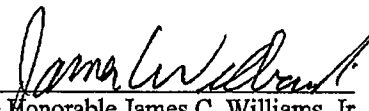
The uncontradicted testimony shows that the individual acts complained of by the plaintiffs, including: (1) the amendment of the Master Deed; (2) The decision to litigate; (3) The manner in which the litigation was handled; (4) The assessments made and (5) The disposition of the insurance refund, were (1) all based on decisions made after considering other options; (2) were made after consulting with counsel, and (3) affected all homeowners equally according to their circumstances.

There is no evidence that there was ever demonstrated, by any person at any time, any bias or prejudice toward the plaintiffs.

The foreclosure against the plaintiffs was filed lawfully, after the plaintiffs refused to pay certain assessments. Other homeowner arrearages which did not result in foreclosure were adequately explained by witnesses for the defense. There is no evidence that the plaintiffs were singled out for retaliatory treatment.

It certainly appears that the plaintiffs are sincere in their disagreement with the management of The Bristol. However, sincerity does not excuse their failure to abide by the written rules which they voluntarily accepted when they elected to purchase at The Bristol. Their only remedy is to participate in the governance of the association by exercising their right to vote.

August 1, 2013


The Honorable James C. Williams, Jr.
Special Referee

p10 flw/10

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2011-CP-10-2232

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust and
Carolyn C. Lucas Revocable Trust,

Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Defendant.

**ORDER DENYING PLAINTIFFS'
MOTION FOR A NEW TRIAL**

-and-

The Bristol Condominium Property
Owners' Association,

Plaintiff,

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust
Dated November 10, 2004, and
Carolyn C. Lucas Revocable Trust
Dated November 10, 2004,

Defendants/
Counterclaim Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Counterclaim Defendant.

FILED
2013 DEC -2 PM 3:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Court, having reviewed the arguments of the plaintiffs in support of their motion for a new trial in this matter, respectfully denies that motion. Plaintiffs have failed to raise any new issues or arguments that were not already thoroughly argued at

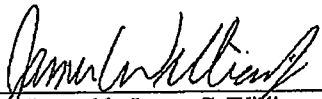
Lucas v. Bristol Condominium Property Owners' Association, et al.
2011-CP-10-2232
Order Denying Plaintiffs' Motion for a New Trial

Pl/Plaintiff

trial. As such, the court stands by its prior rulings for the reasons articulated in its final judgment entered on August 19, 2013.

IT IS SO ORDERED.

Nov 24, 2013


The Honorable James C. Williams, Jr.
Special Referee

Lucas v. Bristol Condominium Property Owners' Association, et al.
2011-CP-10-2232
Order Denying Plaintiffs' Motion for a New Trial
436796

per [signature]

2

JULIE J. ARMSTRONG

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51



JOSEPH A. MOONEYHAM
PO BOX 8359
GREENVILLE SC 29604-8359

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCF

Order/denying plntffs' mot for a new trial

CASE NO: 2011CP1002232

Bristol Condominium Property Owners Association The VS John T Lucas Sr

This judgment was entered on the 02th day of December, 2013, and a copy mailed first class on Tuesday, December 03, 2013, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-10-3240; file under

consolidated case no. 2013- CP-10-1066

John T. Lucas, et al.

The Bristol Condominium Property
Owners' Association

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

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

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: The Defendant Bristol Condominium Property Owners' Association's Motion for Summary Judgment, filed on July 1, 2011, was heard by this Court on August 16, 2012. At the hearing, the Court made an oral ruling granting the motion for summary judgment in favor of the Defendant as to the Plaintiff's causes of action for conversion, trespass, and improper entry. This Court denied the Defendant's motion as to the cause of action for violation of the fiduciary duty. This order will supplement the oral ruling.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

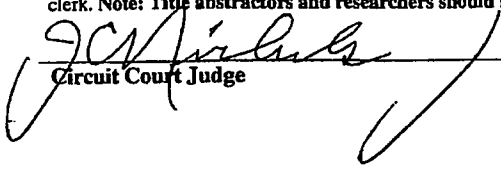
INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$

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

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


Circuit Court Judge

2117
Judge Code

2/19/14
Date

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
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CHARLESTON, SC 29401-2258

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JOSEPH A. MOONEYHAM
MOONEYHAM BERRY & KAROW, LLC
PO BOX 8359
GREENVILLE SC 29604-8359

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order/Consolidated this case under 2010-3240

CASE NO: 2011CP1002232

Bristol Condominium Property Owners Association The VS John T Lucas Sr

This judgment was entered on the 28th day of July, 2011, and a copy mailed first class on Saturday, August 06, 2011, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
THE BRISTOL CONDOMINIUMS)
PROPERTY OWNERS ASSOCIATION)

Plaintiff,)

vs.)

BRITTLEBANK CONDOMINIUMS, LLC,)
THE BEACH COMPANY, BEACH)
BRITTLEBANK, LLC, FSP)
DEVELOPMENT, LLC., GULF STREAM)
CONSTRUCTION COMPANY, INC.,)
NILES BOLTON ASSOCIATES, INC.)
ANDERSEN WINDOWS, INC., BUCK)
LUMBER & BUILDING SUPPLY, INC.)
FERST PLASTERING, INC.,)
SUPERIOR SURFACES OF)
CHARLESTON, INC., CISSON)
INTERIORS, INC., SUPERIOR)
STRUCTURES, INC., ABG)
CAULKING & WATERPROOFING OF)
MORRISTOWN, INC., GLASGOW)
ROOFING COMPANY, INC., and)
DONALD BARR D/B/A BARR &)
BARR SERVICES,)

Defendants.)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 07-CP-10- 6/2

COMPLAINT

(Construction Defect Claims)
(Declaratory Judgment)
(Negligence)
(Breach of Express and Implied Warranties)
(Negligent Misrepresentation)
(Breach of Fiduciary Duties)
(Accounting)
(Unfair Trade Practices)

Jury Trial Demanded

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2007 FEB -9 PM 4:50

FILED

The Bristol Condominiums Property Owners Association ("Plaintiff"), by and through their undersigned attorneys, complaining of the Defendants states and alleges as follows:

1. The Plaintiff is a non-profit corporation organized and existing under the laws of South Carolina.
2. The Plaintiff is comprised of the owners of all of the condominium units located at 3000 Old Bridgeview Lane, Charleston, Charleston County, South Carolina, known as The Bristol ("Bristol"), and is governed by a Board of Directors.

3. The Bristol is a five story building containing fifty-four condominium units.
4. The Board of Directors is composed of five duly elected members of the property owners' association who own units in the Bristol.
5. At a duly held special meeting of the Bristol Condominium Property Owners Association held on December 10, 2006, the Bristol unit owners voted by over ninety percent of their members to authorize the Board of Directors to pursue claims relative to water intrusion and other construction defects within the Bristol, including but not limited to, the building, facilities and individual units.
6. The Board of Directors is bringing this lawsuit on behalf of the Bristol Condominium Property Owners Association, pursuant to the authority given by the vote at the December 10, 2006, special meeting of the property owners and pursuant to its legal authority.
7. In addition to its legally defined obligations, the duties and responsibilities of the Plaintiff are set forth in the Master Deed of the Bristol Horizontal Property Regime ("Master Deed") dated August 30, 2002 and filed in Book D417, Page 1 of the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina.
8. The Master Deed provides in Section 3.4 that the common elements of the Bristol Condominiums are fractionally owned by all unit owners as tenants in common. The Master Deed further provides in Section 8.1 that "...the Association will maintain the Common Elements in first class condition in accordance with proper maintenance procedures applicable thereto and will enforce all warranties with respect to the Common Area."

9. The Plaintiff is charged with the responsibility of maintaining the common elements and with enforcing all warranties relating to the common elements.
10. Defendant Brittlebank Condominiums, LLC ("Brittlebank") is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, Brittlebank was organized for the sole purpose of developing the Bristol.
11. Defendant Beach Brittlebank, LLC ("BB") is a limited liability company organized and existing under South Carolina laws and doing business in Charleston County. Upon information and belief, BB is a member and the manager of Brittlebank.
12. Defendant FSP Development, LLC ("FSP") is a limited liability company organized and existing under South Carolina laws. Upon information and belief, FSP is a member of Brittlebank.
13. The Beach Company ("Beach Company") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, the Beach Company is the manager of Beach Brittlebank, LLC, which is the manager of Brittlebank Condominiums, LLC.
14. Upon information and belief, Brittlebank, BB, Beach Company, and FSP (hereinafter collectively referred to as "Developers") collectively developed the Bristol.

15. Prior to, during, and after construction, the Developers marketed the condominiums as a luxury condominium development and sold the individual condominium units to the Plaintiffs and others.
16. The Developers' representatives drafted and filed the Master Deed dated August 30, 2002, and all amendments thereto.
17. From the time the Bristol Condominium Property Owners Association was formed and up until the late summer of 2006, the Developers controlled the Board of Directors through its appointment of the members of the Board.
18. Defendant Beach Company served as the property manager of the Bristol while the Board of Directors was being controlled by the Developers.
19. Defendant Gulf Stream Construction Company, Inc. ("Gulf Stream") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Gulf Stream, pursuant to a contract with Brittlebank dated October 5, 2000, served as the general contractor for the construction of the Bristol and agreed to construct the project in accordance with the applicable contract documents, including but not limited to the plans and specifications prepared by Defendant Niles Bolton Associates, Inc. Upon information and belief, Gulf Stream is an affiliate of the Beach Company.
20. Defendant Niles Bolton Associates, Inc. ("Niles Bolton") is a corporation organized under Georgia law and registered to do business in South Carolina. Upon information and belief, Niles Bolton maintains its principal place of business in Georgia. Niles Bolton, by contract with the Developers, served as the architect for the design of the Bristol and agreed to provide professional

architectural and engineering services for the design of the Bristol, specifically including but not limited to the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, Defendant Niles Bolton agreed to make periodic visits to the project during construction to observe whether the construction was in accordance with the plans and specifications and all applicable building codes.

21. Andersen Windows Inc. ("Andersen") is a corporation organized under the laws of Minnesota and is registered and authorized to do business in South Carolina. At all times pertinent to this lawsuit, Andersen was engaged in the business of manufacturing and selling windows, window systems, and exterior doors for use in construction projects. Andersen presently sells windows, window systems, and exterior doors for use in South Carolina construction projects. Andersen manufactured and sold the windows, window systems, and exterior doors that were installed at the Bristol.
22. Buck Lumber & Building Supply, Inc. ("Buck") is a corporation organized, existing, and authorized to do business in South Carolina. Buck has its principal place of business in Charleston County, South Carolina. Upon information and belief, Buck was the supplier of the windows, window systems, and exterior doors installed at the Bristol.
23. Ferst Plastering, Inc. ("Ferst") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Ferst maintains its

principal place of business in Charleston County, South Carolina. First, pursuant to its subcontracts with Gulf Stream dated September 19, 2001 and October 25, 2001, agreed to furnish and install all items and incidental items of work required to perform the hardiplank, furring, lathing, and stucco scope of work for the Bristol project in accordance with the contract documents, manufacturer's requirements, including flashings and tie-ins, joints, sealants, and caulking as specified, expansion joints and reveals as required.

24. Superior Surfaces of Charleston, Inc. ("Superior Surfaces") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Superior Surfaces maintains its principal place of business in Charleston County, South Carolina. Superior Surfaces, pursuant to a subcontract with Gulf Stream dated May 15, 2002, agreed to providing and installing the exterior brick on the Bristol.
25. Cisson Interiors, Inc. ("Cisson") is a corporation organized, existing, and authorized to do business under the laws of South Carolina. Cisson, pursuant to a subcontract with Gulf Stream dated December 13, 2000, agreed to provide field engineering and layout, labor and materials and equipment, and all incidentals to complete aluminum stud framing, drywall, Dens Glass sheathing, thermal insulation, and exterior door and window installation on the Bristol project in accordance with the contract drawings and specifications.
26. Superior Structures, Inc. ("Superior Structures") is a corporation organized, existing, and authorized to do business under South Carolina law. Upon information and belief, Superior Structures maintains its principal place of

business in Charleston County, South Carolina. Superior Structures, pursuant to a subcontract with Gulf Stream dated December 6, 2001, agreed to furnish and install all items and incidental items of work to perform the exterior windows, doors, and flashing installation on the Bristol project in strict accordance with Andersen window and door installation requirements and the contract plans and specifications by Niles Bolton.

27. ABG Caulking & Waterproofing of Morristown, Inc. ("ABG") is a Tennessee corporation that is registered and authorized to do business in South Carolina. ABG, pursuant to a subcontract with Gulf Stream dated February 5, 2001, agreed to furnish and install all waterproofing at all exterior balconies in accordance with the contract drawings and specifications for the project.
28. Glasgow Roofing Company, Inc. ("Glasgow") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Glasgow maintains its principal place of business in South Carolina. Glasgow, pursuant to a subcontract with Gulf Stream dated May 28, 2002, agreed to provide all labor, materials, and all incidentals as required to complete installation of the metal flashing and sealant at all third floor balconies in accordance with all contract drawings, specifications, and approved design and submittals including all necessary mounting hardware and sealant to waterproof the balcony edges.
29. Donald Barr d/b/a Barr & Barr Services ("Barr") is a sole proprietor who was a resident of Charleston County and was performing construction related services in Charleston County during the construction of the Bristol. Upon information and

belief, Barr is a resident of Oconee County. Barr, pursuant to a subcontract with Gulf Stream dated January 16, 2002, agreed to furnish and install all items and incidental items of work required to perform exterior doors, windows, and flashing installation in accordance with the contract drawings and specifications and Andersen requirements.

30. The certificate of occupancy was issued for the Bristol prior to July 2005.
31. During Hurricane/Tropical Storm Gaston, which occurred on or about August 29, 2004, numerous instances of water intrusion occurred to the interior of the condominium units, the common areas, and the limited common areas at the Bristol.
32. The water damage to common elements and condominium units is a result of defects and deficiencies in the design and construction of the Bristol, specifically including but not limited to the following
 - a. No weep screed or weeping mechanism was installed along the stucco wall bases at the perimeter of the balcony slabs as required by building codes and proper construction practices;
 - b. There is a lack of adequate weeps in masonry;
 - c. The failure of weep or water management systems to manage seepage water, which gets past the façade cladding, has resulted in wetting of exterior sheathing behind moisture barriers and into the wall cavity and metal framework within the wall cavity;

- d. Gaps are existing between bottom edges of balcony decks and hard coat stucco;
- e. EIFS trim banding element is backwrapped without base coat;
- f. Metal copings are not terminated into hard coat stucco or flashing;
- g. Improper installation and sealing of metal coping joinery on the roof parapet;
- h. Gaps in exterior sheathing;
- i. No joints are installed between EIFS trim band and dissimilar materials;
- j. No separation joints are installed between brick masonry and EIFS;
- k. Gaps exist between brick and floor slab and between sheathing and floor slab;
- l. Window jambs have gaps behind nailing fin and next to wood nailer;
- m. Gaps exist between window frames and wall framing below trellis band board;
- n. Gaps between wood bands and hard coat stucco;
- o. Tyvek wrap is not continuous in areas;
- p. Project specified metal through wall flashing shown on the project drawings is not installed at wall bases, heads, and below window sill bases;

- q. No horizontal joint or through wall flashing is installed between brick masonry and stucco immediately above masonry around building;
- r. There is improper installation of sealants around windows, doors, and cladding terminations;
- s. Improper installation of deck coatings has resulted in cracks or splits allowing surface water runoff to seep under metal copings;
- t. Head and sill flashing called for in plans and specifications was not installed;
- u. Failure to seal and flash terminations and gaps at bottom of window and door jambs installed on concrete slabs;
- v. Failure to install proper sealant joints around penetrations in exterior cladding;
- w. Metal cap flashings have been installed with a negative slope;
- x. Exterior architectural trim has been installed with little or no slope; and
- y. Balcony decks are not properly sloped.

33. Plaintiff is informed and believes that the exterior windows and doors installed at the condominium units, the limited common areas, and the common areas of the building are not in compliance with the building codes and standards which were applicable to this project at the time of design and construction and will have to

be replaced with new exterior windows and doors which comply with current building codes and standards applicable to this project.

34. The Plaintiff has been and will continue to be proximately damaged by the design and construction defects existing at the Bristol.
35. Due to the design and construction defects and resulting property damage, Plaintiff has, and in the future, will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
36. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.

I. FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

37. The allegations contained in paragraphs 1-36 are realleged and restated as if repeated verbatim herein.
38. Plaintiff brings this cause of action against Defendants the Developers, Gulf Stream, Niles Bolton, and all other Defendants who performed work on the Bristol pursuant to section 15-53-10, et seq., of the South Carolina Code seeking a declaration that certain provisions of the Master Deed and sales contracts are void and unenforceable against Plaintiffs.

39. The Master Deed is dated August 30, 2002, and is signed by John A. Darby, President of the Beach Company, and Dana R. Mager, Corporate Secretary of the Beach Company, serving as the Manager of Beach Brittlebank, LLC, which was and is a member of Brittlebank Condominiums, LLC.
40. The Master Deed was filed in Book D417, Page 1 of the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina. The Master Deed is comprised of seventy five pages including six exhibits, the cover page, and the table of contents, and is incorporated by reference.
41. Exhibit E to the Master Deed is the Bylaws of the Bristol Condominium Property Owners' Association ("Bylaws").
42. The Master Deed was amended on at least three occasions prior to transition of the authority to elect or appoint members of the Board of Directors of the Bristol Condominium Property Owners Association from the Developers to the owners of the condominium units.
43. In selling the units, the Developers used form contracts which were prepared by their representatives and agents.
44. The Master Deed, the exhibits to the Master Deed, the amendments to the Master Deed and the sales contracts collectively contain various clauses, provisions, and terms which are oppressive, one sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina. The provisions for which Plaintiff seeks a declaratory judgment from this Court that these terms are void, invalid, and unenforceable include, but are not limited to the purported disclaimer of warranty of habitability, limitation of warranties and remedies, and waiver and

release of claims if certain procedures are not followed by Plaintiffs in the pursuit of lawful and valid claims.

Warranty of Habitability

45. Section 3.6 of the Master Deed states:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF COMPLETION OF CONSTRUCTION (BEING THE LATER OF SUBSTANTIAL COMPLETION UNDER THE CONSTRUCTION CONTRACT, OR THE DATE A CERTIFICATE OF OCCUPANCY IS ISSUED THEREFOR), THE DEVELOPER SHALL AT NO COST TO THE ASSOCIATION REPAIR OR REPLACE (IN THE DEVELOPER'S DISCRETION) ANY PORTIONS OF THE COMMON AREA (EXCEPT FIXTURES, ACCESSORIES AND APPLIANCES COVERED BY SEPARATE WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS) WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. THIS LIMITED WARRANTY IS IN PLACE OF ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND THE DEVELOPER DISCLAIMS ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, THE LIABILITY OF THE DEVELOPER SHALL BE LIMITED TO SUCH REPAIR OR REPLACEMENT AND THE DEVELOPER SHALL NOT BE LIABLE FOR DAMAGES OF ANY NATURE, WHETHER DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL, REGARDLESS OF WHETHER SUCH DAMAGES ARE CLAIMED TO ARISE OUT OF THE LAW OF CONTRACT, TORT OR OTHERWISE, OR PURSUANT TO STATUTE OF ADMINISTRATIVE REGULATION. Each Owner in accepting a deed from the Developer or any other party to a Unit, expressly acknowledges and agrees that this Section 3.6 establishes the sole liability of the Developer to the Association and the Owners related to defects in the Common Area and the remedies available with regard thereto. At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Area.

46. Section 3.6 was inserted in the Master Deed by the Developers.

47. The Defendants did not specifically bargain for Section 3.6 of the Master Deed with any of the condominium unit owners or any of the purchasers of the condominium units.
48. Section 3.6 of the Master Deed was not conspicuous to prospective purchasers of the condominiums at the time they negotiated their contracts to purchase condominium units from the Developers.
49. The owners of the condominium units were unaware of the disclaimer of the warranty of habitability language contained in Section 3.6 of the Master Deed.
50. By inserting such a provision in the Master Deed, the Developers sought to insulate themselves from liability for design and construction defects for which the Developers and other Defendants are liable under the laws of South Carolina.
51. The only parties to benefit from the insertion of such a provision in the Master Deed are the Developers of the Bristol and the other Defendants.

"Real Estate Purchase Agreements"

52. The Developers and their agents prepared standard form contracts to be used for the sale of condominium units at the Bristol.
53. Upon information and belief, the contracts were used for the sale of every unit, with slight modifications in certain instances.
54. The real estate sales contracts prepared by the Developers were identified at the top of each document as a "Real Estate Purchase Agreement."
55. Upon information and belief, each Real Estate Purchase Agreement contained a provision entitled "Warranty." This provision was materially misleading because rather than granting Plaintiff rights, it was designed to limit, waive, and forfeit the

rights which Plaintiff has under the law of South Carolina as purchasers of an interest in real estate.

56. Upon information and belief, the "Warranty" provision is found in either Section 8 or Section 11 of the contracts depending on the version of the contract for sale used by the Developers.
57. Upon information and belief, the "Warranty" provision is materially the same in all of the Real Estate Purchase Agreements.
58. The "Warranty" provision reads as follows:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF CLOSING, THE COMPANY WILL, AT NO COST TO THE PURCHASER, REPAIR OR REPLACE ANY PORTION OF THE UNIT, EXCEPT FOR FIXTURES AND APPLIANCES COVERED BY A MANUFACTURER'S WARRANTY, WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. FURTHERMORE, PURCHASER ACKNOWLEDGES AND AGREES THAT PURCHASER WILL PERFORM SUCH ROUTINE MAINTENANCE AS IS SET FORTH IN ANY WRITTEN MANUAL, INSTRUCTION BOOKLET OR OTHER WRITING AS MAY BE PROVIDED TO PURCHASER BY THE COMPANY OR ANY SUCH MANUFACTURER. THE FAILURE OF PURCHASER TO OBSERVE AND PERFORM ANY SUCH RECOMMENDED MAINTENANCE MAY INVALIDATE ANY WARRANTY WITH RESPECT TO THE ITEM FOR WHICH THE MAINTENANCE WAS NOT PERFORMED. THE COMPANY'S LIABILITY IS EXPRESSLY LIMITED TO SUCH REPAIR OR REPLACEMENT, AND THE COMPANY MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED. THE COMPANY IS NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES PROXIMATELY CAUSED BY A BREACH OF WARRANTY, THE COMPANY'S TOTAL LIABILITY BEING THE COST OF REPLACEMENT OR REPAIR, AND THE PURCHASER WILL NOT BE ENTITLED TO ANY COMPENSATION FOR LOST RENTAL OR INCONVENIENCE.

59. The "Warranty" provisions contained in the Real Estate Purchase Agreements do not specifically state that the Developers are disclaiming the warranty of habitability.

- 60. The "Warranty" provisions found in the Real Estate Purchase Agreements were not specifically bargained for between the Developers and the purchasers.
- 61. Upon information and belief, many of the current owners of the condominiums at the Bristol did not sign a sales contract with the Developers.
- 62. The "Warranty" provisions are not conspicuous in the contracts.

Release of Liability for Failure to Submit Claims to Mandatory Alternative Dispute Resolution Procedures

- 63. Section 16 of the Master Deed is entitled "Alternative Dispute Resolution."
- 64. Subsection 16.1 of Section 16 states

[t]he Developer, Association, Owners, and any Parties not otherwise subject to the Regime who agrees to submit to this Section 16 (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving the Regime or the Project, and to avoid the emotional and financial costs of litigation. For purposes hereof, the architect and contractor for a Building and the Units constructed therein shall constitute Bound Parties hereunder. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Regime or the Project, including without limitation, claims, grievances, or disputes arising out of or relating to the interpretation, application, or enforcement thereof (collectively "Claims"), except for "Exempt Claims" under Section 16.2, are subject to the procedures set forth in 16.3.
- 65. Section 16.3 of the Master Deed purports to prescribe the manner in which claims against "Bound Parties" can be made.
- 66. According to Section 16.3, a Plaintiff with a "Claim" against a bound party cannot initiate legal proceedings unless it complies with procedures outlined by Exhibit F to the Master Deed.
- 67. Exhibit F to the Master Deed purports to establish a mandatory procedure for the resolution of claims. However, the provisions are materially misleading in that the Developers buried within the procedure, in paragraph 1.3(b), an attempt to have

the Plaintiff forfeit its legal rights and release the Developers and other Defendants from any and all liability.

68. Paragraph 1.3(b) of Exhibit F to the Master Deed provides that

In the event Claimant does not submit the Claim to binding arbitration as aforesaid, the Claim is deemed abandoned, and Respondent is released and discharged from any and all liability to Claimant arising out of the Claim; provided, nothing herein will release or discharge Respondent from any liability to a Person not a Party to the foregoing proceedings, or the mandatory requirements of this Paragraph 1.3 with respect to any subsequently arising new dispute or claim by the Claimant which is identical or similar to the Claim previously deemed abandoned under this Paragraph 1.3(b).

69. Under the dispute resolution provision, the Developers also attempted to create a forfeiture of Plaintiff's rights to recover punitive damages by purporting to provide that an arbitrator cannot award punitive damages.
70. Exhibit F to the Master Deed was prepared and filed by the Developers.
71. The owners of condominium units at the Bristol did not negotiate the terms of Exhibit F with the Developers and did not vote to include the provisions in the Master Deed.
72. The Developers included Exhibit F to the Master Deed to have control over the manner in which condominium purchasers pursue claims against them.

REQUESTED DECLARATIONS

73. The Plaintiff requests that the Court declare Section 3.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina.
74. Alternatively, Plaintiff requests the Court to declare that the portions of Section 3.6 purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace

defective work invalid for such purpose and unenforceable under the laws of South Carolina.

75. The Plaintiff requests that the Court declare the entire provisions in the original contracts for sale of the condominium units entitled warranty to be invalid and unenforceable under the laws of South Carolina.
76. Alternatively, the Plaintiff requests the Court to declare that the portion of the warranty provisions in the original contracts for sale of the condominiums purporting to disclaim liability for defective work are insufficient to disclaim the implied warranty of habitability given at law by the developer and the portion of the sales contracts purporting to limit the liability of the developer to the cost to repair and replace defective work be deemed invalid and unenforceable under the laws of South Carolina.
77. The Plaintiff requests that Section 16 of the Master Deed be declared inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina.
78. The Plaintiff requests that Section 16.3 of the Master Deed be declared inapplicable to the claims of Plaintiff and/or invalid and unenforceable under the laws of South Carolina.
79. The Plaintiff requests that Exhibit F to the Master Deed, specifically including, but not limited to Paragraph 1.3(b), be declared inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina.

II. FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to the Developers)

80. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-79.
81. The Developers provided an implied warranty of habitability under South Carolina law to the purchasers and owners of the Bristol condominium units by controlling the design and ultimate cost of construction, by using its affiliate Gulf Stream as the general contractor to control the means and methods of construction, offering the units for sale to the public, and entering into contracts of sale to the Plaintiffs and other members of the class. This warranty of habitability extends to subsequent purchasers who were the foreseeable beneficiaries of this warranty.
82. The attempts by the Developers to disclaim the warranty of habitability are void and unenforceable under law of South Carolina as interpreted by the South Carolina Supreme Court in that the purported disclaimer was not conspicuous and was not specifically bargained for during negotiations for the sale of the units.
83. The numerous design and construction defects and resulting property damage to the individual condominium units of the Bristol constitutes a breach of the warranty of habitability under the laws of South Carolina.
84. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct

the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.

85. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
86. Plaintiff is entitled to a judgment against the Developers in an amount to be proven at trial for all damages proximately caused by the Developers' breach of the warranty of habitability.

III. FOR A THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty as to the Developers)

87. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-86.
88. During the time that the Developers controlled the actions of the Board of Directors for the Bristol Condominiums Property Owners Association, the Developers through their appointed agents on the Board, owed the Plaintiff a fiduciary duty to place the interests of the Plaintiff above the interests of the Developers and their affiliates, such as Gulf Stream. This fiduciary duty included a duty to conduct a good faith investigation of all possible design and construction deficiencies at the Bristol without regard to whether the Developers or its affiliates, including Gulf Stream, were ultimately liable for all damages arising from the deficiencies in design and construction.
89. The Developers also owed a non-delegable duty to the Plaintiff to make certain that all of the common elements of the Bristol were either in good repair and in

compliance with all applicable building codes or that sufficient funds had been provided to the Bristol Condominiums Property Owners Association by the Developers to make any necessary repairs at the time that transition of control of the Board of Directors by the Developers to the owners of the Bristol condominium units.

90. As of the date of transition of control of the Board of Directors by the Developers to the owners of the Bristol condominium units in the late summer of 2006, the Developers knew that the construction and design defects and deficiencies in the common elements and other exterior components of the Bristol had caused and would in the future cause property damage to the units and personal property of the condominium unit owners.
91. The Developers failed to pursue claims against responsible parties and failed to make the needed repairs to the common elements and other exterior components before transition of control of the Board of Directors from the Developers to the owners of the Bristol condominium units and failed to mitigate continuing damage to the Bristol and the Plaintiff.
92. The Developers failed to adequately fund the Bristol Condominiums Property Owners Association so that it could make the necessary repairs. Further, to the extent the Developers took any steps to investigate the design and construction deficiencies at the Bristol, they used funds belonging to the Bristol Condominiums Property Owners Association, the source of which was assessments paid by the condominium unit owners rather than using Developers own funds.

93. By failing to repair the common elements and exterior components, failing to pursue claims against responsible parties, and failing to properly fund the Bristol Condominiums Property Owners Association for the purpose of making such repairs, the Developers breached their fiduciary duties and other non-delegable duties owed to Plaintiffs and members of the class.
94. As a proximate and direct result of Brittlebank, BB, Beach Company, and FSP's breach of its fiduciary duties, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
95. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
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96. The Plaintiff is entitled to a judgment against the Developers for the breach of their fiduciary and other non-delegable duties in an amount to be proven at trial.

IV. FOR A FOURTH CAUSE OF ACTION
(Negligence as to the Developers)

97. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-96.

98. As the developers of the Bristol, Brittlebank, BB, Beach Company, and FSP owed a duty of due care in overseeing the construction, management, and operation of the Bristol to purchasers of condominium units.
99. The Developers breached the duty of due care it owed to Plaintiffs and members of the class as the purchasers of condominium units in one or more of the following particulars:
- a) by failing to properly select the architect, general contractor, and materials used in the construction of the Bristol;
 - b) by failing to properly oversee the design and construction, including the selection of subcontractors, of the Bristol when it planned to sell the condominium units to members of the public for profit;
 - c) by failing to properly and prudently to fund and effect repairs to the common elements of the Bristol and the exterior windows and doors while it was in control of the property owners' association;
 - d) by failing to properly and prudently fund the property owners' association before transition of control of the Board of Directors to the individual condominium unit owners; and
 - e) by engaging in self dealing and self interested transactions without properly evaluating other alternatives.

100. The negligent acts and omissions of the Developers are the proximate causes of construction and design deficiencies which have resulted in property damage and financial damages to Plaintiff.
101. The acts and omissions of Brittlebank, BB, Beach Company, and FSP have proximately caused the Plaintiff to be damaged in that Plaintiff has and, in the future, will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
102. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
103. As a result of the negligence of the Developers, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.
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V. FOR A FIFTH CAUSE OF ACTION
(Accounting at to the Developers)

104. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-103.
105. Management and control of the Bristol Condominiums Property Owners Association was formerly vested in a Board of Directors appointed and controlled by the Developers.

106. Before transitioning control of the Board of Directors from the Developers to the owners of the Bristol condominium units in late summer 2006, the Developers made various transfers of money from the operating account of the Bristol Condominiums Property Owners Association.
107. Plaintiff is not currently aware of all the money and assets belonging to the Bristol Condominiums Property Owners Association that may have been misappropriated.
108. The Developers failed to render a proper accounting as to the funds, operations, assets, and property of the property owners' association.
109. Plaintiff is entitled to an order requiring a complete accounting as to expenses of the property owners' association and further requiring the Defendants to hold as trustee for the Plaintiff any property or benefit improperly obtained by the Defendants.
110. The Plaintiff has no adequate remedy at law for this grievance.

VI. FOR A SIXTH CAUSE OF ACTION

(Negligence as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, Glasgow, ABG, and Superior Structures)

111. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-110.
112. By undertaking construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures owed a duty to Plaintiff to use reasonable care during the performance of their respective work on the building and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that

construction conformed to the design documents when such documents reflected good design practice, the applicable standard of care, and industry standards.

113. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached the duty of care they owed to Plaintiff.
114. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures were negligent, grossly negligent, willful, and reckless in numerous aspects of the construction of the buildings, including, but not limited to, the following:
 - a. Failing to properly supervise subcontractors and laborers during the construction of the Bristol;
 - b. Failing to follow plans and specifications of the architect and design professionals;
 - c. Failing to follow manufacturers' installation instructions and recommendations;
 - d. Failing to perform construction work in accordance with applicable building codes and proper workmanlike practices;and
 - e. Failing to select proper materials and capable subcontractors.
115. As a direct and proximate result of the negligence and recklessness of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures as hereinabove set forth, the condominium units, the common elements, and the limited common elements of the Plaintiff have been damaged by the intrusion of water.

116. Plaintiff has been proximately damaged by Defendants in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
117. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
118. As a result of the negligence of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.

VII. FOR A SEVENTH CAUSE OF ACTION

(Negligence Per Se as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

119. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-118.
120. By undertaking construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures owed a duty to Plaintiff to use reasonable care during the performance of their work on the building and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction

conformed to the design documents when such documents reflected good design practice, conformed to the applicable standard of care, and conformed to industry standards.

121. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached the duty of care it owed to Plaintiff.
122. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures' work violated the applicable building codes in effect at the time of construction, specifically including, but not limited to the following
 - a. Failure to install weep mechanisms;
 - b. Failure to furnish and install exterior windows and doors which were in compliance with all applicable building codes and industry standards;
 - c. Failure to install head flashings;
 - d. Failure to properly install exterior cladding; and
 - e. Such additional building code violations which may be discovered during ongoing investigations of design and construction deficiencies.

123. The violation of the building codes by the contractors amounts to negligence per se.
124. Plaintiff has been proximately damaged by Defendants in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and

construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.

125. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
126. As a result of the negligence per se of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, the Plaintiff is entitled to a judgment against said Defendants in an amount to be determined at trial.

VIII. FOR AN EIGHTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanlike Service as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

127. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-126.
128. By performing construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures impliedly warranted that their work product would be quality workmanship equal to or greater than industry standards.
129. The above referenced construction defects and deficiencies show that Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached their implied warranties by failing to provide quality workmanship.

130. Plaintiff has been proximately damaged by Defendants in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
131. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
132. Plaintiff is entitled to a judgment against Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, in an amount to be determined at trial, as a result of the Defendants breach of its implied warranties.

IX. FOR A NINTH CAUSE OF ACTION

(Breach of Express Warranty as to Gulf Stream, Niles Bolton, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

133. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-132.
134. Gulf Steam, pursuant to the Section 3.5.1 of the General Conditions of its contract with Brittlebank to serve as the general contractor for the construction of the Bristol, expressly warranted that its work would be of good quality, free from defects, and would conform to the contract documents.

135. Niles Bolton, pursuant to its contract with Brittlebank, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.
136. Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, pursuant to section 4.5.1 of their respective subcontracts with Gulf Stream, expressly warranted that their work would be of good quality, free from defects, and would conform to the contract documents.
137. As the ultimate and foreseeable owners of the Bristol condominium units, the Plaintiff and members of the class are beneficiaries of the express warranties provided by these Defendants.
138. These Defendants have breached their express warranties by failing to design and construct the Bristol such that it would be free from defects and in compliance with the applicable building codes and industry standards.
139. Plaintiff has been proximately damaged by Defendants in that it has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
140. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.

141. The Plaintiff is entitled to a judgment against these Defendants for the breach of their express warranties for an amount to be proven at trial.

X. FOR A TENTH CAUSE OF ACTION
(Breach of Express Warranties as to Andersen and Buck)

142. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-141.
143. Andersen and Buck warranted that the products they manufactured and sold for use in the Bristol would be of good quality, free from defects, and suitable for use and in compliance with applicable building codes in the City of Charleston as it relates to a five story riverfront condominium project.
144. The products manufactured and marketed by Andersen and sold by Andersen and Buck and incorporated into the Bristol have failed and are allowing water to intrude into the building. Further, upon information and belief, the exterior windows and doors are not in compliance with the applicable building codes and industry standards as it relates to the Bristol project.
145. The failures of the products manufactured and marketed by Andersen and sold by Buck and Andersen have resulted in damage to the various components of the building and will require extensive repair and restoration by the Plaintiff. Additionally, the exterior windows and doors, which are not in compliance with the applicable building codes, must be removed and replaced with exterior windows and doors which will be in compliance with the current building codes applicable to the Bristol project.
146. The Plaintiff will suffer loss of use of the common elements and the limited common elements of the Bristol, interference with the use and enjoyment of the

common elements and limited common elements during the time in which construction repairs are undertaken to the individual units, to the limited common elements, and to the common elements of the Bristol.

147. The failures of these products constitute a breach of the express warranties made by Andersen and Buck.
148. Plaintiff is entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of the breach of their express warranties.

XI. FOR AN ELEVENTH CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability against Andersen and Buck)

149. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-148.
150. By selling its products for use in the Bristol, Andersen and Buck impliedly warranted that the products would be fit for their intended purposes.
151. The products sold by Andersen and Buck and incorporated into the Bristol have failed and are allowing water to intrude into the building.
152. The failures of the products marketed and sold by Andersen and Buck have resulted in damage to various components of the building and will require extensive repair and restoration by the Plaintiff including, but not limited to, removal of the exterior windows and doors and replacement with exterior windows and doors which comply with the building codes currently applicable to the Bristol project.
153. The Plaintiff will suffer loss of use of the common elements and limited common elements, the interference with the use and enjoyment of their units during the

time in which construction repairs are undertaken to the common elements and the limited common elements of the Bristol.

- 154. The failures of these products constitute a breach of the implied warranty of merchantability.
- 155. Plaintiff is entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of their breach of the implied warranties of merchantability.

XII. FOR A TWELFTH CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for a Particular Purpose as to Buck and Andersen)

- 156. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-155.
- 157. Andersen and Buck were aware that their exterior windows and doors were being considered for use as building components for the Bristol project which is a five story riverfront building located in the City of Charleston.
- 158. Upon information and belief, Andersen and Buck recommended their products for the particular purposes stated by the contractors, the developers, and the architect.
- 159. Andersen and Buck knew or reasonably should have known that the purchasers were relying on their skill or judgment to select suitable goods which are in compliance with applicable building codes.
- 160. By selling the exterior windows and doors for a particular use in the Bristol, Andersen and Buck impliedly warranted that their products would be fit for their intended purpose in a five story riverfront condominium project.
- 161. The products sold by Andersen and Buck and incorporated into the Bristol have failed and are allowing water to intrude into the building.

162. The failure of the products has resulted in damage to the various components of the building and will require extensive repair and restoration by the Plaintiff including removal of all exterior windows and doors which are not in compliance with applicable building codes.
163. The Plaintiff will suffer loss of use of the common elements and the limited common elements, the interference with the use and enjoyment of the common elements and limited common elements during the time in which construction repairs are undertaken to the common elements and limited common elements of the Bristol.
164. The failure of these products amount to a breach of the implied warranty of fitness for a particular purpose.
165. Plaintiff is entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of their breach of the implied warranties of merchantability.

XIII. FOR A THIRTEENTH CAUSE OF ACTION
(Strict Liability in Tort against Andersen and Buck)

166. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-165.
167. Andersen and Buck are in the business of selling building products for use in construction projects in South Carolina, specifically windows, window systems, and doors.
168. Andersen manufactured and sold and Buck sold exterior windows, window systems, and doors that were incorporated into the Bristol during construction.

169. The exterior windows, window systems, and doors were expected to and were incorporated into the Bristol without substantial change from the condition in which they were originally manufactured and sold.
170. The exterior windows, window systems, and doors have failed and are allowing water to enter the condominium units and other portions of the common elements from the exterior during rain events.
171. The failure of the exterior windows, window systems, and doors is causing property of the Plaintiff to be damaged.
172. The failure of the exterior windows, window systems, and doors will result in danger to the Plaintiff and their guests and invitees if these products are unable to withstand the design wind loads of 125 miles per hour required by the applicable building codes.
173. The exterior windows, window systems, and doors that were sold for use in the Bristol are defective and unreasonably dangerous to the condominium owners.
174. As a proximate result of the defective windows, window systems, and doors, Plaintiff have and continue to suffer damages, including but not limited to removal of all exterior windows and doors and replacement with exterior windows and doors which comply with the local applicable building codes.
175. The Plaintiff will suffer loss of use of the common elements and limited common elements, the interference with the use and enjoyment of the common elements and limited common elements during the time in which construction repairs are undertaken to the individual units and to the common elements and limited common elements of the Bristol.

176. Due to the damages caused by the defective products, Plaintiff is entitled to a judgment against Andersen and Buck for an amount to be determined at the trial of this case.

XIV. FOR A FOURTEENTH CAUSE OF ACTION
(Negligence as to Niles Bolton)

177. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-176.
178. Niles Bolton agreed to provide professional architectural and engineering services for the design of the Bristol, specifically including but not limited to the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, Defendant Niles Bolton agreed to make periodic visits to the project during construction to observe whether the construction was in accordance with the plans and specifications and all applicable building codes.
179. It was foreseeable that the Plaintiff, as the ultimate purchasers of the Bristol condominium units, would be damaged if the Niles Bolton breached the above duties.
180. Niles Bolton breached its duty of care as follows
- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
 - b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in

compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;

- c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

181. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.

182. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.

183. Plaintiff is entitled to a judgment against Niles Bolton in an amount to be determined at the trial of the case.

XV. FOR A FIFTEENTH CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service as to Niles Bolton)

184. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-183.
185. By performing design services for the construction of the Bristol, Niles Bolton impliedly warranted that its work product would be of good quality, equal to or greater than industry standards.
186. Niles Bolton breached its duty to provide workmanlike service as follows:
- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
 - b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;
 - c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;

- d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

187. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
188. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
189. Plaintiff is entitled to a judgment against Niles Bolton, in an amount to be determined at trial, as a result of the breach of its implied warranty.

XVI. FOR A SIXTEENTH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to Niles Bolton)

190. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-189.
191. Niles Bolton warranted the sufficiency of the design, plans, and specifications for the Bristol. Plaintiffs and members of the class, as the ultimate purchasers of the

Bristol condominium units, were the foreseeable beneficiaries of this implied warranty.

192. By failing to properly design the building and prepare appropriate plans and specifications, Niles Bolton breached its warranty as follows:
- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
 - b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;
 - c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
 - d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
 - e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

193. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
194. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
195. Plaintiff is entitled to a judgment against Niles Bolton, in an amount to be determined at trial, as a result of the breach of its warranty.

XVII. FOR A SEVENTEENTH CAUSE OF ACTION
(Negligent Misrepresentation as to the Developers)

196. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-195.
197. The Developers, through advertisements, sales brochures and other marketing
literature, website advertisements and by statements and actions of their agents, made numerous representations to the purchasers of condominiums, including, but not limited to the quality and luxury of the condominium units at the Bristol.
198. The representations made by the Developers and their agents to the purchasers of the condominiums were untrue and were misrepresentations of material facts.
199. The representations were made for the purpose of selling condominium units.

200. The individual condominium units owners comprising the Plaintiff, as purchasers of the condominium units, relied upon the representations of the Developers when deciding to purchase the units.
201. In the exercise of reasonable care, the Developers knew or should have known that their representations were false and that the prospective purchasers would rely on the representations.
202. The Developers failed to exercise reasonable care in making the representations.
203. The purchasers of the condominium units reasonably and justifiably relied on the representations of the Developers.
204. The Developers profited from the sale of the condominium units.
205. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
206. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.
207. The conduct of the Developers amounts to gross negligence and entitles Plaintiff to recover punitive damages.

XVIII. FOR AN EIGHTEENTH CAUSE OF ACTION

(Unfair Trade Practices against Brittlebank, Beach Brittlebank, FSP, and Beach Company)

208. Plaintiff reasserts and realleges the allegations contained in the above paragraphs 1-207.
209. The Plaintiff and the Developers are persons within the meaning of the South Carolina Unfair Trade Practices Act.
210. By developing, marketing, and selling the condominium units at the Bristol, the Developers were engaged in commerce.
211. The actions of the Developers in developing, marketing, and selling the condominium units at the Bristol constitute unfair and deceptive practices.
212. The actions are capable of repetition and affect the public interest of South Carolina.
213. Upon information and belief, the actions of the Developers have been repeated.
214. Due to the design and construction defects and resulting property damage, Plaintiff has and in the future will be forced to expend funds to repair damage that has already occurred, will have to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to the units, the limited common areas, and to the common areas of the building.
215. Additionally, Plaintiff will suffer loss of use of the common areas and the limited common areas, and the interference with the use and enjoyment of the common areas and limited common areas during the time in which construction repairs are undertaken to individual units and to the common elements of the Bristol.

216. The Plaintiff is entitled to its actual damages, treble damages, interest, and attorneys' fees.

WHEREFORE, the Plaintiff prays as follows:

- a. That the Court issue a Declaratory Judgment with respect to the first cause of action against the Developers, Gulf Stream, and Niles Bolton
 - i. To declare Section 3.6 of the Master Deed invalid and unenforceable under the laws of South Carolina; Alternatively, to declare that the portions of Section 3.6 purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work invalid for such purpose and unenforceable under the laws of South Carolina;
 - ii. To declare the entire provisions in the original contracts for sale of the condominium units entitled Warranty to be invalid and unenforceable under the laws of South Carolina; Alternatively, to declare the portion of the warranty provisions in the original contracts for sale of the condominiums purporting to disclaim

liability for defective work to be insufficient to disclaim the implied warranty of habitability given at law by the developer and the portion of the sales contracts purporting to limit the liability of the developer to the cost to repair and replace defective work be deemed invalid and unenforceable under the laws of South Carolina.

iii. To declare that Section 16 of the Master Deed is inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina;

iv. To declare that Section 16.3 of the Master Deed is inapplicable to the claims of Plaintiff and/or invalid and unenforceable under the laws of South Carolina.

v. To declare Exhibit F to the Master Deed to be inapplicable to the claims of Plaintiff and/or unenforceable and invalid under the laws of South Carolina.

b. Judgment for actual damages against the Defendants jointly and severally with regard to causes of action II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII;

- c. Punitive damages against the Developers under cause of action XVII, against Gulf Steam, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures for cause of action VII;
- d. Treble damages against the Developers pursuant to section 39-5-110, et seq. for the violation of the South Carolina Unfair Trade Practices Act under cause of action XVIII;
- e. An Order requiring a complete accounting as to receipts and expenses of the property owners' association and further requiring the Defendants to hold as trustee for the Plaintiff any property or benefit improperly obtained by the Defendants;
- f. Costs and attorneys' fees against the Defendants; and
- g. Such further relief as the Court deems appropriate.

ROSEN, ROSEN & HAGOOD, LLC

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ATTORNEYS FOR PLAINTIFF

Charleston, South Carolina
February 9, 2007

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
JANICE L. LANDRY, JOHN M.)
JORDAN, JR, DAVID W. WARNER,)
RAYMOND G. JOHNSON, and)
CHARLES EDWARD DeROSE,)
in their individual capacity and as duly)
elected members of the Board of Directors)
of the Bristol Condominium Property)
Owners Association, and STEVEN L.)
HYATT and HAROLD B. CAMPBELL,)
in their individual capacity and)
collectively with the other named)
Plaintiffs as class representatives of)
all owners and residents of the)
condominium units in the Bristol)
Condominium Property Owners')
Association who are similarly situated)

Plaintiffs,)

vs.)

BRITTLEBANK CONDOMINIUMS, LLC,)
THE BEACH COMPANY, BEACH)
BRITTLEBANK, LLC, FSP)
DEVELOPMENT, LLC., GULF STREAM)
CONSTRUCTION COMPANY, INC.,)
NILES BOLTON ASSOCIATES, INC.)
ANDERSEN WINDOWS, INC., BUCK)
LUMBER & BUILDING SUPPLY, INC.)
FERST PLASTERING, INC.,)
SUPERIOR SURFACES OF)
CHARLESTON, INC., CISSON)
INTERIORS, INC., SUPERIOR)
STRUCTURES, INC., ABG)
CAULKING & WATERPROOFING OF)
MORRISTOWN, INC., GLASGOW)
ROOFING COMPANY, INC., and)
DONALD BARR D/B/A BARR &)
BARR SERVICES,)

Defendants.)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
Case No.: 07-CP-10- 607

FILED
2007 FEB -9 PM 3:08
JULIE J. ARMSTRONG
CLERK OF COURT

COMPLAINT

(Construction Defect Claims)
(Declaratory Judgment)
(Negligence)
(Breach of Express and Implied Warranties)
(Negligent Misrepresentation)
(Breach of Fiduciary Duties)
(Unfair Trade Practices)

Jury Trial Demanded

The Plaintiffs, above named, complaining of the Defendants, would respectfully show unto this Honorable Court:

1. The Plaintiffs are owners and residents of condominium units of the Bristol Condominiums ("Bristol"), located at 3000 Old Bridgeview Lane, Charleston, Charleston County, South Carolina, and bring this action in their names and pursuant to Rule 23 of the South Carolina Rules of Civil Procedure as representatives of a class of similarly situated property owners comprised of each and every condominium unit owner in the Bristol.
2. Janice L. Landry, John M. Jordan, Jr., David W. Warner, Raymond G. Johnson, and Charles Edward DeRose are duly elected members of the Board of Directors of the Bristol Condominium Property Owners Association, are owners of condominium units at the Bristol, and are residents of Charleston County, South Carolina.
3. At a duly held special meeting of the Bristol Condominium Property Owners Association held on December 10, 2006, the Bristol unit owners voted by over ninety percent of their members to authorize the Board of Directors to pursue claims relative to water intrusion and other construction defects within the Bristol, including but not limited to, the building, facilities and individual units.
4. The individual members of the Board of Directors are bringing this lawsuit in their individual capacity and as duly elected members of the Board of Directors, pursuant to the authority given by the vote at the December 10, 2006, special

meeting of the property owners, and collectively with the other named Plaintiffs on behalf of the individual condominium unit owners who are similarly situated.

5. Plaintiff Steven L. Hyatt is an owner of Bristol unit 5014, which he purchased from Brittlebank Condominiums, LLC on or about March 28, 2004. Mr. Hyatt's unit has experienced water intrusion resulting in damage and loss of use of his unit. Attempts to repair his unit by the Defendants have been unsuccessful.
6. Plaintiff Harold B. Campbell is the owner of Bristol unit 5013, which he purchased from Brittlebank Condominiums, LLC on or about September 3, 2004. Mr. Campbell's unit has experienced water intrusion resulting in damage to his unit.
7. The Bristol is a five story building containing fifty-four condominium units.
8. The Plaintiffs would further allege and show:
 - i. The class is so numerous that joinder of all members is impracticable;
 - ii. There are questions of law and fact common to the class;
 - iii. The claims of the Plaintiffs are typical of the claims of the class;
 - iv. The Plaintiffs will fairly and adequately protect the interest of the class; and
 - v. The amount in controversy exceeds One Hundred Dollars (\$100.00) for each member of the class.
9. Pursuant to the Master Deed of the Bristol Horizontal Property Regime ("Master Deed") dated August 30, 2002 and filed in Book D417, Page 1 of the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina, individual condominium unit owners have exclusive ownership and possession of their units.
10. The Master Deed provides in Section 3.4 that the common elements of the Bristol Condominiums are fractionally owned by all unit owners as tenants in common.

The Master Deed further provides in Section 8.1 that "... the Association will maintain the Common Elements in first class condition in accordance with proper maintenance procedures applicable thereto and will enforce all warranties with respect to the Common Area."

11. The property rights of the owners are outlined in section 3 of the Master Deed.
12. Section 3.2(c) provides that the windows, glass surfaces, and doors (including window and door frames and the hardware thereof) serving the unit are considered part of each individual unit.
13. Pursuant to section 8.3 of the Master Deed, individual condominium unit owners are responsible for maintaining, repairing, and replacing all portions of their own units, specifically including doors, windows, screen window, and door hardware.
14. Likewise, the individual condominium unit owners are responsible for maintaining, repairing, and replacing all property within the walls of the condominium units.
15. Defendant Brittlebank Condominiums, LLC ("Brittlebank") is a limited liability company organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, Brittlebank was organized for the sole purpose of developing the Bristol.
16. Defendant Beach Brittlebank, LLC ("BB") is a limited liability company organized and existing under South Carolina laws and doing business in Charleston County. Upon information and belief, BB is a member and the manager of Brittlebank.

17. Defendant FSP Development, LLC ("FSP") is a limited liability company organized and existing under South Carolina laws. Upon information and belief, FSP is a member of Brittlebank.
18. The Beach Company ("Beach Company") is a corporation organized and existing under the laws of South Carolina with its principal place of business in Charleston County. Upon information and belief, the Beach Company is the manager of Beach Brittlebank, LLC, which is the manager of Brittlebank Condominiums, LLC.
19. Upon information and belief, Brittlebank, BB, Beach Company, and FSP (hereinafter collectively referred to as "Developers") collectively developed the Bristol.
20. Prior to, during, and after construction, the Developers marketed the condominiums as a luxury condominium development and sold the individual condominium units to the Plaintiffs and others.
21. The Developers' representatives drafted and filed the Master Deed dated August 30, 2002 and all amendments thereto.
22. From the time the Bristol Condominium Property Owners Association was formed and up until the late summer of 2006, the Developers controlled the Board of Directors through its appointment of the members of the Board.
23. Defendant Beach Company served as the property manager of the Bristol while the Board of Directors was being controlled by the Developers.
24. Defendant Gulf Stream Construction Company, Inc. ("Gulf Stream") is a corporation organized and existing under the laws of South Carolina with its

principal place of business in Charleston County. Gulf Stream, pursuant to a contract with Brittlebank dated October 5, 2000, served as the general contractor for the construction of the Bristol and agreed to construct the project in accordance with the applicable contract documents, including but not limited to the plans and specifications prepared by Defendant Niles Bolton Associates, Inc. Upon information and belief, Gulf Stream is an affiliate of the Beach Company.

25. Defendant Niles Bolton Associates, Inc. ("Niles Bolton") is a corporation organized under Georgia law and registered to do business in South Carolina. Upon information and belief, Niles Bolton maintains its principal place of business in Georgia. Niles Bolton, by contract with the Developers, served as the architect for the design of the Bristol and agreed to provide professional architectural and engineering services for the design of the Bristol, specifically including but not limited to the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, Defendant Niles Bolton agreed to make periodic visits to the project during construction to observe whether the construction was in accordance with the plans and specifications and all applicable building codes.

26. Andersen Windows Inc. ("Andersen") is a corporation organized under the laws of Minnesota and is registered and authorized to do business in South Carolina. At all times pertinent to this lawsuit, Andersen was engaged in the business of manufacturing and selling windows, window systems, and exterior doors for use

in construction projects. Andersen presently sells windows, window systems, and exterior doors for use in South Carolina construction projects. Andersen manufactured and sold the windows, window systems, and exterior doors that were installed at the Bristol.

27. Buck Lumber & Building Supply, Inc. ("Buck") is a corporation organized, existing, and authorized to do business in South Carolina. Buck has its principal place of business in Charleston County, South Carolina. Upon information and belief, Buck was the supplier of the windows, window systems, and exterior doors installed at the Bristol.
28. Ferst Plastering, Inc. ("Ferst") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Ferst maintains its principal place of business in Charleston County, South Carolina. Ferst, pursuant to subcontracts with Gulf Stream dated September 19, 2001 and October 25, 2001, agreed to furnish and install all items and incidental items of work required to perform the hardiplank, furring, lathing, and stucco scope of work for the Bristol project in accordance with the contract documents, manufacturer's requirements, including flashings and tie-ins, joints, sealants, and caulking as specified, expansion joints and reveals as required.
29. Superior Surfaces of Charleston, Inc. ("Superior Surfaces") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Superior Surfaces maintains its principal place of business in Charleston County, South Carolina. Superior Surfaces, pursuant to a

subcontract with Gulf Stream dated May 15, 2002, agreed to providing and installing the exterior brick on the Bristol.

30. Cisson Interiors, Inc. ("Cisson") is a corporation organized, existing, and authorized to do business under the laws of South Carolina. Cisson, pursuant to a subcontract with Gulf Stream dated December 13, 2000, agreed to provide field engineering and layout, labor and materials and equipment, and all incidentals to complete aluminum stud framing, drywall, Dens Glass sheathing, thermal insulation, and exterior door and window installation on the Bristol project in accordance with the contract drawings and specifications.
31. Superior Structures, Inc. ("Superior Structures") is a corporation organized, existing, and authorized to do business under South Carolina law. Upon information and belief, Superior Structures maintains its principal place of business in Charleston County, South Carolina. Superior Structures, pursuant to a subcontract with Gulf Stream dated December 6, 2001, agreed to furnish and install all items and incidental items of work to perform the exterior windows, doors, and flashing installation on the Bristol project in strict accordance with Andersen window and door installation requirements and the contract plans and specifications by Niles Bolton.
32. ABG Caulking & Waterproofing of Morristown, Inc. ("ABG") is a Tennessee corporation that is registered and authorized to do business in South Carolina. ABG, pursuant to a subcontract with Gulf Stream dated February 5, 2001, agreed to furnish and install all waterproofing at all exterior balconies in accordance with the contract drawings and specifications for the project.

33. Glasgow Roofing Company, Inc. ("Glasgow") is a corporation organized, existing, and authorized to do business in South Carolina. Upon information and belief, Glasgow maintains its principal place of business in South Carolina. Glasgow, pursuant to a subcontract with Gulf Stream dated May 28, 2002, agreed to provide all labor, materials, and all incidentals as required to complete installation of the metal flashing and sealant at all third floor balconies in accordance with all contract drawings, specifications, and approved design and submittals including all necessary mounting hardware and sealant to waterproof the balcony edges.
34. Donald Barr d/b/a Barr & Barr Services ("Barr") is a sole proprietor who was a resident of Charleston County and was performing construction related services in Charleston County during the construction of the Bristol. Upon information and belief, Barr is a resident of Oconee County. Barr, pursuant to a subcontract with Gulf Stream dated January 16, 2002, agreed to furnish and install all items and incidental items of work required to perform exterior doors, windows, and flashing installation in accordance with the contract drawings and specifications and Andersen requirements.
35. The certificate of occupancy was issued for the Bristol prior to July 2005.
36. During Hurricane/Tropical Storm Gaston, which occurred on or about August 29, 2004, numerous instances of water intrusion occurred to the interior of the condominium units, the common areas, and the limited common areas at the Bristol.

37. The water damage to common elements and condominium units is a result of defects and deficiencies in the design and construction of the Bristol, specifically including but not limited to the following
- a. No weep screed or weeping mechanism was installed along the stucco wall bases at the perimeter of the balcony slabs as required by building codes and proper construction practices;
 - b. There is a lack of adequate weeps in masonry;
 - c. The failure of weep or water management systems to manage seepage water, which gets past the façade cladding, has resulted in wetting of exterior sheathing behind moisture barriers and into the wall cavity and metal framework within the wall cavity;
 - d. Gaps are existing between bottom edges of balcony decks and hard coat stucco;
 - e. EIFS trim banding element is backwrapped without base coat;
 - f. Metal copings are not terminated into hard coat stucco or flashing;
 - g. Improper installation and sealing of metal coping joinery on the roof parapet;
 - h. Gaps in exterior sheathing;
 - i. No joints are installed between EIFS trim band and dissimilar materials;

- j. No separation joints are installed between brick masonry and EIFS;
- k. Gaps exist between brick and floor slab and between sheathing and floor slab;
- l. Window jambs have gaps behind nailing fin and next to wood nailer;
- m. Gaps exist between window frames and wall framing below trellis band board;
- n. Gaps exist between wood bands and hard coat stucco;
- o. Tyvek wrap is not continuous in areas;
- p. Project specified metal through wall flashing shown on the project drawings is not installed at wall bases, heads, and below window sill bases;
- q. No horizontal joint or through wall flashing is installed between brick masonry and stucco immediately above masonry around building;
- r. There is improper installation of sealants around windows, doors, and cladding terminations;
- s. Improper installation of deck coatings has resulted in cracks or splits allowing surface water runoff to seep under metal copings;
- t. Head and sill flashing called for in plans and specifications was not installed;

- u. Failure to seal and flash terminations and gaps at bottom of window and door jambs installed on concrete slabs;
- v. Failure to install proper sealant joints around penetrations in exterior cladding;
- w. Metal cap flashings have been installed with a negative slope;
- x. Exterior architectural trim has been installed with little or no slope; and
- y. Balcony decks are not properly sloped.

38. Plaintiffs and members of the class are informed and believe that the exterior windows and doors installed at their units, the limited common areas, and the common areas of the building are not in compliance with the building codes and standards which were applicable to this project at the time of design and construction and will have to be replaced with new exterior windows and doors which comply with current building codes and standards applicable to this project.
39. The Plaintiffs and members of the class have been and will continue to be proximately damaged by the design and construction defects existing at the Bristol.
40. Due to the design and construction defects and resulting property damage, Plaintiffs and members of the class have, and in the future, will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction

deficiencies, and to implement the remediation plan to their units and to the building.

41. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

I. FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

42. The allegations contained in paragraphs 1-41 are realleged and restated as if repeated verbatim herein.
43. Plaintiffs and members of the class bring this cause of action against Defendants the Developers, Gulf Stream, Niles Bolton, and all other Defendants that performed construction work on the Bristol pursuant to section 15-53-10, et seq., of the South Carolina Code seeking a declaration that certain provisions of the Master Deed and sales contracts are void and unenforceable against Plaintiffs.
44. The Master Deed is dated August 30, 2002, and is signed by John A. Darby, President of the Beach Company, and Dana R. Mager, Corporate Secretary of the Beach Company, serving as the Manager of Beach Brittlebank, LLC, which was and is a member of Brittlebank Condominiums, LLC.
45. The Master Deed was filed in Book D417, Page 1 of the office of the Register Mesne Conveyance ("RMC") for Charleston County, South Carolina. The Master Deed is comprised of seventy five pages including six exhibits, the cover page, and the table of contents, and is incorporated by reference.

46. Exhibit E to the Master Deed is the Bylaws of the Bristol Condominium Property Owners' Association ("Bylaws").
47. The Master Deed was amended on at least three occasions prior to transition of the authority to elect or appoint members of the Board of Directors of the Bristol Condominium Property Owners Association from the Developers to the owners of the condominium units.
48. In selling the units, the Developers used form contracts which were prepared by their representatives and agents.
49. The Master Deed, the exhibits to the Master Deed, the amendments to the Master Deed and the sales contracts collectively contain various clauses, provisions, and terms which are oppressive, one sided, unconscionable, overreaching, and contrary to the law and public policy of South Carolina. The provisions which Plaintiffs seek a declaratory judgment from this Court that these terms are void, invalid, and unenforceable include, but are not limited to the purported disclaimer of warranty of habitability, limitation of warranties and remedies, and waiver and release of claims if certain procedures are not followed by Plaintiffs in the pursuit of lawful and valid claims.

Warranty of Habitability

50. Section 3.6 of the Master Deed states:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF COMPLETION OF CONSTRUCTION (BEING THE LATER OF SUBSTANTIAL COMPLETION UNDER THE CONSTRUCTION CONTRACT, OR THE DATE A CERTIFICATE OF OCCUPANCY IS ISSUED THEREFOR), THE DEVELOPER SHALL AT NO COST TO THE ASSOCIATION REPAIR OR REPLACE (IN THE DEVELOPER'S DISCRETION) ANY PORTIONS OF THE COMMON AREA (EXCEPT FIXTURES, ACCESSORIES AND APPLIANCES COVERED BY SEPARATE

WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS) WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. THIS LIMITED WARRANTY IS IN PLACE OF ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, EXPRESS OR IMPLIED, AND THE DEVELOPER DISCLAIMS ALL OTHER CONTRACTUAL OBLIGATIONS OR WARRANTIES, INCLUDING ANY IMPLIED WARRANTIES OF HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. TO THE FULLEST EXTENT PERMITTED BY LAW, THE LIABILITY OF THE DEVELOPER SHALL BE LIMITED TO SUCH REPAIR OR REPLACEMENT AND THE DEVELOPER SHALL NOT BE LIABLE FOR DAMAGES OF ANY NATURE, WHETHER DIRECT, INDIRECT, SPECIAL OR CONSEQUENTIAL, REGARDLESS OF WHETHER SUCH DAMAGES ARE CLAIMED TO ARISE OUT OF THE LAW OF CONTRACT, TORT OR OTHERWISE, OR PURSUANT TO STATUTE OF ADMINISTRATIVE REGULATION. Each Owner in accepting a deed from the Developer or any other party to a Unit, expressly acknowledges and agrees that this Section 3.6 establishes the sole liability of the Developer to the Association and the Owners related to defects in the Common Area and the remedies available with regard thereto. At the end of the one (1) year warranty period referred to hereinabove in this Section 3.6, the Developer will assign to the Association in writing all of its rights, claims, causes of action and demands which it has or which may thereafter accrue against all other people who may be responsible for the design and/or construction of the Common Area.

51. Section 3.6 was inserted in the Master Deed by the Developers.
52. The Defendants did not specifically bargain for Section 3.6 of the Master Deed with any of the condominium unit owners or any of the purchasers of the condominium units.
53. Section 3.6 of the Master Deed was not conspicuous to prospective purchasers of the condominiums at the time they negotiated their contracts to purchase condominium units from the Developers.
54. The owners of the condominium units were unaware of the disclaimer of the warranty of habitability language contained in Section 3.6 of the Master Deed.

- 55. By inserting such a provision in the Master Deed, the Developers sought to insulate themselves from liability for design and construction defects for which the Developers and other Defendants are liable under the laws of South Carolina.
- 56. The only parties to benefit from the insertion of such a provision in the Master Deed are the Developers of the Bristol and the other Defendants.

“Real Estate Purchase Agreements”

- 57. The Developers and their agents prepared standard form contracts to be used for the sale of condominium units at the Bristol.
- 58. Upon information and belief, the contracts were used for the sale of every unit, with slight modifications in certain instances.
- 59. The real estate sales contracts prepared by the Developers were identified at the top of each document as a “Real Estate Purchase Agreement.”
- 60. Upon information and belief, each Real Estate Purchase Agreement contained a provision entitled “Warranty.” This provision was materially misleading because rather than granting Plaintiffs rights, it was designed to limit, waive, and forfeit the rights which Plaintiffs have under the law of South Carolina as purchasers of an interest in real estate
- 61. Upon information and belief, the “Warranty” provision is found in either Section 8 or Section 11 of the contracts depending on the version of the contract for sale used by the Developers.
- 62. Upon information and belief, the “Warranty” provision is materially the same in all of the Real Estate Purchase Agreements.
- 63. The “Warranty” provision reads as follows:

FOR A PERIOD OF ONE (1) YEAR FROM THE DATE OF CLOSING, THE COMPANY WILL, AT NO COST TO THE PURCHASER, REPAIR OR REPLACE ANY PORTION OF THE UNIT, EXCEPT FOR FIXTURES AND APPLIANCES COVERED BY A MANUFACTURER'S WARRANTY, WHICH ARE DEFECTIVE AS TO MATERIALS OR WORKMANSHIP. FURTHERMORE, PURCHASER ACKNOWLEDGES AND AGREES THAT PURCHASER WILL PERFORM SUCH ROUTINE MAINTENANCE AS IS SET FORTH IN ANY WRITTEN MANUAL, INSTRUCTION BOOKLET OR OTHER WRITING AS MAY BE PROVIDED TO PURCHASER BY THE COMPANY OR ANY SUCH MANUFACTURER. THE FAILURE OF PURCHASER TO OBSERVE AND PERFORM ANY SUCH RECOMMENDED MAINTENANCE MAY INVALIDATE ANY WARRANTY WITH RESPECT TO THE ITEM FOR WHICH THE MAINTENANCE WAS NOT PERFORMED. THE COMPANY'S LIABILITY IS EXPRESSLY LIMITED TO SUCH REPAIR OR REPLACEMENT, AND THE COMPANY MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED. THE COMPANY IS NOT RESPONSIBLE FOR ANY CONSEQUENTIAL DAMAGES PROXIMATELY CAUSED BY A BREACH OF WARRANTY, THE COMPANY'S TOTAL LIABILITY BEING THE COST OF REPLACEMENT OR REPAIR, AND THE PURCHASER WILL NOT BE ENTITLED TO ANY COMPENSATION FOR LOST RENTAL OR INCONVENIENCE.

- 64. The "Warranty" provisions contained in the Real Estate Purchase Agreements do not specifically state that the Developers are disclaiming the warranty of habitability.
- 65. The "Warranty" provisions found in the Real Estate Purchase Agreements were not specifically bargained for between the Developers and the purchasers.
- 66. Upon information and belief, many of the current owners of the condominiums at the Bristol did not sign a sales contract with the Developers.
- 67. The "Warranty" provisions are not conspicuous in the contracts.

Release of Liability for Failure to Submit Claims to Mandatory Alternative Dispute Resolution Procedures

- 68. Section 16 of the Master Deed is entitled "Alternative Dispute Resolution."
- 69. Subsection 16.1 of Section 16 states

[t]he Developer, Association, Owners, and any Parties not otherwise subject to the Regime who agrees to submit to this Section 16 (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving the Regime or the Project, and to avoid the emotional and financial costs of litigation. For purposes hereof, the architect and contractor for a Building and the Units constructed therein shall constitute Bound Parties hereunder. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Regime or the Project, including without limitation, claims, grievances, or disputes arising out of or relating to the interpretation, application, or enforcement thereof (collectively "Claims"), except for "Exempt Claims" under Section 16.2, are subject to the procedures set forth in 16.3.

70. Section 16.3 of the Master Deed purports to prescribe the manner in which claims against "Bound Parties" can be made.
71. According to Section 16.3, a Plaintiff with a "Claim" against a bound party cannot initiate legal proceedings unless it complies with procedures outlined by Exhibit F to the Master Deed.
72. Exhibit F to the Master Deed purports to establish a mandatory procedure for the resolution of claims. However, the provisions are materially misleading in that the Developers buried within the procedure, in paragraph 1.3(b), an attempt to have the Plaintiffs forfeit their legal rights and release the Developers and other Defendants from any and all liability.
73. Paragraph 1.3(b) of Exhibit F to the Master Deed provides that

In the event Claimant does not submit the Claim to binding arbitration as aforesaid, the Claim is deemed abandoned, and Respondent is released and discharged from any and all liability to Claimant arising out of the Claim; provided, nothing herein will release or discharge Respondent from any liability to a Person not a Party to the foregoing proceedings, or the mandatory requirements of this Paragraph 1.3 with respect to any subsequently arising new dispute or claim by the Claimant which is identical or similar to the Claim previously deemed abandoned under this Paragraph 1.3(b).

74. Under the dispute resolution provision, the Developers also attempted to create a forfeiture of Plaintiffs' rights to recover punitive damages by purporting to provide that an arbitrator cannot award punitive damages.
75. Exhibit F to the Master Deed was prepared and filed by the Developers.
76. The owners of condominium units at the Bristol did not negotiate the terms of Exhibit F with the Developers and did not vote to include the provisions in the Master Deed.
77. The Developers included Exhibit F to the Master Deed to have control over the manner in which condominium purchasers pursue claims against them.

REQUESTED DECLARATIONS

78. The Plaintiffs and members of the class request that the Court declare Section 3.6 of the Master Deed to be invalid and unenforceable under the laws of South Carolina.
79. Alternatively, Plaintiffs and members of the class request the Court to declare that the portions of Section 3.6 purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work invalid for such purpose and unenforceable under the laws of South Carolina.
80. The Plaintiffs and members of the class request that the Court declare the entire provisions in the original contracts for sale of the condominium units entitled Warranty to be invalid and unenforceable under the laws of South Carolina.
81. Alternatively, the Plaintiffs and members of the class request the Court to declare that the portion of the warranty provisions in the original contracts for sale of the

condominiums purporting to disclaim liability for defective work are insufficient to disclaim the implied warranty of habitability given at law by the developer and the portion of the sales contracts purporting to limit the liability of the developer to the cost to repair and replace defective work be deemed invalid and unenforceable under the laws of South Carolina.

82. The Plaintiffs and members of the class request that Section 16 of the Master Deed be declared inapplicable to the claims of Plaintiffs and/or unenforceable and invalid under the laws of South Carolina.
83. The Plaintiffs and members of the class request that Section 16.3 of the Master Deed be declared inapplicable to the claims of Plaintiffs and members of the class and/or invalid and unenforceable under the laws of South Carolina.
84. The Plaintiffs and members of the class request that Exhibit F to the Master Deed, specifically including, but not limited to Paragraph 1.3(b), be declared inapplicable to the claims of Plaintiffs and members of the class and/or unenforceable and invalid under the laws of South Carolina.

II. FOR A SECOND CAUSE OF ACTION
(Breach of Warranty of Habitability as to the Developers)

85. Plaintiffs reassert and reallege the allegations contained in the above paragraphs 1-84.
86. The Developers provided an implied warranty of habitability under South Carolina law to the purchasers and owners of the Bristol condominium units by controlling the design and ultimate cost of construction, by using its affiliate Gulf Stream as the general contractor to control the means and methods of construction, offering the units for sale to the public, and entering into contracts

of sale to the Plaintiffs and other members of the class. This warranty of habitability extends to subsequent purchasers who were the foreseeable beneficiaries of this warranty.

87. The attempts by the Developers to disclaim the warranty of habitability are void and unenforceable under law of South Carolina as interpreted by the South Carolina Supreme Court in that the purported disclaimer was not conspicuous and was not specifically bargained for during negotiations for the sale of the units.
88. The numerous design and construction defects and resulting property damage to the individual condominium units of the Bristol constitutes a breach of the warranty of habitability under the laws of South Carolina.
89. As a direct and proximate cause of the Developers' breach of the warranties of habitability, the Plaintiffs and all members of the class have been damaged in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
90. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

91. Plaintiffs and the members of the class are entitled to a judgment against the Developers in an amount to be proven at trial for all damages proximately caused by the Developers' breach of the warranty of habitability.

III. FOR A THIRD CAUSE OF ACTION
(Breach of Fiduciary Duty as to the Developers)

92. Plaintiffs reassert and reallege the allegations contained in the above paragraphs 1-91.
93. During the time that the Developers controlled the actions of the Board of Directors for the Bristol Condominiums Property Owners Association, the Developers, through their appointed agents on the Board, owed the Plaintiffs and members of the class a fiduciary duty to place the interests of the Plaintiffs and the members of the class above the interests of the Developers and their affiliates, such as Gulf Stream. This fiduciary duty included a duty to conduct a good faith investigation of all possible design and construction deficiencies at the Bristol without regard to whether the Developers or its affiliates, including Gulf Stream, were ultimately liable for all damages arising from the deficiencies in design and construction.
94. The Developers also owed a non-delegable duty to the Plaintiffs and the members of the class to make certain that all of the common elements of the Bristol were either in good repair and in compliance with all applicable building codes or that sufficient funds had been provided to the Bristol Condominiums Property Owners Association by the Developers to make any necessary repairs at the time that transition of control of the Board of Directors by the Developers to the owners of the Bristol condominium units.

95. As of the date of transition of control of the Board of Directors by the Developers to the owners of the Bristol condominium units in the late summer of 2006, the Developers knew that the construction and design defects and deficiencies in the common elements and other exterior components of the Bristol had caused and would in the future cause property damage to the units and personal property of the Plaintiffs and members of the class.
96. The Developers failed to pursue claims against responsible parties and failed to make the needed repairs to the common elements and other exterior components before transition of control of the Board of Directors from the Developers to the owners of the Bristol condominium units and failed to mitigate continuing damage to the Bristol and the Plaintiffs and other members of the class.
97. The Developers failed to adequately fund the Bristol Condominiums Property Owners Association so that it could make the necessary repairs. Further, to the extent the Developers took any steps to investigate the design and construction deficiencies at the Bristol, they used funds belonging to the Bristol Condominiums Property Owners Association, the source of which was assessments paid by the Plaintiffs and members of the class rather than using Developers own funds.
98. By failing to repair the common elements and exterior components, failing to pursue claims against responsible parties, and failing to properly fund the Bristol Condominiums Property Owners Association for the purpose of making such repairs, the Developers breached their fiduciary duties and other non-delegable duties owed to Plaintiffs and members of the class.

99. As a proximate and direct result of the Developers' breach of their fiduciary duties and other non-delegable duties, the Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
100. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
101. The Plaintiffs and members of the class are entitled to a judgment against the Developers for the breach of their fiduciary and other non-delegable duties in an amount to be proven at trial.

IV. FOR A FOURTH CAUSE OF ACTION
(Negligence as to the Developers)

102. Plaintiffs reassert and reallege the allegations contained in the above paragraphs 1-101..
103. As the developers of the Bristol, Brittlebank, BB, Beach Company, and FSP owed a duty of due care in overseeing the construction, management, and operation of the Bristol to purchasers of condominium units.

104. The Developers breached the duty of due care it owed to Plaintiffs and members of the class as the purchasers of condominium units in one or more of the following particulars:
- i. by failing to properly select the architect, general contractor, and materials used in the construction of the Bristol;
 - ii. by failing to properly oversee the design and construction, including the selection of subcontractors, of the Bristol when it planned to sell the condominium units to members of the public for profit;
 - iii. by failing to properly and prudently to fund and effect repairs to the common elements of the Bristol and the exterior windows and doors while it was in control of the property owners' association;
 - iv. by failing to properly and prudently fund the property owners' association before transition of control of the Board of Directors to the individual condominium unit owners; and
 - v. by engaging in self dealing and self interested transactions without properly evaluating other alternatives.
-
105. The negligent acts and omissions of the Developers are the proximate causes of construction and design deficiencies which have resulted in property damage and financial damages to the Plaintiffs and members of the class.
106. The acts and omissions of the Developers have proximately caused the Plaintiffs and members of the class to suffer damages in that they have, and in the future, will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners

Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies, and to implement the remediation plan to their units and to the building.

107. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
108. As a result of the negligence of the Developers, the Plaintiffs and members of the class are entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.

V. FOR A FIFTH CAUSE OF ACTION

(Negligence as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, Glasgow, ABG, and Superior Structures)

109. Plaintiffs and the members of the class reassert and reallege the allegations contained in the above paragraphs 1-108.
110. By undertaking construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures owed a duty to Plaintiffs to use reasonable care during the performance of their respective work on the building and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, the applicable standard of care, and industry standards.

111. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached the duty of care they owed to Plaintiffs and members of the class.
112. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures were negligent, grossly negligent, willful, and reckless in numerous aspects of the construction of the building, including, but not limited to, the following:
- a. Failing to properly supervise subcontractors and laborers during the construction of the Bristol;
 - b. Failing to follow plans and specifications of the architect and design professionals;
 - c. Failing to follow manufacturers' installation instructions and recommendations;
 - d. Failing to perform construction work in accordance with applicable building codes and proper workmanlike practices; and
 - e. Failing to select proper materials and capable subcontractors.
113. The deficiencies set forth above violate the applicable standard building code, manufacturer's requirements and recommendations, industry standards, and good construction practices.
114. As a direct and proximate result of the negligence and recklessness of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures as hereinabove set forth, the condominium units and the

personal property of the Plaintiffs and members of the class have been damaged by the intrusion of water.

115. The Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
116. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
117. As a result of the negligence of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, the Plaintiffs and members of the class are entitled to a judgment against said Defendants in an amount to be determined at the trial of this case.

VI. FOR A SIXTH CAUSE OF ACTION

(Negligence Per Se as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

118. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-117.

119. By undertaking construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures owed a duty to Plaintiffs and members of the class to use reasonable care during the performance of their work on the building and to perform their scope of work in accordance with all applicable building codes, applicable industry standards, and to ensure that construction conformed to the design documents when such documents reflected good design practice, conformed to the applicable standard of care, and conformed to industry standards.
120. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached the duty of care it owed to Plaintiffs and members of the class.
121. Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures' work violated the applicable building codes in effect at the time of construction, specifically including, but not limited to the following
- a. Failure to install weep mechanisms;
 - b. Failure to furnish and install exterior windows and doors which were in compliance with all applicable building codes and industry standards;
 - c. Failure to install head flashings;
 - d. Failure to properly install exterior cladding; and
 - e. Such additional building code violations which may be discovered during ongoing investigations of design and construction deficiencies.

122. The violation of the building codes by the general contractor and subcontractors constitutes negligence per se.
123. As a direct and proximate result of the contractors' violation of the applicable building codes, the Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
124. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
125. As a result of the negligence per se of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, the Plaintiffs and members of the class are entitled to a judgment against said Defendants in an amount to be determined at trial.

VII. FOR A SEVENTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanlike Service as to Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

126. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-125.

127. By performing construction work on the Bristol, Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures impliedly warranted that their work product would be quality workmanship equal to or greater than industry standards.
128. The above referenced construction defects and deficiencies show that Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures breached their implied warranties by failing to provide quality workmanship.
129. As a direct and proximate cause of the breach of Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures' implied warranties, the Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
130. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

131. Plaintiffs and members of the class are entitled to a judgment against Gulf Stream, Buck, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, in an amount to be determined at trial, as a result of the Defendants breach of their implied warranties.

VIII. FOR AN EIGHTH CAUSE OF ACTION

(Breach of Express Warranty as to Gulf Stream, Niles Bolton, Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures)

132. Plaintiffs and the members of the class reassert and reallege the allegations contained in the above paragraphs 1-131.
133. Gulf Steam, pursuant to the Section 3.5.1 of the General Conditions of its contract with Brittlebank to serve as the general contractor for the construction of the Bristol, expressly warranted that its work would be of good quality, free from defects, and would conform to the contract documents.
134. Niles Bolton, pursuant to its contract with Brittlebank, expressly warranted that its plans, specifications, and other instruments of service would be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards.
135. Ferst, Superior Surfaces, Cisson, Barr, ABG, Glasgow, and Superior Structures, pursuant to section 4.5.1 of their respective subcontracts with Gulf Stream, expressly warranted that their work would be of good quality, free from defects, and would conform to the contract documents.
136. As the ultimate and foreseeable owners of the Bristol condominium units, the Plaintiffs and members of the class are beneficiaries of the express warranties provided by these Defendants.

137. These Defendants have breached their express warranties by failing to design and construct the Bristol such that it would be free from defects and in compliance with the applicable building codes and industry standards.
138. Because of the Defendants breaches of their express warranties have proximately suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
139. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
140. The Plaintiffs and members of the class are entitled to a judgment against these Defendants for the breach of their express warranties for an amount to be proven at trial.

IX. FOR A NINTH CAUSE OF ACTION
(Breach of Express Warranties as to Andersen and Buck)

141. Plaintiffs and the members of the class reassert and reallege the allegations contained in the above paragraphs 1-140.

142. Andersen and Buck warranted that the products they manufactured and sold for use in the Bristol would be of good quality, free from defects, and suitable for use and in compliance with applicable building codes in the City of Charleston as it relates to a five story riverfront condominium project.
143. The products manufactured and marketed by Andersen and sold by Andersen and Buck and incorporated into the Bristol have failed and are allowing water to intrude into the building. Further, upon information and belief, the exterior windows and doors are not in compliance with the applicable building codes and industry standards as it relates to the Bristol project.
144. The failures of the products manufactured and marketed by Andersen and sold by Buck and Andersen have resulted in damage to the various components of the building and will require extensive repair and restoration by the Plaintiffs and members of the class. Additionally, the exterior windows and doors, which are not in compliance with the applicable building codes, must be removed and replaced with exterior windows and doors which will be in compliance with the current building codes applicable to the Bristol project.
145. The Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
146. The failures of these products constitute a breach of the express warranties made by Andersen and Buck.

147. Plaintiffs and members of the class are entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of the breach of their express warranties.

X. FOR A TENTH CAUSE OF ACTION

(Breach of Implied Warranty of Merchantability against Andersen and Buck)

148. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-147.
149. By selling its products for use in the Bristol, Andersen and Buck impliedly warranted that the products would be fit for their intended purposes.
150. The products manufactured and marketed by Andersen and sold by Buck and Andersen and incorporated into the Bristol have failed and are allowing water to intrude into the building.
151. The failures of the products marketed and sold by Andersen and Buck have resulted in damage to various components of the building and will require extensive repair and restoration by the Plaintiffs and members of the class including but not limited to removal of the exterior windows and doors and replacement with exterior windows and doors which comply with the building codes currently applicable to the Bristol project.
152. The Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

153. The failures of these products constitute a breach of the implied warranty of merchantability.
154. Plaintiffs and members of the class are entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of their breach of the implied warranties of merchantability.

XI. FOR AN ELEVENTH CAUSE OF ACTION

(Breach of Implied Warranty of Fitness for a Particular Purpose as to Buck and Andersen)

155. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-154.
156. Andersen and Buck were aware that their exterior windows and doors were being considered for use as building components for the Bristol project which is a five story riverfront building located in the City of Charleston.
157. Upon information and belief, Andersen and Buck recommended their products for the particular purposes stated by the contractors, the developers, and the architect.
158. Andersen and Buck knew or reasonably should have known that the purchasers were relying on their skill or judgment to select suitable goods which are in compliance with applicable building codes.
159. By selling the exterior windows and doors for a particular use in the Bristol, Andersen and Buck impliedly warranted that their products would be fit for their intended purpose in a five story riverfront condominium project.
160. The products sold by Andersen and Buck and incorporated into the Bristol have failed and are allowing water to intrude into the building.
161. The failure of the products has resulted in damage to the various components of the building and will require extensive repair and restoration by the Plaintiffs and

members of the class including removal of all exterior windows and doors which are not in compliance with applicable building codes.

162. The Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
163. The failure of these products amount to a breach of the implied warranty of fitness for a particular purpose.
164. Plaintiffs and members of the class are entitled to a judgment against Andersen and Buck, in an amount to be determined at trial, as a result of their breach of the implied warranties of fitness for a particular purpose.

XII. FOR A TWELFTH CAUSE OF ACTION
(Strict Liability in Tort against Andersen and Buck)

165. Plaintiffs reassert and reallege the allegations contained in the above paragraphs 1-164.
166. Andersen and Buck are in the business of selling building products for use in construction projects in South Carolina, specifically windows, window systems, and doors.
167. Andersen manufactured and sold and Buck sold exterior windows, window systems, and doors that were incorporated into the Bristol during construction.
168. The exterior windows, window systems, and doors were expected to and were incorporated into the Bristol without substantial change from the condition in which they were originally manufactured and sold.

169. The exterior windows, window systems, and doors have failed and are allowing water to enter the condominium units and other portions of the common elements from the exterior during rain events.
170. The failure of the exterior windows, window systems, and doors is causing property of the Plaintiffs and members of the class to be damaged.
171. The failure of the exterior windows, window systems, and doors will result in danger to the Plaintiffs and members of the class and their guests and invitees if these products are unable to withstand the design wind loads of 125 miles per hour required by the applicable building codes.
172. The exterior windows, window systems, and doors that were sold for use in the Bristol are defective and unreasonably dangerous to the condominium owners.
173. As a proximate result of the defective windows, window systems, and doors, Plaintiffs and members of the class have and continue to suffer damages, including but not limited to removal of all exterior windows and doors and replacement with exterior windows and doors which comply with the local applicable building codes.
174. The Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

175. Due to the damages caused by the defective products, Plaintiffs and members of the class are entitled to a judgment against Andersen and Buck for an amount to be determined at the trial of this case.

XIII. FOR A THIRTEENTH CAUSE OF ACTION
(Negligence as to Niles Bolton)

176. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-175.
177. Niles Bolton agreed to provide professional architectural and engineering services for the design of the Bristol, specifically including but not limited to the issuance of the plans and specifications for construction. These documents and/or instruments of service were required to be in compliance with all applicable ordinances, codes, regulations, statutes, and industry standards. Upon information and belief, Defendant Niles Bolton agreed to make periodic visits to the project during construction to observe whether the construction was in accordance with the plans and specifications and all applicable building codes.
178. It was foreseeable that the Plaintiffs and members of the class, as the ultimate purchasers of the Bristol condominium units, would be damaged if the Niles Bolton breached the above duties.
179. Niles Bolton breached its duty of care as follows
- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
 - b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in

compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;

- c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

- 180. As a result of Niles Bolton's breach of its standard of care, the Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
- 181. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their

units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

182. Plaintiffs and members of the class are entitled to a judgment against Niles Bolton in an amount to be determined at the trial of the case.

XIV. FOR A FOURTEENTH CAUSE OF ACTION

(Breach of Implied Warranty of Workmanlike Service as to Niles Bolton)

183. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-182.

184. By performing design services for the construction of the Bristol, Niles Bolton impliedly warranted that its work product would be of good quality, equal to or greater than industry standards.

185. Niles Bolton breached its duty to provide workmanlike service as follows:

- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
- b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;
- c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal

coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;

- d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
- e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

186. As a direct and proximate cause of the breach of the implied warranty, the Plaintiffs and members of the class have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
187. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

188. Plaintiffs and members of the class are entitled to a judgment against Niles Bolton, in an amount to be determined at trial, as a result of the breach of its implied warranty.

XV. FOR A FIFTEENTH CAUSE OF ACTION
(Breach of Warranty of Plans and Specifications as to Niles Bolton)

189. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-188.
190. Niles Bolton warranted the sufficiency of the design, plans, and specifications for the Bristol. Plaintiffs and members of the class, as the ultimate purchasers of the Bristol condominium units, were the foreseeable beneficiaries of this implied warranty.
191. By failing to properly design the building and prepare appropriate plans and specifications, Niles Bolton breached its warranty as follows:
- a. By failing to properly design and prepare specifications for the Bristol which were compliant with all applicable building codes and professional standards;
 - b. Failing to specify products, specifically including but not limited to, exterior windows and doors, which were in compliance with applicable building codes for a five story riverfront condominium project in the City of Charleston;
 - c. Failing to design and specify an exterior cladding system for the Bristol condominium project with required details for flashing, sealant joints, control joints, weep systems, metal

- coping to prevent water from intruding into the interior of the condominium units or the wall cavities of the building;
- d. Failing to properly administer, observe and inspect the construction of the building for compliance with the plans and specifications and applicable building codes; and
 - e. Such other breaches of the standard of care which are determined during the ongoing investigation of design deficiencies at the Bristol project.

192. The Plaintiffs and members of the class have been damaged as a result of Niles Bolton's breach of its warranty in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
193. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.

194. Plaintiffs and members of the class are entitled to a judgment against Niles Bolton, in an amount to be determined at trial, as a result of the breach of its warranty.

XVI. FOR A SIXTEENTH CAUSE OF ACTION
(Negligent Misrepresentation as to the Developers)

195. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-194.
196. The Developers, through advertisements, sales brochures and other marketing literature, website advertisements and by statements and actions of their agents, made numerous representations to the purchasers of condominiums, including, but not limited to the quality and luxury of the condominium units at the Bristol.
197. The representations made by the Developers and their agents to the purchasers of the condominiums were untrue and were misrepresentations of material facts.
198. The representations were made for the purpose of selling condominium units.
199. Plaintiffs and members of the class, as purchasers of the condominium units, relied upon the representations of the Developers when deciding to purchase the units.
-
200. In the exercise of reasonable care, the Developers knew or should have known that their representations were false and that the prospective purchasers would rely on the representations.
201. The Developers failed to exercise reasonable care in making the representations.
202. The purchasers of the condominium units reasonably and justifiably relied on the representations of the Developers.
203. The Developers profited from the sale of the condominium units.

204. As a proximate and direct result of the misrepresentations, the owners of the condominium units have suffered damages in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
205. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
206. The conduct of the Developers amounts to *gross negligence* and entitles Plaintiffs and members of the class to recover punitive damages.

XVII. FOR A SEVENTEENTH CAUSE OF ACTION
(Unfair Trade Practices against the Developers)

207. Plaintiffs and members of the class reassert and reallege the allegations contained in the above paragraphs 1-206.
208. The Plaintiffs, members of the class, and the Developers are all persons within the meaning of the South Carolina Unfair Trade Practices Act.
209. By developing, marketing, and selling the condominium units at the Bristol, the Developers were engaged in commerce.

210. The actions of the Developers in developing, marketing, and selling the condominium units at the Bristol constitute unfair and deceptive practices.
211. The actions are capable of repetition and affect the public interest of South Carolina.
212. Upon information and belief, the actions of the Developers have been repeated.
213. As a direct and proximate result of these acts, Plaintiffs and members of the class have suffered an ascertainable loss of money and property in that they have and in the future will be forced to expend funds to repair damage that has already occurred, are subject to future assessments from the Bristol Condominium Property Owners Association to pay for professional fees to investigate the full extent of the problems, to design remediation plans and specifications to correct the design and construction deficiencies and to implement the remediation plan to their units and to the building.
214. Additionally, the Plaintiffs and members of the class will suffer loss of use of their condominium units, the interference with the use and enjoyment of their units during the time in which construction repairs are undertaken to their individual units and to the common elements of the Bristol, and diminution in the value of their property.
215. The Plaintiffs and members of the class are entitled to its actual damages, treble damages, interest, and attorneys' fees.

WHEREFORE, the Plaintiffs and members of the class pray as follows:

a. That the Court issue a Declaratory Judgment with respect to the first cause of action against the Developers, Gulf Stream, and Niles Bolton

- i. To declare Section 3.6 of the Master Deed invalid and unenforceable under the laws of South Carolina; Alternatively, to declare that the portions of Section 3.6 purporting to disclaim the implied warranty of habitability and the portion purporting to limit the liability of the developer to the cost to repair and replace defective work invalid for such purpose and unenforceable under the laws of South Carolina;
- ii. To declare the entire provisions in the original contracts for sale of the condominium units entitled Warranty to be invalid and unenforceable under the laws of South Carolina; Alternatively, to declare the portion of the warranty provisions in the original contracts for sale of the condominiums purporting to disclaim liability for defective work to be insufficient to disclaim the implied warranty of habitability given at law by the developer and the portion of the sales contracts purporting to limit the

liability of the developer to the cost to repair
and replace defective work be deemed invalid
and unenforceable under the laws of South
Carolina.

- iii. To declare that Section 16 of the Master Deed is
inapplicable to the claims of Plaintiffs and
members of the class and/or unenforceable and
invalid under the laws of South Carolina;
- iv. To declare that Section 16.3 of the Master Deed
is inapplicable to the claims of Plaintiffs and
members of the class and/or invalid and
unenforceable under the laws of South Carolina.
- v. To declare Exhibit F to the Master Deed to be
inapplicable to the claims of Plaintiffs and
members of the class and/or unenforceable and
invalid under the laws of South Carolina.

-
- b. Judgment for actual damages against the Defendants jointly
and severally with regard to causes of action
IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, and XV;
 - c. Punitive damages against the Developers under causes of
action XVI, against Gulf Steam, Buck, Ferst, Superior
Surfaces, Cisson, Barr, ABG, Glasgow, and Superior
Structures for cause of action VI;

- d. Treble damages against the Developers pursuant to section 39-5-110, et seq. for the violation of the South Carolina Unfair Trade Practices Act;
- e. Costs and attorneys' fees against the Defendants; and
- f. Such further relief as the Court deems appropriate.

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ATTORNEYS FOR PLAINTIFFS

Charleston, South Carolina
February 9, 2007

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
C/A NO.: 05-CP-10- 3029

KENNETH HANGER,
MORTON ELLISON and
PATRICIA ELLISON,
Individually, and Derivatively as acting
on behalf of the THE BRISTOL
CONDOMINIUM HOMEOWNERS
ASSOCIATION,

Plaintiffs,

vs.

THE BEACH COMPANY, FENNEL
HOLDINGS, INC. and GULF STREAM
CONSTRUCTION COMPANY, INC.,

Defendants.

COMPLAINT

(Negligence, Negligent Misrepresentation,
Breach of Implied Warranty of Habitability,
Breach of Fiduciary Duty, Constructive
Trust and Unfair Trade Practices)

(Jury Trial Demanded)

2005 JUL 26 PM 2:30
JULIE J. ARMSTRONG
CLERK OF COURT

FILED

The Plaintiffs, complaining of the Defendants above named, would allege and show unto
this Honorable Court as follows:

1. Plaintiffs are owners of condominium units at The Bristol, located at 3000 Old
Bridgeview Lane, Charleston, Charleston County, South Carolina, and are proceeding on their
own behalf and derivatively on behalf of The Bristol Condominium Homeowners Association.

FACTUAL AVERMENTS

2. The Defendants, The Beach Company and Fennell Holdings, Inc., upon
information and belief are corporations organized and existing under the laws of the State of
South Carolina and are authorized to conduct business in this State. These Defendants are the

developers and sellers of the condominium units at The Bristol and at all times have been and are in control of The Bristol Condominium Homeowners Association.

3. As such, these Defendants, The Beach Company and Fennell Holdings, Inc., commenced to sell condominium units to, among others, the Plaintiffs in this action and are continuing to market and sell units at The Bristol, despite the fact that these Defendants have been put on notice of numerous construction and design defects of the subject Building, and without disclosing these defects to new homeowners.

4. The Defendant, Gulf Stream Construction Company, Inc. (hereinafter "Gulf Stream") is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and is authorized to conduct business in this State. Gulf Stream was the general contractor of The Bristol Condominiums and was responsible for the proper construction of this project in strict accordance with the Contract documents and with all applicable building codes and within industry standards of good and workmanlike practice.

5. The Bristol is a four-story structure built in 2002 and is a combination of Portland cement plaster stucco (stucco) and cementitious board siding, with brick veneer at the grade level around the park under garage. Due to water intrusion/leaking problems experienced by several homeowners, an engineering investigation was performed on the subject Buildings to determine all construction deficiencies and/or unsatisfactory performance conditions in the exterior cladding or exterior wall components which would lead to this water intrusion and deterioration of the exterior wall envelopes.

6. By the investigation of the subject Buildings and subsequent report provided by the engineer, the homeowners and/or Plaintiffs learned that the subject Buildings have been deficiently designed and have significant construction defects, particularly the stucco cladding system which

was improperly installed and will have to be completely removed and replaced. In addition, the engineer noted other construction, design and stucco deficiencies to the subject Buildings, including, but not limited to, the following:

- (a) Improper stucco installation in that no mechanism for weep had been installed at any location in the four-story wall, which is a violation of Industry Standard ASTM C926 and ASTM C1063;
- (b) Improper and/or no installation of sealant joints;
- (c) No head Flashings at any of the window or door installations;
- (d) Improper control joint installation around windows;
- (e) Cracking at window corners due to lack of proper stress relief which will promote water intrusion;
- (f) Water accumulation at crack line;
- (g) Improper installation of the Metal Cap Flashing on top of the cementitious board siding;
- (h) Improper installation of all of the exterior architectural trim at the sill of windows which will promote water intrusion;
- (i) Improper installation of the exterior cladding system by evidence of staining and damage to interior trim;
- (j) Improper Construction of the Arbors and Posts on the Balconies which have evidence of water intrusion;
- (k) Improper Installation of the exterior cladding that is not in accordance with the IBC and code referenced industry standards;
- (l) Water Intrusion Damage Resulting from improper installation of the exterior

cladding; and

- (m) Deterioration of the subject Buildings due to water intrusion from the failed Exterior Cladding System.

7. As a direct and proximate result and consequence of the numerous stucco installation, construction and design problems and defects as noted above, the Plaintiffs have and will continue to spend substantial sums of money for the repairs and reconstruction of their condominium units and will be subject to loss of use, enjoyment, and depreciation of value of property.

8. In addition to the construction defects, the Defendants, The Beach Company and Fennell Holdings, Inc., in their capacity as head of The Bristol Homeowners Association have:

- (a) Failed and omitted to act in a fiduciary capacity towards the owners of the condominium units;
- (b) Negligently maintained the property;
- (c) Failed to act as competent managers;
- (d) Acted at all times in their own interests and in contravention of their fiduciary duty towards the condominium unit owners;
- (e) Covered up and concealed defects and damage from the unit owners, and
- (f) Acted in violation of all fiduciary duty concepts.

9. Due to the actions of The Beach Company and Fennell Holdings, Inc., as stated above, the Plaintiffs are facing significant damage repairs, deteriorating property, significant immediate expenses for investigation, destructive testing, and an analysis of construction defects, repairs defects, damages, rot deterioration, and a generally overall dilapidated condition which is the direct and proximate result of defective construction, management, maintenance, and

abandonment of generally accepted fiduciary principles on the part of The Beach Company and Fennell Holdings, Inc.

FOR A FIRST CAUSE OF ACTION
(Negligence-Developers)

10. The Plaintiffs repeat and reallege their allegations in Paragraphs One through Nine set forth above as if set forth herein verbatim.

11. The damages and injuries caused to the Plaintiffs, their property, and derivatively on behalf of The Bristol Condominium Homeowners Association, are the direct and proximate result of the negligence, willfulness, wantonness, carelessness and recklessness of the Defendants The Beach Company and Fennell Holdings, Inc. in one or more of the following particulars to wit:

- (a) In their capacity as developers in defectively overseeing the construction of the subject Buildings;
- (b) In failing to inspect, repair and maintain the Buildings;
- (c) In negligently effecting repairs to the Buildings;
- (d) In failing and omitting to exercise that degree of care and caution of a reasonably prudent manager of a homeowners association;
- (e) In failing and omitting to retain proper experts and to effectively inspect and repair the premises; and
- (f) In placing their interests ahead of the owners and thereby, breaching their fiduciary duty.

12. As a direct and proximate result of the above stated negligent actions on behalf of the Defendants The Beach Company and Fennell Holdings, Inc., the Plaintiffs will have to spend

substantial sums of money for the repairs and reconstruction of their condominium units and will be subject to loss of use, enjoyment, and depreciation of value of property.

FOR A SECOND CAUSE OF ACTION
(Negligence/Contractor)

13. The Plaintiffs repeat and reallege their allegations in Paragraphs One through Twelve set forth above as if set forth herein verbatim.

14. The construction of the subject Buildings by Defendant Gulf Stream Construction Company, Inc. deviated from the normal standards of good and workmanlike practice in the construction field in the following particulars, to-wit:

- (a) In failing and omitting to construct the subject Buildings in conformity with the plans and specifications and construction documents;
- (b) In failing and omitting to construct the subject Buildings pursuant to good and workmanlike construction practices;
- (c) In failing and omitting to properly install the exterior cladding system on the subject Buildings to ensure that water intrusion would not occur;
- (d) In failing and omitting to install proper flashing throughout the subject Buildings;
- (e) In failing and omitting to properly seal the subject Buildings' exterior to prevent water infiltration and intrusion; and
- (f) By additional improper construction practices as outlined above.

15. As a direct, foreseeable and proximate result of Gulf Stream's negligence, the Plaintiffs have suffered damages in the amount equal to the extraordinary, repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, diminution in value of the condominium units and loss of use.

FOR A THIRD CAUSE OF ACTION
(Negligent Misrepresentation/Developers)

16. The Plaintiffs repeat and reallege their allegations in Paragraphs One through Fifteen set forth above as if set forth herein verbatim.

17. The Defendants, The Beach Company and Fennell Holdings, Inc., through advertisements, sales brochures and other marketing literature, website advertisements and by statements and actions of their agents, made numerous representations to the Plaintiffs, including, but not limited to, the quality and luxury of the condominium units at The Bristol that incorporates the best of traditional design, development and construction.

18. The above-described representations made by these Defendants and their agents to the Plaintiffs were untrue and were negligent misrepresentations of material facts.

19. The Beach Company and Fennell Holdings, Inc. made the above-described representations in a business or commercial capacity.

20. The Beach Company and Fennell Holdings, Inc. made the above-described statements at a time when, in the exercise of reasonable and ordinary care, they should have ~~known that they were false,~~ and these Defendants knew or should have known that reasonably foreseeable purchasers of the condominium units would rely on their representations made in their advertising and sales and marketing literature, and by their agents. These Defendants, therefore, failed to exercise reasonable care or competence in making the above-described statements.

21. The Plaintiffs relied on this false information supplied by The Beach Company and Fennell Holdings, Inc. when they purchased their condominium units at The Bristol.

22. Such reliance by the Plaintiffs was reasonable and justifiable based on the knowledge available to them and the circumstances at the time.

23. The Beach Company and Fennell Holdings, Inc. breached their duties by failing to exercise due care when making these representations.

24. The Plaintiffs reasonably and justifiably relied on these Defendants' representations, to their detriment.

25. As a direct, foreseeable and proximate result of The Beach Company's and Fennell Holdings, Inc.'s negligent misrepresentations, the Plaintiffs have suffered physical damage to their condominium units as well as loss of use and diminution in value.

26. The Beach Company's and Fennell Holdings, Inc.'s breach of its duty to exercise due care in making representations about the condominium units constitutes gross negligence, entitling Plaintiffs to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Breach of Implied Warranty of Habitability/Developers and Contractor)

27. The Plaintiffs repeat and reallege the allegations contained in Paragraphs One through Twenty-six as set forth above as if set forth herein verbatim.

28. The Defendants impliedly warranted as a matter of law that the subject Buildings at The Bristol which they developed and built was habitable and fit for its intended use.

29. That this implied warranty was breached by the Defendants in that the work performed by Defendant Gulf Stream Construction Company, Inc. was in a manner below ordinary workmanship and the subject Buildings at The Bristol were neither habitable nor fit for their intended use causing damage to Plaintiffs.

30. As a direct, foreseeable and proximate result of the Defendants breach of implied

warranty of habitability, the Plaintiffs have suffered physical damage to their condominium units as well as loss of use and diminution in value.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied Warranty of Good and Workmanlike Service/Contractor)

31. The Plaintiffs repeat and reallege the allegations contained in Paragraphs One through Thirty as set forth above as if set forth herein verbatim.

32. In undertaking to complete its construction work on the subject Buildings at The Bristol, the Defendant Gulf Stream Construction Company, Inc. impliedly warranted that all work would be of good quality, free from faults and defects, of good and workmanlike quality, and in conformance with the contract documents and industry standards.

33. That this implied warranty of good and workmanlike service was breached by Gulf Stream in that the work was performed in a manner below ordinary workmanlike quality causing damage to the Plaintiffs.

34. That as a direct and proximate result of the breach of implied warranty of good and workmanlike service, the Plaintiffs have suffered physical damage to their condominium units as well as loss of use and diminution in value.

FOR A SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty-Developers)

35. The Plaintiffs repeat and reallege the allegations contained in Paragraphs One through Thirty-four as set forth above as if set forth herein verbatim.

36. In their capacity as developers of the condominium project at The Bristol and as head of The Bristol Condominium Homeowners Association, the Defendants The Beach Company and Fennell Holdings, Inc., as a matter of law, undertook a fiduciary duty towards the Plaintiffs and The Bristol Condominium Homeowners Association.

37. The Defendants, in their capacity set forth above, breached their duty as fiduciaries towards the Plaintiffs and towards The Bristol Condominium Homeowners Association in failing to act in a reasonable prudent manner, and in placing their interests ahead of the interests of those to whom they owed a clear fiduciary duty. Rather than acting in the highest possible degree of good faith and fair dealing concerning the Plaintiffs and The Bristol Condominium Homeowners Association, these Defendants acted exactly to the contrary in acting in their own interests at all times, in all aspects of the development and sales of the condominium units, maintenance, and showed lack of concern of the construction defects and failed to disclose these construction defects to new homeowners.

38. As a direct and proximate result of these breaches of fiduciary duty, the Plaintiffs and The Bristol Condominium Homeowners Association have suffered damages in the amount equal to the extraordinary, repair, maintenance and reconstruction costs required and to be required over the expected life of the structure, diminution in value of the condominium units and loss of use.

FOR A SEVENTH CAUSE OF ACTION
(Constructive Trust-Developers)

39. The Plaintiffs repeat and reallege the allegations contained in Paragraphs One through Thirty-eight as set forth above as if set forth herein verbatim.

40. The activities of the Defendants, The Beach Company and Fennell Holdings, Inc., herein in failing to properly manage and maintain the subject Property and in failing to properly manage The Bristol Condominium Homeowners Association have placed the Plaintiffs and the homeowners association in a precarious position, requiring an immediate change in management.

41. As a result of these Defendants' failure to manage properly, their breach of

fiduciary duty, and the ongoing lack of management and maintenance, the Plaintiffs and The Bristol Condominium Homeowners Association are entitled to this Court's placing a constructive trust over and Receiver in place of the current Defendants as manager of The Bristol Condominium Homeowners Association.

FOR AN EIGHTH CAUSE OF ACTION
(Unfair Trade Practices/Developers)

42. The Plaintiffs repeat and reallege the allegations contained in Paragraphs One through Forty-one as set forth above as if repeated verbatim herein.

43. The Plaintiffs, The Beach Company and Fennell Holdings, Inc. are "persons" within the meaning of S.C. Code § 39-5-10(a).

44. The Beach Company and Fennell Holdings, Inc., by developing, selling and marketing the condominium units at The Bristol, were engaged in commerce within the meaning of S.C. Code § 39-5-10(b).

45. The Beach Company's and Fennell Holdings, Inc.'s actions, described hereinabove, constitute unfair and deceptive practices within the meaning of S.C. Code § 39-5-20(a).

46. The Beach Company's and Fennell Holdings, Inc.'s acts are capable of repetition, and, upon information and belief, have been repeated.

47. The Beach Company's and Fennell Holdings, Inc.'s conduct affects the public interest of South Carolina.

48. The Beach Company and Fennell Holdings, Inc., knew, or reasonably should have known, that their conduct violated the Unfair Trade Practices Act.

49. As a direct foreseeable and proximate result of The Beach Company's and Fennell Holdings, Inc.'s unfair and deceptive practices, the Plaintiffs have suffered an ascertainable loss of money and property.

50. The Plaintiffs are entitled to recover their actual damages, which amount should be trebled, together with interest and attorney's fees.

WHEREFORE, the Plaintiffs pray that this Court issue an Order granting judgment for the Plaintiffs against the Defendants, jointly and severally, for the following relief:

- (a) for actual damages in an amount to be proven at trial;
- (b) for trebled damages under S.C. Code § 39-5-110;
- (c) for punitive damages;
- (d) for prejudgment and postjudgment interest on Plaintiffs' damages,
- (e) for a constructive trust to install new management of receiver to take over and manage the assets of The Bristol Condominium Homeowners Association;
- (f) for attorney's fees and costs; and
- (g) for such other and further relief as this Court may deem just and proper.

LEATH, BOUCH & CRAWFORD, LLP

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(843) 937-8811

Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 7/26/05

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
John T. Lucas, Sr. as Trustee of the John T.,)
Lucas Revocable Trust and Carolyn C.)
Lucas, as Trustee of the Carolyn C. Lucas)
Revocable Trust,)
Plaintiffs,)
vs.)
The Bristol Condominium Property)
Owners Association,)
Defendant.)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2010-CP-10-3240

AMENDED COMPLAINT
Jury Trial Demanded

2011 APR -14
JULIE J. STRONG
CLERK OF COURT
APR 11:42

The Plaintiffs would respectfully show this honorable Court that:

1. Plaintiffs are citizens and residents of Greenville County, South Carolina.
2. Defendant is an association organized and doing business under the laws of the State of South Carolina, with its principal place of business being Charleston County, South Carolina.
3. Plaintiffs own property in Charleston County, specifically unit 313 at The Bristol condominium complex.
4. Jurisdiction and venue are proper.

GENERAL FACTUAL ALLEGATIONS

5. In February 2007, a lawsuit was filed by Defendant for construction defects, including construction issues with the windows and doors of the condominiums located at The Bristol.
6. On April 23, 2007, Defendant made a fourth amendment to the Master Deed of Bristol Condominiums Property Owners' Association giving it the authority to maintain, repair and replace the windows and exterior doors to every unit.
7. The Court ruled that the Defendant did not have standing to bring a lawsuit concerning defects with the windows and doors of each unit because the Defendant did not own the windows and doors of each unit.

8. Following this ruling, the Defendant organized a meeting with all condominium owners and encouraged each of them to the lawsuit.
9. Over time, many owners joined the lawsuit. The Plaintiffs did not.
10. On March 13, 2009, the Defendant forwarded a letter to all homeowners explaining what had taken place with the litigation and acknowledged that not all property owners had joined the lawsuit individually.
11. Defendant informed the homeowners that those who had not individually joined the lawsuit could sign a document assigning their right to sue to the Defendant. Therefore, the Defendant would pursue the action on the homeowner's behalf.
12. Plaintiffs never executed an assignment.
13. Subsequently, the lawsuit was settled. The Plaintiffs did not consent to the settlement.
14. Following the settlement, there were special assessments made on the homeowners for attorney's fees and anticipated repair costs that would not be covered by the proceeds of the settlement.
15. Plaintiffs did not agree to the special assessments.
16. Construction on the remodeling process is set to begin shortly.

FIRST CAUSE OF ACTION
(Conversion)

17. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
18. Plaintiffs own unit 313 at The Bristol in Charleston, South Carolina.
19. Defendant converted Plaintiffs' property for its own use and gain by amending the Master Deed.
20. Plaintiffs' did not grant Defendant permission to use their property.
21. As a proximate result of Defendant's conversion of Plaintiffs' property, Plaintiffs have suffered damages that may be ascertained during the discovery and trial of this matter.

SECOND CAUSE OF ACTION
(Breach of Fiduciary Duty)

22. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
23. Plaintiffs use unit 313 at The Bristol as a second home. The Defendant association was formed for several reasons, one being to protect the interests of property owners.
24. A fiduciary relationship existed between the Plaintiffs and Defendant.
25. Defendant breached this duty when it failed to act in good faith.
26. As a proximate result of Defendant's breach, Plaintiffs have suffered and will suffer damages that may be ascertained during the discovery and trial of this matter.

THIRD CAUSE OF ACTION
(Forcible Entry and Detainer)

27. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
28. Defendant made decisions regarding Plaintiffs' windows and doors without the consent of the Plaintiffs.
29. Defendant has made preparations to remove the windows and doors of all units in the remodeling process.
30. Defendant does not have and has never had permission to make decisions regarding the windows and doors of Plaintiffs' property.
-
31. Defendant has moved forward with remodeling despite numerous protests by the Plaintiffs.
32. As a proximate result of Defendant's entry and detainer of Plaintiffs' property, Plaintiffs have suffered and will suffer actual, consequential and special damages that may be ascertained during the discovery and trial of this matter.

FOURTH CAUSE OF ACTION
(Constructive Fraud)

33. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.

34. Defendant represented to Plaintiffs that their consent would be obtained before any actions would be taken by Defendant on behalf of Plaintiffs regarding any use of their windows and doors. Plaintiffs relied on the information provided to them by Defendant.
35. Defendant proceeded to take action that affected the interest in the Plaintiffs' property despite prior notice from Plaintiffs to Defendant that Defendant did not have permission to make decisions or any repairs to Plaintiffs' windows and doors.
36. As a direct and proximate result of Defendant's fraudulent action, Plaintiffs have suffered and will suffer actual, consequential and special damages that may be ascertained during the discovery and trial of this matter.

FIFTH CAUSE OF ACTION
(Fraud and Misrepresentation)

37. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
38. Defendant represented to Plaintiffs that their consent would be obtained before any actions could be taken by Defendant on behalf of Plaintiffs regarding any use of their windows and doors.
39. Defendant knew that it would be making decisions that affected the Plaintiffs' property without the consent of the Plaintiffs.
40. Defendant intended for the Plaintiffs to rely upon the representations the Defendant made regarding the Plaintiffs' property.
41. Plaintiffs' had a right to rely upon the representations of Defendant and did in fact rely upon the representations made by Defendant.
42. Defendant knew that it was going to proceed to make decisions that affected the property interests of the Plaintiffs, with or without the consent of Plaintiffs.
43. As a proximate result of Defendant's fraudulent misrepresentations, Plaintiffs have suffered and will suffer damages that may be ascertained during the discovery and trial of this matter.

SIXTH CAUSE OF ACTION
(Negligence)

44. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.

45. Defendant owed a duty of care to the Plaintiffs to act in a reasonable manner regarding the property owned by Plaintiffs at The Bristol.
46. Defendant breached that duty when it proceeded to take actions that affected Plaintiffs' property without the consent of Plaintiffs.
47. As a proximate result of Defendant's negligence, Plaintiffs have suffered and will suffer damages that may be ascertained during the discovery and trial of this matter.

SEVENTH CAUSE OF ACTION
(Trespass)

48. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
49. Plaintiffs are the legal owners of unit 313 at The Bristol.
50. Defendant has voluntarily entered upon Plaintiffs' property and taken actions inconsistent with Plaintiffs' property interest. Furthermore, Defendant knew or should have known that it did not have permission to enter Plaintiffs' property.
51. As a proximate result of Defendant's trespass, Plaintiffs have suffered and will suffer damages that may be ascertained during the discovery and trial of this matter.

EIGHTH CAUSE OF ACTION
(Nuisance)

52. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
53. Defendant has created an unreasonable interference with Plaintiffs' ability to use their property, including but not limited to, the reconstruction that is to take place regarding Plaintiffs' windows and doors.
54. The nuisance that will be created by Defendant caused by the reconstruction of the windows and doors of Plaintiffs' property will interfere with the Plaintiffs' use and enjoyment of their property.
55. As a direct and proximate result of Defendant's nuisance, Plaintiffs have suffered and will suffer actual, consequential and special damages that may be ascertained during the discovery and trial of this matter.

NINTH CAUSE OF ACTION

(Unjust Enrichment)

56. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
57. Defendant has taken possession of the windows and doors to Plaintiffs' property, unit 313 at The Bristol. Plaintiffs' never granted ownership rights of the windows and doors to the Defendant. Defendant has failed to compensate Plaintiffs for the taking of their windows and doors and has refused to do so.
58. Defendant has been unjustifiably enriched at the expense of Plaintiffs and has enjoyed the benefit of said enrichment without compensating Plaintiffs.
59. As a direct and proximate result of Defendant's unjust enrichment, Plaintiffs have suffered and will suffer actual, consequential and special damages that may be ascertained during the discovery and trial of this matter.

TENTH CAUSE OF ACTION

(Declaratory Judgment)

60. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
61. Plaintiffs have never granted ownership to Defendant of the windows and doors to their property, unit #313 of The Bristol.
62. Defendant has made decisions regarding Plaintiffs' property without consent to do so. Defendant has acted in a manner in which it portrays itself as owner of Plaintiffs' windows and doors.
63. Plaintiffs seek a judgment from this Court pursuant to the S.C. Uniform Declaratory Judgments Act, S.C. Code §15-53-10 *et seq.* for a declaration of the rights, status and other legal relations of the parties declaring the windows and doors of unit 313 of The Bristol are property of the Plaintiffs and not Defendant.

ELEVENTH CAUSE OF ACTION

(Injunctive Relief)

64. Plaintiffs incorporate the allegations of the foregoing paragraphs as if fully repeated herein.
65. Upon information and belief, Defendant has plans to begin remodeling on the

condominiums at The Bristol, including Plaintiffs' property.

66. Some of the remodeling efforts that are to take place relate to the windows and doors of each condominium.
67. Plaintiffs are asking the Court to issue an injunction pursuant to South Carolina Rules of Civil Procedure 65, prohibiting any remodeling, repairs and construction from taking place at The Bristol until issues raised in this action can be resolved.

WHEREFORE, the Plaintiff prays for judgment against the Defendant for the following:

1. Actual, consequential and punitive damages;
2. A judgment pursuant to the S.C. Uniform Declaratory Judgments Act, S.C. Code §15-53-10 *et seq.* declaring the windows and doors of unit # 313 at The Bristol are owned by Plaintiffs;
3. An injunction prohibiting any remodeling, repairs and construction from taking place on any condominiums at The Bristol until issues raised in this action can be resolved;
4. Cost and attorney fees associated with this action; and
5. Such other and further relief as the Court deems just and proper.


Joe Mooneyham, SC Bar No.: 004041
Kelly Pope Karow, SC Bar No.: 69569
MOONEYHAM BERRY & KAROW, LLC
Post Office Box 8359
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Attorneys for the Plaintiff

Greenville, South Carolina
Dated: April 1, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2011-CP-10-2232

THE BRISTOL CONDOMINIUM)
PROPERTY OWNERS' ASSOCIATION,)

Plaintiff,)

FORECLOSURE COMPLAINT

v.)

(NON JURY)

JOHN T. LUCAS, SR., AS TRUSTEE OF)
THE JOHN T. LUCAS REVOCABLE)
TRUST DATED NOVEMBER 10, 2004,)
AND CAROLYN C. LUCAS AS)
TRUSTEE OF THE CAROLYN C.)
LUCAS REVOCABLE TRUST DATED)
NOVEMBER 10, 2004,)

Defendants.

FILED
2011 MAR 25 PM 4:31
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

NOW COMES the Plaintiff, Bristol Condominium Property Owners' Association ("Plaintiff" or "Association"), as the governing body of the Bristol Horizontal Property Regime ("Regime"), by and through its undersigned attorneys and pursuant to South Carolina Rules of Civil Procedure, the Regime Master Deed described hereinbelow and Section 27-31-210 of the S.C. Code of Laws, complaining of the Defendants and alleges and shows unto this court as follows:

1. That Association is an eleemosynary corporation, organized and existing under the laws of the State of South Carolina, with its principal place of business in Charleston County, South Carolina.

2. That upon information and belief, the Defendants are the fee simple owners of that certain property located within the Regime, known as Unit Number 313, also referred to as 3013 (the "Property"), which property is located in Charleston County, South Carolina and is more fully described as follows:

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ALL that certain apartment known as UNIT NUMBER 3013, also referred to as UNIT NUMBER 313, in THE BRISTOL HORIZONTAL PROPERTY REGIME as shown on the plans and specifications attached to that certain Master Deed and By-Laws attached thereto, dated August 30, 2002, and recorded in Book D417, at Page 001, in the R.M.C. Office for Charleston County, S.C., as amended by First Amendment to Master Deed of The Bristol Horizontal Property Regime dated November 13, 2002 and recorded in the R.M.C. Office aforesaid in Book M426, at Page 296; as amended by Second Amendment to Master Deed of The Bristol Horizontal Property Regime dated February 28, 2003 and recorded in the R.M.C. Office aforesaid in Book P439, at Page 828; as amended by Third Amendment to Master Deed of The Bristol Horizontal Property Regime dated February 20, 2004 and recorded in the R.M.C. Office aforesaid in Book Y485, at Page 178, together with all that certain undivided interest in the common elements and limited common elements as set forth in the above-referred to Master Deed.

3. Jurisdiction and venue in Charleston County is proper because the subject property is located in Charleston County.

4. That the Defendants took title to the Property subject to the terms and conditions of that certain Master Deed of the Bristol Horizontal Regime (the "Master Deed"), recorded in the Office of the R.M.C. for Charleston County in Book D-417, Page 001, as amended. The Master Deed is incorporated herein by reference.

5. That the Master Deed, including the Association Bylaws incorporated therein, provides that the Association has the right to file a notice of lien against the Property and enforce its lien rights according to South Carolina law, in order to secure payment of delinquent Association assessments.

6. That the Master Deed provides, inter alia, that all property owners are members of the Association, that they are obligated to pay assessments levied by the Association on the units owned by them in the Regime, that members of the Association are obligated to pay late charges and interest at the rate established by the Board of Directors of the Association for assessments that are not paid by the due date, as well as reasonable attorneys' fees incurred in

the collection of same, all as may be seen by reference to the pertinent sections of the Master Deed.

7. That the assessments levied by the Association on behalf of the Regime remain unpaid through the date of this Complaint.

8. That due demand has been made for the payment of the outstanding assessments, and that the Defendants have refused to make same.

FOR A FIRST CAUSE OF ACTION

9. That the total due as of February 16, 2011, for the regime fees/assessments for the Property, including late charges, interest and lien filing fees, is Twenty-Three Thousand Two Hundred Twenty Nine and 16/100 Dollars (\$23,229.16), plus late charges accruing subsequent thereto, along with subsequently accruing interest at the rate of 18% per annum, until paid, plus reasonable attorneys' fees and costs.

10. On or about February 24, 2011, the Association filed a Notice of Lien on the Property for the amounts due and owing by the Defendants on the Property, said Notice of Lien recorded at Book 0173, Page 669, RMC Office, Charleston County, South Carolina (the "Lien" attached hereto as Exhibit "A").

11. The Master Deed provides for recovery by the Association of a reasonable sum as attorneys' fees from Defendants and the Lien has been placed in the hands of Moore & Van Allen PLLC, Attorneys for Plaintiff, for collection and/or foreclosure.

12. Plaintiff is entitled to an order of foreclosure of its Lien on the Property for the amount of its account and costs and requiring that the Property be sold and the proceeds of the sale after deducting all lawful charges and expenses be applied to the debt owed to the Association, including reasonable attorneys' fees and costs incurred.

13. Said foreclosure should be subject to and shall not extinguish or otherwise effect or compromise any and all prior liens, mortgages, or other encumbrances on the Property, including that certain South Carolina Tax Lien #2010-23001 and County of Charleston Magistrate's Court Judgment 2005-JG-10-834.

14. Plaintiff has performed any and all conditions precedent to the enforcement of its Lien and recovery of the claims alleged herein.

15. Plaintiff does not waive any deficiency arising from the foreclosure sale. However, Plaintiff reserves its right to withdraw its demand for deficiency judgment at any time prior to the foreclosure sale herein.

FOR A SECOND CAUSE OF ACTION

16. Plaintiff realleges Paragraphs 1 through 15 as fully as if set forth verbatim herein.

17. Pursuant to §27-31-210 of the S.C. Code of Laws, the Defendants are obligated to pay a reasonable rental for the Property after the commencement of a foreclosure action.

18. The within action is a foreclosure action and Plaintiff is entitled to recovery of a reasonable rental in an amount determined by the Court.

WHEREFORE, Plaintiff prays that:

UNDER ITS FIRST CAUSE OF ACTION:

(a) It have immediate judgment of foreclosure against the Defendants John T. Lucas, Sr., as Trustee of the John T. Lucas Revocable Trust dated November 10, 2004, and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust dated November 10, 2004 in the amount of Twenty-Three Thousand Two Hundred Twenty Nine and 16/100 Dollars (\$23,229.16) plus late charges accruing subsequent to February 16, 2011, along with

subsequently accruing interest at the rate of 18% per annum, until paid, plus reasonable attorney fees and costs.

(b) Said judgment of foreclosure be subject to any and all prior and/or superior liens and encumbrances and any foreclosure sale be had subject to said liens and encumbrances.

(c) The Property described hereinabove be sold at public auction by the Master according to the statutes governing such sale, and the proceeds of sale, after paying the costs and expenses of this suit, and of sale, be applied to the payment of the Lien, costs and attorneys' fees, and the balance, if any, be held subject to the further Order of this Court.

(d) It be granted an immediate money judgment against Defendants John T. Lucas, Sr., as Trustee of the John T. Lucas Revocable Trust dated November 10, 2004, and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust dated November 10, 2004, for the amount due under the Lien, plus late charges accruing subsequent to February 16, 2011, along with subsequently accruing interest at the rate of 18% per annum, until paid, plus reasonable attorneys' fees and costs, with such amount to be subject to credit after application of the proceeds from any sale of the Property provided for hereunder.

(e) In the event the successful bidder shall be other than the Defendants John T. Lucas, Sr., as Trustee of the John T. Lucas Revocable Trust dated November 10, 2004, and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust dated November 10, 2004, the Sheriff be ordered and directed to eject and remove from the premises the occupant or occupants of the Property sold, together with all personal property located thereon, and to put the successful bidder or his assigns in the full, quiet and peaceable possession of the premises without delay, and to keep the successful bidder or his assigns, in such possession.

UNDER ITS SECOND CAUSE OF ACTION:

- (a) The award of a reasonable rental amount as determined by the Court during the pendency of this foreclosure action.

AS TO ALL CAUSES OF ACTION:

- (a) For such other and further relief as may seem just and proper to the Court.



David B. Wheeler, SC Bar #6055
Joseph T. Belton, SC Bar# 71993
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Post Office Box 22828
Charleston, SC 29413-2828
(843) 579-7000

ATTORNEYS FOR PLAINTIFF

CHARLESTON, SC

March 24, 2011



BP0173669

RMC BK 0173 Pg 669 : pg 1 *

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

NOTICE OF LIEN

YOU WILL PLEASE TAKE NOTICE that Bristol Condominium Property Owners Association does hereby file the within Notice of Lien in connection with the unpaid assessments in the sum of \$ 23,229.16 (including \$10.00 in filing fees), plus interest and costs, plus any other assessments accruing after February 8, 2011, which amount is justly due and owed Bristol Condominium Property Owners Association and has not been paid, upon the premises described hereinbelow and carried on the records of the undersigned in the name of John T. Lucas, Sr., as Trustee of the John T. Lucas Revocable Trust dated November 10, 2004, and Carolyn C. Lucas as Trustee of the Carolyn C. Lucas Revocable Trust dated November 10, 2004.

The premises affected by the lien are described as follows:

Unit Number 313 also referred to as 3013 Old Bridgeview Lane, Charleston, SC 29403
~~The Bristol HPR~~
T.M.S. # 460-10-01-021

IN WITNESS WHEREOF, Bristol Condominium Property Owners Association has hereunto set its hand and seal this 10th day of February, 2011.

x Haver Harris
Witness

Bristol Condominium Property Owners Association

By: [Signature]
Its: Management Agent

[Signature]
Witness

CHARLESTON\438603v1



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2010-CP-10-3240

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust and
Carolyn C. Lucas Revocable Trust,

Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Defendant.

ANSWER TO
AMENDED COMPLAINT

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2011 APR 29 PM 1:39
JULIE J. ARMSTRONG
CLERK OF COURT

The Defendant, by and through its undersigned attorney, answers the Amended Complaint of the Plaintiff dated April 1, 2011 as follows.

1. All allegations of the Amended Complaint not specifically admitted herein are hereby denied.
2. The Defendant admits the allegations of paragraphs 1, 2, 3, 4 and 5 of Plaintiff's Amended Complaint.
3. Answering paragraph 6 of Plaintiff's Amended Complaint, the Defendant admits that on April 23, 2007, Defendant made a Fourth Amendment to the Master Deed of Bristol Condominiums Property Owners' Association wherein the exterior windows and doors of every unit were added to the definition of "limited common elements" under the Master Deed. The Defendant further admits that by right of this Amendment, Defendant now has the authority to maintain, repair and replace exterior windows and doors as well as all other limited common elements.
4. The order of the Court of Common Pleas referenced in paragraph 7 of the Plaintiff's Amended Complaint is a document that speaks for itself. Therefore, the

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Page 1 of 6

Defendant craves reference to it. To the extent that the allegations of paragraph 7 are inconsistent therewith, they are hereby denied.

5. The Defendant admits the allegations of paragraph 8 only insofar as said paragraph alleges that a meeting of the Association was organized wherein the Board of the Association advised homeowners of their right to join in one or more pending lawsuits pertaining to water intrusion problems at The Bristol Condominiums.

6. The allegations of paragraph 9 are admitted insofar as said paragraph alleges that a number of homeowners joined one or more lawsuits pertaining to water intrusion problems at The Bristol Condominiums Association and that the Plaintiffs were not among them. The remaining allegations of paragraph 9 are hereby denied.

7. The allegations contained in paragraphs 10, 11 and 12 of Plaintiff's Amended Complaint are admitted.

8. Answering paragraph 13, it is admitted that all lawsuits pending regarding The Bristol were settled. It is denied that the Plaintiffs did not consent to the terms of the settlement.

9. The allegations of paragraph 14 are admitted insofar as said paragraph alleges that special assessments were made on the homeowners for anticipated repair costs that would not be recovered by proceeds of the settlement. The remaining allegations of paragraph 14 are hereby denied.

10. The allegations contained in paragraph 15 are denied.

11. The allegations contained in paragraph 16 are admitted.

12. Answering paragraph 17, the Defendant repeats and realleges paragraphs 1 through 11 hereinabove.

13. The allegations contained in paragraph 18 are admitted.
14. The allegations contained in paragraph 19, 20 and 21 are denied.
15. Answering paragraph 22, the Defendant repeats and realleges paragraphs 1 through 14 hereinabove.
16. The allegations contained in paragraph 23 are admitted.
17. Paragraph 24 requires no response and states conclusions of law. To the extent that a response may be required, the allegations of paragraph 24 are hereby denied.
18. The allegations contained in paragraphs 25 and 26 are denied.
19. Answering paragraph 27, the Defendant repeats and realleges paragraphs 1 through 18 hereinabove.
20. The allegations contained in paragraph 28 are denied.
21. The allegations contained in paragraph 29 are admitted.
22. The allegations contained in paragraph 30 are denied.
23. Answering paragraph 31, Defendant admits that it has moved forward with remodeling certain components of The Bristol. Defendant craves reference to any and all protests referenced in paragraph 31 of the Plaintiff's Amended Complaint but admits that the Plaintiffs have voiced objections to work commencing in and outside their unit.
24. The allegations contained in paragraph 32 are denied.
25. Answering paragraph 33, the Defendant repeats and realleges paragraphs 1 through 24 hereinabove.
26. The allegations contained in paragraph 34, 35 and 36 are denied.
27. Answering paragraph 37, the Defendant repeats and realleges paragraphs 1 through 26 hereinabove.

28. The allegations contained in paragraphs 38, 39, 40, 41, 42 and 43 are denied.
29. Answering paragraph 44, the Defendant repeats and realleges paragraphs 1 through 28 hereinabove.
30. Paragraph 45 requires no response and states conclusions of law. To the extent that a response may be required, the allegations of paragraph 45 are hereby denied.
31. The allegations contained in paragraphs 46 and 47 are denied.
32. Answering paragraph 48, the Defendant repeats and realleges paragraphs 1 through 31 hereinabove.
33. The allegations contained in paragraph 49 are admitted.
34. The allegations contained in paragraphs 50 and 51 are denied.
35. Answering paragraph 52, the Defendant repeats and realleges paragraphs 1 through 34 hereinabove.
36. The allegations contained in paragraphs 53, 54 and 55 are denied.
37. Answering paragraph 56, the Defendant repeats and realleges paragraphs 1 through 36 hereinabove.
38. The allegations of paragraph 57 are admitted only insofar as said paragraph may allege that Defendant has taken legal ownership of the exterior windows and doors of the Plaintiffs' unit. The remaining allegations of paragraph 57 are hereby denied.
39. The allegations contained in paragraphs 58 and 59 are denied.
40. Answering paragraph 60, the Defendant repeats and realleges paragraphs 1 through 39 hereinabove.
41. The allegations contained in paragraphs 61, 62 and 63 are denied.

42. Answering paragraph 64, the Defendant repeats and realleges paragraphs 1 through 41 hereinabove.

43. Answering paragraph 65, Defendant admits that it has plans to begin remodeling on the condominiums at The Bristol and denies that it plans to remodel any property belonging to the Plaintiffs.

44. The allegations contained in paragraph 66 are admitted.

45. The allegations contained in paragraph 67 requires no response.

AFFIRMATIVE DEFENSE
(Contributory/Comparative Negligence)

46. Any damage suffered by the Plaintiff is the direct and proximate result of its comparative and contributory negligence and Plaintiff's recovery should be barred or, alternatively, reduced proportionately to Plaintiff's comparative negligence.

AFFIRMATIVE DEFENSE
(Failure to Mitigate)

47. Third-Party Plaintiff failed to mitigate its damages as required by law.

AFFIRMATIVE DEFENSE
(Business Judgment Rule)

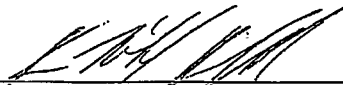
48. The Plaintiffs are barred from recovery pursuant to the Business Judgment Rule.

AFFIRMATIVE DEFENSE
(Statutory Immunity)

49. The Plaintiffs are barred from recovery pursuant to the S.C. Code which provides immunity for Boards of non-profit corporations.

WHEREFORE, having fully answered the Plaintiffs Amended Complaint, this Defendant prays that the same be dismissed with the cost of this action and for such other and further relief as this Honorable Court may deem just and proper.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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K. MICHAEL BARFIELD, Esquire
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ATTORNEYS FOR DEFENDANT

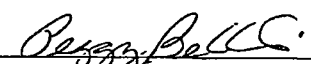
Charleston, South Carolina
April 27, 2011

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2011 APR 29 PM 1:39
JULIE J. ARMSTRONG
CLERK OF COURT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon opposing counsel via E-Mail and U.S. Mail, postage prepaid, this 27 day of April, 2011 as follows:

Joe Mooneyham, Esquire
Kelly Pope Karrow, Esquire
Mooneyham Berry & Karow, LLC
Post Office Box 8359
Greenville, SC 29604
Attorneys for Plaintiff
E-Mail: joe@upstatetriallawyers.com
kellyk@upstatetriallawyers.com


Legal Secretary

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2010-CP-10-3240

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust and
Carolyn C. Lucas Revocable Trust,

Plaintiffs,

-vs-

The Bristol Condominium Property
Owners Association,

Defendant.

**MOTION FOR
SUMMARY JUDGMENT**

FILED
2011 JUL -1 PM 1:51
JULIE J. ARMSTRONG
CLERK OF COURT
BY

-and

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
Civil Action No.: 2011-CP-10-2232

The Bristol Condominium Property
Owners' Association,

Plaintiff,

John T. Lucas, Sr. as Trustee of the
John T. Lucas Revocable Trust
Dated November 10, 2004, and
Carolyn C. Lucas Revocable Trust
Dated November 10, 2004,

Defendants/
Counterclaim Plaintiffs,

-vs-

The Bristol Condominium Property
Owners' Association,

Counterclaim Defendant.

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the
Defendant will move before the presiding judge of the Court of Common Pleas, ten days

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Page 1 of 3

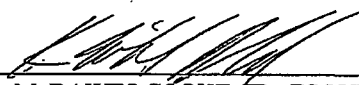
after service hereof, or as soon thereafter as counsel may be heard, for an order granting to said Defendant summary judgment as to all of the Plaintiff's claims in this matter.

This Defendant believes that it is entitled to judgment as a matter of law based on the premise that the Board of The Bristol Condominium Property Owners' Association, a non-profit corporation, is protected from all of the Plaintiffs' claims by the Business Judgment Rule. The Plaintiffs have no evidence that would tend to lift the protections of the Business Judgment Rule from any of the actions of the Board in conjunction with its management of the property or its handling and settlement of any prior litigation involving construction defects at the subject property, all of which form the basis of the Plaintiff's claims.

This motion shall be supported by pleadings, discovery responses, deposition testimony, affidavits, as well as a memorandum of law which will be filed with the Court prior to the hearing of this matter.

It is so moved.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

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*Attorneys for The Bristol Condominium Property
Owners' Association*

Charleston, South Carolina
June 30, 2011

{Client Matter\002116\0103\MTN\00312016.DOC}

Page 2 of 3

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
John T. Lucas, Sr. as Trustee of the)
John T. Lucas Revocable Trust and)
Carolyn C. Lucas Revocable Trust,)
)
Plaintiffs,)
)
vs.)
)
Bristol Condominium Property Owner's)
Association,)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

Case No. ~~2010-CP-10-3240~~

2013-CP-10-1066

MOTION FOR NEW TRIAL
Pursuant to *SCRCP* Rule 59(a)

The plaintiff hereby moves the Court for a new trial absolute, pursuant to Rule 59(a) *SCRCP*.

The plaintiff hereby avers that notice of the judgment to which this motion is addressed was received August 26, 2013, when written notice of the entry of the judgment was received by mail at the offices of counsel. Pursuant to Rule 6 and Rule 59(b), counsel therefore avers that filing of this motion is timely.

Facts and Procedural Posture

The Court is familiar with the salient facts. The Bristol Condominiums is a 54-unit development on the Ashley River in Charleston, developed by the Beach Company and Gulf Stream Construction. In or about 2003, the first unit was sold. Dr. John and Mrs. Carolyn Lucas bought a condo in the development not long after the development made condominiums available for sale.

In 2004 some Bristol homeowners began noticing problems with water leakage in their units. A group of homeowners formed the BPOAG (Bristol Property Owner Advisory Group) in

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JULIE J. ARNSTROG
CLERK OF COURT
BY 6

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December 2004 to establish communication with the Beach Company and Gulf Stream Construction to address the leakage issues.

Various unit windows leaked, the garage flooded periodically, there were no drainage pans under the hot water heaters in some units, the pool leaked, the deck cracked, rainwater drained excessively to lower floor balconies, the deck storage doors warped, and other windows and doors leaked. The BPOAG solicited homeowner contributions of \$100.00 to fund the hiring of a consultant to evaluate these problems.

Some problems were corrected, but the water leakage issues remained. In June 2005 the BPOAG solicited an additional \$200 contribution from each homeowner to pay for additional forensic analysis.

Three homeowners filed suit against the Beach Company and Gulf Stream Construction on July 26, 2005 in an effort to address leaks and other construction defects. This lawsuit would later become known as the "Hanger Suit" or "Hanger Group" because one of the plaintiffs was Dr. Kenneth Hanger.

In September of 2005, the BPOAG hired Sutton-Kennerly & Associates (SKA) to perform forensic engineering analysis. SKA's report presented to all homeowners on July 10, 2006. The report outlines numerous construction defects with the Bristol, including issues with water intrusion through the windows and doors and also with the façade clad. SKA's report also proposed remediation measures. The report was given to the Beach Company and Gulf Stream Construction, which refused to make the suggested remediations.

In August 2006, the homeowners of the Bristol officially took over management of the complex from the Beach Company. One of the first acts of formed Bristol Property Owners

Association (BPOA), was to perform an analysis of the complex's capital reserve fund, which revealed that the reserve fund had been underfunded by the Beach Company.

In the fall of 2006, the BPOA voted to file suit against the Beach Company and Gulf Stream Construction. In October of 2006 Rosen Rosen & Hagood (RRH) was retained and filed suit on February 9, 2007 against the Beach Company, Gulf Stream Constructions and numerous sub-contractors on behalf of BPOA and its homeowners for construction defects, including construction issues with the windows, doors and bathrooms of the condominiums located at the Bristol. At the same time, RRH filed another lawsuit on behalf of individual plaintiffs against the same defendants for the same issues so ensure that some party with standing had sued the defendants as to all issues. The second lawsuit filed by RRH would become known as the "Landry Suit". These three lawsuits were later consolidated for discovery purposes only. Shortly after the February 2007 suits were filed, it became evident to RRH and BPOA that verbage in the Bristol Master Deed made the exterior and interior of the windows and doors of each unit and the bathrooms, bench seats in the bathrooms and bathroom flooring the property of the unit homeowner individually. The BPOA's executive board unilaterally amended the Master Deed to reclassify the exterior windows, doors and screens as limited common areas.

Subsequently, some of the construction defendants filed a motion for summary judgment in the suit brought by BPOA to dismiss the claims for the windows and doors because the BPOA did not have standing to bring those causes of action.

On March 10, 2009, having heard the motions for summary judgment, Judge Clifton Newman granted the motions dismissing the BPOA's claims for damage to windows, doors and bathrooms in individual units, ruling that since at the time the lawsuit was filed, the BPOA did not "own" these features, the BPOA lacked standing to assert claims for damage to them. Judge

Newman further ruled that the amendment to the master deed could not be applied retroactively. Following this ruling, the Board organized a meeting with all condominium owners and encouraged each of them to join the lawsuit individually.

On March 13, 2009, the BPOA forwarded a letter to all homeowners advising of Judge Newman's ruling and acknowledging that not all property owners had joined the lawsuit individually. Those who had not joined were offered the "opportunity" to assign their right to sue to the BPOA. Dr. and Mrs. Lucas neither joined the lawsuit nor assigned their right to sue. On March 19, 2009, the BPOA and Landry suits were settled with all defendants. Prior to and following the settlement of the lawsuit, there were special assessments made on the homeowners for attorneys' fees, litigation costs, and anticipated shortfalls in repair costs that would not be covered by the proceeds of the settlement.

Dr. Lucas paid some of the initial assessments, but contested the special assessment for their new windows and doors. Dr. Lucas believed that he should not have to purchase new windows and doors when he believed he did not need them, and that the windows and doors should have been covered by the settlement proceeds. The Lucases filed this lawsuit on April 20, 2010, alleging conversion, breach of fiduciary duty, forcible entry and detainer, constructive fraud, fraud and misrepresentation, negligence, trespass, nuisance, and unjust enrichment, and asked for a declaratory judgment and injunctive relief. The BPOA moved for summary judgment. At the hearing the causes of action for conversion, forcible entry and detainer, trespass, nuisance, declaratory judgment and injunctive relief were ordered dismissed. Causes of action for fraud, fraud and misrepresentation, breach of fiduciary duty, and negligence remained.

On March 25, 2011, the BPOA filed a foreclosure action against the Lucases. The grounds for the foreclosure were the Lucases' refusal to pay the special assessment and the unpaid reserve fund assessment. The Lucases answered and counterclaimed on May 9, 2011, renewing the claims raised in their initial pleading against the BPOA. The Lucas claims against the BPOA and the foreclosure action have since been consolidated by consent and all issues were to be resolved at trial, which began on May 22, 2013.

Given the number of potential witnesses to be called at trial, the parties agreed to the admission of the deposition testimony of most witnesses and submitted those depositions prior to trial. At trial, the parties called John Lucas, Lona Vest, Jan Landry, and John DeWitt as witnesses.

Discussion

The Court was presented with causes of action for fraud, fraud and misrepresentation, breach of fiduciary duty, and negligence. It found for the defendants on all counts.

While the Court correctly applied *S.C. Code, Ann.* § 33-31-830 (2012, as amended) in reaching its decision in this matter, the plaintiffs contend that the greater weight of the evidence supports their contentions that the management committees for the Bristol Condominiums Property Owners' Association breached their duties to the plaintiffs.

Breach of Fiduciary Duty and Negligence—Failure to Communicate

S. C. Code Ann. § 33-31-830 requires directors to act:

- (a) (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App.1987). Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995).

Since the inception of the Board in August 2006, there have been many complaints about the lack of communication and misdirection from the Board. Cindy Mulcare, whose deposition was submitted by the parties, testified that she was told by the Board that they needed a letter about the Master Deed and was informed it was related to a lawsuit over windows and doors. Mulcare Dep. 52:9-10; 32:1-6. "...I think that the Board should realize that they act on our behalf, so it is our property. And then you have...a responsibility to inform the homeowners on a regular basis what is going on...I was not happy with the way we were updated about financial issues." Prins Dep. 45:4-11. This was an ongoing concern for Mr. Prins. *Id.* at 45:12-15.

The Board would make unilateral decisions on important matters without consulting the homeowners. For example, the Board decided to hire Sutton-Kennerly, an engineering firm, to take an in-depth look at the Bristol structure. J. Landry Dep. 56:16-20. The homeowners were told by the BPOA of this decision and were never allowed a vote. J. Landry Cont. Dep. 11:16-20. Further, when the Board did relay information, there were issues with the way that information was relayed to homeowners. Lona Vest was retained in 2007. On June 28, 2007 Ms. Vest received an email, offered as an exhibit, from Jan Landry in which Ms. Landry expressed

concern and confusion about how the owners were being updated on what was going on at the Bristol. The Board sent information in different ways, but most important information, with the status of the various lawsuits being a prime example, was disseminated by email. J. Landry Cont. Dep. 52:11-24. The Board and the property manager were in charge of deciding how to communicate with the homeowners. *Id.* at 53:18-24. Many homeowners were older and did not use the internet, including Dr. Lucas. Also, not all information was mailed to those owners who did not live at the Bristol. For example, Ms. Vest will testify that meeting minutes would be posted to the website, but only the annual meeting minutes were actually mailed. Dr. Lucas did not always receive information that was left at his door, because he did not live in the unit full-time, and as he pointed out in his deposition and at trial, he eventually stopped getting information altogether. In fact, Ms. Vest testified that "...there were varying complaints the entire time about communication" At one point, the Board even apologized for its lack of notice for a Board meeting for October 21, 2008.

The BPOA further breached its fiduciary duty to communicate by holding many Board meetings off campus. Instead of improving communication, the Board required homeowners to notify the Board in advance if they wished to attend any meetings, which the owners complained was inconvenient. Johann Prins was "very much in favor" of having Board meetings at the Bristol, but "the former Board had preference to have the Board meetings elsewhere." Prins Dep. 55:7-11. When homeowners did attend meetings, the agenda would not be presented until they arrived—there was no advance notice. *Id.* at 62:1-9.

Some meetings were closed to homeowners, and these were referred to as "executive sessions." J. Landry Dep. 69:20-22. These meetings were about legal matters and personnel. *Id.* at 69:25-70:3. Jan Landry stated that matters regarding attorney-client privilege, grievances, or

employee reviews would be discussed in executive session. J. Landry. Cont. Dep. 71:1-9. The Board determined which subjects were to be covered in executive session. Warner Dep. 159:14-21. Dr. Lucas testified "...if you look at the minutes there's not much written down [at the beginning of the lawsuit brought by the Bristol]. It was always executive session." Kenneth Hanger, a former homeowner, raised concerns about the Board holding meetings away from the Bristol because "it was a pain to get to and go away." Hanger Dep. 43:23-44:16. The Board's response, to Dr. Hanger's concern, was that "they wanted to get away from the property and...just be away from it." *Id.* at 44:10-12.

Jan Landry testified in her deposition that the homeowners should have been made aware of the judge's order that stated the regime did not have standing to bring a suit for the windows and doors. J. Landry Cont. Dep. 74:18-20.

Even when information was requested directly from the BPOA, the Board failed to respond, breaching its fiduciary duty. Dr. Lucas testified that he was unhappy because he was being assessed for expenses for a lawsuit that he never joined. Therefore, he had to pay for a lawsuit that he was not a part of. He retained counsel to write a letter requesting information so that he and other homeowners could get information regarding the construction litigation so that he could be informed before voting. He and other homeowners were not allowed to make an informed vote. At one Board meeting, the letter from his attorney was read by Dr. Lucas, asserting his objections to the special assessment and stipulating his refusal to pay, and Dr. Lucas stated that his attorney would be sending the letter to the regime within the week. Though the Board contacted their attorney, Brew Hagood, no materials were ever turned over to Mr. Mooneyham, according to Ms. Vest's and Dr. Lucas's deposition testimony. Dr. Lucas further testified at trial that there was absolutely no response. Lucas Trial Trans. 66:5-10

Another example of the BPOA's withholding information from homeowners is the failure to disclose that there was an alternative to replacing all the windows and doors. Ms. Vest testified that a treatment was available that would not have been as expensive as replacing all the windows and doors at the Bristol. No witness testified that this alternative was ever presented to the homeowners for a vote. The cost differential between these two alternatives was \$400,700 difference in assessment fees, and per unit a \$7,420.37 difference. However, the only solution presented to the homeowners was a full window replacement, and then they were to vote yes or no for this solution. Warner Dep. 193:8-11. It was presented at a meeting, and no discussion was allowed, according to Dr. Lucas' testimony. This was true even though only eighty out of four hundred windows at the Bristol had problems. Warner Dep. 190:1-9. The Board members who voted for replacement rather than treatment and repair had construction issues with their condos, and were therefore placed in a conflict position relative to other homeowners who did not. *Id.* at 152:15-18. David Warner stated that, instead of a cheaper approach that would have resulted in a lesser assessment, the BPOA voted that it was in every homeowner's interest to replace all the windows and then have them assessed at approximately \$32,000-\$36,000. *Id.* at 191:20-192:1.

There was a document entitled "Bristol Construction Defect Litigation Cost Projections" dated February 19, 2008. Hourly and contingency costs were compared. *Id.* However, the cost projections were never presented to the homeowners. D. Landry Dep. 69:8-11. When asked as to why this wouldn't have been presented to homeowners, Dave Landry stated, "I would anticipate this is early on and the Board probably did keep it to themselves." *Id.* at 69:8-17.

Breach of Fiduciary Duty and Negligence—Funds Mishandled

The evidence also shows that defendant mishandled funds and failed to manage the financial status of the Bristol properly. The most costly part of the reconstruction of the Bristol was replacing all windows and doors with new ones. David Warner, a former Board President, testified that there was an alternative to full replacement that would have been less costly, but the homeowners were never presented that option. However, the only solution presented to the homeowners was to vote yes or no on full new window replacement. Warner Dep. 193:8-11. In fact, evidence presented at trial showed that only eighty out of 400 hundred windows at the Bristol had problems and needed to be fixed. Warner Dep. 190:1-9.

The Beach Company developed the Bristol project. When management was transferred over to the Bristol, the reserve fund was underfunded. Landry Trial Trans. 206:4-7. David Warner, former Board President, testified that the underfunding of the reserve fund has been a continuous problem at the Bristol. Warner Dep. 78:12-14. Despite this issue, in order to fund the construction litigation, defendant took loans from the reserve fund and those loans were never paid back. Landry Trial Trans. 207:10-15. In addition, Jan Landry, a former Board President, testified that money was borrowed from the operating account to pay for the construction litigation and those loans were not paid back either. Landry Trial Trans. 207:16-23. When Johan Prins, a homeowner, raised a concern at a meeting about the using funds from the reserve account to pay for the lawsuit the response was “the lawsuit will be over in six months or so, and then we have the money...and then we can take [a] look at the picture again.” Prins Dep. 25-26:12-26:9 and 26:10-24. At trial, Jan Landry, testified that she believed it was ok to borrow money from the reserve fund, but it should be paid back. Landry Trial Trans. 236:2-22.

During the construction litigation, the Bristol received a refund for overpayment of flood insurance premiums. Landry Trial Trans. 207-208:24-4. The refund amount was \$171,000. *Id.* at 208 9-16. Landry testified at trial that the refund was placed in the reserve account and attempted to evade questions regarding the money being used to fund the litigation. *Id.* at 208-209:18-7. However, another former Board President, David Warner, testified that most of that refund was used for construction litigation. Warner Dep. 204:13-15. Ms. Landry also testified that it was never discussed with homeowners what to do with the refund. Landry Trial Trans. 209:11-14.

Various homeowners at the Bristol were plaintiffs, along with the regime, in the three simultaneous lawsuits which were brought to resolve the construction and leakage issues. Money from the Bristol's operating and reserve funds was used to pay the expenses incurred by individual homeowners, and that the costs advanced were never refunded to those funds when the individual plaintiffs successfully settled their lawsuits. In fact, the Bristol never sought to recover any litigation costs from the members of the Hanger lawsuit. Landry Trial Trans. 203:24-204:2 and Hanger Dep. 23:2-4. Lona Vest testified that the regime incurred expenses for information used by the Landry and Hanger suits and that the Bristol never sought reimbursement. Vest Trial Trans. 9:17-10:6. The plaintiff therefore presented evidence sufficient to meet his burden of proof of both negligence and breach of fiduciary duty.

Fraud

The elements of fraud in South Carolina are:

§ 18-2 Fraud – Elements

- (1) a representation;
- (2) falsity of the representation;

- (3) materiality of the representation;
- (4) the speaker's knowledge of its falsity or a reckless disregard for the truth or falsity;
- (5) the speaker's intent that the representation be acted upon by the person hearing the representation;
- (6) the hearer's ignorance of its falsity;
- (7) the hearer's reliance on its truth;
- (8) the hearer's right to rely thereon; and
- (9) the hearer's consequent and proximate injury.

Ralph King Anderson, Jr., *South Carolina Requests to Charge, Civil*. 2002.

Fraud can occur in South Carolina when a party fails to disclose material information that it is bound to disclose. *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986). As already suggested, the defendant Board failed to disclose the homeowners' association's lack of standing to make various claims for damages prior to the abortive attempt to amend the Master Deed and to coerce homeowners into joining the various lawsuits. The BPOA was aware of Judge Newman's ruling, the fact certainly was material to homeowners' decisions to participate in the various lawsuits, and the decision whether to participate obviously impacted all the homeowners, including Dr. Lucas.

Further, it appears that the homeowners were never made aware of true nature of the insurance issue that led the Board to its unilateral amendment of the Master Deed.

Cindy Mulcare, an insurance agent for Wachovia (at the time), became involved at the Bristol during 2007. Mulcare Dep. 14:20-25. She was approached by the BPOA about the ownership of the doors and windows. *Id.* at 29:8-30:19. She stated that this could be a problem because "it's hard for the insurance company to wrap their arms around what exactly is covered

and what is not covered unless it's specific in the master deed and then our policy follows that." *Id.* at 33:5-14. The Board then asked her to write a letter about the ambiguities in the Master Deed and bylaws. *Id.* at 51:13-52:3, 52:9-10. Plaintiff's Exhibit 20 is the letter from Cindy Mulcare to the Bristol Property Owners Association, which begins, "You have requested that I review the Master Deed of The Bristol Property Owners Association and attempt to ascertain if the language used to describe Property Rights and descriptions of units...conforms to coverage in the insurance contracts...." In a letter to the owners at the Bristol, the Board stated that "Our insurers have written to us recommending the Board immediately act to correct this definition in the Master Deed," and that "The Board voted to amend the Master Deed and change the definition of the windows and doors from individual property to limited common property." (Exhibit 18). However, the letter from Cindy Mulcare did not specifically address the doors and windows issue—it only stated that there was ambiguity as to what would be the responsibility of the unit owners. Mulcare Dep. 74:13-75:10.

Harold Campbell, an insurance agent who lived at the Bristol, also stated that his understanding was that the change to the Master Deed for the windows and doors was because of the judge's order, because "the lawsuit...would not have worked unless there were 54 lawsuits for each unit, which made it...harder to work for the association. And that's why the master deed was amended to allow us to be collective in our attempt to seek the repairs with the lawsuit." Campbell Dep. 51:13-20. Campbell, who served on the insurance committee, and was a State Farm agent thought the letter from Cindy Mulcare to the Board was about the deed being confusing in general. *Id.* at 62:16-18. He stated that the insurance report given by Charles DeRose at the Board meeting on March 15 linked Cindy Mulcare's letter to window and door coverage, but her letter never actually mentioned windows and doors. *Id.* at 79:19-24. Ms.

Mulcare stated that someone on the Board of Directors had a problem with the owners owning their windows and doors, and was going to present this to the owners. Mulcare Dep. 36:18-37:3.

Ample evidence of the Board's fraud, both by omission and commission, was therefore presented through deposition and trial testimony. The plaintiff met his burden of proof on these causes of action. Further, negligent misrepresentation is proven by the evidence outlined above. To recover in a negligent misrepresentation action, a plaintiff must prove: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of his reliance upon the representation. *Tomlinson v. Mixon*, 626 S.E.2d 43, 367 S.C. 467 (S.C.App. 2006) Essentially, negligent misrepresentation is similar to fraud without the scienter element. The evidence outlined meets the plaintiff's burden of proof on this cause of action.

Damages

Dr. and Mrs. Lucas contend that they have incurred the following damages:

- a. They have been forced to pay more than their fair share of various assessments as a result of the BPOA's negligent failure to prorate assessments;
- b. They did not receive their share of the insurance refund recovered by Ms. Vest, which was \$3,185.19.
- c. They have been forced to pay additional assessments in the amount of \$10,223.32 for litigation fees and costs.

- d. They have been forced to pay about \$23,000 for the cost of replacing their windows and doors, even though they believe that neither, in their case, were defective;
- e. They are entitled to \$26,300.45, representing their 1/54th share of the funds paid by the BPOA to Rosen Rosen & Hagood towards attorney fees and costs that benefited the individuals in the Landry and Hanger lawsuits;
- f. They are entitled to have the Court consider their claims that the BPOA acted recklessly and violated its fiduciary duties to them in the respects noted above.

Grounds for These Motions

Of course, having set forth his disagreements with the Court's view of the evidence, the plaintiff must demonstrate grounds for his motion. Rule 59(a)(2) authorizes a trial court to grant a new trial "for any of the reasons for which rehearings have heretofore been granted in the courts of the State." Generally, a court may grant a new trial if, after consideration, it determines that the verdict is against the greater weight of the evidence. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E. 2d 265 (1990). More often granted when a trial judge reviews a jury's verdict and sits as a "thirteenth juror," the Court may in this case, in its discretion, elect to grant a new trial to Dr. Lucas based on a consideration of the evidence set forth above.

CONCLUSION

For the reasons stated, the plaintiff respectfully requests that the Court reconsider its ruling in this matter based upon the evidence presented at trial and specifically referenced in this motion. The plaintiff further requests that upon review of the evidence and trial testimony, that the Court reverse its current ruling in favor of the defendant and urges that the Court grant him a new trial absolute, pursuant to *SCRCP* Rule 59 (a).

Respectfully submitted,



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September 3, 2013

Greenville, South Carolina

1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON)

3
 4 CASE NO. 2010-CP-10-3240
 5

6 JOHN T. LUCAS, SR., et al.)

7 Plaintiffs,)

8 -vs-)

BEFORE THE HONORABLE:
 JAMES WILLIAMS, JR.

9 BRISTOL CONDOMINIUM PROPERTY)

OWNER'S ASSOCIATION,)

10)

Defendants.)

11 _____)

12

13

14 Given before Trisha G. Rarick, Court Reporter and Notary
 15 Public, at BARNWELL, WHALEY, PATTERSON & HELMS, LLC, 288
 16 Meeting Street, Suite 200, Charleston, South Carolina, on
 17 Wednesday, May 23, 2013, at 9:28 a.m.

18

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A P P E A R A N C E S

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ALSO PRESENT:

LONA VEST

JOHN T. LUCAS, SR.

CAROLYN LUCAS

I N D E X

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1 (Plaintiffs' Deposition Exhibit No. 3

2 was marked for identification.)

3 THE COURT: All right. You may proceed.

4 MR. MOONEYHAM: Thank you, Your Honor, if
5 you please, we call Ms. Vest.

6 LONA VEST,
7 having been first duly sworn, was examined and testified as
8 follows:

9 THE WITNESS: Yes. I do.

10 THE COURT: State your full name, please.

11 THE WITNESS: My name is Lona Redman Vest,
12 L-O-N-A, R-E-D-M-A-N, V-E-S-T.

13 THE COURT: Thank you, ma'am. All right.

14 MR. MOONEYHAM: Thank you, Your Honor.

15 EXAMINATION

16 BY MR. MOONEYHAM:

17 Q Ms. Vest, it is my intention to jump
18 around a little bit today to I hope short circuit or
19 speed up your testimony. But what I'd like to do is
20 start with very basic information. Where are you
21 employed currently?

22 A I own Property Management Services, which
23 is a regime association management company in Mount
24 Pleasant, South Carolina, and I manage property in
25 the Charleston area, Isle of Palms and Mount

1 Pleasant.

2 Q And one of the properties that you manage
3 would be the Bristol?

4 A Yes, sir.

5 MR. MOONEYHAM: Your Honor, for purposes
6 of this examination, I believe this witness
7 would be identified as a party, and, therefore,
8 would be subject to cross-examination under --

9 THE COURT: Sure.

10 BY MR. MOONEYHAM:

11 Q Ms. Vest, you understand what that means?
12 I get to ask you leading questions, if that would be
13 necessary. Before we called you this morning, we
14 had a meeting with counsel, and we reviewed a
15 spreadsheet that you have provided and compared it
16 to a document that we had, in fact, called
17 construction litigation expenses.

18 A Yes, sir.

19 Q I'm going to hand you both your
20 spreadsheet and the annotated document. Are those
21 the documents that we reviewed this morning?

22 A Yes. They are.

23 Q All right. The document that you prepared
24 is the document to your right?

25 A Right.

1 Q Correct?

2 A Yes. It is.

3 Q And what does that document purport to
4 explain?

5 A It's entitled the Bristol construction
6 defect litigation cost projections. It would have
7 been a tool that I used with the board members
8 throughout the process of litigation and early
9 mitigation. I would have updated this report as
10 time went on. So you'll note that it basically
11 lists the venders and the bills, and depending on
12 the timing, whether or not the bill had already been
13 paid or was pending payment.

14 There are notations out to the side
15 as to basically what that work was for, unless it
16 was fairly obvious, such as Suttan-Kennerly &
17 Associates, which was the engineering group, Moore &
18 VanAllen, which was our general counsel, or Rosen,
19 Rosen & Hagood, which was our litigation attorney.
20 But for the most part, there are some annotations as
21 to who these people are, what service they provided.

22 MR. MOONEYHAM: Your Honor, we offer that
23 as Plaintiffs' Exhibit Number 4.

24 MR. BARFIELD: No objection.

25 (Plaintiffs' Deposition Exhibit No. 4

1 and 5 were marked for identification.)

2 THE COURT: You need to see it back?

3 MR. MOONEYHAM: We'll just put it right
4 here.

5 (Off-the-record discussion.)

6 BY MR. MOONEYHAM:

7 Q Ms. Vest, while I was collecting the
8 stapler, the court reporter marked Plaintiffs'
9 Exhibit Number 5; is that correct?

10 A Yes, sir.

11 Q And what is that document?

12 A This is entitled construction litigation
13 expenses.

14 Q This morning, did you --

15 THE COURT: Without objection on 5 also?

16 MR. BARFIELD: Yes, sir. Subject to any
17 relevance objections on the line of questioning

18 from these documents.

19 THE COURT: All right.

20 BY MR. MOONEYHAM:

21 Q This morning, before we began, did you
22 participate in the annotation of this document?

23 A Yes, sir. I did.

24 Q Okay. And does the data that appears on
25 Plaintiffs' Exhibit Number 5 reflect changes in the

1 computation based on the information that you
2 provided on Exhibit 4?

3 A Yes, sir. And I believe it's
4 representative to the best of my knowledge.

5 Q Very good. And Plaintiffs' Exhibit 5 is
6 what?

7 A It was a document your -- you prepared
8 listing litigation-related expenses, if I'm not
9 mistaken, and there were some holes in it based on
10 information that I had on my form, as well as
11 settlement information. So it was -- we've now
12 updated it to be a more complete representation of
13 the costs.

14 Q Okay. And so Plaintiffs' Exhibit Number 3
15 then would be a total compilation of the money that
16 Bristol spent involved in its litigation of the
17 construction issues in the three lawsuits we talked
18 about yesterday?

19 A Yes, sir. I believe it is.

20 Q And just for the record, the total cost is
21 \$1,380,962.80?

22 A Yes, sir. It is.

23 Q Is there any practical way to divide those
24 costs amongst the three lawsuits?

25 A In the three lawsuits being the regime

1 suit, the Landry suit and the Hanger suit as we've
2 dubbed them?

3 Q Yes, ma'am.

4 A No, sir. It would be very difficult to do
5 that. I don't -- we might be able to make a stab at
6 it. When the judge enjoined the suits for the
7 purpose of discovery, all of the information became
8 available to not only the Landry suit but the Hanger
9 suit, and it would be difficult in some respects to
10 understand the way each played and how much they
11 were used.

12 But basically, these costs were all
13 incurred by the Bristol regime, and there were no
14 expenses translated to the Landry suit or to the
15 Hanger suit.

16 Q That was -- you anticipated my next
17 question. The lawyers who represented the

18 plaintiffs in the Landry suit and in the Hanger suit
19 had the data developed by the Bristol lawsuit
20 available to them, correct?

21 A Yes.

22 Q And the Bristol, as a regime, paid for
23 expert testimony, destructive testing, all the items
24 listed on Plaintiffs' Exhibit Number 4, correct?

25 A Correct.

1 Q And when the litigation ended, the Bristol
2 elected not to seek reimbursement of the costs that
3 the Bristol had incurred from the Hanger lawsuit
4 proceeds or from the Landry lawsuit proceeds; is
5 that correct?

6 A That's correct.

7 Q Okay.

8 A But two points to that. One was that the
9 attorneys viewed the Landry suit as a helpful hand
10 in the regime suit. In other words, they could
11 offer a more full release to the defendants in the
12 fact that they represented 40 out of 54 of the
13 homeowners.

14 Their original intent was hopefully
15 to represent all of the homeowners. The six that
16 had already brought a suit with -- Hanger, obviously
17 didn't join, but all of the homeowners were invited
18 to join the Landry suit. We had the six in the
19 Hanger suit who did not join, and then we had eight
20 who elected not to join at all.

21 Two of the eight were actually
22 developer related. One was the beach company,
23 because they still retained a unit, and one was Dr.
24 Darby, who also owned a unit but is related to the
25 beach company. So that's one provision of the

1 Landry suit.

2 The second issue was that when we
3 settled the suit, there were funds allocated for
4 expenses that were sued for in the Landry suit, and
5 all of the money rolled into our repairs. The
6 regime did the interior repair work that we received
7 funds for in the suit. So basically, the Landry
8 people didn't get any money back.

9 The only money they had subsequently
10 received is \$2,000. If they make their bathroom
11 repair, they are eligible to receive \$2,000. But
12 other than that, they received no money.

13 Q So, for example, in the Landry lawsuit
14 then, the homeowners as a group are treated
15 differently, depending on their election of
16 participating in the lawsuit, right? Homeowners who
17 did not participate don't get the benefit of \$2,000?

18 A That's correct, in that issue. However --

19 Q Let me -- I realize you've got -- there's
20 an explanation, but I want to make sure we clarify
21 the point. The people who did not participate in
22 the Landry lawsuit contributed to the expense of the
23 Landry lawsuit by paying reserve fund payments and
24 special assessments and all that sort of thing, but
25 they did not and do not benefit from the Landry

1 lawsuit by getting the \$2,000 you just described,
2 unless they elected to participate?

3 A That's correct. The A people are out in
4 the cold.

5 Q Right.

6 A As it relates to the bathrooms.

7 Q Yes, ma'am. And likewise, as it relates
8 to the Hanger lawsuit, when the Hanger lawsuit
9 settled, the Bristol homeowners association elected
10 not to attempt to recover costs from the Hangers,
11 that group of plaintiffs, correct?

12 A That's correct.

13 Q And the plaintiffs in the Hanger lawsuit
14 actually received the cash at the time that that
15 settlement was disbursed, didn't they?

16 A Yes.

17 Q And so the homeowners who were not parties
18 to that lawsuit contributed money to the litigation
19 of that case -- there were how many plaintiffs in
20 the Hanger lawsuit?

21 A Six.

22 Q So that those six homeowners benefited
23 from money paid by everyone, the whole 54 member
24 group, and none of that money was recovered,
25 correct?

1 A Correct.

2 Q Okay. And in fact, when the special
3 assessments for windows and doors were ordered or
4 arrived at, the plaintiffs in the Hanger lawsuit
5 actually had funds, because they recovered in that
6 lawsuit, with which to pay the special assessments?

7 A Correct.

8 Q And unlike everybody else who didn't have
9 any funds, didn't receive the check, and, instead,
10 received a special assessment, correct?

11 A Correct.

12 Q Okay. So in the resolution of the Hanger
13 lawsuit, then the individual plaintiffs were treated
14 differently in the Hanger case than plaintiffs who
15 were just members of the association?

16 A Correct.

17 Q Okay.

18 A But let me add this much. The Hanger
19 plaintiffs, the six of them, were responsible for
20 their own bathroom repairs. They also are not
21 eligible for the \$2,000 contribution, if you made
22 your bathroom repairs. And -- but they did -- and
23 they were not made whole. Their settlement was not
24 such that they walked away with enough money to pay
25 for all of their bathrooms as well as their window

1 and door assessments. From the best of my
2 knowledge, I don't think they were made whole. So
3 I'm just going to add that.

4 Q But -- I may be wrong about this, but my
5 recollection was that, at least at the time of your
6 deposition, you testified that with the exception of
7 Mr. and Mrs. -- or Dr. and Ms. Hanger, because they
8 had two units, everybody else in the Hanger lawsuit
9 was able to pay the special assessment with the
10 proceeds of the settlement?

11 A Yes. That's true.

12 Q So if they were made whole, they were made
13 a lot more whole than everybody else, people who got
14 20 and 30 and \$40,000 assessments, correct?

15 A That's correct. They made out better than
16 the Landry group did.

17 Q Right.

18 A Or the eight that didn't participate.

19 Q And the litigation number that we're
20 talking about in this case, the contribution made by
21 Bristol Homeowners Association as a group, was a
22 fairly substantial number, wasn't it?

23 A Yes, sir. The 1.3?

24 Q Yeah. And the actual cost --
25 out-of-pocket cost to the association was fairly

1 substantial, 300 and some thousand dollars; is that
2 right?

3 A Could you be more specific as to which
4 numbers you're relating -- you're talking about in
5 terms of your \$300,000 out of pocket?

6 Q Sure.

7 A Are you talking about the capital reserve
8 funds that were borrowed?

9 Q My recollection, and I'm looking at the
10 last page of plaintiffs' Exhibit Number 4.

11 A Okay.

12 Q It appears to me that the homeowners
13 association borrowed \$325 --

14 MR. MOONEYHAM: Your Honor, since you
15 don't have it, you and I can look at it
16 together.

17 BY MR. MOONEYHAM:

18 Q \$325,000 was borrowed from capital
19 reserves, and then another \$55,000 was borrowed from
20 operating to fund litigation; is that correct?

21 A Yes, sir. And then they also had a line
22 of, and they borrowed money on the line of credit.

23 Q That was the next thing I was going to
24 say. Another \$295,000 was borrowed from a line of
25 credit, correct?

1 A Correct.

2 Q And at the time the three lawsuits
3 settled, no funds were allocated from -- some were
4 recovered to pay these loans back, correct?

5 A We did pay the bank back. We did First
6 Federal, but we did not repay the interfund loans,
7 the interfund transfers from the Bristol's funds.

8 Q Right.

9 A But we did -- we did pay off the loan.

10 Q So \$295,000 was paid out of the settlement
11 proceeds, but the 325 and 55 interfund loans, as you
12 called them, were not paid back?

13 A That's correct.

14 Q Okay. All right. So what I was saying
15 was, and I remember that \$300,000, the money paid
16 out of the Bristol's funds available was not a
17 substantial number. It was 325, plus 55 would be
18 \$385,000, right?

19 A Correct.

20 Q And that money was spent in ways that
21 assisted homeowners in a disparate way, not equally,
22 correct? Because some people got a benefit that
23 others didn't get, right?

24 A We could debate that issue, but it went to
25 pay for -- eventually, the monies from the lawsuit

1 went to pay for the stucco replacement,
2 waterproofing on all the decks, flashing at all of
3 the interfaces.

4 So we can get into a debate as to how
5 much went to each thing and whether or not there was
6 a benefit at the end of the day. You know, I'll
7 agree with you that they never paid back the loans
8 that they made, but part of the reason that they
9 didn't pay it back was the thought process was that
10 once the building was completely repaired, you were
11 dealing with a whole new building.

12 So it changed the looks of the
13 capital reserve fund. The agreement was that we
14 were going to completely repair the building, have a
15 new reserve fund study done, and revisit the way
16 that we were funding the capital fund, which is
17 exactly what we did.

18 So the thought process was that once
19 we repaired the building, we would have accomplished
20 most of the things that you would normally set funds
21 aside for. So we'd be going back to basically
22 ground zero, and we would then take a look at the
23 reserve again.

24 I think that that's what lent to part
25 of their decision-making not to refund those monies

1 to the fund, and, again, the only source of cash
2 would be to go back to the homeowners.

3 Q Right. And I understand that, and I
4 understand that that was -- you used the term
5 agreement. I'm not sure who agreed to do all that,
6 but the point is, that decision was made only after
7 some homeowners had benefited unequally from the
8 resolution of the lawsuits?

9 A Correct.

10 Q Okay. All right. Now, to fund, getting
11 back to zero, as you talked about a minute ago, the
12 board elected to require special assessments from
13 the members of the association, correct?

14 A Yes.

15 Q And I told you before we went on the
16 record that I was going to ask you about that
17 specifically, and you suggested that we could look
18 at what's been marked as Defendants' 1, Your Honor,
19 which is the submission yesterday regarding the
20 foreclosure against Dr. and Ms. Lucas, and we're
21 going to look -- I think you said that you could
22 tell if me we looked --

23 Ms. Vest, you told me if we looked at
24 the customer transaction detail report, which is
25 kind of at the back of the document, you could

1 identify the special assessments for me; is that
2 correct?

3 A Yes, sir.

4 Q Okay. Let's run through that very quick
5 just -- again, so the record is clear, tell me what
6 the special assessments were when they were assessed
7 based on the transcript in front of you.

8 A Okay. Let me clarify one point. I --
9 there was a range of special assessments as it
10 related to the window and doors. I can tell you off
11 of this document what Dr. Lucas' was.

12 Q Sure.

13 A It is not indicative of all of the unit
14 types. There should be another document that
15 actually spells out what each person paid. So I
16 can't tell you that off the top of my head. I'm
17 going to glean through this pretty quickly, in that
18 there are regular assessments, but the -- you have
19 the monthly regime fee being assessed.

20 Every March, you have an insurance
21 assessment. The regime basically gets the insurance
22 bill in, divides it by 55, assesses the homeowners,
23 asks them to pay within 30 days, and then we pay the
24 premium to the insurance company.

25 THE COURT: Why 55?

1 THE WITNESS: I'm sorry?

2 THE COURT: Why do you divide --

3 THE WITNESS: 54. There are 54 units in
4 the building.

5 THE COURT: I thought you said 55. I
6 didn't --

7 MR. MOONEYHAM: You did. I wrote it down.
8 I was going to ask her the same question.

9 THE WITNESS: Oh, did I say 55?

10 MR. MOONEYHAM: You said 55.

11 BY MR. MOONEYHAM:

12 Q Okay. That's all right.

13 A The first special assessment, which I
14 would class as the A special assessment, was in
15 August. I believed it was assessed at around August
16 2007, and it was for \$1,896. And that was to
17 generate money to be able to pay legal fees, and the
18 genesis of that assessment was that there is a
19 provision in the master deed that the board can
20 charge 20 percent of the annual budget to the
21 homeowners without a special assessment -- or a
22 special vote of the owners approving that
23 assessment.

24 So they elect -- and you can do that
25 one time each fiscal year, and they elected to enact

1 that section of the master deed.

2 THE COURT: So that was the first special
3 assessment ever done?

4 A That was the first special assessment in
5 my tenure. I came to work for the property in early
6 2007. I don't know if there were special
7 assessments prior to that, but it's my understanding
8 that that was really the first one after the board
9 took over.

10 Q And as I look at this document, I'm about
11 a third of the way down, first page, I see the
12 assessment of \$1,896. It's actually dated July the
13 1st, 2007. Do you see that?

14 A Okay. That's the one.

15 Q All right. And I see the negative number
16 means that's -- that the homeowner owes the money,
17 right?

18 A No. The negative number means that
19 Dr. Lucas prepaid. You'll see at the top that Dr.
20 Lucas sent us a large check that prepaid his monthly
21 assessments. So for about the first year I was
22 there, Dr. Lucas was paid in advance.

23 Q Okay. All right. So the negative number
24 then at 7-1-2007 for 1,896 reflects a withdraw from
25 his capital account or escrow account with you to

1 make that payment, correct?

2 A Correct. And then you can see he actually
3 sent me a check for the 1,896.

4 Q That was my next question. So not only
5 did he pay that assessment once, he paid it twice?

6 A Well, he continued to maintain his credit.

7 Q Right.

8 A So he received credit for his prepayment.

9 Q All right. In any event, he certainly
10 paid it at least once, if not twice?

11 A He paid it.

12 Q Got you. All right. When is the next
13 assessment, special assessment?

14 A You don't see another special assessment.
15 The assessments, you see the larger numbers are
16 insurance assessments?

17 Q Right.

18 A The next special assessment that you see
19 is the beginning of the window special assessment.

20 The window special assessment, if I'm not mistaken,
21 Dr. Lucas' share of the window special assessment
22 was in the \$21,000 range, but we assessed it on a
23 monthly basis, basically to generate cash flow to
24 pay for the windows.

25 And that's the \$2,011.66 that you see

1 repeatedly applied to Dr. Lucas' account.

2 Q And that's the last -- the first time that
3 appears is the last number on the first page?

4 A Correct.

5 Q In December of 2009?

6 A Yes, sir. And then you see it appearing
7 again January 1st, February 1st. You see it
8 repeatedly, and you will note that Dr. Lucas
9 actually paid some of that. You'll see that in
10 March, I received a large check from Dr. Lucas. And
11 then again, in April, I received a large check from
12 Dr. Lucas.

13 Q If we count those payments, I see one -- I
14 mean not the payments, but the assessments, two,
15 three --

16 A The 2,631.50 that you see assessed in
17 March, March 1st, that's the insurance assessment.

18 Q Right.

19 A We did not assess the special assessment
20 that month. We only assessed the insurance
21 assessment to give the owners a break.

22 Q I see 15 --

23 A I believe that's correct.

24 Q -- \$2,011.66 assessments, with the last
25 one being February of 2011; is that right?

1 A Yes.

2 Q Okay. You told me that you thought his
3 total window assessment was in the neighborhood of
4 \$21,000.

5 A I believe so.

6 Q 15 times 2,000 would be \$30,000. How is
7 that?

8 A I have -- as I said, I'd have to look at
9 that original spreadsheet that gave each individual
10 unit owners. You're relying on my memory, and -- I
11 believe this is it, it's plaintiffs' -- I don't know
12 if that's 81 or 87.

13 THE COURT: Look at the tab.

14 MR. BARFIELD: Yeah. Tab 11.

15 BY MR. MOONEYHAM:

16 Q Okay.

17 A Would you like this?

18 Q If you don't mind.

19 A Sure.

20 Q This reflects that the initial assessment
21 was \$23,256.21?

22 A Yes.

23 Q Is that the right number?

24 A Yes, sir. I believe that's the
25 representative breakdown.

1 Q Okay. All right. Then explain to us how
2 Dr. Lucas owed 15 payments of \$2,000, which would be
3 in excess of 30,000.

4 A I don't know. Let me count them myself
5 first, and then I'll argue with you. I do not know.

6 THE COURT: The one thing, you have got
7 2,400 here.

8 A It would have been the last -- I believe
9 it's the last column would be the total assessment.

10 THE COURT: 31,674?

11 BY MR. MOONEYHAM:

12 Q If the cost of windows was 23,256.21 --

13 A You have to look at Dr. Lucas' unit
14 number. Look at -- go to 3013. Then --

15 Q I'm sorry, 28.

16 A But keep going.

17 Q Right. 31,674.

18 A Okay. That's why it's 15 payments of
19 that. I'm sorry. Thank you.

20 Q So that's why it's 15 payments of 21- --

21 A Yeah. I thought I was going to have to
22 give Dr. Lucas money back. You had me all scared.

23 Q Somehow, Ms. Vest, I don't think you're
24 scared about anything. All right. So we talked
25 about the assessments for the windows. Are there

1 any additional special assessments reflected in
2 Exhibit Number --

3 A Yes, sir.

4 Q Tell me about that.

5 A We weren't done assessing.

6 Q Right.

7 A We assessed a short-fall assessment that
8 basically was generated for two reasons. One was
9 that we had changed orders to the construction
10 contract, and I believe those totaled around
11 250,000. Again, we're dealing with my memory.

12 Then, we also had owners who didn't
13 pay, and so, therefore, we didn't have enough money
14 to pay out the contract. So we had an assessment to
15 all of the owners, and I believe it was around
16 \$9,000. And it came almost immediately on the heels
17 of the window assessment.

18 And I believe, if you look at April
19 of 2011 -- no. Excuse me. That's on insurance
20 assessment. There's another insurance assessment in
21 April, but you'll start to see a special assessment
22 for -- of \$750 a month, which is the short-fall
23 assessment. And you will see that begin again, as I
24 said, in April of 2011 or May 2011.

25 THE COURT: And you call that what now?

1 THE WITNESS: That was a short-fall
2 assessment.

3 THE COURT: Short fall. Okay.

4 A It basically was used to make up the
5 difference from the change orders and the monies
6 that we couldn't collect from the owners.

7 BY MR. MOONEYHAM:

8 Q And the first time I see that is --

9 A May I believe.

10 Q -- May 1st of 2011, which is almost at the
11 bottom of page 2?

12 A Yes, sir.

13 Q Okay.

14 A And I see one, two, three, four, five,
15 six, seven, eight, nine, ten, eleven. Eleven
16 installments of that, I believe.

17 Q So --

18 A 11 times 750.

19 Q So 7,500, plus 1,500 would be 9,000.

20 That's right.

21 A Do you see 12?

22 Q Is there 12?

23 A All right. Let me go back and look at it
24 again. You may be right. It might have been in
25 here.

1 Q So that would be \$9,750?

2 A Okay.

3 Q How was the short-fall assessment
4 calculated?

5 A It was split evenly over the 55 -- 54
6 homeowners.

7 Q So the short fall would have been 54 times
8 \$9,750?

9 A Yes, sir.

10 Q Okay. So \$526,500?

11 A I believe that's about right. I'm sure
12 there's probably documentation on the special
13 assessment. We had to have the homeowners vote on
14 that. So I'm sure there's documentation on the
15 vote.

16 Q So a minute ago, you said you thought it
17 was about \$250,000, that was just --

18 A No, sir. What I said was there was about
19 a \$250,000 change order that we didn't have monies
20 to pay, and then we had money that we couldn't
21 collect from the homeowners. And those two combined
22 created that short fall.

23 Q Okay. Right. So we've got the regime
24 fees. We've got the insurance assessment
25 periodically. We have got the 1,896 one-time

1 assessment. We've got the windows assessment.
2 We've got a short-fall assessment. What other
3 assessments -- special assessments were --

4 A That --

5 Q -- ordered or asked for from the
6 homeowners?

7 A That's it.

8 Q That's it? All right. Okay. The --

9 A Wait. I'm lying to you, and I don't mean
10 to be lying to you. There is another assessment.

11 Q What is that?

12 A That is very recent. We had a sewer
13 problem.

14 Q Sewage problem?

15 A Correct. And we had a special assessment
16 last year, and, again, the board invoked the 20
17 percent rule. And they assessed 20 percent last

18 fiscal year for contributions toward -- we had a
19 \$300,000 sewer problem that we had to repair. And
20 they are also invoking the 20 percent rule for 2013.

21 So there is one assessment on his
22 history, and then there will be an upcoming
23 assessment in September. And the amount of that is
24 1,680, and Dr. Lucas paid that.

25 Q 1,680 on September 1st, 2012, 1,680, that

1 was paid?

2 A Yes, sir. And it will be 1,680 again in
3 September 2013.

4 Q Right. Okay. And how was the 1,680
5 assessment calculated? You said 20 percent of the
6 annual budget.

7 A 20 percent of the annual budget divided by
8 54 owners. So it was split equally.

9 Q All right. Okay. So generally speaking,
10 setting aside the window assessment, which we'll
11 talk about in a minute, when the homeowners are
12 assessed whatever money is owed is divided by 54?

13 A That's correct.

14 Q When the window assessment was calculated,
15 the number of windows was used as a factor in
16 calculating the assessment?

17 A That's correct.

18 Q That's why at tab 11 in defense proposed
19 exhibits, the numbers are different?

20 A That's correct.

21 Q Correct? The homeowners -- the values of
22 the condos, certainly they were different, are they
23 not?

24 A Yes.

25 Q The market values are different. And you

1 would agree with me that the statute that addresses
2 the calculation of assessments requires a
3 consideration of the value of the property and the
4 value of the condos, correct?

5 A You wouldn't take that up with me. You
6 would have to take it up with the developer. I
7 worked for the beach company on a consulting basis
8 when they created the Bristol documents. I worked
9 for them off the drawing board, and they felt -- the
10 beach company felt very strongly that they just
11 wanted an equal -- everyone to have an equal share.
12 That's the way they wrote it.

13 I made certain suggestions that they
14 did not take into consideration early on, and
15 another very strong point for them is they wanted
16 the unit owners to own the windows and the doors,
17 which isn't always normal in a condominium,
18 particularly a high-rise setting.

19 Q But the answer to my question though is
20 that the statute requires that the total value of
21 the development be considered and that each condo
22 receive a relative percentage value of the total
23 development, and in this case, 154th of total value
24 of the development does not equal the value of each
25 condo?

1 A That's correct.

2 Q Okay.

3 A But I could also add to that that there
4 are lots of regimes out there that split the fees
5 equally and do not weight or create percentage
6 classes, it exists. There are those that are
7 properly weighted and those that are even splits.

8 Q I was going to ask you that. The flip
9 side of the coin is that there are also regimes that
10 do an accurate calculation of the market value of
11 the development and create a ratio with that value
12 and the value of each condo?

13 A Correct.

14 Q And that's what the statute requires,
15 isn't it?

16 A Yes.

17 Q Okay. And so all these 54th assessments
18 would be inconsistent with the statute, correct?

19 A Correct. They're not -- to be honest, I
20 don't know the date of the statute. A lot of the
21 properties we manage were developed in the '80s.

22 Q But this property certainly wasn't
23 developed in the '80s?

24 A No. If I'm not mistaken, I started
25 working on this property in the late 1990s, and it

1 actually came to fruition, so to speak, in about
2 2002.

3 Q All right. Now, that's all we need to
4 talk about the assessments, correct?

5 A That's all of the assessments.

6 Q Okay. All right. We've talked about the
7 assessments and where they're calculating?

8 A Yes, sir.

9 Q Okay. Let's talk about -- since we've got
10 this foreclosure document in front of us, let's talk
11 about the foreclosure a little bit.

12 A Okay. I'm going to take it back then.

13 Q Sure. It appeared when I reviewed this
14 yesterday afternoon that you are the witness who
15 would have been called had counsel for Moore &
16 VanAllen hung around to call witnesses to testify
17 about foreclosure; is that correct?

18 A I am the witness.

19 Q All right. And, essentially, on page 3 of
20 this document, your anticipated testimony is
21 reflected. Did you participate in the preparation
22 of this anticipated testimony?

23 A No. I mean I briefly reviewed it, but it
24 was prepared for me to be honest.

25 Q All right. Let's talk specifically about

1 the information that appears on page 4, which is the
2 calculation of the numbers for foreclosure.

3 A I did participate in that.

4 Q Okay. So you provided these numbers?

5 A Yes, sir.

6 Q Is that correct? Now, I want to focus
7 your attention specifically on C, insurance
8 assessments. Is it your testimony today that Dr.
9 Lucas has refused to pay insurance assessments?

10 A No. He's paid insurance assessments.

11 (Off-the-record discussion.)

12 BY MR. MOONEYHAM:

13 Q Okay. We were talking about page 4 of
14 Defendants' Exhibit 1, which specifically seems to
15 indicate to me that Dr. Lucas has now paid all of
16 his insurance assessments; is that correct?

17 A I don't think that that represents that.
18 Basically, what I did was I broke out what type of
19 monies were owed. I gave him credit for all the
20 payments received, but I don't specify what the
21 payments were. So he's giving me -- we billed them
22 \$97,000. He has sent in checks worth \$49,000.

23 So basically, that -- that's all that
24 states. We'd have to look at his actual history to
25 then discuss -- as I said to you in the early days

1 when I managed property, he prepared. So basically,
2 what I did to create these totals is I went back to
3 the last time he had a zero balance, and I just
4 literally made a column of what was a regime fee,
5 what was a capital reserve.

6 That every month, he's billed for the
7 regime fee, which would be the operating expenses,
8 and he's billed for a contribution for the capital
9 reserve. Then he's billed annually for the
10 insurance, and then he's had special assessments.

11 Q Sure.

12 A And basically what I did was I lumped in
13 all of his payments and give him credit in one lump
14 sum of what monies he'd given me. I did not specify
15 what they -- what he paid me for. As a general
16 rule, Dr. Lucas pays me every month for the
17 operating portion of the regime fee.

18 He typically does not pay me for the
19 capital reserve contribution, and that -- I don't
20 remember exactly when that genesis began, but at
21 some point, Dr. Lucas voiced an objection to the
22 capital reserve portion. So he's discontinued
23 paying that.

24 To the best of my knowledge, he's
25 paid the insurance fee every year, but -- and at

1 some point, he made part of the special assessment
2 for the windows, but then he discontinued paying for
3 the windows.

4 And then I don't believe he paid any
5 of the special assessments that relate to the short
6 fall, but he may have. I'd have to specifically
7 look at his history to tell you what that \$49,000
8 meant.

9 Q I got you, and that's what I wanted to
10 clarify. And we don't -- numbers are not as
11 concerning to me as the concepts are. This exhibit
12 appears to suggest that it's possible Dr. Lucas did
13 not pay insurance assessments, did not pay regular
14 regime fees, because these are listed as payables.
15 And your testimony today is he did, in fact, pay his
16 regime fees, generally timely, right?

17 A Correct.

18 Q He did not, because he opposes the failure
19 to pay back the loan to the capital reserve fund,
20 and he's told you that, he's not made capital
21 reserve fund contributions, because he thought that
22 money ought to have come back from the litigation,
23 right?

24 A Yes.

25 Q He has paid his insurance assessments, as

1 you just testified. So that item, although that is
2 what would have been owed, is probably a zero
3 balance, correct?

4 A Correct.

5 Q And again, as we've talked about, he
6 contests his obligation to pay the special
7 assessments, and so he's not made those payments.
8 And so --

9 A But he's made some of them. He didn't
10 completely not pay them. He paid some of it.

11 Q Right.

12 A And as I said earlier, he did pay the
13 sewer special assessment.

14 Q Right. Because he believes that that is
15 an obligation that he owes, right?

16 A Correct.

17 Q So if we're really looking at how we get
18 to this -- the -- I guess the \$48,000 number, if we
19 ignore the late fees, we're really talking about the
20 window assessment, capital reserve contributions
21 that he suggested he doesn't think he owes because
22 the loans were not paid back, and the short-fall
23 assessment?

24 A I believe that's true. I have my --

25 Q Conceptually.

1 A Conceptually. I have my own -- I created
2 my own spreadsheet, which then the attorneys used to
3 create this document.

4 Q Right.

5 A And in my particular spreadsheet, I did
6 give him credit by the month for what he did or
7 didn't give me, and I realize that this -- this
8 isn't part of the production, but I do -- you know,
9 basically, what Joseph's done is he's lumped it.

10 Q I got you.

11 A Just to give you an idea.

12 Q Again, the numbers are less concerning to
13 me as the concepts are more concerning. Dr. Lucas
14 has said repeatedly, I think this was handled wrong.
15 I don't think I ought to pay these assessments, but
16 I will pay the things I think I owe, and he's paid
17 the things he thinks he owes, correct?

18 A As far as I can see in my own cheat-sheet
19 notes, he has always paid the insurance, he's paid
20 the operating side of the regime fee, and as I said,
21 he's given me -- he paid some money toward the
22 special assessment, and so, yes. That's an accurate
23 characterization of the payments he's made.

24 Q Thank you. There's also a \$15,990 interim
25 collection cost line item on this document. Did you

1 participate in the creation of that line item?

2 A No.

3 Q Do you have any idea what that is?

4 A I'm assuming those are the legal fees
5 related to Dr. Lucas' collections.

6 Q Okay. Have you any idea what would
7 justify a \$15,000 legal fee in this case?

8 A I'm not a lawyer. I don't know.

9 Q But you pay lawyers?

10 A I do pay lawyers. Sometimes way too much.

11 Q And this would be one of those cases,
12 right, where you'd be paying a lawyer way too much,
13 in my opinion.

14 A You think?

15 Q But the point is, do you have an invoice
16 or any documentation that would support a \$15,000
17 payment to the lawyers in this situation?

18 A No. Not with me. No, sir. You know, I'm
19 assuming I could go back and pull all the Moore &
20 VanAllen bills that have been paid since the
21 beginning of time.

22 Q You have been to most of the depositions
23 in this case?

24 A No, sir. I went to Dr. Lucas' deposition.

25 Q That's the only one you went to?

1 A That's the only one I have been to.

2 Q Do you know of your own knowledge whether
3 anyone at Moore & VanAllen appeared at giving any
4 deposition in this case?

5 A I don't believe so.

6 Q You certainly -- have you looked at
7 transcripts and that sort of thing?

8 A No, sir.

9 Q The depositions? So you just don't know
10 if they'd come to any depositions?

11 A No. Joseph Belton was at Dr. Lucas'
12 deposition with me.

13 Q Other than --

14 A Other than that, I'm not -- no. I don't
15 believe they have been to any.

16 Q All right. And, of course, the
17 transcripts, at the beginning of the transcripts,
18 the lawyers' appearances are reflected, right? Or
19 do you know?

20 A I don't know.

21 Q I think all the lawyers would take
22 judicial notice that people who come to depositions
23 are identified as being in the deposition. The
24 point is, are you aware of any work other than the
25 drafting of the complaint and this submission that

1 Moore & VanAllen did in this case that was worth the
2 \$15,000 fee?

3 A I can't speak to the Moore & VanAllen
4 bills. Honestly, I don't know. I can't answer
5 where that 15,000 came from.

6 Q And that was my question. As you sit here
7 today, you can't say here's support for this bill?

8 A Correct.

9 Q Okay. All right.

10 THE COURT: Can I ask her --

11 MR. MOONEYHAM: Sure.

12 THE COURT: Have they billed you-all for
13 those 15,000, or they just added that to the
14 tab?

15 A Your Honor, I really don't know. They
16 bill us every month.

17 THE COURT: But you don't know whether

18 they included the charges for Dr. Lucas'
19 foreclosure every month or not?

20 A I have never sat down and tallied exactly
21 how much I paid for Dr. Lucas' related legal fees.
22 So I can't honestly tell you what that number is,
23 because this has gone on for years.

24 THE COURT: I know, but I wasn't concerned
25 about what the number was. Usually, when

1 lawyers do a foreclosure fee, I don't know
2 about usually, but many times, they don't get
3 any money at all until it's over. So my
4 question really is is Moore & VanAllen waiting
5 until the end of it, or have you been paying
6 them along and along?

7 A We have been paying them along the way.

8 THE COURT: Okay. That's what I wanted to
9 know. Okay. I got you.

10 MR. MOONEYHAM: Thank you, Your Honor, for
11 that clarification.

12 BY MR. MOONEYHAM:

13 Q Is your testimony that you have been
14 paying them to handle this foreclosure action, or
15 have you been paying them as your general counsel
16 for the Bristol?

17 A Paying them for all of the above. They're
18 the general counsel for the regime. They bill
19 specifically per action item, and so I would receive
20 bills every month that would have Dr. Lucas' name at
21 the top of them. And that would be all of the time
22 related to anything to do with the Lucas action, and
23 there have been other issues that they've worked on
24 for the regime.

25 So each month I get multi pages of

1 bills, and each bill is specific to whatever
2 activity they worked on.

3 Q Okay. If you look at the affidavit of
4 counsel that's attached, there's a reflection of the
5 accumulative amount of coverage, \$64,000. This is
6 page 6 of the exhibit, and counsel asked for 10
7 percent, 15 percent of the amount covered. You see
8 that?

9 A Yes, sir.

10 Q Do you have a contract with Moore &
11 VanAllen that would support that contingency fee?

12 A No, sir.

13 Q Are you aware --

14 A But let me stipulate, I was not present
15 when the board originally hired Moore & VanAllen.
16 So I don't know whether or not when the board
17 originally hired them, that was part of that
18 agreement.

19 Q Okay. And you are aware that contingency
20 contracts are required by rule to be in writing?

21 A I don't know that I'm aware of that. I
22 would expect so, but I learned something.

23 Q All right. In addition to that, it says
24 an additional fee of \$3,500 would be reasonable and
25 appropriate. Is this foreclosure any different than

1 any other foreclosure in terms of the complexity or
2 difficulty of handling it?

3 A Well, yes. It's different in that,
4 generally, if we're dealing with a straight
5 foreclosure, we're just dealing with the
6 foreclosure. The fact that we have this other
7 action going at the same time I'm sure probably
8 contributed to some of the complexity of this.

9 Q Don't you think it made it easier to have
10 the other lawsuit going on because of these very,
11 very good lawyers sitting at the table with us have
12 done all of this work?

13 A No. I would have thought it would have
14 extended the foreclosure, not that these lawyers are
15 not fabulous. But I would have assumed that it
16 would have added time to this process, and,
17 therefore, it may have added money to it.

18 Q And you just testified a minute ago that
19 you believe that Bristol had paid these interim
20 collection costs along and along?

21 A Yes, sir.

22 Q So that the total debt is not \$64,000,
23 because those costs have been paid along and along,
24 and if you're calculating attorneys' fee, the
25 attorney's not going to collect -- he's not going to

1 get a percentage of what he's already been paid, is
2 he?

3 A No, sir. I wouldn't believe so, no. I
4 would assume that money would come back to the
5 regime.

6 Q So that is an inaccurate calculation, if
7 he's asking for a third or 10 percent or 15 of this
8 \$15,000 if that's what you paid, correct?

9 A I would assume so, yes.

10 Q All right. Okay.

11 A But again, I'm not a lawyer.

12 Q I understand. Let's talk about
13 foreclosure as a concept for a moment. When I
14 reviewed your deposition, you and Ms. Pope had a
15 long discussion about foreclosures with Bristol.
16 And if you need the deposition to refresh your
17 recollection, I'll be happy to get you a copy of it.

18 I've got one somewhere. In fact, it's right there.

19 This would be in -- if you need to
20 look at it, in the second portion of the deposition
21 toward the end. I don't remember the page number.
22 You-all talked about Jay Harmon (phonetic)?

23 A Yes.

24 Q Who, according to you, at the time you
25 were deposed, had never made a payment at all after

1 some certain period in time, and upon him, SunTrust
2 foreclosed to collect mortgage?

3 A Correct.

4 Q All right. Okay. But she had never --
5 she wasn't paying regime fees and assessments and
6 all that stuff, right?

7 A Her husband had been on the board. He had
8 a falling out. He refused to pay any more money,
9 and from that point forward, he did not pay any more
10 money. I don't remember the exact timing, and they
11 accumulated a very sizeable balance, correct.

12 Q And SunTrust foreclosed?

13 A That's correct.

14 Q The Bristol did not?

15 A The Bristol did not. The Bristol would
16 have, but SunTrust already filed the foreclosure,
17 and the thought process is that if the bank is
18 foreclosing the unit, we're in a secondary position.
19 So if we spent money on a foreclosure, we -- that
20 would just be throwing good money after bad money.
21 The thought -- generally, what we've experienced is
22 that Judge Scarborough will wipe out any subsequent
23 liens and wipe out our position anyway.

24 Q But my point is, even though there was a
25 falling out, even though no payments were being

1 made, the Bristol did not foreclose?

2 A That's correct. We did not on that unit.

3 Q Right. And you-all talked about Ken Nix,
4 Unit 5016. He apparently owed substantial money,
5 agreed to a payment plan. So he was making partial
6 payments, very much like Dr. Lucas was making
7 partial payments, and there was no foreclosure in
8 his case either generally?

9 A I don't remember it being substantial, but
10 yes. They own the unit. They're still in the unit,
11 and he's currently in good standing. So I remember
12 at one point, they did owe us some money. I don't
13 remember it being substantial, but they did end up
14 paying, and we worked it out.

15 Q And there was no foreclosure?

16 A There was not foreclosure of any type.

17 Q I think you talked about a lady named Olga
18 something. I'm not even going to guess at her last
19 name?

20 A Olga Vallededejulia,
21 V-A-L-L-E-D-E-J-U-L-I-A, and Olga is O-L-G-A.

22 Q Unit 3002?

23 A Yes, sir.

24 Q According to your testimony, she owed
25 about \$60,000?

1 A Correct.

2 Q The bank foreclosed, but the Bristol did
3 not?

4 A The bank did not -- the bank either
5 foreclosed, or she did a deed in lieu. Olga was
6 elderly. We did an asset check on Olga. Olga had
7 no assets at all. She had the unit here. Her son
8 had gone off with all of her money. She had a
9 daughter in Virginia Beach. The daughter moved her
10 up to an assisted living, but a subsidized assistive
11 living, and basically, Olga was on Medicaid and had
12 nothing.

13 And so I worked with the daughter to
14 assist in getting the unit back to the bank, and so
15 we realized that there would be no recovering on
16 Olga.

17 Q Bottom line is that --

18 A We did not file a foreclosure.

19 Q -- she owed \$60,000, and no foreclosure
20 was filed?.

21 A That's correct. We -- and the regime did
22 not file a foreclosure.

23 Q That's what I meant.. The regime did not
24 file foreclosure. Bishop Rembert owed about
25 \$90,000.

1 A And we filed a foreclosure.

2 Q Not according to your testimony.

3 A Well, we may not -- we suspended his
4 foreclosure. So I'd have to look at the testimony,
5 but we brought a foreclosure action against Bishop
6 Rembert.

7 Q And when he made payments, it's your
8 testimony that you suspended foreclosure?

9 A He paid a \$20,000 payment, and then he
10 began giving us his rent each month.

11 Q Okay.

12 A And, basically, we got Bishop Rembert to
13 sign an agreement, and I don't know the legal
14 terminology, but, basically, what the agreement was
15 that we didn't lose our standing. That if Bishop
16 Rembert discontinued his good-faith efforts to pay
17 us, with the agreement he eventually would sell his
18 unit, then we could pick up where we left off and
19 continue with the foreclosure.

20 Q But the point is, he owed \$90,000. He
21 made a payment leaving a \$70,000 balance, and you
22 suspended the foreclosure?

23 A But he had a payment plan, yes. That's
24 correct.

25 Q And his payment plan is \$150 a month

1 toward the \$75,000 balance?

2 A That's correct. But then he sold the
3 unit.

4 Q But you suspended the foreclosure?

5 A That's correct.

6 Q When Mr. Zinkowski -- did he pass away?

7 A Dr. Zinkowski, yes. And he passed away.

8 Q All right. There was an outstanding
9 balance then as well, and no foreclosure was filed
10 by the Bristol either, was there?

11 A Dr. Zinkowski was I think -- I think he
12 owed -- he didn't owe a huge sum, but he did owe
13 money when he passed away. A lot of that balance
14 accumulated from the time that he died until his
15 unit was eventually in a short sale.

16 Q But there was no foreclosure by the
17 Bristol?

18 A No. But there -- no. There was no
19 foreclosure by the Bristol.

20 Q Bill Smith owed more than \$50,000?

21 A That's correct.

22 Q Unit 5005, which included regime fees and
23 construction assessment. The bristol did not
24 foreclose on Mr. Smith either, did it?

25 A The bank did.

1 Q But the Bristol did not?

2 A No. The Bristol did not.

3 Q Ashley Middleton was also behind on her
4 payments?

5 A Short sale.

6 Q But the Bristol did not foreclose?

7 A No.

8 Q So of the one, two, three, four, five,
9 six, seven, eight, of the nine people, including Dr.
10 Lucas, who had outstanding balances and difficulties
11 in terms of their agreements to make payments and
12 payments and that sort of thing, the only
13 foreclosure that was followed through was Dr. Lucas'
14 foreclosure?

15 A No. Rembert, Bishop Rembert. There were
16 two foreclosures filed.

17 Q But as soon as he made a payment, you
18 suspended his foreclosure?

19 A We negotiated. It wasn't quite as simple
20 as that. We negotiated a plan with Bishop Rembert.
21 Let's go back and discuss why this is this way.

22 Q Well, you've answered it. I'm sure your
23 lawyer's going to ask you a lot of questions.

24 A Okay. Well, they can ask me why.

25 Q They'll ask those questions. I'm sure

1 they will. Bottom line is, out of the people you
2 were able to remember at the time of your
3 deposition, the only foreclosure that's still
4 ongoing is Dr. Lucas', and only two of the nine
5 people even had a foreclosure to deal with?

6 A That's correct.

7 Q Okay. And that's despite the fact that
8 Dr. Lucas was making payments and despite the fact
9 that he had had us write you a letter in March of
10 2010, which is tab 23, that says that we dispute --
11 he disputes the nature of the assessments and the
12 regime fee assessments?

13 A That's correct.

14 Q You would agree with me that one of Dr.
15 Lucas' big issues in his dealings with the Bristol
16 has been a lack of communication. Whether you agree
17 or not, that's one of his issues, correct?

18 A Yes. He has expressed concerns about the
19 level of communication, and he feels that he has not
20 received adequate communication.

21 Q The lack of communication was particularly
22 an issue at about the time that the construction
23 lawsuits were being filed, according to the e-mail
24 that you and Ms. Landry exchanged that was made an
25 exhibit yesterday, right?

1 A Well, let me say this. I came on board
2 just after the lawsuit was filed. So I can't speak
3 to what communication occurred prior to my arrival.
4 At the time I arrived, Ms. Jan Landry and I did have
5 several discussions about how to create
6 communication.

7 Q Okay. That would have been about the time
8 the lawsuits were being filed?

9 A The lawsuit was filed just prior to that.
10 I officially --

11 Q To your coming on board?

12 A Yeah. I came on board March 1st, 2007,
13 although they had invited me to a couple of meetings
14 to talk. Like, I helped participate in the
15 insurance that year. I worked with the insurance
16 committee. So I came and did some consulting work
17 for them prior to coming on board, but I believe the
18 lawsuit was filed in very early February.

19 Q All right. The next critical time from a
20 communication standpoint, in my view as a lawyer,
21 would have been when decisions were being made about
22 whether to try the case or settle it, if we're
23 talking about litigation. You would agree that that
24 was a very critical time, wasn't it?

25 A Yes.

1 Q The lawsuit got settled essentially in a
2 courthouse, the POA lawsuit.

3 A The jury was seated and --

4 Q A jury lawsuit.

5 A Yeah. The jury was seated, and we came to
6 a settlement that night.

7 Q And the homeowners were not given the
8 opportunity to evaluate the settlement terms before
9 the settlement was agreed to, correct?

10 A I take issue with that to some extent.
11 The attorneys came and talked to homeowners at
12 various times as we came close to going to court.
13 When we went to court, the board ultimately made the
14 decision to accept the settlement.

15 Q The board did, but the individual
16 homeowners didn't have any input into the terms of
17 the settlement?

18 A That's correct. That night, the board
19 reviewed the settlement offer and accepted it.

20 Q And as we heard yesterday, about 40
21 percent of the outside of that building out there is
22 glass. So the next critical issue would have been
23 evaluating what to do with the window remediation.
24 Would you agree with that?

25 A I don't think she said 40 percent was

1 glass. I think she said the majority of the
2 building was glass.

3 Q I think she -- she testified 40 percent.
4 Now, that may not be right, but you just said the
5 majority of the outside of the building is glass?

6 A That would be my personal impression.

7 Q Sure.

8 A I think there's an awful lot of windows
9 and doors.

10 Q And the point there is the lawsuit was
11 actually filed to a large degree to address leaking
12 windows and doors. So the focus of the lawsuit
13 remediation efforts would have been to repair the
14 windows and doors, right?

15 A That's correct.

16 Q And, in fact, the board considered three
17 alternatives for that remediation, correct?

18 A I know we strongly considered two.

19 Q Okay. Well --

20 A If you could characterize what you believe
21 the three are, I might be able to speak to that
22 more.

23 Q I'm drawing that from the testimony of the
24 witness who we were going to call today who's been
25 evading us. He was the chairman of the construction

1 committee, right?

2 A Yes. He was.

3 Q And he testified in his deposition I
4 believe that there were -- there was a kit fix,
5 there was a fix when some windows and doors would
6 have been replaced and others would have been kitted
7 and there was a replacement situation where all the
8 windows and doors would have been replaced. I would
9 consider those to be three potential remediation
10 efforts.

11 A There was an offer from Anderson to do
12 what you're terming the kit fix, which would be to
13 replace certain windows. We found that some of the
14 windows -- the windows were all supposed to have a
15 DP rating of 40. When we went in and actually did
16 all of the discovery work, we found that there were
17 windows that had a DP rating of 0. There were some
18 that had a DP rating of 40, and there were some that
19 had some DP rating, but it was less than 40.

20 And Anderson had made us an offer.
21 So yes. That retrofit, as I would call it, was one
22 option. Another one was complete replacement of all
23 of the windows and doors. I wouldn't necessarily --
24 you know, there might have been -- a third option
25 would be to just go and only deal with the windows

1 that were problematic. I don't know if that would
2 be what you'd consider option 3.

3 But in my mind, the two that received
4 the greatest consideration were the retrofit versus
5 for total replacement.

6 Q The homeowners were not made aware of the
7 potential for the retrofit or for the intermediate
8 fix, which would have been to retrofit some and
9 replace others. The only option that was presented
10 to homeowners as a group was replacement of all the
11 windows and doors. Isn't that true?

12 A No. That is not true. We went out to the
13 homeowners with a recommendation, and basically what
14 we did was we presented what the recommended
15 approach was, and that was what was voted on. But
16 we held meetings, you know, informational meetings
17 where we discussed these other issues, but the

18 Anderson retrofit option really never fleshed out.

19 So there are a lot of reasons that
20 that was not the preferred approach anyway had it
21 fleshed out, but we had a lot of issues with
22 Anderson. And they weren't as forthcoming, and they
23 were very difficult to work with, which then just
24 contributed to that being an even less desirable
25 approach.

1 Q When it came time to the vote, the only
2 option that was recommended was the option of
3 replacing all the windows and doors?

4 A That's correct. The homeowners did not
5 vote on two options. They got the opportunity to
6 vote yes or no on the preferred option.

7 Q Up or down?

8 A Yes.

9 Q As opposed to --

10 A Either or.

11 Q -- either or. All right. So there was --
12 you would agree with me that there was a lack of
13 communication at least at the time of the vote
14 regarding multiple options that were considered by
15 the board and not voted on by the homeowners?

16 A No. I wouldn't agree with you at all.

17 Q Okay.

18 A I would also add one other caveat.
19 Generally, with regimes, it's standard operating
20 procedure for the board to put forth one option and
21 vote it up or down. It is not typical to give
22 homeowners a vote on either or, because, typically,
23 you don't get a resounding response.

24 Typically, what my regimes will do,
25 which I'll recommend that they do, is go out with

1 one option, vote it up or down. If the homeowners
2 vote it down, you then go back with your backup
3 plan. But generally, the board has plan A and plan
4 B, and they generally want plan A approved. And in
5 most cases, homeowners approve what the board's
6 investigated and looked into on their behalf, and
7 they generally accept the recommendation, which is
8 what happened in this case. We only had eight
9 dissenting votes.

10 Q Right. Because it was up or down, you
11 only had eight dissenting. Had you presented
12 multiple options, then the vote would have been more
13 difficult to control by the board, right?

14 A Well, that and also we had a high level
15 of -- a high threshold. We were looking for a super
16 majority to pass it, which would have been a
17 two-thirds vote. So if we had offered multiple
18 options, it would have been difficult to achieve a
19 super majority.

20 Q I understand. Dr. Lucas' next concern was
21 what he perceives as misleading or deceptive
22 information that was provided. He focused on the
23 whole insurability of the windows, and I want to
24 talk to you about that in just a little bit. Harold
25 Campbell is or was a resident at Bristol?

1 A He wasn't a resident. He was an owner.

2 Q Owner?

3 A Harold owned unit 5013. He just sold it
4 in 2013.

5 Q He was a State Farm agent?

6 A He is a State Farm agent.

7 Q He is a State Farm agent. He, in his role
8 as a State Farm agent, provided or wrote coverage
9 for a number of the condos at Bristol?

10 A Prior to my involvement, Harold had or --
11 had relationships with owners selling them HO-6
12 policies. When I came to be involved with the
13 Bristol, Harold was on the insurance committee. Jan
14 mentioned yesterday that Brad Sherlock was on the
15 insurance committee, Charles Derosé was on the
16 insurance committee. Johnny Jordan was on the
17 insurance committee, and if I'm not mistaken, I
18 think that was it. There might have been a fifth
19 member.

20 But Harold was sort of a pivotal
21 go-to person for us on the insurance committee when
22 it came time for us to work on that renewal for
23 2007.

24 Q At some point, at least, he wrote policies
25 that insured windows and doors for four or five

1 residents at the Bristol, true?

2 A I don't know that. That would have been
3 his relationship with the individual owners.

4 Q But there's no question that coverage for
5 the windows and doors was available to residents at
6 the Bristol prior to the change of the master deed,
7 fourth amendment, right?

8 A I'm assuming that's true, because Dr.
9 Lucas has said that he had coverage. So I would
10 assume if he was afforded coverage, others could get
11 it.

12 Q Sure. At the time that the lawyers wished
13 to amend the master deed, no one polled the owners
14 to see if any of them had the coverage we're talking
15 about, did they?

16 A The lawyers didn't wish to change the
17 master deed. The board wished to change the master
18 deed, and no, the board did not poll the owners.

19 Q The board didn't poll the owners?

20 A No.

21 Q No one sought quotes for coverage for the
22 people who might not have had insurance on their
23 windows and doors?

24 A No, sir.

25 Q So despite what the letter from what Ms.

1 Mulcare says about insurability, insurability really
2 wasn't the issue, was it? The windows and doors
3 were certainly insurable, weren't they?

4 A Yes. I believe they were insurable, and
5 no. I would not say the insurability of them was
6 the major overriding issue.

7 Q The real issue was getting windows and the
8 doors in the lawsuit?

9 A No. It was not. There real issue was
10 that when we were insuring the building, if we did
11 not insure the entire building envelope, we felt
12 that it was going to be a huge problem in getting
13 claims settled. We'd have issues about whether or
14 not homeowners had adequate coverage.

15 Homeowners buy their own HO-6
16 policies. It's not my job to make sure those
17 homeowners are properly, individually insured. So
18 we had no idea whether or not everybody was properly
19 insured.

20 Q Well, and that's exactly right. It's the
21 homeowners' individual responsibility to purchase
22 the coverage?

23 A Right.

24 Q But --

25 A Let me finish my point.

1 Q Well, I think you're not answering my
2 question. You're --

3 A I'm getting ready to answer your question
4 though. You stated that the -- you stated that the
5 main purpose of that amendment was to satisfy needs
6 of the lawsuit. That's not true. The owners owning
7 the windows and doors in a five-story highrise makes
8 no sense. The owners, if they had a problem with
9 their individual window and door would incur massive
10 costs to get up there to fix it. Also, on top of
11 it, there would be ARB or architectural review
12 issues in the event of a large loss because --

13 Q Let me -- just right there, you just
14 brought up something I wanted to talk to you about.
15 You said ARB. I think I've seen it as BAR, but the
16 board of architectural review controls the ability
17 of homeowners to replace -- or approves the
18 replacement of windows?

19 A Correct. But we're not discussing the
20 same thing. When I say the ARB or the architectural
21 function, review function, I'm talking about the
22 regime's architectural review function. The regime
23 insists that there is like product in appearance
24 throughout the entire building, and one of the
25 conversations that we were having on that insurance

1 committee level was the fact that if there was a
2 huge loss, it would be almost impossible to
3 coordinate getting 54 unit owners to install their
4 own windows and doors, me making sure that they all
5 met the same codes, they all looked exactly the same
6 way.

7 It just was going to be a nightmare,
8 and keep in mind, I have been doing this 30 years.
9 I went through all the Hurricane Hugo repairs. And
10 so I've lived it, and one of my -- some of what I
11 conveyed to the board is that I thought that it was
12 going to be a huge nightmare if the owners
13 individually owned these windows and doors. And we
14 had to coordinate making sure all these owners got
15 their windows and doors in specific time so we could
16 make stucco repairs and waterproofing repairs. It
17 would have been a disaster.

18 And I'm not the one who originally
19 raised the issue. The issue was originally raised
20 by Harold and Cindy, Harold and Cindy Mulcare, and
21 it was then expounded upon, and everybody agreed it
22 was in the owners' best interest for the regime to
23 take ownership of the windows and doors.

24 Q And your testimony today is that that was
25 just coincidental to the fact that Judge Newman had

1 just granted the motion for summary judgment on the
2 issue of the ownership of the windows and doors.

3 A Just Newman didn't grant that -- he did
4 not make that judgment until almost a good year
5 later. If you look at the dates of this, we went
6 out for the window assignment. We sent a letter to
7 all the homeowners when Judge Newman made his
8 ruling, and we went out to all the owners and said
9 to them, Judge Newman has just now ruled that we
10 don't own these windows and doors for the purpose of
11 this lawsuit. We need your assignment of your
12 window and doors.

13 And we went out to the owners. We
14 disclosed that we didn't own them as it related to
15 the lawsuit, and couldn't sue for them. And we went
16 out and got assignments from everyone. You're
17 talking two different periods of time.

18 Q Okay. Maybe I misspoke. But the point is
19 that you were in litigation, you -- the homeowners
20 association was in litigation. There was a concern
21 about the ownership of the windows and doors. There
22 was a concern about standing to make those claims,
23 and the assignment was prepared in an effort to
24 retroactively change the ownership of windows and
25 doors to make claims made in the lawsuit valid

1 claims.

2 Judge Newman, in fact, in his order,
3 I believe, said that that retroactive effort was in
4 effect; isn't that true?

5 A We're going backwards on that huge long
6 statement. I disagree with you --

7 Q Well --

8 A Let me clarify some of what you've stated,
9 because I don't believe it's correct.

10 Q Okay. If I'm incorrect, then the record
11 will reflect it, and you and I will be here all day
12 talking about it. So let's just let your lawyers
13 ask you questions to make -- to correct what I
14 have --

15 A Well, my response is some of what you said
16 is true, and some of what you said is incorrect.

17 Q All right. Thank you. What warranty, if
18 any, accompanied the installation of the Anderson
19 windows initially?

20 A I don't know. The property built was in
21 2002, and I came in in 2007, and I don't know what
22 the initial warranty was.

23 (Off-the-record discussion.)

24 BY MR. MOONEYHAM:

25 Q I think we were talking about the warranty

1 on the Anderson windows.

2 A Right. And I said I didn't know what it
3 was.

4 Q Did you make an effort to find out what it
5 was? You said you engaged in negotiation --

6 A Me, personally, no. But I'm sure
7 somebody -- one of the experts, I'm sure. I'm sure
8 Suttan-Kennerly probably looked into it, but me,
9 personally, no. I think I assumed there probably
10 wasn't much more warranty to them. I had some
11 previous experience suing Anderson. So I probably
12 knew enough to be dangerous in the fact that it
13 doesn't necessarily go so well to try and work --
14 you know, Anderson can be very unresponsive if they
15 want to. They can be responsive, or they can be
16 unresponsive.

17 Q Were you the person who was responsible,
18 speaking of responsive, who was responsible for
19 determining whether there was any warranty left on
20 the windows?

21 A No.

22 Q Who would have been responsible?

23 A I would assume that either the attorneys
24 were or Suttan-Kennerly. I know we had lots of
25 discussion about these Anderson windows. There were

1 no as-builts. We couldn't find any as-builts for
2 them. Suttan-Kennerly and Brew Hagood's office
3 spend an awful lot of time trying to find out
4 exactly what series windows were in the Bristol,
5 exactly what the DP ratings were supposed to be.

6 As I said, Anderson was not -- not
7 particularly forthcoming, and I don't even know that
8 Anderson had all of the records related to what was
9 sold to the beach company. So it was quite a
10 process.

11 Q Do you know whether pressure washing
12 windows voided the warranties?

13 A No. But --

14 Q Still no, because you don't know what the
15 warranties were?

16 A No. But --

17 Q The property was pressure washed, though,
18 wasn't it?

19 A It was not pressure washed. I washed the
20 property once during my tenure, and I used
21 low-pressure hoses. I hired a man that just
22 basically used the same pressure that you would use
23 on a garden hose. And we use a lift to get him up
24 and around the building, because I knew I had leaks
25 in the building. And I needed to wash the mold off

1 of the stucco, because, basically, the property
2 looked like a Chia Pet.

3 So I washed the building, but I knew
4 good and well I had water intrusion issues. So no,
5 I did not turn a big fat pressure washer at 40 or
6 greater PSI on the building.

7 Q At tab 17 in our submissions, there's an
8 invoice for washing the exterior of the Bristol.
9 I'll show you, cost is \$9,150?

10 A Yes, sir.

11 Q And the name of the company that did the
12 pressure washing is American Pressure Washing?

13 A Correct, LLC.

14 Q LLC.

15 A American Pressure Washing, LLC.

16 Q Okay. So it's related to the pressure
17 washing company?

18 A Correct.

19 Q And at some point after the building was
20 pressure washed in or about March of 2007, a second
21 washing was scheduled, and you advised not to engage
22 in that washing, correct?

23 A I don't remember specifically being
24 advised not to do it because they thought it was a
25 poor concept. I think we were out of money.

1 Q But you advised not to do it?

2 A Correct. But the --

3 MR. MOONEYHAM: Thank you. That's okay.
4 Your Honor, if I might have one second. I may
5 be about finished.

6 (Off-the-record discussion.)

7 MR. MOONEYHAM: Thank you, Ms. Vest.
8 That's all the questions I have.

9 MR. BARFIELD: Your Honor, if I may offer
10 a scheduling suggestion?

11 THE COURT: Sure.

12 MR. BARFIELD: If we could take five, use
13 the restroom, order lunch similar to what we
14 did yesterday, that way we can put the lunch
15 order in, and then I can begin my cross.

16 THE COURT: All right. Well, let's put
17 the order in.

18 (There was a pause in the
19 proceedings.)

20 THE COURT: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. BARFIELD:

23 Q Ms. Vest, I have got some questions for
24 you, and they will be -- we're going to revisit some
25 topics that you covered with Mr. Mooneyham and --

1 but I don't think we'll be too terribly long.

2 First off, let's talk for a minute
3 about the assessments at the Bristol. Mr. Mooneyham
4 asked you a fair number of questions about how the
5 assessments were calculated. Do you remember that
6 line of questioning?

7 A Yes. I do.

8 Q Okay. Are you familiar with the term
9 statutory value?

10 A Vaguely, but not --

11 Q From the Horizontal Property Act.

12 A Yes. Vaguely but --

13 Q All right.

14 A -- don't ask me for a legal definition.

15 MR. BARFIELD: All right. Well, I'm going
16 to ask the Court to take judicial notice of a
17 subsection of the Horizontal Property Act, and
18 if there's no objection to it, I'm simply going
19 to read a short paragraph of it into the
20 record.

21 THE COURT: Any objection?

22 MR. MOONEYHAM: Until I know what section
23 you're talking about, I don't know if I'll
24 object or not.

25 MR. BARFIELD: This is section 27-31-60,

1 property rights of apartment owner.

2 MR. MOONEYHAM: No objection.

3 THE COURT: All right.

4 BY MR. BARFIELD:

5 Q All right. And this section reads, an
6 apartment owner shall have the exclusive ownership
7 of his apartment and shall have a common right to a
8 share with the other co-owners in the common
9 elements of the property equivalent to the
10 percentage representing the value of the individual
11 apartment with relationship -- relation to the value
12 of the whole property.

13 This percentage shall be computed by
14 taking as a basis the value of the individual
15 apartment in relation to the value of the property
16 as a whole. The percentage shall be expressed at
17 the time the horizontal property regime is
18 constituted, shall have a permanent character and
19 shall not be altered without the acquiescence of the
20 co-owners representing all the apartments of the
21 property.

22 The basic value, which shall be fixed
23 for the sole purpose of this chapter, and
24 irrespectively of the actual value, shall not
25 prevent each co-owner from fixing a different

1 circumstantial value to his apartment in all types
2 of acts and contracts.

3 Now, that's -- and there's a
4 subsection B that talks about something entirely
5 different. But are you somewhat familiar with the
6 concept outlined in that portion of the statute?

7 A Yes. From an end-user.

8 Q Right. And in your experience, do master
9 deeds for horizontal regimes have usually as an
10 exhibit a calculation of the values that are
11 described in that provision?

12 A Yes.

13 Q All right. I'm going to show you the
14 master deed for the Bristol, which is actually in an
15 exhibit to the Moore & Van Allen foreclosure
16 materials that were submitted yesterday. And I have
17 got it opened up to Exhibit C.

18 A Does it have a page number?

19 Q Well, it's --

20 MR. MOONEYHAM: Page I.

21 BY MR. BARFIELD:

22 Q Yeah. Page I. Roman numeral -- small
23 Roman numeral I on the --

24 A Okay.

25 Q And this bears a heading, schedule of

1 assigned values, percentage interest, storage space
2 and parking spaces for each unit.

3 A Correct.

4 Q You see that exhibit?

5 A Yes.

6 Q All right. And then it has a table that
7 lists the units at the Bristol, and then the third
8 column over has -- bears the heading statutory
9 value. Do you see what I'm talking about there?

10 A Yes.

11 Q All right. Do you believe that that
12 statutory value listed there is the Bristol's way of
13 doing what it described in that statute?

14 MR. MOONEYHAM: Objection. Leading, Your
15 Honor, I'm going to ask for a ruling on this
16 issue. I realize this is cross-examination,
17 but this witness certainly is not hostile, nor
18 should they be allowed to examine under leading
19 questions under 611 -- my interpretation of
20 rule 611.

21 THE COURT: You say she's not --

22 MR. MOONEYHAM: Because she's not hostile
23 to them. She's aligned with them. I object to
24 their being allowed to examine with leading
25 questions pursuant to rule 611.

1 THE COURT: If they're allowed, what
2 difference does it make really? Technically,
3 my -- and I understand your point. My position
4 has always been if you called her as a hostile
5 witness, he can still cross-examine her. So I
6 overrule your objection. I mean I've been
7 consistent through that throughout my career.
8 I can hear the argument either way, but that's
9 always the way I felt about it.

10 MR. BARFIELD: Thank you, Your Honor.

11 THE COURT: And especially dealing -- when
12 we're dealing with a more or less professional
13 witness. I don't think -- I don't think she's
14 going to be effecting in a lot of her answers
15 by whether he asks a leading question or not.
16 I mean I think she showed that to you. She
17 doesn't mind disagreeing with a lawyer, which
18 is great.

19 All right. Go ahead.

20 BY MR. BARFIELD:

21 Q Anyway, the statutory values in Exhibit C
22 to the Bristol's master deed.

23 A Yeah. I believe that this is the
24 developer's way of addressing -- establishing that
25 value and, therefore, establishing their percentage

1 of ownership. And in this case, it's equal to every
2 unit regardless of size or location of the building.

3 Q All right. And what is the statutory
4 value assigned to each unit at the Bristol in this
5 exhibit?

6 A A big \$2,000.

7 Q All right. I understand you're not an
8 appraiser, but I imagine as a property manager, you
9 have seen units bought and sold at the Bristol, have
10 you not?

11 A I have.

12 Q Okay. And is \$2,000 a reflection of the
13 market value at any point in time of the condos at
14 the Bristol?

15 A No.

16 Q All right. I believe you testified in
17 response to Mr. Mooneyham's questions about the way
18 assessments other than the special assessment for
19 the windows have always been levied at the Bristol.
20 Do you recall that testimony?

21 A Yes.

22 Q And I believe you said they were done
23 equally?

24 A Correct.

25 Q All right. Having seen this exhibit to

1 the master deed, do you believe that charging those
2 assessments equally was consistent or inconsistent
3 with what is prescribed herein?

4 A Consistent.

5 Q Okay. Thank you. Now, let me ask you
6 this. With regard to the special assessment for the
7 doors and windows, can you -- just for
8 everybody's -- to refresh everyone's recollection,
9 how was that calculated?

10 A That was calculated inconsistently with
11 the master deed, but we got legal opinions from our
12 general counsel as well as our litigation counsel.
13 We -- the building committee and the board had a
14 long conversation about how to go about assessing
15 for the doors and the windows.

16 They felt it was most palatable to
17 assess based on the number of windows and doors,
18 because the three bedroom units have a tremendous
19 numbers of windows and doors and would be very --
20 they add considerably to the cost to the windows and
21 doors.

22 So they basically discussed doing a
23 weighted special assessment. Both attorneys
24 reviewed it and blessed it, and then we went to the
25 homeowners, and we presented those assessments and

1 voted on it.

2 Q Okay.

3 A And the homeowners passed it.

4 Q All right. So that was put to a vote of
5 the homeowners and it passed?

6 A Correct. We had eight that dissented.

7 Q And I know there was some discussion,
8 perhaps a bit of confusion, but what was the
9 assessment -- was Dr. Lucas' assessment for?

10 A Roughly \$31,000.

11 Q Okay. That's what was actually assessed,
12 roughly 31,000?

13 A Yes, sir. I believe that's right. Here,
14 I'll tell you. Thank you. \$31,674.90.

15 Q Okay. Do you know what his assessment
16 would have been had it been assessed with him --

17 A I believe it would have been just about
18 that.

19 Q Okay. For the record, let me finish my
20 question. Had it been assessed in accordance with
21 the statutory values from the master deed?

22 A I believe it would have been commensurate
23 to that.

24 Q All right. Let's leave that issue for the
25 time being. I want to ask you a little bit about

1 the topic of dissemination of information --
2 pertinent information to the members of the Bristol
3 Association.

4 Mr. Mooneyham asked you -- well, he
5 got you to confirm that that is one of Dr. Lucas'
6 issues in this case, lack of information. Do you
7 recall that --

8 A Yes.

9 Q -- line of questioning? All right. Can
10 you tell me what methods have been employed to
11 disseminate pertinent information to the members of
12 the association in general? And then I would like
13 you to tell us what methods, if any, have been
14 employed to insure that Dr. Lucas specifically has
15 received pertinent information.

16 A Generally, we communicate by mail, mailing
17 to owners. We created a website early on. We
18 posted all of the meeting minutes, all of the
19 documents. We would send out e-mail blasts as well.
20 We would put notices under the doors. Typically,
21 the notices that went under the doors were pursuant
22 to activities going on in the immediate future in
23 the building.

24 So they would go under all of the
25 doors, basically, you know, that we would be

1 cleaning the trash chutes or having elevator
2 inspections or a fire alarm inspection. We would
3 also, as I said earlier, mail to all of the
4 homeowners. We would -- anything related to the
5 lawsuit, if I was instructed to do so, would go
6 certified. Now, I believe that there were a certain
7 number of certified mailings that went, and a couple
8 of those were not retrieved by the Lucases. So they
9 were not picked up at the post office.

10 So there would have been a variety.
11 General information would have been sent by mail,
12 but if it was litigation sensitive, time sensitive,
13 it would have been sent certified.

14 Q Okay. Now, have you had -- as a property
15 manager, have you had direct communications with the
16 Lucases over the years that you have been doing that
17 job?

18 A I've had some. I would not characterize
19 it as a lot of communications, but yes. I've had
20 some communications. The first time I believe I met
21 Ms. Lucas, she attended a meeting of all of the
22 homeowners. I met Dr. Lucas I believe at a meeting.
23 I spoke to Dr. Lucas -- he phoned me twice at home,
24 and I spoke to him twice at home.

25 He called me once to tell me that his

1 cable was out and asked for my help, then he left me
2 a phone message at home. We had sent a letter out
3 to all of the homeowners advising them that we
4 needed to test the fire system, and he left me a
5 voice mail at home refusing permission for me to
6 enter his unit.

7 Q Okay. If Dr. Lucas were concerned that he
8 was not receiving important communications from the
9 board or from committees of the board, could he have
10 called you or e-mailed you or written you to address
11 that situation?

12 A Yes. I was on site two days a week. So I
13 was available to the homeowners, physically there on
14 Tuesdays and Thursdays. I would have been available
15 at my Mount Pleasant office the rest of the week,
16 and, obviously, Dr. Lucas looked me up in the phone
17 book and called me at home. So I felt that if he
18 really wanted to reach out to me, he could do so.

19 Q Did he ever call you and say, Lona, or
20 Ms. Vest, I'm not getting information in a timely
21 fashion?

22 A He did -- he did reach out to me at one
23 point, and he mentioned this in his testimony. He
24 did reach out to me about the same time that he was
25 trying to reach out to David Warner, and David

1 Warner was living at that particular point at his
2 summer home in Maine.

3 And he did want to talk to David
4 Warner, and I believe I gave Dr. Lucas David
5 Warner's number in Maine, and they connected. And
6 then I received a call from David Warner giving me
7 instructions as to send additional information out
8 to Dr. Lucas.

9 Q Okay. What kind of additional
10 information? Do you remember what issue that dealt
11 with?

12 A I think I specifically remember sending
13 some of the information related to the
14 Suttan-Kennerly findings and related to the lawsuit.
15 I don't remember specifically how much information I
16 sent. I did send some.

17 Q Okay. Were you aware that the Lucases did
18 not live permanently at the Bristol?

19 A Yes. When I first came to manage the
20 property, their son lived in their unit. And so
21 basically, I communicated with the son. And early
22 on, I remember when we'd send a proxy out for an
23 annual meeting notice, Dr. Lucas would designate his
24 son as proxy. I think at a later meeting of all the
25 owners, he subsequently gave his proxy to Johan

1 Princ I believe once.

2 He -- I had some conversations with
3 Kristin and John. I wouldn't characterize as a lot
4 of interface with them, but I did have some. And I
5 received a phone call once from Ms. Lucas about the
6 water bill. I believe that came up yesterday in
7 testimony, that the water bill had not been paid,
8 because it had been mailed to the building. And she
9 and I did have a conversation at that point.

10 We had a couple of conversations at
11 meetings privately about the website and talking
12 about how they could get up to be able to access the
13 website. And then I had -- I had an e-mail I
14 believe from Dr. Lucas at one point. I was trying
15 to get access to all of the units, shortly before
16 the lawsuit came to fruition, to get a good look at
17 ~~all of the windows and doors to get an idea of any~~
18 that might be leaking that I didn't have on my list.
19 And he did e-mail me and give me permission to
20 access his unit at that point.

21 And Sutton-Kennerly then created a
22 spreadsheet where they noted conditions of all the
23 windows and doors. And then we had an exchange at
24 an annual meeting, when Dr. Lucas expressed I think
25 great concern prior to hiring an attorney or it

1 might have been around that same time frame when he
2 asked me specifically whether or not the board had
3 insurance. And he expressed that he felt that he
4 had been mistreated as it related to the lawsuit.

5 Q Okay. Did Dr. Lucas -- was Dr. Lucas ever
6 excluded from receiving information that was sent to
7 other members of the association?

8 A The only exclusion might have occurred as
9 it related to the Landry suit. There might have
10 been information that would have been sent out
11 specifically to those plaintiffs that would not have
12 been sent to Dr. Lucas, because Dr. Lucas chose not
13 to join that suit. Everyone was invited to join
14 that suit, and then there came a time when dealing
15 with that suit I would only deal with the 40 that
16 were parties in that suit related to specific
17 issues. But I don't remember it being a lot of
18 information.

19 Q Okay. And I guess really what I was
20 asking, was Dr. Lucas ever singled out to be kept in
21 the dark?

22 A No.

23 Q Let's talk for a moment about the Hanger
24 lawsuit. Okay? Do you remember Mr. Mooneyham
25 asking you some questions about that?

1 A Yes.

2 Q All right. Did the Hangers have separate
3 counsel? And when I say the Hangers, I mean the
4 Hanger group. Did they have separate counsel from
5 the lawyers who were representing the association
6 and the Landry group?

7 A Yes. They had retained Michael Seekings
8 and Jeff Leath, L-E-A-T-H.

9 Q And do you know what kind of fee
10 arrangements the Hanger group had with Mr. Seekings
11 and Mr. Leath?

12 A It's my understanding it was contingency.

13 Q All right. And so is it also your
14 understanding that when the Hanger suit was settled,
15 that Mr. Leath and Mr. Seekings were paid a
16 percentage of the settlement funds per that
17 contingency agreement?

18 A Yes.

19 Q All right. And the testimony I believe
20 has been that the board action and the Landry action
21 were pursued by Rosen, Rosen & Hagood on an hourly
22 basis?

23 A Correct. By Brew Hagood, B-R-E-W, Hagood,
24 and Britt Kelly, B-R-I-T-T.

25 Q When the Hanger suit was settled and those

1 plaintiffs received funds from that settlement, I
2 believe you already testified that they did have to
3 pay the special assessment --

4 A Yes.

5 Q -- for the doors and windows?

6 A Yes.

7 Q What about repairs to the interior of
8 their units? How was that handled?

9 A That was a subject of tremendous debate
10 between the board and the building committee. There
11 was a concern -- there was going to be a certain
12 amount of interior repair needed to all of the units
13 as it related to the new windows and doors. We
14 actually had to build a -- what I would characterize
15 as a knee wall to incorporate the new windows into
16 the living rooms.

17 So there was actual sheetrock
18 construction. There would be sheetrock and trim
19 damage. And there was a great debate about whether
20 or not the six in the Hanger suit and the eight that
21 were not in any suit should be charged for their
22 interior repairs related to the trim and the
23 sheetrock.

24 The board eventually decided that
25 they would charge no one for the interior repairs,

1 that all 54 units would receive interior repair work
2 along with the windows and doors. And so they
3 received the trim, the sheetrock repairs and
4 painting at no additional cost.

5 Q Okay. Was it complicated trying to
6 reconcile who paid what after these lawsuits got
7 settled?

8 A It was hugely debated. It became less
9 complicated when the board finally arrived at their
10 final approach, which was that we were -- instead of
11 me trying to keep a sub-tally of everyone's interior
12 repairs and painting and trim work, that that would
13 be incorporated into the contract.

14 The bathrooms are owned by the
15 individual unit owners. They weren't part of the
16 suit. So what ended up happening in the bathrooms
17 were debated for a very long time. The board did
18 not reach their final decision on how to deal with
19 the bathrooms until probably within the last year
20 and a half.

21 Prior to that, Craig Tallberg and I
22 actually approached some of the original 40 in the
23 Landry suit to get them to agreed to sign a release
24 of all the monies that would have been due to them
25 for the bathrooms. And basically, a lot of

1 homeowners agree to it, but several did not.

2 So the board then developed this plan
3 that they would pay \$2,000 to people who had already
4 made bathroom repairs. So it became less
5 complicated with some of the decisions. Right
6 immediately following the settlement, it was very
7 complicated, because we had so many different
8 parties with varying interests.

9 You know, the Landry people received
10 money from the suit that they did not get. The
11 money went into the pot to fix the building. The
12 eight were disenfranchised to some extent, because
13 they didn't participate in an additional interior
14 individual suit, and then six received money.

15 So basically, the board and building
16 committee spent a great of time trying to find the
17 most fair approach, as well as workable approach to
18 resolve it.

19 Q Okay. And I'm going to show you a
20 document that's at tab 45 of plaintiffs' exhibits.
21 Do you recognize this document?

22 A I create so many documents that it doesn't
23 ring an immediate bell, but yeah. Okay. Yes.

24 Q All right. This is a letter dated October
25 27th, 2009?

1 A Yes.

2 Q All right. And on the back page, who is
3 it -- who is this letter from?

4 A It is from Dave Landry and David Warner.

5 Q All right. And just take a moment. I
6 don't need you to read it in detail. Just take a
7 moment, and I'm going to ask you to characterize it
8 and describe approximately what it is and what it
9 was for if you can.

10 A From what I can remember of this document,
11 it gives you the background of these different
12 suits. It basically provides an explanation of what
13 transpired leading up to the settlement, and then it
14 discusses the board's recommendations on how to
15 proceed. And at the very end of the letter, it
16 states that the BRC, which would be the Bristol
17 Repair Committee, has recommended all of these --

18 previously, what I just described to you, the
19 assessment of the windows, the regime paying for
20 interior repair. And basically, it acts -- it
21 states that the board fully endorses this approach,
22 and then it says that we'll be voting on it.

23 Q Okay. Can I get you look at page 3 of
24 that document?

25 A Yes.

1 Q And I'm looking about three-quarters of
2 the way down, and there is a paragraph that starts
3 with several owners.

4 A Yes.

5 Q Do you see that? Could you read that,
6 please?

7 A Several owners have asked that the Hanger
8 participants surrender their net proceeds, which are
9 estimated at \$240,000 to the POA. This would mean,
10 however, that POA would incur a minimum of \$300,000
11 to cover their windows, doors, showers and interior
12 damages. Clearly, this is not a, quote/unquote,
13 good deal.

14 Q And read the two lines in bold beneath
15 that.

16 A It is not in the POA's financial interest
17 to co-mingle the Hanger funds, because it simply
18 will cost us more to take on the additional
19 obligations that they prefer to repair themselves.

20 Q All right. So that reflects the -- does
21 that reflect the decision or recommendation of the
22 board with regard to how to handle the Hanger funds
23 after everything came in?

24 A Yes.

25 Q All right. And is that how it was done,

1 that the Hanger funds were kept separate?

2 A Correct. The Hanger participants kept
3 their own money.

4 Q All right.

5 A Except what they paid for the windows and
6 doors.

7 Q Right. And they paid their own attorneys?

8 A Correct.

9 Q Were the Hanger participants -- did they
10 have to pay the special assessments to cover -- or
11 any assessments to cover the attorneys' fees for the
12 association's attorneys?

13 A Yes.

14 Q All right. So the Hanger participants
15 actually paid for two sets of attorneys?

16 A That's correct.

17 Q All right. And that was their choice?

18 A Yes.

19 Q Okay. All right. Did the Hanger
20 plaintiffs have the option of opting out of
21 replacing their exterior doors and windows because
22 they had filed suits on their own behalf?

23 A No.

24 Q All right. And why not?

25 A Because, as I said earlier, we -- the

1 building had to remain whole, and all of the windows
2 and doors had to match. And the board at this point
3 owned the windows and doors, the regime did. So
4 they would have been forced -- had they purchased
5 their own windows and doors, they would have been
6 made to comply with purchasing what we purchased and
7 installing it. They would have been required to
8 match us.

9 Q All right. Let's -- and this is jumping
10 around, but let's talk briefly about Moore &
11 VanAllen fees for prosecuting the foreclosure, and
12 we'll also then segue kind of talking about the
13 reasons for the foreclosure, if we can.

14 I believe you testified that Joseph
15 Belton, one of Moore & VanAllen's attorneys, did
16 attend Dr. Lucas' deposition?

17 A That's correct.

18 Q Okay. Do you recall that we had a
19 mediation in this case at their offices?

20 A Yes.

21 Q All right. Did Moore & VanAllen's
22 attorneys participate to one degree or another in
23 that mediation?

24 A Yes.

25 Q All right. Did they -- without revealing

1 attorney-client privilege, did they consult with you
2 or members of the Bristol board leading up to that
3 mediation?

4 A Yes.

5 Q All right. Would you be surprised if I
6 told you that I had had communications as co-counsel
7 with them throughout this lawsuit regarding the
8 status of the lawsuit?

9 A No. I'm aware you did.

10 Q Okay. I believe it's already been
11 discussed that the foreclosure action was
12 consolidated with the action first brought by the
13 Lucases. Do you recall that?

14 A Yes.

15 Q All right. And did the Moore & VanAllen's
16 participate in the efforts necessary to achieve that
17 consolidation?

18 A Yes.

19 Q And to the extent that there may have been
20 informal settlement discussions in this case, do you
21 believe that the Moore & VanAllen attorneys have
22 participated in those as well?

23 A Yes.

24 Q Now, let's talk about the foreclosure
25 action filed against the Lucases. Mr. Mooneyham

1 walked you through a number of examples of other
2 units -- unit owners who have been delinquent at
3 various times on monies owed to the association.. Do
4 you recall that?

5 A Yes.

6 Q All right. And I think his overarching
7 point was there were I think he said nine examples
8 that he pointed to, and of all of those, the Lucases
9 were the only ones that the association chose to go
10 the distance on the foreclosure?

11 A That's not true. We would have gone the
12 distance on Bishop Rembert except --

13 Q Well, I'm going to ask you about that.

14 A Okay.

15 Q I'm setting it up. Do you recall that
16 question?

17 A Let me rephrase the statement. In my --
18 the foreclosure has gone on with Lucas longer than
19 any other action, but I think -- as I said earlier,
20 I think that has some bearing on the fact that
21 there's another action pursuant to this. So yes.
22 This is the furthest we have gone in an act of
23 foreclosure for the Bristol.

24 Q Okay. In those foreclosures, there were
25 was at least one, there may have been another, in

1 which an outside creditor such as a mortgage holder
2 foreclosed on a unit owner at the Bristol. Do you
3 remember those examples?

4 A Yes.

5 Q All right. And you testified about that a
6 little while ago. Was the Bristol party to those
7 foreclosure actions as what I would call a
8 ride-along defendant, a co-creditor?

9 A Yes. Just a little bit on the subject of
10 this and why, in my personal opinion, we did not
11 target Dr. Lucas. When we had -- we had a standard
12 operating procedure as it related to collections.
13 We would file a lien against the property first, and
14 the lien would ride. You know, the hopes would be
15 that the homeowner would pay us with the threat of
16 the lien. If the homeowner didn't pay us, the lien
17 would go on the unit.

18 If then the board every time they
19 meet, they review an active receivables list, and
20 they go through and discuss a course of action as it
21 relates to each of these delinquent homeowners.
22 Part of that process was they would ask that Moore &
23 VanAllen do an asset check on the individual
24 homeowners to get an idea of whether or not there
25 were assets beyond the unit.

1 Because at this particular time, most
2 of the units were well below the value of their
3 original mortgages. I would go back to the closing
4 statements, because I had all of those files at the
5 Bristol. And I would look at what the original
6 sales price was, what the original mortgage value
7 was, and then we would pull the mortgage off the RMC
8 website and try and get an idea of how much the unit
9 owner owed on the unit.

10 In a lot of cases, or in several
11 cases, the mortgage holder was also trying to
12 collect as in the case of Harmon, as an example, and
13 they filed an action against Harmon.

14 When I did the background check on
15 Bill Smith, as an example, Bill Smith owned that
16 particular unit in an LLC. He owed it as Access
17 Medical Charleston, LLC. When you ran an asset
18 check on Access Medical Charleston, you find that
19 the only asset they had was the unit.

20 When I went further and did the
21 mortgage check on Bill Smith's unit, as an example,
22 I found there were three mortgages on the unit.
23 There was a primary and two subsequent mortgages,
24 and Bill Smith owed over 800 and some odd thousand
25 dollars on a unit that was worth possibly \$500,000.

1 So I would go back and report to the
2 board what I found out on each one of these
3 individual delinquent unit owners. If I was served
4 with a foreclosure action, the board would then not
5 turn around and file foreclosure also, because that
6 would be additional legal fees, and that would be,
7 as I said earlier, good money after bad.

8 We would just follow the foreclosure
9 action, hoping that the bank would take the unit
10 back and become a paying customer. We would then go
11 back and try and collect monies from the owner once
12 they moved on and left. Once the unit was seized in
13 foreclosure, we hired a collection agency. And on
14 those unit owners that it was feasible, we turned
15 them over to the collection agency.

16 Harmon, in the case -- I can go over
17 each individual case, but each one of them has
18 different conditions. Harmon, they signed an
19 agreement to get -- to expedite the foreclosure.
20 The board signed an agreement to not pursue the
21 Harmons individually.

22 Bill Smith, I have a collection
23 agency trying to collect on Bill Smith. You know,
24 we're trying to pierce the LLC. We're trying to go
25 after Bill Smith, and he has a custom collection of

1 cars. So we are actively trying to pursue Bill
2 Smith.

3 In Dr. Zinkowski's case, he's dead.
4 You know, God rest your soul, Ernie. But there is
5 no ability to collect from Ernie. So those monies
6 completely got written off, and there's no
7 additional action there.

8 But in each one of these situations,
9 the board tried to exhaust all of the available
10 avenues to get the money back, and in some cases, we
11 are still working to get the money back.

12 Q Okay. You already touched on this, but I
13 wanted -- it bears repeating. Is Dr. Lucas being
14 targeted for foreclosure for punitive reasons?

15 A No.

16 Q All right. Do you believe it's
17 appropriate or necessary to forego filing a
18 foreclosure action just because a unit owner has
19 preemptively filed a lawsuit against the board for
20 dealing with fees it owed?

21 A No.

22 Q And procedurally speaking, the association
23 consented to consolidating the foreclosure action
24 with the Lucas action?

25 A Yes.

1 Q All right. Let's jump topics again if we
2 may. You were asked about the -- about the
3 selection of the windows that were used during --
4 that were purchased for to replace the original
5 windows at the Bristol?

6 A Yes.

7 Q All right. And you made reference to BRC?

8 A What I made reference to was the
9 architectural review responsibilities of the regime
10 as dictated by the master deed, but the BAR came up,
11 which is the board of architectural review that the
12 City has.

13 Q Right. But there's something else called
14 the BRC, isn't there, or was?

15 A The BRC was the Bristol Repair Committee,
16 correct.

17 Q Okay. Now, what was the function of the
18 Bristol Repair Committee in this process?

19 A The Bristol Repair Committee was created
20 after we settled the lawsuit to look at how we
21 defined the scope of repairs to be made to the
22 building, get competitive pricing for that work,
23 examine all alternatives and basically recommend to
24 the board the best repair scope, as well as the most
25 cost-effective repair scope.

1 The board would then review all of
2 this information and go back to the owners, and the
3 BRC was actually comprised of a diverse group of
4 people. The board specifically asked people that
5 had been at odds in the past, specifically Ken
6 Hanger, as an example, to sit on the BRC so that
7 there would be a broader representation of the
8 owners. And maybe some that would come with a
9 differing opinion.

10 Q All right. And did the BRC weigh
11 competing considerations, the options that you were
12 asked to talk about a little while ago, with regard
13 to the windows? And specifically, I'm talking about
14 the retrofit option versus the full replacement
15 option.

16 A Yes.

17 Q Okay. And did the BRC work with anybody
18 from the outside, any professionals, to inform them
19 in making a recommendation on that issue?

20 A They did. Sutton-Kennerly was still
21 involved at this point in making suggestions. They
22 also -- Craig Tallberg attempted to deal with
23 Anderson -- or insisted that we funnel all
24 communications through their attorney. So either
25 Craig or myself was continuously trying to

1 communicate effectively with the attorney to come up
2 with that retrofit program.

3 And we also interviewed various
4 window manufactures. We examined various
5 alternatives for windows. We looked at different
6 pricing, and we also interviewed several different
7 contractors and got them to provide pricing.

8 Q Okay. And I believe you already testified
9 that, ultimately, the recommendation was to go with
10 the full replacement of the windows rather than the
11 retrofit option?

12 A They decided to go with full replacement
13 of the windows and doors. They were purchasing
14 impact resistant glass with a door and window
15 product that had a DP rating of 80, which was well
16 above what the original DP ratings were. And as I
17 stated earlier, the DP ratings on all of the
18 Anderson windows should have been a DP 40. In some
19 cases, it was a DP 0.

20 So it was -- it was viewed as a
21 tremendous improvement. We also had a huge debate
22 as to whether or not to leave the stucco in place
23 and only cut the stucco away from the windows and
24 replace only that stucco that was impacted by the
25 window and door replacement.

1 We priced that -- we priced different
2 alternatives to do a modified removal of the stucco
3 and found that it was really almost the exact same
4 amount of money, and we could get an extended
5 warranty on new stucco and waterproofing. So the
6 decision was made to spend incrementally more to
7 replace all of the stucco.

8 So that's when we increased that
9 scope to included full stucco replacement. And as I
10 stated earlier, there had been some conversation
11 about the condition of the fasteners inside the
12 wall. We had removed the stucco from the 14 stack,
13 from the third floor to the fifth floor, to look at
14 the inside of the cavity to see the conditions in
15 the cavity. And there was some discussion about
16 whether or not those fasteners were impacted.

17 So there was a remedial plan that was
18 developed to address fasteners. So all of these
19 things morphed out of this building committee. They
20 reviewed all of these different options. They met
21 consistently. They went through and interviewed.
22 At some point, they also made a decision to leave
23 Suttan-Kennerly.

24 Suttan-Kennerly gave a cost estimate
25 to see us through the reconstruction process, and

1 they also felt that that was a large amount of
2 money. And they began a search to look for somebody
3 that was, A, local, because Suttan-Kennerly was
4 coming in from North Carolina. And, B, would
5 provide the same services but for less money.

6 Q Okay. With all of that in mind, did the
7 BRC, the Bristol Repair Committee, do a thorough job
8 in your -- to your observation in discharging their
9 duties?

10 A In my experience, yes. And I have a fair
11 amount of experience. I have done a lot of
12 reconstruction work. I worked with Oceanfront
13 Villas, Seascape Villas, Summer House Villas,
14 Charleston Oceanfront Villas, and I have worked with
15 a lot of different building repair committees at
16 these different places, and I thought the building
17 committee that was formed with the Bristol did a
18 good job.

19 Q Did they -- before making recommendations,
20 did they weigh competing considerations or competing
21 bids from outside contractors?

22 A Yes. I think we interviewed at least
23 three contractors.

24 Q Okay. In your experience as a property
25 manager, and specifically, your experience with the

1 Bristol, is the cheapest way of doing something
2 always the most prudent option?

3 A No.

4 Q All right. I have got one more topic I
5 want to cover with you, and I think you were kind of
6 itching to expound on this. And Mr. Mooneyham did a
7 good job of keeping you --

8 A Shutting me down?

9 Q Well, not shutting you -- keeping you
10 tight on answering his questions, and he predicted
11 that I would ask you about this. And so I'm going
12 to prove him to be a sage. With regard to the
13 fourth amendment to the master deed, okay, the
14 change, the status of the doors and windows, there
15 has been some testimony that Dr. Lucas believes that
16 that was done primarily to serve the litigation.
17 You have been here through all of the testimony in
18 this case. Do you recall that?

19 A Yes.

20 Q All right. You testified a little while
21 ago that you do not believe that to be the case. I
22 want to ask you to walk us through the time line of
23 events related to communications with the insurance
24 professionals, we have talked about Cindy Mulcare,
25 the amendment of the deed, and I want to throw Judge

1 Newman's order into the mix, because we heard about
2 that on your direct examination. So are you
3 comfortable describing that chronology?

4 A Not a problem.

5 Q Okay.

6 THE COURT: Could I intersect something?

7 MR. BARFIELD: Certainly.

8 THE COURT: We've got lunch, which is the
9 most important thing we have to do today, and
10 then we have a witness coming at 1:00.

11 MR. BARFIELD: Yes, sir.

12 THE COURT: Would it be any problem with
13 recessing her testimony and taking it up after
14 your 1:00 witness?

15 MR. BARFIELD: Well, I don't have a
16 problem with that.

17 MR. MOONEYHAM: I don't have a problem
18 with it.

19 THE COURT: I think me and the doctor
20 are ready to eat.

21 (Off-the-record discussion.)

22 JOHN CHARLES DEWITTE,
23 having been first duly sworn, was examined and testified as
24 follows:

25 THE WITNESS: I do.

1 THE COURT: State your full name, please.

2 THE WITNESS: John Charles DeWitte.

3 DIRECT-EXAMINATION

4 BY MR. BARFIELD:

5 Q Good afternoon, Mr. DeWitte. We've met
6 previously. I'm Michael Barfield, and I'm counsel
7 for the Bristol in this litigation. Can you give us
8 a little bit of a benefit of your professional
9 background, and then I might ask you about your
10 involvement with the Bristol.

11 A All right. For 20 years, I worked for a
12 large commercial general contractor, moved into the
13 area in 200- -- I guess moved in 2007, started
14 working in 2004. Worked for that general contractor
15 on the Law Barracks project at The Citadel, and The
16 Citadel football stadium project.

17 During that time, I started at Cooper
18 River Contracting in early 2007, and since 2007,
19 have done a number of condo restorations in town,
20 along with doing turnkey concrete work on large
21 commercial projects.

22 Q Okay. And tell us about how you came to
23 be involved with the Bristol.

24 A Originally, I was contacted by Lona Vest,
25 who asked whether I'd be interested in providing a

1 proposal to the Bristol for the rework or
2 recladding -- restucco, I guess, of the building.

3 Q Okay. And had you dealt with Lona Vest
4 before?

5 A I had.

6 Q All right. And how?

7 A Charleston Oceanfront Villas. We had done
8 the sea wall stabilization there first, and then
9 they asked whether we would stay on board or were
10 interested in staying on board to do their
11 reskinning of the ocean side, along with other
12 repairs to the building.

13 Q All right. And after you spoke with
14 Ms. Vest about the Bristol, did Cooper River
15 Contracting, your company, in fact, submit a bid for
16 the repair work to be done on the Bristol?

17 A Yes.

18 Q All right. And did you have -- was a
19 scope of work or set of plans or anything like that
20 provided to you for purposes of putting that bid
21 together?

22 A There were a set of plans that were
23 provided to us on the project.

24 Q All right. Do you recall who had prepared
25 those plans?

1 A I believe it was Suttan-Kennerly.

2 Q All right. Before you submitted your bid,
3 were you at all familiar with the history of the
4 litigation that had preceded the request for bids at
5 the Bristol?

6 A I was not.

7 Q All right. So after you submitted your
8 bid, was Cooper River Contracting ultimately awarded
9 the contract to perform the repair work?

10 A Yes.

11 Q Okay. Do you off the top of your head
12 remember approximately what that repair contract
13 amount was?

14 A It was roughly five million dollars.

15 Q And without pulling out Suttan-Kennerly
16 documents, can you tell us sort of in general terms
17 what the scope of work was that you were bidding on
18 and contracting to perform?

19 A It was removing and replacing the stucco
20 on the building, removing and replacing all the
21 windows, bringing those up to current code
22 requirements, replacing the parapet cap. We did --
23 we also refurbished the pool there as an add on, and
24 top-coated the balconies again with the sonic garden
25 deck coating material.

1 Q Okay.

2 THE COURT: Top-coated what?

3 A The balconies, decks.

4 THE COURT: Balcony.

5 BY MR. BARFIELD:

6 Q Now, when you say the pool was an add on,
7 does that -- was that a change order or --

8 A That was a change order.

9 Q All right. Let's take those items in turn
10 then. What was the reason, to your understanding,
11 that the stucco needed to be removed and replaced?

12 A They had leaks in the building.

13 Q All right. And so why would that require
14 the exterior cladding to be replaced?

15 A They -- the original stucco system was put
16 on without a water management system on the
17 building. So there was nowhere -- any moisture that
18 got in behind the stucco was unable to weep back out
19 on the exterior, and in a lot of cases, came in the
20 interior windows and doors.

21 Q All right. Was the -- so I assume you
22 performed that work, the removal and replacement of
23 the stucco?

24 A Correct.

25 Q When you removed the original stucco from

1 the building, did you see problems with the way it
2 had been installed originally?

3 A There was signs of a water infiltration,
4 definitely.

5 Q All right. Let's talk about -- well,
6 before we leave the stucco, do you remember
7 approximately what the stucco removal and
8 replacement cost as a line item?

9 A About two million dollars.

10 Q All right. Let's talk about the exterior
11 doors and windows. Your company removed and
12 replaced the original windows?

13 A Correct.

14 Q All right. Did you participate in
15 conjunction with the Bristol board or subcommittee
16 of that board in the selection of the new windows?

17 A I was responsible for putting together the
18 information, the pricing for the windows, the
19 different window suppliers and providing that
20 information to the Bristol, and I believe they had a
21 construction committee at that time who made the
22 decision on what window to use.

23 Q All right. We've heard testimony today
24 about there being a couple of different options
25 and -- with regard to windows, one being

1 retrofitting the original windows with kits, and the
2 other being full replacement of the windows. Did
3 you participate at all in the analysis and
4 decision-making on that issue?

5 A No.

6 Q All right. So when you became involved,
7 had the decision to replace the windows already been
8 made?

9 A Yes.

10 Q All right. There's been some discussion
11 of DP rating -- the term DP rating has been used
12 today, and I don't know how familiar His Honor is
13 with that term. It's a relatively new term, at
14 least to me. What is DP rating?

15 A Design pressure.

16 Q All right. And what is that a measure of?

17 ~~A It's a -- all windows are generally -- or~~
18 most of the windows in high wind areas are tested
19 for wind loading requirements. And depending on the
20 construction of the window, it will take different
21 DP ratings or different loads on the window.

22 Q Okay. And what does the code require
23 presently with regard to DP rating on windows where
24 the Bristol is located?

25 A There was an analysis done by a local

1 engineer, but I think it's DP 50 or 60. Again, I
2 don't recall exactly what it was, but the windows
3 that were installed met the requirement.

4 Q All right. And what brand of windows were
5 installed out there?

6 A Kolbe -- I forget the actual model, but it
7 was a Kolbe window.

8 Q That's fine. And those were DP rated to
9 be compliant with the code --

10 A Correct.

11 Q -- as of the repair job?

12 A Correct.

13 Q All right. What about the windows that
14 were removed? Were those DP rated such that they
15 were code compliant at that time?

16 A To my knowledge, they were not.

17 Q All right. What is your understanding of
18 the reason why the windows had to be removed as part
19 of the repair process?

20 A In order to flash the windows properly,
21 you had to remove them.

22 Q So was it the original installation of the
23 windows that was the issue as opposed to the windows
24 themselves with the water intrusion?

25 A Well, you had various issues with the

1 water infiltration. There was windows that actually
2 leaked, and there was openings that allowed the
3 water to come in.

4 Q Okay. And when you say openings, are you
5 referring to the installation of the windows?

6 A It would be the installation of the
7 windows.

8 Q All right. What we all have heard,
9 flashing, house wrap, those types of things involved
10 in window installation?

11 A Whether it be poorly flashed or, you know,
12 improperly installed.

13 Q All right. So what does the code say --
14 let me ask it this way, why couldn't the windows
15 that were removed out of the Bristol, those that did
16 not leak themselves, why couldn't they simply be put
17 back in the walls as is without either being
18 retrofitted with kits or being replaced?

19 A Well, there is a couple of issues with
20 that. One is, that if you remove something and put
21 it back, you have got to bring it up to the current
22 bidding code requirements. You couldn't simply put
23 a lot of those windows back, because they didn't
24 meet the current building requirements for the wind
25 load.

1 The retrofitting, again, I wasn't
2 involved with the retrofitting analysis. And so,
3 you know, I know a lot of the -- some of the framing
4 had to be redone around the windows to increase the
5 framing in order to take the new loads. So that
6 would entail pulling out a window.

7 And the windows leaked. I mean they
8 were -- they -- there was a number of units that --
9 based on the report -- I don't have any first-hand
10 knowledge, but based on the reports that I read,
11 they leaked.

12 Q Okay. Were there examples of windows that
13 leaked either themselves or because of installation
14 deficiencies that where the leaking was not apparent
15 for either the -- from the inside of the units that
16 they have been -- they were part of?

17 A You didn't always -- just because a window
18 leaked, you didn't necessarily see the signs of it
19 inside the building. It could have traveled inside
20 the drywall and down a track and come out somewhere
21 else. So it's -- a water infiltration is always a
22 tricky thing to try to determine exactly where it's
23 coming in, but the openings are generally where it's
24 coming in.

25 Q Right. So if you have a condition where a

1 window is leaking into a wall combined with the
2 stucco condition -- the stucco installation
3 condition that you described earlier, how does that
4 manifest?

5 A Well, the windows that were installed
6 there did not have any pans in them. So the water,
7 if it got -- whether through the window or through
8 the opening itself, there was no way of having it
9 weep back to the exterior of the building. So with
10 the method in which they installed the stucco, with
11 them caulking everything solid, it took the path of
12 least resistance, which was inside, because it
13 couldn't come out outside.

14 Q Okay. And what can that do to a building,
15 in your experience?

16 A Well, it'll obviously cause -- in the case
17 of the Bristol, you have got a concrete slab, which
18 is going to make it wet. It's not really going to
19 deteriorate the slab. Metal studs, it's going to
20 start rusting metal studs.

21 Q Okay. And are those conditions that you
22 observed when you removed the exterior stucco from
23 the Bristol?

24 A We replaced a number of studs that had
25 been heavily corroded due to moisture.

1 Q And when you say studs, is the Bristol a
2 metal-framed building or wood-framed building?

3 A Metal frame.

4 Q All right. So when you say deterioration
5 or corrosion to the studs, we're not talking about
6 wood rot?

7 A No.

8 Q All right. So how -- we're talking about
9 rust?

10 A Rust on the studs, yes.

11 Q All right. What was the issue with the
12 parapet cap? What did you do?

13 A Just in order to complete the building
14 envelope, we had to take it up over and tie it into
15 the roofing system. So you had a continuous
16 membrane both from the inside of the parapet up over
17 top of the new vapor barrier that was on the
18 exterior of the building.

19 Q All right. So that is -- is it safe to
20 say that's part and parcel of the exterior reclad?

21 A Yeah.

22 Q All right. Now, the pool was an add on
23 you said. Tell me how that came about.

24 A Just during the demolition and the
25 reconstruction, you know, they had to drain the

1 pool, and they took the opportunity while the pool
2 was basically out of commission for one summer to
3 refurbish it.

4 Q Okay. Was that -- were you repairing
5 deficiencies with the way the pool was built, or
6 were you -- what necessitated that work to the pool,
7 if anything?

8 A They -- we put a waterproofing membrane on
9 the whole deck, because they had a few water
10 infiltrations problems with the deck of the pool.
11 And, you know, during that process, took the
12 opportunity to put in stone -- Travertine pavers
13 down and recoat the pool.

14 Q All right. All right. The final thing
15 you mentioned was that you top-coated balconies.
16 What did that process entail?

17 A Pretty much exactly as I stated. We
18 didn't do any -- our contract -- we did not have a
19 contract to correct any of the sloping issues that
20 they had with balconies. It was bird baths and some
21 back slopings and things like that. Just do the
22 nature of the demolition. It got pretty dirty, and,
23 you know, we went in there. And once we were done
24 the -- our work and pretty much coming off the unit,
25 we would recoat the balcony with the sonic guard

1 waterproofing membrane.

2 Q Okay. Now, the Bristol is a building that
3 consists of 54 individual condos. How did your
4 company approach the work you did with regard to
5 managing the logistics of that condition? In other
6 words, you got 54 owners out there who some of them
7 live there full time, some don't. How do you attack
8 that problem?

9 A Well, obviously, you've got to start
10 somewhere and finish somewhere. So we picked a
11 starting point and went around the building I
12 believe it was clockwise. And with -- you know,
13 through coordination meetings with the board and the
14 HOA, we just kind of give them an updated scheduling
15 telling them where we'll be around the building at
16 any given time.

17 Q Okay. What was done with the -- generally
18 speaking, what was done with the windows that you
19 removed?

20 A If they were damaged, they were scrapped.
21 If they were salvageable, we gave a lot of them to
22 Habitat. They would come and pick them up.

23 Q Can you tell me, if you can recall, about
24 the warranties that accompanied the new Kolbe
25 windows that were put into the Bristol?

1 A I want to -- and I'd be guessing.

2 Q Okay. Let me ask you more generally then.

3 Did those windows come with warranties?

4 A Yes.

5 Q All right. What about the stucco?

6 A Yes.

7 Q If you had done -- performed a piecemeal
8 stucco repair, would that have affected the
9 warranty?

10 A You wouldn't get a warranty.

11 Q Okay. What about -- scrap that.

12 Did you work at all with the City
13 Board of Architectural Review with regard to the
14 selection of the windows?

15 A I presented the new windows and the new
16 stucco system designed to the BAR.

17 Q ~~Okay. And did the BAR have to approve~~
18 what was being done on this job before you put
19 anything there on the building?

20 A Yes.

21 Q And was there a -- did they rubber stamp
22 what you submitted the first time, or was there any
23 back and forth?

24 A No. They commented on the doors and
25 windows.

1 Q All right.

2 A And made suggestions, actually, on what
3 they would like to see.

4 Q Okay. Bear with me one second. Did you
5 have any knowledge or opinions with regard to the
6 decision to replace the windows as opposed to
7 retrofitting them with higher DP rated kits?

8 A No.

9 Q Okay. You weren't a part of that --

10 A No.

11 Q -- decision-making? Do you know how, if
12 at all, retrofitting the existing window may have
13 impacted the warranty on those windows?

14 A No. I mean I have no knowledge of what
15 was discussed during I guess the litigation process
16 on the repair or retrofitting of existing windows.

17 MR. BARFIELD: That's all I have for you.

18 Answer any questions that Plaintiffs' counsel
19 might have.

20 CROSS-EXAMINATION

21 BY MS. POPE:

22 Q Mr. DeWitte, I'm Kelly Pope. I represent
23 the Lucases, and we have met a while back when I
24 took your deposition. I just have a few questions
25 for you, and you may have touched on this just a

1 moment ago, but I wanted to clarify. You don't know
2 whether the retrofitting to the windows that were
3 existing prior to your doing the reconstruction, you
4 don't know if the retrofitting to those windows
5 would have brought the bad windows up to code or
6 not?

7 A I do not.

8 Q Okay. Do you have any knowledge as to
9 what the warranty was on the Anderson windows and
10 doors that were in place prior to you doing
11 reconstruction?

12 A I do not.

13 Q Okay. And my final question deals with
14 pressure washing. In your opinion, and given your
15 experience, do you think it's a good idea to
16 pressure wash windows?

17 A The person doing the pressure washing
18 needs to know what they're doing.

19 Q Okay. So let me expound on that just a
20 little bit. You said they need to know what they're
21 doing. What do you mean by they need to know what
22 they're doing?

23 A Well, a door --

24 Q Why is that so important?

25 A Well, a door, for example, you -- I mean

1 it's common sense, you can't put a high pressure
2 power washer at the base of a door and not expect
3 water coming in.

4 Q Okay.

5 A I mean it's going to find a way.

6 Q Okay.

7 A I mean a door is an opening. It just
8 happens to have seals around it. If you put enough
9 pressure, water will come in.

10 MS. POPE: Okay. Thank you. I have no
11 further questions, Your Honor.

12 RE-DIRECT-EXAMINATION

13 BY MR. BARFIELD:

14 Q How do you determine conclusively that a
15 window leaks? And when I say the window, I'm not
16 talking the window as it's installed in a wall. I'm
17 talking about the window itself.

18 A You would have to have the window tested.
19 You want to isolate the window from the opening.

20 Q Okay. And how -- are you familiar with
21 that testing process? How does that work?

22 A I have seen a number of windows tested,
23 and usually, there's a chamber built or there's some
24 way -- you isolate the window and put -- well,
25 whether it's out of the opening or inside the

1 opening is, obviously, two different test
2 procedures.

3 Q Okay. So if I hear you correctly, what
4 you're saying is if you were going to conclusively
5 determine whether the original windows at the
6 Bristol were -- let's put code aside.

7 A Uh-huh.

8 Q Were acceptable to be put back in the
9 wall, you'd have to perform testing on individual
10 windows?

11 A Well, you never -- yeah. I mean if you
12 wanted to be -- know conclusively that a window
13 didn't leak, you'd have to test each individual
14 window.

15 MR. BARFIELD: Okay. That's all I have.

16 THE COURT: Ms. Pope?

17 RE-CROSS-EXAMINATION

18 BY MS. POPE:

19 Q When you remove a window, can you look at
20 the space where the window was and determine whether
21 it was the window that was leaking or whether the
22 space around the window was leaking?

23 A After the window's been taken out?

24 Q Yes.

25 A You can't. You don't know. You -- you

1 would have to have -- you would have to see physical
2 signs of moisture. If you saw the physical signs of
3 moisture, whether it be on the window or the
4 opening, then you could be -- it would be -- you
5 could determine whether the water -- you could have
6 a better understanding where the water's coming
7 from, but that's not to say that the window doesn't
8 leak onto the opening.

9 Q Okay.

10 A It's -- moisture and water infiltration is
11 a tricky thing.

12 MS. POPE: All right.

13 EXAMINATION

14 BY THE COURT:

15 Q In relation to the numbers that you're
16 using to describe DP, are they just relative
17 numbers, or do they mean something?

18 A They mean something. There's actually --
19 it depends on the location of the building, the
20 height of the building, location of the window on
21 the building. So there's a number of factors that
22 --

23 Q In other words, 40, you can go somewhere
24 and read what 40 means, different specs for that
25 window?

1 A Well, that's a pressure rating, but I'm
2 saying the building itself -- like the Bristol, for
3 example, there's always hot spots on a building.
4 Building corners are usually hot spots. So they'll
5 have a higher DP rating than, let's say, a flat
6 wall, flat area, due to different pressures around
7 the building due to the winds or the wind loads
8 imposed on the building.

9 So the DP 40 -- the DP 40 is a
10 pressure rating that's assigned to the window when
11 it's tested, and then you can get -- there's a
12 calculation you can do on the whole building to see
13 what the minimum requirement --

14 Q Yeah. Does 40 mean something like 40
15 pounds per square inch, or is that a relative number
16 that you --

17 A ~~No. It's 40 pounds per square inch.~~

18 Q Okay. All right.

19 A 40 pounds per square foot.

20 Q Okay. It's a definite meeting?

21 A Yeah.

22 Q When the original stucco was put on that
23 building, describe to me how it would look. You got
24 a metal stud, and then what?

25 A The original system?

1 Q Yeah.

2 A You'd have a metal stud. You'd have a
3 drainage matter -- sorry. Let me back up. You have
4 a metal stud. You have a DensGlass, which is a
5 yellow board, an exterior-grade drywall.

6 Q Okay.

7 A It's fiberglass impregnated. And then on
8 top of that, you'd have the -- I believe on the
9 Bristol was building paper.

10 Q Like tar paper?

11 A Like tar paper, yeah. Like a building
12 felt.

13 Q Yeah.

14 A And then you'd have a -- again, I'm trying
15 to think. They -- I believe they had a drainage
16 mat. Then you have the wire mesh or the mesh that's
17 attached to the DensGlass or to the paper, which is,
18 obviously, attached to the DensGlass. And then you
19 have a three-coat stucco system, cementitious stucco
20 system that's applied to that lathe that's applied
21 to the wall.

22 Q And so to remove the stucco, what portion
23 of that do you have to remove?

24 A As an absolute minimum, you'd have to get
25 down to the DensGlass, and in a lot of cases, the --

1 when you go back with a new system, the manufacturer
2 who -- of the stucco system that is providing the
3 warranty on the stucco -- wants you to go right back
4 and put a new substraight, meaning a new piece of
5 DensGlass on as well. So we had to take it right
6 back to the metal frame, and then build it back
7 again in order to get the warranty on the stucco
8 system.

9 Q The DensGlass would what? Would take the
10 place of plywood?

11 A Yeah. Yes.

12 Q Okay. So in this case, when you went
13 back, did you take that off to the metal stud?

14 A We did, yes.

15 THE COURT: Okay. All right. Any follow
16 up?

17 MS. POPE: Your Honor, if I might just
18 have a moment, if you don't mind, before we
19 dismiss this witness?

20 THE COURT: Sure.

21 (Off-the-record discussion.)

22 RE-CROSS-EXAMINATION

23 BY MS. POPE:

24 Q Mr. DeWitte, weren't there issues with
25 owners' closets on the balconies having water

1 intrusion issues as well?

2 A There are closets that have water in them.
3 Our contract was not to make them water tight.

4 Q I understand. I understand. And right
5 now, I just want to clarify. I'm not asking about,
6 technically the scope of work you were asked to do
7 and repair. While you were there, to your
8 knowledge, did you discover that were issues with
9 water intrusion on the owners closets?

10 A There were, and it was mainly due to the
11 type of door it was and the weather stripping on the
12 door.

13 Q Right. And do you -- the fifth floor
14 condos, those owner closets, those do not have the
15 roofs that came out and over the owners' closets,
16 did they?

17 A I don't believe they did.

18 Q Okay. I believe you said that there was
19 water that would get into the closets, stand in the
20 closets that wasn't draining properly?

21 A Well, I mean the -- again, the closets
22 were never designed to be water tight or waterproof.

23 Q Right.

24 A So if moisture got in there, it had no way
25 of getting out.

1 Q Okay. Was it -- strike that.

2 The water issues from the owners'
3 closets, wouldn't some of that water also drain down
4 the stucco walls?

5 A Prior to the renovation there's some --
6 it's possible. It's possible that if water got in
7 there, it could have found its way down inside the
8 building.

9 Q Okay. Besides -- and this is going to be
10 laymen's terms. Besides the water traveling from
11 the fifth floor to the first floor or to the bottom
12 of the Bristol, is there another way for that water
13 to travel besides going down the stucco walls?

14 A You're saying on the exterior or interior?

15 Q Interior.

16 A Gravity is going to take its course. I
17 ~~mean water is going to go --~~

18 Q But were there other piping -- was it just
19 the stucco just coming down to the stucco walls, or
20 was there piping in the other places where it could
21 have also traveled?

22 A I don't believe there was any other piping
23 on the exterior wall. Again, I'd have to go back
24 and look, but, generally, you don't put piping on
25 exterior walls because of the -- you know, the --

1 you keep it away from the elements, keep it away
2 from potential problems with freezing or other
3 problems that could be created.

4 Q And there were none within the stucco
5 walls?

6 A Again, I don't recall seeing any on the
7 exterior. Again, it's just not -- there may have
8 been some near the exterior but maybe not right at
9 the exterior. That's not to say there wasn't some
10 there. I just don't remember any, or if there were,
11 they were very few.

12 MS. POPE: Okay. Just one moment. That's
13 all I have. Thank you.

14 RE-EXAMINATION

15 BY THE COURT:

16 Q You say that two million out of the five
17 million was for stucco?

18 A Correct.

19 Q How much was for the windows and doors?

20 A Well, I recall the window supply was like
21 1.5 million. So that was just a supply, and then we
22 had, obviously, the --

23 Q That was just the cost of the unit for the
24 windows and doors themselves, the 1.5?

25 A Yeah.

1 Q And then the cost of installing it?

2 A Well, that was -- you know, I think it was
3 rough half a million dollars for installing it or
4 maybe a little more, and then you had all the other
5 work that had added up to the total.

6 THE COURT: Okay. Anything else?

7 MR. BARFIELD: No. Your Honor.

8 THE COURT: All right. Thank you, sir.

9 You may be excused. Thank you for coming.

10 (Off-the-record discussion.)

11 CONTINUATION OF EXAMINATION OF MS. VEST:

12 EXAMINATION

13 BY MR. BARFIELD:

14 Q All right.

15 A I know I'm still under oath.

16 Q You're still under oath. When we left
17 off, I had asked you kind of an open-ended question
18 about the chronology related to the amendment of the
19 master deed and Judge Newman's decision and the
20 whole process involving that.

21 A Okay.

22 Q Can you walk us through that sequence of
23 events in order, please?

24 A Yes.

25 Q Okay. Let's start off with Cindy

1 Mulcare's letter.

2 A Well, how about let's start with me. I
3 became involved -- I was being interviewed in the
4 January, February time frame. I was formally hired
5 to start March 1st. I was asked to come early to
6 attend the February board meeting, and I was also
7 asked to begin working with the insurance committee.

8 At that point, the lawsuit had
9 already been filed. I started working with the
10 insurance committee, and that's when I first met
11 Cindy Mulcare. She was brought to the table by
12 Charles Derosé, who knew her from Wells Fargo and
13 had held her up as a great insurance agent for us to
14 talk to.

15 At that particular time, we were
16 being insured by All State, Tim Scott's office, and
17 Tim Scott had come to the board to announce that he
18 could no longer write the Bristol, because the
19 Bristol was outside of an area that All State was
20 willing to continue writing.

21 So they were in kind of a panic mode
22 because all of a sudden, this great deal that we
23 were getting from All State evaporated, and they
24 felt that they were just going to renew with All
25 State. They had a great deal going, and All State

1 was now off the table.

2 So we then started interviewing
3 insurance agents. I think at that particular time,
4 we got a couple of quotes, but Cindy Mulcare
5 provided a quote. It was incredibly thorough. At
6 the exact same time, Harold Campbell raised the
7 issue about the insurance -- the flood insurance and
8 the location of the building and the rating of the
9 flood insurance.

10 He and Johnny Jordan went down to the
11 building inspector's office and found out the
12 building footprint is actually in an A zone, and
13 that we were being improperly billed for the flood
14 insurance. So we began a process in this short
15 period of time of trying to amend our flood
16 certificates, getting refunds for the two years
17 ~~worth of flood insurance that we were then eligible~~
18 for. And then we also began negotiating with Cindy
19 Mulcare for the coverage of the building.

20 At that particular time, Harold
21 Campbell asked the regime board if they would be
22 willing to allow him to write the flood insurance.
23 He was a State Farm agent, and he didn't have the
24 ability to write the building, because they wouldn't
25 allow that. But he could write a federal flood

1 policy for the building.

2 The board agreed. Given the fact
3 that he had been so helpful in pointing out this
4 problem, they agreed that he could write the flood
5 insurance, because it would have been the same price
6 whoever we wrote it with.

7 Q Right.

8 A So Harold becomes the flood insurance
9 agent. Cindy becomes the building agent. At that
10 particular time, in these insurance committee
11 discussions, we started discussing the impact of the
12 master deed. And I think Johnny Jordan at that
13 point suggested that they both read through the
14 master deed and just make sure that we had a
15 complete program, and that, also, there weren't
16 going to be any issues related to the master deed.

17 We were purchasing what's considered
18 an all-in policy, which would mean that it would
19 cover the entire building. And typically, when you
20 purchase an all-in policy, you insure the building
21 as it was originally built. So if you bought a
22 unit, you would have the expectation that we would
23 pay to put the unit back into the condition it was
24 when you originally purchased it from the developer,
25 and you would be responsible for any upgrades and

1 improvements.

2 So we were concerned about
3 understanding exactly how this all-in policy was
4 going to work. And keep in mind too that this was
5 the first purchase of this insurance committee as a
6 homeowner controlled board.

7 The insurance had been purchased all
8 along and negotiated by the beach company. So this
9 group was very concerned about doing a thorough and
10 good job with it. At some point, Cindy Mulcare
11 comes back to us, and I don't know if Cindy came to
12 us first or Harold came to us first, but they raised
13 the issue of the windows.

14 And the issue became all of the
15 things I've described earlier, the impact in the
16 event of a catastrophic loss, in terms of whether or
17 ~~not all the homeowners had the proper insurance, how~~
18 would we manage that information? How would we
19 manage physically changing out of all these windows
20 if I had to coordinate 54 different people buying
21 all of these windows. All of these issues came into
22 play.

23 And typically, when you purchase an
24 insurance policy, the very first thing that an
25 adjustor does is looks at the master deed to

1 understand clearly what the regime is responsible to
2 pay for it. The fact that the owners owned the
3 windows and doors was a concern, because they felt
4 that if we had a catastrophic loss, the adjustor
5 would look at the master deed. They would omit
6 coverage for the window and doors, and there would
7 also be a big problem in adjusting the loss.

8 And so these things came into play.
9 So the board members -- or the committee largely. I
10 believe it was Johnny Jordan, who not only sat on
11 this committee, but sat on the board, asked these
12 two people to write a letter explaining what they
13 had found. They then took those letters to David
14 Wheeler.

15 Q David being --

16 A Who was the regime counsel.

17 Q Okay.

18 A They asked David Wheeler advice. David
19 Wheeler came up with the suggestion that we invoke
20 this particular section of the master deed on an
21 emergency basis that would allow the board to change
22 the master deed after providing notice to the
23 homeowners and not receiving any objections.

24 We followed David's advice --
25 Wheeler's advice. We sent out the letters to the

1 homeowners, and we received no objections, and we
2 followed it to the letter of the master deed. Then
3 we recorded the amendment once we received no
4 objections, and, quite frankly, we had expected to
5 receive objections. We thought that the Hanger
6 group would be objecting, and so the board was very
7 concerned because they thought for sure that the
8 group of plaintiffs in the Hanger group would
9 object, and they never did.

10 So we received no objections. We
11 recorded the amendment. We took over the ownership
12 of the windows and doors. At some juncture, there
13 was a certain amount of discussion, but not a lot of
14 discussion, about whether or not that would have an
15 impact on the case. But if I remember -- the way I
16 remember it is that I don't really remember that
17 ~~being a big crushing issue to Brew Hagood and Britt~~
18 Kelly.

19 The next thing that happened was
20 there was an order from a judge to enjoin the
21 discovery, and that was the first piece of action
22 that we received word of on this particular lawsuit.
23 And we sent that out to all the homeowners to advise
24 them of that. There were a lot of questions. The
25 owners didn't really understand it. We mailed it

1 out. We posted it on the bulletin board.

2 Q Now, let me stop you there. When you say
3 enjoin, are you referring to consolidation?

4 A Yes. I'm sorry.

5 Q Okay.

6 A I'm using an incorrect --

7 Q I just wanted to make sure we're correct.

8 A The consolidation of the case as it
9 related to discovery.

10 Q Okay.

11 A We notified all the homeowners that this
12 occurred. We posted it on the website. We posted
13 it on the bulletin board. Then at some juncture
14 later down the road, and I want to say -- when I say
15 later down the road, I'm talking 2008, it might have
16 even been closer to 2009, the issue of the ownership
17 of the windows and doors as it related to the
18 lawsuit became a burning issue.

19 There was a -- Brew and Britt
20 appeared in front of Judge Newman. I did not
21 attend. I believe Johnny Jordan went on behalf of
22 the board, and at that point, it became an issue.
23 And it was my understanding that Michael Seekings
24 and Jeff Leath were fighting in favor of their
25 owners being able to sue for the windows and doors,

1 which would be the Hanger lawsuit.

2 And they prevailed, which then took
3 the windows and doors out of the regime suit and
4 posted an issue to Britt and Brew. At that point,
5 they came to the board and also explained to me that
6 they needed to get assignments from the owners for
7 their windows and doors.

8 So they came to me and gave me a
9 letter and an assignment agreement and asked me to
10 please send it out to all of the homeowners. I did
11 that. And then it was my job to try and collect as
12 many of these assignments as possible. And I don't
13 really remember how many assignments I received, but
14 it was my job to go out and chase these assignments.

15 After that, one of other issues that
16 then later came up is more window testing. Brew and
17 Britt came to us shortly before the issue was going
18 to court, and they suggested that we really needed
19 to do more in depth window testing. And Harold
20 Campbell had a vacant unit in the building, and he
21 agreed to allow us to do some more extensive water
22 testing.

23 So that became the next thing that we
24 did, and we did that in a fairly short time period,
25 and I believe it was in 2009, shortly before we

1 actually went to court. Then we went to court, and
2 as I said, we went all the way through the process
3 of seating the jury. And right after the jury was
4 seated was when we settled our lawsuit.

5 And then the Hanger group actually
6 went to court the next day, and they settled very
7 quickly. I think they took test testimony of maybe
8 two witnesses, and then they settled.

9 Q Okay. Thank you. Was Judge Newman's
10 ruling on the windows and doors, was that a -- were
11 Britt and Brew doing anything about that? In other
12 words, did they -- were they going to pursue that
13 issue further, or did they just let Judge Newman's
14 order stand?

15 A No. Their response was to ask me to get
16 the window assignments from the individual unit
17 owners.

18 Q What about, do you know anything that they
19 may have done procedurally within the lawsuit about
20 that? Did they file a motion or --

21 A I couldn't speak to that.

22 Q Okay.

23 A I just know the end result as it impacted
24 me.

25 Q All right. And in terms of assignments,

1 do you remember how many owners gave over
2 assignments?

3 A I don't remember.

4 Q All right. What was the --

5 A I know that the Hanger group, obviously,
6 did not give me their assignments.

7 Q Right. But they wouldn't have to because
8 they were --

9 A Correct.

10 Q -- suing in their individual capacities?

11 A Correct. So I did not receive assignments
12 from the six plaintiffs in the Hanger suit, but
13 after that, I don't know how many other assignments
14 I got.

15 Q All right. So just to kind of shed light
16 on a very complicated issue, is it accurate that
17 Judge Newman basically said, I'm not taking into
18 consideration that the board has -- or that the
19 association has now taken ownership of the windows
20 and doors. For purposes of this lawsuit, I, Judge
21 Newman, am looking to who owned the windows and
22 doors when the lawsuit was filed?

23 MR. MOONEYHAM: Objection.

24 A That's my understanding.

25 Q Okay.

1 A It was really date related. It was the
2 fact that the suit had been filed at a time when the
3 owner -- when the windows and doors were owned by
4 the owners.

5 MS. POPE: I just wanted to make sure that
6 your objection got on the record.

7 MR. MOONEYHAM: I'm sorry. I objected
8 to -- probably too quietly, but I objected to
9 this witness's characterization of the order.

10 THE COURT: Of the judge's order?

11 MR. MOONEYHAM: Judge's order, yes, sir.
12 The order is part of the record, but it would
13 be my objection that she's interpreting the
14 Court's order.

15 THE COURT: Well, I think the order speaks
16 for itself. So to the extent she was trying to
17 interpret the order, I would sustain the
18 objection.

19 BY MR. BARFIELD:

20 Q So what was -- to your understanding, what
21 was the importance of getting the assignments after
22 Judge Newman's ruling?

23 A That was to be able to add those -- the
24 costs of the windows into the regime suit so that we
25 could maximize the amount of money that the regime

1 would be able to settle the lawsuit for to make
2 repairs.

3 Q Okay. Why would you want to -- stupid
4 question, but why would you want to maximize the
5 amount of the amount you could recover in a lawsuit?

6 A So we could make repairs with less money
7 out of homeowners' pockets.

8 Q Okay. Did Dr. Lucas ever sign an
9 assignment?

10 A I honestly don't remember.

11 MR. BARFIELD: I think that's all I have.

12 Thank you. Answer any questions that Mr.

13 Mooneyham has on redirect.

14 THE COURT: All right, sir.

15 MR. MOONEYHAM: Thank you, Your Honor.

16 RE-DIRECT EXAMINATION

17 BY MR. MOONEYHAM:

18 Q In responses to some questions about the
19 way in which foreclosures were handled, earlier you
20 testified that when a bank forecloses, that
21 Bristol's process is to simply follow that
22 foreclosure and see what happens, correct?

23 A Generally, yes.

24 Q Okay. Would it have been just as
25 appropriate in this case to follow the litigation

1 that was going on, which you knew about, and Dr.
2 Lucas has advised you of, to see what happened in
3 this litigation before you foreclosed? Wouldn't
4 that be just as appropriate?

5 A I don't think that the board felt that
6 there was enough emphasis on the collection piece of
7 the puzzle, and I don't think -- I think that they
8 wanted to insure that they were going to collect the
9 funds from Dr. Lucas. We would have gone all the
10 way through this litigation, and at the end of it,
11 he still could have decided not to pay us.

12 Q And you mentioned the collection process.
13 This is certainly something that you could have
14 turned over to a collection agency, right?

15 A It depends. The collect --

16 Q But it could have been turned over to a
17 collection agency?

18 A Yes. It could have, but that's our usual
19 last resort.

20 Q But in point of fact, you do turn matters
21 over to collection agencies all the time for
22 collection?

23 A No. That characterization is not correct.
24 We do not do it all the time. In all my years I've
25 been in this business, I just started working with a

1 collection agency in the last year and a half. They
2 charge a percentage of what they collect, and
3 they're sort the last course of action, not the
4 first.

5 Q I think they charge a percentage of the
6 collection, just like the law firm charges a
7 percentage of what they collect in foreclosure,
8 right?

9 A Well, I wouldn't have necessarily said
10 that a law firm charges a percentage to get a
11 collection. But yes, there are fees related to a
12 collection through a law firm, yes.

13 Q And doesn't the affidavit that's part of
14 Defendants' Exhibit Number 1 specify 10, 15 percent
15 share of the recovery as attorneys' fees?

16 A Yes.

17 Q ~~So that's like a collection agency?~~

18 A Cheaper.

19 Q Depends on which collection agency you
20 hire, doesn't it?

21 A That's true.

22 Q All right. We can talk about Judge
23 Newman's order. I had a particular question about
24 that, and that is tab number 34 -- or 33. Let me
25 look one second.

1 MR. MOONEYHAM: Your Honor, this is this
2 tab number 33.

3 BY MR. MOONEYHAM:

4 Q I noted that one of the grounds for
5 summary judgment that Judge Newman ruled on was
6 specific to --

7 MR. MOONEYHAM: 34, Your Honor.

8 BY MR. MOONEYHAM:

9 Q One of the things that Judge Newman ruled
10 on related to summary judgment -- well, maybe I'm
11 wrong. One of the things -- third time I said one
12 of the things, that Judge Newman ruled on in summary
13 judgment was that the Walter defendants were
14 entitled to summary judgment as to all claims
15 brought by defendants Tallberg and Peterson, unit
16 4005, and Zinkowski, unit 4012, because the statute
17 of limitations had run, correct?

18 A Correct.

19 Q Did the board elect to pay Mr. Tallberg or
20 Mr. Zinkowski for damage or -- Dr. Zinkowski for
21 damage to the bathrooms?

22 A No.

23 Q They were not paid?

24 A No.

25 Q They did not -- you say they did not

1 receive any settlement money?

2 A They did not receive any settlement money
3 for bathrooms, no. Craig Tallberg had some interior
4 damages to his unit, which we repaired, but no.

5 Q Okay. So the board didn't pay for
6 interior damage to Mr. Tallberg's unit?

7 A No. They didn't pay for the bathroom.
8 The bathroom --

9 Q They paid for interior damage though?

10 A Correct.

11 Q Even though the statute of limitations had
12 run?

13 A They paid for damage to his carpet from
14 water intrusion from the windows. They never paid
15 for his bathroom, which is what Judge Newman had
16 ruled. Craig got no money for his bathroom.

17 Q Okay. You mentioned in your chronology of
18 the events that occurred a few moments ago that you
19 were able to obtain \$171,000 refund because of the
20 mischaracterization of the footprint of the
21 building. It was in the A zone as opposed to some
22 other zone, right?

23 A That's correct.

24 Q All right. You recovered \$171,000?

25 A Yes.

1 Q How much of that was disbursed to
2 homeowners to refund the payments they paid?

3 A None.

4 MR. MOONEYHAM: Thank you. That's all.

5 RE-CROSS-EXAMINATION

6 BY MR. BARFIELD:

7 Q What was done with that \$171,000?

8 A It was put into the capital reserve, and
9 let me say why it wasn't given back to the
10 homeowners. We were advised by counsel that whoever
11 paid the money would be entitled to the money, and
12 at that particular time, when you calculated who
13 paid those premiums, it was the beach company had
14 paid a fair share of those premiums.

15 And the board was told if they gave
16 the money back to the homeowners, that we would have
17 to pay that money back to the beach company. And
18 given the fact that we had just entered the
19 litigation with the beach company, the board felt it
20 prudent to put the money in the capital reserve fund
21 instead of paying money back, because they would be
22 then giving more money back to the beach company.

23 Q The beach company being the same people
24 that left you-all in the lurch by underfunding the
25 capital fund in the first place?

1 A Correct.

2 MR. BARFIELD: Okay. That's all I have.

3 MR. MOONEYHAM: One further point, Your
4 Honor, unless you had a question, Your Honor.

5 THE COURT: Go ahead.

6 RE-DIRECT EXAMINATION

7 BY MR. MOONEYHAM:

8 Q I was going to ask you, when did that
9 refund come back?

10 A It was sometime probably mid 2007. We had
11 a little trouble getting it.

12 MR. MOONEYHAM: That's all I've got.

13 Thank you.

14 THE WITNESS: I want to say like June
15 maybe.

16 EXAMINATION

17 BY THE COURT:

18 Q I've got a couple. Categories of damages
19 that the board was intending to collect for, and I
20 got three. But I want you to add to it if you can.
21 Stucco, that was a category of damages kind of to
22 itself, right?

23 A Yes, sir.

24 Q Windows and doors?

25 A Yes, sir.

1 Q Showers?

2 A That was under the Landry suit. Yes, sir.

3 Q Everything. Everything the board was
4 trying to collect for. So we have got three
5 categories now?

6 A No. We have more than that.

7 Q Well, that's what I'm asking. I want you
8 to give me the rest of them.

9 A Okay. Could we start with the outside of
10 the building and work in? Because that will make
11 more sense.

12 Q Any way you want to.

13 A Stucco on the exterior of the building,
14 the windows and doors. We had flashing issues at
15 everywhere there was a transition. So we have
16 stucco, the transitions to brick. We had issues
17 that the roof line or the flat roof transitioned
18 where John talked about the parapet. We had --

19 Q That would have been under the homeowners'
20 suit?

21 A Correct.

22 Q All right. Flashing.

23 A We have waterproofing issues, that the
24 decks were not properly waterproofed where you wrap
25 the waterproofing up the wall, and you waterproof

1 the deck so that you don't have water intrusion at
2 the wall -- at the balcony to wall interface. And
3 you also don't have issues with water rolling in and
4 into the downstairs main ceiling.

5 Q That would be on the homeowners' suit?

6 A Yes, sir.

7 Q Okay.

8 A We had issues with the closets that Kelly
9 mentioned. We had issues where water would run back
10 into the closets, because the closets were not
11 waterproofed. They had an interior grade door on
12 the closet on the outside of the building, and they
13 weren't properly waterproofed so that water could
14 get around the door. And then inside the door on
15 the floor, there was no waterproofing at all either.

16 And in a couple of cases, we had
17 ~~water roll all the way back and into the building~~
18 and into somebody's apartment. So the closets.

19 Q All right. Would that be part of the
20 common property, the homeowners?

21 A Yes, sir.

22 Q Okay.

23 A Then we had issues with the trellis. When
24 you go to the building, you will see that the fifth
25 floor units on their upstairs balcony have a

1 decorative trellis that is then tied back into the
2 building. Up above the doors on the balconies,
3 there is this trellis. And the trellises weren't
4 property primed and painted, and they also were not
5 properly waterproofed as they were tied back into
6 the metal stud system.

7 So we had to reflash and rebuild that
8 whole trellis system, because we had a lot of
9 water -- if you look at all the water intrusion
10 complaints of the building, you'll see a lot of them
11 are on the fifth floor. So again, that also was
12 included in the common areas suit.

13 And then -- what else am I thinking
14 of? I think that largely characterizes the outside
15 of the building. Then on the inside of the
16 building, you -- there were issues related to the
17 trim and the paint and the sheetrock inside, around
18 all the windows and doors.

19 We had ten units out of the 54 that
20 had damage from ongoing leaks, because keep in mind,
21 while this suit was going on, every time it rained,
22 I had units that were leaking. And I was doing my
23 best to mitigate that water intrusion, but we had
24 interior damages. And there were ten that either
25 had hardwood floors that were severely damaged,

1 carpet that was severely damaged, wallpaper,
2 sheetrock. And that was all included in the Landry
3 suit, but it eventually became something that I
4 coordinated the repairs of when we did the big
5 project.

6 So you had all of those interior
7 repairs. You had the interior repairs to every unit
8 that we worked on, which would be all 54, and then
9 you had ten that had extensive damage that we took
10 care of.

11 Then you have the bathroom issue.
12 The bathroom issue is that the bath -- the showers
13 were not properly waterproofed, and the -- you had
14 the floor of the shower, and then the showers have a
15 seat that the homeowner can then sit on while
16 they're in the shower. And the seats were not
17 ~~waterproofed at all. They literally glued tile to~~
18 plywood, and so you have a shower surround with this
19 little seat in it with just a plywood and tile
20 construction.

21 And so all that water was seeping in
22 there, and it was -- it was rusting out the metal
23 framework of the shower seat, and then in some
24 cases, tiles would pop off. And in worse case
25 scenarios, the guy downstairs would get water

1 through your shower.

2 So that then began the shower issue,
3 and we didn't find that out until we were already
4 into the construction. Craig Tallberg wanted to
5 remodel his bathroom, and when he went into tearing
6 out the old one, he found out of this rust. And he
7 called me and asked me to come and look at it. And
8 that point, it then became an issue that we
9 expounded on.

10 We tore out tile and examined eight
11 different showers in the building to see if it was a
12 common issue or one just limited to Craig, and we
13 found it in every one -- every one of the eight
14 units we investigated. The reason that Ernie got
15 excluded was because he found out he had a problem
16 when he moved in immediately, and the beach company
17 came in and redid his shower at no cost to him. So
18 the judge took Ernie out of the mix.

19 Then when they brought the Landry
20 suit, you know, there were claims exten- -- you
21 know, there were extenuating claims related to, you
22 know, loss of use, moving, electricity use, those
23 all more or less boiled out and got thrown out when
24 we came to this settlement and mediation. But those
25 homeowners did allege some of those losses in that

1 suit, and I believe the Hangers did as well. But
2 they didn't get any compensation for that.

3 Q And when the suit was settled, and this is
4 behind tab 45, which is your letter that we went
5 into extensively a little while ago. On top of page
6 3 -- well, bottom of page 2, after I've sent
7 invoices to the lawyers, the engineering firm and
8 expert witnesses were paid, the total amount we're
9 paying for repairs is 3.5 million, represents a net
10 recovery of 53 percent of the total repair costs
11 after expenses. Didn't we just hear the total
12 repair costs were 5 million?

13 A Yes.

14 Q Well, 3.5 million is more than 53 percent
15 of five million.

16 A I honestly don't remember where we came up
17 with that 53 percent.

18 Q Okay. All right.

19 A I'd like to explain it to you, but I don't
20 know.

21 Q That's fine. The next paragraph says, the
22 cost for the interior repairs in showers recovered
23 for the Landry lawsuit owners is 350,000. So there
24 was an allocation of that total 3. -- would have
25 been 3.6 million or something like that. There was

1 an allocation of 350,000 to the Landry lawsuit?

2 A Yes, sir. We kept that.

3 Q Pardon?

4 A We kept it. The regime kept it. They
5 didn't give it to the Landry plaintiffs. They kept
6 it, and they added that money into the pot that was
7 then used to fix the whole building, with the
8 exception of the \$2,000 that is offered to
9 homeowners if they make their bathroom repairs.

10 Q So we just heard testimony that the cost
11 of the windows themselves was a million and a half.
12 Apparently, that's what the contractor had to write
13 a check to Kolbe for the windows is a million and a
14 half dollars?

15 A Yes, sir.

16 Q And it cost a half million to put them in?

17 A I assume so. In somewhere in this mix of
18 paper is his actual estimate that gives you an
19 itemized --

20 Q Well, I'm just using the figures that he
21 gave us --

22 A But yes.

23 Q -- and I'm sure they are rough. So I
24 think on the basis of that testimony, it was 2
25 million dollars cost to replace the doors and

1 windows in the 54 units?

2 A Yes, sir.

3 Q And total recovery to do that was 350,000?

4 A No, sir. The 350,000 was the recovery for
5 the personal damages to the interior of units --

6 Q That included windows and doors?

7 A No, sir. It did not include the windows
8 and doors. That is the pot of money that the Landry
9 group got. Because, remember, we got window
10 assignments. So the window money, the allocation
11 out of the settlement that would have gone to you
12 personally if you owned the window and door, we got
13 your assignment that then put that money back in the
14 regime's pot.

15 Q Okay. Well, I guess with the balance
16 3,319,000 allocated to stucco, windows, doors,
17 waterproofing, repairs handrail --- so the 350 was
18 actually for interior damage to individual
19 apartments?

20 A Yes, sir.

21 Q And that was determined by Mr. Z had this
22 damage, Mr. F had this damage, Mr. B had that
23 damage?

24 A Correct.

25 Q And that was damage unrelated to stucco,

1 windows, doors, waterproofing repair, hand rails,
2 trellis and all that other stuff?

3 A That's correct.

4 Q And they got nothing?

5 A Correct. Except --

6 Q 2,000?

7 A Right.

8 Q Okay.

9 A Which it cost you more than \$2,000 to fix
10 your bathroom. So they're not getting the big
11 bargain by getting 2,000 to fix the bathroom.

12 Q All right. And 40 people participated in
13 the Landry lawsuit?

14 A Yes, sir.

15 Q But not all 40 of those are assigned their
16 interest in the windows and doors?

17 A I don't remember how many assignments I
18 got. So I'm pretty sure I got the 40, but I don't
19 know how many of the eight disenfranchised people I
20 got. And I know I did not get any of the six.

21 Q Okay. And of the eight, you said
22 Mr. Darby didn't participate, because he would have
23 been suing himself basically?

24 A Yes.

25 Q The beach company didn't participate.

1 That was two condos?

2 A That's right.

3 Q Mr. Lucas -- Dr. Lucas didn't participate,
4 as we well know?

5 A That's correct.

6 Q And was there another one that you
7 mentioned specifically, or the other five just in
8 the same category?

9 A They mentioned Mr. Nix earlier. He didn't
10 participate. Mr. -- I could tell you quickly --

11 Q No. That was not my point.

12 A There were some -- I had a developer in
13 the building who had been in a bunch of lawsuits,
14 and he doesn't like lawsuits. So he wouldn't
15 participate. Bishop Rembert, that owed the regime
16 all that money, he didn't participate. So there was
17 a random mix, but they were all asked to
18 participate.

19 THE COURT: Okay. I think that's all I
20 have got. Any follow up?

21 RE-CROSS-EXAMINATION

22 BY MR. BARFIELD:

23 Q I'd just like to maybe underscore
24 something that the judge brought out, which is part
25 of Dr. Lucas' claim here is that the Landry --

1 individuals that are part of the Landry action in
2 part got a free ride because of the efforts of the
3 shared attorneys and experts that the association
4 was paying for. You've heard that testimony?

5 A Yes.

6 Q Okay. But you just clarified for the
7 judge that when the settlement came in, with the
8 exception of those \$2,000 checks to a few
9 individuals from the Landry suit, the recovery that
10 was allocated in the settlement for those
11 individuals went into the community pot?

12 A Yes.

13 MR. BARFIELD: Okay. That's all I have.

14 RE-DIRECT-EXAMINATION

15 BY MR. MOONEYHAM:

16 Q But the Hanger lawsuit was handled
17 differently? Their settlement proceeds did not go
18 into the community?

19 A That's correct.

20 MR. MOONEYHAM: Okay.

21 RE-EXAMINATION

22 BY THE COURT:

23 Q All right. In this paragraph, the balance
24 3,300,000 allocated to stucco, et cetera, who
25 allocated that? Was allocated -- when they were

1 standing at the courthouse trying to settle it, were
2 they leaving with a separate amount of money for
3 windows and doors and stucco, a separate amount for
4 the homeowners, separate amount for Landry, or were
5 they just dealing with one pot of money and the
6 board allocated? So when you say allocated to, who
7 did that allocating?

8 A It was done at the courthouse. It was
9 done as part of the settlement process. When we
10 were sitting at the courthouse and we were
11 discussing settlement, it was their apportionment
12 minutes made at that time. It was not, here's your
13 pot of money. Board of directors, decide how too
14 spend it. The money was earmarked as we received
15 it.

16 Q And it was really earmarked without any
17 ~~regard for which of these areas of damages was under~~
18 the homeowner lawsuit and which was under the Landry
19 lawsuit, was it not?

20 A I can't really say that, because I mean
21 there was some general discussion in terms of
22 magnitude, and the defendant contributing the funds
23 as well played into -- played into where the money
24 went to some extent.

25 Q But the homeowners could not have

1 collected a dime for damage to their windows and
2 doors, the homeowners that let -- the homeowners
3 association?

4 A After Judge Newman's order, the regime
5 could not collect any money for the windows and
6 doors had they not gotten the assignments from those
7 owners.

8 Q Okay.

9 A As I said earlier, the original intent of
10 the Landry suit was to be able to provide a more --
11 a fuller or more comprehensive release to the
12 developer. It was really never to line anybody's
13 pocket. It was really to provide a more significant
14 release and expedite settling this case.

15 THE COURT: Anything?

16 MR. MOONEYHAM: Yes, Your Honor.

17 RE-DIRECT-EXAMINATION

18 BY MR. MOONEYHAM:

19 Q I found a document -- actually, I didn't.
20 Ms. Pope did.

21 MR. MOONEYHAM: I'd like to have this
22 marked as Plaintiffs' Exhibit Number 6.

23 (Plaintiffs' Deposition Exhibit No. 6
24 was marked for identification.)
25

1 A Pursuant to fee agreement signed by the
2 owners of 41, which that is not correct. It really
3 is 40. The Bristol POA is to determine the
4 equitable allocation of the funds between the POA
5 and the unit owner plaintiffs.

6 MR. MOONEYHAM: So, Your Honor, this
7 document would seem contrary to the testimony
8 Ms. Vest just offered that the division of
9 money occurred in the courthouse. In fact,
10 that language says that the POA gets to divide
11 the money.

12 THE COURT: All right. Let me look at it.
13 Are you familiar with it?

14 MR. BARFIELD: Yes, sir.

15 THE COURT: I'm not sure it says what you
16 said it says, but --

17 A ~~I think it says, please don't sue us~~
18 because you didn't get what you thought.

19 MR. MOONEYHAM: Your Honor, I do --

20 THE COURT: I don't know that it's
21 significant, but the Court wasn't allocating
22 any money.

23 MR. MOONEYHAM: Right. That was the point.
24 I was trying to make.

25 THE COURT: It was basically the

1 plaintiffs' lawyers, because I'm sure no
2 defense lawyer cares who got his money. He
3 just wanted a release. And without getting a
4 release for the windows and doors, there's no
5 settlement. I mean I think we can all agree to
6 that. That was the elephant in the room with
7 the windows and doors, even more so than the
8 stucco. Because if you don't replace all the
9 windows and doors, you don't replace all the
10 stucco.

11 So if they're not going to get a release
12 for the windows and doors, there's not going to
13 be a settlement, period, of any kind. The
14 homeowners couldn't bring that suit. That had
15 to be brought by Landry. So --

16 MR. MOONEYHAM: But, no. The Landry
17 suit -- I beg your pardon, Your Honor. I don't
18 think the Landry suit had anything to do with
19 the --

20 BY MR. MOONEYHAM:

21 Q The Landry suit was for the interior
22 damage, right?

23 A That was the original intent of the Landry
24 suit.

25 Q And then once the association's lawyers

1 realized that they need to get this assignment
2 signed, the individual homeowners assigned their
3 rights to litigate the windows and doors issues to
4 the homeowners association, not the Landrys, right?
5 When you went scrambling around to get the
6 assignments.

7 A Those individual homeowners gave an
8 assignment to give their windows and door rights to
9 the regime.

10 Q To the regime?

11 THE COURT: To the homeowners?

12 A To the regime.

13 BY MR. MOONEYHAM:

14 Q Not to the Landrys?

15 THE COURT: Okay. That might be what she
16 said then. I'm not giving up yet. Okay. I
17 understand. All right. Anything else for this
18 lady?

19 MR. BARFIELD: No, Your Honor.

20 THE COURT: Thank you, ma'am. You can
21 step down.

22 (Off-the-record discussion.)

23 THE COURT: Let's put on the record the
24 motions -- any motions. First one, plaintiff.
25 Any motion from the plaintiff?

1 MS. POPE: No, sir.

2 THE COURT: From the defendant?

3 MR. BARFIELD: Well, if you'd like to --

4 THE COURT: I want you to give me the name
5 of your motion, and then if it suits you-all,
6 we'll combine your arguments on the motion and
7 arguments opposing the motion in the closing
8 arguments. And I'll let you go, you know,
9 whatever you want to cover in that if that's
10 okay.

11 MR. BARFIELD: Yes, sir.

12 THE COURT: But let's get the name of your
13 motion that you want to make. That will
14 protect the record.

15 MR. BARFIELD: Okay. Well, the defendants
16 would present a motion for directed verdict,
17 Your Honor, based largely in the same arguments
18 that we raised in our summary judgment motion.
19 First, that the derivative action argument.

20 Secondly, we make -- we base the motion on
21 the business judgment rule.

22 Thirdly, specifically with regard to the
23 claim for attorneys' fee, and that may be
24 subsumed within the summary judgment motion we
25 made, but we don't believe that there is any

1 cause of action raised that would permit the
2 recovery of attorneys' fees.

3 I guess next with regard to the damages
4 claim specifically related to the -- him
5 seeking recovery of the amount of the special
6 assessment, we would say he's not entitled to
7 that because he hadn't paid it yet.

8 With regard to breach of fiduciary duty,
9 we'd argue as a matter of law that they have
10 not proven that cause of action by clear and
11 convincing evidence, which is the legal
12 standard. And then generally speaking, no
13 proof of damage on any -- of the cause of
14 action and no evidence of -- there's been no
15 evidence of negligence.

16 THE COURT: Okay. First should be -- go
17 ahead.

18 MR. BARFIELD: And I just say, finally, we
19 still -- to the extent that we are still
20 dealing with the pleadings that are before the
21 Court, I don't think that they've proven the
22 surviving cause of action set forth in those
23 pleadings based on the facts set forth in those
24 pleadings.

25 THE COURT: And I believe Judge Nicholson

1 did away with the conversion, the trespass and
2 the detainer?

3 MR. BARFIELD: Yes, sir.

4 THE COURT: Okay. Any questions about the
5 motions, Ms. Pope -- I mean, and you agree,
6 we're just going to incorporate all your
7 arguments on your behalf and opposing to the
8 motions and closing argument all into one?

9 MS. POPE: Yes. That's fine.

10 THE COURT: And we've got both parties
11 here. We've got plaintiff and defendant, and
12 we've got plaintiff as a suit. So I'll -- I
13 mean I'll let you argue basically as long as
14 you want to go back and forth. I don't care
15 who goes first.

16 MS. POPE: That covers --

17 THE COURT: But I mean I want you to be
18 heard. This is your day in court. Okay?

19 MS. POPE: Thank you.

20 THE COURT: And so I want you to have that
21 opportunity to be heard on any issue that you
22 want heard, however we do it.

23 MS. POPE: Thank you.

24 THE COURT: So I guess we'll go with
25 the -- you want to go with the plaintiff first,

1 then the defendant, then the plaintiff?

2 MS. POPE: That's fine with me.

3 THE COURT: Then if the defendant wants to
4 reply, fine. That's -- I won't have a problem
5 with that. All right.

6 MS. POPE: Okay. Thank you, Your Honor.
7 I'm going to basically really just jump into
8 the heart of the matter. Our trial brief that
9 we submitted, and I think the defendants would
10 agree, that laid out the procedural history and
11 a good bit of the facts that were agreed upon
12 by both parties. And we spent substantial time
13 talking about those, and you received lots of
14 information prior to today that briefed you on
15 a lot of that as well.

16 THE COURT: That reminds me. We need to
17 introduce them into the record, if we hadn't
18 already done so by deposition.

19 MR. BARFIELD: Yes, sir. And our
20 exhibits, which I have in the same format as
21 the plaintiffs' exhibits.

22 THE COURT: It won't take but a second.
23 Let's do that now. So that's your defense
24 exhibits.

25 MR. BARFIELD: Yes, sir.

1 THE COURT: Give them to her and let her
2 mark them. That will be Defendants' 2.

3 (Defendants' Deposition Exhibit No. 2
4 was marked for identification.)

5 THE COURT: And the deposition of --

6 MS. POPE: Craig Tallberg, T-O-L-B-E-R-G.

7 MS. VEST: T-A-L-L-B-E-R-G.

8 THE COURT: Start with a T?

9 MS. POPE: It does start with a T, and the
10 first name is Craig.

11 THE COURT: All right. And there's no
12 objection receiving that as testimony into the
13 trial?

14 MR. BARFIELD: None at all, Your Honor.

15 THE COURT: All right. Go ahead.

16 MS. POPE: Thank you. Thank you, Your
17 Honor. What I'll do is we're just going to get
18 right to the heart of the matter and not go --
19 as I said before, not go through all the
20 procedural history and some facts that we all
21 have stipulated to and agreed to.

22 One of the issues that -- and has been
23 discussed in great detail through testimony,
24 through testimony that's been presented by way
25 of deposition prior to and through Dr. Lucas'

1 deposition, one of the issues deals with the
2 breach of fiduciary duty that we believe was
3 owed to Dr. Lucas and that we believe was not
4 fulfilled by the board members.

5 One aspect of that that's been discussed
6 in great detail is unfair assessments, and as
7 we have stated through our trial brief, but has
8 also been discussed through testimony, is the
9 South Carolina Horizontal Property Act,
10 specifically sections 27-31-60 and 27-31-190.

11 Specifically 27-31-60 states, in part,
12 equivalent to the percentage representing the
13 value of the individual apartment is dealing
14 with coming up with values to property. And it
15 says that the percentage shall be computed by
16 taking as a basis the value of the individual
17 ~~apartment in relation to the value of the~~
18 property as a whole.

19 Now, of course, both sides don't agree on
20 how the value of that condo at the Bristol has
21 been determined. There have been comments made
22 and references made back to the value that
23 stated within the horizontal -- within the
24 master deed.

25 What we argue is that it is -- the way

1 that the assessments are done and presented on
2 the homeowners is unfair, and it is
3 fundamentally unfair in the fact that you have
4 homeowners who have condos that are more
5 expensive, and they get treated the same as
6 condos that are less expensive.

7 So instead of the value of the condos
8 being the true market value, tax value of the
9 condos being taken into consideration when
10 they're doing these assessments, it is an
11 assessment that is across the board, which
12 creates an unfair assessment. Because, like I
13 said just a moment ago, you have more expensive
14 condos getting a benefit of being treated the
15 same as condos that are not as expensive.

16 So we would make that argument that the
17 assessments that are made on the homeowners
18 have been unfair. The only assessment that has
19 taken into account even partially what the size
20 of a condo may be is the window and doors
21 assessment when they took in the number of
22 windows and doors that the condos had.

23 That's the only evidence that we have seen
24 that the board has actually taken into
25 consideration the difference and the difference

1 in the value of the condos. Now, that doesn't
2 mean that there have not been homeowners
3 besides Dr. Lucas that has complained about
4 that issue.

5 Through testimony that you have received
6 prior to the trial beginning, the depositions
7 that were submitted as trial testimony that you
8 have been able to review, there are numerous
9 homeowners that have complained.

10 You have Ken Hanger stated that he had
11 made a suggestion that the assessments be done
12 a different way. Craig Tallberg has made that
13 suggestion. I believe Johan Princ was one that
14 had made that suggestion. So there's multi
15 homeowners who have complained about the way
16 the assessments are being done besides Dr.
17 Lucas, but those complaints, concerns,
18 inquiries have basically been shut down,
19 ignored. And they want to keep the thing the
20 way it's always been done, do the same way they
21 have been doing it.

22 The homeowners took over responsibility
23 for the management of the Bristol in August of
24 2006. Jan Landry yesterday testified for quite
25 some time. She was initially on that board.

1 She was the vice president, and then she became
2 the president. You heard testimony about her
3 extensive experience in dealing with property
4 associations, finances and her belief on how
5 boards should run homeowners associations.

6 Her belief in how it should be run is very
7 different from how it is run today in the
8 belief of the new board that's on board. The
9 new board believes in transparency. The new
10 board believes in having open board meetings.
11 The new board believes in trying to communicate
12 better with the homeowners.

13 Prior to this new board that's been
14 elected and has been running Bristol, the
15 original board, and you heard Ms. Landry
16 testify, that she believed that transparency
17 is -- I'm trying to think of the exact word, is
18 foolish. And that there should be executive
19 sessions. There should be things that the
20 board should meet on and be privy and that
21 homeowners should not basically is the attitude
22 that she had.

23 And that's the attitude that the original
24 board took when dealing with homeowners. The
25 communication has not only been a complaint of

1 Dr. Lucas, but communication with the
2 homeowners have been the complaint of numerous
3 homeowners.

4 There's testimony that shows that Ken
5 Hanger testified that he didn't attend some of
6 the board meetings initially because they were
7 off campus. They didn't have them at the
8 Bristol.

9 Johan Princ was another one that stated he
10 didn't understand why they weren't having them
11 at the Bristol, wanted them to have them at the
12 Bristol. He also testified that it was a
13 disadvantage to the homeowners because they
14 weren't given the agenda of the meeting until
15 they showed up. And that if they wanted to
16 attend the meetings, that they had to provide
17 ~~in writing to the board that they planned to~~
18 attend prior to attending the meeting.

19 If that's not making it difficult for
20 homeowners to be involved with the board and
21 being involved in decisions going on, I don't
22 know what is. And then in addition to that,
23 there were times when they didn't even know
24 that the board was going to meet. They didn't
25 get the communications or they got them too

1 late. They weren't timely.

2 In fact, there was an exhibit presented
3 during the testimony that stated that there was
4 going to be a meeting about the construction
5 litigation issues, and at point blank says on
6 it, sorry about the late notice.

7 And it was a notice that was slid under
8 doors and put on the bulletin board. And
9 testimony from Ms. Landry and others
10 recognizes -- the board recognized that many of
11 the homeowners used those condos as second
12 homes. They weren't there all time.

13 So if you're sliding it under the door,
14 you're putting it on the bulletin board,
15 they're not going to see it. So
16 communication's been a problem throughout, and
17 it's -- the board owes a duty to the homeowners
18 to communicate with them so that they can make
19 informed decisions about votes, if they're even
20 going to be able to get a vote.

21 One of the other issues in dealing with
22 communication, and not only communication to
23 the homeowners, but also not complete truth and
24 not complete communication deals with the
25 master deed, changes to the master deed. And

1 that has been a big issue, obviously, for Dr.
2 Lucas, but it was an issue for others too.

3 Cindy Mulcare's testimony -- she is the
4 agent -- insurance agent that we kept referring
5 to her letter over and over again, the letter
6 which stated that she didn't state that the
7 Bristol was uninsurable. She just stated that
8 there might be issues with claims.

9 Cindy Mulcare testified that she is the
10 one that was approached by members of the board
11 of the Bristol to look at the master deed,
12 because there were concerns about issues with
13 the windows and doors in the litigation. That
14 was her testimony.

15 The board presented to the homeowners and
16 gave the impression that the insurance agent
17 looked at the master deed, oh, my gosh, there's
18 this problem. She approached us with this had
19 to be fixed, homeowners. We had to take
20 emergency action all because there were going
21 to be insurability issues.

22 And Cindy Mulcare's testimony is the total
23 opposite of that. She testified, as I just
24 said, that she was approached to look at the
25 master deed because there were concerns and

1 issues dealing with the litigation and the
2 windows and doors.

3 In fact, she says, Cindy Mulcare was told
4 by the board that they needed a letter about
5 the master deed and was informed it was related
6 to the lawsuit over the windows and doors.
7 That is specifically what she states in her
8 deposition.

9 In addition to that, there's been
10 testimony that there was no effort done by the
11 board to find out which homeowners had
12 insurance to cover their windows and doors.
13 Dr. Lucas testified that he understood
14 completely that he owned his windows and doors,
15 and, therefore, he became the responsible
16 homeowner.

17 As testimony was given today, that it was
18 the homeowner's responsibility to make sure
19 they were properly insured. Well, he did that.
20 He made sure that he was properly insured. Jan
21 Landry testified that she assured that her
22 husband made sure that they had the proper
23 insurance, and she understood that they owned
24 their windows and doors.

25 Harold Campbell, who is -- was a homeowner

1 at the Bristol and is a State Farm Insurance
2 agent, testified that not only did he, of
3 course, cover -- provide a policy for himself,
4 but he also provided policies for five to six
5 other homeowners at the Bristol and provided
6 them with insurance. And he testified that he
7 made sure that his policy covered any damage
8 that happened to his windows and doors. And he
9 further testified that the five to six people
10 that he covered at the Bristol also had
11 insurance for their windows and doors, because
12 the master deed gave them ownership, and they
13 were responsible for them.

14 But the board never took on the
15 responsibility of going out, finding out who
16 was insured, who wasn't, before they just made
17 ~~the unilateral decision, hey, we're changing it~~
18 because we need to for the master deed, for
19 being able to get insurance coverage.

20 As you know, we've made the argument that
21 they did that because they wanted to do it from
22 a litigation standpoint. True. The summary
23 judgment motion was not filed until a later
24 date to have the windows and doors excluded
25 from the homeowners association lawsuit.

1 However, Jan Landry, who was heavily
2 involved in the process to investigate whether
3 to file suit and was involved heavily in the
4 initial filing of the lawsuit in the initial
5 process of the lawsuit up until 2008, she
6 testified yesterday that prior to filing the
7 lawsuit and after the filing of the lawsuit,
8 there were discussions and concerns about how
9 the master deed and the windows and doors
10 section of that was going to affect the
11 litigation.

12 It had been a concern from the beginning,
13 and it was concern after the lawsuit was filed
14 as to how they were going to handle that
15 situation. So it is our argument that the
16 homeowners association, the board, was trying
17 to head off that problem that was going to come
18 up later on down the road and try to make that
19 change to the master deed and did so without
20 being totally honest with the homeowners.

21 Craig Tallberg, who is now sitting on the
22 board, he's been on the board for the past
23 couple of years I do believe, his testimony --
24 you will see from his testimony, he's one of
25 the really big ones pushing for transparency.

1 The reason why he is doing that and pushing
2 that, according to him, is that you really
3 didn't know what was going on with the board.
4 You really didn't know what was going on with
5 the lawsuit. You didn't know what was going on
6 with finances if you were not in the inner
7 circle, and that's what he called it, the inner
8 circle.

9 He testified that he didn't know that the
10 judge had ruled that the homeowners association
11 couldn't sue for the windows and doors until
12 after that was done. He didn't understand
13 fully what the issue was with the windows and
14 doors and the homeowners association, didn't
15 understand fully how that affected -- the
16 litigation issue affected the master deed. He
17 just said the homeowners didn't know what was
18 going on.

19 In addition to all of that, as far as the
20 communications go, Johan Princ also complained
21 that the homeowners were not being made aware
22 of the financial situation at the Bristol in
23 general. Inquiries were made. They were not
24 provided information. He would -- he said that
25 he thought that that was a big concern, that

1 the homeowners didn't know what was going on
2 with the money.

3 Johan Princ actually I think later became
4 a board member, but at the time initially in
5 the beginning, when he was not a board member,
6 had complaints about the finances and the lack
7 of communication.

8 And there was also an exhibit that was
9 discussed yesterday during Ms. Landry's
10 testimony, which was an e-mail from her to Lona
11 Vest in regards to a communication going out to
12 the homeowners, is it going to e-mail. Is it
13 going by mail. And even made the comment, I'm
14 sure our homeowners have hundreds of pieces of
15 mail under their door by now.

16 That's just a constant theme throughout
17 that the initial board's control of the
18 homeowners association in that there was no
19 communication, and if it was, it was a partial
20 communication. And not only Dr. Lucas, but
21 many homeowners complained about that issue and
22 the off-campus meetings.

23 During the construction litigation, I
24 think this is interesting, lots of the
25 homeowners wanted to know what was going on.

1 Not only at the litigation part of it, but when
2 the settlement was going on, mediation was
3 going on. Craig Tallberg testified, and I'm
4 not sure if I'm saying that right still or not,
5 testified that he attended the mediation,
6 wanted to attend, he and two other homeowners.
7 They actually attended the first day of
8 mediation. The second day of mediation, they
9 were escorted out and told that they could not
10 be there because they were not part of the
11 board mediation team. And he and two other
12 homeowners were escorted out and not allowed to
13 stay for the mediation. And that was an issue
14 that he brought up and that he complained
15 about.

16 Dr. Lucas testified that once there was a
17 ~~settlement, there was going to be~~
18 reconstruction started, that he had requested
19 information so that he could make an informed
20 decisions about votes. He didn't get any
21 information. That he had his attorney write to
22 get information and didn't receive information.

23 That he stood up and he read the letter at
24 the meeting about requesting information and
25 still didn't receive information. He wanted it

1 so that he could make an informed vote.. He
2 thought that he deserved that information and
3 didn't get it.

4 It was at that point later and following
5 the threat of the foreclosure that he decided
6 to file suit, other examples of failure to
7 communicate properly with homeowners so that
8 they can be fully aware and make informed
9 decision about what to do.

10 In addition to the communication, there's
11 been other issues with mismanagement of funds,
12 just not managing the Bristol properly period.
13 One of those issues dealt with the insurance
14 refund that we've discussed that has been
15 testified to. There was a flood premium
16 insurance refund that was given back to the
17 Bristol. It was in the amount of \$171,000.

18 And instead of giving that back to
19 homeowners, or even letting the homeowners vote
20 to decide what to do about it, the homeowners
21 were just told that this money was going into
22 the reserve fund. And testimony shows that
23 that money was actually then taken and used for
24 construction litigation and expenses related to
25 that, the ongoing lawsuits, all of them.

1 So the homeowners were never given an
2 opportunity about that. And some homeowners
3 actually through testimony you'll see weren't
4 even aware of what the amount of the refund was
5 until this litigation took place.

6 Another --

7 THE COURT: How was Dr. Lucas damaged by
8 the way that refund was applied?

9 MS. POPE: Well, our argument would be
10 that he was damaged because he was entitled to
11 that, because he had paid into that premium.
12 And he was entitled to a portion of that,
13 refunded back to him, instead of going into the
14 litigation cost to fund the three lawsuits. So
15 a portion of money belonged to him. It should
16 have been refunded to him.

17 ~~THE COURT: Well --~~

18 MS. POPE: As the others as well.

19 THE COURT: -- would you not have to
20 consider the fact that had it not gone into
21 paying the litigation, there would have had to
22 been an assessment to pay that same amount of
23 money to the -- support the litigation? I'm
24 trying to get a measure of damages.

25 Now, suppose he was due \$500 back or

1 \$1,000 back. That's \$1,000 less available to
2 support the litigation, which has got to be
3 made up somewhere. That's not going to change
4 the amount it costs to litigate. Plus, the
5 testimony was that part of that money was going
6 to have to go back to the beach company, which
7 would have further depleted the reserve, which
8 would have raised his assessment even more than
9 the amount of his refund.

10 So that's my question is just strictly to
11 damages, if they were wrong in not doing that,
12 what are his damages?

13 MS. POPE: Theoretically, the argument was
14 made that the reason why they kept that was
15 because part of the money would have to go back
16 to the beach company, but there's been
17 testimony that the beach company underfunded
18 the reserve in excess of \$300,000.

19 So I believe, and that the board had a
20 very strong argument to state to the beach
21 company, we got this refund and if you're
22 entitled to \$100,000 of this refund, we are
23 keeping that because you underfunded the
24 reserve. And we are entitled to that money.
25 That money can go to the reserve fund, and then

1 basically divide among the individual
2 homeowners, which Dr. Lucas would have been
3 entitled to some of that money.

4 THE COURT: Okay. All right. Thank you.

5 MS. POPE: You're welcome. The issue
6 of -- there's been a lot of talk about the
7 replacing of windows. Could you have done a
8 treatment or do they all need to be replaced,
9 and we've heard a lot of that back and forth.
10 The testimony and information that's been
11 provided is that the difference between the
12 cost for the windows that they purchased and
13 replaced and the cost of doing a treatment to
14 the windows, the difference between doing those
15 two processes was approximately \$400,000.

16 Craig Tallberg testified that he thought
17 that the homeowners should have been able to
18 have that opportunity to vote whether to do the
19 treatment or do the replacement, and that the
20 board didn't agree.

21 So an opportunity to save the homeowners
22 \$400,000 was not even made -- that information
23 wasn't even made available to the homeowners.
24 That was found out by the homeowners much
25 later. Some of them through this litigation

1 found out that option.

2 In addition to that information, David
3 Warner will -- he testified that there were --
4 make sure I get this right. He stated that
5 there was about 80 out of the 400 windows at
6 the Bristol that had problems. And you'll
7 remember he was board president during the time
8 of lot of this was going on. So you have
9 approximately 400 windows at the Bristol, and
10 he said that there were only about 80 that had
11 problems.

12 And that he also went on to say that the
13 board members who voted for the full
14 replacement, rather than the treatment repair,
15 had construction issues in their condos.

16 Dave Landry, Jan Landry's husband, she
17 testified yesterday that he came on and took
18 her place on the board when she resigned in
19 2008. He actually came on and then later --
20 shortly after that, became president. He
21 testified that there was information not given
22 to the board. Specifically, there was a
23 form -- a Bristol construction defect
24 litigation cost projection that laid out the
25 benefits, pros and cons of contingency versus

1 hourly, what they project -- the board
2 projected what the litigation may cost. And
3 this was a worksheet that the board was using.

4 And he stated that that was never
5 presented to the homeowners, and he, I quote, I
6 will anticipate this is early on, and the board
7 probably did keep it to themselves.

8 In addition, he testified that during the
9 litigation that there was money being moved
10 around everywhere. Craig Tallberg testified
11 that during the litigation process, there was
12 money being taken from operating reserve, here,
13 there, everywhere, to pay attorneys' fees and
14 costs of the litigation.

15 Johan Princ raised concerns about how the
16 litigation fund was being handled, how the
17 ~~reserve fund was being pulled from, drained to~~
18 fund the litigation. He raised that at a board
19 meeting, and he said that the board's response
20 was that the lawsuit will be over in six months
21 or so, and then we have the money. And then we
22 can take a look at the picture again.

23 Well, we all know that the reserve fund
24 gave money to the construction litigation fund
25 in the amount \$325,000, and it's never been

1 paid back. We know that the operating fund is
2 still owed \$55,000 from money that was used for
3 the construction litigation that's never been
4 paid back.

5 So not only did Dr. Lucas have concerns
6 about the money, but other homeowners did as
7 well. And Dave Landry testified that -- he was
8 the treasurer in 2009, and he testified that
9 they were spending money, and I quote, we were
10 spending money on things we shouldn't have been
11 spending it on.

12 There was also -- during the time of the
13 litigation beginning, there was a \$300,000 line
14 of credit that was taken out to help fund the
15 litigation process, and the evidence shows, and
16 the testimony shows, that that \$300,000 line of
17 credit was paid back. Some of it out of the
18 settlement proceeds, and then some of it I
19 believe over a time later on. But it was a
20 loan that was paid back, where as the reserve
21 fund and the operating account funds were not.

22 There is also the issue that's been
23 discussed a lot about the Hanger lawsuit and
24 piggy backing on the homeowners association
25 lawsuit and the Landry lawsuit. The board is

1 the one that -- when it came time for
2 settlement, the board is the one that allocated
3 the settlement funds. They allocated a portion
4 towards the Landry lawsuit. They allocated a
5 portion towards the Bristol property owners
6 association lawsuit. The board is also the one
7 that made the decision not to pursue any money
8 from the Hanger participants to repay the
9 homeowners association for costs and expenses
10 that the association incurred as far as
11 pursuing the lawsuits.

12 So instead of -- I think the figure was
13 close to 300,000, I believe that the -- may
14 have been a little more than that, that the
15 Hangers -- that was their net amount for the
16 Hanger lawsuit, and the board chose not to have
17 that money put into the fund to help with the
18 construction litigation.

19 So that's another decision that they made
20 that as far as allocating funds as to how to
21 spend money was not one that we believe was
22 appropriate and fair.

23 I touched on the amendment to the master
24 deed, fourth amendment. Bear with me please.

25 THE COURT: Sure take your time.

1 MS. POPE: And I'll touch on that -- I
2 want to point out something that Ms. Mulcare
3 also stated in her deposition testimony. That
4 in dealing with the master deed issue and the
5 fourth amendment and her looking at it and the
6 windows and doors, she stated that in her
7 testimony that someone on the board of
8 directors had a problem with the owners owning
9 their window and doors. And that that was
10 going to be presented to the board, and that
11 was going to be a change.

12 So clearly Ms. Mulcare's recollection of
13 why she was approached and a lot of what had to
14 do with her looking at the master deed and the
15 change was because of the litigation and the
16 windows and doors, not because of the insurance
17 issue, as the board would like for everyone to
18 believe -- or wanted everyone to believe.

19 The foreclosure issue. Dr. Lucas filed
20 his lawsuit in 2010. He contested, as we know,
21 special assessments. He contested the reserve
22 fund assessments. He made allegations against
23 the board as to how they were handling issues,
24 not handling issues.

25 And then a year later, that board makes

1 the decision to foreclose on his property, and
2 they foreclose on his property for the same
3 reason why he filed his lawsuit a year before.
4 He's contesting a debt that they say he owed,
5 and instead of waiting to see the outcome of
6 his lawsuit as to whether he should have to pay
7 those assessments or not, they go ahead and
8 foreclose on his property.

9 He files his lawsuit. He's not backing
10 down. He's going to move forward with it, and
11 we take the position that the board wanted to
12 basically bully him and threaten and scare him.
13 And they knew what they were doing. They
14 intentionally chose to harass this man, because
15 he was standing up to them. He already filed
16 his action. He's contesting those debts, and
17 ~~they still foreclosed on his property for those~~
18 same debts.

19 He filed an answer and a counterclaim to
20 that foreclosure action, and those have been
21 made exhibits to our trial brief, and you can
22 see his counterclaim is basically the same
23 claims and actions that he filed a year before,
24 because it's -- it was all related.

25 Following the filing of that foreclosure

1 action was when he started having to vigorously
2 defend himself against that foreclosure action.
3 He incurred, he testified, approximately
4 \$100,000 in fees and costs following the filing
5 of that foreclosure action. He had title to
6 his property. He couldn't do anything with it.
7 He was a prime target, one, because he wasn't
8 backing down to them, but because he had free
9 and clear ownership of his condo.

10 There was no mortgage to stand behind. He
11 was standing up to them, he wasn't backing
12 down, and they wanted to make an example of him
13 and prove a point. There was testimony today
14 that there have been nine foreclosure actions
15 at the Bristol. Only two of those foreclosure
16 actions -- let me back up. I'm sorry.

17 There were nine individuals who owed money
18 and owed fees and not paying regime or special
19 assessment, and some of those I believe was in
20 excess of \$90,000, most of them in excess of
21 what Dr. Lucas was claimed to have owed at the
22 time his foreclosure action was filed.

23 Only one other foreclosure was filed by
24 the board. A deal was worked out. Payments
25 were made, and they released that foreclosure.

1 Dr. Lucas was paying his regime fees. The only
2 thing he was not paying were the fees that he
3 was contesting, and he is the one that was
4 singled out and had a foreclosure filed against
5 him. And we believe the evidence shows and the
6 testimony shows that it's because he was
7 standing up to them and contesting them,
8 actually fighting them and wasn't backing down.

9 The testimony that's been provided through
10 the trial and through exhibits and deposition
11 testimony, there was special assessments in the
12 amount of \$11,646. Now, one of those being an
13 assessment for \$1,896 that Dr. Lucas did pay.
14 Those are assessments that are related to the
15 litigation, the construction litigation.

16 We've already hit on the fact that there's
17 ~~the outstanding loan reserve and operating~~
18 accounts in the amount of \$380,000. They have
19 never been repaid. The litigation expenses
20 associated with the construction lawsuit are
21 \$1,380 -- no. \$1,380,962.80. Did I get that
22 right? Yes. Okay.

23 The cost incurred by Dr. Lucas in
24 defending the foreclosure action has been
25 approximately \$100,000 that he's incurred in

1 having to defend that, and we believe that -- I
2 know there's an argument being made that he's
3 not entitled to attorneys' fee and costs. But
4 one, we believe that that was a frivolous
5 action, that it never should have been filed in
6 the first place. And that he had to incur
7 those costs in order to defend against the
8 foreclosure action, to keep it from going
9 forward, and also to pursue the counterclaims
10 that he had against that foreclosure action.
11 So those are expenses that he has incurred in
12 doing that.

13 The difference between the cost between
14 buying the -- replacing with new windows and
15 doors and doing the other alternative, which
16 would have been to do the kit, the
17 retrofitting, that was about \$400,000, the
18 difference between those two amounts.

19 There's the insurance premium refund of
20 \$171,000. I believe that covers everything. I
21 probably went a lot longer than I had intended.

22 THE COURT: No. You go right ahead.

23 MR. MOONEYHAM: If I could have a moment
24 to -- and I will speak to the argument of a
25 derivative action, derivative claim, in that

1 the damages and claims that Dr. Lucas is making
2 are not individual to him. We made argument
3 that they are. It's not a derivative action
4 because you have -- you have a group of people
5 within that group. Some have been treated
6 better than others.

7 And so Dr. Lucas being one of the ones
8 that has not been treated fairly and not
9 treated as well as others within the group. So
10 his claims are derivative. They're individual
11 to him, and we feel that he has sustained
12 individual damages that have been testified to
13 and presented here.

14 And my co-counsel says I got everything.
15 So I conclude at this time, and I'm sure I will
16 have some remarks in response to defense
17 counsel.

18 THE COURT: Sure. I was just looking at
19 my notes here.

20 MS. POPE: Oh, and the assessment for the
21 windows and doors, I'm sorry, to Dr. Lucas was
22 approximately \$31,000. I think I failed to
23 mention that one.

24 THE COURT: All right, Mr. Barfield.

25 MR. BARFIELD: May it please the Court?

1 THE COURT: Yes, sir.

2 MR. BARFIELD: Your Honor, let's see where
3 to start. I think probably the best place to
4 start is where we started at the beginning of
5 this, and I'd be remiss if I didn't -- harken
6 back to the theme of the case that Dawes
7 articulated yesterday morning, which is there
8 are people that are comfortable living in a
9 horizontal property regime, and there are
10 people that will never be comfortable living in
11 a horizontal property regime.

12 And there's no right or wrong to that.
13 It's just the way people are put together, and
14 the way they can live with one another. And
15 I'll submit to you, and I think probably Dr.
16 Lucas wouldn't disagree that at the end of this
17 whole rigmarole, he's probably not a person who
18 is happy living within a horizontal property
19 regime.

20 I know I'm not. That's why I don't.
21 Horizontal property regimes are set up to be a
22 representative form of government, just like
23 most democracies. There's only so much that
24 you can put to a referendum before it gets too
25 unwieldy. And so that's why in government and

1 in horizontal property regimes and in
2 corporations, we elect representatives to
3 perform due diligence and make the tough
4 decisions on our behalf. And that's exactly
5 what the evidence in this case has shown was
6 done by the various boards of directors at the
7 Bristol.

8 You know, I own stock in -- I don't know
9 what corporations I own stock in. You've got
10 mutual funds at -- who knows how many
11 corporations I own stock in, but if I found
12 out, I could go to a shareholder's meeting all
13 day long. And I can get information from those
14 corporations all day long, everything that's
15 subject to disclosure. But they sure wouldn't
16 let me go to a board of directors meetings of,
17 ~~say, Bank of America and vote on everything.~~
18 I'm not a director of that corporation.

19 And there were boards of directors at the
20 Bristol, and there are members at large who
21 were, in essence, corporate shareholders, and
22 certain things were put to the vote of the
23 associations, and certain things had to be done
24 by the directors.

25 And so the law sets forth a frame work for

1 how we measure the actions of corporate boards,
2 and that measure is called the business
3 judgment rule. And we have outlined a lot of
4 case law in our pretrial brief, but --
5 regarding the business judgment rule, but I
6 think it probably bears highlighting here just
7 briefly.

8 In essence, the business judgment rule
9 immunizes management from liability and
10 corporate transactions undertaken by management
11 where there is a reasonable basis to indicate
12 the transaction was made in good faith.

13 In the dispute between the directors of a
14 homeowners association and aggrieved
15 homeowners, the conduct of the directors should
16 be judged by the business judgment rule, and
17 absent a showing of bad faith, dishonesty or
18 incompetence, the judgment of the directors
19 will not be set aside by judicial action.

20 And then one other point I will add is
21 that the business judgment rule creates a
22 higher standard of proof in these kinds of
23 cases. You have to show that the business
24 judgment rule was violated by clear and
25 convincing evidence, and we would submit to the

1 Court that the record in this case shows
2 that -- shows no evidence of bad faith on the
3 part of any board of directors at the Bristol.

4 We understand and we sympathize that Dr.
5 Lucas, and at varying times, others as quoted
6 by the plaintiffs a moment ago, have disagreed
7 with certain actions taken by the board of the
8 Bristol. I would counter that by saying that
9 serving on a homeowners association board is a
10 thankless job, and I never want to do it. And
11 so I applaud those that are willing to do that,
12 and I think the record in this case has shown
13 that those who have served on the Bristol board
14 through what was a very difficult and
15 tumultuous time did so to the best they could
16 and did so in good faith, and acted in what
17 they believed to be best interest of the
18 association.

19 And that's what the law requires of them.
20 It does not require perfection. People are
21 always going to disagree. There were will
22 always be dissenters, but that's just the way
23 this kind of thing works.

24 So again, we have to look at everything in
25 this case under the umbrella of the business

1 judgment rule.

2 The second point I want to bring out is to
3 simply reraise our argument with regard to this
4 being more appropriately a derivative action.
5 I respectfully disagree with what Kelly has
6 said about there being individual damages. I'm
7 at a loss to figure out what -- I'm at a loss
8 figuring out if there are any damages in this
9 case, but if there are any, what damages are
10 unique to Dr. Lucas.

11 And as I read the case law that applies to
12 derivative actions and trying to parse out what
13 is derivative and what is individual, if --
14 even if there is a minority of shareholders who
15 collectively have incurred the same kind of
16 damages because of corporate action, then that
17 must be brought as a derivative action.

18 An individual may only bring action
19 against a corporate board of directors in his
20 own name if he has been singularly aggrieved.
21 And really, as I read the case law, they have
22 to be targeted. It almost has to be an ultra
23 vires kind of targeting of an individual for --
24 with -- you know, there's no requirement of
25 intent, but in trying to conceive of how an

1 individual may incur those kinds of damages, I
2 can only think of intentional harm as something
3 that will qualify.

4 So again, I don't believe they have proven
5 that he has any individual damages that are
6 unique to him. I hate to argue elements of
7 causes of action, but since we're sort of
8 wrapping closings up with a directed verdict, I
9 feel I at least need to touch on that.

10 You know, we're bound by the pleadings in
11 the case, and so one of the causes of action
12 that Your Honor must apply to facts as
13 presented to, the first one is breach of
14 fiduciary duty. I don't think there's been any
15 evidence at all to suggest that the boards at
16 the Bristol breached a fiduciary duty here, and
17 ~~I'm not entirely sure what it is -- what~~
18 conduct that they contend qualifies as breach
19 of fiduciary duty. But again, that must be
20 judged under the business judgment rule, and
21 I've covered that. /

22 Second is negligence. Well, again, I'm
23 not sure what evidence has been presented in
24 this trial to show that anyone acted
25 negligently. What we have heard at length is

1 testimony that the board was charged with
2 weighing competing considerations, and they had
3 to make some tough decisions. Sometimes those
4 decisions were unpopular with some, but that
5 doesn't rise to the level of a negligent breach
6 of duty. And, once again, in order to recover
7 from negligence, you have to prove damages.
8 And I have not seen any evidence that Dr. Lucas
9 has incurred damages.

10 They have also alleged fraud, and I think
11 that that absolutely fails. Proving fraud is
12 tough, and there are specific elements that you
13 must prove. And our law is very particular
14 about those elements. I think they fail on the
15 very first one, which is showing that there was
16 a misrepresentation. I don't think there's
17 been any evidence whatsoever presented in the
18 record of this case to show that
19 misrepresentations were made directly to Dr.
20 Lucas.

21 Now, they say that there was some
22 obfuscation on the part of the board as to
23 certain facts, and we can argue whether or not
24 that actually occurred. But in order for Dr.
25 Lucas to occur -- to recover from fraud, he has

1 to show that a misrepresentation was made
2 directly to him, and there's been no evidence
3 of that.

4 But in addition to that, he has to show
5 that he relied on it, that he had a right to
6 rely on it, and that he was damaged as a
7 result. I'm sure I'm missing a couple of -- I
8 think there are nine elements, but those are
9 the high points here. Because I don't think
10 he's shown any of -- evidence of any of those.

11 And as with the business judgment rule, in
12 order to recover for fraud, you have to prove
13 the elements by clear and convincing evidence.
14 We certainly don't have that.

15 There's a cause of action for abuse of
16 process, and I think they tried to kind of roll
17 that up into this concept of it being a
18 wrongful -- well, wrongful foreclosure is not a
19 recognized cause of action in South Carolina.
20 Abuse of process is.

21 However, to the extent the law is very
22 clear on this, and Dawes and I were stung by
23 this not so long ago, at the hand of a very
24 wise judge, that in order to recover for abuse
25 of process, you have -- you can't recover for

1 abuse of process if the process was followed
2 through to its logical conclusion.

3 And so in the instance of a foreclosure,
4 had a foreclosure been filed for an improper
5 purpose and abandoned or aborted in its nascent
6 stages, then maybe they'd be on to something if
7 they could show damages as a result. But the
8 fact of the matter is the foreclosure action
9 was filed and yet here we are as part of this
10 trial.

11 And so they cannot recover for abuse of
12 process if that is what they base it upon. So
13 the notion that that's the vehicle through
14 which they might recover attorneys' fees is
15 wrong on a couple of levels. They can't -- I
16 don't believe attorneys' fees are recoverable
17 under abuse of process. They're certainly not
18 recoverable simply for successfully defending
19 against the foreclosure action. The reward for
20 defending a foreclosure action is you get to
21 keep your property.

22 And in addition to that, I would take
23 issue with the assertion that \$100,000 in
24 attorneys' fees were incurred, quote/unquote,
25 defending against the foreclosure. Those

1 attorneys' fees were incurred prosecuting Dr.
2 Lucas' claims against the Bristol. And, you
3 know, right or wrong, he kind of started the
4 fight.

5 I think I put in the pretrial brief that
6 every deposition in this case, except for Dr.
7 Lucas' deposition, which we noticed, was
8 noticed by Dr. Lucas. And you're probably
9 painfully aware at this point of how many
10 depositions were taken in this case, because
11 you've had to read most of them.

12 So their attorneys' fees claims are non
13 start. You know, I think you paid close
14 attention to the facts in this case, and so I
15 don't want to rehash all of the testimony.

16 THE COURT: Thank you.

17 ~~MR. BARFIELD: I thought you would like~~
18 that. Well, but I would merely say that
19 everything that Your Honor has heard over the
20 last two days and read leading up to this trial
21 must be filtered through the business judgment
22 rule, and I simply ask you to be aware, you
23 know, our position that these are lay people
24 that have done the best they could. And I
25 understand and appreciate that Dr. Lucas has

1 not been happy with what they have done, but
2 everything they have done has been legitimate.

3 There's been no evidence presented that
4 anything they did was a deviation from their
5 governing documents, which I think is a crucial
6 point, and, you know, these boards shepherded
7 the Bristol through a very difficult time. And
8 at the end of that process, they were able to
9 fix their building, which was a disaster from a
10 water intrusion standpoint.

11 And while there was somewhat of a
12 shortfall, it's much more palpable, I believe,
13 to the owners out there to have to pay a few
14 thousand dollars to make up that shortfall then
15 to have to come completely out of pocket
16 millions of dollars, which was the only
17 alternative, had they not pursued that
18 litigation to the degree in which they did.

19 Dawes -- don't shoot the messenger. Dawes
20 says you should watch the DVD, which is in
21 evidence now. He said if you do, that you will
22 see that they took a very methodical approach
23 to try and solve the problem, that they all
24 unwittingly inherited, because they all,
25 unfortunately, bought a bad building, and the

1 developer didn't do right by them.

2 So they did what they could do, and
3 apparently the DVD is good evidence of that.
4 That's all I have. Thank you, Your Honor.

5 THE COURT: Yes, ma'am?

6 MS. POPE: Very briefly, Your Honor. In
7 response to some of the arguments made and some
8 of the comments made by, so eloquently, by Mr.
9 Barfield, in regards to the business judgment
10 rule, it does say that they're supposed to act
11 reasonably, in good faith and honestly and
12 competently. And I believe I laid out
13 extensively in my closing arguments, presenting
14 evidence and testimony, rehashing some of that
15 shows that that just wasn't the case in this
16 particular instance.

17 ~~In addition to that, I will point out that~~
18 the South Carolina law states that parties in a
19 fiduciary relationship must fully disclose to
20 each other all known information that is
21 significant and material. And as the evidence
22 and testimony has shown, that, again, has not
23 been the case in this particular instance.

24 And one of the -- the attorneys' fees was
25 hit on in regards to the foreclosure action. A

1 lot of those depositions were taken because Dr.
2 Lucas had to vigorously defend himself against
3 the foreclosure action, and there were lots of
4 claims that he made in the counterclaim and his
5 answer in regards to the foreclosure action
6 that had to be established and had to be
7 determined.

8 I mean one of those was slander of title.
9 A lot of those dealt with the fraud. There was
10 a breach of fiduciary duty in there as well.
11 So a lot of work that was done prior -- I mean
12 after the foreclosure was filed was because he
13 had to defend against it, and that is a damage
14 that he has incurred.

15 And I'll end with a comment that Mr.
16 Barfield used, which was targeting an
17 individual. I think the evidence clearly shows
18 that the homeowners association targeted Dr.
19 Lucas. He was someone who, yes, was a
20 dissenter, but he was a dissenter that wasn't
21 going to go quietly. He was a dissenter that
22 was going to fight, and he was one that was not
23 going to back down and not going to give up,
24 because he believes it is the right thing to
25 do.

1 And because he didn't do that, they've
2 harassed him and bullied him and backed him
3 into a situation where he has had to spend a
4 lot of money defending him, and someone who has
5 had perfect credit, wonderful portfolio, has
6 now had the foreclosure action filed against
7 him.

8 So he was someone that we believe was
9 targeted by the homeowners association, and we
10 believe that the homeowners association should
11 be punished. Thank you.

12 THE COURT: All right. Thank you, ma'am.
13 I don't believe we formally introduced all
14 these other depositions that you want to make
15 part of the record. In fact, we've only got
16 one deposition introduced.

17 MS. POPE: I believe we -- did we make
18 those exhibits? I was under the impression --
19 I'm sorry. That's my fault. That they were
20 listed as tabs in exhibit to our trial brief,
21 and they were not, I don't think. They're
22 listed in our trial brief. Then I stand
23 corrected.

24 THE COURT: Well, I just think -- I mean I
25 don't think they're going to object to --

1 MR. BARFIELD: No, sir.

2 THE COURT: -- you introducing, but I
3 think you need to move to introduce.

4 MS. POPE: Yes.

5 MR. BARFIELD: And I need to do the same
6 with Dr. Lucas' deposition too.

7 THE COURT: All right. Any objection to
8 accepting Dr. Lucas' deposition as evidence in
9 this case?

10 MS. POPE: No, your Honor.

11 THE COURT: All right. You need to give
12 her one to mark.

13 (Defendants' Deposition Exhibit No. 3
14 was marked for identification.)

15 MS. POPE: Your Honor, I'd make a motion
16 to enter the following depositions as evidence
17 in this case, Bradford Sherlock, Dr. Kenneth
18 Hanger, Johan Princ, Harold Campbell, Troy
19 Herndon, Cindy Mulcare, David Landry, and David
20 Warner.

21 THE COURT: Any objection?

22 MR. BARFIELD: No, sir.

23 THE COURT: All right. They're admitted.
24 And there again, you probably have all the
25 originals, and that's -- I leave that up to

1 you, but that's the way to do it, just to give
2 her the originals.

3 MR. BARFIELD: Defendant would move to --
4 and I think may have already done it -- would
5 move to enter the deposition of Dr. John Lucas
6 into evidence in this case.

7 THE COURT: You just did it, and I grant
8 it.

9 (Plaintiffs' Deposition Exhibit No. 7
10 was marked for identification.)

11 THE COURT: There's one other thing, and
12 that's this duty to communicate. What is the
13 extent of that duty? What is that duty?
14 You-all want to address that very briefly in a
15 letter or something to me? I mean does that go
16 beyond the duty of good faith, and what you
17 ~~read didn't seem --- what you read about~~
18 disclosure, I'm not sure that applies as a duty
19 to communicate from the board to a stockholder.

20 And there may be some special duty of a
21 homeowners association board as opposed to a
22 Bank of America he was talking about. I don't
23 know that. I don't know the answer. I'm
24 asking that question, if there's some special
25 duty to communicate and what the extent of it

1 is. Because I don't think that duty to
2 disclose that you read is applicable to this
3 situation. I mean, certainly, if you -- if a
4 bank has acted as trustee, they have to
5 disclose to the beneficiary of the trust or the
6 trustor, whoever, any conflicts it might have,
7 any interest they might have, but that's not
8 what we're talking about here.

9 We're talking about the duty to
10 communicate the business of the corporation to
11 individual shareholders. And I'm not sure what
12 kind of duty exists there. So would you--all
13 just address that if you could? I'm not trying
14 to add work to you. You can do it in a letter
15 or -- put it in writing. Don't send me an
16 e-mail. You can send me an e-mail too, but
17 follow it up with something in writing, just
18 very briefly on that issue.

19 MR. MOONEYHAM: Yes, sir.

20 MR. BARFIELD: Okay.

21 THE COURT: And now, somebody is going to
22 give me a DVD. That's all. I believe that's
23 it as far as I'm concerned. I do need you to
24 get me a few copies of a few of these exhibits
25 that have been marked, because I don't want to

1 take the original. It's very short, just a few
2 pages, but everything else, I got. I just hate
3 to carry something I got to be responsible for
4 and having the exhibits in my possession.

5 (Trial was concluded at 5:57 p.m.)

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REPORTER'S CERTIFICATE

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I, TRISHA G. RARICK, Court Reporter and Notary Public in and for the State of South Carolina at large, do hereby certify that I correctly reported the within-entitled matter and that the foregoing is a full, true and correct transcription of my shorthand notes of the testimony and/or other oral proceedings had in the said matter.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my seal this ____ day of _____, 2013, at Charleston, Charleston County, South Carolina.

TRISHA G. RARICK
Court Reporter
My Commission Expires
APRIL 19, 2019

1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF CHARLESTON)

3
 4 CASE NO. 2010-CP-10-3240
 5

6 JOHN T. LUCAS, SR., et al.)

7 Plaintiffs,)

8 -vs-)

BEFORE THE HONORABLE:
 JAMES WILLIAMS, JR.

9 BRISTOL CONDOMINIUM PROPERTY)
 OWNER'S ASSOCIATION,)

10 Defendants.)

11 _____)

12

13

14 Given before Trisha G. Rarick, Court Reporter and Notary
 15 Public, at BARNWELL, WHALEY, PATTERSON & HELMS, LLC, 288
 16 Meeting Street, Suite 200, Charleston, South Carolina, on
 17 Wednesday, May 22, 2013, at 9:28 a.m.

18

19

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1 THE COURT: We have some preliminary
2 matters?

3 MR. BARFIELD: We do.

4 MR. COOK: Judge, I'm not sure where you
5 want to start. We do have a motion for summary
6 judgment.

7 THE COURT: All right.

8 MR. COOK: By agreement, I would like to
9 present this as an abbreviated form.

10 THE COURT: All right, sir.

11 MR. COOK: Because it may help organize
12 things. But also, do you want the parties to
13 introduce themselves for the record?

14 THE COURT: Yes. That would be good.

15 MS. POPE: Kelly Pope, here for the
16 plaintiff.

17 MR. LUCAS: John Lucas.

18 MS. LUCAS: Carolyn Lucas.

19 MR. MOONEYHAM: Joe Mooneyham.

20 MR. BELTON: Joseph Belton.

21 MS. VEST: I'm Lona Vest, with Property
22 Management Services.

23 THE COURT: I feel like I know you.

24 MR. COOK: I'm Dawes Cook for the
25 defendant.

1 MR. BARFIELD: And Michael Barfield, also
2 for the defendant.

3 THE COURT: All right. Yes, sir,
4 Mr. Cook?

5 MR. COOK: Thank you. This will be our
6 second motion for summary judgment. Our
7 previous motion for summary judgment was
8 granted in part, denied in part. Discovery has
9 proceeded.

10 The theme of this case is communal living,
11 that there are a lot of places where you can go
12 to live, and you can pretty much do what you
13 want. And people can't make you pay what you
14 don't want to pay, but a condominium is not one
15 of those places that you -- for the privilege
16 of -- for the benefits that you have of living
17 in a uniform structure, you have a very
18 detailed set of rules and governments, and you
19 give up a lot of your autonomy.

20 And this is a case where the people have
21 spoken over and over again about what they
22 believe was in the collective best interest of
23 the Bristol Condominiums, and Dr. Lucas and Ms.
24 Lucas just don't agree with what the majority
25 has decided on numerous occasions.

1 Not atypically, people who don't actually
2 live in a communal setting sometimes have
3 different value systems than those who are
4 actually living there. In a lot of homeowners
5 cases that I deal with, that's exactly what it
6 is, that you have somebody who maybe has an
7 investment property, and they don't think that
8 maintaining the premises is quite as important
9 as the people who are actually living there,
10 and maybe that's -- maybe that's what's driving
11 this.

12 But one way that that principle is
13 manifested legally is through their idea of
14 derivative action, and much of what the
15 plaintiffs are complaining about, they're
16 actually complaining about injuries that were
17 committed to the property owner's association.

18 For example, they complained that the
19 property owner's association had to pay more
20 than its share of the legal fees associated
21 with the litigation of a construction defect.
22 And Dr. Lucas claims 154th interest in whatever
23 that average was, and whether they can prove
24 that there was any is a whole different issue.

25 But that's not an individual claim, and

1 we've cited that in our pretrial brief and the
2 cases that talk about the difference between
3 the derivative claim and an individual claim.

4 A derivative claim generally is a claim
5 that is common to everybody by virtue of their
6 membership in the association. And, you know,
7 we've all heard about derivate actions against
8 boards of directors and so forth where you've
9 injured the corporation, and as a shareholder,
10 my injury is that my property -- my stocks has
11 gone down. Well, you can't sue for that
12 personally. You can only sue derivatively.

13 The rules set forth what you have to do in
14 order to step into the shoes of the corporation
15 and take that action, and none of that was
16 done, and this case wasn't pleaded as a
17 derivative action.

18 So that's our first prong of our summary
19 judgment motion, and that is that most, if not
20 all, of the damages that Dr. Lucas is claiming
21 are damages that he claims he incurred by
22 virtue of poor decisions made on behalf of the
23 property owners association. And he has not
24 differentiated from any other member in that
25 injury.

1 The second basis of our summary judgment
2 motion is that certain of his claims are just
3 not recoverable as a matter of law. The
4 largest element of damage that he's asking for
5 is his attorneys' fees in prosecuting this
6 action and in defending the foreclosure suit.

7 And I know the whole argument about
8 whether the foreclosure is proper is a
9 different one, but there's simply no statute,
10 no contractual provision, no nothing, that
11 entitles him to recover his attorneys' fees for
12 bringing this lawsuit.

13 And then the third and final basis for
14 summary judgment is that very little of what
15 he's asking for, I'm using as the guide page
16 four of their pretrial brief in which they set
17 out the specific elements of damage that
18 they're claiming, is included in the complaint.

19 The amended complaint in this case alleges
20 the improper taking of his windows, and it has
21 it set out as various causes of action, breach
22 of fiduciary duty, negligence. Some of them
23 have been thrown out by the Court already. But
24 on the common nucleus of facts underlying all
25 of it is that he contests the ability of the

1 association to take control and ownership of
2 his windows.

3 Now, aside from the fact that it's not --
4 that nothing else is pleaded in the complaint,
5 there's simply no injury from the, quote,
6 taking of his windows. As an aside physically,
7 he has his windows. You know, the association
8 gave them to him after they were taken out for
9 what that may be worth.

10 But actually, ownership of windows is a
11 liability, because if you owned your own
12 windows, and this is one of the reasons why the
13 association decided to take them into the
14 association, then each individual owner has his
15 own responsibility to insure the windows and to
16 replace them and to maintain them.

17 ~~And the first thing that they discovered~~
18 was that it was impractical to get adequate
19 insurance for the building if the building --
20 if the association doesn't own the windows.

21 Because if we had a hurricane and a bunch
22 of windows got blown out, you would want to
23 make a claim to the insurance company, and the
24 insurance company would come back and say,
25 well, we're not paying for those. You don't

1 own them, and it would have been up to each
2 individual homeowner to insure his windows.

3 It wouldn't have given the homeowners any
4 autonomy in what to do with their windows,
5 because the bylaws and the regulations and
6 appearance regulations and so forth would have
7 required that they maintain them and do exactly
8 with them as all the other windows were being
9 done.

10 As an example, as you probably know from
11 reading the pleadings, a group of unit owners
12 brought their own lawsuit and settled it, and
13 they claimed -- they were claiming damage to
14 their windows, as well as their interior
15 spaces.

16 And when they settled it, the property
17 owners association still required them to pay
18 to fix the windows. They didn't get to go out
19 and choose their own windows. They had to get
20 the same windows as everybody else did, but
21 they had to pay for them.

22 So there's no -- there's absolutely no
23 benefit to an individual property owner in
24 owning his windows. It's a pure liability. He
25 can't decide that, you know, I want a different

1 color windows or I want a different style
2 windows, or I want to take my windows out and
3 make it an open balcony. They can't do that.
4 It's only a requirement that they maintain
5 them.

6 So to the extent that the complaint
7 alleges damages arising out of the taking of
8 the windows, there are none, and as we'll get
9 into the -- because I promised I'd be brief, I
10 won't go into the analysis of the bylaws, but
11 we'll get into that, obviously, as to why the
12 association was correct to do that.

13 So that's our summary judgment motion,
14 that each claim is barred by one or more of
15 these three points, one that they're either not
16 recoverable as a matter of law, that they are
17 ~~recoverable only in the derivative action, and~~
18 this is not a derivative action, or they're
19 just not pleaded for in the complaint. Thank
20 you.

21 THE COURT: Ms. Pope, you want to make a
22 brief response at this time, or you want --

23 MS. POPE: Mr. Mooneyham is going to.

24 THE COURT: Okay. Yes, sir.

25 MR. MOONEYHAM: Thank you, Your Honor.

1 Your Honor, may it please -- there are a couple
2 responses I will make, and I'll try to be
3 brief.

4 First, purely from a procedural
5 standpoint, this derivative question was argued
6 at the summary judgment motion previously, and
7 that motion -- and I will refer to the actual
8 transcript of the hearing that was held before
9 Judge Nicholson on the 16th of August of 2012.

10 And on page 10 of the transcript, Mr.
11 Barfield actually brought up the question of
12 whether the plaintiffs' claims were derivative
13 rather than direct, and Judge Nicholson,
14 although he did grant partial summary judgment,
15 denied the motion in part as well.

16 So our position initially is this
17 particular issue has been litigated already.
18 The motion has been denied, and so it would be
19 inappropriate at this point for the Court to
20 grant a motion on the derivative issue, because
21 certainly, there was scintilla evidence then.
22 Additional evidence would not negate or obviate
23 that evidence.

24 And so on the issue of the derivative
25 claim, the argument that these are derivative

1 claims, that's our first thought.

2 In addition to that, while I certainly
3 understand Mr. Cook's argument that some of the
4 claims made by our clients may be -- might have
5 been brought as derivative claims, there are
6 certainly other claims that would not or could
7 not have been derivative claims.

8 The case of Brown v. Stewart decided in
9 the motion, the moving papers, and, of course,
10 what that case says is that misconduct by the
11 management corporation as felt a particular
12 loss of individual stockholder of liability for
13 mismanagement is an asset of the stockholder
14 and not of the corporation.

15 As you know from having read our
16 materials, for example, we allege that the
17 assessments were calculated inaccurately.
18 Recalculation of the assessments would not
19 cause more money to go to the corporation.
20 What it would cause is a jiggering of the money
21 that was already assessed, and so, for example,
22 Mr. Lucas' claims that he was assessed
23 improperly or inappropriate would put money
24 back his pocket. That's an individual claim
25 that's certainly not a claim of the

1 corporation.

2 And because the assessment is going to be
3 the same number regardless, if it costs -- make
4 up a number 1.15 million dollars, I think to
5 bring up some numbers, to what they need to be
6 brought up to, that money's been paid in. It's
7 really just reallocation of that money. It's
8 not money that's coming out of the corporate
9 pocket to pay Mr. Lucas.

10 And so surely, there are claims in our
11 lawsuit that are not derivative but that are
12 particular to Mr. Lucas.

13 The second issue that Mr. Cook brought up
14 was that some of the claims are not recoverable
15 as a matter of law, and he pointed to the issue
16 of attorneys' fees. Without going into the
17 merits of those claims, we have brought a
18 wrongful foreclosure action, which I would say
19 is akin to an abuse of process claim or maybe
20 even a frivolous acts claim.

21 And in both of those claims, if we prove
22 our case to you, then you certainly can award
23 attorneys' fees, because in both of those
24 cases, the parties' economic damages and
25 losses, including the cost of defending himself

1 from an inappropriate claim, would be
2 recoverable. And so to the extent that
3 Mr. Lucas has spent money in attorneys' fees
4 and costs to defend himself, then the
5 attorneys' fees would be recoverable. And I
6 think that's pretty clear from cases, and I can
7 cite you a case on that, but I don't think I
8 need to right now.

9 And then as it relates to the third
10 argument, we certainly contest to the taking of
11 the windows. That is simply an example of our
12 arguments that this relates to the breach of
13 fiduciary duty and negligence. Those aren't --
14 the taking of the windows isn't the only damage
15 that we allege, and it is my view that once we
16 plead a cause of action as elements of damage
17 are developed in discovery, we certainly can,
18 at this stage, argue whatever damage we
19 incurred at that point.

20 I think Mr. Barfield at one point said
21 it's kind of a moving target, and damages are a
22 moving target sometimes in cases. But we're
23 not excluded or precluded from alleging at this
24 stage additional elements of damage, so long as
25 we can plead a cause of action that allows us

1 to recover that damage. That's our position.

2 THE COURT: All right. Mr. Belton, I
3 believe you said you wanted to present some
4 documents, and then you were leaving?

5 MR. BELTON: That's correct.

6 THE COURT: All right. Well, we don't
7 want to -- be glad to have you with us, but we
8 don't want to delay your departure. So I'll
9 give you that opportunity.

10 MR. BELTON: Sure. How many copies of the
11 testimony would you like?

12 THE COURT: I don't know what we're
13 talking about. I guess you need one marked as
14 an exhibit for the court reporter. Is this the
15 original?

16 MR. BELTON: It is. I can give you an
17 extra one. What I'm going to be doing here,
18 instead of actually presenting the case live,
19 just offering you reference testimony.

20 THE COURT: Okay. All right. So this is
21 basically --

22 MR. BELTON: This will be our case in
23 chief on the -- for the foreclosure action
24 component of the case. The counterclaims that
25 were filed are going to be actually handled by

1 Mr. Barfield and Mr. Cook.

2 THE COURT: All right. Any objection on
3 the part of the plaintiff to proceed with this?

4 MS. POPE: No objection.

5 THE COURT: You're familiar with it?

6 MS. POPE: I just actually got it.

7 MR. BELTON: My understanding is that in
8 this particular case, and they are described,
9 since we have had two actions that have been
10 consolidated just for sake of clarity, we have
11 been identified as the POA, and that the Lucas'
12 have been identified as the unit owners.

13 We originally filed this action, the
14 second one down in the caption, the 2011 ending
15 in 2232. It was later consolidated with the
16 main case, and so what I wanted to present here
17 ~~is just our case in chief just for the~~
18 foreclosure action component establishing the
19 debt. And this is by way of testimony of Lona
20 Vest, which is here today.

21 Then attached are the exhibits of the
22 master deed, the notice of lien, and then also
23 the affidavit of attorneys' fees. So this
24 testimony right here establishes the debt,
25 establishes his failure to pay the assessments

1 that were charged and able to be, I think,
2 broken down into each of the different areas of
3 the regular regime fees, the capital reserve
4 contributions, insurance, special assessments,
5 things of that nature, less his payments to
6 date. So it's an up-to-date debt that is due.

7 THE COURT: All right. And I will mark
8 this as an exhibit for the plaintiff -- I mean
9 for the defendant and just make it part of the
10 record as testimony in this foreclosure part of
11 the trial --

12 (Defendant's Deposition Exhibit No. 1
13 was marked for identification.)

14 MR. BELTON: Correct.

15 THE COURT: All right. It's been marked
16 Defendants' 1, and Ms. Pope, if you find
17 something there that you are not expecting or
18 you need to respond to, or if you need time to
19 respond it to, certainly I'll do that, give you
20 some time -- whenever you have a chance to look
21 at it.

22 MS. POPE: Yeah. Actually, if we could,
23 because this is the first time that we have
24 been handed --

25 THE COURT: All right. Thank you, sir.

1 (Mr. Belton left the room.)

2 THE COURT: Okay. You may call your first
3 witness.

4 (Off-the-record discussion.)

5 MR. COOK: We had agreed off the record
6 that we're just going to agree to all the
7 exhibits coming in, but we want to reserve
8 relevance objections. And we're not consenting
9 to the amendment of pleadings to conform to the
10 proof, but because it's a non-jury we're going
11 to allow it all to come in for what it's worth.

12 THE COURT: All right. The court reporter
13 needs to have the exhibits. So are you going
14 to give them to her later, or you got a copy to
15 give to her, or how are we going to deal with
16 that.

17 MS. POPE: We can later if that's okay. I
18 believe this is my only copy left.

19 THE COURT: A plaintiffs' exhibit list.

20 MS. POPE: I can give -- what may be
21 easier, Your Honor, is to do a plaintiffs'
22 exhibit list, and because most of the exhibits
23 are actually within these notebooks.

24 THE COURT: Right.

25 MS. POPE: If you want to do -- just do

1 the list without actually reproducing the
2 exhibits themselves. Now, there are some
3 addition -- additional ones, tabs 46 through
4 59, of our pretrial brief are actually not
5 exhibits within these notebooks that were used
6 in depositions. So those will need to be
7 copied and supplemented, but we can do it
8 whichever way is easiest for you.

9 THE COURT: All right. The defendant
10 basically consents to the genuineness of these
11 exhibits, not the materiality of the relevance,
12 but as far as the genuineness of the exhibits,
13 you're not challenging that?

14 MR. COOK: That's correct. And we just
15 also agreed between us that we would reserve
16 objections to relevancy, because a lot of them
17 go outside the pleadings. And we just don't
18 want later on for somebody to say, well, you
19 impliedly consented to amendment by letting
20 these come in.

21 THE COURT: I understand. Well, I'm going
22 to give the court reporter my copy of the
23 plaintiffs' exhibit list, and let her -- unless
24 you have an extra one. If you don't, she can
25 just mark mine, and I can get a copy later.

1 (Plaintiffs' Deposition Exhibit No. 1
2 was marked for identification.)

3 MR. BARFIELD: The first numbered exhibit
4 is Plaintiffs' 18.

5 MS. POPE: Okay. I just didn't want there
6 be any confusion, and the reason -- I said
7 there's a Plaintiffs' Exhibit 1 in the
8 depositions, but I don't know that anyone is
9 going to be referencing that today. Does
10 that -- because what we did on our exhibit
11 list, we did the different tabs, but we kept
12 them corresponding with the deposition
13 exhibits, because there were so many.

14 MR. COOK: Are we doing that too?

15 MR. BARFIELD: Yeah. Well, I didn't know
16 if you want -- in terms of trial exhibits, if
17 you wanted to use your tab numbers or the
18 deposition exhibit numbers.

19 MS. POPE: In referencing documents,
20 probably what I will be doing is identifying it
21 as tab number so and so, which was Plaintiffs'
22 Exhibit 10 in depositions.

23 MR. BARFIELD: Okay.

24 MS. POPE: So we can still do this as --

25 THE COURT: Well, I think it needs to be

1 referred to as tab, because I've already seen
2 the Plaintiffs' 20 -- well, that's a
3 Defendants' 20, but I think you need to refer
4 to them by tab.

5 MR. BARFIELD: Okay.

6 MS. POPE: Yes, sir.

7 THE COURT: And so what has been marked
8 Plaintiffs' Exhibit 1 is Plaintiffs' Exhibit
9 list tab 1 through 59, and we had that
10 discussion already on the record.

11 MS. POPE: Yes, sir.

12 MR. BARFIELD: All right.

13 THE COURT: Yes, ma'am.

14 JOHN T. LUCAS, SR.,
15 having been first duly sworn, was examined and testified as
16 follows:

17 THE WITNESS: So help me, God.

18 THE COURT: If you need a break, Dr.
19 Lucas, you let us know, and we'll take a break
20 any time you need one.

21 THE WITNESS: I appreciate that, sir.

22 DIRECT-EXAMINATION

23 BY MS. POPE:

24 Q If you would, state your name for the
25 record, please.

1 A John Thomas Lucas.

2 Q Okay. And I'm going to ask you to speak
3 up a little bit, because we have got traffic going
4 by and make sure that the court reporter can hear
5 you and everything. But at any point in time she
6 can't, she'll just let us know. Okay. All right.
7 Dr. Lucas, where do you live?

8 A In -- my primary residence is in Travelers
9 Rest, 100 Upcountry Lane.

10 Q Okay. And that's in Greenville County?

11 A Yes.

12 Q Okay. And how long have you lived at that
13 particular address?

14 A Probably six -- approximately six years.

15 Q Okay. And I'm going to short circuit your
16 extensive educational background. You're retired,
17 correct?

18 A Yes.

19 Q Okay. And what did you do before you
20 retired?

21 A I practiced medicine.

22 Q In what area?

23 A Neurosurgical surgery.

24 Q Okay. And do you own a property here in
25 Charleston County?

1 A Yes. I do.

2 Q What property do you own here in
3 Charleston?

4 A Unit 3013 at the Bristol.

5 Q Okay. And where is the Bristol located?

6 A On the corner of Lockwood and 17, the
7 crosstown of 17. I think the address is Old
8 Bridgeview Lane.

9 Q Okay. And where is your condo located as
10 far as --

11 A The building is five floors. We're the --
12 the first two floors are the garage, and we're the
13 first floor above the garage.

14 Q Okay. And where --

15 A That would be the third.

16 Q The third floor. What does your condo
17 face? Do you face the water? Do you face the road?

18 A We face the MUSC parking lot, and I think
19 it's -- used to be a Quality Inn --

20 Q Okay.

21 A -- in front. They recently bought and
22 sold it and changed it. May have been a Howard
23 Johnson's when we first was there.

24 Q What road does your condo face?

25 A Oh, Lockwood. I'm sorry.

1 Q Nope. That's okay. When did you purchase
2 your condo at the Bristol?

3 A I don't know. It was before the
4 homeowners association took over, and it was
5 still -- I purchased it from the Gulfstream Company.

6 Q And why were you looking at a property
7 here in Charleston?

8 A My son had been accepted for med school at
9 the Med U, and we were looking for a place for him
10 to stay that was close by. Most of the places at
11 that time I did not feel secure and were not secure
12 when I was going to med school. So the Bristol had
13 a security system, had its own parking lot, and it
14 was within walking distance of the Medical
15 University.

16 Q Okay. Were you going to use the condo as
17 well, or was it strictly just for your son?

18 A It was for my son until he had done his
19 four years, and then the -- we had planned at some
20 point to maybe retire there when we got to where we
21 couldn't do as well.

22 Q Okay.

23 A And -- but yes. We would visit him at the
24 Bristol, and theoretically, one room was -- the
25 bedroom was ours but --

1 Q Okay. That --

2 A But we had to schedule.

3 Q Okay.

4 A Because it was other people that would use
5 that bedroom.

6 Q How many bedrooms did your condo -- or
7 does your condo have?

8 A Two.

9 Q Two. Two bedrooms. How many bathrooms?

10 A Two and a half.

11 Q Okay. And there's a balcony on your
12 condo?

13 A Yes.

14 Q And the balcony faces?

15 A The parking lot, Lockwood.

16 Q Lockwood? Okay. Do you recall when your
17 son started medical school?

18 A No.

19 Q Okay.

20 A It was shortly after we bought the condo.

21 Q But you don't remember what year it was
22 that --

23 A No.

24 Q Okay. But it was -- you bought your condo
25 when it was still under management of --

1 A Yes. We bought the condo, and he moved in
2 shortly after. I never lived there in that regard.
3 He moved in.

4 Q Okay. When you first bought your condo,
5 how often would you come down and use it on average,
6 monthly?

7 A Well, probably once a month, I'd come down
8 to see my son and take him out to dinner, because I
9 wanted to make sure he was eating right.

10 Q Okay.

11 A I mean, you know, we go to a nice
12 restaurant and have dinner.

13 Q Okay. When did -- strike that. Does your
14 son still live in the condo?

15 A No.

16 Q When did he move out of the condo?

17 A Four years later -- well, three and a half
18 to three and three-quarters later.

19 Q Okay. When you purchased your condo,
20 would it have been maybe around 2005?

21 A I think it's in the record.

22 THE COURT: Can we stipulate on the date?
23 What is it?

24 MS. POPE: I believe it's January 2005. I
25 do not know the exact, maybe January 11th, but

1 I know it's January 2005.

2 THE COURT: '05?

3 MR. BARFIELD: We don't have a problem
4 with that.

5 BY MS. POPE:

6 Q Okay. So you purchased the condo at the
7 Bristol in 2005, and you believe your son moved out
8 maybe 2008, 2009?

9 A Three and three-quarters a year.

10 Q Okay. When you first purchased your
11 condo, what was your understanding as to what you
12 controlled or didn't control with the condo?

13 A My understanding was I controlled my
14 property from the front door, and I had part control
15 in the hallways, and, of course, the elevators, and
16 common area downstairs, which includes an exercise
17 room now, two offices, the Bristol rooms. Small
18 kitchen was considered common, and then we were
19 deeded two parking places as part of the condo, and
20 we were deeded a storage place down on the second
21 floor near where all the common area was.

22 Q Okay. What was your understanding at the
23 time you purchased your condo as to what you were
24 responsible to insure?

25 A The whole thing. I insured the whole

1 thing.

2 Q When you say whole thing, give me
3 specifics. What do you mean the whole thing?

4 A From the front door to the -- where you
5 step off the edge.

6 Q When you say the edge, did you-

7 A Outside.

8 Q Did you feel that you were responsible for
9 insuring the balcony?

10 A Yeah. Because if somebody fell off, I was
11 liable.

12 Q Okay. So you insured everything?

13 A Correct.

14 Q Window, doors, the balcony area?

15 A Correct. And as part of my deed, they
16 wrote in a little section of the balcony that was
17 kind of bannistered off at one end. That was
18 considered common, but they deeded that over to me
19 as part of my property. It's four-by-eight feet,
20 but the reason I wanted that is I could walk down
21 the end, look around the building and see the river.
22 And also, it was where the wind picked up.

23 Q So it was originally a common area, but it
24 was deeded to you for your responsibility?

25 A Yes. There was several common areas

1 that -- or porches that were not deeded. I mean
2 that was part of the common, but this was deeded
3 over to me. It's in my deed.

4 Q Okay. The insurance policy that you had
5 when you first purchased your condo in 2005 --

6 A Correct.

7 Q -- has it changed any since 2005, not
8 premium amount, but the basic concept and what it
9 covers?

10 A No. It covers the same thing. I was
11 originally insured by -- I can't remember the
12 company, but they pulled out of the coastal market.
13 And before the policy lapsed, I got a policy with a
14 company down in Beaufort, which was Seacoast, and it
15 was the same policy, except Lloyds of London covered
16 it. Everybody had to change their policy that
17 had -- it was the same -- it was -- it wasn't State
18 Farm. I think it was All State, if I remember.

19 Q When you said had to change the policy,
20 you mean had to change carriers?

21 A Changed carriers, yeah. The policy didn't
22 change, because I took it to them and said, I want
23 the same thing. They said fine.

24 Q Okay. The policy you originally had, you
25 took it and asked them to cover the same things?

1 A Correct. Well, I gave them a copy of the
2 thing and --

3 Q Okay.

4 A The original insurance thing.

5 Q The policy that you have on your condo
6 then when you purchased it in 2005 and now, what
7 does it insure as far as the windows and doors to
8 your unit are concerned?

9 A Well, my understanding, it insures
10 everything. I got flood insurance. I got -- it
11 insured the windows and doors. For some reason,
12 that -- the builders said it was -- that I had to
13 insure that. So I insured it, and he said I had to
14 insure it, because you got to take the window out
15 and put it in from the inside, not the outside.

16 Q Okay.

17 A And because of hurricanes, I went ahead
18 and specifically insured my windows.

19 Q When you first moved into your condo in
20 2005, did you ever go to any -- or hear about any
21 informal homeowners meetings?

22 A They had one that I went to and remember.
23 Now, I may have gone to others, but the main one I
24 remember that deals with this topic is they had paid
25 somebody to do destructive testing, which amounted

1 to tearing the wall -- outside wall off of the unit
2 next to me and I think part of the one down beyond
3 that.

4 And the -- then they had a meeting
5 after that destructive testing, and I contributed to
6 that money. And this was before -- it was -- I
7 believe my homeowners association. And basically,
8 we had a meeting, and in the meeting, they presented
9 a one, maybe two-page document. And the only thing
10 they found when they tore the stucco off was a
11 rusted nail.

12 But they did not go below the
13 waterproof sheathing to do the stucco -- well, you
14 do -- you got insulation. Then you do a waterproof
15 sheathing over that, and then you put the metal that
16 holds the stucco. And then you put the stucco.

17 Q Okay. You -- I'm going to back up just a
18 little bit just to kind of clarify, because you used
19 they several times.

20 A That was the group that was trying to sue.

21 Q Okay. You said that was true. Now, this
22 is before -- this is before the formal homeowner
23 association was formed?

24 A Correct.

25 Q All right.

1 A Correct.

2 Q So this is a group of homeowners getting
3 together?

4 A Well, they were already some -- there's --
5 there was some tropical storm that passed by
6 Charleston, and somebody said their windows leaked
7 or they had water. And everybody started discussing
8 it. I didn't. I didn't pay any attention, because
9 I didn't have a water leak to my knowledge.

10 Q Okay. You said -- I'm sorry. Go ahead.

11 A I have not had a water leak to my
12 knowledge.

13 Q You said you contributed to that at the
14 meeting.

15 A Yeah.

16 Q Explain that to me.

17 A Well, no. They wrote everybody a letter
18 saying we want some money so we can pay for this.

19 Q Pay for what?

20 A The tearing off of the stucco and all that
21 stuff. So they -- they called it destructive
22 testing.

23 Q And they had an engineer look at the --

24 A They had somebody to look at it, because
25 they were feuding with the Gulfstream, and that was

1 it. And I think I paid \$1,200 or 14. I can't
2 remember.

3 Q 1,200 or \$1,400, is that what you said?

4 A Yeah. That's what they did with
5 everybody, you know, wanted to. I think that was a
6 --

7 Q That was an assessment. That was
8 voluntary if you wanted to?

9 A Yeah. I think that was an arm twisting,
10 we're -- might be in trouble, and everybody
11 understood. And not all the units were sold at that
12 time.

13 Q Do you know how many?

14 A No. I don't. The builder still had it,
15 and there was a thing in the records that which --
16 when it reached a certain number of them sold, they
17 had to turn them over --

18 Q Okay.

19 A -- to the homeowners association as a -- I
20 guess a legal name.

21 Q In the bylaws, once a certain percentage
22 of the condos were sold?

23 A Yes. And that's how most of them are.

24 MS. POPE: Okay. All right. And if we
25 could stipulate August 2006 was when the formal

1 movement with the homeowners association -- the
2 homeowners actually took responsibility of the
3 Bristol in managing.

4 MR. BARFIELD: Lona, does that sound
5 accurate to you?

6 MS. VEST: It was in August of 2008, yes.

7 MR. BARFIELD: 2008?

8 MS. POPE: 2006, sorry.

9 MR. BARFIELD: Okay.

10 THE COURT: August 2006 is when the
11 homeowners --

12 MS. VEST: That's when the -- they had an
13 official turn-over meeting and elected the
14 first homeowner representative board.

15 THE COURT: Okay.

16 BY MS. POPE:

17 Q Okay. Take us up to August 2006. At that
18 time, when the homeowners association -- the
19 homeowners actually took over and elected a board,
20 were you having any problems with your condo at that
21 time?

22 A No.

23 Q Okay. Did you participate in the election
24 of the first board?

25 A No. They kind of just assumed board

1 positions. They may have had some kind of an
2 election, but they were the ones complaining and
3 they got positions.

4 Q Okay. When you say they, anyone in
5 particular that you remember?

6 A It was one guy that resigned and moved
7 away, which I thought was kind of suspicious, and
8 then Landry -- Ms. Landry got -- took charge as
9 president.

10 Q Okay.

11 A The other members of the board -- I think
12 Hunger was a member, because he was already suing.

13 Q You mean Dr. Hanger?

14 A Dr. Hanger, yeah. Dr. Hanger was already
15 suing the beach company, Gulfstream, or whoever.

16 Q Right. Okay.

17 A He'd already filed suit.

18 Q By 2006?

19 A Well --

20 Q That's your recollection?

21 A That's my recollection that when the board
22 -- he had already sued or -- it was a mess which I
23 preferred to keep out of.

24 Q Okay. You said it was a mess that you
25 preferred to keep out of. What do you mean it was a

1 mess?

2 A Well, some people were fighting for
3 control to sue, and some people went ahead and sued,
4 which established I guess their position. And I
5 think it was just Hunger and maybe the person next
6 to him either above or below, but it was just two of
7 them. And -- that I remember. It didn't bother me.
8 So -- it didn't bother my property, so I kept my
9 nose out of it.

10 Q Right.

11 A But at that time, somebody formed a suit,
12 and I think Hunger was on the board with the
13 bankers. I'm not sure.

14 Q Okay.

15 A That's the best of my recollection.

16 Q In the fall of 2006, after the homeowners
17 take responsibility of managing the Bristol, what do
18 you remember about there being talk about suing the
19 builder?

20 A Well, that was the first thing they talked
21 about. They were talking about that before they
22 even took ownership, and they were fussing. Part of
23 that tearing the wall off I think was -- as I
24 remember, was because the builder didn't want to pay
25 for the destructive testing. It was some kind of

1 rift about that, and so they went ahead and did
2 their destructive testing.

3 Q When you say they, you mean some of the
4 homeowners?

5 A The homeowners. Or the people involved,
6 it was Hunger -- Hanger, I'm sorry. Hanger and
7 Landry --

8 Q Okay.

9 A -- were the main ones, and at that time,
10 one of the people that had been elected president
11 left. He just resigned his position and left. He
12 moved back up north.

13 Q Okay. What was your feeling about filing
14 a lawsuit against the builder?

15 A I didn't have any problem, except my
16 bathroom mirror wasn't hung properly, and it slipped
17 down. And I called up the builder, and he came and
18 fixed it.

19 Q Okay.

20 A And I thought I had a warranty with the
21 builder -- well, I did have a warranty with the
22 builder, and a whole book of warranties on the
23 appliances, the windows, the -- everything that, you
24 know, they give you, and I had warranties on them.
25 And so, you know, I figured if something happened, I

1 would take care of it.

2 Q All right.

3 A I wasn't there. My son was there.

4 Q Okay.

5 A And he was supposed to watch out.

6 Q Did you intend -- in the fall of 2006, did
7 you attend any of the meetings, homeowner
8 association meetings, or do you remember?

9 A I don't remember honestly. I told him to
10 go, but he never did.

11 Q Okay.

12 A Busy studying or something.

13 Q Okay.

14 A As a matter of fact, I think I did sign
15 over a proxy for him to go.

16 Q Okay. Did you have a problem with the
17 homeowners association filing a lawsuit against the
18 builder?

19 A Yeah. I did.

20 Q Okay. Tell me why.

21 A Well, honestly, I had been the butt of so
22 many lawsuits that I thought it was -- company
23 excluded, I thought it was just a money grab.

24 Q Okay. I'm going to have you explain what
25 you mean by that, that you had been the butt of so

1 many lawsuits. Explain what you mean.

2 A Well, as a surgeon, I have been sued five
3 times, which I think is under the normal number of
4 times, but none of them were ever a judgment against
5 me, meaning I wasn't at fault.

6 Q Okay.

7 A But you get kind of tired of that and that
8 kind of way of life, and every time you get sued,
9 you have to take off from work. It disrupted your
10 private life, wife suffered, kids suffered, because
11 I was in a bad mood. And so I just wanted to stay
12 out of it. Leave me alone.

13 Q Okay.

14 A And I thought I had been left alone.

15 Q Okay. When did you first realize that you
16 weren't being left alone, that you were going to be
17 a part of the lawsuit one way or the other?

18 A Truthfully, I had told them that I didn't
19 want to be.

20 Q You told who?

21 A The people that were suing, the board and
22 everybody I could tell there. I said -- you know,
23 and they took a vote, and they would -- they really,
24 in my opinion, were trying to sell everybody on the
25 idea of suing the builder, get some money. And they

1 used all kind of things.

2 Like he didn't put enough in the
3 association. I remember that. And it started out
4 with the windows was the big thing, and they were
5 Anderson windows. I didn't have any trouble with my
6 windows, and just about everything you could think
7 of, they were trying to do. And I said, whoa, no.

8 So -- well to jump ahead and tell you
9 when, they settled the lawsuit in August. I'm not
10 sure which one year -- or they settled it some time,
11 and they presented the settlement in August. I
12 didn't ask to be part of that either, but I did
13 inform them that, you know, they got 60 cents on the
14 dollar. And I did say that, and that's in the
15 minutes. Very few things I said got in the minutes,
16 but that one was in the minutes.

17 I didn't realize why they were only
18 getting 60 cents on the dollar. Well, that was it.
19 But they called the meeting for the reconstruction
20 since September, and they showed -- they had two
21 window guys there, aluminum window guys, the sales
22 man. And we couldn't discuss about the windows,
23 because Sternowski (phonetic) or whatever was his
24 name -- he's dead now, poor guy. But -- died I
25 think of a heart attack.

1 But anyway, he said we don't need to
2 discuss our business in front of the salesman. So
3 we had no discussion. So then that was in
4 September. They said we're going to meet in
5 October. Well, they apparently didn't have enough
6 votes or something bothered them, and I also told
7 them, you know, I'm not part of the suit. My
8 windows are fine. I don't want any of this mess.

9 But when that happened, I got an
10 inkling something was going on, which meant I was
11 going to get stuck paying the bill. So as soon as
12 that meeting was over, it was on -- I left on a
13 weekend, and I called Mr. Mooneyham up.

14 Q Now, don't go into any of your
15 conversations that you had with him.

16 A No. But I hired him, because I felt like
17 I was getting ready to be royally involved. So
18 anyway, he asked, because they said they were going
19 to have a meeting in October. I didn't know
20 anything about what was going on.

21 So I got Mr. Mooneyham to write a
22 letter, which is a record, asking for information.

23 Q Now, and I just want to clarify as far as
24 timeline goes. This is after the construction case
25 lawsuits had settled?

1 A Yes.

2 Q Okay.

3 A Well, I mean they doled the money out,
4 and -- but anyway, it was after the settlement. And
5 when they were talking about construction, they were
6 talking about windows, and everybody choose. That's
7 when I figured I better get a lawyer.

8 So I hired Mr. Mooneyham, and I asked
9 him to ask them for information so that we'd know
10 how to prevent ourself from being royally involved.
11 So anyway --

12 Q I'm going to stop you for just a second.
13 Okay? I'm going to back up a little bit.

14 A Okay.

15 Q Because --

16 A Because I was getting there, but go ahead.

17 Q Okay. We jumped from the beginning of
18 them filing a lawsuit to the settlement, and there's
19 some stuff in between that I want to cover timewise.
20 Okay?

21 A Okay. But between the lawsuit and
22 settlement. Okay.

23 Q Yes, sir. Do you recall whether you voted
24 on whether -- when they took a vote on whether to
25 file a lawsuit or not? Do you remember whether you

1 participated in that vote?

2 A I told them I didn't want to be part of
3 it.

4 Q Okay.

5 A And but anyway, it went on. And
6 apparently, Landry, somebody, went ahead and sued,
7 and I said, well, I'm glad I'm not a part of this,
8 but --

9 Q In addition to the homeowners lawsuit?

10 A No. It may have been --

11 Q The association.

12 A -- association or something.

13 Q Okay.

14 A And basically, this drug on and drug on,
15 and what they were doing was taking the money for
16 their suit out of either a special assessment, or
17 they were raising the fees. I know the condo fees
18 got up to around \$800 a month.

19 Q Okay.

20 A I remember that, and they were funneling
21 that money over to pay for the attorneys, because
22 they -- the thing that really kind of had me is they
23 didn't hire him on a contingency. They hired him on
24 an hourly basis. So that meant they were paying,
25 you know, all along, and as my condo fees went up.

1 One of the people at the homeowners association
2 said, well, condo fees are going up everywhere, and
3 they used New York as an example. Well, Charleston
4 is expensive, but it ain't New York.

5 Q Okay.

6 A So anyway, I figured, well, this time,
7 they're probably paying for the lawsuit. So I
8 called Mr. -- name starts with a W.

9 Q Could it be Warner?

10 A Warner.

11 Q David Warner.

12 A Called him up. Well, he wasn't there. He
13 had -- he was up in Massachusetts or something. I
14 think he had two places. And I called him -- Lona
15 knows. I called, and she connected me in or had him
16 call back, and he wasn't in town. And he called
17 back, and we had some words about why the condo fees
18 were going up so much. And I brought up the fact
19 that I was tired of paying for his lawyer to be
20 quite frank.

21 And he sent some little blurb that
22 had been sent out before to the homeowners I think
23 at that time. They just had a party line that they
24 would send out.

25 Q Okay. I've got several things I want to

1 clarify within there, but the last thing you talked
2 about was he sent you a blurb. Now --

3 A Well, Lona actually sent it. He told her
4 to send me some blurb. It was about contingency
5 versus payment by the hour or something like that,
6 and there was a fight going on about that too, which
7 I tried to get out of. But the condo fees kept
8 going up and up and up, and --

9 Q Well, let me ask you something right quick
10 there about the communications, because you kind of
11 hit on it just then. What were your feelings about
12 the communications between the board and the
13 homeowners? How did the board communicate with the
14 homeowners?

15 A Well, not well.

16 Q And I'm talking about the time in the
17 beginning when all the lawsuit and stuff was going
18 on.

19 A I mean it was word of mouth back then, and
20 I kept telling my son, listen, but he was going to
21 school. But it was all by word of mouth, and you
22 could tell this group was churned up, and that group
23 was churned up.

24 Q And at some point, your son moved out. So
25 no one was in the condo except for you could then

1 visit?

2 A Right. But he would take -- the way they
3 communicated is they'd slide the thing under the
4 door.

5 Q What thing?

6 A Whatever blurb -- it was condo business
7 and sometimes -- the only reason I paid attention to
8 it was because it gave the combination to the gate.
9 You had to have a combination to get in the gate,
10 and that's what I look at. It was usually on an
11 orange -- a different color page, orange or red or
12 something. But they changed it periodically, and
13 that was before they came out with the little
14 buttons you pressed, the little openers.

15 Q Okay.

16 A Which they finally came out with, which
17 meant I didn't even have to pay attention to the
18 condo -- to the combination, and there were little
19 files you could get in the door with, which you rake
20 across a reader.

21 So at that point, you know, it would
22 come under the door. My son would put it in a
23 stack. He would usually figure out what the
24 combination was, because he was the one using it.
25 And then when he left, it would go under the door.

1 Occasionally -- we always got the bill. We always
2 got the bill.

3 Q How did you receive the bill?

4 A From the management company.

5 Q I know, but would it come in the mail?

6 Would it come under the door? Was it e-mail?

7 A Some of the mail -- yeah. Some of them --
8 well, it came in the mail, the bills did.

9 Q Okay.

10 A And that was really -- and once in a
11 while, there'd be something stuck in the envelope
12 with the bill.

13 Q That was mailed to your residence?

14 A Yes.

15 Q Not to the condo?

16 A Yes.

17 Q Okay. I want --

18 A For a while, after he left, or somewhere
19 in there -- somewhere in there -- the condo handles
20 the water bill.

21 Q Right.

22 A Or the -- whoever handles it. They got
23 little meters they read, and then we pay our water
24 bill. But it's usually through some company. It
25 was through ISTA. I don't know who it's through

1 now.

2 Q Okay.

3 A But I'd write a check each month for that,
4 but that would come in the mail.

5 Q When you say in the mail, residence?

6 A My residence.

7 Q Okay.

8 A But when he moved out, that must have been
9 four or five months, water bill wasn't paid, because
10 they were stuffing it down in my mail box.

11 Q At the Bristol?

12 A At the Bristol, and I didn't know it. And
13 I forgot what brought it to our attention. They
14 didn't turn the water off. I forgot -- but anyway
15 might have been I must have realized I didn't get a
16 water bill. So we started looking around to find
17 ~~out where the water bill is. I didn't want, you~~
18 know, to shut the water off.

19 And it ended up being some company,
20 and the bills were being put downstairs, along with
21 a lot of other mail that would come in down there.

22 Q Okay. I'm going --

23 A My son would check his mail periodically
24 and leave the other.

25 Q Okay. All right. Let's go back to the

1 lawsuits for just a second. Okay. I'm going to
2 clarify on that.

3 A Uh-huh.

4 Q There was -- you already mentioned once
5 before there was the Hanger lawsuit --

6 A Yeah.

7 Q -- that was filed early on?

8 A Right.

9 Q You mentioned the lawsuit that the board
10 brought for the homeowners association against the
11 builder?

12 A Yes.

13 Q Okay. And then you also mentioned a suit
14 that Landry brought?

15 A Well, yes.

16 Q Okay. Tell me what your understanding is
17 or was of the Landry lawsuit.

18 A Well, my understanding was that it was a
19 board lawsuit.

20 Q It was --

21 A Meaning Landry. She was the president.
22 She was handling all of that, and she sued for some
23 alphabet soup in there. I mean they changed the --
24 it was originally BOPC something, and then it was
25 BO- -- they changed the name of the homeowners

1 association. It was Bristol Condominium Homeowners
2 Association BCPHO or something.

3 Q Okay.

4 A The only reason I paid attention to it was
5 when I wrote the check --

6 Q Okay.

7 A -- to pay my dues, but anyway --

8 Q What was your understanding to be the
9 purpose of the Landry suit? What was it supposed to
10 be doing?

11 A I didn't know.

12 Q Okay.

13 A I mean I thought it was the board's suit,
14 but -- and that's what I thought all the way up
15 until we discovered a Judge Newcome -- Newton?

16 Q Newman maybe?

17 A Newman. Judge Newman. It started with an
18 N, and he said they couldn't sue for my property.

19 Q Who couldn't?

20 A The board.

21 Q Okay.

22 A And I didn't know that. They were suing,
23 and I didn't know they were suing for me, which
24 really ticked me off, because I told them I didn't
25 want to be a part of it. Well, come to find out,

1 they had sued for all property owners, and I guess
2 that was me, being one of the property owners. But
3 then the judge ruled that they couldn't sue for my
4 property, which is what I thought. You know, I
5 thought the board was just suing for the common
6 property. Okay? And then that's okay, and that was
7 --

8 Q Because you agreed they have a
9 responsibility to protect the common areas?

10 A Yeah.

11 Q Okay.

12 A I have no problem with that. And I
13 thought that's what my dues were for, but then I
14 found out that they were suing for me. But that --
15 I found that out after Mr. Mooneyham was hired. But
16 before that, there was a thing where they said we're
17 going take you -- well, this gets complicated.

18 Before that, they sent out a thing
19 with a little DVD, and they said, we want to sue.
20 And they asked if I wanted to sue or if I minded if
21 they sue. I didn't want to sue. But the DVD was a
22 presentation. It was a presentation by Landry,
23 somebody else, that talked, and then there was a
24 third little guy. Didn't know who it was at that
25 time, but he said, we'll worry about the windows

1 later in that suit.

2 Well, it was all right with me,
3 because Landry said on that DVD that the windows and
4 stuff are my own property, and I chose not to sue
5 because I didn't have a problem.

6 Q Okay.

7 A Well, so that's why I thought it was a
8 common area they were suing for, and it sounded
9 like -- that thing sounded like a common area, and
10 they weren't messing with my property. Fine, if
11 they want to sue for something that belongs to
12 everybody, fine, but don't be messing with my stuff.

13 So it wasn't more than a month,
14 probably couple of weeks, a letter comes in the mail
15 from some insurance person. You got it. We've
16 talked about it, and she said there might be some
17 ~~question of insurance on the~~ windows and doors. I
18 said, dang, I insured mine. I got insurance. So it
19 went in the pile of unuseful information to be
20 honest with you.

21 And it wasn't long after that, we got
22 a thing where they had made all my property
23 secondary property, which I didn't fully understand,
24 but they took control of my property.

25 Q You said all your property. It wasn't all

1 your property?

2 A Well, the initial thing the board said,
3 the only thing I owned was the air conditioner, the
4 stove, the refrigerator, washing machines. That's
5 what came in the mail to me.

6 Q Okay.

7 A And they owned everything else, which
8 really the proverbial discuss hit the wall.

9 Q Okay.

10 A And -- or fan. And because -- I mean if
11 they can tell me what to paint my walls, what's the
12 use to have a -- or hang my curtains, what's the use
13 to have the thing?

14 Q What was your understanding --

15 A They were taking my property.

16 Q No. What was your understanding as to
17 why?

18 A I never knew. Except when I started
19 putting things -- some of this is hindsight and some
20 of it is before. The hindsight, that's what the
21 insurance thing was about.

22 Q You're talking about the letter from --

23 A Yeah. And I had my own insurance. So I
24 said, you know, I didn't like it, and I let them
25 know I didn't like it. Well, they came back later

1 for something saying about the windows, if I wanted
2 you on the lawsuit, but this was after the lawsuit
3 had been settled I found out later. That if I
4 wanted to join the lawsuit, we could get something
5 for my windows. Well, I never joined it.

6 Then, Lona sent me some letter, and
7 this may be the same letter. I'm sorry. Forgive
8 me. But Lona sent me some letter in August, and the
9 reason I remember that was because they wanted to
10 make me part of the lawsuit. And this is just
11 before the settlement meeting.

12 Q Okay.

13 A You know, in the settlement, I said, I'm
14 not part of this lawsuit. And they said, well,
15 we'll let you be a part of the lawsuit. And I said,
16 no. And after the meeting, Lona asked me if I got
17 the letter. Well, I went home, looked, and there
18 was a letter saying -- I think Lona was going to pay
19 for a couple of my windows.

20 You know, I'm afraid being all of
21 this money, you know, I already paid for the lawsuit
22 for a couple of windows. Then I got another one
23 that was on a piece of paper that sounded like an
24 attorney wrote it. You got a copy of it. Sounded
25 like an attorney wrote it.

1 Q Okay.

2 A And it was all this mishmash about, you
3 know, legal stuff for me to sign, but I didn't sign
4 that one either. Because it didn't have an
5 attorney's name on the page. That wasn't even a
6 letterhead on that thing. It was two pages of
7 paper, and it looked like the letterhead had been
8 blocked out and Xeroxed. That was sent to me. I
9 didn't do that either. Well, this is in -- this was
10 before or just after August.

11 Q Of what year?

12 A The year of the settlement.

13 Q Settlement?

14 A Yeah.

15 Q Okay.

16 A And then when they came up with the thing
17 of changing all the windows back, I said, this is
18 out of my hands. I need to hire an attorney.
19 Should have gotten one on the retainer the day I
20 bought the condo, but anyway, that's when I hired
21 the attorney.

22 MS. POPE: Okay. I believe, and we can
23 check to make sure, and Lona may -- I would
24 like to stipulate to the date. I believe the
25 settlement was June of 2009.

1 THE COURT: Is that right?

2 MS. VEST: That's about right. I thought,
3 honestly, it was a little earlier than that.

4 MS. POPE: That may have been when the
5 release paperwork was signed.

6 MS. VEST: Spring of 2009.

7 MS. POPE: Spring of 2009. Okay.

8 BY MS. POPE:

9 Q Dr. Lucas, I want to talk to you -- you
10 had mentioned this earlier talking about
11 assessments, and you said in the beginning, you paid
12 some of the assessments. Do you remember about how
13 much you paid in special assessments in the
14 beginning of the lawsuit and leading up to the
15 lawsuit?

16 A Well, when we got the condo, I paid a
17 monthly regime fee.

18 Q Right.

19 A And I'm thinking that's 450. I can't be
20 sure, but I can produce checks. All right? Well,
21 when all the suit business started, it jumped up,
22 and it jumped up some more, and it jumped up some
23 more. Jumped up some more, and I said, those guys
24 are making me pay for the lawyer.

25 Q But regime fee is separate than a special

1 assessment?

2 A Well, the regime fee has -- they tack on
3 \$100 for the reserve fund --

4 Q Right.

5 A -- each month.

6 Q Right.

7 A And that -- the regime fee and that was
8 going up. Now, how much they were doing one and how
9 much for the other, I never really knew. I think it
10 was listed as \$100.

11 Q Okay. Were there other special
12 assessments, smaller, that you paid?

13 A Yeah. There were small ones. One of them
14 was actually for attorney fees I think, and I kind
15 of balked at that, and that's when my -- I called --

16 Q Mr. Warner.

17 A -- Warner.

18 Q Okay.

19 A Because I wasn't suing. So, what the heck
20 is going on?

21 Q Okay. When did it reach a point where you
22 refused to pay a special assessment?

23 A All right. We had the settlement meeting,
24 which was in August. September, we had the rebuild
25 meeting, and that's where they showed us the

1 aluminum siding and doors or windows.

2 Q Okay.

3 A All right? Then we went to -- we were
4 supposed to have a meeting in October, but they
5 didn't. But in the meantime, I have hired Mr.
6 Mooneyham, and Mr. Mooneyham wrote a letter to him
7 asking what the heck is going on.

8 So they delayed that meeting till
9 November. Now, I didn't go to the November meeting,
10 and to my knowledge, there's been no meeting minutes
11 of that meeting. But Mr. Mooneyham went to it,
12 because I had hired him by that time. I knew
13 something was going to happen. So I had hired him.

14 So he went down, and what he reported
15 back to me was --

16 Q Don't say what you-all discussed --

17 A I understand.

18 Q -- because that's attorney-client
19 privilege.

20 A He told me -- they forwarded it to -- I'm
21 sorry, but that was -- I mean I had no way, but they
22 had voted to replace all my property basically.

23 Q You're talking about the windows and
24 doors?

25 A Windows and doors.

1 Q Okay.

2 A And well, there was the month of December
3 after that. Now, I was fit to be tied. So I went
4 to that meeting.

5 Q Let me set something up. Was this after
6 the lawsuit had settled?

7 A Oh, yeah. It was settled. They had the
8 meeting in August.

9 Q Okay. There was --

10 A And then, September they had the rebuild
11 stuff. Yeah. They said something about a
12 shortfall, and they put out pieces of paper with
13 windows on it. But they put out something about how
14 much you had to pay for windows. I'm trying not to
15 use the word, but I said a word, and then I said, I
16 own the windows. Why am I putting in new windows?

17 I said, I'm not going to do it,
18 because I own my windows. Well, here is where the
19 trickery came in. They changed the type of window,
20 and they said, all of them had to be done. Well,
21 but we were asking information all this time. So --
22 and after the November meeting, Mr. Mooneyham wrote
23 them a letter after the September meeting, no
24 response.

25 So it was December, quote/unquote,

1 Christmas meeting, we go to the meeting -- my wife
2 and I both. All right? And before we left, we
3 asked Mr. Mooneyham to write a letter to them saying
4 that I wasn't going to pay for my windows.

5 Q You weren't going to pay the special
6 assessment?

7 A Right. I own my windows, and why should I
8 buy them back from what they took from me is the way
9 I looked at it. They took my windows, and now,
10 they're asking me to buy them back. Well, anyway,
11 so at that December meeting, it was the end of the
12 year, and they were electing officers. So I ran for
13 office. I had no intention of being there, but I
14 got some votes, unfortunately, but I didn't win, but
15 it got their attention.

16 Q Okay.

17 ~~A And the only reason I ran for office was~~
18 to say my mind, because each person when they ran
19 for office, they made a little spiel. Okay? Now,
20 the rest of the meetings, you couldn't say anything,
21 generally speaking. They presented something, and
22 you rubber stamped, voted on it. That was the way
23 the meetings were run, still are. The last one I
24 went to was.

25 And so at that meeting, Mr. Mooneyham

1 had written a little where I -- for me, which said,
2 I'm not paying for the windows, and I'm not paying
3 for any new debt. Because, see, they said we have
4 an overage of what we got from the lawsuit.

5 Q You mean the reconstruction was going to
6 be --

7 A Yeah. It was going to be like 1.6 million
8 dollars more.

9 Q Okay.

10 A And you didn't get to agree. You just got
11 that, and you got to vote, you know, yes or no.
12 Well, mine was no. But anyway, so in December
13 meeting, running for office, and Mr. Rosen, their
14 attorney, was at that meeting. He was sitting at
15 the table with Mr. Warner, and I said good. Maybe
16 we'll get some response.

17 So I read Mr. Mooneyham's letter
18 verbatim in that meeting. Mr. Rosen didn't say any
19 word, but he knew some information that I didn't
20 know at that time. And Mr. Warner said, we will
21 respond to it, and within a month, I was foreclosed,
22 or threat of foreclosure if I didn't pay.

23 Q Okay.

24 A And I told him I wasn't going to pay for
25 my windows, and I wasn't going to pay for any new

1 debts they had. Because they had found out that the
2 windows weren't the problem. I mean some of them
3 leaked, but they were all up -- you know, they were
4 put in. They did find some of them had something
5 wrong with the flashing around them, and they found
6 that some of them had water coming between the glass
7 and the wood.

8 But at that meeting, they said, we
9 also found water coming under the owner's closet
10 door going into the wall, because it wasn't properly
11 joined. And the water would run down in the wall,
12 and that cost I think a quarter million dollars
13 more.

14 Well, my closet is under a roof.
15 It's under a porch roof, and it would have to be one
16 heck of a blow for a window to be -- I mean wind
17 ~~would have to blow wind straight across to get under~~
18 my owner's door and into the wall, because I looked.
19 I didn't have any water in it, but on the fifth
20 floor --

21 Q Okay.

22 A -- there's no roof. That closet set out
23 in the open.

24 Q Okay.

25 A That's what I figured what had happened.

1 Q You talked a moment ago about you got a
2 letter stating that if you didn't pay the special
3 assessment, they were going to foreclose on your
4 property.

5 A Yes. That was what Warner said.

6 Q Okay.

7 A That was in January of that year.

8 Q Following the --

9 A After me reading the letter --

10 Q After the -- hold on. After the
11 settlement and so forth. So this would have been
12 January of 2010?

13 A Probably. I mean it was -- it all
14 happened at once, August, settlement, September,
15 what we going to do, construction. No time to think
16 within a month.

17 Q Right.

18 A Then they said it was going to meet in
19 October, but they skipped that because -- you know,
20 and I had seen Mr. Mooneyham at that time, and Mr.
21 Mooneyham went to the November. And then it was in
22 December of the same year, which I read my letter in
23 a meeting. That's why I ran, so I could read
24 something.

25 Q Okay.

1 A Obviously, they didn't like it. So they
2 threatened to foreclose on me.

3 Q Following that letter stating they were
4 going to foreclose on you if you didn't pay the
5 special assessment, was that when you filed suit?

6 A No. No, no, no.

7 Q Okay. How long after that was it before
8 you filed --

9 A I'm not sure. You-all have to attest
10 through you-all's records, but we went on and on and
11 on. We argued with them for a while about the
12 windows. You-all did, about whether or not the
13 owners should own the windows, and the argument that
14 I had was, you put them in from the inside, they're
15 my windows. And the original master deed said they
16 were my windows.

17 Q Okay.

18 A And that's in black and white.

19 Q Dr. Lucas --

20 A Yes.

21 Q -- you eventually filed a lawsuit, which
22 is why we're here today.

23 A Yeah. I filed a lawsuit, and the reason I
24 filed that lawsuit was that we had no information.
25 They weren't giving us information. As a matter of

1 fact --

2 Q What information were you wanting?

3 A Just the routine business information.

4 Q Such as?

5 A The condo minutes, the condo records,
6 where money went --

7 Q Financial?

8 A Yeah. I want to know what they'd done
9 with all that money they wanted. Okay? Couldn't
10 get any information. We got some little old letter
11 written by Landry that glossed over the whole
12 thing -- not Landry, Warner, glossed over the whole
13 thing. It's in there, you-all's records, which
14 didn't tell us anything.

15 And so they went ahead and started
16 changing the windows, and they hadn't even ordered
17 the windows when I told them that I wasn't going to
18 get a window. They hadn't even ordered them,
19 because it wasn't until February they ordered the
20 windows. They could have changed their orders, or
21 they -- or they could have just not ordered them.

22 But then they pulled the sneaky
23 trick, well, we're going change the windows, and,
24 you know, it's a better window. Well, we know that
25 that's not totally true, and they didn't bother to

1 tell us that they could have treated the windows,
2 which we found out later, that their attorneys had
3 presented to them that they could treat the windows.
4 Because to be honest with you, well --

5 Q Was the treatment cheaper than the
6 replacement?

7 A Well, wait a minute, before we get to the
8 treatment. We went through all that period of time
9 where they were changing the windows. They started
10 on the water side and ran toward me. I think it was
11 supposed to go the other way, but they changed their
12 mind and came towards me where my condo is, the
13 street side.

14 And I said, you know, don't bother
15 me. I'm not changing mine, and so one day, Lona
16 comes in reportedly to take my windows so dust won't
17 get in. ~~She called you-all. And you-all related to~~
18 me, and I said, okay. So she goes in and tapes my
19 windows, theoretically, and she'll have to say
20 whether or not she did. I didn't go. But then they
21 said, your windows leak. You got to change all your
22 windows, because I found two windows that leaked.

23 Well, there was a little brown strip
24 at the bottom of the glass. Well, in Charleston,
25 you know, if you breath too much in a room,

1 condensation occurs on the inside, and it runs down.
2 And that's what I thought it was. So I didn't pay
3 any attention to it. And they still do that after
4 they replaced them. The last time I was down there,
5 which was in November, I think, it's still got
6 condensation. They even wrote a letter, don't run
7 your fireplace without opening a door, because it
8 got the place so air tight that the people that
9 don't have a chimney for their fireplace have to
10 open the door to run their fireplace. Otherwise,
11 you suffocate.

12 As a matter of fact, my son when I
13 called him, had a bad, bad headache, and, you know,
14 I'm thinking aneurysm, okay, because I'm a
15 neurosurgeon. And, you know, so I'm running down
16 the road in the middle of the night going from
17 Beaufort to Charleston thinking differential from a
18 kid.

19 Well, come to find out, the kid was
20 apoxic, because he was too -- the gas for the
21 fireplace was free, but the heat was not. So he was
22 running the fireplace so he wouldn't have to pay the
23 heating bill, but my son -- you know --

24 THE COURT: Smart.

25 A -- in the summer, he would open the doors

1 so the air conditioning in the hallway would come in
2 so he wouldn't have to pay the air conditioning
3 bill, and he closed every vent in every room except
4 his. And I had to pay 10 bucks when I'd visit him
5 to open my vents, because he was paying the electric
6 bill. Now, that was a -- anyway --

7 Q Okay.

8 A That's my son.

9 THE COURT: Did he learn that from his
10 momma or his daddy?

11 THE WITNESS: Probably, to be truthful,
12 probably his momma.

13 BY MS. POPE:

14 Q All right. We're going to go back to
15 talking about your lawsuit. Okay?

16 A Okay.

17 Q You brought your lawsuit because you
18 wanted information, you said?

19 A Oh, well, no. They came to change my
20 windows before we even had the lawsuit, because they
21 said they were bad. And we had a ruckus about that.
22 I told them not to change my windows. They did.

23 Q Okay. I want to talk about your lawsuit
24 that you brought.

25 A Okay.

1 Q You know, you brought -- you said for
2 information?

3 A Yeah.

4 Q About the issues with the windows and
5 doors. What else were you suing for or had concerns
6 about? What else was your lawsuit about?

7 A Well, honestly, we -- in that letter from
8 Lona, it said, if you're going to contest this
9 procedure of your windows, you had to do it in three
10 years or something, and we picked up on that. So we
11 filed a lawsuit, but it wasn't really -- the main
12 reason we wanted was the darn information of what
13 happened. We hadn't gotten any information, so --
14 we've asked for it. We hadn't gotten it.

15 So we knew that if we filed a suit,
16 we could get information, and that's really why the
17 suit was filed initially.

18 Q Okay.

19 A But we got some information.

20 Q What information are you referring to?

21 A Well, one of the biggest things about the
22 window was somebody had asked Lona, or Lona did it
23 on her own, to pressure wash our side of the
24 building, because we were deciding not to really
25 complain. So they had pressure washed that -- I

1 don't know what you call it down here, stone wash,
2 whatever. It's stucco. They just used pressure,
3 and I got to put two and two together. And I also
4 remembered that the sticky rubber part under my
5 kitchen door --

6 Q Uh-huh.

7 A This is when it started getting a
8 little -- one time I went down there, and it was
9 bent back, like something from the outside pushed
10 back. Well, I touched it. It's still sticky. So I
11 opened the door and tucked it back up. I didn't
12 know how or why.

13 But anyway, but then we found out
14 they had pressure washed. Well, everybody knows you
15 don't pressure wash your windows. You really
16 shouldn't pressure wash a building unless it's fully
17 rated for that. Then we looked -- or I looked in my
18 warranty and found out my warranty had been violated
19 so --

20 Q What warranty?

21 A For windows.

22 MR. BARFIELD: I will interpose an
23 objection to the hearsay on that.

24 THE WITNESS: Well, it's in the books.

25

1 BY MS. POPE:

2 Q You just keep answering.

3 A All right. It's in the warranty book.
4 That second book they gave is a saying that stone
5 washing windows voids warranty.

6 Q Okay.

7 A And that was with Anderson, because right
8 after, they said, Anderson is going to give us a
9 deal on windows. I said, yeah. You sue somebody --
10 I mean I have been sued so many -- well, I did treat
11 one malpractice lawyer, but anyway -- but anyway,
12 where was I at? About the windows. I said, oh,
13 yeah, Anderson is going to give you a real deal.

14 Well, the next scenario was, well, we
15 can't get anything from Anderson. So we're not
16 going to buy Anderson windows. This is how they
17 pulled the switcheroo. We're not going to buy the
18 windows from Anderson, because we can't get past the
19 lawyers. And that's their word.

20 They always -- we can't get the
21 salesman. We can only talk to the lawyers. So
22 that's why Anderson windows was not presented as an
23 option for replacement. So if you replace with
24 another window, that means you got to replace all
25 the windows to make them look alike. And that's

1 what they used to tear up my windows.

2 Q Okay. So your lawsuit was contesting the
3 special assessment?

4 A It was contesting -- I think we're up to
5 -- well, I quit counting about seven assessments.

6 Q Okay.

7 A Because it was used -- the trick they used
8 is, oh, we're going to study the whatever fund that
9 --

10 Q The reserve fund.

11 A The reserve fund. They study it. They
12 say we don't have enough. They do an assessment.

13 Q Okay.

14 A It's usually because they spent --

15 Q Okay.

16 A It -- they use it as a slush fund to buy
17 lawyers, everything, you know, and they never really
18 funded it. And each time they would really study
19 it, it would be different, always want money.

20 Q Okay.

21 A And they're doing that now. They're
22 saying we need to restudy the reserve fund, and
23 right now, to my knowledge, reserve fund doesn't
24 have anything in it.

25 Q Okay. The assessments for the windows and

1 doors, how were those determined? How was it
2 determined how much each homeowner was going to pay?

3 A Oh, they had charged a certain amount per
4 window. They counted the windows, and if you had X
5 number of windows, you paid X amount of money.

6 Q So it wasn't a set amount divided by 54
7 units, it was based on how many windows you had?

8 A Oh, yeah. That was a funny thing. After
9 the lawsuit, they started saying we all pay equally.
10 Okay? But the first thing they did as a board
11 action was to charge unequal for the windows,
12 because there was so much of a ruckus raised that he
13 -- they were trying to stick the windows into one
14 lump sum, and the homeowners wouldn't let them.

15 Q Okay.

16 A So they had to divide it out by windows,
17 the number of windows. They didn't divide it out by
18 the kind of windows until I raised cain, and then
19 they sent out a little thing that was the cost of
20 the windows, theoretically. I don't know how, but
21 some windows there have got a big giant dome, you
22 know.

23 The fifth floor is the penthouse
24 floor, and as a matter of fact, one of the things I
25 complained about was that my condo has less windows

1 than the fifth floor condo. Well, the initial thing
2 came out as us having the same number of windows.
3 We don't.

4 Q Okay.

5 A And I fussed about that. Well, somebody
6 corrected it, and I'm sure I know who. But anyway.

7 Q The assessment for the windows and doors
8 was based on how many windows and doors you had?

9 A Yeah.

10 Q Okay. The other assessments --

11 A I mean, you know, bigger condos would have
12 more windows. Condos on the end would have more
13 windows. Condos on the end side would have less.
14 Condos on the fifth had more. Condos on the third
15 floor --

16 Q Okay. Other assessments, whether they
17 ~~dealt with the lawsuit, paying of insurance~~
18 policy -- hold on. Let me finish. Paying of the
19 insurance policies, are those assessments broken
20 down based on where your condo is located, size of
21 your condo, or is it just flat across the board?

22 A Flat across the board. Everybody pays the
23 same, the insurance, and that was another thing.
24 That was kind of after the lawsuit, but they say
25 everybody pays the same for insurance. Duh, you got

1 more windows. That is more costly.

2 Q Well, they've got a bigger condo?

3 A Yeah. And a bigger condo, but it's not --
4 you know, the condos are pretty much columns, and
5 that's why they call it a horizontal regime. If you
6 have something wrong with a column, then those
7 people settle the difference.

8 Q Okay.

9 A Including the guy on the fifth floor who
10 has more windows.

11 Q Uh-huh.

12 A Now, certain parts of the building have
13 bay windows. Some of them have big expensive dome
14 windows.

15 Q But I'm not talking about the window and
16 door special assessment right now.

17 A All right.

18 Q I'm talking about --

19 A I'm sorry.

20 Q That's okay. I'm talking about --

21 A Insurance.

22 Q -- insurance?

23 A That's what --

24 Q Hold on. Let me finish. Insurance and
25 any other special assessment.

1 A All equal.

2 Q Okay.

3 A But that's why I brought out the point
4 about the windows and doors. The first thing they
5 did after the lawsuit, they couldn't get away with.

6 Q Was try to do it equally?

7 A They tried to do it equal with the windows
8 and doors, but everybody said no. They were smart
9 enough to say no. So they did it by windows, the
10 number of windows. Well, the windows were a value,
11 so to speak.

12 Q Okay.

13 A And so -- but then from that point on,
14 they started saying everything is equal. Everything
15 is equal, equal assessments, equal amounts. We're
16 going to make these into apartments where everybody
17 ~~owns 154th of the whole building. That was their~~
18 gimmick with that one. If we owned the whole
19 building, which goes back to them taking the windows
20 and condos.

21 Q Okay. Hold one second.

22 A Okay. Trying to get --

23 Q Hold on. Has the way that the board
24 apportions insurance payments among the condo
25 owners, has that changed, or is it still you pay

1 equal share?

2 A We pay equal share this year.

3 Q Okay. On special assessment, any type of
4 special assessment?

5 A They're all equal. They've always been
6 equal. They say we pay equal, because that's what
7 we started out. Well, when we started out paying
8 the assessment, it was for cleaning the floors,
9 cleaning the common floors, cleaning the -- well,
10 security. That's a big cost, paying for security,
11 and I agree with those because those are a common
12 expense.

13 I got a lady out there vacuuming my
14 hall, I pay -- you know, somebody else has got a
15 hall in theirs. It was common for the security.
16 The guy guards my place at night, my son's there,
17 you know -- it's to pay for the gates, the gates
18 that open and close, the little -- you know, that's
19 common.

20 To use the Bristol room was supposed
21 to be common, but somehow in there when they got
22 short of money, they wanted you to pay to use the
23 Bristol room. And I got the feeling people wasn't
24 cleaning up, but you had to pay to use your common
25 property.

1 Q Okay.

2 A And that was the same fee for everybody.

3 Q Up to a certain point, you paid, as a
4 homeowner, flood insurance as --

5 A Pay --

6 Q There was a general policy for the
7 Bristol?

8 A Yeah. But I had my own flood insurance.

9 Q Right. You had your own, but in addition
10 to that, the Bristol had a flood insurance policy?

11 A And I figured that was okay, because the
12 generator is down on the bottom, and the flood
13 insurance would cover that.

14 Q Okay. And any point in time --

15 A And the downstairs, there's a first floor
16 common area where the post office boxes are and the
17 entrance --

18 Q But at some point, there was a refund for
19 the flood insurance premium?

20 A Oh, yeah. They were -- somebody had
21 goofed up, and there was a refund on the flood
22 insurance.

23 Q To the Bristol --

24 A To the Bristol.

25 Q -- Homeowner Association?

1 A And I never saw any refund. See, the way
2 they work is money in equally, money out unequally.

3 Q Okay.

4 A They pay for their own, you know. The
5 only thing they got caught on was the windows and
6 doors.

7 Q Do you know how much that refund was?

8 A You know, I don't.

9 Q Okay. Do you know what it was used for?

10 A It was, quote/unquote, put in a reserve
11 fund, but it eventually was used to pay the lawyer
12 fees.

13 Q For the litigation -- the construction
14 litigation?

15 A Against the builders, yeah.

16 Q Okay.

17 A That's what happened to all the reserve
18 fund.

19 Q Okay.

20 A And what happened was they had to rely
21 more on the reserve fund, because the fees had
22 gotten so high and the -- you know, everything
23 got -- the economy got bad, and then they didn't
24 have an excuse to raise the fees. We were no longer
25 New York. So they had to go down, and they couldn't

1 sell their property because of the high condo fees.
2 Highest -- I think it was the highest in town at one
3 time.

4 And so they had to reduce the condo
5 fees and then go to special assessments and reserve
6 funds. That's my opinion.

7 Q Okay. Now, at some point -- I'm trying to
8 remember the date. Just one moment. I believe it
9 was April of 2011. Here we go. I stand corrected.
10 In March of 2011, do you remember being sued, the
11 foreclosure action that was filed against you?

12 A Uh-huh.

13 Q Okay. What was your understanding as to
14 what that foreclosure action was for?

15 A Not paying my dues. It's that December
16 meeting that I wrote about the windows and doors,
17 ~~and that same meeting, they ran out and borrowed~~
18 \$250,000. And I wasn't going to be part of that.
19 They were making debt, but it was to sue -- I was
20 foreclosed on for that reason, the windows and doors
21 is my understanding. But I didn't pay for the
22 windows and doors.

23 But each month, I paid whatever the
24 monthly charge was minus the \$100, which was the
25 special assessment fee.

1 Q So you were still paying your regime fee?

2 You --

3 A Oh, yeah. I paid my regime fee all along,
4 because I didn't contest that. Well, I did, because
5 the price went up and down.

6 Q Right.

7 A And they were using that money -- as a
8 matter of fact, it was an emphasis on bathrooms too.

9 Q Okay. We're going to get to the bathrooms
10 in just a second.

11 A Okay. But they were using that reserve
12 fund, which was \$100, and that's what I was
13 contesting.

14 Q That and the special assessment?

15 A And the special assessment.

16 Q Okay.

17 A Yeah. And I didn't pay them, and I didn't
18 pay for the windows and doors either.

19 Q Okay. Now, I'm going --

20 A I mean why should I pay for windows and
21 doors that I owned that they destroyed and buy them
22 back from --

23 Q I understand, but let me show you this --
24 I'm going to get you to look at this for a moment.

25 MS. POPE: Do you want me to refer to

1 this, Your Honor, by tab number or --

2 THE COURT: Tab number is easiest for me.

3 MS. POPE: Okay.

4 BY MS. POPE:

5 Q I'm going to refer to tab number 48 of
6 plaintiff's pretrial brief and list of exhibits,
7 which I think we've marked as Plaintiffs' Exhibit 1.
8 This is a copy of the foreclosure action that was
9 filed --

10 A I've never seen it.

11 Q -- in the March of 20 --

12 A I've never seen it.

13 Q Yes. Now, it names you actually as the
14 trustee.

15 A John T. Lucas, Sr., and John T. Lucas
16 Revocable Trust, yeah.

17 Q Okay. Now, the property at the Bristol
18 that you own, the condo, when you initially
19 purchased it, was it purchased by the trust or you
20 as an individual?

21 A By me as an individual.

22 Q Okay. And did you later open the trust or
23 open the trust and transfer the property?

24 A I hired -- when I was living in Beaufort,
25 I hired an attorney for tax reasons -- but for tax

1 reasons to put it in a trust, and my understanding
2 of the trust by this attorney was that the tax on it
3 somehow got delayed when I died --

4 Q Okay.

5 A -- to my kids and they pay it, not me.

6 Q And you and your wife, Carolyn Lucas, are
7 the control -- you-all control the trust?

8 A Yeah. And there's -- well, yeah. Well,
9 actually, guess what? I'm supposed to be the one
10 who controls the trust, because I'm the executor, at
11 least that's what they tell me.

12 Q Okay. So the lawsuit that you initially
13 brought in 2010 against the homeowners association
14 for the various things that we discussed, the trust
15 didn't bring that. You, as individuals, brought
16 that lawsuit?

17 A Yeah. It was to get information.

18 Q Okay. But you perceived yourselves as
19 owners of the condo. You brought the lawsuit?

20 A Paid for it.

21 Q Okay. All right.

22 A We paid for it. The trust didn't buy it.

23 Q Following the filing of the foreclosure
24 action against you, do you know how much you had
25 incurred in attorneys' fees and costs defending

1 and -- defending that foreclosure action, but then
2 also pursuing them for a counterclaim for the false
3 foreclosure?

4 A God only knows. I mean you-all would have
5 to figure that one out. I mean I --

6 MR. BARFIELD: I will object to the
7 relevance based on our arguments pre- --

8 THE COURT: I understand, but I'll allow
9 him to answer.

10 MR. BARFIELD: Yes, sir.

11 A Well, I do know that it's costing me more
12 because when -- before we even brought the lawsuit,
13 we made a deal, or Mr. Mooneyham or -- may have been
14 you, made a deal with the homeowners that they pay
15 for my windows.

16 BY MS. POPE:

17 Q Okay.

18 A And I dropped the suit. I mean, you know,
19 and we also made an inquiry as to whether or not if
20 I put money in escrow for whatever I wasn't paying,
21 that your firm would keep until it was settled.

22 Q You're talking about placing money after
23 the foreclosure was filed, placing money in escrow?

24 A I don't know whether that was before or
25 after.