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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
John M. Milling, Special Referee

Case Nos. 2009-CP-26-10053 & 2009-CP-26-11862
Appellate Case No. 2013-001281

Harleysville Group Insurance, a Pennsylvania
corporation, ... Appellant/Respondent,

v.

Heritage Communities, Inc., a South Carolina
corporation; Heritage Magnolia North, Inc., a
South Carolina corporation; Buildstar Corporation,
a South Carolina corporation; Magnolia North
Horizontal Property Regime; Magnolia North
Property Owners Association, Inc., a South
Carolina corporation, and National Surety Corp., ... Defendants,

Of whom Heritage Communities, Inc., a South
Carolina corporation; Heritage Magnolia North,
Inc., a South Carolina corporation; Heritage
Riverwalk, a South Carolina corporation; Buildstar
Corporation, a South Carolina corporation, and
National Surety Corp. and Tony L. Pope and Lynn
Pope, individually and representing as a class all
unit owners at Riverwalk at Arrowhead Country
Club Horizontal Property Regime are Respondents,

And Magnolia North Horizontal Property Regime,
Magnolia North Property Owners Assoc., Inc., a
South Carolina corporation and Riverwalk at
Arrowhead Country Club Horizontal Property
Regime; Riverwalk at Arrowhead Country Club
Property Owners Association, Inc. are Respondents/Appellants.

CONSOLIDATED RECORD ON APPEAL
VOLUME TWO

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Country Club Property Owners
Association, Inc.

HARLEYSVILLE GROUP INS. V HERITAGE COMMUNITIES
Consolidated Case No. 2013-001281

CONSOLIDATED RECORD ON APPEAL
INDEX

VOLUME I

ORDERS and JUDGMENTS

Post Trial Order in underlying case April 10, 2009 (Riverwalk)	1
Post Trial Order in underlying case November 16, 2009 (Magnolia North).....	7
Order of Reference appointing the Honorable Judge John Milling as Special Referee October 21, 2010 – (Magnolia North) (Riverwalk)	17
Special Referee Order denying Harleysville’s Motion for Directed Verdict or Declaratory Judgment February 21, 2013 (Riverwalk).....	21
Special Referee Order denying Harleysville’s Motion for Directed Verdict or Declaratory Judgment February 21, 2013 (Magnolia).....	23
Special Referee Order disposing of cases February 28, 2013 (Riverwalk)	25
Special Referee Order disposing of cases February 28, 2013 (Magnolia)	75
Order of Special Referee denying relief requested in Harleysville Motion to Alter, Amend or Vacate filed April 24, 2013 (Magnolia North)	121
Order of Special Referee denying relief requested in Harleysville Motion to Alter, Amend or Vacate filed April 24, 2013 (Riverwalk)	124

PLEADINGS

Harleysville Declaratory Judgment Complaint October 14, 2009 (Riverwalk).....	127
Riverwalk Answer and Counterclaim at Arrowhead, et. al. October 21, 2009 (Riverwalk).....	141
POA Amended Answer and Counterclaim November 6, 2009 (Riverwalk).....	148

Harleysville Reply to Amended Counterclaim November 23, 2009 (Riverwalk).....	167
Harleysville Declaratory Judgment Complaint December 10, 2009 (Magnolia North).....	173
Magnolia North POA's Answer and Counterclaim December 17, 2009 (Magnolia North).....	221
Harleysville Reply to Counterclaim January 4, 2010 (Magnolia North)	241

TRANSCRIPTS

Riverwalk/Magnolia North Trial Transcript December 13-14, 2010	246
Testimony	253
James Lee Wright	262
Direct by Calamari	262
Cross by Henry	421
ReDirect by Calamari	448

VOLUME TWO

Frank Baiden	457
Direct by Calamari	457
Cross by Henry	498
ReDirect by Calamari	507
Riverwalk/Magnolia North Hearing Transcript December 9, 2011	539
Testimony	551
Frank Baiden	551
Direct of Calamari	551
Cross of Henry	561
ReDirect of Calamari	566
James Wright	568
Direct by Calamari	568
Cross of Henry	577
John D. Brown, Jr.	578
Direct of Henry	578
Cross of Calamari	584
ReDirect of Henry	602
Cross of Calamari	604
ReDirect of Henry	610
Riverwalk/Magnolia North Hearing Transcript April 9, 2013	641

EXHIBITS/DOCUMENTS

December 2010 Trial Exhibits - Riverwalk specific:

Tr. Ex 1 – Trial Transcript of Riverwalk underlying liability action January 5-15 2009, page excerpts.....	743

VOLUME THREE

Tr. Ex 1 – Trial Transcript of Riverwalk underlying liability action January 5-15 2009, page excerpts continued.....	958

Tr. Ex 4- Third Amended Complaint in underlying Pope Class Action July 22, 2008	1076

Tr. Ex 4 – Fourth Amended Complaint in Underlying POA Liability Action August 3, 2006	1098

December 2010 Trial Exhibits – Magnolia North specific:

Tr. Ex. 6 – Magnolia North underlying Trial Transcript May 11-20, 2009 Page excerpts	1112

Tr. Ex 6 – Transcript of video deposition of Gwyn Hardister April 15, 2009 (played in underlying Trial)	1312

Tr. Ex. 9 -Eighth Amended Complaint in underlying liability action February 24, 2009	1406

December 2010 Trial Exhibits – Both Cases:

Tr. Ex 11 – Deposition Transcript of James Lee Wright August 3, 2010	1413

Tr. Ex 11 – Deposition Transcript of Brian Tormey, October 19, 2010.....	1437

VOLUME FOUR

Tr. Ex 12 – Commercial General Insurance Policies (notebook) issued by Harleysville to Insureds.....	1450

Tr. Ex 14 – Harleysville Response to Defendants First Request to Admit and Supplemental Interrogatories February 4, 2010	1640

Tr. Ex 14 – Harleysville Answers to Defendants First Set of Interrogatories and Request for Production February 22, 2010.....	1648

Tr. Ex. 14 – Harleystown Amended Responses to Defendants First Request to Admit and Supplemental Interrogatories February 17, 2010	1665
Tr. Ex 14 – Fourth Amended 30(b)(6) Notice of Deposition of Harleystown Ins. Group August 6, 2010	1673
Tr. Ex 14 – Harleystown Answers to Defendant’s Supplemental Interrogatories and Request for Production, September 28, 2010	1678
Tr. Ex 14 – Harleystown Amended Answers to Defendant’s Request for Admissions dated October 1, 2010.....	1705
Tr. Ex 14 – Harleystown Second Amended Answers to Defendant’s Request For Admission October 7, 2010.....	1717
Tr. Ex 14 – Harleystown Amended Answers to Interrogatories October 15, 2010...	1730
Tr. Ex 15 – Harleystown Reservation of Rights Letters to Insureds	1776
Tr. Ex 17 – Harleystown Chart regarding policies, limits, and aggregate remaining	1844
Tr. Ex 19 – Harleystown Four Policy Forms	1845

VOLUME FIVE

Tr. Ex 20 – Baiden Construction Report (Riverwalk).....	1926
Tr. Ex. 21 – Baiden Construction Report (Magnolia North).....	1967
Tr. Ex 22 – Transcript of Motions Hearing in Rivers Oaks matter	1976
Tr. Ex 23 – Affidavit of Roger Van Wie	1993
Tr. Ex 24 – Deposition Transcript of James Graham December 2, 2008.....	1995
Tr. Ex 25 – Verdict Form from underlying trial January 15, 2009 (Riverwalk).....	2116
Tr. Ex 26 – Pope CA # 05-CP-26-3289 Verdict form from underlying case	2118
Tr. Ex 27 – Verdict Form from underlying trial May 20, 2009 (Magnolia North).....	2120

Underlying Cases Trial Exhibits:

Underlying Trial Ex. 8 (Riverwalk)	2122
Underlying Trial Ex. 4 (Magnolia North)	2123
Underlying Trial Ex. 6 (Magnolia North)	2154
Underlying Trial Ex. 15 (Magnolia North)	2179
Underlying Trial Ex.30 (Magnolia North)	2181
Underlying Trial Ex. 36A (Magnolia North)	2185
Underlying Trial Ex. 40 (Magnolia North)	2300
Underlying Trial Ex. 665 (Magnolia North)	2309

OTHER MOTIONS

Pretrial Brief of Riverwalk December 1, 2010 (Riverwalk) (Magnolia North)	2315
Harleysville PreTrial Brief December 3, 2010 (Riverwalk) (Magnolia North)	2359
Harleysville Motion to Conform Evidence and Correct Mistake in Record February 17, 2012 (Riverwalk)	2403

VOLUME SIX

Harleysville Motion for Judgment as a Matter of Law and Directed Verdict September 12, 2012 with proposed order (Magnolia North)	2409
Harleysville Motion for Judgment as a Matter of Law and Directed Verdict September 12, 2012 with proposed order (Riverwalk)	2465
Magnolia North Motion to Alter or Amend March 20, 2013	2521
Riverwalk Motion to Alter or Amend March 20, 2013	2524
Harleysville Motion to Alter or Amend or Vacate March 21, 2013 (Magnolia North)	2527
Harleysville Motion to Alter or Amend or Vacate March 21, 2013 (Riverwalk)	2547

Harleysville’s chart “Magnolia North Data” submitted to the Special Referee
As an attachment to its Proposed Order, February 16, 2012.....2568

Harleysville’s chart “Riverwalk Data” submitted to the Special Referee
As an attachment to its Proposed Order, February 16, 2012.....2569

Certificate of Counsel

EXHIBIT NUMBER 26

STIPULATED AND ADMISSIBLE BY ALL PARTIES

MR. HENRY: AND EXHIBIT 27 WILL BE THE VERDICT
FORM FOR THE MAGNOLIA NORTH PROPERTY
OWNERS ASSOCIATION, INC., CASE 2003-
CP-26-3203, AND WE'VE STIPULATED
THAT THESE ARE IN EVIDENCE.

EXHIBIT NUMBER 27

STIPULATED AND ADMISSIBLE BY ALL PARTIES

THE COURT: OKAY. THANK YOU. ARE YOU READY?

MR. CALAMARI: YES. THANK YOU; YOUR HONOR.

THE COURT: VERY GOOD.

MR. CALAMARI: YOUR HONOR, AT THIS TIME, WE'D LIKE
TO CALL TRIPP BAIDEN TO THE STAND.

AT THIS TIME, FRANK E. BAIDEN, III, HAVING BEEN
CALLED TO THE STAND, WAS DULY SWORN AND TESTIFIED AS
FOLLOWS:

DIRECT EXAMINATION

BY MR. CALAMARI:

Q: Mr. Baiden, please state your full name.

A: It's Frank, excuse me, Frank Edward Baiden, III.

Q: And you go by the name of Tripp?

A: Tripp, that's correct.

Q: So if I call you Tripp, we'll understand that I'm

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Consolidated ROA_0457

1 A: That's fine.
2 Q: --- talking to you. Tell me about your
3 occupation.
4 A: I'm an unlimited general-contractor.
5 Q: How long have you been an unlimited general
6 contractor?
7 A: I've been in the industry for 28 years. I've had
8 my unlimited license for 20 years, give or take a
9 year or so.
10 Q: And how many projects have you been involved in
11 over the course of that time?
12 A: Close to \$500,000,000 worth.
13 Q: And do you hold any position with a company?
14 A: Yes. I'm vice-president with Baiden &
15 Associates.
16 Q: And tell us about Baiden & Associates.
17 A: We've been Baiden for about 23 years. We've done
18 a variety of projects, from banks, strip centers,
19 Lowe's, high-rise condos, hotels.
20 Q: Have you done new construction?
21 A: Yes, we have.
22 Q: What about renovations?
23 A: Yes, sir.
24 Q: Give us some examples of the work that you've
25 done.

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Consolidated ROA_0458

1 A: Excuse me. I'm a little bit nervous for some
2 reason. I don't know.
3 Q: That's all right. Feel free to take your time.
4 A: Okay. I apologize to The Court. We've done
5 extensive renovations. We've done everything
6 from the ground up to restorations of existing
7 hotels, strip centers, and malls.
8 Q: What does it mean to have an unlimited
9 contractor's license?
10 A: I'm licensed to build everything except for
11 bridges.
12 Q: Do you enjoy your work?
13 A: Love it.
14 Q: What about, and your father started the company?
15 A: Yes, sir, he did.
16 Q: And how long did he have the company before you
17 were involved?
18 A: About two years before I got involved, after I
19 graduated college.
20 Q: Okay. And can you give us just the names of some
21 of the projects around the county that you've
22 worked on?
23 A: Springmaid Beach, Dunes Village, all the Sand
24 Dunes properties, Springs Towers.
25 Q: What's the name of the, Ocean Grand, what was the

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1 work that was done there?
2 A: Dunes Village.
3 Q: Dunes Village.
4 A: Dunes Village.
5 Q: What was done there?
6 A: That was about a 50 million dollar project that
7 took course over about a three and a half year
8 period.
9 Q: And what did Baiden Construction do?
10 A: Built both, both facilities and a parking garage.
11 Q: Do you know what you're doing when it comes to
12 construction?
13 A: Yes, sir.
14 Q: Have you done cost estimates in the past?
15 A: Yes, sir.
16 Q: When you look at construction, are you able to
17 determine what kind of construction it is?
18 A: Yes, sir.
19 Q: All the particulars and information related ---
20 A: Absolutely. We do, for instance, on a 26 million
21 job, for instance, a 20 story high-rise, both
22 Sidney Mathis and my other chief estimator,
23 Bronson Summers, along with myself will
24 collectively put a cost estimate together, which
25 typically takes about two months.

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1 Q: Okay. And how do you go about putting a cost
2 estimate together?

3 A: Well, in, in normal situations, you have a set of
4 architectural drawings, structural drawings,
5 mechanical and electrical, and we involve our
6 subcontractors and we collectively put a number
7 together.

8 Q: And do you feel that you have expertise in the
9 field of general contracting?

10 A: Yes, sir.

11 Q: What about in construction?

12 A: Yes, sir.

13 Q: And what about in cost estimation?

14 A: Yes, sir. Actually, Sidney Mathis and Bronson
15 Summers do the lion's share of the cost
16 estimating at this time. For the first ten years
17 I was involved with the company, I was very
18 involved with that aspect of it, but I've moved
19 on to different responsibilities.

20 MR. CALAMARI: YOUR HONOR, AT THIS TIME, WE'D OFFER
21 MR. BAIDEN AS AN EXPERT IN THE FIELD
22 OF GENERAL CONTRACTING, CONSTRUCTION
23 COST ESTIMATION.

24 MR. HENRY: YOUR HONOR, WE HAVE NO OBJECTION TO
25 HIS QUALIFICATIONS, BUT AT THE

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1 APPROPRIATE TIME, WE'LL OBJECT TO
2 HIS TESTIMONY AND THE INTRODUCTION
3 OF A CONSTRUCTION ESTIMATE THAT'S
4 ABOUT TO BE INTRODUCED, I BELIEVE.
5 MR. CALAMARI: YOUR HONOR, AND THAT IS WHAT WE'RE
6 GOING TO DO. SO I THINK MAYBE WE
7 TAKE UP THE OBJECTION NOW. JUST A
8 PREVIEW, I'VE ASKED MR. BAIDEN TO
9 LOOK AT THE PROJECT, LOOK AT THE
10 EXPERT REPORTS, HE'S VISITED THE
11 PROJECT, AND THEY'VE SPENT COUNTLESS
12 HOURS PUTTING TOGETHER AN ESTIMATE
13 THAT BREAKS DOWN THE COST OF
14 REPAIRING THE IMPROPER WORK AND THE
15 COST OF REPAIRING THE DAMAGED WORK
16 TO CONDUCT THE ANALYSIS FOR THE
17 FIRST TIME IN THIS ACTION,
18 UNDERLYING TRIAL OR NOW, OF ANYBODY
19 BREAKING DOWN THAT COST ANALYSIS.
20 SO THAT'S THE TESTIMONY THAT HE'S
21 GOING TO OFFER. I UNDERSTAND THAT
22 MR. HENRY HAS AN OBJECTION. I THINK
23 NOW IS PROBABLY THE TIME TO ---
24 MR. HENRY: YOUR HONOR, WE WOULD OBJECT TO ANY
25 TESTIMONY REGARDING HIS COST

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1 ESTIMATES ON A NUMBER OF GROUNDS.
2 THE FIRST GROUND IS THAT IT VIOLATES
3 RULES OF EVIDENCE, 401, 402, AND
4 403, IN THAT IT IS NOT RELEVANT, IT
5 PROVES NO FACT IN DISPUTE OR MAKES
6 NO FACT IN DISPUTE MORE PROBABLE OR
7 LESS PROBABLE THAN IT WOULD WITHOUT
8 THE EVIDENCE. BECAUSE HIS REPORT
9 DOES NOT RELATE TO THE JURY'S
10 VERDICT IN ANY WAY, IT IS AN ATTEMPT
11 TO GO BEHIND THE GENERAL VERDICT OF
12 THE JURY, WHICH IS NOT PERMISSIBLE
13 UNDER THE LAWS OF THIS STATE, AND I
14 HAVE CITED TO YOU A NUMBER OF CASES,
15 INCLUDING NEWMAN, CLAYTON, COLLINS,
16 MOORE, TOMASKO, AND A RECENT CASE
17 THAT CAME OUT IN ADVANCE SHEET, AND
18 I BELIEVE IT'S THE FEW CASE. THIS
19 IS AN ATTEMPT, AND WE WOULD FURTHER
20 OBJECT TO AN ATTEMPT BY HARLEYSVILLE
21 TO RE-LITIGATE DAMAGES, WHICH IS NOT
22 PERMISSIBLE IN THIS DJ ACTION, AND I
23 WOULD CITE THE NEWMAN CASE AGAIN.
24 THERE CAN BE NO PROOF OF WHAT THE
25 JURY ALLOCATED DAMAGES TO AT THIS

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1 STAGE, AND EVEN IN MR. WRIGHT'S
2 DEPOSITION, HE SAID, AND MR.
3 TORMEY'S DEPOSITION, THERE'S NO WAY
4 AT THIS POINT TO DETERMINE HOW THE
5 JURY ALLOCATED DAMAGES. IN
6 ADDITION, YOUR HONOR, WE WOULD
7 OBJECT ON THE BASIS THAT
8 HARLEYSVILLE CONTROLLED THE DEFENSE,
9 TOOK NO ACTION OR PRESENTED TO THE
10 COURT NO OBJECTION TO A GENERAL
11 VERDICT, NOR DID IT DISCUSS WITH ITS
12 INSUREDS THE DIVERGENT INTERESTS
13 HARLEYSVILLE AND THE INSUREDS WOULD
14 HAVE WERE A GENERAL VERDICT
15 RENDERED. HARLEYSVILLE, IN
16 ADDITION, FAILED TO ASK THE COURT TO
17 SUBMIT A SPECIAL VERDICT OR SPECIAL
18 INTERROGATORIES, AND WE WOULD TAKE
19 THE POSITION THAT THIS REPORT IS NOT
20 ADMISSIBLE.

21 THE COURT: MR. CALAMARI?

22 MR. CALAMARI: THANK YOU, YOUR HONOR. WE FEEL LIKE
23 THAT THIS ISSUE REVOLVES AROUND
24 FAIRNESS, AND WE'VE GIVEN THIS A LOT
25 OF THOUGHT, AND I KNOW MR. HENRY'S

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1 READ A LOT OF CASES. I'VE READ A
2 LOT OF CASES. WE'VE SEEN CASES
3 ACROSS THE COUNTRY. FALL ON BOTH
4 SIDES. BUT ESSENTIALLY, THE CASES
5 THAT TELL THE PARTIES, "YOU CAN'T
6 ALLOCATE," OR, "YOU CAN'T DO
7 ANYTHING. YOU CAN'T LOOK AT A
8 JURY'S VERDICT. YOU CAN'T DECIDE
9 WHAT PART'S COVERED AND WHAT PART'S
10 NOT COVERED," THEY ALL DEAL WITH THE
11 FUNDAMENTAL ISSUE OF FAIRNESS, WHAT
12 DID THE PARTIES KNOW AT THE TIME THE
13 TRIAL TOOK PLACE. IN EVERY ONE OF
14 THESE CASES, THE MOST RECENT CASE,
15 THE FEW CASE, WHERE THE PEOPLE PUT
16 POUNDS OF SUGAR IN A GASOLINE TANK,
17 AND WE ALWAYS SAY YOU CAN ONLY FIND
18 THESE IN CASES, MOVIES DON'T MAKE
19 THESE THINGS UP, BUT IN THAT CASE,
20 IT WENT TO THE JURY, THEY HAD CAUSES
21 OF ACTION, SOME COVERED, NOT
22 COVERED. THEY KNEW SOME WERE
23 COVERED AND SOME WERE NOT COVERED,
24 AND THEY DIDN'T TAKE THAT ACTION.
25 SO THE COURT IN THAT CASE SAYS,

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1 "LET'S SEE HOW WE DECIDE THIS.
2 LET'S SEE THE FAIRNESS ARGUMENT THAT
3 WE'RE GOING TO LOOK AT IN THIS CASE.
4 IS IT FAIR TO THESE PARTIES TO SAY,
5 'YES, YOU SHOULD HAVE DONE IT AT
6 THAT TIME,' " AND ALL OF THOSE CASES
7 FALL ON THE SIDE OF SAYING, "IF YOU
8 HAD REASON TO KNOW OF HOW TO
9 ALLOCATE, THEN YES, YOU SHOULD HAVE
10 DONE IT AT THE TIME. WE'RE NOT
11 GOING TO DO IT NOW." BUT IN THIS
12 CASE, I THINK EVERYBODY RECOGNIZES
13 THE DILEMMA WE HAVE, AND YOU POINTED
14 IT OUT VERY CLEARLY, THAT IF WE HAD
15 THE SECOND NEWMAN DECISION PRIOR TO
16 TRYING THIS CASE, THE PLAINTIFFS
17 WOULD HAVE TRIED IT DIFFERENTLY, THE
18 DEFENDANTS WOULD HAVE TRIED IT
19 DIFFERENTLY, HARLEYSVILLE WOULD HAVE
20 INTERVENED. MS. EVANS AND I ARE
21 BOTH INVOLVED IN NUMEROUS CASES
22 AROUND THE STATE WHERE COURTS ARE
23 BEING REQUIRED TO LET THE INSURANCE
24 COMPANY INTERVENE BECAUSE OF THE
25 NEWMAN DECISION, NOT JUST IN

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1 CONSTRUCTION CASES BUT IN
2 EVERYTHING. THE INSURANCE COMPANIES
3 ARE BEING REQUIRED TO INTERVENE.
4 YOU CANNOT INTERVENE IN THE
5 UNDERLYING ACTION. IT IS NEXT TO
6 IMPOSSIBLE.. YOU CAN ASK FOR
7 ALLOCATION. THE JUDGE IN THESE
8 UNDERLYING CASES CAN SAY, "HEY, THIS
9 IS REQUIRED FOR US TO FILL THESE
10 CATEGORIES. I HOPE YOU HAVE EXPERTS
11 ALONG THOSE LINES," BUT CERTAINLY,
12 JUDGE NEWMAN DIDN'T KNOW ABOUT THE
13 SECOND NEWMAN DECISION THAT
14 ALLOCATED THESE DAMAGES. HE
15 COULDN'T HAVE. NONE OF US COULD
16 HAVE BECAUSE THE DIRECTIVE FROM THE
17 SUPREME COURT PRIOR TO THIS ACTION
18 WAS, "EVERYTHING'S COVERED, THE COST
19 TO TEAR OFF, THE COST TO FIX, THE
20 COST TO PUT BACK UP. EVERYTHING'S
21 COVERED." ALL THEY SAID WAS A
22 CONSTRUCTION DEFECT ALONE, WITHOUT
23 DAMAGE, IS NOT COVERED. WELL, AS
24 WE'VE ALL SEEN IN THIS CASE, THERE'S
25 DAMAGE. WE'VE GOT OUR ARGUMENT ON

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1 THE OTHER ISSUE, BUT FOR THIS
2 PURPOSE OF THIS ANALYSIS, WE'RE NOT
3 ASKING YOU TO LOOK BEHIND THE JURY
4 VERDICT. WE'RE NOT ASKING YOU TO
5 DISTURB THE JURY VERDICT. THE JURY
6 VERDICT IS THE JURY VERDICT. THIS
7 CASE IS NOT ABOUT CHANGING THAT
8 VERDICT. IT'S NOT ABOUT SAYING THE
9 JURY WAS WRONG. IT'S NOT ABOUT
10 SAYING THEY SHOULD HAVE DONE THIS,
11 THEY SHOULD HAVE DONE THAT. WE'RE
12 JUST TALKING HERE ABOUT WHO PAYS FOR
13 WHAT AND WHAT IS THE INSURANCE
14 OBLIGATION AND WHAT IS THE INSURED'S
15 OBLIGATION. MR. HENRY SAYS THAT,
16 AND THERE ARE CASES OUT THERE THAT
17 SAY, "WE DON'T DISTURB A JURY
18 VERDICT," AND WE'RE NOT ASKING YOU
19 TO, BUT THERE ARE MANY, MANY CASES
20 THAT DISTURB A JURY VERDICT, JNOV,
21 DIRECTED VERDICT, ADDITUR,
22 REMITTITUR. THIS MORNING, I PULLED
23 TWO CASES OFF WESTLAW. ONE IS
24 MCCRAE VERSUS, I CAN'T PRONOUNCE
25 THAT LAST NAME, LOOKS LIKE

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1 GHERAIBEH, AND IT'S 380 S.C. 183.
2 INVOLVING ADDITUR OR REMITTITUR.
3 THE NEXT CASE IS DILLON VERSUS
4 FRAZER, 383 S.C. 59, INVOLVING
5 ADDUTIR OR REMITTITUR, HAPPENS ALL
6 THE TIME. THE COURT OF APPEALS WILL
7 SAY, "YOU KNOW WHAT? THE JURY GAVE
8 TOO MUCH." JUDGES WILL SAY, "13TH
9 JUROR DOCTRINE, YOU GAVE TOO MUCH,
10 YOU GAVE TOO LITTLE. IT'S NOT BASED
11 ON THE EVIDENCE." SO TO SAY SIMPLY
12 THAT JURY VERDICTS ARE SACRED, WE
13 CAN'T EVER DO ANYTHING, IF THAT WERE
14 THE CASE, THERE'D BE NO APPEALS
15 COURT. THERE WOULD BE NO NEED FOR
16 ONE. THE COURT OF APPEALS AND THE
17 SUPREME COURT LOWER PUNITIVE DAMAGES
18 ALL THE TIME. THEY STRIKE DAMAGES
19 ALL THE TIME. THEY STRIKE CAUSES OF
20 ACTION. SO THAT'S WHAT WE'RE ASKING
21 IN THIS CASE. BUT TO SAY IT'S NOT
22 RELEVANT WHEN IT IS EXACTLY WHAT THE
23 NEWMAN DECISION SAYS YOU NEEDED TO
24 DO OR YOU SHOULD DO NOW IN THE
25 UNDERLYING TRIAL, TO SAY THAT'S NOT

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1 RELEVANT IS NOT FAIR TO US, AND I
2 THINK ALL THESE CASES DEAL WITH THE
3 FAIRNESS ARGUMENT. NOW, SOME OF THE
4 ~~OBJECTIONS WERE THAT WE SHOULD HAVE~~
5 DONE THIS AT THE TIME. OKAY, WHAT
6 SHOULD WE HAVE DONE AT THE TIME? WE
7 DON'T KNOW, AND I THINK YOU
8 SUGGESTED, WHEN WE TALKED PRIOR TO
9 THE CASE STARTING, WE DON'T REALLY
10 KNOW WHAT THE PROPER METHOD TO
11 HANDLE THIS IS, CERTAINLY DIDN'T
12 KNOW AT THAT TIME, AND WE DON'T
13 REALLY KNOW NOW, AS LAURA AND I CAN
14 ATTEST, AND I'M SURE THERE WILL BE A
15 LOT OF PLAINTIFFS' LAWYERS IN
16 CONSTRUCTION CASES SAYING, "I DON'T
17 WANT YOU IN THIS CASE. I DON'T WANT
18 YOU IN HERE," WHAT DO WE DO? WHAT
19 WOULD MR. HENRY HAVE US DO IN THE
20 UNDERLYING CASE? I'VE ASKED HIM.
21 I'D LIKE FOR HIM TO TELL THE COURT
22 WHAT WE SHOULD HAVE DONE AND HOW WE
23 SHOULD HAVE CONDUCTED OURSELVES,
24 SHOULD WE HAVE INTERVENED, SHOULD WE
25 HAVE CROSS-EXAMINED WITNESSES,

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1 SHOULD WE HAVE BROUGHT MR. BAIDEN IN
2 THE UNDERLYING TRIAL BECAUSE NONE OF
3 THE OTHER EXPERTS DIVIDED THESE
4 DAMAGES, IT WASN'T DONE. THIS COURT
5 HAS AN OPPORTUNITY TO CORRECT THE
6 PROBLEM THAT EXISTS IN THESE CASES.
7 THIS COURT HAS AN OPPORTUNITY TO
8 SHOW THE APPELLATE COURTS THE PATH
9 TO RESOLVE THESE ISSUES AND THE BEST
10 WAY TO DO IT, AND I HOPE THE COURT
11 ACCEPTS THAT OPPORTUNITY BECAUSE IT
12 IS GROUNDED IN FAIRNESS. I THINK
13 IT'S FAIR TO HARLEYSVILLE, IT'S FAIR
14 TO THE INSURED, AND WHAT WOULD
15 HAPPEN IF THESE CASES WERE TRIED
16 AFTER NEWMAN AND ALL OF THAT
17 EVIDENCE CAME IN WOULD BE EXACTLY
18 WHAT MR. BAIDEN COMES OUT WITH, AND
19 THAT'S ALL WE'RE ASKING, IS TO BE
20 FAIR ON THIS ISSUE. THANK YOU.

21 MR. HENRY: YOUR HONOR, JUST A BRIEF RESPONSE,
22 HE IS ASKING THE COURT TO ALTER OR
23 CHANGE THE JURY'S VERDICT. THERE'S
24 NO QUESTION ABOUT THAT. I'M
25 SURPRISED THAT HE HAS MADE THAT

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1 STATEMENT. IF THE JURY FOUND THAT
2 THERE WAS \$500,000 WORTH OF
3 CONSEQUENTIAL DAMAGES, WHAT MR.
4 CALAMARI IS ASKING THE COURT TO DO
5 IS SAYING, "WELL, WE'RE GOING TO
6 DISREGARD THAT. WE'RE GOING TO GET,
7 LATER, HAVE THE INSURANCE CARRIER
8 GET SOMEBODY TO SAY IT DIDN'T COST
9 THAT MUCH SO THEY CAN LOWER IT."
10 THE CASES, I HAVE ASKED BOB FROM THE
11 TIME WE STARTED THIS TO GIVE ME ONE
12 CASE WHERE THE COURT SAID THAT YOU
13 COULD GO BEHIND A GENERAL VERDICT
14 AND HAVE THE COURT ALLOCATE DAMAGES,
15 AND THERE'S ONE CASE, DUKE VERSUS
16 HOCH, WE BOTH CITED IT IN OUR
17 MEMORANDUM. IF YOU READ THAT CASE,
18 WHAT THE COURT FOUND, AND THERE ARE
19 A NUMBER OF OTHER CASES THAT POINTED
20 THIS OUT, WAS THAT IN DUKE VERSUS
21 HOCH, SOMEWAY, AND THE COURT DIDN'T
22 SAY HOW, THEY COULD SAY HOW THE JURY
23 ALLOCATED DAMAGES, AND SO THEY SENT
24 IT BACK FOR THE COURT TO DETERMINE
25 HOW THE JURY ALLOCATED DAMAGES. IN

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1 ALL THE OTHER CASES THAT CONSIDERED
2 DUKE VERSUS HOCH, WHAT THEY SAID WAS
3 THE PREFERENCE TO THIS IS, "CAN YOU
4 DETERMINE HOW THE JURY ALLOCATED
5 DAMAGES?" THERE ARE A NUMBER OF
6 THINGS THAT HARLEYSVILLE COULD HAVE
7 DONE. THIS IS NOT A NEW ISSUE AS
8 MR. CALAMARI WOULD HAVE YOU RULE.
9 THIS IS NOT A NEW ISSUE. THE
10 DEFENSE LAWYERS IN MY FIRM HAVE FOR
11 MANY YEARS GONE TO COURT AND ASKED
12 FOR A SPECIAL INTERROGATORY TO THE
13 JURY. FOR EXAMPLE, ON INTENTIONAL
14 CONDUCT, HE'S SAYING MR. LEE WRIGHT
15 TESTIFIED THIS WAS INTENTIONAL
16 CONDUCT, THEY DID IT SO MANY TIMES
17 OVER AND OVER. THEY COULD HAVE
18 SIMPLY ASKED THE COURT ON THAT ISSUE
19 TO SUBMIT AN INTERROGATORY TO THE
20 JURY, "DO YOU FIND THAT THE CONDUCT
21 WAS INTENTIONAL?" AND LET THEM
22 ANSWER THAT QUESTION. THAT IS DONE
23 DAY IN AND DAY OUT. DUKE VERSUS
24 HOCH AND OTHER CASES THAT I'VE CITED
25 IN MY MEMORANDUM SAY THERE ARE THREE

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Consolidated ROA_0473

1 THINGS THAT THE INSURANCE COMPANY
2 CAN DO. ONE IS THEY CAN ASK FOR
3 INTERVENTION. IF THAT IS DENIED,
4 ~~THEY CAN ASK THE DEFENSE ATTORNEYS,~~
5 AND THEY CONTROL DEFENSE, JUST LIKE
6 THE NEWMAN CASE SAYS, THEY CAN ASK
7 THE COURT TO SUBMIT SPECIAL
8 INTERROGATORIES OR, THIRD, THEY CAN
9 GO TO THEIR INSURED AND SAY,
10 "LISTEN, WE'VE GOT A CONFLICT OF
11 INTEREST HERE, AND WE'VE GOT A
12 CONFLICT OF INTEREST AND, THEREFORE,
13 YOU NEED TO GET AN ALLOCATED
14 VERDICT." NOW, MR. CALAMARI SAYS,
15 "WELL, WE DIDN'T KNOW WHAT WAS
16 COVERED AND WHAT WAS NOT," AND THEY
17 SAID NEWMAN CAME OUT AFTERWARDS.
18 THE L-J CASE SAID WHAT WAS COVERED.
19 THE L-J CASE SAYS THAT DAMAGE TO THE
20 WORK PRODUCT ITSELF IS NOT COVERED,
21 AND THEY CITED THE HIGH COUNTRY
22 CASE, WHICH WAS THE SAME KIND OF
23 CASE WE'VE GOT HERE, AND THE COURT
24 SAID THAT THE SECONDARY DAMAGE WAS
25 COVERED. MR. CALAMARI'S TRYING TO

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Consolidated ROA_0474

1 SAY THIS WAS SOMETHING NEW, IT JUST
2 JUMPED OUT OF THE WOODWORK. IT WAS
3 NOT NEW, AND EVERY CASE THAT HAS
4 BEEN LOOKED AT -- AND MR. CALAMARI
5 SAID, "WELL, THESE WERE CAUSES OF
6 ACTION," WELL, THAT'S NOT THE CASE.
7 ARMSTRONG, THE CASE I SENT TO YOU,
8 ALL INVOLVED TRYING TO DETERMINE
9 WHETHER THE JURY ALLOCATED DAMAGES
10 TO A CERTAIN ISSUE, A CERTAIN
11 AMOUNT, AND THE COURT SAID, "NO, WE
12 ARE NOT GOING TO DISTURB A JURY
13 VERDICT," AND THAT'S WHAT EVERY
14 OTHER CASE HAS SAID, AND WE WOULD
15 OBJECT TO THEM NOW TRYING TO DO WHAT
16 THEY SHOULD HAVE DONE A LONG TIME
17 AGO..

18 MR. CALAMARI: YOUR HONOR, IF I MAY JUST FOLLOW-UP
19 BRIEFLY, THE DUKE VERSUS HOCH CASE
20 SEEMS TO BE THE ONE THAT ALL THE
21 LEGAL ARTICLES CITE AS BEING THE
22 BEGINNING AUTHORITY ON THIS ISSUE,
23 AND IN THE DUKE VERSUS HOCH CASE,
24 THE ORIGINAL THOUGHT WAS, "WELL, THE
25 INSURED DOESN'T HAVE ANY COVERAGE

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1 BECAUSE THE INSURED HAD THE
2 OBLIGATION TO RAISE THESE ISSUES,"
3 SO THEY TALKED ABOUT SHIFTING
4 BURDENS OF PROOF AND ALL THAT. BUT
5 IN THAT CASE, WHAT THEY ULTIMATELY
6 DECIDED WAS, "LET'S REMAND THIS CASE
7 FOR DETERMINATION OF WHAT'S COVERED
8 AND WHAT'S NOT COVERED." THEY SENT
9 THAT CASE BACK TO DO EXACTLY WHAT
10 WE'RE ASKING TO DO IN THIS CASE, AND
11 WHY, BECAUSE OF FAIRNESS, AND I
12 CITED A NUMBER OF CASES IN MY BRIEF,
13 PARTICULARLY THE ALABAMA CASE THAT
14 SAID, "LET'S REMAND THIS," OR IT
15 SAID THAT YOU CAN'T INTERVENE
16 BECAUSE UNTIL DAMAGES ARE AWARDED,
17 YOU DON'T HAVE A RIGHT, THERE'S NO
18 RIGHT TO INTERVENE, AND IT GAVE THE
19 SUGGESTION, "WELL, POSSIBLY, AFTER
20 THE DAMAGES ARE AWARDED, THE
21 INSURANCE COMPANY CAN THEN STEP IN
22 AND DO SOME WORK, OFFER SOME
23 TESTIMONY, AND THEN A JURY CAN
24 DECIDE AT THAT POINT," BUT THE
25 ARTICLES ALL SAY THAT IN THE 11

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Consolidated ROA_0476

1 YEARS SINCE THAT PRACTICE HAS BEEN
2 AVAILABLE AS AN ALTERNATIVE METHOD
3 THAT THEIR COURT PROVIDED, NO ONE
4 HAS TAKEN THEM UP ON IT BECAUSE IT'S
5 JUST NOT AN ACCEPTABLE METHOD. BUT
6 WE THINK THIS COURT HAS AN
7 OPPORTUNITY TO ISSUE A RULING OF
8 FAIRNESS. IF WE TRIED THESE
9 UNDERLYING CASES TODAY, I THINK WE
10 ALL CAN AGREE THAT THERE WOULD BE
11 VERY LITTLE UNDERLYING DAMAGE, VERY
12 LITTLE RESULTING DAMAGE, WE WOULD
13 HAVE A SPECIALIZED VERDICT FORM
14 BECAUSE NEWMAN IS NOW OUT, AND THE
15 JURY WOULD COME OUT AND SAY, "WE
16 FIND X MILLION DOLLARS TO FIX THE
17 IMPROPER WORK AND THIS AMOUNT OVER
18 HERE TO FIX THE DAMAGES," AND IT
19 WOULDN'T BE ANYWHERE NEAR WHAT WE
20 HAVE RIGHT NOW. WE JUST DIDN'T HAVE
21 THAT OPPORTUNITY AT THE TIME BECAUSE
22 THE CASE LAW WAS DIRECTLY AGAINST
23 THIS IN NEWMAN ONE. SO WE JUST ASK
24 THAT THIS COURT DO THE RIGHT THING,
25 DO THE FAIR, EQUITABLE DECISION

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WITHIN THE POWER OF THIS COURT AND
ALLOW THIS TESTIMONY AND ALLOW THE
ALLOCATION.
THE COURT: I AM SURE THAT EACH OF YOU GENTLEMEN
WANT ME TO DO THE RIGHT THING. THE
PROBLEM IS THAT YOU HAVE DIFFERING
OPINIONS ABOUT WHAT IS THE RIGHT
THING TO DO. THERE IS, OF COURSE,
FAIRNESS IN ALLOWING AN INSURANCE
CARRIER TO PUT UP HIS POSITION.
THERE'S ALSO FAIRNESS IN NOT PUTTING
THE PLAINTIFFS WHO TRIED THE CASE
UNDER THE LAW AS IT EXISTED AT THAT
TIME TO HAVE TO RE-LITIGATE ISSUES
THAT HAVE ALREADY BEEN RESOLVED.
THE NEWMAN TWO CASE CAME OUT AS A
RESULT OF A DECLARATORY JUDGMENT
THAT ANSWERED THE GENERAL QUESTION
OF, "YES, THERE IS COVERAGE." THE
SUPREME COURT HAD THE OPPORTUNITY AT
THAT TIME TO MAKE SOME DECLARATION
AS TO WHAT TO DO, EITHER BY SENDING
THE CASE BACK AND SAY, "GO MAKE A
DETERMINATION," LIKE THE HOCH CASE,
OR TO DO WHAT IT SAID, WHICH WAS NO

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1 WAY TO DETERMINE AT THIS PARTICULAR
2 POINT IN TIME WHAT TAKES PLACE. FOR
3 THE SAKE OF A TRIAL BAR, I HOPE THAT
4 WHEN THIS MATTER GOES FORWARD,
5 SHOULD IT GO FORWARD, THAT THE
6 SUPREME COURT WILL DECIDE HOW TO
7 HANDLE THINGS. BUT I THINK, WITH
8 THIS CASE HAVING BEEN TRIED UNDER
9 THE LAW THAT EXISTED AT THAT TIME,
10 I'M GOING TO GRANT MR. HENRY'S
11 MOTION AND, AS I THINK I MENTIONED,
12 IT COULD BE THAT THIS CASE BECOMES
13 ONE SUCH AS NELSON VERSUS CONCRETE
14 SUPPLY WHERE WE HAD THE INTRODUCTION
15 OF COMPARATIVE NEGLIGENCE, BUT IT
16 DIDN'T DO THE PLAINTIFF IN THAT CASE
17 ANY GOOD, AND THE DEFENDANT WON ON
18 CONTRIBUTORY NEGLIGENCE. BUT I'M
19 GOING TO RESPECTFULLY DENY YOUR
20 REQUEST, SUSTAIN MR. HENRY'S
21 OBJECTION, AND LET YOU OFFER THIS
22 TESTIMONY BY WAY OF PROFFER.

23 MR. CALAMARI: THANK YOU, YOUR HONOR. YOUR HONOR,
24 WE HAVE THIS WITNESS, WHO IS MR.
25 BAIDEN, AND THEN WE HAVE THE COST

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1 ESTIMATOR. SO I'D LIKE THE PROFFER
2 TO INCLUDE THE TESTIMONY THAT MR.
3 BAIDEN'S ABOUT TO GIVE AND THEN THE
4 TESTIMONY THAT MR. MATHIS IS GOING
5 TO GIVE.
6 MR. HENRY: THAT'S FINE WITH THE PLAINTIFFS.
7 YOUR HONOR, AS LONG AS WE NOTE MY
8 OBJECTION TO BOTH OF THEM.
9 MR. CALAMARI: YES.
10 THE COURT: AND, MR. BAIDEN, THIS CHANGES NO WAY
11 HOW YOU TESTIFY. IT'S JUST THE
12 METHOD IN WHICH THE RECORD COMES UP.
13 MR. BAIDEN: I UNDERSTAND.
14 Q: Okay, Mr. Baiden, thank you. This is now the
15 proffer of the evidence from Mr. Baiden and Mr.
16 Mathis. Please tell The Court, what did you do
17 to prepare to give an opinion in this case?
18 A: We, we first met, I think we met on two or three
19 occasions with you at your office to, to find out
20 some of the details and what responsibilities
21 that you wanted us to do. We ---
22 Q: Let me stop you there. Did I tell you to tell
23 the truth and be fair?
24 A: Yes.
25 Q: Okay, thank you.

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Consolidated ROA_0480

1 A: Anyway, we initially started with, with, with
2 several, many visits to both Riverwalk and
3 Magnolia, took onsite photos. On Riverwalk, we
4 had to basically do our own set of drawings, we
5 didn't have any drawings accessible to us, in
6 order to do a true cost estimate take-off.
7 Magnolia, I think you gave us, well, you did give
8 us a set of drawings from Magnolia, which made it
9 a little bit easier to perform what we had to do.
10 We basically, the bulk of what we, we got -- our
11 knowledge is from Buric's report. They had
12 extensive reports, I think, 500 plus photos for
13 each job.
14 Q: Okay. How many hours do you think you spent?
15 A: Oh, probably 80 to 90 hours plus on each job.
16 Q: And you didn't do this for free. You were paid
17 for your time?
18 A: That's correct.
19 Q: And how much per hour did you charge?
20 A: \$200.
21 Q: And approximately what are the total fees that
22 you charged to perform this task?
23 A: I would, Sidney may be able to better answer
24 that, but I would say 18 to 20,000, each job.
25 Q: I'm going to show you a copy of your estimate.

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1 I'm going to show you a copy of the report that
2 you prepared for Riverwalk. Please describe the
3 report. And that is ---

4 MR. CALAMARI: WE'LL MARK THAT AS EXHIBIT NUMBER
5 20, AND WE'LL OFFER IT INTO EVIDENCE
6 UNDERSTANDING YOU'VE ALREADY
7 EXCLUDED IT AND WITH THE OBJECTION.

8 MR. HENRY: MY UNDERSTANDING IS THE INTRODUCTION
9 OF THIS IS SUBJECT TO MY OBJECTION
10 AND IT IS A PROFFER.

11 PLAINTIFF'S EXHIBIT NUMBER 20

12 OFFERED AS A PROFFER

13 Q: Mr. Baiden, walk us through your report, just
14 tell us what it says.

15 A: Well, basically, what we did was we looked at
16 this as if we were pricing to do the work. We
17 did an original cost estimate for, -- This is
18 Riverwalk we're looking at first?

19 Q: Yes.

20 A: -- for Riverwalk, did a true cost estimate in
21 today's market, what it would cost to perform the
22 work that needed to be performed, and then Mr.
23 Calamari asked us to, to break out what was work
24 done improperly and what was damage that was
25 results of the work that was done improperly.

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1 Q: Please explain to The Court, are you able to do
2 that?
3 A: Yes.
4 Q: How do you do that?
5 A: Well, again, you start off with the original cost
6 estimate, total value, and based on our years of
7 experience in, in doing renovational work, you,
8 you come up with the improper work number and you
9 do a percentage of what you assume to be damage
10 work, not just assume, based on Buric's report
11 and things of that sort, historical data.
12 Q: When you looked at the Buric report, was that the
13 actual repair cost for work that had been done or
14 was it an estimate?
15 A: On, on our part or Buric?
16 Q: No, from Buric.
17 A: That would've been an estimate, I mean, ---
18 Q: Okay. It was just an educated guess by Buric?
19 A: Right. Well, Buric didn't actually give a lot of
20 numbers. They were basically just informative.
21 Q: Okay. And then what did you do? Tell me about
22 your report.
23 A: Okay. Once we got all the information that we
24 needed, my basic responsibility was providing
25 information I pulled from Buric's report to

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1 Sidney, taking field photos, taking dimensions,
2 providing Sidney with all the knowledge that he
3 needed to do the number crunching for the
4 project.

5 Q: Is there a summary page within this report? This
6 is a proffer. So is there a summary page in this
7 report that talks about the estimates?

8 A: No, sir.

9 Q: I believe there is.

10 A: Well, there's an opening ---

11 Q: The page that you made ---

12 A: Oh, okay, yeah. I'm sorry. I thought you meant
13 like a written summary report. This is the cap
14 sheet of the individual items that, that were of
15 concern.

16 Q: Let's go through these. Tell me, what is the
17 description of the work? Just tell me that
18 category so we know that we have everything
19 included.

20 A: Okay. At Riverwalk, there were one, two, three,
21 four, five, six, seven main areas of concern in
22 Buric's report. That included the window and
23 masonry repairs, walkway repairs, balcony
24 repairs, exterior trim repairs, exterior caulking
25 issues, there were stair bearing issues, and

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1 there were some draft wall stop repairs that were
2 involved.

3 Q: Okay. Let's look at the first item. Why don't
4 you tell me, window and masonry repairs,
5 generally, what is that? And then tell me the
6 estimated total cost, the next category is
7 estimated improper work cost, then the estimated
8 cost, the damaged work, and then a percentage.
9 Just go through each of these and explain to The
10 Court ---

11 A: Okay.

12 Q: --- what those are.

13 A: In Buric's report, the windows on this particular
14 job were proved to be inferior. They did not
15 pass the water intrusion test. So that led to
16 having to remove those windows and purchase new
17 ones and replace them. In order to get to those
18 windows, you have to take some of the masonry out
19 in order to, to perform that portion of work, and
20 also on this particular job, a lot of the masonry
21 areas did not provide lintels. They weren't
22 present.

23 So in the process of, of doing that, the
24 estimated total cost, there were 17 buildings on
25 Riverwalk, the estimated total cost for that

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1 portion of work was \$3,085,000 and some change.
2 The estimated cost for the improper work for that
3 particular item was \$2,855,000. The lion, or big
4 portion of that is to purchase the new windows.
5 And then the estimated cost for the damage that
6 occurred from that was \$229,000, yeah, \$229,000,
7 which is a percentage of total damaged work for
8 that particular line item was 4.85 percent.

9 Q: Okay. And then what's the next item?

10 A: Walkway repairs. There's improper slope, water
11 ponding, things of that sort. The estimated
12 total cost for walkway repairs was \$392,000.
13 Estimated cost for improper work that was done
14 was \$342,000. The estimated cost for damage that
15 resulted from that was \$50,000, which is a total
16 percentage of 1.06 percent.

17 Q: Okay. What's the next item?

18 A: Balcony repairs, the estimated total cost to
19 perform those repairs was \$508,000. The
20 estimated cost for the improper work was
21 \$441,000. The estimate for cost, the damage that
22 occurred from that improper work was \$66,000,
23 which is 1.41 percent, and on those two items,
24 Mr. Calamari, the walkway and balcony repairs, it
25 was basically just done wrong, the work itself.

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1 There was not a whole lot of damage that occurred
2 from that because they're exterior balconies, but
3 once you remove them, there was some rot evidence
4 and things of that sort that had to be fixed.

5 Q: Okay. And you've broken that down in the cost
6 analysis?

7 A: Yes, sir.

8 Q: Okay. What's the next item?

9 A: Exterior trim repairs, for the 17 buildings, it
10 was a total of 582,000. Estimated cost of
11 improper work on that one was 84,000 of that 582.
12 The estimated cost for the damage that occurred
13 from improper trim was \$497,000, which was 10.5
14 percent.

15 Q: Okay. What's the next one?

16 A: Exterior caulking, estimated total cost was
17 161,000. Cost for improper work was 161,000.
18 There was zero cost for damage that occurred. It
19 was just done improperly, wrong, and zero
20 percent.

21 Q: What about the next item?

22 A: Stair bearing repairs, total of \$7,964. The
23 estimated cost, improper work, was \$7,964. There
24 was basically no damage that occurred from that.

25 Q: What about draft wall repairs?

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Consolidated ROA_0487

1 A: That was very minimal. I think it was found in
2 seven or eight units, total, out of all 17
3 buildings. That was 3,696. Cost of improper
4 work was 3,701, and there was zero damage
5 resulting from that not being performed.

6 Q: Go through the total of the -- Well, first, let
7 me ask you, the categories that you mentioned, is
8 that to do everything that's listed in the Buric
9 report?

10 A: That's everything listed in the Buric report,
11 yes, sir.

12 Q: And will that fix all the problems out at
13 Riverwalk?

14 A: Yes, it would.

15 Q: And did you give -- What was the total estimate
16 to do the work?

17 A: The estimated total to do the work for all 17
18 buildings was \$4,741,000.

19 Q: And would Baiden & Associates do the work?

20 A: Absolutely, yes, sir.

21 Q: And how much of that 4,741,508 was to repair work
22 that was done improperly the first time?

23 A: \$3,896,000.

24 Q: And how much of it is to correct work, or parts
25 of the building that are damaged?

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Consolidated ROA_0488

1 A: It would be 17.82 percent of the total job cost,
2 which would equate to \$844,000.
3 Q: Now, while you were out there, and you spent
4 countless hours looking at pictures and other
5 things, did you have an opportunity to look at
6 the defective work done by the contractor in the
7 case?
8 A: Yes.
9 Q: What are your thoughts on that?
10 A: There was just, there was a lot of things that
11 were done improper, and, and one of the things,
12 you know, that we noticed, it was consistent with
13 every building. In other words, it wasn't a
14 situation where maybe somebody caulked one window
15 wrong or left one lintel out. It just seemed to
16 be consistent from building to building to
17 building.
18 Q: Was it a consistent and pervasive problem?
19 A: Yes.
20 Q: Were they repeated?
21 A: Yes, sir.
22 Q: A couple of the issues, like you mentioned slope
23 of the balcony, experienced contractor, how does
24 that happen, that you don't slope the balcony?
25 A: In a high-rise, like concrete structures that we

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1 were very familiar with, it can be very difficult
2 with a post-tensioned slab type design to get the
3 slope that's required by the architect. It's
4 just a very difficult situation in the amount of
5 run that you have, but in a wooden structure, in
6 my opinion, there's no excuse not to provide the
7 proper slope.

8 Q: Do you think they just made an accident?

9 A: I just don't think they followed through very
10 clearly.

11 Q: What about, was there head flashing missing?

12 A: Yes, sir.

13 Q: What about, the same type of problems that you
14 saw at Riverwalk, did you see those problems at
15 Magnolia North?

16 A: Saw them at Magnolia, as well, but they were more
17 extensive, in my opinion, at Magnolia than they
18 were at Riverwalk.

19 Q: Let's take a look at the Magnolia North report,
20 which is Exhibit Number 21, and I'd like you to
21 do the same thing, go through and explain that
22 report.

23 MR. HENRY: JUST FOR THE RECORD, YOUR HONOR, I
24 WANT TO NOTE MY SAME OBJECTION, AND
25 I ASSUME YOUR RULING WOULD BE THE

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Consolidated ROA_0490

1 SAME ON THIS NEXT REPORT.

2 THE COURT: YES. I INTENDED FOR MY RULING TO
3 COVER ALL OF MR. BAIDEN'S TESTIMONY
4 ABOUT THE TWO PROJECTS.

5 EXHIBIT NUMBER 21

6 OFFERED AS A PROFFER

7 MR. CALAMARI: AND MR. MATHIS, AS WELL.

8 THE COURT: AND MR. MATHIS, AS WELL.

9 Q: Okay. Mr. Baiden, let's talk about this report.
10 What did you do to prepare for this report?

11 A: We did the same thing we did at Riverwalk. We
12 spent extensive, extensive time onsite at the
13 property, took some of our own field photos. On
14 this one, we had the luxury of a full set of
15 working drawings, which made it a little easier
16 for us to do what needed to do, and again, we
17 relied very heavily on Buric's report. We had
18 boxes of very extensive work that Buric put into
19 this project.

20 Q: And did you arrive at a cost estimate to fix
21 everything that was identified in the Buric
22 report?

23 A: Yes, we did.

24 Q: Okay. So let's go through. I think the first,
25 this one's on the first page in the Magnolia

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1 North report.

2 A: Yeah. I've got -- You call it a summary. I

3 always refer to it as a cap sheet ---

4 Q: Okay. I'm sorry.

5 A: That's okay.

6 Q: What is a cap sheet?

7 A: A summary.

8 Q: Okay. Please go through, and first, let's talk

9 about the description of the repairs.

10 A: Okay, all right. At Magnolia, we started off

11 with exterior trim repairs. There's 21 buildings

12 at Magnolia. The total cost for exterior trim

13 repairs for all 21 buildings was \$2,837,000. The

14 estimated cost for the improper work was

15 1,820,000, estimated for damage was \$1,016,000.

16 Q: Okay. So the trim work in Magnolia North caused

17 more damage?

18 A: Yes, it did, percentage, yeah, it did. And it

19 was, it was also an inferior trim. It wasn't

20 what was specified, to the best of my knowledge.

21 Sidney can maybe attest to that a little bit

22 better, but ---

23 Q: And what's the percentage of damaged work for

24 that estimate?

25 A: 11.04 percent.

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1 Q: Okay.

2 A: All right. Then we went on to masonry repairs.
3 For all 21 buildings, the estimated total cost to
4 perform this work, material and labor, was
5 \$2,310,000. The estimated -- And I'm leaving off
6 the change, \$977.12, but I'm just rounding up, if
7 that's okay.

8 Q: Yes. It's okay.

9 A: Okay. And then for the masonry repairs, the
10 estimated cost of improper work was \$1,727,000.
11 The estimated cost for damage that occurred from
12 that improper work was \$583,000, which is a
13 percentage of 6.33 percent for all 21 buildings.

14 Q: Okay. And what's the next item?

15 A: The next item would be window replacement. The
16 total number for estimated total cost is
17 1,881,000. The estimated cost for improper work
18 was 1,474,000. The estimated cost for damaged
19 work for all 21 buildings was \$406,000, which the
20 percentage of total damaged work was 4.41
21 percent.

22 Q: Okay. What's the next item?

23 A: Firewall repairs, and it was listed in the other
24 one as firestop, but it's firewall repairs, was
25 \$3,455. Estimated cost for improper work was

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1 \$3,455, which is zero percent, and that's just
2 actually work they did not perform that showed up
3 in Buric's report.
4 Q: Okay. And what's the next one?
5 A: Garage shingle repairs. Estimated total cost was
6 \$22,000. Estimated cost for improper work was
7 \$22,000. Damaged work was zero, zero percent.
8 Q: Now, the categories of descriptions, is that
9 sufficient to fix all the problems identified in
10 the Buric report?
11 A: Yes, sir. There's, there's -- The total,
12 estimated total cost for, for all 21 buildings
13 was \$9,213,000. The cost for improper work for
14 all buildings was \$6,179,000, and the damage that
15 occurred as a result of the improper work was
16 \$3,033,000.
17 Q: Okay. And then what's the percentage category?
18 A: On Magnolia, it's 32.93 percent, is the total of
19 damage that occurred from improper work.
20 Q: So are you saying that in a cost breakdown of
21 whatever the repair cost is, you would assume the
22 32.93 percent would be the cost associated with
23 fixing damaged portions of the building?
24 A: Yes, sir.
25 Q: And that would leave the remaining percentage,

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1 the 67 percent, roughly, to fix the improper
2 work?
3 A: That's correct.
4 Q: And that's the same in Riverwalk, the breakdown
5 of those -- it's the numbers, the percentages are
6 different ---
7 A: Percentages are different. You had 32 percent at
8 Magnolia and 17 at Riverwalk.
9 Q: And would Baiden Construction do the work for
10 this ---
11 A: Yes, sir.
12 Q: --- price? And would that fix everything at
13 Magnolia?
14 A: Fix everything. Again, what we did initially,
15 and if you, if I can -- What we did initially was
16 look at it as it was a job, did a total cost
17 estimate based on Buric's report, and then we
18 went back and broke out the numbers.
19 Q: Okay. Now, you had an opportunity to look at the
20 pictures at Magnolia North?
21 A: Yes, sir.
22 Q: And look at the report and conduct onsite visits?
23 A: Yes, sir.
24 Q: Okay. Tell me about this improper work, how is
25 it?

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1 A: At Magnolia?
2 Q: Yes.
3 A: Very, very similar to some of the issues we saw
4 at Riverwalk, just a little more extensive, you
5 know, inferior flashing trim, balcony slope,
6 inferior windows. Again, here, at this job, the
7 windows did not pass the water intrusion test
8 that Buric performed, and, and for instance, for
9 the windows, in my experience, you may not see it
10 right now, but if it doesn't pass that water
11 intrusion test, it may take one month, one year,
12 but within a period of time, they will fail and
13 you will have damage inside.
14 Q: Now, you've constructed a lot of projects
15 yourself, correct?
16 A: Yes, sir.
17 Q: Okay. And you've been on other construction
18 projects where you've seen buildings?
19 A: Yes. Well, the last renovation we did was
20 Springs Towers in North Myrtle Beach, nine story
21 building. Now, it's been there for about 20
22 years plus, but we removed and replaced all
23 existing windows and all the exterior siding. I
24 don't know if those windows were actually
25 inferior, but the caulking was not done

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1 correctly, the exterior joints weren't flashed
2 correctly, and what we found, that we started at
3 the ninth floor, tearing off the exterior façade,
4 and the first two floors were just eaten up with
5 rot, completely, but once we got lower and lower
6 and lower, it scaled down to, I think the last
7 two floors had very little damage on them.

8 Q: So you have experience in dealing with these
9 issues?

10 A: Yes, sir.

11 Q: Now, tell me, in comparison, the Riverwalk and
12 Magnolia North projects to, and I'm not just
13 talking about ones where you were called in to
14 fix it, I'm talking about all the other projects
15 in the area, compare them and comment on the
16 construction practices at Riverwalk and Magnolia
17 North.

18 A: At Riverwalk, I think there were a lot of things
19 that didn't get managed properly during the
20 course of construction, whether it be from the
21 general contractors, subcontractors, or it's
22 just, collectively, you can see there's a lot of
23 different trades involved in some of the things
24 that happened at Riverwalk and Magnolia, you
25 know, and again, everything that Baiden &

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1 Associates found at both projects was very
2 consistent.

3 Q: Okay. Thank you, Mr. Baiden. That's all the
4 questions I have for you.

5 THE COURT: MR. HENRY?

6 MR. HENRY: YOUR HONOR, THESE QUESTIONS WILL BE
7 SUBJECT TO MY OBJECTIONS.

8 **CROSS EXAMINATION**

9 **BY MR. HENRY:**

10 Q: Mr. Baiden, when you -- Well, let me ask you,
11 first of all, when were you first retained?

12 A: That would have been approximately six months
13 ago.

14 Q: And you did your estimates based on what the
15 prices were six months ago?

16 A: In today's market, yes, sir.

17 Q: And you would agree with me that prices change
18 over the course of time?

19 A: Yes; sir, it does.

20 Q: And so what you estimated may not be the same as
21 an estimate that was given in 2009?

22 A: Well, there's a possibility of that, but six
23 months to a year, unless something drastic
24 happens in the construction market, isn't going
25 to make that much of a difference.

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1 Q: But in this economy, prices are dropping or
2 changing pretty rapidly, aren't they?
3 A: You saw a big change about two years ago, and
4 it's leveled off now.
5 Q: Okay. Now, what date did you get your labor
6 costs?
7 A: Our labor costs?
8 Q: Yes.
9 A: And you say what date?
10 Q: Yes. When you determined your labor costs, when
11 did you determine that, what date did you
12 determine that?
13 A: Okay. Let's see, for Magnolia North, we
14 presented the report on October 25th, so ---
15 Q: Of what year?
16 A: Of 2010. So I would say, if we presented on the
17 25th, it would be the last week of September or
18 first week of October of 2010.
19 Q: And would that be the same time that you got your
20 material costs?
21 A: During that, that two month period of, let's just
22 say, September to October.
23 Q: Okay. What kind of windows did you use to
24 replace the present windows at Magnolia and
25 Riverwalk?

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1 A: We went, we worked with Coastal Glass, and
2 exactly what we replaced with, Sidney may be able
3 to recollect it, I don't think it's listed in
4 this file, but it was something that met actual
5 code and would pass a water intrusion test.
6 Q: Okay. Do you think the code was different in
7 2009 than it is today?
8 A: 2009 to today?
9 Q: Yes.
10 A: I wouldn't -- Well, they change constantly.
11 Q: Right.
12 A: But from 2009 to today, I wouldn't venture to
13 think so.
14 Q: But you don't know?
15 A: No. I don't, I don't know.
16 Q: Okay. Now, in the litigation, were you told what
17 the window replacements were that were presented
18 to the jury?
19 A: No, sir. I just went off of Buric's reports and
20 their recommendations.
21 Q: So, if I understand it correctly, you did not
22 have anything out of the original file other than
23 the Buric report?
24 A: That's correct.
25 Q: You didn't look at the Prime South report that

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1 did the estimate for the jury?
2 A: I did not.
3 Q: Okay. You didn't look at the Dave Roady report
4 that was given to the jury?
5 A: Who is Dave Roady?
6 Q: Obviously, you didn't see it if you don't know
7 who that is.
8 A: Is he with ---
9 Q: No.
10 A: Okay.
11 Q: He's not with Buric. He was the defendant's cost
12 estimator.
13 A: Okay. No, sir.
14 Q: You didn't look at the Tom Carlson report, who
15 was also a defendant's estimator in the original
16 trial?
17 A: No, sir.
18 Q: Okay. And you didn't look at Alan Campbell's
19 report?
20 A: No, sir.
21 Q: Okay. The only thing you looked at relative to
22 the underlying actions were the Buric reports?
23 A: There was other, yeah, the Buric reports was the
24 lion's share of it, and that's pretty much it,
25 the Buric report and the photos, and again, the

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1 Buric report was very extensive in detail.
2 Q: Right. Now, you would agree with me, would you
3 not, that if you submitted this to ten
4 ~~estimators, there wouldn't be one of them that~~
5 was the same?
6 A: Absolutely not.
7 Q: You don't know if your estimate would have been
8 the same as Prime South's or Tom Carlson's or
9 anybody of that, this is your estimate and it
10 relates to nobody else's?
11 A: That's correct. Again, we, we estimated this as
12 if we were going to do the work in today's
13 market.
14 Q: Okay. Now, I noticed that you had a fairly
15 substantial contingency in your report; is that
16 correct?
17 A: Yes. Sidney could probably attest to that better
18 than I could, on the contingency part of it.
19 Q: You don't know what's in the contingency?
20 A: No, sir, I don't. Sidney can answer that
21 question.
22 Q: Did you see any indications of leaking windows
23 when you looked in the report?
24 A: In Buric reports, yes, not actually onsite. We
25 did not do any invasive surveys ourselves. We

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1 just relied on what Buric supplied us, and at
2 every window location, extensively throughout the
3 report, they took moisture readings, and probably
4 85 percent of them were above what is
5 recommended. They were high.

6 Q: And with your construction experience, would you
7 expect leaks inside of the rooms?

8 A: Yes, sir.

9 Q: And you would expect damage of carpet, finishes,
10 wallpaper, that sort of thing?

11 A: In time.

12 Q: Right. And let me ask you this. What would the
13 homeowners be doing while you were taking the
14 windows out and fixing the porches and all that,
15 would you want them to vacate the units?

16 A: Yes, sir. We looked at it, for instance, at
17 Riverwalk, for the 17 buildings, to do it in
18 phases, either two or three buildings at a time,
19 and yes, the tenants would need to move out.

20 Q: I assume you haven't made any comparison of your
21 nine million dollar estimate with the defendant's
22 2.5 million dollar estimate in Magnolia, have
23 you?

24 A: I haven't, no, sir. When you say -- No, sir.

25 Q: Now, does the contingency have provisions in it

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1 for the damage to the homeowners' carpet and
2 wallpaper and if they damage, water got on the
3 drapes and furniture and that sort of thing?
4 A: Again, the contingency issues would be better
5 answered by Mr. Mathis.
6 Q: Okay. And when you take the windows out, you're
7 going to have to go inside the units, right?
8 A: That's correct.
9 Q: Okay. And you're going to have to take interior
10 trim down, you're going to have to do painting in
11 the units, if there's wallpaper there, you're
12 going to have to take it up and that sort of
13 thing; is that correct?
14 A: Yes, sir. You'd have to roll the carpet back,
15 remove the trim, cut the sheetrock out from
16 around the windows; remove and replace any
17 damaged or rotten wood, re-insulate, and then
18 reinstall the window and then put it all back
19 together.
20 Q: Do you know if you have any money in your
21 contingency for damage to landscaping?
22 A: I believe, in there somewhere, we had some funds
23 for landscaping. I could look through the file,
24 but again, C. D. Mathis, in that contingency,
25 he'd be better off to answer that question.

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1 Q: What do you contemplate doing on the private
2 balconies?
3 A: On the private balconies?
4 Q: Yes.
5 A: Repairing what was in the Buric report.
6 Q: Repairing what was in the Buric report?
7 A: Yes, sir.
8 Q: And would that include taking up the homeowners'
9 carpet and screens or whatever is on those
10 balconies?
11 A: Yes, sir.
12 Q: Okay. Now, describe for me --- Let me show you a
13 picture in the Buric report that is Building
14 4811. Do you see that?
15 A: Uh-huh (affirmative response).
16 Q: And is that HardiePlank around those windows?
17 A: It's, it's a type of HardiePlank siding to some
18 degree, yes, sir.
19 Q: Did you see anything in the Buric report that
20 indicated that the HardiePlank siding was in any
21 way defective?
22 A: I believe, on Magnolia, it was actually the wrong
23 product altogether on the siding.
24 Q: I'm not talking about the trim. I'm talking
25 about ---

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1 A: The actual siding?
2 Q: --- the HardiePlank that's around the windows,
3 right here.
4 A: Yeah. --- That would be considered --- You're talking
5 about the whole flat wall section or the ---
6 Q: Yes. Did you see anything in the Buric report
7 that indicated that the HardiePlank siding was
8 installed incorrectly?
9 A: Yes, sir. But the specifics, I don't remember at
10 this time.
11 Q: Can you look at his report? Because I haven't
12 seen anything in his report to indicate there's
13 any deficiencies in the HardiePlank.
14 A: Now, we'd have to go back to the trim. In order
15 to take the trim off, you're going to have to do
16 some siding repair, as well, now, which is going
17 to get into the HardiePlank siding.
18 Q: Right. And in order to take the windows out and
19 if there's rot around the windows, you're going
20 to have to take the HardiePlank out?
21 A: In certain areas, certain portions of it, and
22 it's, it's lapped, so yes.
23 Q: So you're taking off products that were not
24 installed incorrectly; is that correct?
25 A: On that particular, yeah, that would be something

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1 you would have to remove in order to get to, to
2 perform the work, the task at hand, which would
3 be replacing the windows.

4 Q: And I want to make sure. There's no correlation
5 between your estimate and the estimates that were
6 given to the jury in the underlying action?

7 A: No, sir.

8 Q: Thank you, Mr. Baiden. I appreciate it.

9 **RE-DIRECT EXAMINATION**

10 **BY MR. CALAMARI:**

11 Q: Mr. Baiden, I just have one more question.

12 A: Yes, sir.

13 Q: Your cost, the cost of repairing the damaged
14 work, you don't need to look at anybody else's
15 documents to determine your cost to repair the
16 damaged work, correct?

17 A: No, sir. We spent approximately two months for
18 each job preparing that estimate.

19 Q: So you don't need any other reports, I mean, you
20 can go out and look there and say that the work
21 that's damaged on this building, "This is what
22 it's going to cost to fix it"?

23 A: That's correct, yes.

24 Q: And that's in your report?

25 A: That in the report, yes, sir.

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1 Q: Thank you.

2 MR. CALAMARI: CAN WE TAKE LIKE A FIVE MINUTE

3 BREAK?

4 THE COURT: SURE, WE'LL TAKE A FIVE MINUTE

5 RECESS.

6 *****OFF THE RECORD*****

7 (ON THE RECORD)

8 MR. CALAMARI: YOUR HONOR, WE HAVE A DEPOSITION OF

9 DREW BROWN, AND AT THE COURT'S

10 PREFERENCE, I WILL ASK THE

11 QUESTIONS, AND MS. EVANS WILL ANSWER

12 OR IF YOU JUST WANT TO TAKE IT AND

13 READ IT, IT'S ENTIRELY UP TO YOU,

14 BUT WE WANT THAT TO BE PART OF OUR

15 CASE, AS WELL.

16 MR. HENRY: IT'S IN EVIDENCE, YOUR HONOR. I

17 DON'T SEE ANY ---

18 MR. CALAMARI: SOMETIMES PEOPLE LIKE TO HEAR IT,

19 BUT IT'S UP TO YOU.

20 THE COURT: HOW MANY PAGES IS IT?

21 MR. CALAMARI: 50 PAGES, SOMETHING LIKE THAT, OF

22 TESTIMONY. IT'S ENTIRELY UP TO YOU.

23 THE COURT: HAVE YOU GOT CERTAIN PARTS OF THE

24 DEPOSITION THAT YOU FEEL ARE MORE

25 CRITICAL THAN OTHER PARTS OF THE

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1 DEPOSITION, SOME BACKGROUND STUFF?
2 MR. CALAMARI: IT'S THE WHOLE THING. IT WOULD BE
3 PRETTY MUCH JUST -- I THINK WHEN WE
4 TOOK THE DEPOSITION, WE JUST JUMPED
5 RIGHT INTO THE REPORT. SO IT WOULD
6 BE THE WHOLE THING. IT'S ENTIRELY
7 UP TO YOU.
8 THE COURT: AND AFTER THE DEPOSITION, WHAT DO WE
9 HAVE?
10 MR. CALAMARI: THE ONLY OTHER THING WE HAVE AFTER
11 THE DEPOSITION IS I HAD INTENDED TO
12 CALL JIM GRAHAM. YOU'VE HEARD SOME
13 TESTIMONY ABOUT MR. GRAHAM. HE
14 WORKED FOR BETTERBILT WINDOWS, AND
15 HE CAME AND TESTIFIED IN THE
16 RIVERWALK MATTER. SO HE DOES HAVE
17 SOME TRIAL TESTIMONY. THERE WAS A
18 BIG DISPUTE ABOUT WHAT HE COULD OR
19 COULD NOT TESTIFY TO, AND AT THE
20 TIME OF THE TRIAL, HE DID NOT
21 TESTIFY, WE BELIEVE, FULLY. SO WE
22 HAD INTENDED TO CALL HIM. WELL, HE
23 DOES NOT LIVE IN SOUTH CAROLINA. HE
24 LIVES IN NORTH CAROLINA. I CALLED
25 AND CALLED AND CALLED, AND I WASN'T

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1 GETTING ANY RESPONSE, AND FINALLY,
2 OVER THE WEEKEND, I TALKED TO HIS
3 WIFE, AND SHE HAD HIM CALL ME ON
4 SUNDAY, AND HE SAID, "I'M SORRY, BUT
5 I'M GOING TO VIRGINIA THIS WHOLE
6 WEEK, AND I CAN'T COME TO TESTIFY."

7 I HAD TALKED TO MR. HENRY -- WAS IT
8 SATURDAY MORNING? -- AND ASKED IF I
9 COULD PUT IN HIS DEPOSITION THAT WAS
10 TAKEN IN THE UNDERLYING MATTER, AND
11 HE SAID, "I OBJECT TO IT." SO I
12 WOULD LIKE TO OFFER THE DEPOSITION
13 TRANSCRIPT OF JAMES C. GRAHAM THAT
14 WAS TAKEN ON DECEMBER 2ND OF 2008
15 UNDER RULE 32, WHICH I BELIEVE
16 ALLOWS ANYONE TO USE A DEPOSITION IN
17 A COURT PROCEEDING SO LONG AS THE
18 ADVERSE PARTY WAS PRESENT DURING THE
19 DEPOSITION. MR. HENRY TOOK THE
20 DEPOSITION ON BEHALF OF THE TONY
21 POPE ACTION AND THE RIVERWALK
22 ACTION.

23 MR. HENRY: YOUR HONOR, THAT DEPOSITION WAS
24 TAKEN IN ONE OF THE CASES, HAD
25 NOTHING TO DO WITH ANYTHING ABOUT

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1 INSURANCE MATTERS. HE TESTIFIED IN
2 ONE OF THE CASES, AND IT WOULD HAVE
3 -- I WOULD NOT BE IN A POSITION TO
4 CROSS EXAMINE HIM ABOUT THE ISSUES
5 IN THIS CASE. WELL, WHAT HE WANTS
6 TO DO IS INTRODUCE THAT DEPOSITION
7 BECAUSE MR. GRAHAM SAID HE TOLD THEM
8 THEY WERE PUTTING THE WINDOWS IN
9 WRONG AND THEY KEPT DOING IT. WELL,
10 THAT'S IN THE TRANSCRIPT. SO I JUST
11 DON'T THINK THAT THAT DEPOSITION, I
12 MEAN, ---

13 THE COURT: IS THERE ANYTHING NEW FROM YOUR
14 VIEWPOINT IN THE DEPOSITION THAT'S
15 NOT IN THE TRANSCRIPT?

16 MR. HENRY: NO. THERE'S NOT A THING. WHAT
17 HAPPENED IN ONE OF THE CASES, AND I
18 CAN'T REMEMBER, HE TESTIFIED IN
19 RIVERWALK AND NOT ---

20 MR. CALAMARI: HE DID NOT TESTIFY IN MAGNOLIA
21 NORTH.

22 MS. EVANS: IT WAS IN RIVERWALK.

23 MR. HENRY: RIGHT. HE DIDN'T TESTIFY IN
24 MAGNOLIA NORTH. HE TESTIFIED IN
25 RIVERWALK, AND THERE WAS A DISPUTE

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1 ABOUT WINDOWS. I MEAN, THE INSURED
2 ARE SAYING IT'S THE WINDOW, AND DREW
3 BROWN LATER PROVED IT WAS THE
4 WINDOW, IN ADDITION TO THE WAY THEY
5 WERE PUTTING IT IN, AND I CAN'T
6 RECALL ANYTHING IN THE TRANSCRIPT
7 THAT'S NOT IN THE DEPOSITION.
8 THE COURT: OR ANYTHING THAT'S ---
9 MR. HENRY: I MEAN, THE OTHER WAY AROUND.
10 THE COURT: --- NOT IN THE TRANSCRIPT.
11 MR. HENRY: BUT WHAT HAPPENED WAS THEY PROFFERED
12 HIS -- OR WE PROFFERED HIS
13 TESTIMONY, AND THEN THE COURT
14 ALLOWED HIM TO TESTIFY, AND SO HIS
15 TESTIMONY'S IN THE RECORD. IN THIS
16 PARTICULAR CASE, AND I WOULD POINT
17 OUT, I'M NOT CRITICIZING BOB, BUT
18 THESE CASES WERE FILED MANY YEARS,
19 OR NOT MANY YEARS AGO, BUT THESE
20 CASES WERE FILED MANY, MANY, MANY
21 MONTHS AGO, AND YOU KNOW, MR.
22 GRAHAM, I THINK BOB JUST TRIED TO
23 GET IN TOUCH WITH HIM TO GET HIM
24 HERE. HIS DEPOSITION COULD HAVE
25 BEEN TAKEN MONTHS AND MONTHS AGO,

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AND SO WE WOULD OBJECT TO NOW, AT
THIS LATE DATE, USING HIS DEPOSITION
FOR THESE ISSUES WHEN HE WAS NEVER
CROSS EXAMINED ON THESE ISSUES.
MR. CALAMARI: YOUR HONOR, IN RESPONSE, I NAMED HIM
AS A WITNESS IN DISCOVERY LONG AGO.
I TRIED TO CALL HIM LONG AGO. IF
MR. HENRY HAD QUESTIONS FOR HIM,
BECAUSE I KNEW WE HAD HIS
DEPOSITION, I KNEW HE HAD TRIAL
TESTIMONY, FIGURED EITHER ONE COULD
BE PUT IN. IF I COULDN'T GET HIM
HERE, I COULD PUT THE DEPOSITION IN.
I TALKED TO MR. GRAHAM. HE'S OUT
THIS WEEK. HE IS BACK IN TOWN AFTER
CHRISTMAS. IF THERE ARE INSURANCE
QUESTIONS, I AM CERTAINLY HAPPY TO
LET THOSE INSURANCE QUESTIONS BE
ASKED IN A DEPOSITION. WE CAN BRING
HIM HERE. WE CAN GO TO CHARLOTTE.
THE GREAT THING ABOUT HAVING A BENCH
TRIAL AND 60 DAYS TO SUBMIT THE
ORDERS IS, IF WE TAKE HIS DEPOSITION
THE FIRST WEEK IN JANUARY, SECOND
WEEK IN JANUARY, WHICH HE SAID HE'S

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1 AVAILABLE, ALL THESE QUESTIONS CAN
2 BE ASKED AND WE CAN SUBMIT THIS. I
3 DON'T SEE THE HARM OF PUTTING IN HIS
4 DEPOSITION TRANSCRIPT. TO SAY THAT
5 THERE'S NOTHING IN THIS TRANSCRIPT
6 THAT WASN'T BROUGHT OUT AT TRIAL, I
7 THINK IS A MISCHARACTERIZATION OF
8 THE TRANSCRIPT. THIS TRANSCRIPT'S
9 120 PAGES LONG. THERE'S A LOT OF
10 INFORMATION, A LOT OF DETAIL. WE
11 KIND OF SEE HIS TESTIMONY AS JIM
12 GRAHAM LIGHT, AND THE DEPOSITION
13 TRANSCRIPT IS JIM GRAHAM HEAVY, AND
14 WE THINK THAT THAT'S RELEVANT AND
15 IMPORTANT TO THIS CASE. THAT'S WHY
16 WE'D LIKE TO PUT IT IN. WE THINK
17 RULE 32 ALLOWS US TO PUT IT IN.
18 THE COURT: WITH RESPECT TO THAT DEPOSITION
19 THAT'S BEING PUT IN, IT WOULD BE PUT
20 IN AS EVIDENCE OF WHAT?
21 MR. CALAMARI: EVIDENCE OF KNOWLEDGE OF THE
22 INSURED'S IN THIS CASE KNOWING THAT
23 THERE WERE WINDOW PROBLEMS, THAT
24 THEY CONTINUED TO USE THE SAME
25 PRACTICE, SAME PROCEDURE ON HUNDREDS

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1 AND HUNDREDS OF WINDOWS FOLLOWING
2 THAT, KNOWING AND EXPECTING THAT
3 THEY WOULD CAUSE THIS PROBLEM, AND
4 TO SHOW THAT IT WASN'T AN ACCIDENT,
5 IT WAS A CONTINUED PATTERN AND
6 PRACTICE, AND WHEN YOU HAVE A
7 MANUFACTURER'S WITNESS, A WITNESS
8 FROM THE MANUFACTURING COMPANY COME
9 DOWN AND TELL YOU THAT, "YOU ARE
10 DOING THIS. YOU KNOW YOU ARE DOING
11 IT. IT'S GOING TO CAUSE PROBLEMS.
12 IT'S GOING TO CONTINUE TO CAUSE
13 PROBLEMS," HE'S STRONG ABOUT THAT IN
14 HERE. WHEN MR. HENRY ORIGINALLY
15 OFFERED HIM AND THERE WAS AN
16 OBJECTION IN THE RIVERWALK MATTER,
17 THERE WAS A LOT OF EXPLANATION OF
18 WHAT HE WAS GOING TO TESTIFY TO, AND
19 THEN WHEN HE TESTIFIED, HE DIDN'T
20 TESTIFY TO IT BECAUSE OF A PROFFER
21 ON SOME ISSUES AND SOME OBJECTIONS
22 MADE. WE THINK ALL OF THAT'S; IN
23 THIS, IT GOES TO THE PUNITIVE
24 DAMAGES AWARD. IN THAT CASE, THE
25 QUESTION WAS, "IS THIS GOING TO

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1 SUPPORT PUNITIVE DAMAGES, SHOWING
2 KNOWING CONDUCT?" ABSOLUTELY. SO WE
3 THINK THAT IT HELPS, REALLY, EVERY
4 ISSUE IN THIS CASE. AND HE'S
5 AVAILABLE FOR ANY OF THESE CROSS
6 EXAMINATION QUESTIONS IN EARLY
7 JANUARY.

8 MR. HENRY:

9 YOUR HONOR, I WANT TO CONCLUDE THIS
10 CASE. I DON'T WANT TO HAVE NOT ONLY
11 TO WRITE ORDERS OR PROPOSED ORDERS
12 AND TAKE -- I DON'T WANT TO HAVE TO
13 TAKE DEPOSITIONS, TOO. HE NAMED HIM
14 AS A WITNESS. I MEAN, HIS
15 INTERROGATORIES ARE DATED MANY MOONS
16 AGO, AND HE WAITED UNTIL NOW TO CALL
17 HIM. I WOULD CERTAINLY HAVE HAD
18 HIS, YOU KNOW, I COULD HAVE TAKEN
19 HIS DEPOSITION. HE ASKED ME TO
20 INTRODUCE HIS DEPOSITION AT THE LAST
21 HOUR, AND I SAID, "I OBJECT TO IT,"
22 BECAUSE I DIDN'T GET TO CROSS
23 EXAMINE HIM. THERE'S A LOT OF FACTS
24 THAT, YOU KNOW, HIS INSURED IN THE
25 UNDERLYING CASE SAID THERE WERE
WINDOW PROBLEMS; THE WINDOWS WERE

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Consolidated ROA_0516

1 LEAKING, AND THEY CHANGED
2 MANUFACTURERS. I MEAN, ALL THAT'S
3 IN THE RIVERWALK CASE, AND YOU KNOW,
4 THERE WAS JUST THAT DISPUTE AS TO
5 WHAT ---

6 THE COURT: IS THIS ESSENTIALLY A MANUFACTURER
7 SAYING, "WE HAVE NO PROBLEMS WITH
8 OUR WINDOWS. IT'S AN INSTALLATION
9 PROBLEM BY THE INSURER," AND THE
10 INSURER SAYING, "WE HAVE NO
11 INSTALLATION PROBLEMS. IT'S A
12 MANUFACTURING PROBLEM"?

13 MR. HENRY: EXACTLY. THAT WAS THE DISPUTE, AND
14 HERITAGE CHANGED WINDOW
15 MANUFACTURERS AT SOME LATER TIME. I
16 THINK THEY CHANGED A COUPLE OF TIMES
17 BECAUSE, IF YOU LOOK AT DREW BROWN'S
18 WINDOW REPORTS, I THINK THERE MIGHT
19 BE, I THINK THEY CHANGED TO CAPITOL
20 WINDOWS, AND YOU KNOW, AND DREW
21 BROWN LATER FOUND, YEAH, THERE'S
22 BOTH, THERE'S A WINDOW PROBLEM AND
23 THERE'S AN INSTALLATION PROBLEM.

24 MR. CALAMARI: YOUR HONOR, I THINK THIS GOES TO THE
25 ISSUE OF THEM KNOWING THAT THERE'S

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1 AN INSTALLATION PROBLEM. WHEN THE
2 MANUFACTURER COMES AND TELLS YOU,
3 "HEY, IF YOU KEEP PUTTING THESE
4 WINDOWS IN, IN THIS MANNER, YOU'RE
5 GOING TO EXPERIENCE SIGNIFICANT
6 PROBLEMS," AND THE INSURED SAYS, "I
7 DON'T CARE. I'LL JUST CHANGE WINDOW
8 MANUFACTURERS SO YOU WON'T
9 COMPLAIN," AND TO CHARACTERIZE ME AS
10 JUST CALLING HIM, I'VE BEEN CALLING
11 HIM FOR ---
12 THE COURT: THAT'S NOT -- I'M NOT WORRIED ABOUT
13 THOSE KINDS OF THINGS, BUT EVEN AS
14 THE PROFFER WAS PRESENTED BY MR.
15 BAIDEN, OF COURSE, NOT ALL OF THIS,
16 BUT IT SEEMS LIKE THERE WAS SOME
17 THREE OR FOUR MILLION DOLLARS THAT
18 WAS ALLOCATED TO WINDOW PROBLEMS,
19 AND THEN PART OF THAT WAS RESULTING
20 DAMAGE PROBLEMS. SO IT WOULD NOT
21 SURPRISE ME FOR A MANUFACTURER TO
22 TRY AND SHIFT A THREE TO FOUR
23 MILLION DOLLAR PER COMPLEX TO AN
24 INSTALLER AND TO BE VERY VOCAL AND
25 EMPHATIC ABOUT IT. SO I DON'T KNOW

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1 WHETHER THAT'S TRUE KNOWLEDGE THAT,
2 "YOU'RE DOING IT WRONG," OR WHETHER
3 THAT IS KNOWLEDGE THAT THE
4 MANUFACTURER IS CONTENDING YOU'RE
5 DOING IT WRONG. DO WE HAVE ANYTHING
6 IN THE TRIAL TRANSCRIPT AS MR.
7 GRAHAM IS DESCRIBING THE PROBLEMS
8 WITH THE INSTALLATION AND HOW THAT
9 WAS CREATING IT VERSUS ---
10 MR. HENRY: THERE IS, YOUR HONOR: IN THE
11 UNDERLYING ACTION, HE'S TELLING THEM
12 THAT THEY AREN'T PROPERLY FLASHING
13 THE WINDOWS AND THAT SORT OF THING,
14 AND HE ACTUALLY DOES A WINDOW TEST
15 TO PROVE THAT THEY AREN'T FLASHING
16 THE WINDOWS PROPERLY, AND THEY
17 ACTUALLY ---
18 THE COURT: DO WE ALSO HAVE TESTIMONY IN THE
19 RECORD WHERE THE INSTALLER OR THE
20 SUB IS TALKING ABOUT AND PERHAPS
21 BUILDSTAR'S PEOPLE ARE TALKING ABOUT
22 WHY IT IS BEING INSTALLED PROPERLY?
23 MR. HENRY: THERE'S TESTIMONY WHERE MR. VAN WIE
24 CALLED A MEETING. THEY GOT THEM
25 THROUGH, NOT PRIME SOUTH -- WHAT WAS

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1 THE COMPANY THAT THEY BOUGHT THOSE
2 WINDOWS FROM? ANYWAY, THEY BOUGHT
3 THEM FROM A LOCAL SUPPLIER.
4 MR. CALAMARI: PELICAN.
5 MS. EVANS: PELICAN.
6 MR. HENRY: WHAT?
7 MS. EVANS: PELICAN.
8 MR. HENRY: BUILDERS FIRST?
9 MS. EVANS: PELICAN.
10 MR. HENRY: PELICAN, THAT'S RIGHT, PELICAN.
11 THEY BOUGHT THEM FROM THE PELICAN,
12 THE BETTERBILT, AND THEY CALLED MR.
13 GRAHAM, HE WAS THIS AREA'S
14 TROUBLESHOOTER, AND THEY ALL MET,
15 AND VAN WIES, BUILDSTAR, HERITAGE,
16 WERE TRYING TO GET THEM TO REPLACE
17 MANY WINDOWS; AND MR. GRAHAM WENT
18 BACK TO HIS FOLKS AND TOLD THEM,
19 "ABSOLUTELY NOT," THAT, "THEY'RE
20 INSTALLING THEM WRONG. THERE'S
21 NOTHING WRONG WITH THE WINDOWS," AND
22 I THINK, I NEVER MADE, IF I RECALL,
23 WE NEVER MADE BETTERBILT A PARTY.
24 WE DID? YEAH, AND SETTLED WITH
25 THEM. SO THEY WERE NO LONGER A

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1 PARTY TO THE LAWSUIT.
2 MR. CALAMARI: YOUR HONOR, I THINK THAT SOME OF THE
3 MEETINGS THAT MR. GRAHAM HAD AND THE
4 CONVERSATIONS HE HAD WITH THE
5 INSURED IN THE CASE ARE NOT IN THE
6 TRIAL TRANSCRIPT, BUT THEY ARE IN
7 THE DEPOSITION, AND THAT'S WHY I
8 CALLED HIS TRIAL TESTIMONY JIM
9 GRAHAM LIGHT. ALSO, JIM GRAHAM
10 STOPPED WORKING FOR BETTERBILT, I
11 BELIEVE, IN 2002, AND THE DATE OF
12 THE DEPOSITION WAS 2008. SO IF
13 THERE'S ANY CLAIM THAT HE WOULD SAY,
14 "I DIDN'T," YOU KNOW, "I'M WORKING
15 FOR THE MANUFACTURER, AND THERE'S
16 DEFINITELY NOTHING WRONG WITH THE
17 WINDOWS," I DON'T THINK THAT COMES
18 IN. BUT THERE IS ADDITIONAL
19 INFORMATION IN THE DEPOSITION THAT
20 WAS NOT PRODUCED AT TRIAL. ALSO, IF
21 THERE ARE INSURANCE QUESTIONS, WHAT
22 ARE THEY AND HOW DIFFICULT WOULD
23 THAT BE, TO ASK THOSE QUESTIONS TO
24 MR. GRAHAM SINCE IT'S A BENCH TRIAL
25 AND THERE'S NO JURY?

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1 MR. HENRY: YOUR HONOR, I WOULD JUST OBJECT TO
2 THEM PUTTING IN A DEPOSITION IN AN
3 INSURANCE COVERAGE ACTION WHERE, IF
4 THE ROLES WERE REVERSED, AND THEY'RE
5 NOW SAYING THAT SOMETHING WAS, YOU
6 KNOW, WRONG WITH THE WAY THEY WERE
7 PUTTING THEM IN, AND THERE WAS A
8 CONTROVERSY AT TRIAL ABOUT WHETHER
9 THEY WERE PUTTING THEM IN WRONG OR
10 WHETHER THERE WAS A WINDOW PROBLEM,
11 ---
12 THE COURT: I'M ASSUMING, AT TRIAL, THEY TOOK
13 THE POSITION IT WAS A WINDOW PROBLEM
14 INSTEAD OF AN INSTALLATION PROBLEM.
15 MR. HENRY: WELL, THE INSURED TOOK THE POSITION
16 THAT THERE WAS A DISPUTE AS TO
17 WHETHER THERE WAS A WINDOW PROBLEM
18 OR AN INSTALLATION PROBLEM, AND THEY
19 TRIED TO MAKE IT LOOK LIKE MR.
20 GRAHAM'S TESTIMONY WAS SWAYED
21 BECAUSE OF HIS RELATIONSHIP WITH
22 BETTERBILT, ALTHOUGH HE HAD BEEN
23 RETIRED FROM BETTERBILT FOR SOME
24 YEARS, AND HE SAID, I MEAN, I'LL BE
25 CANDID, HE SAID THAT THEY WERE, AND

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Consolidated ROA_0522

1 HE TOLD THE VAN WIES, BUILDSTAR,
2 "YOU'RE PUTTING THEM IN WRONG."
3 THERE'S NO QUESTION ABOUT THAT.
4 THAT'S IN THE TRANSCRIPT, "YOU'RE
5 PUTTING THEM IN WRONG," AND THEY'RE
6 SAYING, "SOMETHING'S WRONG WITH THE
7 WINDOWS. THEY'RE LEAKING THROUGH
8 THE WINDOWS," AND LATER ON, IT WAS
9 FOUND OUT THEY WERE LEAKING THROUGH
10 BOTH PLACES.

11 MR. CALAMARI: YOUR HONOR, I THINK RULE 32
12 BASICALLY SAYS THAT AS LONG AS A
13 PARTY WAS PRESENT AT THE DEPOSITION,
14 RULE 32 SAYS, "AT THE TRIAL OR ON
15 THE HEARING OF A MOTION OR
16 INTERLOCUTORY PROCEEDING, ANY PART
17 OR ALL OF A DEPOSITION, SO FAR AS
18 ADMISSIBLE UNDER THE RULES OF
19 EVIDENCE APPLIED AS THOUGH THE
20 WITNESS WERE THEN PRESENT AND
21 TESTIFYING, MAY BE USED AGAINST ANY
22 PARTY WHO WAS PRESENT OR REPRESENTED
23 AT THE TAKING OF THE DEPOSITION OR
24 WHO HAD REASONABLE NOTICE THEREOF,
25 IN ACCORDANCE WITH ANY OF THE

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1 FOLLOWING PROVISIONS," ONE BEING HIM
2 BEING UNAVAILABLE. OBVIOUSLY, THE
3 DEPOSITION ---
4 THE COURT: --- THAT'S NOT A DEPOSITION IN THIS
5 LAWSUIT.
6 MR. CALAMARI: NO, SIR. BUT I THINK ---
7 THE COURT: IT'S A DEPOSITION IN THE UNDERLYING
8 SUIT. SO IS RULE 32 GOING TO
9 TRANSPORT THE DEPOSITION IN THE
10 UNDERLYING SUIT TO A DEPOSITION OF
11 THE CURRENT SUIT THAT COULD BE
12 UTILIZED? I DON'T THINK RULE 32
13 NECESSARILY APPLIES TO TRANSPORT
14 THAT DOCUMENT, THAT DEPOSITION IN
15 THE BASE SUIT TO MAKE IT NOW ABLE TO
16 BE INTRODUCED IN THE BRAND NEW SUIT
17 BECAUSE IT WAS NOT THIS SUIT'S
18 DEPOSITION. I DON'T THINK RULE 32
19 -- AND I'M OPERATING OFF THE TOP OF
20 MY HEAD. Y'ALL HAVE GOT THE BOOK IN
21 FRONT OF YOU.
22 MR. CALAMARI: YOUR HONOR, RULE 32 IS SILENT ON
23 THAT, AND THE ABSENCE OF SOMETHING
24 IN A STATUTE USUALLY IMPLIES IT WAS
25 LEFT OUT FOR A PURPOSE, AND IN THIS

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CASE, WHY ELSE WOULD THEY USE THE
LANGUAGE OF MOTION, INTERLOCUTORY
PROCEDURE, YOU KNOW, ESSENTIALLY ANY
MATTER ---

THE COURT: BUT IT ALL RELATES TO THE SUIT IN
WHICH THE DEPOSITION WAS TAKEN.

MR. CALAMARI: NOT NECESSARILY. I THINK YOU CAN
INTRODUCE THAT AS LONG AS THE PARTY
TO WHICH YOU'RE, WHO'S OPPOSING IT
HAD THE OPPORTUNITY TO PARTICIPATE
IN THAT DEPOSITION, AND MR. HENRY
TOOK THE DEPOSITION. YOU KNOW, IF
WE WERE TO RETAKE THE DEPOSITION IN
THIS CASE PRIOR TO THIS OR HAVE HIM
TESTIFY LIVE, HE WOULD TESTIFY
EXACTLY AS HE DOES IN THE
DEPOSITION. IT'S IN ---

THE COURT: I'M SURE HE WOULD NOT CHANGE HIS
TESTIMONY, BUT I'M NOT SURE HIS
TESTIMONY IN THE DEPOSITION IS AS
COMPLETE AS HIS TESTIMONY WOULD BE
IF NEW QUESTIONS WERE BEING ANSWERED
RELATING TO THE ISSUE OF COVERAGE.
I UNDERSTAND THAT IT IS
HARLEYSVILLE'S POSITION THAT

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BUILDSTAR AND THE OTHER DEFENDANTS
WERE ON NOTICE THAT THE WINDOWS WERE
BEING INSTALLED IMPROPERLY BASED ON
MR. GRAHAM'S GIVING THEM THAT
INFORMATION AND THAT THAT KNOWLEDGE
FOR MR. GRAHAM WOULD THEN ACTIVATE
THE EXCLUSION THAT HARLEYSVILLE
WOULD HAVE NO RESPONSIBILITY FOR
INTENDED ACTS, AND THAT'S ONE WAY OF
LOOKING AT IT. THE OTHER WAY OF
LOOKING AT, AS MR. HENRY HAS SAID,
IS THAT THERE WAS A DISPUTE BETWEEN
THE MANUFACTURER AND THE INSTALLER
AS TO WHETHER IT WAS A WINDOW
PROBLEM OR AN INSTALLATION PROBLEM
AND THEY WERE THREATENING TO CHANGE
MANUFACTURERS AND PERHAPS DID.
THERE IS LANGUAGE IN NEWMAN TWO THAT
SAYS IT IS UNREASONABLE TO BELIEVE
THAT TRINITY EXPECTED OR INTENDED
ITS SUBCONTRACTOR TO PERFORM
NEGLIGENTLY, AND THIS RELATES TO THE
FRAMING AND EXTERIOR SHEATHING OF
THE HOME, THEY SAY, ARE NOT COVERED
UNDER THE CGL POLICY BECAUSE A

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1 CONSTRUCTION PROFESSIONAL WOULD
2 EXPECT SUBSTANTIAL MOISTURE
3 INTRUSION FROM DEFECTIVE STUCCO TO
4 RESULT IN THESE TYPES OF DAMAGES,
5 BUT THEN IT GOES ON AND SAYS, "IN
6 OUR OPINION AND IN THE ABSENCE OF
7 ANY EVIDENCE OTHERWISE, IT'S
8 UNREASONABLE TO BELIEVE THAT TRINITY
9 EXPECTED OR INTENDED ITS
10 SUBCONTRACTOR TO PERFORM
11 NEGLIGENCE. THEREFORE, TRINITY
12 COULD NOT HAVE EXPECTED OR INTENDED
13 THE RESULTING PROPERTY DAMAGE," AND
14 IT CITES A TEXAS CASE, "BUT A
15 DELIBERATE ACT PERFORMED NEGLIGENCELY
16 IS AN ACCIDENT IF THE EFFECT IS NOT
17 THE INTENDED OR EXPECTED RESULT;
18 THAT IS, THE RESULT WOULD HAVE BEEN
19 DIFFERENT HAD THE DELIBERATE ACT
20 BEEN PERFORMED CORRECTLY." SO WE'VE
21 GO A QUESTION OF WHETHER OR NOT IT
22 QUALIFIES AS AN ACCIDENT IF IT HAD
23 BEEN PERFORMED CORRECTLY, AND SO I
24 UNDERSTAND THE DISPUTE. I THINK
25 THERE'S EVIDENCE IN THE RECORD ABOUT

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Consolidated ROA_0527

1 THIS, AND I THINK Y'ALL WOULD
2 PROBABLY AGREE THAT THIS IS A
3 DISPUTE BETWEEN WHETHER THIS WOULD
4 QUALIFY AS AN ACCIDENT, THE WAY
5 THINGS WERE DONE, OR WHETHER IT
6 WOULDN'T QUALIFY AS AN ACCIDENT. I
7 SEE IT AS A LEGAL QUESTION MORE THAN
8 AS AN EVIDENTIARY QUESTION.

9 MR. HENRY: YOUR HONOR, IF HE WANTS TO, YOU
10 KNOW, -- YOU SUMMARIZED THE DISPUTE
11 HERE, WHETHER OR NOT GRAHAM TELLING
12 THEM THAT THEY WERE PUTTING THE
13 WINDOWS IN WRONG AND THEY CONTINUED
14 TO DO IT, WHETHER OR NOT THAT'S
15 SUFFICIENT EVIDENCE TO EXCLUDE
16 COVERAGE UNDER EXPECTED OR INTENDED.
17 THAT'S IN THE DEPOSITION. THAT'S IN
18 THE TRIAL TRANSCRIPT. WHAT ELSE IS
19 IN THERE, I DON'T KNOW.

20 THE COURT: I DO NOT THINK THAT RULE 32 AS
21 DRAFTED PROVIDES FOR THE AUTOMATIC
22 INTRODUCTION OF A DEPOSITION TAKEN
23 IN ONE CAUSE OR IN ONE LAWSUIT TO BE
24 INTRODUCED EVEN WHEN PARTIES ARE THE
25 SAME BUT THE LAWSUIT IS DIFFERENT

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Consolidated ROA_0528

1 AND THE ISSUES ARE DIFFERENT. I'M
2 GOING TO LET IT COME IN AS A PROFFER
3 IN THE EVENT THAT I AM WRONG, BUT I
4 THINK, AT BEST, IT WOULD BE
5 CUMULATIVE BY MY EXCLUDING IT,
6 BECAUSE I THINK I'M CLEARLY GOING TO
7 HAVE TO DECIDE WHETHER OR NOT IT'S
8 AN ACCIDENT OR IT'S NOT AN ACCIDENT
9 BECAUSE I THINK, UNDOUBTEDLY, THE
10 TESTIMONY IS THAT GRAHAM TOLD THEM,
11 "YOU'RE DOING IT WRONG," AND THEY
12 SAID, "WE'RE DOING IT OKAY. IT'S
13 YOUR WINDOW THAT'S WRONG," AND IS
14 THAT AN ACTION THAT'S AN INTENDED
15 ACTION FROM BOTH WHAT'S BEING DONE
16 AS WELL AS TO EXPECT THE CONSEQUENCE
17 OR WHETHER IT'S MORE LIKE IN THE
18 NEWMAN CASE, WHERE, YOU KNOW, IT'S
19 BEING DONE NEGLIGENTLY; IF IT HAD
20 BEEN DONE PROPERLY, IT WOULDN'T HAVE
21 BEEN AN ACCIDENT, AND I THINK, YOU
22 KNOW, I'M GOING TO HAVE TO MAKE SOME
23 DECISION AND THE APPELLATE COURT'S
24 GOING TO HAVE TO MAKE SOME DECISION
25 AS TO WHETHER OR NOT THE INTENDED

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ACT INCLUDES BOTH THE ACT AND THE
REPETITION OF THAT ACT, AS WELL AS,
"WE'RE DOING IT WITH AN INTENTION
THAT IT DOES IN FACT, WE'RE
KNOWINGLY DOING SOMETHING IN A
NEGLIGENT FASHION." QUITE FRANKLY,
IN THIS PARTICULAR CASE, WHAT I SEE
MORE AS A COVERAGE ISSUE THAT I CAN
DEAL WITH IS NOT TRYING TO ALLOCATE
DAMAGES UNDER THE NEGLIGENCE AND
DAMAGES UNDER BREACH OF FIDUCIARY
AND THAT TYPE OF THING IS WHETHER OR
NOT THE CGL POLICY IS INTENDED TO
COVER PUNITIVE DAMAGES, DO THESE
DAMAGES ARISE OUT OF THE NEGLIGENCE
OR WHETHER OR NOT THESE DAMAGES ARE
UNRELATED TO THE PROPERTY OTHER THAN
YOU HAVE TO HAVE PROPERTY DAMAGE IN
ORDER TO SUPPORT PUNITIVE DAMAGES,
AND THOUGH, YOU KNOW, THEY
HISTORICALLY ARE NOT COMPENSATORY,
BUT THEY ARE BASED UPON DAMAGES THAT
ARE COMPENSATORY. SO I'M STRUGGLING
WITH WHETHER OR NOT I TIE THEM TO
THE DAMAGES THAT WERE DONE TO THE

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1 BUILDING AS A RESULT OF THE
2 OCCURRENCE OR WHETHER I SAY, "NO.
3 THEY'RE MORE RELATED TO THINGS THAT
4 ARE NOT COVERED," EVEN THOUGH THE
5 POLICY DOESN'T SPECIFICALLY SAY IT'S
6 INCLUDED OR EXCLUDED, AND THEN I
7 HAVE TO DEAL WITH, "OKAY, DO I
8 CONSTRUE THIS AGAINST THE CARRIER?"
9 THEY HAVE THE RIGHT TO SAY THINGS IN
10 MORE DETAIL. SO THOSE ARE ISSUES
11 THAT I'LL LET Y'ALL ADDRESS IN YOUR
12 PROPOSED ORDERS. SO PUT IT IN AS A
13 PROFFER, AND WE'LL MARK IT THAT WAY.

14 MR. CALAMARI: THANK YOU, YOUR HONOR. AT THIS
15 TIME, WE'LL PROFFER THE DEPOSITION
16 OF JAMES C. GRAHAM, IT WAS TAKEN IN
17 CHARLOTTE, NORTH CAROLINA ON
18 DECEMBER 2ND OF 2008 IN THE TONY
19 POPE VERSUS HERITAGE, ET AL, AND THE
20 RIVERWALK VERSUS HERITAGE, ET AL,
21 CASE NUMBER 05-CP-26-3289, AND I
22 BELIEVE THIS WOULD BE EXHIBIT 24.

23 PLAINTIFF'S EXHIBIT NUMBER 24

24 OFFERED AS A PROFFER

25 MR. CALAMARI: YOUR HONOR, WE DON'T HAVE ANY OTHER

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1 WITNESSES. DO YOU HAVE ANY
2 WITNESSES?
3 MR. HENRY: NO.
4 MR. CALAMARI: I THINK THAT WOULD CONCLUDE THE
5 TESTIMONY. I CAN TELL FROM THE
6 DISCUSSIONS WE'VE HAD OVER THE LAST
7 COUPLE OF DAYS THAT MR. HENRY AND I
8 SAID, "HEY, LET'S CALL JUDGE
9 MILLING, HE CAN HANDLE THIS," YOU'D
10 BE HAPPY TO GET THAT CALL. SO WE DO
11 APPRECIATE ALL OF YOUR TIME AND
12 EFFORT IN THIS, AND WE KNOW THERE'S
13 A LOT MATERIAL AND A LOT OF ISSUES.
14 THE COURT: YOU ARE MORE THAN WELCOME. MS.
15 EVANS, YOU OFFERED A ZIP DRIVE?
16 MS. EVANS: I DID, YOUR HONOR, AND I'M GOING TO
17 HAVE TO TAKE IT BACK TO MY OFFICE TO
18 DOWNLOAD THE TRANSCRIPTS AND ALL OF
19 THE EXHIBITS, BUT IF THAT'S OKAY
20 WITH YOU, I'LL FEDEX THAT UP TO YOU
21 AS SOON AS I GET IT DONE TOMORROW.
22 THE COURT: YOU DON'T HAVE TO FEDEX IT.
23 MS. EVANS: OKAY. YOU DON'T WANT TO READ IT
24 BEFORE CHRISTMAS?
25 THE COURT: NO.

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Consolidated ROA_0532

1 MR. HENRY: YOUR HONOR, FOR THE RECORD, THE
2 DEFENSE WILL NOT CALL ANY WITNESSES.
3 WE WILL RELY ON THE EXHIBITS AND THE
4 TESTIMONY THAT'S BEEN INTRODUCED.
5 MS. EVANS: YOUR HONOR, FOR THE RECORD, NATIONAL
6 SURETY DOESN'T HAVE ANY WITNESSES TO
7 CALL EITHER.
8 THE COURT: THESE BOOKS THAT ARE UP HERE, ARE
9 THESE COURT COPIES OR ARE THESE
10 THINGS THAT NEED TO BE ---
11 MR. CALAMARI: I APOLOGIZE FOR HAVING KEPT HANDING
12 YOU THINGS.
13 THE COURT: THAT'S ALL RIGHT.
14 MR. HENRY: WE'RE GOING TO STAY A LITTLE WHILE,
15 JUDGE, AND MAKE SURE WE'VE GOT ALL
16 THIS STUFF SO YOU'LL BE ABLE TO READ
17 ALL OF IT IN SOME FASHION.
18 MR. CALAMARI: CAN I SUGGEST THAT INSTEAD OF
19 FORCING YOU TO LOAD ALL THIS UP THAT
20 WE HAVE IT DELIVERED TO YOUR OFFICE?
21 AND THAT WAY YOU WON'T HAVE ---
22 MS. EVANS: WELL, I CAN PUT EVERYTHING ON A ZIP
23 DRIVE IF YOU'D LIKE IT THAT WAY?
24 MR. CALAMARI: EITHER WAY.
25 THE COURT: MY MEMORY ON A ZIP DRIVE IS I PLUG

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Consolidated ROA_0533

1 IT INTO THE SIDE OF THE COMPUTER,
2 AND IT'S GOT STORAGE, AND IT JUST
3 BRINGS IT UP ON THE COMPUTER INSTEAD
4 OF FOLDING IT ACROSS MY LAP.
5 MS. EVANS: YES, SIR, IT IS, AND I HAVE ALL OF
6 IT ON ONE ZIP DRIVE.
7 MR. HENRY: CAN YOU SEND ME ONE, TOO?
8 MS. EVANS: SURE.
9 MR. CALAMARI: UNLESS YOU'D LIKE THE HARDCOPIES, I
10 KNOW, MYSELF, I ALWAYS LIKE TO HAVE
11 THE HARDCOPIES, BUT DIFFERENT PEOPLE
12 LIKE DIFFERENT THINGS.
13 THE COURT: I THINK IT WOULD MAKE MORE SENSE AT
14 THIS POINT IN TIME THAT IF I NEED
15 THE HARDCOPY, TO DETERMINE WHAT I
16 MAY NEED AS A HARDCOPY. IT ALSO MAY
17 MAKE SENSE, IN ORDER TO ENSURE THAT
18 EVERYTHING STAYS TOGETHER -- WHERE
19 WILL THESE EXHIBITS BE KEPT? DONNA,
20 WOULD YOU BE ABLE TO STORE THEM HERE
21 IN THE COURTHOUSE OR WOULD YOU HAVE
22 TO TAKE THEM WITH YOU?
23 COURT REPORTER: I WOULD TAKE THEM TO MY OFFICE.
24 MR. CALAMARI: AND WE WOULD OFFER TO STORE THEM FOR
25 YOU. WE HAVE SOME EMPTY OFFICES

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1 THAT I COULD LOCK THE DOOR, AND
2 THEY'D BE LOCKED IN THERE.
3 MR. HENRY: THAT WOULD BE FINE WITH ME.
4 THE COURT: IT MAY BE THAT IF I THEN NEED
5 SOMETHING IN HARDCOPY FASHION, I
6 NOTIFY Y'ALL AND Y'ALL TELL ME WHERE
7 IT IS, AND I'LL SET UP A TIME TO
8 COME AND LOOK AT IT. I JUST THINK
9 IT'D BE EASIER TO MANAGE IT THAT
10 WAY.
11 MS. EVANS: WE CAN DO THAT.
12 MR. HENRY: ARE ALL THESE BATES STAMPED?
13 MS. EVANS: ALL OF THEM ARE NOT BATES STAMPED,
14 BUT WE HAVE A PROGRAM THAT CAN BATES
15 STAMP THEM IMMEDIATELY IF THEY'RE
16 PDF. SO WE COULD DO THAT. IT
17 WOULDN'T BE HARD.
18 MR. HENRY: THE REASON I WAS ASKING IS, IF YOU
19 REFER TO BURIC'S REPORT, YOU KNOW,
20 FOR THE RECORD, HOW ARE YOU GOING
21 TO, IT'S PAGE TEN, BUT YOU KNOW, THE
22 PAGES AREN'T MARKED.
23 MR. CALAMARI: I THINK WHAT LAURA'S SAYING IS THAT
24 IT WOULD BE ON THE ZIP DRIVE WITH A
25 BATES NUMBER.

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Consolidated ROA_0535

1 MR. HENRY: OKAY.
2 MS. EVANS: AND WHAT WE COULD DO IS NOW BATES IT
3 ALMOST LIKE A RECORD ON APPEAL AND
4 HAVE IT ONE THROUGH 10,000, AND THEN
5 WE COULD REFER TO IT WHEN WE DO THE
6 BRIEFS BY THAT NUMBER.
7 MR. HENRY: THAT WOULD BE, THAT WOULD WORK, THAT
8 WOULD WORK.
9 THE COURT: THAT MAY ACTUALLY, FROM Y'ALLS
10 BRIEFS STANDPOINT, MAKE IT WORK
11 BETTER THAN DOING IT THE OTHER WAY.
12 MS. EVANS: THAT WILL BE FINE. WE CAN DO THAT.
13 MR. HENRY: YOU DON'T WANT TO TAKE ALL THESE.
14 YOU'VE ALREADY GOT MOST OF THEM.
15 MS. EVANS: I'VE GOT ALL OF THEM EXCEPT FOR THE
16 RIVERWALK EXHIBITS.
17 MR. HENRY: WHY DON'T WE LET LAURA TAKE THESE,
18 THESE ARE ORIGINALS FROM THE COURT.
19 MS. EVANS: OKAY.
20 MR. CALAMARI: AND THEN I'LL TAKE THE REST OF THESE
21 BACK, AND WE'LL HAVE THEM ON A ZIP
22 DRIVE.
23 THE COURT: THAT SOUNDS GREAT. THANK Y'ALL VERY
24 MUCH.
25 MR. HENRY: THANK YOU JUDGE, APPRECIATE IT.

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(This proceeding concluded at 11:20 a.m.)

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Consolidated ROA_0537

CERTIFICATE

This is to certify that the foregoing transcript of the hearing held before Honorable John M. Milling, Special Circuit Court Trial Judge, consisting of **Two Hundred Ninety-two (292)** pages is a true and correct transcript of the testimony given at said hearing. The hearing was reported by method of stenomask with backup.

I further certify that I am neither employed by nor related to any of the parties in this matter nor their counsel; nor do I have any interest, financial or otherwise, in the outcome of the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of February, 2011.

Donna H. Martin, CVR
Certified Court Reporter
Notary in and for the State of
South Carolina
My Commission Expires: 12-28-14

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
)

COPY

Harleysville Group Insurance Group,
A Pennsylvania Corporation,

Plaintiff,

vs.

CASE NO:
2009-CP-26-10053

Heritage Communities, Inc., A South Carolina
Corporation; Heritage Riverwalk, A South Carolina
Corporation; Buildstar Corporation, A South Carolina
Corporation; Riverwalk at Arrowhead Country Club
Horizontal Property Regime, Riverwalk at Arrowhead
Country Club Property Owners Association, Inc., A South
Carolina Corporation, National Surety Corp., and Tony
L. Pope and Lynn Pope, Individually and Representing
as A Class All Unit Owners at Riverwalk at Arrowhead
Country Club Horizontal Property Regime,

Defendants.

Harleysville Group Insurance Group,
A Pennsylvania Corporation,

Plaintiff,

vs.

CASE NO:
2009-CP-26-11862

Heritage Communities, Inc., A South Carolina
Corporation; Heritage Magnolia North, Inc., A South
Carolina Corporation; Buildstar Corporation, A South
Carolina Corporation; Magnolia North Horizontal
Property Regime, Magnolia North Property Owners
Association, Inc., A South Carolina Corporation, and
National Surety Corp.,

Defendants.

**THE HEARING HELD BEFORE THE
HONORABLE JOHN M. MILLING,
DARLINGTON COUNTY CIRCUIT JUDGE**

Friday, December 9, 2011
10:00 a.m. -- 12:05 p.m.

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TRIAL 00013941

Consolidated ROA_0539

The following is the hearing held before The Honorable John M. Milling, Darlington County Circuit Judge, at the Horry County Government & Justice Center, located at 1301 2nd Avenue, Conway, South Carolina, on Friday, December 9, 2011.

APPEARANCES:

FOR THE PLAINTIFF:

Robert C. Calamari, Esquire
McANGUS GOUDELOCK & COURIE
2411 North Oak Street, Suite 401
Myrtle Beach, South Carolina 29577

FOR THE DEFENDANT:

Pat Henry, Esquire
THOMPSON & HENRY
1300 2nd Avenue
Conway, South Carolina 29526

FOR THE DEFENDANT:

(National Surety)
Laura Evans, Esquire
Karin McCarthy, Esquire
SMITH, MOORE, LEATHERWOOD
171 Church Street, Suite 210
Charleston, South Carolina 29401

COURT REPORTER:

Sharon B. Brock
Verbatim Court Reporter

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TRIAL 00013942

INDEX

PAGE

FRANK BAIDEN

Direct Examination by Mr. Calamari	13
Cross Examination by Mr. Henry	23
Re-Direct Examination by Mr. Calamari	28

JAMES WRIGHT

Direct Examination by Mr. Calamari	30
Cross Examination by Mr. Henry	39

JOHN D. BROWN, JR.

Direct Examination by Mr. Henry	40
Cross Examination by Mr. Calamari	46
Re-Direct Examination by Mr. Henry	63
Cross Examination by Mr. Calamari	66
Re-Direct Examination by Mr. Henry	72
Certificate Page	103

EXHIBITS

Plaintiff's Exhibit Number 28	
Insurance Policy Table Riverwalk	33

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TRIAL 00013943

Plaintiff's Exhibit Number 29	
Insurance Policy Table Magnolia	33
Plaintiff's Exhibit Number 30	
Certificate of Occupancy Riverwalk	35
Plaintiff's Exhibit Number 31	
Certificate of Occupancy Magnolia	35
Plaintiff's Exhibit Number 32	
Photos	47
Plaintiff's Exhibit Number 33	
Photos	47
Plaintiff's Exhibit Number 34	
Photos	47

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TRIAL 00013944

1 MR. CALAMARI: THANK YOU, YOUR HONOR.

2 THIS IS A CONTINUATION OF THE TESTIMONY PHASE
3 OF THE HERITAGE AND RIVERWALK MATTERS. THIS IS
4 NECESSITATED, WE BELIEVE, BY THE RECENT SUPREME
5 COURT DECISION IN CROSSMAN, THE SECOND CROSSMAN
6 WHERE THEY DISCUSSED TIME ON THE RISK. THE BULK
7 OF THIS VERY BRIEF TESTIMONY IS GOING TO BE
8 RELATED TO THE TIME ON THE RISK ISSUES.

9 MR. HENRY: YOUR HONOR, I THINK THAT
10 THEY'RE A COUPLE OF THINGS THAT NEED TO BE PUT
11 ON THE RECORD. WE HAD CONCLUDED THE TESTIMONY
12 PREVIOUSLY AND THEN YOU GAVE US 30 DAYS OR 30
13 DAYS TO PREPARE AN ORDER AFTER WE GOT THE
14 TRANSCRIPT. I JUST WANT TO MAKE THE RECORD
15 CLEAR, AND THEN CROSSMAN I CAME OUT AND WE ALL
16 AGREED THAT WE WOULD HOLD THE CASE OPEN UNTIL
17 CROSSMAN WAS FINALIZED, WHICH IT APPARENTLY HAS
18 BEEN, AND THAT WE WOULD OPEN THE TESTIMONY UP
19 IF THERE WERE ANY NEW THINGS IN CROSSMAN, BUT
20 THE ONLY REAL NEW THING IN CROSSMAN WAS THE
21 APPLICATION OF THE TIME ON THE RISK, INSTEAD OF
22 BEING A JOINT AND SEVERAL, IT IS A TIME ON THE
23 RISK ANALYSIS.

24 I WOULD, ALSO, YOUR HONOR,
25 AND I HOPE WE CAN AGREE TO THIS WITHOUT MY

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TRIAL 00013945

Consolidated ROA_0543

1 STANDING UP AND OBJECTING TO EVERY QUESTION, A
2 RIGHT TO PUT ON THE RECORD THAT MY CLIENTS IN
3 RIVERWALK AND MAGNOLIA, THE DEFENDANTS, OBJECT
4 TO ANY TESTIMONY REGARDING TIME ON THE RISK.
5 AS WE DISCUSSED IN THE PREVIOUS TESTIMONY,
6 ESPECIALLY AND PARTICULARLY, MR. BAIDEN, HIS
7 ANALYSIS WAS THAT IN 2010, HE DID AN ESTIMATE
8 OF REPAIR AND THEN HE TRIED TO BREAK OUT WHAT
9 THE SECONDARY DAMAGE OR WATER INTRUSION DAMAGE
10 WAS OR PROGRESSIVE DAMAGE. YOU SUSTAINED MY
11 OBJECTION TO THAT TESTIMONY BECAUSE THERE IS A
12 GENERAL VERDICT, AND IN ORDER FOR THERE TO BE
13 TESTIMONY ABOUT PROGRESSIVE DAMAGE, WE'VE GOT
14 TO KNOW WHAT THAT DAMAGE WAS. JUST AS AN
15 ILLUSTRATION, BREACH OF FIDUCIARY DUTY WAS
16 SUBMITTED TO THE JURY. WE DON'T KNOW IF THE
17 JURY JUST SAID; "OKAY, THEY TURNED THESE COMMON
18 ELEMENTS OVER IN DEFECTIVE CONDITION, WE'RE
19 GOING TO GIVE THE PLAINTIFF THE VERDICT ON
20 BREACH OF FIDUCIARY DUTY." BREACH OF FIDUCIARY
21 DUTY NOT ONLY INCLUDES DEFECTIVE CONSTRUCTION,
22 IT ONLY INCLUDES ANY CONTINUING DAMAGE
23 THEREAFTER CAUSED BY THE DEFECTIVE
24 CONSTRUCTION. THAT'S THE DUNES WEST CASE AND
25 THE GODDARD CASE.

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TRIAL 00013946

1 IN ADDITION, YOUR HONOR, WE
2 WOULD SUBMIT THAT THE TESTIMONY ON TIME ON THE
3 RISK IS NOT RELEVANT UNDER EVIDENCE RULES 401
4 AND 402; BECAUSE THERE IS NO RELATIONSHIP TO
5 MR. BAIDEN'S REPORT TO THE JURY VERDICT, AND SO
6 WE DO NOT BELIEVE THAT ANY TESTIMONY AS TO TIME
7 ON THE RISK WOULD BE APPLICABLE. THERE WERE
8 NUMBERS OF DIFFERENT TYPES OF DAMAGES SUBMITTED
9 TO THE JURY. THERE WAS, FOR EXAMPLE, IN
10 MAGNOLIA NORTH THE DEFENDANTS CONCEDED THAT WE
11 WERE ENTITLED TO WHAT IT COST TO COMPLETE THE
12 PAVING. WE DON'T KNOW IF THE JURY ALLOCATED
13 DAMAGES TO THAT OR NOT. WE DON'T KNOW WHAT
14 THEY ALLOCATED DAMAGES TO, SO WE WOULD MOVE OR
15 WE WOULD WANT TO ENTER OUR OBJECTION TO ANY
16 TESTIMONY RELATED TO THE TIME ON THE RISK.

17 A BREACH OF WARRANTY WAS
18 SUBMITTED TO THE JURY AND THE JURY -- WELL, THE
19 JUDGE DIRECTED A VERDICT IN MAGNOLIA NORTH ON A
20 BREACH OF WARRANTY OF WORKMANLIKE SERVICE.
21 AGAIN, AS WE ARGUED IN THE PREVIOUS CASE, THE
22 PUGH CASE, AND ALL THE OTHER CASES IN SOUTH
23 CAROLINA, SAY THAT IT'S YOUR DUTY IF YOU WANT
24 AN ALLOCATION OF DAMAGES TO SUBMIT SPECIAL
25 INTERROGATORIES OR A SPECIAL VERDICT AND THE

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TRIAL 00013947

Consolidated ROA_0545

1 COURT IN EVERY CASE THAT HAS CONSIDERED IT HAS
2 REFUSED TO GO BEHIND THE GENERAL VERDICT, AND
3 SO ANY TESTIMONY ON TIME ON THE RISK WOULD BE
4 ARBITRARY AND SPECULATIVE.

5 AND AGAIN, YOUR HONOR, I
6 WOULD RAISE WHAT THE COURT SAID IN NEWMAN TO
7 THE INSURANCE CARRIER IN THAT CASE, "YOU HAD AN
8 OPPORTUNITY TO GET AN ALLOCATED VERDICT WHEN
9 THAT WAS BROUGHT UP AT TRIAL AND YOU DIDN'T DO
10 IT AND WE'RE NOT GOING TO NOW TRY TO ALLOCATE
11 DAMAGES BETWEEN COVERED AND NON-COVERED ITEMS,
12 EVERYTHING IS COVERED." AND THERE ARE A NUMBER
13 OF CASES WHICH I'VE ALREADY CITED TO YOUR HONOR
14 THAT SAY THE SAME THING. THEY MADE A CONSCIOUS
15 TO NOT TO INTERVENE, AND NOW THEY CAN'T USE
16 THAT TO TRY TO TAKE AWAY THEIR INDEMNITY OR
17 LESSEN THEIR INDEMNITY. TIGER RIVER SAID WHEN
18 THE SITUATION COMES UP THAT THE INSURANCE
19 CARRIER HAS A CHOICE BETWEEN THEIR INTEREST AND
20 THAT OF THEIR INSURED, THEY HAVE TO TAKE THEIR
21 INSURED'S INTEREST, AND IF IT WAS GOING TO BE A
22 PROBLEM FOR THEM TO INTERVENE AND TAKE AN
23 ADVERSE POSITION THEY HAD TO LET IT GO AND
24 ALLOW THE JURY TO GIVE A GENERAL VERDICT.

25 THAT IS MY OBJECTION TO

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TRIAL 00013948

Consolidated ROA_0546

1 TIME ON THE RISK, YOUR HONOR. A COUPLE OF
2 OTHER HOUSEKEEPING MATTERS. I WENT BACK AND
3 LOOKED AT THE TRANSCRIPT AND I OBJECTED TO
4 JAMES GRAHAM'S DEPOSITION. I READ THE RULE AND
5 IT'S A LITTLE HAZY. ONE WAY OR THE OTHER YOU
6 COULD MAKE AN ARGUMENT, SO I'M GOING TO
7 WITHDRAW MY OBJECTION. HE TESTIFIED IN THE
8 TRIAL AND SO HIS TESTIMONY IS BASICALLY THE
9 SAME, AND I'M TRYING TO GET RID OF ANY FILL
10 ISSUES.

11 THE COURT: WHICH WITNESS WAS THAT,
12 PAT?

13 MR. HENRY: JAMES GRAHAM. HE WAS A
14 REPRESENTATIVE OF BETTER-BUILT WINDOWS. ON
15 PAGE 13 OF THE TRANSCRIPT THERE'S SOME LANGUAGE
16 TO SUGGEST THAT BAIDEN'S REPORT MAY COME IN
17 WITHOUT OBJECTION, AND LATER ON IT'S CLEAR THAT
18 THERE WAS AN OBJECTION MADE AND I -- LET ME
19 LOOK HERE REAL QUICK, YOUR HONOR.

20 MS. EVANS: JUST FOR THE RECORD, MADAM
21 COURT REPORTER, THE DEPOSITION OF JAMES GRAHAM
22 IS ACTUALLY EXHIBIT NUMBER 24.

23 MR. HENRY: AND THAT'S WHAT I WOULD
24 LIKE TO PUT ON THE RECORD, YOUR HONOR. COULD
25 WE HAVE AN AGREEMENT THAT MY OBJECTION WOULD BE

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TRIAL 00013949

Consolidated ROA_0547

1 A CONTINUING OBJECTION AND I DON'T HAVE TO
2 STAND UP EVERY TIME A QUESTION IS ASKED?
3 MR. CALAMARI: YES, AND I REALLY THOUGHT
4 THAT ---
5 MS. EVANS: THAT'S FINE, FINE.
6 MR. CALAMARI: I REALLY THOUGHT WHAT WE
7 WERE GOING TO DO TODAY IS JUST HAMMER OUT SOME
8 TESTIMONY AND THEN MAKE ALL THESE LEGAL
9 ARGUMENTS LATER, BECAUSE I THINK THESE ARE ALL
10 LEGAL ARGUMENTS. I THINK THESE ARE ALL
11 PRESERVED TO BE MADE AT A LATER DATE. WE HAVE
12 PLENTY OF LEGAL ARGUMENTS, SO DO YOU, AND I
13 THINK THEY'RE GOING TO BE IN THE BRIEFS AND WE
14 HAVE AN OPPORTUNITY TO MAKE ARGUMENTS.
15 MR. HENRY: BUT THEY APPEALED BOTH OF
16 THESE CASES, AND ONE OF THE THINGS I'VE LEARNED
17 IS YOU GOT TO GET AN OBJECTION ON THE RECORD
18 AND GET THE JUDGE TO RULE ON IT OR YOU'VE
19 WAIVED IT, AND THAT'S WHY I WANTED THIS
20 OBJECTION TO BE ON THE RECORD.
21 THE COURT: I'M NOT SURE WHAT EXACTLY
22 THE NATURE IS OF WHAT THE TESTIMONY IS GOING TO
23 BE ABOUT AS TO TIME ON RISK, WHETHER IT'S GOING
24 TO BE JUST SOME GENERAL INFORMATION ABOUT WHAT
25 POLICY DATES WERE AND, LET'S SEE, THE NUMBER OF

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TRIAL 00013950

Consolidated ROA_0548

1 YEARS THAT THE DAMAGE OCCURRED VERSUS THE
2 NUMBER OF YEARS THE POLICY WAS IN EXISTENCE
3 TIMES THE VERDICT TESTIMONY FOR THAT FALLBACK
4 METHOD FOR ALLOCATING DAMAGES WHEN YOU AREN'T
5 IN TRIAL STAGE OR WHETHER THEY'RE GOING TO BACK
6 AND TRY TO ARGUE, "BASED UPON OUR ANALYSIS, WE
7 GOT \$12.15 THAT OCCURRED BECAUSE OF CONTINUING
8 DAMAGES." SO TO OFFER TESTIMONY LIKE THAT TO
9 SAY THAT MILLIONS OF DOLLARS WERE THE DAMAGES
10 THAT AROSE OUT OF THE INITIAL MISAPPLICATION OR
11 CUTTING THE BOARDS WRONG, INSTALLING THE
12 WINDOWS IMPROPERLY, THAT ALLOW THE SEEPAGE,
13 I'LL JUST HAVE TO HEAR. THERE WELL MAY BE SOME
14 OF THE TESTIMONY PRESENTED TODAY THAT WE MAY
15 HAVE TO JUST HEAR IT AND THEN MAKE A
16 DETERMINATION AS TO WHETHER THAT'LL BE ALLOWED
17 TO COME IN AS TESTIMONY OR WHETHER I SHOULD
18 SUSTAIN AN OBJECTION AND ALLOW IT TO COME IN AS
19 A PROFFER. WE'LL JUST HAVE TO SEE. SO YOU MAY
20 END UP HAVING TO -- I UNDERSTAND YOUR GENERAL
21 OBJECTION, BUT YOU MAY END UP HAVING TO MAKE
22 SOME SPECIFIC OBJECTION, SO THAT IT DOESN'T --
23 YOU DON'T FIND YOURSELF IN A SITUATION LIKE A
24 MOTION IN LIMINE AND THEN FAILING TO PRESENT IT
25 AGAIN DURING THE TRIAL TESTIMONY ---

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TRIAL 00013951

Consolidated ROA_0549

1 MR. CALAMARI: RIGHT.
2 THE COURT: --- AND THE APPELLATE COURT
3 NOT LOOKING FAVORABLY TO THAT.
4 MR. HENRY: THAT'S FINE.
5 MR. CALAMARI: AND, YOUR HONOR, I THINK
6 IT'S GOING TO BE THE EARLIER OF WHAT YOU SAID.
7 WE'RE GOING TO TALK IN GENERAL TERMS, BECAUSE
8 WE BELIEVE THE OTHER PART IS MORE OF A LEGAL
9 ARGUMENT AND US, THE LAWYERS, SUMMARIZING IT IN
10 THE BRIEFS AND ORDER. SO IT'S GOING TO BE VERY
11 GENERAL TESTIMONY.
12 THE COURT: VERY GOOD. ALL RIGHT. YOU
13 MAY PROCEED.
14 MR. CALAMARI: THANK YOU, YOUR HONOR. AT
15 THIS TIME WE'LL CALL TRIPP BAIDEN TO THE STAND.
16 WE'VE ALREADY GONE THROUGH QUALIFYING HIM AS AN
17 EXPERT AS A GENERAL CONTRACTOR?
18 MR. HENRY: YES.
19 MR. CALAMARI: OKAY.
20 MR. HENRY: I'LL STIPULATE TO HIS
21 QUALIFICATIONS.
22 MR. CALAMARI: DID YOU GET THAT MR. HENRY
23 STIPULATED TO HIS QUALIFICATIONS?
24 COURT REPORTER: I DID.
25 MR. HENRY: AS A GENERAL CONTRACTOR.

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TRIAL 00013952

Consolidated ROA_0550

1 MR. CALAMARI: I UNDERSTAND.

2 FRANK E. BAIDEN, AFTER HAVING BEEN CALLED TO THE
3 STAND AND DULY SWORN, TESTIFIED AS FOLLOWS:

4 COURT REPORTER: WILL YOU STATE YOUR NAME
5 AND SPELL YOUR LAST?

6 MR. BAIDEN: FRANK E. BAIDEN, B-A-I-D-E-
7 N, III.

8 DIRECT EXAMINATION

9 BY MR. CALAMARI:

10 Q: Mr. Baiden, ---

11 A: Yes, sir.

12 Q: --- you're continuing your testimony. You've
13 already testified before. We've gone through
14 your qualifications, and you are a member of
15 Baiden Construction.

16 A: Yes, sir.

17 Q: Just refresh the Court's memory a little on ---

18 A: Baiden and Associates is a general contractor.
19 We've been around the Beach for about 25 years.
20 I've worked with the company for the entire 25
21 years. My last position was vice-president and
22 now I'm a owner, and I was still currently doing
23 small construction, but not like the high-rises
24 like we were, because the economy slowed down,
25 and that work is just not there right now.

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TRIAL 00013953

Consolidated ROA_0551

1 Q: Okay. And you've had occasion to look at
2 buildings and repair buildings that had water
3 damage?

4 A: Absolutely.

5 Q: Many times?

6 A: Many times.

7 Q: Give us some examples of the way that water gets
8 past the building envelope.

9 A: Well, there's many examples that can happen,
10 improper flashing, improper caulking, improper
11 overhangs, improper roof systems, improper
12 caulking at sidewalks where they join the
13 building at the grade.

14 Q: And at what rates does water getting past the
15 building envelope cause damage?

16 A: Well, it's, it's hard to tell. It's progressive,
17 you know, you could get one area around the
18 window and get water in it and not see it for
19 years or it could show up, you know, three years
20 or seven years.

21 Q: Well, does it depend on the size of the hole?

22 A: Yes, sir.

23 Q: Does it depend on whether there are other parts
24 of the building that could prevent it?

25 A: That's correct.

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TRIAL 00013954

Consolidated ROA_0552

1 Q: Please explain to the Court.

2 A: You could have a pinhole around a window, say,
3 where maybe a man was caulking and he missed a
4 half inch or a quarter inch and water could
5 intrude there on a certain driving rain and you
6 may not see it on the interior of the building
7 for years.

8 Q: What about a caulking failure, how does that
9 work?

10 A: Well, a caulking failure can be from many things,
11 expansion, contraction, installed improperly,
12 installed in the wrong climate, so there's many
13 factors that could affect.

14 Q: So is that something that caulking may not fail
15 for a long time and then fail and result in
16 damage?

17 A: That's correct, and most caulking companies have
18 recommendations to re-inspect their caulking. It
19 depends on the brand. Some say two years, three
20 years, five years.

21 Q: Do you ever see parts of the building that maybe
22 aren't done correctly as the plans would request
23 or require, but for one reason or another there
24 is no damage?

25 A: Uh-huh (affirmative response).

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TRIAL 00013955

Consolidated ROA_0553

1 Q: Give me some examples of those. And when you say
2 uh-huh, that's hard to ---

3 A: I'm sorry, yes. Yes.

4 Q: Give me some examples.

5 A: Well, one example would be if you have a
6 corridor, I would say a six foot overhang over
7 and you've got a entry door and a two by four
8 window beside it and they forgot to put the
9 flashing above that window, it still may be
10 caulked because, you know, for the paint to, to
11 have a surface to meet, but if it called for
12 flashing and without that overhang, you probably
13 won't have any problem there, because rain won't
14 have the chance to get up to that area as easy,
15 as it would if it were exposed on the outside of
16 the building.

17 Q: Explain to the Court the different layers of
18 protection of the building envelope?

19 A: Well, you got the, you've got the felt on the
20 roof, you've got the shingles, you've got, of
21 course, your wood structure, you've got all kind
22 of exterior products, brick, vinyl, wood siding,
23 Dryvit, stucco; of course, you have your windows,
24 flashing, caulking, high grade paints, just a
25 variety of things.

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TRIAL 00013956

1 Q: So in some instances, does it occur where one
2 might not work but the other provides protection?

3 A: Yes, sir.

4 Q: Explain that.

5 A: You could -- well, let me say one might not --
6 one is not there or not put in or -- I'm sorry,
7 rephrase that question.

8 Q: I kind of lost my train of thought here, but is
9 there a situation -- Have you encountered a
10 situation before where maybe one part of the
11 building envelope isn't done perfectly, but the
12 other part of the building envelope provides the
13 protection to prevent the building from becoming
14 damaged?

15 A: Yes.

16 Q: And could you give us an example?

17 A: I'm trying to -- and when you say, "One part,"
18 it's kind of ---

19 Q: I'm talking like if the window wasn't flashed
20 properly and that the building wrap was there and
21 it prevented ---

22 A: Okay. Okay. Yeah. Let's say for instance the
23 building wrap was there and the window was not
24 flashed properly there is a possibility water
25 could get around that flashing in small amounts

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TRIAL 00013957

Consolidated ROA_0555

1 and the vapor barrier would help keep it --
2 protect it from the building.

3 Q: And once you go out to a building and you find
4 damage, water damage in a building, is there any
5 way to tell when that water damage started?

6 A: No, sir.

7 Q: Are there occasions that you've encountered where
8 the building products are exposed to water, rain,
9 during construction?

10 A: Yeah, all the high-rises we built, of course
11 that's concrete, but in framing homes or some
12 banks we framed during the framing process the
13 wood is exposed for however, you know, usually
14 six to 12 weeks or ten weeks before it's ever
15 protected, and naturally it will get rained on.

16 Q: And when you say protected, tell us in a little
17 more detail. You're talking about the building
18 is framed and then there's no roof or nothing
19 over it; is that ---

20 A: That's correct.

21 Q: Explain to the Court, in your words, what that
22 means.

23 A: Well, what that means is you have exposed lumber,
24 typically not treated lumber that's framing the
25 structure and during the course of framing it's

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TRIAL 00013958

Consolidated ROA_0556

1 naturally going to rain, you know, many times,
2 and basically, I've never seen it where it
3 affected the final product in any way, shape or
4 form.

5 Q: Does that cause damage to the building?

6 A: No, sir. Now, eventually it has to be protected.
7 You can't let it sit there for three years, but
8 in the course of ---

9 Q: What is it in the building that causes this water
10 damage? Explain how buildings become water
11 damaged.

12 A: Oh, a variety of ways, improper slope, improper
13 caulking, improper flashing. A lot of times
14 where two dissimilar materials meet like wood
15 siding abuts a window, it can be done
16 incorrectly. Vinyl soffits can be done
17 incorrectly which will allow water intrusion.
18 Roofers sometimes install boots on the roof in a
19 improper fashion that allows water to get in.
20 When you have HVAC units on a roof, the line-sets
21 cannot be installed properly and you get water
22 intrusion there as well.

23 Q: Is it just the first time water comes in that
24 causes the damage or is it something else?

25 A: It's not the first time, no.

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TRIAL 00013959

Consolidated ROA_0557

1 Q: What is it? Explain to the Court what ---
2 A: It's, it's over --, over a period of time.
3 Q: You had an occasion to personally look at
4 information regarding Riverwalk and Magnolia
5 North, correct?
6 A: Yes, sir.
7 Q: What did you look at?
8 A: Exterior siding, windows flashing, walkways,
9 deckways, the things that we could see from the
10 outside. We did no constructive observations on
11 the inside.
12 Q: What about reports, expert reports, did you look
13 at any of those?
14 A: Yeah, in depth. Yes, sir.
15 Q: And what was in the expert reports?
16 A: Just a list of all the damage that, that they
17 saw, that they dated.
18 Q: Were there pictures?
19 A: Yes, sir, moisture readings, pictures.
20 Q: Were you able to tell, can you tell when the
21 damage started at Riverwalk?
22 A: No, sir.
23 Q: Were you able to tell when the damage started at
24 Magnolia North?
25 A: No, sir.

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TRIAL 00013960

1 Q: Were you able to tell when the damage stopped at
2 Magnolia North?

3 A: No, sir.

4 Q: Were you able to tell when the damage stopped at
5 Riverwalk?

6 A: No, sir.

7 Q: Is there any real way, in your opinion, to
8 determine when damage starts or stops in a
9 construction project?

10 A: Actual damage?

11 Q: Yes.

12 A: No. Now, you can see the actual leak and if
13 that's the first time you see it, but I don't
14 think that would cause damage; you just repair
15 it. If it's repaired at that time, typically,
16 you won't have any damage.

17 Q: Do repair costs typically increase or decrease
18 overtime?

19 A: They increase.

20 Q: Do you have any examples? You were telling me
21 about one example personally you experienced.

22 A: Oh, I'm a contractor. I should've known better,
23 but I got a hunting lodge out in Marion County
24 and we got three bedrooms and a little half-bath
25 in the back with all the hardwood floors and --

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TRIAL 00013961

Consolidated ROA_0559

1 but the toilet never worked in that bathroom, so
2 we never used it. I went in there, it was
3 raining one day and I saw a little pin leak
4 coming down by the window and I ignored it, and
5 we didn't go out there but about once every two
6 months and didn't go in that bathroom for
7 probably three years and went in it and that
8 little pin leak was still a little pin leak, but
9 I had to re-change all the hardwood floors in the
10 bathroom because it had been over that period of
11 time, and I could have taken a tube of caulk and
12 bent the flashing down and re-caulked the outside
13 of the window and solved the problem, but I
14 wasn't smart enough to do it or didn't take the
15 time to do it.

16 Q: Did it cost you more because you waited?

17 A: Oh, yes.

18 Q: How much would it have cost initially if you
19 would've fixed it the day you noticed the leak?

20 A: A two dollar bottle of caulk and ten minutes of
21 my time.

22 Q: And how much did it eventually cost you when you
23 ---

24 A: I think we spent about \$300 on the floor. It
25 wasn't a big floor.

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TRIAL 00013962

Consolidated ROA_0560

1 Q: Have you been able to formulate an opinion as to
2 the progress of the damage at Riverwalk and
3 Magnolia North?

4 A: Formulate an opinion of the progress?

5 Q: Yes. Tell us about your opinion.

6 A: I say it's been ongoing.

7 Q: Is that opinion to a reasonable degree of
8 certainty?

9 A: Yes, sir.

10 Q: Thank you. That's all I have.

11 MR. HENRY: YOUR HONOR, MY QUESTIONING
12 WILL BE SUBJECT TO MY OBJECTION REGARDING THE
13 APPLICATION OF TIME ON THE RISK.

14 THE COURT: UH-HUH (AFFIRMATIVE
15 RESPONSE).

16 CROSS EXAMINATION

17 BY MR. HENRY:

18 Q: Mr. Baiden, my understanding is you've never done
19 any destructive testing in Riverwalk or Magnolia;
20 is that correct?

21 A: Not, not extensive. We pulled carpet back and
22 bent some flashing, but we've not gone in and
23 torn out walls and things of that sort.

24 Q: You went on site and tore carpet back?

25 A: Yes, sir.

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TRIAL 00013963

Consolidated ROA_0561

1 Q: Did you see where water had come in?

2 A: Yes, sir.

3 Q: Let me ask you this. Did you do any studies of
4 the complaints by the homeowners as to leaks
5 coming in their units?

6 A: We saw a bunch of ticket reports for maintenance
7 and repair or a few, but did not study any
8 complaints. We, we focused more on the, the, the
9 reports from the experts. That gave us all the
10 knowledge we needed to perform the cost analysis.

11 Q: Well, let me ask you this. We could agree, could
12 we not, that when this flashing was left out
13 around the windows the first rain event, water
14 got in the units; couldn't we agree to that?

15 A: Depending on if it's a driving rain or what type
16 of rain, I mean, I've seen instances where you
17 had a window or a coupla, that's another good
18 example, it doesn't rain for three months and if
19 you get the correct rain, the driving rain and
20 you'll see leaks and scratch your head all the
21 time to figure out what's going on.

22 Q: Did you look at the pictures in the Buric report
23 of Magnolia and Riverwalk?

24 A: Yes, sir.

25 Q: And did you see the substantial rot around the

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TRIAL 00013964

Consolidated ROA_0562

1 windows?

2 A: In some of the photos, yes, I think there was.

3 Q: And do you believe that began -- When do you
4 believe that began?

5 A: There -- there's virtually no way to tell. It
6 depends on the, the type of water intrusion, how
7 much or how little.

8 Q: So if water is intruding behind the cladding, the
9 flashing, the caulking and that sort of thing,
10 and water gets back of the building where it's
11 not supposed to be, ---

12 A: Uh-huh (affirmative response).

13 Q: --- that's a harmful condition to that building;
14 is it not?

15 A: It, it depends on, I mean, it can be, but if it
16 happens one time, no.

17 Q: Well, you're not here to testify that water
18 intrusion at Magnolia just happened one time, are
19 you?

20 A: No, huh-uh (negative response), but in some cases
21 I've seen it happen that way.

22 Q: Water intrusion began when the buildings were
23 built and there was gaps in the flashing,
24 caulking and that sort of thing; was there not?

25 A: Well, there's no way to determine, in my opinion,

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TRIAL 00013965

Consolidated ROA_0563

1 it happened exactly when the buildings were
2 built. I've had experiences on some of our
3 buildings with expansion, contraction, humidity,
4 again, wind-driven rains. There's a lot of
5 elements that, that change things overtime that
6 may affect -- I've had that happen to my personal
7 houses that I've, that I've built, two years
8 didn't have a single problem, and all of a
9 sudden, I've got some -- a problem in the
10 bathroom with some mildew on the wall.

11 Q: But you can't testify as a general contractor
12 when all this flashing and caulking and decks
13 were improperly installed, you can't say that
14 water began to intrude when it rained the first
15 time?

16 A: No, sir.

17 Q: You don't know?

18 A: It depends on -- I said it could be a driven
19 rain, a light rain, it has to be a certain heavy
20 rain.

21 Q: You saw where the windows had been leaking and
22 damaged the sheetrock inside the buildings,
23 didn't you?

24 A: Uh-huh (affirmative response).

25 Q: And you saw where it got on drapes and carpet and

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TRIAL 00013966

Consolidated ROA_0564

1 that sort of thing?
2 A: Yes.
3 Q: But you didn't do any check of the homeowner
4 records to determine when they were out there
5 fixing those deficiencies?
6 A: No, sir.
7 Q: Wouldn't that tell you when the leaks began ---
8 A: No, sir.
9 Q: --- and to damage the ---
10 A: When they're fixing it, that would not tell you
11 when they began.
12 Q: And it wouldn't tell you if there was anything
13 wrong with it?
14 A: No, sir. It would just tell you that it's become
15 obvious enough that it needs to be tended to.
16 MR. HENRY: CAN I HAVE JUST A MINUTE,
17 YOUR HONOR.
18 THE COURT: CERTAINLY.
19 ****OFF THE RECORD****
20 (ON THE RECORD.)
21 MR. HENRY CONTINUES:
22 Q: When flashing is not put in correctly that's a
23 violation of code; is it not?
24 A: Yes, sir.
25 Q: When water penetrates through the cladding,

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TRIAL 00013967

Consolidated ROA_0565

1 that's a violation of code; is it not?
2 A: Well, that's just a damage being occurred. I
3 don't know about ---
4 Q: Damage, water?
5 A: Water going in, I don't, think it's a code issue.
6 The flashing would be.
7 Q: The code requires wood not to have over a certain
8 water content, right?
9 A: That's correct.
10 Q: And you saw the water probes out there that where
11 many parts of the buildings were subject to
12 beyond the code water allowance?
13 A: Yes. They took extensive water probes.
14 Q: I think that's all I have.
15 RE-DIRECT
16 BY MR. CALAMARI:
17 Q: I just have one follow-up question. You also saw
18 in those pictures many instances where the water
19 probe, the moisture probe, found acceptable
20 levels of moisture in the wood?
21 A: Yes, sir.
22 Q: That's all.
23 A: We, we went through all of those, each little
24 line item.
25 MR. CALAMARI: THANK YOU, YOUR HONOR. I

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TRIAL 00013968

Consolidated ROA_0566

1 THINK THAT'S ALL WE HAVE FOR THIS WITNESS.
2 MR. HENRY: YOUR HONOR, AGAIN, I WOULD
3 ASK THAT HIS TESTIMONY BE SUBJECT TO MY
4 OBJECTION AS BEING IRRELEVANT AND THE OTHER
5 GROUNDS THAT I HAVE ALREADY STATED, THAT
6 THERE'S A GENERAL VERDICT AND HIS TESTIMONY AS
7 TO WHEN DAMAGE STARTED; WHEN IT DIDN'T WOULD BE
8 TOTALLY IRRELEVANT.
9 THE COURT: I DON'T THINK HE HAD ANY
10 TESTIMONY AS TO WHEN DAMAGE STARTED.
11 MR. HENRY: WELL, THAT HE DIDN'T --
12 WELL, YOU'RE RIGHT.
13 MR. CALAMARI: IT WAS THE ABSENCE OF
14 TESTIMONY, AND REALLY, JUST BECAUSE OF THE WAY
15 CROSSMAN WAS WRITTEN, YOU KNOW, WITHOUT
16 KNOWING, THIS BEING PROBABLY THE FIRST CASE
17 DISCUSSING THIS, WE FELT THAT CROSSMAN, EVEN
18 THOUGH IT SEEMED TO ME THAT THEY ALMOST TOOK
19 JUDICIAL NOTICE OF THESE ISSUES, THAT THE
20 SUPREME COURT MIGHT WANT TO SEE SOME EVIDENCE
21 ON THIS OR SOME TESTIMONY. THAT'S ALL.
22 THE COURT: THANK YOU. LAURA, DO YOU
23 HAVE ANY QUESTIONS?
24 MS. EVANS: NO QUESTIONS.
25 THE COURT: THANK YOU.

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TRIAL 00013969

1 MR. CALAMARI: YOUR HONOR, AT THIS TIME
2 WE'LL CALL LEE WRIGHT.

3 JAMES LEE WRIGHT, HAVING BEEN CALLED TO THE STAND AND
4 DULY SWORN, TESTIFIED AS FOLLOWS:

5 COURT REPORTER: WOULD YOU STATE YOUR NAME
6 AND SPELL YOUR LAST?

7 MR. WRIGHT: JAMES LEE WRIGHT, W-R-I-G-
8 H-T.

9 DIRECT EXAMINATION

10 BY MR. CALAMARI:

11 Q: Mr. Wright, you're here today testifying on
12 behalf of Harleysville; is that correct?

13 A: Correct.

14 Q: But you no longer work for Harleysville?

15 A: No, I don't.

16 Q: Just give a brief description of why you left
17 them and what you're doing now.

18 A: I left at the beginning of last month. I'm now
19 at Excel America handling homebuilders insurance,
20 but on, on an excess level.

21 Q: And we talked originally, the first time you
22 testified. I want to show you two charts and the
23 information on these charts is already in
24 evidence. The information on these charts is
25 already in evidence, but I broke them down purely

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TRIAL 00013970

Consolidated ROA_0568

1 for the Court, the time on the risk analysis, and
2 the charts I gave you are the policies that were
3 in place.

4 MR. CALAMARI: AND, YOUR HONOR, WHEN WE
5 TALK ABOUT THESE POLICIES WE DON'T WANT TO,
6 JUST LIKE MR. HENRY SAID, WE DON'T WANT TO HAVE
7 ANYBODY CONSTRUE THAT WE BELIEVE ANYTHING IS
8 COVERED UNDER THESE POLICIES. THIS IS ACTUALLY
9 AND IT'S PURELY FOR THE TIME ON THE RISK
10 ANALYSIS, SO.

11 MR. HENRY: AND, YOUR HONOR, I WOULD
12 LIKE MY OBJECTION TO CONTINUE AS TO ANY
13 TESTIMONY INVOLVING TIME ON THE RISK.

14 MR. CALAMARI: AND THIS IS INFORMATION
15 THAT'S ALREADY ---

16 Q: Mr. Wright, can you tell us what's on the policy
17 table from Magnolia North? Please identify the
18 information.

19 A: These are policies issued to Heritage
20 Communities, Build Star and Heritage Magnolia
21 North, covering the period from 4/1/97 through
22 11/30/2000.

23 Q: And what about the one for Riverwalk?

24 A: That would be policies issued -- some of the same
25 policies, policies issued to Heritage Communities

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TRIAL 00013971

Consolidated ROA_0569

1 and Build Star are the same policies, the
2 difference on the Magnolia North sheet being that
3 another Heritage entity, Heritage Magnolia North
4 also had policies issued, which those policies
5 ran from September '98 to November 2000.

6 Q: And the only policy that would be missing on here
7 is the, and it's because I didn't put it on here,
8 would be the National Surety policy, right?

9 A: Right, and that's, that's an umbrella policy over
10 one of the Heritage Community policies.

11 Q: Okay. I'm going to hand you ---

12 THE COURT: ARE THESE TO BE EXHIBITS OR
13 SIMPLY ---

14 MR. CALAMARI: YES. IF YOU DON'T MIND, IF
15 WE COULD MARK THOSE AS EXHIBITS.

16 MS. EVANS: THIS WILL BE 28.

17 MR. CALAMARI: LET'S MARK THE RIVERWALK
18 ONE AS 28, AND MAGNOLIA NORTH AS 29. SO 28 IS
19 THE RIVERWALK LIST OF POLICIES, AND 29 WOULD BE
20 MAGNOLIA NORTH.

21 PLAINTIFF'S EXHIBIT NUMBERS 28
22 MARKED FOR IDENTIFICATION.

23 PLAINTIFF'S EXHIBIT NUMBERS 29
24 MARKED FOR IDENTIFICATION.

25 MR. HENRY: YOUR HONOR, THIS MORNING IS

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TRIAL 00013972

Consolidated ROA_0570

1 THE FIRST TIME I'VE SEEN THESE. I TAKE BOB'S
2 WORD THAT THEY'RE BASICALLY FROM CHARTS THAT
3 ARE ALREADY IN EVIDENCE. WE HAD IN EVIDENCE
4 CHARTS OF ALL THE POLICIES, COPIES OF ALL THE
5 POLICIES, THEIR DATES AND AMOUNTS REMAINING.
6 MR. CALAMARI: AND THIS IS PURELY FOR
7 SIMPLICITY PURPOSES, THIS SECTION OF THE
8 TRANSACTION.
9 MR. HENRY: I UNDERSTAND.
10 MS. EVANS: IF I MIGHT JUST FOR A
11 SECOND, YOUR HONOR, SINCE I WAS CHARGED WITH
12 PULLING TOGETHER THE RECORD FOR YOUR HONOR FOR
13 THE PROPOSED ORDERS, WE NOTICED IN GOING BACK
14 WHEN WE LEFT LAST DECEMBER FROM THIS COURTROOM
15 WE HAD A NOTEBOOK OF HARLEYSVILLE POLICIES
16 WHICH WAS EXHIBIT NUMBER 12.
17 THE COURT: RIGHT.
18 MS. EVANS: AND IN GOING BACK AND
19 COMPARING THAT TO MAKE SURE THAT WE HAD
20 EVERYTHING, NOT ALL OF THE POLICIES LISTED
21 EITHER IN BOB'S TABLES THAT HE'S PUTTING IN
22 NOW, NOR IN WHAT WE, I THINK, CALLED THE
23 EXHAUSTION CHART LAST YEAR, WHICH WAS EXHIBIT
24 NUMBER 17, WERE INCLUDED IN THAT NOTEBOOK. SO
25 AS A MATTER OF HOUSEKEEPING, I TALKED TO BOB

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TRIAL 00013973

Consolidated ROA_0571

1 AND PAT ABOUT POST THIS TESTIMONY DAY, GOING
2 BACK AND MAKING SURE THAT ALL THOSE POLICIES
3 ARE IN THERE, INCLUDING ANY POLICES THAT WERE
4 CANCELLED BECAUSE OF NON-PAYMENT.
5 MR. CALAMARI: YES.
6 MS. EVANS: JUST SO WE'LL HAVE A
7 COMPLETE RECORD OF EVERY SINGLE POLICY.
8 THE COURT: OKAY.
9 MR. CALAMARI: YES, SIR.
10 THE COURT: THANK YOU.
11 MS. EVANS: AND AS A MATTER OF
12 HOUSEKEEPING, I'M GOING TO DO THAT AFTER TODAY,
13 AND I'LL GIVE MY REVISED VERSION BOTH TO BOB
14 AND PAT, SO WE CAN ALL CHECK IT AND BE ON THE
15 SAME PAGE.
16 THE COURT: VERY GOOD.
17 Q: Mr. Wright, I'm going to hand you two other
18 documents, and these are just a table showing --
19 and this is already information that's in
20 evidence in one form or another.
21 MR. CALAMARI: I DON'T REMEMBER IF WE
22 ALREADY HAD A CHART FOR THE COs. I DIDN'T
23 THINK WE DID. I DIDN'T SEE ONE.
24 MR. HENRY: THERE'S ONE IN THE BURIC
25 REPORT.

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TRIAL 00013974

1 MR. CALAMARI: OKAY. WE'RE GOING TO ENTER
2 THESE AS ---

3 Q: Well, tell us what they are.

4 A: These are pages listing building numbers at the,
5 at the different projects and corresponding dates
6 where the Certificate of Occupancy was issued for
7 the building.

8 MR. CALAMARI: SO IF WE COULD OFFER THE
9 RIVERWALK ONE AS EXHIBIT NUMBER 30, AND THEN
10 THE MAGNOLIA NORTH WAS EXHIBIT 31.

11 PLAINTIFF'S EXHIBIT NUMBERS 30

12 MARKED FOR IDENTIFICATION.

13 PLAINTIFF'S EXHIBIT NUMBERS 31

14 MARKED FOR IDENTIFICATION.

15 Q: Mr. Wright, in Exhibit Number 30, the Riverwalk,
16 date of Certificate of Occupancy, what is the
17 first Certificate of Occupancy?

18 A: It looks like these are in numerical order, not
19 necessarily chronological, but it looks like for
20 Riverwalk the first CO date was issue -- or the
21 first CO issued was August or, I'm sorry, October
22 29, 1997.

23 Q: And when is the last CO date?

24 A: For Riverwalk, that would December 30, '99.

25 Q: What about the Magnolia North, when is the first

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TRIAL 00013975

Consolidated ROA_0573

1 CO date for any building in Magnolia North?
2 A: 12/10/98.
3 Q: And when is the last CO date for Magnolia North?
4 A: Actually, I think one of these is an incorrect
5 date. I think 23 was actually later than this.
6 I think that was in November of 2000, and this
7 has May 2000.
8 Q: I have 8/15 of 2000. Is that not what's written
9 on there?
10 A: No, 23 on this sheet says May 31st, 2000, but I
11 think it's later than that.
12 Q: It's 8/15/2000.
13 A: 8/15?
14 Q: So August 15th, 2000.
15 A: August 15, 2000.
16 Q: I apologize for that.
17 THE COURT: ANYBODY DISAGREE?
18 MR. HENRY: I'M SORRY, I DIDN'T ---
19 MR. CALAMARI: THE LAST CO DATES.
20 MR. HENRY: ON WHICH ONE?
21 MR. CALAMARI: IT SHOULD BE 8/15/2000.
22 MS. EVANS: WE'LL ALSO SUBSTITUTE IN A
23 EXHIBIT WITH CORRECTIONS THAT NEEDS TO BE MADE.
24 MR. CALAMARI: OKAY.
25 THE COURT: NOBODY HAS A CERTIFICATE OF

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TRIAL 00013976

1 OCCUPANCY FOR BUILDING 20 ---
2 MR. CALAMARI: I COULDN'T FIND ONE FOR THE
3 ONE THAT'S MISSING ON THERE.
4 MR. HENRY: WE NEVER COULD FIND ONE AT
5 THE TRIAL, YOUR HONOR.
6 MR. CALAMARI: YES, BUILDING 20.
7 MR. HENRY: THAT WAS JUST LEFT OUT.
8 MS. EVANS: YOUR HONOR, THOSE
9 CERTIFICATES OF OCCUPANCY WERE SUMMARIZED IN
10 DREW BROWN'S REPORT, ---
11 MR. HENRY: RIGHT.
12 MS. EVANS: --- WHICH IS PART OF THE
13 UNDERLYING TRIAL TRANSCRIPTS AND THE
14 TRANSCRIPTS, AND HE, TOO, IS MISSING BUILDING
15 NUMBER 20.
16 MR. HENRY: AND THAT'S WHAT I SAID,
17 YOUR HONOR. I ASSUME FROM WHAT BOB SAYS AND
18 CERTAINLY DON'T QUESTION HIS WORD THAT THESE
19 ARE THE SAME DATES, POLICY AMOUNTS AND ALL THAT
20 THEY HAVE PUT INTO EVIDENCE IN THE UNDERLYING
21 CASE AND THAT WE'VE ADMITTED IN THIS CASE.
22 THE COURT: ALL RIGHT.
23 Q: Mr. Wright, do you recall the verdict date in
24 Magnolia North?
25 A: I don't offhand. I think it was ---

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TRIAL 00013977

1 Q: Was it May 20th of 2009?
2 A: Sounds about right.
3 Q: Do you remember the verdict date in Riverwalk?
4 A: That would've been just prior to that.
5 Q: Would it have been around January 15, 2009?
6 A: In, in certainly January ---
7 Q: Around January ---
8 A: Right.
9 Q: --- without spending time -- Okay. And is it
10 Harleysville's position that only the damages
11 occurring within the policy period are covered by
12 the policies, ---
13 A: Yes.
14 Q: --- if they're covered at all?
15 A: If they're covered at all, they have -- damages
16 must occur within the policy effective dates in
17 order to qualify for coverage under the policy.
18 Q: And is Harleysville asking this Court to perform
19 a time on risk analysis?
20 A: Yes.
21 MR. CALAMARI: THAT'S ALL I HAVE FOR THIS
22 WITNESS. YOUR HONOR, I BELIEVE THAT THE TIME
23 ON RISK ANALYSIS IS A LEGAL MATTER THAT LAWYERS
24 SUBMIT, SO I DON'T THINK THE WITNESS IS
25 QUALIFIED. THOSE ARE ALL THE QUESTIONS I HAVE

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TRIAL 00013978

Consolidated ROA_0576

1 FOR MR. WRIGHT.
2 THE COURT: MR. HENRY? AND THE COURT
3 RECOGNIZES THAT ALL YOUR QUESTIONS ARE SUBJECT
4 TO YOUR OBJECTION.
5 MR. HENRY: THANK YOU, YOUR HONOR.
6 CROSS EXAMINATION
7 BY MR. HENRY:
8 Q: You never found the Reservation of Rights letters
9 we talked about before?
10 A: I ---
11 MR. CALAMARI: YOUR HONOR, THIS BEING
12 BEYOND THE PURPOSE OF THIS HEARING, I THINK WE
13 SAID THAT ALL THOSE -- AND THESE ARE QUESTIONS
14 ALREADY ASKED?
15 THE COURT: YES. I THOUGHT WHEN I WAS
16 READING THROUGH IT YESTERDAY AFTERNOON AND THIS
17 MORNING THAT THOSE RESERVATION OF RIGHTS
18 LETTERS WERE NOT FOUND.
19 MR. HENRY: THAT'S ALL I HAVE.
20 MS. EVANS: NO QUESTIONS, YOUR HONOR.
21 THE COURT: THANK YOU.
22 MR. CALAMARI: THANK YOU, MR. WRIGHT.
23 MR. HENRY: SUBJECT TO OUR ONGOING
24 OBJECTIONS, YOUR HONOR, WE WOULD CALL DREW
25 BROWN.

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TRIAL 00013979

Consolidated ROA_0577

1 FRANKLIN DREW BROWN, AFTER HAVING BEEN CALLED TO THE
2 STAND AND DULY SWORN, TESTIFIED AS FOLLOWS:

3 COURT REPORTER: WILL YOU STATE YOUR NAME
4 AND SPELL YOUR LAST?

5 MR. BROWN: FRANKLIN DREW BROWN, B-R-O-
6 W-N.

7 MR. HENRY: YOUR HONOR, MR. BROWN
8 TESTIFIED AS AN EXPERT, WAS QUALIFIED AS AN
9 EXPERT IN BUILDING DIAGNOSTICS AND AS A GENERAL
10 CONTRACTOR IN THE UNDERLYING CASE AND WE WOULD
11 MOVE TO ADMIT HIM AS AN EXPERT IN THOSE AREAS.

12 MR. CALAMARI: YOUR HONOR, I AGREE. I
13 JUST RAISE THE OBJECTION THAT ANY TESTIMONY HE
14 GIVES INCONSISTENT WITH WHAT HE'S ALREADY DONE
15 IN THE UNDERLYING TRIAL AND THAT BE EXCLUDED.

16 MR. HENRY: YOUR HONOR, THESE QUESTIONS
17 WILL BE IN REFERENCE TO THE TIME ON THE RISK,
18 WHICH AGAIN, WE WOULD LIKE THE TESTIMONY TO BE
19 SUBJECT TO OUR ONGOING OBJECTION.

20 THE COURT: OKAY. ALL RIGHT, SIR.

21 DIRECT EXAMINATION

22 BY MR. HENRY:

23 Q: Mr. Brown, there are two extensive Buric reports
24 in the record and the underlying cases. What
25 role did you have in preparing those reports?

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TRIAL 00013980

Consolidated ROA_0578

1 A: I was a director of Building Diagnostics at Buric
2 and I directed the investigator in their effort,
3 performed investigations at the projects and
4 oversaw the development and issuance of those
5 reports.

6 Q: Okay. And did you also prepare a scope of repair
7 for those buildings in both Riverwalk and
8 Magnolia?

9 A: Yes.

10 Q: And were you present and did you do the
11 investigative reports where you opened up many
12 areas of the buildings to determine rot ---

13 A: Yes.

14 Q: --- or deficiencies?

15 A: Yes.

16 Q: What were some of the deficiencies in the
17 buildings that allow for water intrusion?

18 A: Improper application of claddings, including the
19 building components with the cladding, such as
20 sealant joints, improper flashing and application
21 of what we refer to as a secondary membrane,
22 improper installation of trim materials, and
23 water intrusion that occurred behind those.

24 Q: How many of these kinds of investigations have
25 you done in the past?

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1 A: I mean, several hundred.

2 Q: Right. And are you still doing that?

3 A: Yes. At Buric, it was a, it was a -- it consumed
4 a 100 percent of my time for seven years. In my
5 present capacity it's a -- it's something that we
6 do as a, as a service in our present company as
7 well.

8 Q: And have you investigated in your career
9 buildings that were basically new?

10 A: Yes.

11 Q: And new buildings that had the kind of
12 deficiencies that you found at Riverwalk and
13 Magnolia?

14 A: Yes.

15 Q: And in investigating these new buildings, what
16 did you find as far as when damage occurs?

17 A: Well, when there's building defects such as the
18 building defects that we found at Riverwalk and
19 Magnolia, when those defects are part of the, are
20 part of the product that's put into service, the
21 damage begins to occur at the, at the time of the
22 first weather event, because the, the improper
23 construction is in place at that time.

24 Q: And you've got the information in the Buric
25 report about the COs; is that correct?

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1 A: That's correct.

2 Q: And have you formed an opinion to a reasonable
3 degree of certainty as to whether or not damage
4 -- Well, let me show you this Riverwalk and
5 Magnolia CO dates.

6 THE COURT: YOU'RE REFERRING TO
7 PLAINTIFF'S 30 AND 31?

8 MR. HENRY: YES, YOUR HONOR, 30 AND 31.

9 Q: What is the CO date as to Riverwalk?

10 A: The earliest CO date on Building 1 10/29/97.

11 Q: Do you have an opinion to a reasonable degree of
12 certainty when damage began on that building?

13 A: Yes.

14 Q: And what is your opinion?

15 A: It would've, it would've occurred at, at or
16 approximately near that time. There was ---

17 Q: The CO date?

18 A: That's correct. There was a weather event,
19 whenever the first weather event occurred, before
20 or shortly thereafter when that CO date was
21 issued.

22 Q: And how about, do you have an opinion to a
23 reasonable degree of certainty as to when damage
24 began in Magnolia North?

25 A: Yes.

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1 Q: And what is that opinion?

2 A: Well, it would be the same as Riverwalk. It
3 would be, it would be when the buildings were put
4 in service, and that should be at or near the CO
5 dates when the first weather even occurred.

6 Q: Let me ask you this. If water gets behind the
7 cladding and let's suppose it rots ten percent of
8 a four by eight piece of sheathing and two years
9 later 15 percent of it has rotted, does it make
10 any difference as far as the cost of replacement?

11 A: With regard to the sheathing, no. The sheathing
12 is a structural panel member that has to resist
13 the wind loads and transfer the wind loads from
14 the, from the structure to the foundation and the
15 code addresses that the sheathing has to be put
16 in and nailed in a certain pattern to do that
17 loading, and it's not possible to come in and
18 replace a very small portion of sheathing or a --
19 if you're doing that, you're replacing enough to
20 make sure that that sheathing does carry the
21 structural integrity. So if there'd been some
22 progression on the end of that sheet it'll, it'll
23 still be the same cost.

24 Q: And would that be true for framing members?

25 A: Yeah. Once the, once the framing member is water

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1 damaged and can't, and can't hold, hold its
2 structural capacity, exceeds the 19 percent
3 moisture content allowed by code, it has to be
4 replaced, and, and whether -- for instance, a
5 stud, whether it was six inches up the bottom of
6 the stud or eight inches, would be virtually the
7 same, it'd be the same cost.

8 Q: Now, I think your reports are dated in 2003; is
9 that correct?

10 A: I believe so. It's been, it's been a while, yes,
11 sir.

12 Q: When you went out to do your destructive
13 investigation sometime in 2003, what was your
14 sense or what was your view of the extent of the
15 damage at that time with the newness of these
16 buildings or the dates of these buildings?

17 A: And, and you're speaking of once we had
18 completed, completed our investigations, not, not
19 our initial investigation?

20 Q: No. Well, in your initial or your full
21 investigation, what was your sense of the degree
22 of damage in 2003?

23 A: Well, the -- in 2003, when, when the, when the
24 report, when the full report was issued, I mean,
25 my sense would be that for buildings of this very

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1 young age that the damages were severe.
2 Q: Okay. Is there any way to know what damages
3 happened in what year?
4 A: Not in my opinion, no.
5 Q: But there's no question in your mind that damages
6 began sometime in 1997 when the COs were issued
7 in these buildings and continued thereafter?
8 A: Well, the COs were, were varied, I mean, the, the
9 building was a, was a phase construction project,
10 so some COs were in '97, some were in '99, but
11 per building it's my opinion that, that would be
12 correct, per -- as if we talked about each
13 building.
14 Q: The damage began around the time of the CO?
15 A: That's correct.
16 Q: That's all I have.
17 MR. CALAMARI: AND THESE ARE IN HIS REPORT
18 AND I JUST PULLED THEM OUT. I DON'T EVEN KNOW
19 WHAT PAGES THEY ARE, BUT THEY'RE ALL PICTURES
20 IN HIS REPORT, AND I ONLY HAVE THIS ONE COPY.
21 CROSS EXAMINATION
22 BY MR. CALAMARI:
23 Q: Mr. Buric (Brown), I'm going to show you a
24 picture that we're going to mark as Exhibit
25 Number 32, and please tell the Court what that

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TRIAL 00013986

Consolidated ROA_0584

1 is.

2 PLAINTIFF'S EXHIBIT NUMBER 32 through 34
3 MARKED FOR IDENTIFICATION.

4 A: This is a picture of a column at grade, the trim
5 around a column that was Unit Number 104 near the
6 entry of Building 4811.

7 Q: And what was the date of that picture?

8 A: The date of the picture was 4/29/04.

9 Q: Tell the Court the exact date when that damage
10 occurred.

11 A: That damage began to occur at the time of
12 installation.

13 Q: The exact date, that damage occurred?

14 A: The, the first weather event occurred that
15 allowed water to be on the ground near that, near
16 that piece of construction.

17 Q: And you know that for certain?

18 A: Yes.

19 Q: How do you know that for certain?

20 A: Because the, the trim product is contact with the
21 grade and the trim product would've began to pick
22 up the water, moisture, from the grade. It's an
23 improper installation.

24 Q: I'm going to show you another picture. We'll
25 mark this as Exhibit Number 33.

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TRIAL 00013987

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PLAINTIFF'S EXHIBIT NUMBER 33
MARKED FOR IDENTIFICATION.

Q: Tell me what that picture is.

A: This is a picture of the attached garages at Magnolia that are, that are very nearly adjacent to the building and the -- it depicts the area that's between the brick veneer foundations and the sidewalks, the balcony entrance, I mean, below the balcony entrances.

Q: I believe on this there's a note, "Grade traps water?"

A: That's correct.

Q: And what's the date of that picture?

A: 4/29/04.

Q: And damage in that picture?

A: No, no damage is depicted in this picture.

Q: Are there columns in that picture?

A: Yes.

Q: Do those columns have the same type of condition as in Exhibit Number 33?

A: Many of them did. This was not meant to be a close-up of those columns. This was meant to depict the issue that the -- of the -- that the grade has been improperly set up here and it's trapping water, and as it traps water, that can

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TRIAL 00013988

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1 lead to more water being put on that condition we
2 just talked about where the columns actually come
3 into contact with that water.

4 Q: Identical condition, but no damage?

5 A: I didn't say no damage. I said that's not that
6 picture is meant to depict. There very well
7 could've been damage to those columns, and I
8 recall that the vast majority of the columns at,
9 at both Riverwalk and at Magnolia were damaged or
10 had been damaged and have been replaced.

11 Q: But you don't know if there's damage in that
12 pictures, you can't see any?

13 A: Not from that picture, no.

14 Q: So as far as your testimony is, your opinion,
15 there's no damage that you can see in that
16 picture?

17 A: That's not my, my, my -- that's not -- my opinion
18 is not that there's no damage. My picture -- my
19 opinion is that picture is not meant to depict
20 damage. If there was damage, it would've been
21 depicted in other photographs and other moisture
22 readings.

23 Q: And you say it happened at the same rain event or
24 the initial rain event?

25 A: That's correct.

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TRIAL 00013989

Consolidated ROA_0587

1 Q: But you never went to the site until 2003?

2 A: That's correct.

3 Q: You didn't even know about Magnolia North or
4 Riverwalk until you went out there in 2003?

5 A: Well, I think we did preliminary reports in a
6 year prior to 2003, but I did not ---

7 Q: 2003?

8 A: I'll just make it simple. I did not know about
9 Riverwalk or Magnolia until I went to the site.

10 Q: And for the record, I think those preliminary
11 reports were in 2003. I think your report is in
12 2004 or 2005, but I think they're in 2003, but
13 that's all subject to what we're seeing. What
14 about this picture? We'll mark this as Exhibit
15 Number 34.

16 **PLAINTIFF'S EXHIBIT NUMBER 34**

17 **MARKED FOR IDENTIFICATION.**

18 A: The ceiling drywall is cracked. This is a
19 picture that depicts a ceiling area at the
20 porches that are -- This is actually at a, at a,
21 at a, at a entrance balcony ceiling that where
22 the ceilings are drywall and the drywall is
23 cracked.

24 Q: And I know you're not going to tell me you know
25 exactly when that drywall started to crack?

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Consolidated ROA_0588

1 A: The -- I, I do not know when it exactly started
2 to crack, but it would've been -- and, and not
3 exactly, but it would've been in proximity to
4 the, to the CO dates, because those improper
5 construction joints put into the drywall, the
6 stresses that created that crack were present
7 from the very beginning, and stresses accumulate
8 and cause cracks. It's just like if you get a
9 flat tire, if you get a nail on my site in your
10 tire, your tire is damaged, I know it happened on
11 my site. Now when it'll go flat, I can't tell
12 you. That's -- there's a lot of variables in
13 that.

14 Q: So you never went out to the project until 2003,
15 you never visited the site during any of the
16 policy periods; is that correct?

17 A: I'm not, I've not done a correlation to my visits
18 and the policy dates.

19 Q: You don't have any specific personal knowledge of
20 any damage occurring until you were out there on
21 site, correct?

22 A: Have any personal knowledge?

23 Q: Personal specific as in you saw it occurring
24 prior to the time you were out there?

25 A: I could not see anything until I was on site.

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TRIAL 00013991

Consolidated ROA_0589

1 Q: So everything else is a guess?
2 A: It's not a guess. It's, it's based upon
3 experience and, and the ---
4 Q: Your expert opinion?
5 A: That's correct.
6 Q: In Riverwalk, I went back and read your testimony
7 and it seemed to me that a lot of your testimony
8 was, "We see conditions, but we didn't run down
9 the extent of the damage;" does that sound
10 correct?
11 A: No.
12 Q: No? The record speaks for itself. In Riverwalk,
13 do you recall testifying you found no structural
14 damage during your site visits on the balconies
15 and walkways?
16 A: No.
17 Q: Do you recall that you testified that just prior
18 to the trial in 2009 that you then, again,
19 visited the site and you said that now you found
20 some spongy areas on the walkway that were not
21 there when you were out on the site in 2004?
22 A: I don't recall that.
23 Q: But if it's in the record, the record speaks for
24 itself, correct?
25 A: That's correct.

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TRIAL 00013992

1 Q: Are the damages progressive overtime based on
2 these conditions?
3 A: Yes.
4 Q: Do you recall during the trial telling the jury
5 that areas appeared when you looked at them as if
6 they were starting to begin damage or could begin
7 damage, becoming damaged shortly thereafter?
8 A: No.
9 Q: But if it's in the record, it's in the record?
10 A: Yeah, but make sure that we're, we're not -- that
11 damage and decay are two different things.
12 Damage begins with the water entering the
13 sensitive, the moisture sensitive building
14 products, and that's the standard of the code.
15 The code indicates that we must protect these
16 building components from damage, from water
17 intrusion, which then will -- that water
18 intrusion begins, the wood products begin to
19 uptake that water, that damage cycle has begun.
20 Eventually, decay will begin, which is a
21 microbial process that will, will actually begin
22 to destroy the ability of the wood to carry any
23 load, and eventually that decay will come --
24 become so bad that the wood will no longer pick
25 up moisture, it'll actually kind of suspend this

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TRIAL 00013993

Consolidated ROA_0591

1 picking up of moisture. So it's a -- as we just
2 said, it's a, it's a, it's a timeline event.

3 Q: I recall you testifying something to that effect.
4 So you're saying that until the wood is decayed
5 or it begins the decay process, it can be dried
6 out and used?

7 A: No.

8 Q: Do building products get wet or do they come in
9 contact with the elements during construction?

10 A: They do.

11 Q: Are they necessarily damaged at that point?

12 A: Not, not until -- not as they -- not if they can
13 be dried out and before the cells and the glues
14 break down, but Mr. Baiden's testimony, he's been
15 luckier than I have. The majority of wood frame
16 products that I've built, we've had to, before
17 construction even could continue, replace floor
18 sheathing sometimes wall sheathing, because
19 they've uptaken too much moisture, the glues have
20 broke down and they've done what called buckling.
21 If we happen to hit the construction period
22 during an extremely rainy season when you can't
23 -- as he described, before you can get the
24 building dried in. So damages can occur even
25 during the time construction that require placing

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TRIAL 00013994

Consolidated ROA_0592

1 the products.

2 Q: So you testified to Mr. Henry's questions damages
3 occurred on the first rain event after the CO.

4 How do you know they didn't occur before the CO?

5 A: That's what I say. I said that's why I did not
6 say exact on the CO date? If the buildings were
7 put -- if for instance the buildings were
8 completed and the buildings set there and was
9 complete and the, the defects that we found were
10 in place at that time and there were rain events
11 before the CO, then the rain events before the CO
12 would've, would've begun damage but -- and the
13 industry standard is that the time of the, of the
14 completion of a building, typically, there's a
15 inspection process called out and the CO is
16 issued right as the building is being put into
17 service.

18 Q: But just as you testified in these cases, a lot
19 of times you can look at a building from the
20 exterior, let's say an inspection, and not know
21 there's damage or any problem with the building,
22 and obviously these buildings passed inspection,
23 and then you went out and found a bunch of
24 problems.

25 A: I would agree with everything you said.

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TRIAL 00013995

Consolidated ROA_0593

1 Q: So they don't necessarily even need to be
2 completed under your opinion when the damage
3 might begin?

4 A: They, they -- when the defects such as we saw
5 with sheathing, for instance as an example,
6 sheathing and lack of flashing, that lack of
7 flashing began to allow the water intrusion in at
8 the time that the building was put in service, at
9 or near it, and the first rain event.

10 Q: What about discoloration? Discoloration is not
11 necessarily damage, is it?

12 A: Discoloration of what?

13 Q: From a building product that changes color
14 because of the weather?

15 A: It would depend on which building product you're
16 speaking of.

17 Q: It depends on a lot of factors, right?

18 A: That's correct.

19 Q: Are all the entries of water intrusion on
20 Magnolia North and Riverwalk sizable enough to
21 immediately cause damage?

22 A: All the entries of water intrusion at Riverwalk
23 and Magnolia are of the nature that when, when
24 the rain event occurs and water enters the system
25 damage begins.

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TRIAL 00013996

Consolidated ROA_0594

1 Q: But a lot of them are just, as in the pictures
2 that we showed to the Court, if the columns are
3 set on the grade and there's pooling water, in
4 those pictures you weren't able to identify any
5 damage, so some of them might not be damaged
6 right away?

7 A: I, I -- we keep referring to those photographs
8 and, and I've not testified that there's no
9 damage on those photographs. Those, those, those
10 trim products in that condition were subject to
11 damage at the very beginning. Now, if it -- as
12 we just testified about the other -- as you just
13 rightly said, it's not always visible to the
14 naked eye. That uptake of water and that's water
15 -- it happens on a cellular level as that wood
16 begins to build up that moisture content, it may
17 look fine to the eye, to the naked eye, but that,
18 that product will come to be damaged.

19 Q: What about caulking? When caulking is put up if
20 it's put in too thick and it later cracks, does
21 that crack occur on the day of the CO?

22 A: No.

23 Q: It occurs sometime down the road; is that
24 correct?

25 A: It can, yes.

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TRIAL 00013997

Consolidated ROA_0595

1 Q: And there were pictures and things that you
2 testified to during trial about sealant failures.

3 A: Yes.

4 Q: And you don't have any idea when those occurred?

5 A: No.

6 Q: So there are at least the sealant failures in
7 this case, you have no idea if they occurred
8 2003, 2001, '99, '97, 2004, even when you came to
9 trial, they could've happened afterwards?

10 A: As far as the actual failure that, that, that,
11 that caused the sealant to fail enough to allow
12 water through, I don't, but the failure, the
13 damage to the sealant joint due to improper
14 construction would've, once again, begun at the
15 time of this installation, because it is the
16 stresses that build up in the sealant joints
17 because of the improper configuration that
18 creates that, and those stresses are there on day
19 one.

20 Q: I'm talking about the damages that result from
21 the sealant cracking that may be pulling away and
22 now creating havoc, you don't know when those
23 occurred?

24 A: The damages that -- they occur at the time of the
25 installation of the sealant if it's improperly

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TRIAL 00013998

Consolidated ROA_0596

1 installed. The stresses are there and it begins
2 to damage the sealant.

3 Q: Did you tell the jury, "Only give us the cost of
4 what you believe it would be to repair this
5 building on the day of CO?"

6 A: No.

7 Q: How much did you ask the jury for to repair, the
8 entire time of the damage or just the damage that
9 occurred at CO?

10 MR. HENRY: YOUR HONOR, HE DIDN'T ASK
11 THE JURY FOR ANYTHING. HE DIDN'T EVEN TESTIFY
12 AS TO THE AMOUNT IT WOULD TAKE TO REPAIR THE
13 BUILDING.

14 MR. CALAMARI: WELL, THE TRANSCRIPT SPEAKS
15 FOR ITSELF AND HE PUT OUT THE SCOPE AND HE MADE
16 MANY REFERENCES TO, "THIS WAS AN ONGOING
17 CONDITION AND IT'S CONTINUING TO BE BAD AND WE
18 GOT TO GET THE MONEY WE NEED TO FIX THIS
19 SCOPE." IT WAS THE DAY OF THE TRIAL. THEY
20 ASKED FOR THE MONEY TO FIX THE SCOPE ON THE DAY
21 OF THE TRIAL, NOT ON THE DATE OF THE CO. ON
22 THE DATE OF THE CO, THE REPAIR COST WOULD'VE
23 BEEN MINIMAL.

24 MR. HENRY: YOUR HONOR, I'LL STIPULATE
25 THAT WE DIDN'T ASK THE JURY TO AWARD US DAMAGES

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TRIAL 00013999

Consolidated ROA_0597

1 THAT OCCURRED ON A PARTICULAR DATE OF A CO.
2 THE COURT: FOR SOME REASON YOU FELT
3 THAT THEY HAD INCREASED PAST THAT POINT?
4 MR. HENRY: I WOULD THINK SO.
5 A: Could you repeat the question.
6 MR. CALAMARI: CAN I HAVE JUST A SECOND?
7 THAT'S ALL I HAVE, YOUR HONOR. THANK YOU.
8 MS. EVANS: I HAVE NO QUESTIONS, YOUR
9 HONOR.
10 THE COURT: MR. HENRY, HAVE YOU GOT
11 ANYTHING ELSE? I MAY HAVE A QUESTION. LET ME
12 LOOK. THIS IS A QUESTION FOR THE LAWYERS? IS
13 THERE ANY TESTIMONY IN THE RECORD AS TO AT WHAT
14 POINT -- I KNOW THESE WERE ONGOING DAMAGES, BUT
15 IT SOUNDS LIKE THERE HAS BEEN SOME TESTIMONY AT
16 THE FIRST TRIAL, OF COURSE, I HAVEN'T READ THE
17 TRANSCRIPTS FROM THE FIRST TRIAL, BUT ACCORDING
18 TO MR. BROWN'S TESTIMONY TODAY, I AM UNDER THE
19 IMPRESSION THAT THERE MAY HAVE BEEN SOME
20 TESTIMONY AT THE TRIAL OF THE CASE THAT AT SOME
21 POINT IN TIME THE DAMAGES HAD REACHED A POINT
22 WHERE THEY NEEDED TO BE REPLACED. IT DIDN'T
23 MATTER WHETHER YOU REPLACED THEM IN 2003 OR YOU
24 REPLACED THEM IN 2009 OR WHETHER YOU REPLACED
25 THEM IN 2000. AT SOME POINT THE DAMAGES HAD

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TRIAL 00014000

Consolidated ROA_0598

1 REACHED THE POINT OR THE DAMAGE TO THE PRODUCT
2 HAD REACHED THE POINT WHERE THE COST OF
3 REPLACING IT DIDN'T INCREASE AFTER THAT POINT,
4 SO THAT IT WAS BAD ENOUGH IN 2000 THAT IT
5 NEEDED REPLACING OR IT WAS BAD ENOUGH IN 2003
6 IT NEEDED REPLACING OR IT WAS BAD ENOUGH IN
7 2006 AND IT NEEDED REPLACING, SO THAT THE ONLY
8 VARIABLE MAY HAVE BEEN THE ACTUAL -- IT COST
9 TWO DOLLARS A UNIT TO DO SOMETHING IN 2000,
10 \$2.25 TO DO IT IN 2003 OR \$2.50 TO DO IT IN
11 2006. WAS THERE EVER ANY TESTIMONY ABOUT AT
12 WHAT POINT IN TIME THE DAMAGES TO THE
13 UNDERLYING PRODUCT HAD REACHED THAT IT NEEDED
14 TO BE REPLACED?

15 MR. HENRY: YOUR HONOR, I THINK THAT
16 THERE WAS TESTIMONY THAT A NUMBER OF THE
17 BUILDING COMPONENTS IN 2003, AND THERE'S
18 NOTHING IN THE RECORD ABOUT ANYTHING AFTER
19 2003, TO MY KNOWLEDGE, BUT THERE'S CERTAINLY

20 ---

21 THE COURT: WHAT WAS YOUR TRIAL DATE?

22 MR. CALAMARI: IT WAS JANUARY AND MAY OF
23 2009 WHEN THE TRIAL TAKES PLACE.

24 MR. HENRY: YES, JANUARY AND MAY.

25 MR. CALAMARI: THESE REPORTS WERE 2004.

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TRIAL 00014001

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1 THE COURT: THE TESTIMONY IS DAMAGES
2 WERE FOR 2003?
3 MR. HENRY: THAT'S CORRECT, YOUR HONOR.
4 MR. CALAMARI: SEE, WE TAKE A LOT OF ISSUE
5 WITH THAT, BECAUSE OF THE WAY THESE CASE ARE
6 TRIED, AND WE'RE GOING TO PUT TOGETHER A CHART
7 OF TESTIMONY FOR YOU TAKING PORTIONS OF THE
8 UNDERLYING TRANSCRIPTS TO ILLUSTRATE OUR POINT,
9 AND THE ONE THAT I HIGHLIGHT THE BEST IS MR.
10 BROWN SAID THAT DURING HIS VISITS OUT THERE, HE
11 SAID THAT WATER WAS GETTING INTO THE BALCONIES
12 AND WALKWAYS, AND HE SAID AT THE TIME HE WENT
13 OUT THERE, THERE HAD NOT YET BEEN ANY
14 STRUCTURAL DAMAGE, BUT RIGHT BEFORE THE TRIAL,
15 HE TOLD THE JURY, HE SAID, "I WENT OUT RIGHT
16 BEFORE THE TRIAL AND I FOUND SPONGY AREAS AND
17 THEREFORE NOW THERE'S STRUCTURAL DAMAGE." JUST
18 LIKE WITH THE COLUMNS AND OTHER THINGS, THEY'LL
19 SAY, "WELL, THERE'S WATER GETTING IN, IT'S
20 HITTING THOSE, AND YOU MIGHT NOT SEE DAMAGE."
21 THERE'S A LOT OF TESTIMONY OF, "THIS LOOKS LIKE
22 IT'S STARTING TO DAMAGE." WELL, IF IT'S
23 STARTING TO DAMAGE IN 2004, THEN HE'S TELLING
24 THE JURY OR IMPLYING TO THEM THAT THE DAMAGE AT
25 THE TIME OF TRIAL IS MUCH WORSE, AND THERE WAS

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TRIAL 00014002

1 A LOT OF TESTIMONY OF HIDDEN DAMAGE. I THINK
2 MR. HENRY USED THE WORD, "TIP OF THE ICEBERG,
3 WE'VE OPENED UP SECTIONS, BUT WE DON'T KNOW HOW
4 FAR THE DAMAGE EXTENDED." IT WAS KIND OF THE
5 UNKNOWN LEFT TO THE JURY TO DECIDE, "HOW MUCH
6 IS THE DAMAGE TODAY?"

7 MR. HENRY: YOUR HONOR, THAT'S ---

8 MR. CALAMARI: THAT'S WHY WE LOOK AT THAT
9 PARTICULAR ---

10 MR. HENRY: THAT IS TOTALLY -- MR.
11 CALAMARI, FIRST OF ALL, WASN'T AT THE TRIAL.

12 MR. CALAMARI: I WAS.

13 MR. HENRY: WELL, YOU KNOW, YOU WERE.
14 I FORGOT ABOUT THAT.

15 MR. CALAMARI: HE TOLD ME THAT IF I SAT IN
16 THERE DURING THE JURY SELECTION HE WAS GOING TO
17 TELL THEM WHO I WAS AND WHERE I WAS FROM.

18 MR. HENRY: YOUR HONOR, CAN I CLEAR
19 THIS UP WITH MR. BROWN? I HAVE A FEW MORE
20 QUESTIONS.

21 THE COURT: THAT'S FINE.

22 MR. CALAMARI: AND I OBJECT TO ANY
23 TESTIMONY THAT'S INCONSISTENT WITH HIS
24 TESTIMONY UNDERLYING TRANSCRIPT, BECAUSE IT IS
25 VERY CLEAR IN THE RECORD.

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TRIAL 00014003

Consolidated ROA_0601

1 MR. HENRY: IT WON'T BE INCONSISTENT, I
2 CAN ASSURE YOU OF THAT.

3 RE-DIRECT

4 BY MR. HENRY:

5 Q: Mr. Brown, you did a report in 2003; correct?

6 A: That's correct.

7 Q: And you did a scope of work based on that 2003
8 report; is that correct?

9 A: That's correct.

10 Q: And Al Best was our cost estimator; correct?

11 A: That's correct.

12 Q: And he did a cost analysis on what the condition
13 of those builders were in 2003, correct, ---

14 A: That's correct.

15 Q: --- when you did your report?

16 A: That's correct.

17 Q: There's nothing in the record of presenting to
18 the jury anything, any damages, after 2003;
19 correct?

20 A: Not that I recall, no, sir.

21 Q: All right. Now, one other question. When you
22 went out there in 2003, had the homeowners done a
23 lot of repairs?

24 A: Yes, and particularly to the decks, both on
25 Riverwalk and Magnolia. There had been sections

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TRIAL 00014004

Consolidated ROA_0602

1 of the, of the carpet pulled back and plywood
2 replacements done around the columns.
3 Q: Do you recall Jennifer Harmon testifying that the
4 homeowners spent \$120,000 on the decks out there?
5 A: I don't recall that particular testimony, but I
6 know there'd been extensive work on, on the decks
7 prior to our investigation and even during our
8 investigation, because they were, they were to
9 the point that they were dangerous, that somebody
10 could step through and break an ankle.
11 Q: And in addition to the decks, they had done work
12 on the windows to try to keep them from leaking
13 and that sort of thing; do you recall that?
14 A: Yes.
15 MR. CALAMARI: YOUR HONOR, DO YOU MIND IF
16 I ASK SOMETHING?
17 THE COURT: SURE.
18 MR. HENRY: I'M NOT THROUGH.
19 MR. CALAMARI: I THOUGHT YOU WERE, I'M
20 SORRY. YOU WERE WALKING BACK.
21 Q: Did you see Exhibit 11 in the Riverwalk case
22 detailing the amount of water damage repairs that
23 the homeowners had done; do you recall that?
24 A: I do not recall.
25 Q: And then Exhibit 30 in the Magnolia North case

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TRIAL 00014005

1 detailing substantial deficiencies ---

2 A: I do not recall the ---

3 Q: --- and repairs to those deficiencies?

4 A: I don't recall the particular exhibit, but I do
5 recall that we, we reviewed the homeowners'
6 repair records and, and that those were -- that
7 both projects were, were extensive repair along
8 the line of decks, windows and, and, and
9 ceilings. The, the cracking of gypsum ceilings
10 was an ongoing repair item that we, that me and
11 Mr. Calamari just discussed. It was ongoing
12 prior to our -- and painting those, repairing
13 them and painting, that was ongoing throughout
14 before our investigation, and even during our
15 investigation they were making those efforts.

16 Q: That's all I have.

17 RE-CROSS

18 BY MR. CALAMARI:

19 Q: Mr. Brown, I have a few questions for you. I
20 have your report as May 28th, 2004 in the
21 Magnolia North case. Is there any reason to
22 doubt that?

23 A: The reports, I don't have, I don't have a
24 photographic memory of the report dates. It's
25 been some seven years ago. The dates on the

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TRIAL 00014006

Consolidated ROA_0604

1 cover pages are the dates of the reports.
2 Q: And Mr. Best, I don't believe, gave his first
3 estimate until 2006; does that sound right?
4 A: I, I don't -- I do not know.
5 Q: And he visited -- You worked with Mr. Best on
6 this project; is that correct?
7 A: Mr. Best was the cost expert. Yes.
8 Q: And he gave huge allowances for unknowns that
9 might be out there based on information that was
10 in your report; is that correct?
11 A: There, there was allowances -- there was, there,
12 there -- in any case that you're estimating, in
13 any case that you're estimating a repair and, and
14 hidden damage situation, you're, you're, you're
15 basing that upon -- you've got, you've got monies
16 in there for stuff that's hidden behind the
17 primary cladding.
18 Q: You're a general contractor?
19 A: Yes.
20 Q: Would it be prudent for a general contractor to
21 say, "Okay, in 2003, there's this scope of repair
22 and I'm going to agree to fix everything under
23 the sun at this building in 2009 for the same
24 price I would've done it in 2003?"
25 A: Well, it would depend on the circumstances. We

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TRIAL 00014007

1 actually prepared the scope of work for Mr. Best.
2 Mr. Best didn't make the determination on what to
3 fix. He was given a scope of work that was based
4 upon our 2003 report and the work that we had
5 done in 2003, and then he prepared an estimate
6 based upon that scope.

7 Q: And it included enormous allowances, it would
8 have to?

9 A: It included our calculations of what the damages
10 would've been based upon our moisture readings
11 and the evidence that we had gained during our
12 site investigation.

13 Q: And at the time of his repair? The allowances
14 were based on what it would be at the time of his
15 repair?

16 A: They were ---

17 Q: You didn't want him to lose money, didn't you?

18 A: They, they were based upon the, upon the scope
19 that we prepared based upon our 2003 report.

20 Q: Which we now know is the 2004 report.

21 A: Whichever -- whenever we issued the final report,
22 yes.

23 Q: Do you recall testimony, Riverwalk in 2008, where
24 the stairs actually fell away from the building
25 and detached?

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TRIAL 00014008

Consolidated ROA_0606

1 A: That the stairs fell away in 2008?
2 Q: That they broke and pulled away from the building
3 in one section?
4 A: I don't recall testimony, but I do recall at
5 Riverwalk having knowledge that at sometime
6 subsequent to our investigation that there was a
7 stair collapse.
8 Q: So that happened after you went out and looked at
9 the project?
10 A: That's correct.
11 Q: So damages got worse after you left?
12 A: The structure failure actually occurred, the
13 stresses, and, and, and one of the points that we
14 made in our report, prior to anything failing was
15 there was improper bearing of the stairs at
16 those, at those projects. Those stresses were
17 accumulating in those building components and
18 eventually those stresses led to a collapse.
19 Q: In one instance?
20 A: Well, at least in one instance that we know of.
21 I, I think there was, I think there was several
22 instances, I know, and there was also instances
23 at Magnolia North a stairwell either partial
24 collapse or collapse.
25 Q: You haven't been back out to the project?

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TRIAL 00014009

1 A: Yes, I have.
2 Q: When was the last time you went?
3 A: Two weeks ago.
4 Q: Why did you go back out then?
5 A: We've been employed to administer the contract,
6 construction management of the repair.
7 Q: How much is the repair going to cost?
8 A: At which project?
9 Q: Both.
10 A: I don't, I don't recall.
11 Q: You're the general contractor and you don't know
12 what it's going to cost to repair it?
13 A: I'm not the general contractor. I'm the
14 construction manager. We're, we're administering
15 the contract on behalf of the Homeowners
16 Association.
17 Q: Have you seen the contract?
18 A: Yes.
19 Q: Is it less than the repair than Al Best's
20 \$9,000,000 he offered at trial?
21 A: I'm not -- I've not made any -- it's -- this
22 particular phase that we're administering for
23 Magnolia North is repairing the balconies and the
24 stairs, so they can maintain access to the
25 building, so they don't -- as we said, there was

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TRIAL 00014010

1 failures occurring. It's a -- they're, they're
2 taking care of things, I assume, on a prioritized
3 basis and it's only a -- it's not a, it's not the
4 scope, it's not the full scope that we presented
5 at this particular time.

6 Q: Does it involve stripping off all of the brick?

7 A: This particular scope is, is strictly to address
8 the balcony issues.

9 Q: And didn't your report say that you should strip
10 off all the brick in both projects?

11 A: And the brick will eventually need to be stripped
12 off in both projects.

13 Q: But it hasn't been done, yet?

14 A: No, it has not.

15 Q: And you don't know of any plans of them to strip
16 it off?

17 A: I know Riverwalk is, is, is planning a phase of
18 stripping brick and replacing windows.

19 Q: But they haven't done it, yet?

20 A: They have not, not to my knowledge.

21 Q: When you say stripping brick, stripping off every
22 piece of brick?

23 A: Not the front entranceways as we testified we
24 felt like those could, could be left in place,
25 but the -- at Riverwalk it's contemplating

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TRIAL 00014011

1 stripping the brick off the ends and the backs of
2 the buildings, all the bricks.

3 Q: Do they're going to do the full \$9,000,000 scope
4 of repair even though the jury only awarded them
5 four and a half ---

6 MR. HENRY: YOUR HONOR, THAT'S GETTING
7 WAY BEYOND THE PURPOSE OF THIS.

8 MR. CALAMARI: I THINK IT GOES TO THE
9 CREDIBILITY OF THE TESTIMONY HE'S GIVEN BEFORE
10 ABOUT DAMAGES. I'M SHOCKED TO HEAR HIM SAY
11 THAT ALL THESE DAMAGES OCCURRED AT CO TIME, SO
12 I THINK ALL THIS GOES TO HIS CREDIBILITY AS TO
13 THE SCOPE HE GAVE, THE ESTIMATE WITH THE
14 AMOUNTS, AND NOW TO SAY THAT HE'S INVOLVED IN
15 THE REPAIR, BUT THEY'RE NOT REALLY DOING THE
16 REPAIR.

17 MR. HENRY: HE'S INVOLVED IN THE REPAIR
18 OF A VERY LIMITED PART OF THE BUILDING, YOUR
19 HONOR, THE DECKS, THAT'S ALL, IT HASN'T
20 ANYTHING TO DO WITH THE \$9,000,000 REPAIR.

21 MR. CALAMARI: I'LL STOP. THANK YOU.

22 RE-DIRECT:

23 BY MR. HENRY:

24 Q: Drew, your report is dated 2004, May of 2004.
25 You actually did the report, the investigation,

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TRIAL 00014012

Consolidated ROA_0610

1 in 2003, correct?

2 A: If, if I could see it for just a second, I want

3 to -- I'll, I'll ---

4 Q: This is of Riverwalk.

5 A: Okay. I can make -- I want to be very accurate

6 with it. It was -- the actual report was, was

7 published in 2004.

8 Q: Here it is right here.

9 A: We began site reviews in December of 2003, and

10 those continued up into 2004, into early 2004.

11 Q: So you began in 2003. You did a preliminary

12 report in 2003, didn't you?

13 A: That's correct.

14 Q: And your report is just dated 2004?

15 A: It was published in, in, in May of 2004.

16 Q: And would that be about the same time for

17 Magnolia, also?

18 A: Yes. The dates of -- well, the date -- the

19 Magnolia report and the dates of investigation

20 will be within the report. The published date

21 will be in the cover page date and the

22 investigation dates will be documented.

23 Q: I believe that's all I have.

24 THE COURT: MR. CALAMARI, ANYTHING

25 FURTHER?

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TRIAL 00014013

1 MR. CALAMARI: NO, SIR.
2 THE COURT: MS. EVANS?
3 MS. EVANS: NO, YOUR HONOR.
4 THE COURT: THANK YOU. YOU MAY STEP
5 DOWN.
6 MR. BROWN: THANK YOU, YOUR HONOR.
7 MR. HENRY: YOUR HONOR, JUST TO PROTECT
8 THE RECORD, I'D LIKE TO MOVE TO STRIKE ANY
9 TESTIMONY RELATIVE TO TIME ON THE RISK FOR THE
10 REASONS I STATED IN MY OBJECTION AT THE
11 BEGINNING OF THE CASE.
12 THE COURT: ALL RIGHT. THANK YOU. I'M
13 GOING TO OVERRULE YOUR OBJECTION AND ACCEPT THE
14 TESTIMONY THAT'S BEEN PRESENTED ON TIME ON RISK
15 FOLLOWING THE HOLDING OF THE CROSSMAN II CASE.
16 ANYTHING FURTHER FROM THE PLAINTIFF?
17 MR. CALAMARI: NOTHING FURTHER, YOUR
18 HONOR.
19 THE COURT: ANYTHING FURTHER FROM THE
20 DEFENDANT?
21 MR. HENRY: NOTHING FROM THE DEFENDANT,
22 YOUR HONOR.
23 THE COURT: THANK YOU.
24 MS. EVANS: YOUR HONOR, I DO JUST HAVE
25 A FEW HOUSEKEEPING ISSUES WITH THE RECORD, AND

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TRIAL 00014014

1 I BELIEVE THAT WE'VE WORKED IT OUT AMONGST
2 OURSELVES AND WE WANT TO MAKE SURE THAT WHAT
3 WE'VE WORKED OUT IS OKAY WITH YOU. THE RECORD
4 IS QUITE VOLUMINOUS, ESPECIALLY THE UNDERLYING
5 TRANSCRIPTS. EACH HAVE ABOUT 200 EXHIBITS
6 ATTACHED TO THEM. WE ARE MISSING SOME OF THE
7 EXHIBITS IN RIVERWALK AND THAT IS BECAUSE THE
8 COUNSEL WHO TRIED THAT CASE, ERIC FOSMIRE, AT
9 COLLINS AND LACY, COLLINS & LACY TRANSFER THE
10 FILE TO NELSON MULLINS FOR THE APPEAL, AND
11 NELSON MULLINS DOES NOT HAVE ALL OF THE DEFENSE
12 EXHIBITS IN THE UNDERLYING RIVERWALK CASE. WE
13 DO HAVE ALL THE EXHIBITS IN THE UNDERLYING
14 MAGNOLIA CASE, PLAINTIFF'S AND DEFENSE. WE
15 HAVE THE MAJORITY OF PAT'S EXHIBITS IN THE
16 RIVERWALK CASE, BUT JUST NOT MOST OF THE
17 DEFENSE EXHIBITS, AND SO THE DISCUSSION BETWEEN
18 THE THREE OF US WAS, TO LIMIT THE RECORD WE'LL
19 GIVE YOU THE UNDERLYING TRANSCRIPTS AND THEN TO
20 LIMIT THE EXHIBITS TO THOSE THAT WE UTILIZED IN
21 OUR BRIEFS OR OUR PROPOSED ORDERS TO TRY TO,
22 (A), LIMIT THE LENGTH OF IT, AND (B), BECAUSE
23 WE DON'T HAVE ALL OF THEM. IS THAT ACCEPTABLE
24 WITH EVERYONE?

25 MR. CALAMARI:

I'VE GOT A LOT OF CHECKS.

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TRIAL 00014015

Consolidated ROA_0613

1 I HAVE TO CHECK WITH PEOPLE ON THESE THINGS,
2 AND TO EXCLUDE PARTS OF THE UNDERLYING RECORD,
3 I THOUGHT WE -- YOU CERTAINLY DON'T HAVE TO
4 READ IT ALL, BUT THE THINGS THAT WE POINT OUT
5 THAT ARE IMPORTANT -- I THINK YOU'D ASKED
6 BEFORE OF A LIST OF MAYBE THE MORE IMPORTANT
7 DOCUMENTS, BUT THERE'S A LOT OF EXHIBITS IN
8 THERE THAT SOMEONE DOWN THE ROAD MIGHT SAY,
9 "WHY DID BOB CALAMARI AGREE TO EXCLUDE THIS?"
10 AND I PREFER NOT TO HAVE THAT HAPPEN.
11 MS. EVANS: WE ARE FINE WITH INCLUDING
12 ALL OF THE EXHIBITS, THE PROBLEM IS THAT WE
13 WERE NOT INVOLVED IN THE UNDERLYING CASES AND
14 NO ONE WHO WAS INVOLVED IN THE UNDERLYING
15 CASES, IN RIVERWALK SPECIFICALLY FROM THE
16 DEFENSE SIDE, AND PAT HAS BEEN GOOD ABOUT
17 GETTING PLAINTIFF'S EXHIBITS, HAS BEEN ABLE TO
18 LOCATE THOSE CASES. SO I AM ---
19 THE COURT: SO THE ORIGINAL EXHIBITS?
20 MS. EVANS: THE ORIGINAL EXHIBITS.
21 THE COURT: FROM THE COURT?
22 MS. EVANS: CORRECT.
23 MR. HENRY: YOUR HONOR, I AGREE WITH
24 LAURA, BUT I -- FIRST OF ALL, I HAVE NO
25 OBJECTION TO ANY OF THE EXHIBITS IN THE

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TRIAL 00014016

Consolidated ROA_0614

1 UNDERLYING CASE. WE AGREED TO THAT EARLY ON TO
2 DO THAT. WHAT I HAD SUGGESTED IS WHEN WE DO
3 OUR PROPOSED ORDERS OR WHATEVER YOUR HONOR
4 WANTS, THAT WE SIMPLY INCLUDE THE EXHIBITS
5 BEYOND THE TRANSCRIPT TO KEEP THE RECORD AS
6 SMALL AS POSSIBLE, BECAUSE, I MEAN, YOU'RE
7 TALKING ABOUT A PICKUP TRUCK LOAD OF DOCUMENTS,
8 AND THERE ARE A LOT OF DOCUMENTS, ACCOUNTING
9 RECORDS, HOMEOWNERS MINUTES, ALL KINDS OF
10 THINGS THAT I CAN'T SEE HOW IT WOULD BE
11 RELEVANT, BUT AGAIN, I DON'T OBJECT. I'M JUST
12 TRYING TO KEEP THE RECORD SIMPLE, AND WHAT I
13 HAD SUGGESTED IS WE DO OUR ORDERS, SAY, "OKAY,
14 THIS IS BEYOND THE TRANSCRIPT, WE WANT TO KEEP
15 THESE EXHIBITS IN AND WE CAN GO THROUGH THEM."
16 BUT LIKE I SAY, I DON'T OBJECT TO ANY OF THEM.
17 I'M JUST TRYING TO MAKE THE RECORD A LITTLE
18 MORE SIMPLE.

19 MS. EVANS: I DON'T OBJECT TO PUTTING
20 ALL OF THEM ON THE ZIP DRIVE, IT'S JUST THAT
21 SOME OF THEM ARE MISSING AND I DON'T KNOW HOW
22 TO FIX THAT PROBLEM.

23 MS. MCCARTHY: I WOULD PROPOSE WE
24 INCORPORATE THE RECORDS TO THE EXTENT THEY
25 EXIST OR TO THE EXTENT THEY CAN BE LOCATED AND

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TRIAL 00014017

1 PROVIDE EVERYTHING ON THE ZIP DRIVE, AND THE
2 EXHIBITS THAT WE'RE RELYING ON TO SUPPORT OUR
3 ARGUMENTS AND OUR BRIEFS, WE COULD INCLUDE ON A
4 SEPARATE DRIVE, SO THAT WOULD BE CONVENIENT FOR
5 YOUR HONOR.

6 THE COURT: I THINK THAT WOULD WORK, TO
7 HAVE ONE ZIP DRIVE CONSIST OF THOSE THINGS THAT
8 EVERYBODY THINKS IS IMPORTANT AND THE SECOND
9 ONE JUST TO HAVE EVERYTHING ON IT.

10 MS. EVANS: AND MY PARALEGAL HAS
11 ACTUALLY MADE A LIST, THAT I'LL CIRCULATE TO
12 EVERYBODY, EXACTLY WHICH EXHIBITS WE HAVE AND
13 WHICH EXHIBITS WERE MISSING. THERE ARE A FEW
14 THAT WE HAVE BEEN UNABLE TO EVEN IDENTIFY
15 BECAUSE THEY'RE NOT REALLY IDENTIFIED EVEN IN
16 THE UNDERLYING TRANSCRIPT WELL, BUT I'LL
17 CIRCULATE THOSE LISTS TO EVERYBODY. AS I
18 STATED BEFORE, I JUST WANT TO PUT BACK ON THE
19 RECORD THAT WE ARE GOING TO WORK WITH MR.
20 CALAMARI TO MAKE SURE THAT ALL OF THE
21 HARLEYSVILLE POLICIES THAT MAY BE APPLICABLE
22 ARE INCLUDED WITHIN EXHIBIT NUMBER 12, THOSE
23 INCLUDE CANCELLED POLICIES, JUST SO WE'LL HAVE
24 A RECORD OF ALL THE POTENTIAL HARLEYSVILLE
25 POLICIES. THERE ARE A COUPLE OF TYPOS IN

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TRIAL 00014018

Consolidated ROA_0616

1 EXHIBITS 28 AND 29 THAT MR. CALAMARI UTILIZED
2 TODAY. WE'LL FIX THOSE TYPOS AND INCLUDE THE
3 CORRECTED, OF COURSE, WE'LL CIRCULATE THOSE.
4 MR. CALAMARI: AND I TYPED THOSE MYSELF.
5 I CAN'T SAY ANYTHING ABOUT MY SECRETARY.
6 MS. EVANS: AND THEN EXHIBIT NUMBER 31,
7 AS WE IDENTIFIED ON THE STAND, THERE IS AN
8 INCORRECT CO DATE FOR BUILDING NUMBER 23, AND
9 WE'LL CORRECT THAT AS WELL. THE OTHER QUESTION
10 I THINK WE HAVE THAT WE DISCUSSED AMONGST
11 OURSELVES IS HOW WE WANT TO PROCEED FROM HERE.
12 MY THOUGHT HAD BEEN, GIVEN THE COMPLEXITY OF
13 THE ISSUES, OBVIOUSLY, THAT PERHAPS WE SUBMIT
14 POST-TRIAL BRIEFS FOLLOWED SHORTLY BY PROPOSED
15 ORDERS SINCE WE'RE NOT DOING CLOSING STATEMENTS
16 AND WE'RE NOT REALLY MAKING LONG ARGUMENTS TO
17 THE COURT.
18 MR. CALAMARI: AND, I MEAN, PEOPLE GET
19 THINGS DIFFERENT WAYS, BUT I JUST DIDN'T KNOW
20 IF IT WOULD BE HELPFUL FOR US TO COME TO
21 DARLINGTON AND JUST GIVE OUR SIDE, YOU KNOW,
22 WITHOUT ANY ARGUMENT BACK AND FORTH JUST KIND
23 OF GIVE AN OVERVIEW OF WHAT EACH SIDE'S
24 POSITION IS AND THEN SUBMIT THE OTHER, SO YOU
25 HAVE A COUPLE OF DIFFERENT METHODS OF HOW THE

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TRIAL 00014019

1 INFORMATION WAS CONVEYED.
2 MS. MCCARTHY: DO WE WANT TO DO THAT
3 BEFORE OR AFTER ---
4 MR. CALAMARI: WHATEVER ANYBODY THINKS
5 WOULD BE BETTER.
6 MS. EVANS: YES. IT DEPENDS ON WHAT
7 ---
8 MS. MCCARTHY: WHAT WOULD BE MORE
9 CONVENIENT.
10 MS. EVANS: WHAT YOUR PREFERENCE IS IN
11 TERMS OF ---
12 MR. HENRY: WHAT BOB AND I TALKED
13 ABOUT, YOUR HONOR, AT ONE POINT WAS THERE ARE
14 SO MANY ISSUES AND AT ONE TIME THAT WE HAD
15 AGREED TO JUST SUBMIT PROPOSED ORDERS TO YOU,
16 BUT HE AND I TALKED ABOUT SITTING DOWN AND
17 SAYING, "OKAY, THESE ARE WHAT WE THINK THE
18 ISSUES ARE THAT WE'RE GOING TO ADDRESS," SO
19 THAT IF HE ADDRESSES TIME ON THE RISK, I DON'T
20 LEAVE THAT OUT, I ADDRESS THAT, TOO, BUT JUST
21 LOOKING THROUGH THIS THERE ARE SO MANY ISSUES
22 THAT PROBABLY WILL NEED TO BE ADDRESSED IN
23 THESE ORDERS, THAT AT SOME POINT WE'VE ALL GOT
24 TO KNOW REALLY WHAT THE ISSUES ARE AND SO THAT
25 WE DON'T LEAVE ANYTHING OUT.

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TRIAL 00014020

1 THE COURT: IS THAT SOMETHING THAT
2 WOULD WORK BETTER WITH THE THREE OF Y'ALL
3 COMMUNICATING WITH EACH OTHER AS TO WHAT ISSUES
4 YOU FEEL LIKE NEED TO BE PRESENTED IN A
5 PROPOSED ORDER, SO THAT EACH OF Y'ALL ADDRESSES
6 THOSE ISSUES AND A BRIEF DOESN'T GO LACKING OR
7 A PROPOSED ORDER DOESN'T GO LACKING?
8 MR. HENRY: OR WE COULD SUBMIT BRIEFS
9 AND THEN LET YOU SAY HOW YOU'RE GOING TO RULE
10 AND LET ONE PERSON FIX AN ORDER, I MEAN, I'M
11 JUST -- I DON'T KNOW.
12 MS. EVANS: WE GOT A LOT OF MOVING
13 PARTS, UNFORTUNATELY.
14 MR. HENRY: YES.
15 MR. CALAMARI: I THINK IF WE SUBMIT THE
16 BRIEFS AND PROPOSED ORDERS IN A WORD DOCUMENT
17 YOU CAN ---
18 THE COURT: I SUSPECT THAT I WILL BE
19 BORROWING FROM WHAT EACH OF YOU HAVE TO SAY. I
20 DON'T THINK ANYBODY IS GOING TO GET RELIEF IN
21 FULL. I THINK THAT I'VE GOT SOME TIME ON RISK
22 ISSUES THAT I'VE GOT TO DEAL WITH, BUT I DON'T
23 THINK THAT I GO BACK AND I TRY TO TAKE THAT
24 GENERAL VERDICT AND I SAY 75 PERCENT OF IT
25 OCCURRED OUTSIDE OF THE POLICY DATES OR 75

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TRIAL 00014021

1 PERCENT OF IT OCCURRED IN THE POLICY DATES.
2 QUITE FRANKLY, I THINK AT THIS STAGE OF THE
3 GAME HARLEYSVILLE IS STUCK WITH WHATEVER THE
4 GENERAL VERDICT IS FOR WHATEVER IT'S
5 RESPONSIBLE FOR UNDER ITS POLICIES. I'VE GOT
6 ISSUES ABOUT -- I THINK THE CERTIFICATE OF
7 OCCUPANCY IS A STARTING DATE FOR WHEN YOU START
8 TRYING TO DETERMINE WHEN DAMAGES OCCURRED, BUT
9 I'M NOT SURE WHAT THE END DATE IS, BECAUSE YOU
10 COULD GET AN END DATE IN DARLINGTON COUNTY
11 WHERE A CASE CAN COME UP FOR TRIAL IN 18 MONTHS
12 A WHOLE LOT QUICKER THAN YOU CAN GET AN END
13 DATE IN HORRY COUNTY WHERE CASES COME UP FOR
14 TRIAL FIVE YEARS AFTER THEY'RE FILED. SO I
15 DON'T KNOW THAT YOU CAN USE THE -- AND I WAS
16 LOOKING AT THE CROSSMAN CASE AND I THOUGHT IT
17 SAID SOMETHING ABOUT IT, BUT I CAN'T FIND IT.
18 I DON'T KNOW THAT YOU CAN USE THE END DATE FOR
19 DAMAGES IN A CASE LIKE THIS THAT'S OCCURRING IN
20 HORRY COUNTY AS BEING THE DATE THE JURY
21 RENDERED THE VERDICT, BECAUSE I THINK AT SOME
22 POINT IN TIME DAMAGES GET BAD ENOUGH THAT IT
23 DOESN'T MATTER WHETHER IT'S 90 PERCENT DAMAGED
24 AT THE YEAR 2009 WHEN THE VERDICTS WERE
25 RENDERED OR WHETHER IT WAS 40 PERCENT DAMAGED

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TRIAL 00014022

1 AT 2003 WHEN MR. BROWN'S REPORT WAS DONE. I
2 THINK AT SOME POINT IN TIME IT REACHES THE
3 POINT WHERE YOU JUST HAVE TO SAY, "IT'S GOT TO
4 BE REPLACED AND THAT IT'S 90 PERCENT HERE AND
5 40 PERCENT THERE WHENEVER IT REACHED THAT
6 POINT." SO I'VE GOT SOME OF THOSE THINGS TO
7 STRUGGLE WITH TO TRY TO FIND WHAT'S THE CLOSURE
8 POINT OF DAMAGES WITHOUT GOING TOO FAR INTO
9 THAT GENERAL VERDICT LANGUAGE. SO THOSE ARE
10 THINGS THAT CONCERN ME, AND I COULD BE MISSING
11 THE BOAT ON IT.

12 I STILL GOT TO DEAL WITH
13 THE ISSUE OF WHAT PUNITIVE DAMAGES, COVERED
14 DAMAGES UNDER THE POLICY WITH MR. HENRY WANTING
15 THEM COVERED AND THE INSURERS WANTING THEM
16 UNCOVERED, SO THOSE ARE CERTAINLY ISSUES THAT
17 HAVE GOT TO BE DEALT WITH. BUT THOSE ARE JUST
18 SOME OF MY THOUGHTS, AND I'M NOT SURE AT THIS
19 POINT WHAT'S THE BEST WAY TO ADDRESS THOSE.

20 MR. HENRY: THE PROBLEM WITH LOOKING AT
21 IT LIKE THAT IS, FOR EXAMPLE, IN MAGNOLIA NORTH
22 THERE WERE MORE TYPES OF DAMAGES SUBMITTED TO
23 THE JURY. WE DON'T KNOW HOW THE JURY, FOR
24 EXAMPLE, PAVING, THEY LEFT THE PAVING, THEY
25 CONCEDED THAT, AND WE HAD TESTIMONY THAT WE

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TRIAL 00014023

Consolidated ROA_0621

1 SPENT 80,000, SOMETHING LIKE THAT ON FINISHING
2 THE PAVING. THAT WOULDN'T BE SOMETHING YOU
3 WOULD CONSIDER WITH TIME ON THE RISK, BUT YET,
4 WE DON'T KNOW IF THEY ALLOCATED ANY DAMAGES TO
5 THAT. THEY SPENT --- THE TESTIMONY IS THEY
6 SPENT \$120,000 FIXING THESE DECKS, AND THERE'S
7 MANY EXHIBITS OR AN EXHIBIT IN EACH ONE WHERE
8 THEY FIXED WATER INTRUSION ISSUES THROUGHOUT
9 THE PROJECT AND ALL THAT WAS SUBMITTED TO THE
10 JURY. AT THIS POINT THERE IS NO WAY OTHER THAN
11 TO GUESS AND YOU CAN'T ASK A JUROR WHAT THEY
12 DID, BUT I JUST DON'T THINK YOU CAN DEAL WITH A
13 TIME ON THE RISK BECAUSE OF THE STATUS OF THE
14 GENERAL VERDICT.

15 THE COURT: WELL, I AGREE IT'S MUCH
16 MORE DIFFICULT TO DEAL WITH A CASE THAT'S
17 ALREADY BEEN TRIED TO THE VERDICT AND GOT THE
18 GENERAL VERDICT THAT IT WOULDN'T BE -- YOU
19 COULD TRY THE CASE NOW WITH CROSSMAN II BEING
20 OUT, BUT I'M ASSUMING IT WAS A GENERAL VERDICT
21 THAT WAS IN CROSSMAN.

22 MR. CALAMARI: IT WAS.

23 THE COURT: AND THE ONLY THING THAT
24 WAS, YOU KNOW, AND, OF COURSE, IT'S DIFFERENT,
25 IS THAT THE 7.2 MILLION WAS STIPULATED TO BE

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TRIAL 00014024

Consolidated ROA_0622

1 THESE PROGRESSIVE TYPE DAMAGES.
2 MR. HENRY: RIGHT.
3 THE COURT: WE GOT NO STIPULATION OF
4 WHAT WAS AGGRESSIVE, SO IT MAKES IT MORE
5 DIFFICULT TO DEAL WITH THIS CASE FACTUALLY THAN
6 IT WAS WITH CROSSMAN, BUT I GET SOME MESSAGE
7 FROM THIS CASE WHEN IT WAS BEING REMANDED BACK
8 TO THE COURT OF SOME GENERAL INSTRUCTIONS ON
9 HOW THINGS ARE TO BE DONE, AND I DON'T KNOW
10 WHETHER IT'S APPROPRIATE TO DO THEM WHERE
11 YOU'VE GOT A GENERAL VERDICT OR NOT, AND IT MAY
12 BE THAT YOU JUST TAKE THE FULL \$9,000,000, I
13 REMEMBER, AS BEING THE FIGURE SOMEWHERE AND
14 DON'T BREAK IT DOWN, BUT YOU STILL HAVE GOT THE
15 ISSUES OF, WHAT DOES THE TESTIMONY SAY ABOUT
16 THOSE DAMAGES VERSUS THE COVERED PERIOD,
17 BECAUSE CROSSMAN TALKS ABOUT, IF SOMEBODY
18 ELECTS NOT TO HAVE INSURANCE COVERAGE, THEN THE
19 INSURANCE COVERAGE THAT WAS IN EXISTENCE, THAT
20 INSURER SHOULDN'T BE RESPONSIBLE FOR DAMAGES
21 THAT OCCURRED IN YEARS FIVE AFTER THE POLICY
22 HAS ENDED. SO I'M NOT SURE THAT I CAN'T FOLLOW
23 THAT KIND OF LOGIC FOR CROSSMAN EVEN IF WE'VE
24 GOT A GENERAL DAMAGES CASE.
25 MS. MCCARTHY: YOUR HONOR, IN MANY

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TRIAL 00014025

Consolidated ROA_0623

1 JURISDICTIONS TIME ON THE RISK IS THE
2 METHODOLOGY THAT'S EMPLOYED BY THE COURT TO
3 WHERE INTERVENTION IS NOT REQUIRED AS A MATTER
4 OF FACT. COURTS RECOGNIZE THAT IT'S IMPOSSIBLE
5 TO ALLOCATE DAMAGES TO POLICY PERIODS EVEN
6 THOUGH THE BURDEN IS ON THE INSURED TO PROVE
7 ITS DAMAGES DURING THE POLICY PERIOD, AND THE
8 COURT THEN, WHEN THEY FIXED THE TIME PERIOD,
9 THE TIME ON THE RISK, WHICH IN THIS CASE, THE
10 CROSSMAN CASE WAS STIPULATED TO, THE COURT
11 LOOKS TO THE UNDERLYING TRIAL, FACTS ELICITED
12 AT TRIAL TO DETERMINE THE START TIME AND THE
13 END TIME OF THE TRIGGERED PERIOD THAT THE COURT
14 IS GOING TO EMPLOY THE METHODOLOGY FOR, AND WE
15 WOULD SUBMIT THAT THAT IS A METHODOLOGY THAT
16 COULD BE EMPLOYED BY THIS COURT AND PROBABLY
17 SOMETHING THAT WILL BE THE FORMULA THAT WILL BE
18 UTILIZED IN SOUTH CAROLINA ON AN ONGOING BASIS.

19 MR. HENRY: BUT, YOUR HONOR, THE
20 PROBLEM WITH -- I AGREE WITH WHAT SHE SAYS, YOU
21 KNOW, AND I'VE DONE A LOT OF READING ON TIME ON
22 THE RISK, BECAUSE THAT'S SOMETHING FAIRLY NEW,
23 AND THEY DO DEBATE ON END DATES AND BEGINNING
24 DATES. THE PROBLEM IS THE GENERAL VERDICT.
25 ONLY AGGRESSIVE DAMAGES APPLY TO TIME ON THE

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TRIAL 00014026

Consolidated ROA_0624

1 RISK. THERE'S NO QUESTION ABOUT THAT, BECAUSE
2 THEY'RE OVER A PERIOD OF TIME, AND THERE'S NO
3 QUESTION IN THIS CASE, WE HAD PROGRESSIVE
4 DAMAGES, BUT IN NEWMAN AND CLAYTON AND THE
5 OTHER CASES WHERE THEY TRIED TO SAY, "WELL,
6 THERE'S" -- IT'S A GENERAL VERDICT, BUT THERE'S
7 NOT COVERED DAMAGES IN THERE. THE COURT SAID,
8 EVERY TIME, "YOU SHOULD'VE SUBMITTED
9 INTERROGATORIES" ---

10 THE COURT: I KNOW, BUT IF I TAKE THE
11 ENTIRE DAMAGE AMOUNT -- I'M NOT SAYING I'M
12 GOING BEHIND AND I'M TRYING TO FIGURE OUT HOW
13 MUCH OF THE DAMAGE WAS COST OF REPAIR VERSUS
14 PROGRESSIVE DAMAGE BECAUSE IT WAS A GENERAL
15 VERDICT WHERE COST OF REPAIR NORMALLY WOULDN'T
16 BE COVERED UNDER AN INSURANCE POLICY, BUT
17 PROGRESSIVE DAMAGE WOULD BE, AND I'M SAYING I'M
18 NOT LOOKING AT THAT, BUT I DON'T KNOW THAT I
19 CAN'T STILL SAY, "OKAY, WE'RE STUCK WITH
20 \$9,000,000 OR THEY'RE STUCK WITH \$9,000,000."
21 BUT THEY'RE ONLY STUCK WITH HALF OF \$9,000,000,
22 BECAUSE THEY ONLY GOT HALF THE TIME FRAME IF
23 THEY COVER '97 THROUGH 2000, AND THE DAMAGE
24 THAT MR. BROWN TALKS ABOUT HAD BASICALLY GOTTEN
25 TO THE POINT AT LEAST BY 2003 THAT IT WAS SO

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TRIAL 00014027

Consolidated ROA_0625

1 MUCKED UP HE, YOU KNOW, HIS TESTIMONY WAS HE
2 THOUGHT IT WAS EXTENSIVE FOR A BUILDING THAT
3 WAS NO OLDER THAN IT WAS. THEN I'M TALKING
4 ABOUT A SIX YEAR PERIOD IN WHICH I'M ALLOCATING
5 THE TOTAL POT OF DAMAGES THAT THE JURY AWARDED.
6 MR. HENRY: THE PROBLEM WITH THAT, YOUR
7 HONOR, AND I UNDERSTAND WHAT YOU'RE SAYING, THE
8 PROBLEM WITH THAT IS IN ORDER TO DO THAT YOU
9 HAVE TO ASSUME WHAT THE JURY ALLOCATED DAMAGES
10 TO.
11 THE COURT: I DON'T THINK SO.
12 MR. HENRY: I MEAN, SUPPOSE THAT JURY
13 ALLOCATED DAMAGES TO EVERYTHING TO DEFECTIVE
14 CONSTRUCTION OR THEY GAVE US PAVING AND THEY
15 GAVE US REPAIRS AND ALL THAT, THAT WOULD NOT BE
16 SUBJECT TO ANY KIND -- THAT'S IN THE POLICY
17 PERIOD. THAT'S IN THE JURY'S VERDICT IF THEY
18 ALLOCATED TO THAT. IN ALL THE CASES I'VE READ
19 I CANNOT FIND A CASE WHERE THE COURT ALLOWED A
20 TIME ON THE RISK WHERE THERE WAS A GENERAL
21 VERDICT. YOU CAN'T DO IT BECAUSE YOU DON'T
22 KNOW WHAT YOU'VE GOT TO ALLOCATE, AND IT GETS
23 BACK TO EXACTLY WHAT I SAID EARLIER, YOUR
24 HONOR. THE PURPOSE OF THE INSURANCE IS TO
25 INDEMNIFY THE INSURERS. WHEN THEY TOOK OVER

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TRIAL 00014028

Consolidated ROA_0626

1 THE DEFENSE THAT WAS THEIR PRIMARY
2 RESPONSIBILITY, AND WHEN THEY DIDN'T DO THAT,
3 WHAT OUR COURT HAS SAID AND OTHER COURTS
4 THROUGHOUT THE LAND HAVE SAID IS, "THE PURPOSE
5 OF YOU'RE TAKING OVER THE DEFENSE IS TO MAKE
6 SURE YOU DID EVERYTHING TO GET THE DEFENDANT,
7 YOUR INSURED, FULLY INDEMNIFIED." AND IF
8 ANYBODY HAS GOT TO TAKE THE LOSS OF THAT IT'S
9 THE INSURANCE CARRIER, BECAUSE THEY HAD
10 COMPLETE CONTROL OF THE DEFENSE. THAT'S WHAT
11 NEWMAN SAID, "YOU HAD CONTROL OF THE DEFENSE,
12 THERE MAY BE UNCOVERED ITEMS." WELL, THEY SAID
13 THERE WERE, BUT YOU CAN'T TELL IT. SO THE
14 WHOLE VERDICT IS COVERED. THEY SAID THAT IN
15 CLAYTON AND THEY'VE SAID THAT EVERY TIME, "YOU
16 CANNOT GO BEHIND THE GENERAL VERDICT." AND TO
17 APPLY SOMETHING, THE TIME ON THE RISK WOULD BE
18 YOU WOULD HAVE TO TAKE SOMETHING OUT OF THE
19 GENERAL VERDICT AND SAY, "OKAY, I'M GOING TO
20 APPLY THIS TO TIME ON THE RISK." CLEARLY,
21 PUNITIVE DAMAGES WOULD NOT BE SUBJECT TO THAT
22 AND LOSS OF USE WOULDN'T BE SUBJECT TO THAT TO
23 AN ALLOCATION OVER A PERIOD OF TIME. THE
24 POLICY SAYS THAT LOSS OF USE IS DEEMED TO OCCUR
25 AT THE TIME OF THE OCCURRENCE THAT CAUSED IT,

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TRIAL 00014029

1 SO THAT WOULD NOT BE.
2 THE COURT: WELL, THERE MAY HAVE TO BE
3 SOMETHING IN BRIEFS THAT TALK ABOUT WHAT
4 POTENTIALLY COULD BE DAMAGES SUBJECT TO TIME ON
5 THE RISK AND WHAT MIGHT NOT BE SUBJECT TO TIME
6 ON RISK BASED ON -- BUT I'M NOT SO SURE THAT I
7 CAN'T USE A TIME ON RISK WITHOUT VIOLATING
8 NEWMAN, AND SOME OF THIS STUFF IS JUST BEING
9 CHANGED IT TALKED ABOUT.
10 MS. EVANS: YOUR HONOR, I HAVE A
11 SUGGESTION. OBVIOUSLY, THE ISSUES ARE COMPLEX,
12 AND BOB AND PAT AND I HAD TALKED ABOUT GETTING
13 TOGETHER AND COMING UP WITH A LIST OF EVERY
14 SINGLE ISSUE AND EVERY SINGLE QUESTION THAT WE
15 THINK YOU NEED TO ANSWER IN THIS CASE, AND MY
16 SUGGESTION IS THAT WE DO THAT AND THEN WE
17 CIRCULATE IT TO YOU, SO THAT YOU CAN ADD YOUR
18 QUESTIONS THAT YOU NEED TO HAVE ANSWERED, AND
19 THEN WE CAN DO OUR BRIEFS AND OUR PROPOSED
20 ORDERS BASED ON ---
21 THE COURT: I AGREE WITH THAT.
22 MR. CALAMARI: I THINK THAT WOULD WORK.
23 YOUR HONOR ---
24 MS. EVANS: BECAUSE WE CAN DEBATE ALL
25 DAY IN HERE ABOUT ---

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TRIAL 00014030

Consolidated ROA_0628

1 MR. CALAMARI: I KEEP HEARING MY MOTHER
2 SAY, "BE COURTEOUS," BUT AS I DO I NEVER GET TO
3 SAY ANYTHING, SO I'D LIKE TO JUST TAKE A FEW
4 MINUTES TO ADDRESS SOME OF THE ISSUES THAT HAVE
5 COME UP, AND I WANT TO SAY THERE ARE A LOT OF
6 PEOPLE EXTENSIVELY INVOLVED IN CROSSMAN, BUT MY
7 NAME IS ONE OF THE ONES ON THE DECISION AND
8 WORKED WITH THE HARLEYSVILLE FROM THAT SIDE OF
9 IT.

10 MR. HENRY: MINE IS, TOO.

11 MR. CALAMARI: ONLY THE SECOND ONE. MINE
12 IS ON ALL OF THEM. WHEN YOU TALK ABOUT THE CO
13 DATE AND THE VERDICT DATE, WHEN YOU LOOK AT WHY
14 DID THE SUPREME COURT PICK THOSE DATES, YOU
15 KNOW, WHY DID THEY SAY, "WELL, CO DATE AND
16 VERDICT DATE?" WELL, IT HAS SOMETHING TO DO
17 WITH THE WAY THESE CASES ARE TRIED, BUT IT ALSO
18 HAS TO DO WITH THIS EXACT SITUATION WHERE YOU
19 HAVE A GROUP OF DEVELOPERS WHO ARE BUSINESSMEN
20 AND THEY FORM CORPORATIONS; THEY GET INSURANCE,
21 AND THEY SELL THE UNITS AND THEN THEY STOP
22 THEIR INSURANCE. WELL, IF YOU TOOK WHEN THE
23 DAMAGE ACTUALLY OCCURRED, DESPITE WHAT MR.
24 BROWN TIRED TO SAY, BUT IF YOU TOOK THE DAMAGE
25 THAT ACTUALLY OCCURRED, PROBABLY, MOST LIKELY,

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TRIAL 00014031

1 I'D HAVE TO SAY WITHOUT EXCEPTION, VERY LITTLE,
2 IF ANY OF THAT DAMAGE EVER OCCURRED DURING THE
3 POLICY PERIOD. IF YOU LOOK AT MAGNOLIA NORTH,
4 BUILDING NUMBER 23, THE LAST POLICY EXPIRED 107
5 DAYS AFTER THE CO. IT'S VERY DIFFICULT FOR ME
6 TO BELIEVE THAT IN BUILDING 23 THERE'S ANY
7 DAMAGE WHATSOEVER, PROPERTY DAMAGE THAT
8 OCCURRED DURING THE POLICY PERIOD. NOW, THE
9 SUPREME COURT SAID, "WELL, YOU HAD INSURANCE
10 DURING THE TIME, IF WE CAN'T FIGURE IT OUT,
11 LET'S PICK TWO DATES, LET'S PICK DATES THAT ARE
12 FAIR, WE'LL PICK A CO DATE AND WE'LL PICK A
13 VERDICT DATE." SO IF YOU'RE NOT GOING TO USE
14 THE VERDICT DATE, LET'S SAY YOU'RE DOING TO USE
15 DREW BROWN'S 2004 EXPERT REPORT DATE OR THE
16 DATE OF AL BEST, THE 2006 REPAIR ESTIMATE DATE,
17 LET'S SAY YOU'RE GOING TO USE THAT DATE, THEN
18 IS IT REALLY FAIR IF YOU'RE GOING TO USE THAT
19 DATE TO USE CO DATE WHEN, IN FACT, WE KNOW THAT
20 NO DAMAGE OCCURRED AT CO, BECAUSE IT HAD
21 BUILDING INSPECTORS, IT HAD CONTRACTORS, IT HAD
22 EVERYONE OUT THERE LOOKING. THERE WASN'T ANY
23 DAMAGE AT THAT POINT, ESPECIALLY TO THE
24 COLUMNS, THE STAIRWELLS. NO DAMAGE HAD
25 MANIFESTED ITSELF AT ALL AT THAT POINT. SO I

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TRIAL 00014032

1 THINK THE SUPREME COURT IS LOOKING AT THIS,
2 SAYING, "YOU KNOW WHAT, CONSTRUCTION CASES ARE
3 DIFFICULT BECAUSE THERE'S THOUSANDS OF ISSUES,
4 THERE'S ALMOST HUNDREDS OF THOUSANDS OF CLAIMS
5 IN 23 BUILDINGS OF ITEMS OF IMPROPER WORK, HOW
6 IN THE WORLD ARE WE GOING TO LOOK AT EACH ONE
7 AND DETERMINE WHEN THAT DAMAGE OCCURRED?" AND
8 IF YOU CAN'T DO IT SPECIFICALLY, THEY SAID,
9 "LET'S DO THE TIME ON RISK ANALYSIS, LET'S DO
10 TIME ON RISK AND LET'S DO A FAIRNESS ARGUMENT,
11 IF WE'RE GOING TO PICK THE START DATE WHEN WE
12 KNOW THERE WAS NO DAMAGE, THEN LET'S PICK THE
13 VERDICT DATE WHEN CHANCES ARE THE DAMAGE HAD
14 ALREADY ACCRUED AT LEAST A LITTLE WHILE BEFORE
15 THE FINAL VERDICT." SO THAT IS OUR POSITION,
16 AND I THINK KAREN BROUGHT OUT THE FACT THAT
17 SHOWING DAMAGES THAT OCCUR WITHIN THE POLICY
18 PERIOD IS ALWAYS THE BURDEN OF THE INSURED. IN
19 THIS CASE, MR. HENRY'S CLIENT STEPS IN THE
20 SHOES OF THE INSURED. THEY WERE INVOLVED IN
21 THIS CASE. THEY HAD EVERY OPPORTUNITY TO DO
22 IT. JUST AS HE WANTS TO SAY THE BURDEN IS ON
23 US FOR THE GENERAL VERDICT FOR ALLOCATION OF
24 DAMAGES, THE BURDEN IS ON THEM TO SHOW THE
25 DAMAGES OCCURRED WITHIN THE POLICY PERIOD, AND

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TRIAL 00014033

1 IF IT'S UP TO SPECULATION, CONJECTURE,
2 GUESSING, THEN THEY CAN'T DO IT; BUT THE
3 SUPREME COURT ADDRESSED ALL OF THIS IN CROSSMAN
4 AND SAID, "CO DATE AND VERDICT DATE, UNLESS
5 THERE'S SOMETHING SPECIFIC." NOW, OUR VIEW OF
6 WHAT SPECIFIC MEANS IS LET'S SAY THE BUILDING
7 IS PUT TOGETHER AND IT'S ATTACHED IN THE MIDDLE
8 AND ON DECEMBER 13TH OF 2004, THOSE BOLTS BREAK
9 FREE AND THE BUILDING COLLAPSES, NO DAMAGE
10 BEFORE THAT, BUT DAMAGE ON DECEMBER 13TH.
11 THERE'S A SPECIFIC SITUATION THAT YOU CAN LOOK
12 TO, TO SAY, "WE KNOW WHEN THE DAMAGES
13 OCCURRED." BUT THERE HADN'T BEEN A WITNESS UP
14 HERE IN THE UNDERLYING TRIAL OR TODAY THAT
15 SAID, "I KNOW EXACTLY WHEN THE TOTAL EXTENT
16 FROM START TO FINISH OF ALL THESE DAMAGES
17 OCCURRED." IN FACT, THEY ALL SAID THE OPPOSITE
18 OF, "WE DON'T KNOW." SO I THINK THAT'S WHY THE
19 SUPREME COURT PUT TOGETHER THE TIME ON RISK,
20 FAIRNESS ANALYSIS, TO BE FAIR TO THE INSURANCE
21 COMPANY, TO BE FAIR TO THE JUDGMENT HOLDER, TO
22 BE FAIR TO THE INSURED.

23 MR. HENRY: WELL, YOUR HONOR, LIKE WE
24 SAID, WE CAN DEBATE THIS ALL DAY, BUT WHAT HE'S
25 TALKING ABOUT IS PROGRESSIVE DAMAGES, AND IN

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TRIAL 00014034

Consolidated ROA_0632

1 THIS CASE, UNLIKE CROSSMAN, UNLIKE ANY OTHER
2 CASE WE'VE HAD, IN THIS PARTICULAR SITUATION WE
3 DON'T KNOW WHAT THE PROGRESSIVE DAMAGES ARE. I
4 DISAGREE WITH WHAT HE SAID ABOUT NOT KNOWING IF
5 ANY DAMAGES OCCURRED WITHIN THE POLICY PERIOD.
6 HE'S BECOME OUR WITNESS, I GUESS, NOW, BECAUSE
7 THAT'S NOT WHAT ANYBODY -- AND I DON'T THINK
8 THAT'S REASONABLE. I DON'T THINK BOB WOULD GET
9 UP HERE AND TELL YOU THAT WITH THE \$9,000,000
10 IN 2003, THAT NO DAMAGES HAD OCCURRED SINCE
11 1997.. I THINK THAT'S WAY BEYOND THE PALE, BUT
12 IN ANY EVENT, ALL I'VE GOT TO GO ON ARE THE
13 SOUTH CAROLINA CASES ON GENERAL VERDICTS AND
14 THEY SAY IF YOU'VE GOT COVERED AND NON-COVERED
15 ITEMS IN A GENERAL VERDICT THE INSURANCE
16 COMPANY IS STUCK WITH THE GENERAL VERDICT,
17 UNLESS THEY GO IN, IN THE COURT AND ASK FOR AN
18 ALLOCATION. EVEN MR. WRIGHT TESTIFIED THAT HE
19 WOULD'VE HAD TO HAVE ASKED THE JURY TO ALLOCATE
20 DAMAGES OVER A PERIOD OF TIME. HE KNEW THAT.
21 THEY DIDN'T DO IT. THEY GOT THE BURDEN.
22 MR. CALAMARI: I'M NOT SURE THAT'S MY
23 DIRECT STATEMENT. THE RECORD WILL SPEAK FOR
24 ITSELF.
25 MR. HENRY: IT IS. HERE IT IS. I'LL

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TRIAL 00014035

Consolidated ROA_0633

1 SHOW IT TO YOU.

2 THE COURT: ALL RIGHT. I'VE HEARD IT,
3 NOW I'LL READ IT. I THINK IT'S GOOD FOR Y'ALL
4 TO GET TOGETHER, FIGURE OUT WHAT NEEDS TO BE
5 DONE, AND THEN SUBMIT THINGS IN WORD FORM.

6 MR. HENRY: YOUR HONOR, I THINK IT'D BE
7 A GOOD TIME FOR US TO SET SOME TIME PARAMETERS,
8 BECAUSE BOB HUNTS ALL THE TIME. HE DOESN'T
9 WORK ALL THAT MUCH.

10 MR. CALAMARI: POST-HEART ATTACK BOB.

11 MR. HENRY: HE'S IN A DEER STAND
12 SOMEWHERE AND I HAVE TO CALL HIM IN A DEER
13 STAND.

14 THE COURT: I ANTICIPATE THAT THERE'S
15 NO REASON REALLY TO SEND ME BRIEFS AND PROPOSED
16 ORDERS, BECAUSE I THINK YOUR PROPOSED ORDERS
17 WILL CONTAIN A LOT OF THE ARGUMENT THAT YOUR
18 BRIEFS WOULD HAVE IN IT. SO JUST SEND ME
19 PROPOSED ORDERS. HOW LONG DO Y'ALL NEED TO GET
20 TOGETHER AND TALK ABOUT ALL THE ISSUES THAT
21 NEED TO BE FRAMED IN THOSE PROPOSED ORDERS?
22 WITH CHRISTMAS COMING UP, DO Y'ALL NEED UNTIL
23 JANUARY 15TH?

24 MR. HENRY: I DON'T THINK SO. I THINK
25 WE CAN GET TOGETHER NEXT WEEK AND GO OVER WHAT

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TRIAL 00014036

Consolidated ROA_0634

1 THE ISSUES ARE. I THINK WE PRETTY WELL KNOW
2 WHAT THE ISSUES ARE, BUT I AGREE WITH THE
3 HOLIDAYS AND EVERYTHING THAT -- ORIGINALLY, WE
4 WERE GOING TO GET EVERYTHING DONE IN DECEMBER,
5 BUT I DON'T THINK THAT'S REALISTIC NOW, BUT I
6 DON'T SEE OF ANY REASON WE COULDN'T GET
7 TOGETHER NEXT WEEK. ALL THE TESTIMONY IS IN
8 AND WE BASICALLY KNOW THE ISSUES, AND THEN HAVE
9 MAYBE SOMETIME IN JANUARY TO SUBMIT PROPOSED
10 ORDERS.

11 MR. CALAMARI: MY SCHEDULE IS PACKED NEXT
12 WEEK.

13 MR. HENRY: YOUR SCHEDULE IS ALWAYS
14 PACKED.

15 MR. CALAMARI: IT IS, AND I WAS TRYING TO
16 GET ---

17 MR. HENRY: WELL, LET'S DO IT THIS
18 AFTERNOON.

19 MS. EVANS: YOUR HONOR, ONCE WE COME UP
20 WITH ---

21 THE COURT: DO WE WANT TO SAY JANUARY
22 30TH FOR POST-ORDERS? CAN EVERYBODY LIVE WITH
23 THAT?

24 MS. EVANS: TWO THINGS. ARE WE GOING
25 TO GIVE YOU THIS LIST THAT WE COME UP WITH TO

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TRIAL 00014037

Consolidated ROA_0635

1 MAKE SURE THAT EVERYTHING YOU WANT COVERED IS
2 COVERED, AND IF SO, WHEN DO YOU WANT THAT? AND
3 SECONDARILY, WE'RE GOING TO NEED THE SECOND
4 PART OF THE TRANSCRIPT, SO I DON'T KNOW WHAT
5 YOUR SCHEDULE IS ON GETTING THAT TO US.

6 THE COURT: I DON'T THINK I NEED TO BE
7 A PARTICIPANT OF DEVELOPING THE LIST, BECAUSE
8 WHATEVER I RULE ON, I RULE ON BASED ON THE
9 TESTIMONY THAT'S BEEN PRESENTED TO ME AND WHAT
10 YOU RAISE IN YOUR PROPOSED ORDERS, AND IF
11 SOMEBODY FAILS, Y'ALL'S GROUP FAILS TO RAISE
12 SOMETHING THAT YOU THEREAFTER THINK I SHOULD'VE
13 RULED ON, SO BE IT.

14 MR. HENRY: I ASSUME, YOUR HONOR -- MAY
15 I SIT DOWN? I ASSUME THAT WE ARE GOING TO DO
16 ONE ORDER, I MEAN, THERE ARE TWO CASES HERE? I
17 ASSUME THAT WE'RE GOING TO DO ONE ORDER. IT'S
18 A LITTLE DIFFICULT TO, I MEAN, IT'S NOT REALLY
19 DIFFICULT. THE EVIDENCE, THE TESTIMONY AND THE
20 ISSUES IN BOTH CASES ARE BASICALLY THE SAME.

21 THE COURT: GIVE ME TWO ORDERS. YOU
22 CAN CUT AND PASTE, BUT GIVE ME TWO ORDERS, AN
23 ORDER FOR EACH CASE, AND THEN THAT WAY,
24 WHENEVER THE APPELLATE COURT IS LOOKING AT IT,
25 THEY CAN DECIDE TO CONSOLIDATE FOR THE PURPOSES

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TRIAL 00014038

Consolidated ROA_0636

1 OF ARGUMENT OR THEY CAN DECIDE TO TREAT THEM
2 SEPARATELY.
3 MR. HENRY: I'M STILL NOT SURE HOW TO
4 TREAT LAURA OVER THERE. I'M GOING TO TREAT HER
5 NICE.
6 MS. EVANS: JUST LET ME OUT.
7 THE COURT: FIND A REASON THAT YOU NEED
8 EXCESS INSURANCE.
9 MR. HENRY: WELL, IF SOMETHING HAPPENS,
10 JUDGE, THAT HARLEYSVILLE, OF ALL THE POLICIES,
11 THEY DECIDED THE ONE THAT THEY HAVE THAT THEY
12 ARE EXCESS ON THAT ONE, ALL OF A SUDDEN, GOT
13 EXHAUSTED. I'M NOT SURE HOW THAT HAPPENED.
14 THE COURT: I ASSUME THAT YOU STILL DO
15 NOT CARE WHERE THE MONEY COMES FROM AS LONG AS
16 ---
17 MR. HENRY: NO, YOUR HONOR. I HAVE NO,
18 I MEAN, I'M NOT SURE HOW I DEAL WITH THAT,
19 BECAUSE IT APPEARS TO ME, AND I DON'T THINK
20 THERE'S ANY DISAGREEMENT, THAT THERE'S
21 COVERAGE, THERE'S PLENTY OF COVERAGE.
22 THE COURT: I THOUGHT AT SOME POINT IN
23 TIME WE WERE GOING TO HOLD OFF ON THAT THING
24 BETWEEN THOSE TWO UNTIL I DECIDED OTHERWISE.
25 MS. EVANS: CORRECT.

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TRIAL 00014039

1 MR. HENRY: OKAY. WELL, THAT'S FINE.
2 I WON'T EVEN ADDRESS THAT IN MY ORDER.
3 MS. EVANS: AND WHAT WE'LL ADDRESS IS
4 WE FILED FORM TO HARLEYSVILLE OBVIOUSLY, SO WE
5 HAVE A LOT OF THE SAME ARGUMENTS, AND THEN WE
6 MAY HAVE ADDITIONAL EXCLUSIONS THAT MAY BE
7 INCLUDED THAT WERE INCLUDED IN OUR PRE-TRIAL
8 BRIEF.
9 MR. HENRY: THEY HAVE A DIFFERENT
10 POLICY WITH DIFFERENT EXCLUSIONS AND THAT'S
11 WHAT I'D LIKE TO KEEP THEM TO THE SIDE, IF YOU
12 WILL, AS FAR AS MY ORDER IS CONCERNED. I'D
13 JUST LIKE TO DEAL WITH HARLEYSVILLE'S POLICIES.
14 THE COURT: JANUARY 30 IS A MONDAY.
15 JANUARY 31 IS A TUESDAY. WHICH DATE DO Y'ALL
16 WANT? IT DOES MAKE ANY DIFFERENCE.
17 MS. MCCARTHY: JUST SO THAT WE GET AN
18 OPPORTUNITY TO ---
19 MS. EVANS: YES, THE 31ST.
20 THE COURT: THE 31ST?
21 MS. EVANS: ONE EXTRA DAY.
22 MR. HENRY: I'M SORRY, I DIDN'T CATCH
23 THE FIRST PART.
24 THE COURT: WE WILL PICK JANUARY THE
25 31ST DATE ON WHICH THE PROPOSED ORDERS ARE DUE.

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TRIAL 00014040

1 MR. HENRY: OKAY.
2 THE COURT: I'M GOING TO REFUSE TO
3 PROMISE YOU WHEN I WILL BE ABLE TO TELL YOU I
4 HAVE ACCEPTED ONE OR A COMBINATION, BECAUSE I'M
5 GOING TO HAVE TO LOOK AT THE ORDERS, THERE ARE
6 GOING TO SEND ME TO LOOKING, I'M SURE, AT SOME
7 OF THE UNDERLYING CASE, AS WELL AS SOME OF THE
8 TESTIMONY, THREE PART DAYS THAT WE TOOK
9 TESTIMONY LAST YEAR AND THIS YEAR. I WILL
10 PROMISE YOU THAT I WILL GET TO IT QUICKLY IF I
11 CAN, BECAUSE THERE'S NO INCENTIVE BUT TO SIT ON
12 IT. I KNOW THAT THERE WAS A MOTION FOR
13 RECONSIDERATION THAT I MADE TO ONE OF MY
14 BRETHREN ON THE BENCH BEFORE I WENT ON THE
15 BENCH THAT WAS MADE FOR A CONSIDERABLE PERIOD
16 OF TIME, AND I FINALLY ENDED UP HAVING TO TELL
17 THAT PARTICULAR JUDGE, "JUST RULE AGAINST ME.
18 MAKE ANY RULING. I'M GETTING READY TO GET ON
19 THE BENCH." I WON'T DO THAT TO YOU. SO I WILL
20 TRY TO GET IT OUT BY FISHING SEASON.
21 MR. CALAMARI: THANK YOU.
22 THE COURT: ANYTHING ELSE WE NEED TO DO
23 TODAY?
24 MS. EVANS: THANK YOU, YOUR HONOR.
25 MR. CALAMARI: THANK YOU, YOUR HONOR, I

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TRIAL 00014041

Consolidated ROA_0639

1 APPRECIATE IT.
2 THE COURT: THANK Y'ALL FOR YOUR
3 COURTESY.
4 MR. HENRY: THANK YOU VERY MUCH.
5 (The hearing concluded at 12:05 p.m.)

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TRIAL 00014042

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF HORRY

HARLEYSVILLE GROUP INSURANCE GROUP,
A Pennsylvania Corporation,
Plaintiff,
vs. CASE NO. 2009-CP-26-11862
HERITAGE COMMUNITIES, INC, A South
Carolina Corporation, et al,
Defendants.

HARLEYSVILLE GROUP INSURANCE GROUP,
A Pennsylvania Corporation,
Plaintiff,
vs. CASE NO. 2009-CP-26-10053
HERITAGE COMMUNITIES, INC., A South
Carolina Corporation, et al,
Defendants.

HEARING HELD BEFORE HONORABLE JOHN M. MILLING,
SPECIAL CIRCUIT COURT TRIAL JUDGE

DATE: April 9, 2013

TIME: 11:05 a.m.

LOCATION: Darlington County Courthouse
1 Public Square
Darlington, SC

REPORTED BY: BONNIE L. SABADOS,
Registered Professional
Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(INDEX AT REAR OF TRANSCRIPT)

1 THE COURT: All right. This is a
2 matter before the Court on April 9, 2013 here in
3 Darlington, South Carolina. The Court had issued
4 various orders in the two cases involving
5 Harleysville verses National Surety and Riverwalk
6 and Pope as well as Harleysville verses National
7 Surety and Magnolia. The parties have timely
8 filed their motions to alter or amend with respect
9 to the orders that have been issued by the Court.

10 Mr. Bob Calamari and Mitch Brown with
11 Nelson Mullins are the plaintiffs in this matter.
12 I will hear from y'all now.

13 MR. CALAMARI: Thank you, Your Honor.
14 This is -- we represent Harleysville in two
15 actions. First action is relating to the Magnolia
16 North project, and the second action relates to
17 the Riverwalk project. This is a motion to
18 vacate, alter, or amend in each action.

19 I want to talk about the background
20 and how we got to this point cause I think that
21 will further help us understand my issues with the
22 order. These underlying actions were tried, the
23 Riverwalk action in January of 2009, and the
24 Magnolia North action was tried in May of 2009.
25 Both went to verdict. Both involved defendants.

1 that were insureds of Harleysville. Harleysville
2 provided a defense in the case and defended under
3 a reservation of rights. Harleysville after the
4 verdicts, filed this declaratory judgment action
5 seeking an analysis of the damages and other
6 coverage issues in the case. Harleysville kept
7 close contact with its insured throughout,
8 discussed the issues with their lawyers, and
9 proceeded accordingly afterwards.

10 We have -- after the DJ action was
11 filed, we had one set of hearing dates. It
12 consisted, I believe, of two days in December of
13 2010. Then there were some changes in the law by
14 the Supreme Court. We then came back and waited
15 on those changes. We came back about a year later
16 and had another day of hearing to discuss some
17 additional issues that the Supreme Court set out
18 in that order.

19 Then is where we got to the point
20 which led to the orders of today. We discussed at
21 that hearing how will we go about the issues, how
22 did we -- we had given pre-trial briefs. There
23 were pleadings. There were other discussions
24 about what the issues were, the days of testimony
25 and, how would we ask the Court for relief we were

1 seeking. We talked about briefs. We talked about
2 an oral argument type thing, and the Court decided
3 that it was best to submit proposed orders.

4 Mr. Henry submitted orders. I submitted orders,
5 and National Surety submitted orders. But the
6 orders were essentially in the form of briefs.
7 And that kind of leads me to where we got to
8 today.

9 We now have two orders that you
10 signed. And essentially they ruled on the larger
11 issues in the case. We are asking you to vacate
12 those orders. And at minimum to alter those
13 orders and amend those orders.

14 We have really five categories of what
15 we believe to be errors or incorrect parts of
16 those orders, and to summarize those, and I'll go
17 through them, the first one is missing orders.
18 What things did we ask for that have not yet been
19 ruled upon. The second one is there are rulings
20 in those orders on grounds never asserted, which
21 gets back to when we submitted them, they were
22 somewhat in the form of briefs. And things that
23 never came up at trial. There were some
24 additional grounds for things that you did not
25 rule upon at trial we believe are improper. Then

1 there are findings of fact in those orders. The
2 findings of fact we take particular issue with
3 because, as I pointed out in my motion, there are
4 a number of findings of fact that are based on
5 evidence that was excluded by you at trial. You
6 excluded the evidence at trial, we proffered the
7 evidence, and then now it appears in the orders
8 as a finding of fact. And as we all know, a
9 proffer of evidence is to let the Court know the
10 issue that would otherwise be presented. So if
11 those are going to be now admitted into evidence,
12 we feel like we should have the opportunity to
13 more fully explain and discuss those orders.

14 The next number four would be just
15 generally incorrect rulings. Obviously we made it
16 clear from the beginning that we felt we should be
17 permitted to allocate, and the Court disagrees,
18 Mr. Henry disagrees, and there are some other
19 rulings in the orders that we believe are
20 incorrect.

21 The fifth and final category is the
22 fact that essentially you excluded 90 percent of
23 our evidence that we offered. And we feel that in
24 a bench trial, all of that evidence should be
25 admitted, and the Court should determine the

1 appropriate weight to give to that evidence. We
2 all knew from the start, and I think we talked
3 about it the day we met with you initially that
4 this is a process that will likely go to the
5 appellate courts, and we wanted to make sure all
6 issues were preserved, that everything could be
7 decided upon in an expeditious fashion with the
8 appellate courts. Having all of the evidence
9 excluded kind of puts the Court of Appeals in a
10 hold. I believe there's authority that says that
11 bench trial evidence should not be excluded and
12 should be considered. Those are the five
13 categories, but I want to talk about kind of the
14 basis of these actions. And there is part on our
15 side, and I believe there is part on Mr. Henry's
16 side from the HOA.

17 Harleysville provided insurance
18 policies to three distinct insurers that were then
19 amalgamated at trial into one entity, and the
20 common goal for insurer and insured at that point
21 is to win the underlying case. You want to do
22 what's best for the insured and provide a defense.
23 It's the duty of defense. We have to do it, and
24 we were glad to do it, and we provided very good
25 lawyers to do it. Experts. We feel that the

1 lawyers did an excellent job. During that time,
2 we communicated frequently with the insured, and
3 we reached agreements with them, and we discussed
4 coverage issues, and we had reservations of
5 rights. And we did other things that carriers
6 should do, and I think we went above and beyond
7 even with the trip to Florida to talk to one of
8 the insureds who had moved.

9 Can Harleysville now be prejudiced by
10 protecting the insured in the underlying action.
11 I think the simple answer is no. I don't think
12 anything the Supreme Court or other areas says
13 that an insured -- an insurer who protects its
14 insured is then prejudiced by an action that it
15 was never a party to. And we think that's a key
16 element in looking at this.

17 You look at two different trials,
18 there are divergent interests. Clearly by the
19 findings of fact in these cases, and the fact that
20 we're each on the other side of the V shows that
21 there are divergent interests. And our Supreme
22 Court in the Simms verses Nationwide case has said
23 in the past that when that happens, those issues
24 can be litigated at a later time, which was what
25 we discussed with the insured accordingly, to the

1 undisputed testimony of Lee Wright which was
2 excluded but proffered.

3 The second area in this case that's
4 kind of a prevailing theme is the damages issue.
5 I know Mr. Henry has said several times, and I
6 expect today he will say Bob must have a crystal
7 ball because he can look at this mixed verdict of
8 covered and non-covered damages and present to the
9 Court issues of what percentage is covered, what
10 percentage is not covered. But now it seems that
11 Mr. Henry and the HOA's have taken the position
12 that they can get the benefit of everything. So
13 when we're talking about allocation, every bit of
14 the damages is a covered damage, and I believe
15 that's the way the Court ruled that we can't
16 allocate, so they all fall into the resulting
17 damages category covered under the policy, which
18 we disagree with, but I believe that's the ruling
19 at this time.

20 On the other hand, when we talk about
21 time on risk, I believe Mr. Henry and the HOA
22 wants to say that the damages are -- could
23 possibly all be for defective work, repairing
24 defective work. And I want to point out that both
25 of those are a physical and legal impossibility.

1 You can't have it. You can't have it both ways.
2 It's a mixture of damages.

3 From a physical standpoint, you can
4 look at the estimates that were presented to the
5 jury which is part of the record in the underlying
6 action. And those estimates included vast numbers
7 of damages that were not covered, and vast numbers
8 of damages that according to current law in the
9 Supreme Court are covered. And so you have that
10 mixture of damages which necessitates further
11 action by the Court.

12 It's a legal impossibility as well
13 because in order to prevail in an underlying
14 action in a construction case, the plaintiff must
15 prove that there are incorrect constructed
16 portions of the buildings, code violations, shoddy
17 workmanship, some construction defect that
18 necessitates a repair of that defective condition
19 that was asked for in the underlying action. You
20 can't win the underlying action unless you have
21 that under any theory. In addition to that, you
22 must have resulting damages in order for it ever
23 to be an occurrence, which is the burden of the
24 insured. So what we have in the underlying action
25 is a presentation of evidence showing defective

1 conditions, and then rotten portions of the
2 building. The repair necessarily included fixing
3 the defective condition and fixing the rotten
4 damage or the rotten wood from water intrusion.
5 So you have those elements that are necessary to
6 ever recovery. So if the argument is for time on
7 risk, this is all damages for defective work.
8 Well, then none of it is covered because it's not
9 an occurrence. The argument is it's all resulting
10 damage. Well, you have to prove the elements of
11 your original cause of action in order to get to
12 recovery of the resulting damage. So any way you
13 look at it, the damages are a mixture, and you
14 can't have it both ways.

15 I want to talk a little bit now about
16 the first section, the missing orders. And the
17 first order that's missing is our motion for
18 default. The insured in this case was served the
19 complaints, in both of these cases was served with
20 complaints. We talked to their attorney. We met
21 with their attorney. We asked him to file an
22 answer. He refused to file an answer. We
23 notified him of court dates. He refused to show
24 up for court dates. We filed a notice and entry
25 of default, and we filed a motion for a default

1 judgment. We still do not have a ruling on that.
2 And I believe there needs to be -- I submitted
3 proposed orders. I believe there needs to be a
4 separate order issued saying they're default and
5 their rights are foreclosed, which leads to the
6 second step of that.

7 The HOA's in this case say well, we
8 are judgment holder and we can assert rights
9 against the insurance company, which is accurate
10 because of the policy provision. But nothing in
11 South Carolina has ever changed the rule that
12 judgment holder, a third party, does not have
13 rights to an insurance contract. And for years,
14 people would say well, I'm going to need an
15 assignment of rights from the insured in order to
16 go after them. That was never the case. Read the
17 policy. There is a provision in the policy.
18 Well, the policy provision doesn't appear anywhere
19 in these orders. All the orders say is we step
20 into the shoes of the insured. But I hope the
21 Court can see the problem with that because if you
22 truly step into the shoes of the insured, you step
23 into the shoes of them as a defaulting party where
24 the pleadings said you intended the damage, and
25 it's excluded. You step into the shoes of the

1 insured where the insured made an agreement
2 according to the uncontradicted testimony of Lee
3 Wright to handle all coverage issues at a later
4 time which was evidence that was offered and
5 excluded. And you step into their shoes with all
6 the problems that they have. The HOA in this case
7 wants to say well, any problems that the insured
8 brings in their shoes, that prejudiced us,
9 therefore, it should be excluded. And I believe
10 the Court improperly excluded that evidence.

11 The insured or the judgment holder by
12 stepping into the shoes of the insured, which is
13 not what the policy allows, has in this case now
14 said we can assert rights of the insured that the
15 reservation of rights letters weren't good enough.
16 But yet during the trial when Lee Wright tried to
17 testify about the various meetings he had with
18 Roger Van Wie and Jack Green, and when he tried to
19 testify about discussions that they had, that was
20 excluded because it wasn't relevant. Yet now in
21 the order, the order states that reservation of
22 rights letters weren't delivered which is totally
23 against the uncontradicted and undisputed
24 testimony of Lee Wright which was excluded and
25 proffered. And it ignores the discussions that

1 they had with them about these rights. It ignores
2 the fact that they were amalgamated. So allowing
3 them to step into their shoes but without any of
4 the baggage brought by the insured is just not
5 proper. All they can do under the policy is bring
6 a right to say these things are covered or not
7 covered. But they don't have standing to stand up
8 and say oh, and by the way, for the nine years or
9 six or seven years that these cases were pending,
10 and you were defending under a reservation of
11 rights, and you had meeting after meeting,
12 discussion with Harleysville and the insured about
13 various things. We're not going to let that into
14 evidence. We're not going to allow that to be
15 considered. And then to come out with a finding
16 that the reservation of rights letters not only
17 were not delivered, but the content of them which
18 was never raised and not part of your ruling at
19 trial, that they are too vague and they didn't
20 protect their rights, and therefore, as an
21 independent ground, everything is covered. We
22 believe that to be plain error based on all the
23 evidence in the case. And that all stems from the
24 missing order.

25 The second section, and just to make

1 sure on the record I incorporate all of my
2 arguments into the record.

3 THE COURT: Certainly.

4 MR. CALAMARI: And that way I don't
5 have to go through each one individually. But the
6 rulings on the grounds never asserted. We offered
7 the testimony of Frank Baden, Jr., Trip Baden, III
8 to show an allocation of the underlying action.
9 And we proffered the evidence because it was
10 excluded based on the fact that you believed that
11 the general verdict precluded any evidence that
12 would allow us to address the issues to allocate
13 the verdict. The order goes a step further and it
14 says that we believe that the evidence offered by
15 Mr. Baden was speculative. Well, I'm not sure
16 that's a proper -- I don't believe it's proper to
17 order anything when it's proffered evidence. You
18 excluded it on one ground and one ground only. We
19 proffered, gave you a preview of the evidence we
20 would put into evidence, and the order now on
21 something that was not raised at trial comes out
22 and tells us that it's excluded because it's too
23 vague. And we don't think that's correct. We
24 also for many other reasons believe we should
25 allocate, which I'll get to later.

1 The reservation of rights letters.
2 We offered into evidence reservation of rights
3 letters. We offered into evidence discussion with
4 the insureds about reservation of rights letters.
5 It was excluded. The ground, which I previously
6 stated, for excluding the reservation of rights
7 letters is, A, you said since it wasn't produced,
8 it didn't exist. The testimony by Lee Wright is,
9 I put in my motion, that he is 100 percent sure
10 that it existed. Also the parties were
11 amalgamated at trial, and also that he met with
12 them and discussed these issues. Those were all
13 excluded, that evidence. The issue, the ruling on
14 the ground never asserted was that the evidence or
15 that the reservation of rights letters were too
16 vague, that they didn't convey the fact that
17 Harleysville was going to raise coverage issues at
18 a later time. That's just not the law. It's
19 not -- the HOA doesn't have standing to raise that
20 issue. The insureds are in default. They never
21 appeared. And the uncontradicted testimony says
22 that all coverage issues based on the law at that
23 time were understood.

24 The next category is findings of fact
25 that are based on excluded evidence. And I have

1 listed a number of them in my two motions, so I
2 incorporate that in as well. The Court excluded
3 Lee Wright's testimony regarding the reservation
4 of rights. But then there's a finding of fact
5 that says the reservation of rights letters were
6 never sent. Well, all the evidence related to
7 that was excluded. The letters spoke for
8 themselves, and yet there's a finding of fact on
9 that basis.

10 There is an exclusion, one part of the
11 exclusion in the orders is that there is a finding
12 that the insureds intended good work. Well, in
13 the underlying action, if you look at the record,
14 Mr. Henry took the position that the insured did
15 not intend good work. The insured said we built
16 the buildings. We don't think there's anything
17 wrong with them. In our case, we wanted to
18 present evidence through Lee Wright, summarize
19 the evidence that's in there to show that they
20 didn't build good buildings. This is another
21 example of divergent interest, and it shows the
22 difficulty that all three parties have. Mr. Henry
23 would like to say that the insured did a terrible
24 job in the underlying action, and then yet in this
25 case based on evidence that was excluded, he puts

1 in the order that no, he thinks they did a good
2 job. That right there should be enough that we
3 should be allowed to be involved.

4 Intervention. There's a finding of
5 fact in one of the orders, 39, 44 and 45 and
6 corresponding in the other order, that finds that
7 we had the opportunity to intervene and chose not
8 to. That it was our decision. During the
9 testimony, Lee Wright gave a laundry list of
10 reasons why we didn't intervene, including
11 divergent interests, including threats by the
12 insured of bad faith in a previous similar case,
13 threats by the Court in a previous case of
14 sanctions and pressure that made us withdraw an
15 existing motion to intervene in an earlier case.
16 The fact that we would need to raise issues in the
17 underlying action that weren't even part of the
18 record, and then the reason that the Newman One
19 decision from the Supreme Court said everything
20 was covered at the time. So we wanted to offer
21 that evidence, but the Court excluded it because
22 they said in a general verdict this is not
23 relevant. Well, we believe that now there is a
24 finding of fact that we could have intervened, or
25 that we should have intervened and chose not to.

1 And we tried to give evidence, but it's all
2 excluded.

3 Need for allocation. There's a
4 finding of fact that says Harleysville knew there
5 was a need for allocation. All the evidence in
6 this case is to the contrary. Lee Wright
7 testified, even though it was excluded and
8 proffered, that they did not believe there was any
9 need to allocate because at that time under
10 existing Newman orders, there was no right to
11 allocate. That original Newman order, the first
12 one, said that construction defects are an
13 occurrence and the cost to get to them, fix them
14 and replace, put back the other work that wasn't
15 damaged is all covered. So his testimony was the
16 exact opposite, yet in the order there is a
17 statement that says Harleysville knew of its need
18 to allocate and chose not to. And we believe that
19 needs to change.

20 The other one in paragraph in the one
21 order 39, 41, 42, 43, 44 45, are Harleysville's
22 efforts to intervene. And then the Court finds
23 that in the findings of fact that Harleysville
24 decided not to intervene. I think we at least
25 should be able to explain our reasons why we

1 didn't intervene if there's going to be a finding
2 of fact.

3 The next section is excluded evidence.
4 We think the evidence excluded clearly is
5 prejudicial to Harleysville. These cases are
6 going to go to the appellate courts, and they're
7 going to hear the arguments based on the Duke
8 verses Hawk case and all those cases following as
9 to burden shifting. Who has the burden. Because
10 it starts with the insured has the burden to show
11 damages fall within the insuring agreement. There
12 are some limited situations where if the insurer
13 could have taken care of it in the underlying
14 action without harming the insured and controlled
15 the defense, then the Court might say we're not
16 going to let you go back and fix it. That was the
17 bulk of our testimony. We wanted to offer a lot
18 of evidence, and we did through a proffer. It was
19 all excluded.

20 To give our reasons why. We think the
21 Court is supposed to conduct that analysis and
22 never gave us the opportunity to present that
23 evidence and have it admitted. So what does an
24 appellate court do when they say this is the test.
25 Could they have intervened? Was it right for them

1 to intervene? Was it reasonable for them to take
2 the action that they took? Did the insured and
3 them reach an agreement which is the testimony of
4 Lee Wright. Did the insured and others threaten
5 bad faith against them in the past on a very
6 similar condominium project? Right now the Court
7 can't consider that because it's not part of the
8 record.

9 The other thing in general is that in
10 a bench trial, we believe the case law exists
11 saying that the Court should consider all
12 evidence. It shouldn't exclude anything. It
13 should just take it all in and rule upon it. But
14 a lot of those issues were offered. The Baden
15 opinion. Let's say the Court of Appeals says:
16 Obviously we have to give Harleysville and other
17 carriers the right to allocate damages. How are
18 we going to do that? Can't do it in the
19 underlying action. Since these trials, I have
20 been denied trying to. Judge Harrington was going
21 to come off the bench when I tried to intervene in
22 a case in Charleston. She's like no way, you're
23 not doing that. Laura has been denied in federal
24 court in a construction case saying Judge, I want
25 to intervene for the purpose of allocating

1 damages. I believe it was Judge Perry.

2 MS. EVANS: Judge Buckner in state
3 court.

4 MR. CALAMARI: Judge Buckner.
5 Obviously I keep in touch with a lot of coverage
6 lawyers around the state. We all chuckle because
7 we feel like we have to make that motion, but boy,
8 does it make the trial court judges upset because
9 it places them in a position where they say we're
10 not going to let it happen. Now, in other types
11 of cases, there are times where lawyers intervene
12 when there is one covered cause of action, and one
13 clearly not covered cause of action, and there is
14 going to be damages associated with each, and they
15 have different damages, and they have to put them
16 into the categories. And they'll say we just want
17 to make sure the damages for this are here, and
18 the damages for this cause of action are here.
19 That doesn't hurt the insured, although there is
20 now some cases across the country that say the
21 carrier needs to step back and wait, and their
22 duty of defense prevails. You can sort that out
23 later. And we submitted in our pre-trial brief a
24 number of cases in various states across the
25 country that allow this exact type of action.

1 Newman says you can't do it. Or Newman says you
2 should have intervened. You should have taken
3 steps to protect your rights to allocate the
4 damages. That's a little different. That was an
5 arbitration. If we were here trying the
6 underlying action, no problem. I could come in
7 and say: Judge Milling, you can separate out the
8 fact that I'm the insurance company and this is
9 the reason I'm doing this. But in front of a
10 jury, it's highly prejudicial. You know, there
11 are times when Jim Graham whose deposition is now
12 part of the record, it was offered in the case and
13 his testimony was offered in the case, to say that
14 they knew of these problems. If you look at the
15 closing arguments in some of the cases, Mr. Henry
16 said they knew of these problems. They had other
17 projects. They did the same thing there, doing
18 the same thing now. As Harleysville, I would like
19 to stand up and say yes, yes, they did. They knew
20 of all these things. They intended it, they
21 expected this would happen, therefore it's
22 excluded. I can't do that. I can't do that and
23 maintain the carrier's duty of defense. It just
24 can't be done.

25 We also believe that during trial in

1 these cases, and we raised this, and you overruled
2 it, but on cross examination, a lot of questions I
3 asked, Mr. Henry came back and asked Mr. Wright
4 again, and I didn't object. And I said well, I
5 think he opened the door. And we said no, this is
6 all part of the proffer. I think if we let it all
7 in, we can do it.

8 Prejudice. What's a prejudice to
9 Harleysville excluding that evidence? Well, right
10 now, not letting that evidence in, it's prejudice
11 to Harleysville because the order as it stands
12 says you had the right to intervene or the chance
13 to intervene, and you chose not to, and you don't
14 have any evidence to explain your reasons why. So
15 we are clearly prejudiced by not allowing that
16 evidence in. With Baden, his testimony that the
17 issue up front was that you can't possibly,
18 there's no reasonable method to look at a verdict
19 and conduct any type of analysis to determine what
20 category the jury put the damages in. Well, all
21 the trial work to some extent is opinions,
22 argument, and offering evidence which lends itself
23 to a conclusion. So we offered Baden. We didn't
24 just say to Baden. Hey, look at the report. Look
25 at the report and give us your damages. Tell us

1 how to break it down. We told him go out to the
2 site, spend a hundred hours out there, look at all
3 the damages, look at the reports, find out what
4 the scope is, come up with your estimate of what
5 it would cost you to fix it, don't try to guess
6 what the other people did, and give us a
7 percentage. And that's an opinion testimony that
8 helps the trier of fact to a conclusion at issue
9 in the trial. It can be done. This is by far the
10 least intrusive method to allocate damages. I've
11 heard suggestions well, you could have held the
12 jury another week after trial, and then put in a
13 bunch of other evidence. Carrier could have
14 stepped in, the plaintiff would have been required
15 to have different estimates. Any of those
16 different estimates would have hurt the insured in
17 the underlying action. And then to be right there
18 with the insured and build up their damages, and
19 then tell them it's not covered can't be fair to
20 the insured. That method I don't believe is
21 anywhere near as easy and effective as this
22 method.

23 The reservation of rights letters.
24 You found that they weren't effective, but you
25 excluded the testimony where the insured and Lee

1 Wright meet face to face with the insured's
2 attorney and talked about the coverage issues and
3 how we tried to intervene once. You got all
4 upset. You told us we couldn't, and then we
5 withdrew it. And so now we're looking at this on
6 kind of a joint effort. Let's go forward and
7 handle all these coverage issues later. You
8 excluded that evidence. So we see that there is
9 great prejudice to us in those cases.

10 Incorrect rulings. Because I feel
11 like in a motion, I don't know that this is
12 necessary, but the time on risk. Actually, this
13 one is necessary. Time on risk is -- you awarded
14 in the order time on risk for buildings, damage to
15 buildings that hadn't been built yet. If I can
16 find it. And I put together some charts to show
17 how easy it can be done. Time on risk and the way
18 other judges have done it, the way Judge John did
19 it in the Crossman case, is he took the original
20 CO date for every building. And I made a chart.
21 He took the CO date for every building. He took
22 the end date for damages which you picked, and he
23 -- here it is. He picked an end date for the
24 damage, and he performed a chart. He made up a
25 chart. And these were all submitted with our

1 original orders. This is the Magnolia North.
2 I've got one for Riverwalk too. We submitted, I
3 think, 48 different examples of how to take the CO
4 date plus 30, the last policy date, and the Burek
5 report and come up with an itemized list. Because
6 the way the report stands now -- let me find the
7 Riverwalk one. It was already submitted. The way
8 it all stands now, the ruling finds damages for
9 buildings that weren't built. Because if you see
10 the CO date, the first CO date in Magnolia North
11 is January 9 of 1999. And the last CO date is
12 September 14, of 2000. The last building should
13 only have 77 days time on the risk. And the first
14 building has 691. So what your order has found is
15 building 23 has 691 days time on the risk. And we
16 think that, you know, it's an easy -- during one
17 of the breaks, I'll find the other one. We think
18 that's an easy way to accurately give the
19 evidence.

20 Second one, something I should have
21 mentioned earlier. The final policy. We didn't
22 find that that final policy period in one of the
23 cases was canceled for non-payment. We submitted
24 it, I think, right before we submitted the
25 proposed orders. It was well into the game. And

1 you denied the motion to bring it in. And you
2 gave grounds for that. The problem we have now is
3 I think everybody in the room knows that last
4 policy didn't exist. We mailed it. The policy
5 says that cancelation is effective upon mailing.
6 We mailed out the cancelation notice. The insured
7 is not here to dispute it. We offered that
8 evidence. So the accurate evidence shows a
9 different policy period than what's here. I think
10 we sent that in a year ago. So to say that well,
11 it's too late in the game. Here we are. I don't
12 think it's too late. And if they want to do
13 another day of hearing on any of these issues,
14 we're certainly happy to do that.

15 Allocation. We believe we should be
16 able to allocate for the reasons we've put in
17 there.

18 Reservation of rights. We don't think
19 the judgment holder can raise it. We think all
20 evidence supports the reservation of rights
21 existed and it was valid and understood.

22 Time on the risk. The Court found in
23 a finding of fact that the damages began 30 days
24 after the CO date. The evidence in the record
25 from Drew Brown was that the first rain event

1 which probably was 30 days. I find it interesting
2 that after hundreds of hours of Baden testifying
3 or looking at the project, spending timeless hours
4 and hours of putting together an estimate,
5 analyzing everything, that the order finds him
6 speculative. But Baden who was caught offguard
7 that day says probably that first rain event is
8 when water touched it, but he couldn't say it
9 damaged it. He said it touched it. So how do we
10 find that day. I understand if the Court is going
11 to pick a day, they pick a day. Crossman says,
12 you know, whatever the Court finds. But to say
13 that it happened within 30 days and have a finding
14 of fact, I just don't think that's supported in
15 the record.

16 The punitive damages. Let's talk
17 about loss of use first. Loss of use under the
18 policy is considered to be property damage, and it
19 is deemed to occur at the time of the physical
20 injury to the property. If there is no physical
21 injury to the property, it's deemed to occur at
22 the time of the occurrence. Both of those mean
23 the same thing in South Carolina under our Supreme
24 Court's ruling in Crossman, because the physical
25 damage that took place in this action is a

1 progressive damage. And that is what necessitated
2 the loss of use. The repairs haven't happened
3 yet. Some of them may have. The physical damage
4 is spread out over a long period of time. So time
5 on the risk should be considered on a time on risk
6 analysis. So those numbers should be applied to
7 time on risk. The punitive damages in the
8 Riverwalk case for time on risk are based on the
9 progressive damage period. And so therefore, time
10 on risk should apply to those as well. And the
11 punitive damages for repair cost, same thing.
12 Same thing in Magnolia North where there were \$2
13 million punitive damages. They have got to be
14 under the Gamel factors, they have got to be a
15 function of the actual damages that support those
16 punitive damages, and the actual damages were
17 those progressive damages over the long period of
18 time.

19 One more thing about damages. In
20 this action, the underlying action, the damages
21 sought by the plaintiff were repair cost damages.
22 No other damages were sought. Repair cost, loss
23 of use all related to the construction defect.
24 There are no other categories of damage to
25 consider in those things. It happened during

1 their experts and definitely during the closings
2 where Mr. Henry was able to stand up and say these
3 are the damages in this case, nine million and
4 one. I can't remember what the other one was at
5 Riverwalk. And we've got copies of those. Of
6 course, that's all part of the record as well.

7 I think at this point, Mr. Brown wants
8 to talk a little bit about other issues.

9 MR. BROWN: Thank you, Your Honor. I
10 would like to talk, if I could, about the general
11 verdict rule and intervention because that's
12 really the heart of Mr. Henry's case is the
13 general verdict rule and whether that rule
14 applies. Essentially what Mr. Henry has the Court
15 doing in its order is ordering that there was no
16 effort to intervene, there was no effort to seek a
17 special verdict, and therefore, the general
18 verdict rule applies. That's essentially the
19 entirety of his argument.

20 There are five reasons, Judge, why
21 that's incorrect. One, no one is trying to
22 impeach the verdict in the underlying trials.
23 There is no contest here about the damages should
24 have been less than what they were found to be in
25 the underlying trials. That's not what this case

1 is about. This case is instead about allocation.

2 Secondly, a trial judge, as Your Honor
3 knows, need not grant an intervention request,
4 need not grant a special verdict request even if
5 everybody is asking for it. So assume everyone
6 asked for that, and the judge says no, I'm not
7 going to do that. I'm not doing either one of
8 those. Where in Mr. Henry's world does that leave
9 us? He says well, there's now a general verdict.
10 What do we do? Well, Your Honor, we would submit
11 you would have to have some kind of proceedings to
12 allocate, even under his view of the legal world
13 here and the principals. And so if that's the
14 case, and if a trial judge is within his
15 discretion to grant or deny the intervention
16 request, to grant or deny the special verdict
17 request, how can his view of the rules be right.
18 And the reason is it's not. That's the simple
19 reason. It's not right.

20 Third, as Mr. Calamari said, the
21 parties here, the insured and the carrier, had an
22 agreement to have these issues of allocation
23 litigated in a separate proceeding. That trumps
24 everything Mr. Henry is talking about with the
25 general verdict rule. When you have an agreement

1 with your insured, you're not going to get into
2 this allocation in the underlying trial. We're
3 not going to try to intervene. We don't want to
4 do anything to prejudice you. We'll agree that we
5 will have this dealt with in subsequent
6 litigation. That is the end of the story. And
7 that should have prevailed here and defeated any
8 kind of general verdict rule that Mr. Henry
9 proposes.

10 Fourth, as Mr. Calamari said, we've
11 already cited numerous cases where the courts have
12 in fact allowed subsequent litigation to address
13 allocation issues. And they've pointed out we
14 don't want the insurance carrier to intervene
15 because that injects the issue of insurance in
16 front of a jury in the underlying trial. That's
17 bad. We all know that's a bad thing. We don't
18 want that. And so they allow the subsequent
19 litigation to go forward without allocation.

20 And lastly, fifth, the general verdict
21 rule just simply does not apply. And let's talk
22 about the general verdict rule, if I could, for a
23 minute. The general verdict rule is a concept
24 that relates to the failure to show any prejudice.
25 That's what it's all about. The loser can't show

1 because of the general verdict that he's been
2 prejudiced. And the way it normally works is like
3 the Owners Insurance Company case that Mr. Henry
4 cites to the Court, you've got two claims, either
5 one of which is supported by the jury verdict.
6 One of them, there's an argument about coverage,
7 and one of them there's not. Well, even if you
8 win the argument that there was no coverage for
9 one of the claims, there is still a claim standing
10 for which the verdict completely can be covered.
11 And therefore, the Owners Insurance Company court
12 said general verdict rule applies. You can't show
13 any prejudice. Now, here, there is no question
14 that there is prejudice. And that's the key
15 difference, and this is why the general verdict
16 rule does not apply to this case.

17 The key point here, and Mr. Calamari
18 mentioned it, is in a construction defect case, by
19 its very nature, the plaintiff is proving
20 construction defects, bad workmanship, and the
21 need to repair those bad defects and workmanship.
22 Therefore, obviously you can't repair something
23 for free. Therefore, there are damages found for
24 repairing. Well, repairing bad workmanship is not
25 covered. Okay. What's the end result of that?

1 The end result is this verdict without any
2 question whatsoever contains coverage -- contains
3 damages that are not covered by these Harleysville
4 policies. Okay. So there is no operation of the
5 general verdict rule like it normally operates
6 where you can say well, the verdict could have
7 been all attributed to a covered claim, so
8 therefore, there is no prejudice here. There is
9 no way this verdict can be attributed to a covered
10 claim. This verdict absolutely of necessity has
11 non-covered damages in it. So the general verdict
12 rule does not apply.

13 Now, he cites to the Newman case, and
14 says well, Newman -- I went under Newman, and
15 that's the end of the story. Well, there's
16 several answers about Newman. Number one, Newman
17 was an all or nothing occurrence case. That's
18 what it was all about. I argued the second Newman
19 case, the rehearing when they heard it the second
20 time. It was all about whether there's an
21 occurrence or whether there's not an occurrence.
22 Newman in his second released opinion for the
23 first time said we're going to find these types of
24 damages not to be covered. And they based it
25 actually on an exclusion in that case. I will

1 submit to the Court that Newman has been
2 transcended by the Crossman case about these types
3 of progressive damages. But in any event, Newman
4 for the first time in its second opinion said some
5 of these damages that the arbitrator found aren't
6 covered, but we can't tell from this record. And
7 the issue wasn't before the Court to try to
8 allocate those damages, so we're not going to. So
9 that's what the Newman court said. We asked for a
10 rehearing, and Mr. Henry pointed this out in our
11 rehearing petition. We said this looks like
12 you're projecting, Court, that we can't allocate
13 or reallocate in a subsequent proceeding or
14 subsequent litigation. And the Court, as he
15 pointed out, declined to take rehearing for a
16 third time or a second time, I guess it would be.
17 That doesn't surprise me that the Court frankly
18 didn't want to issue a third opinion in the Newman
19 case. But the fact is the issue that we're
20 talking about here wasn't litigated in the Newman
21 case. There was no briefing about this in the
22 Newman case about whether you can allocate or
23 whether there is a general verdict rule that
24 applies, number one.

25 Number two, and this is really, really

1 important. The Newman case involved an
2 arbitrator. The underlying merits trial was an
3 arbitration, not a jury trial. Why is that
4 important? Because, as Mr. Calamari said, the
5 injection of the insurance issue before the jury
6 is what causes the problems with intervention.
7 Okay. There is no issue with an arbitrator. In
8 fact, arbitration rules routinely permit any
9 interested party, including insurance companies,
10 to intervene in an arbitration proceedings and
11 have their issues decided inside that proceeding.

12 So you have in the Newman case a very
13 distinguishing factor there. You have an
14 arbitrator that if there is -- you need to
15 intervene in that proceeding, which I mentioned
16 arbitration rules would allow, big deal. You
17 intervene and you tell the arbitrator hey, we've
18 got insurance. He's a lawyer. He understands.
19 He may be a judge. In that case, it was Dahls
20 Cook, a very experienced lawyer. He's not going
21 to be biased because of the existence of insurance
22 and be unable to render a fair determination
23 because of that. He can easily make an allocation
24 decision. That's very easy for him to do.

25 In the case with a jury, however,

1 totally, totally different story. Here, we
2 have -- you come in, Mr. Henry wants to put a duty
3 on us to come in and say either ask the jury all
4 these questions about which they don't have any
5 idea what we're talking about. Why are we asking
6 these damages to be put in these buckets on a
7 special verdict form. Why is that being done? If
8 you're on a jury, just imagine yourself as a
9 juror. Why are we doing this? This doesn't seem
10 to make any sense. It's not an issue in the case.
11 In fact, in the Ford -- the Brown verses Ford
12 Motor Company case that I argued not too long ago,
13 or it might have been Carter Watson verses Ford,
14 one of those. The Court said it was improper to
15 submit questions to the jury that weren't actual
16 issues that needed to be decided in the underlying
17 case. You couldn't ask them theoretical questions
18 or questions that might help the parties out in
19 some later issue. They actually said that's not
20 proper to do. And Judge Dennis had done that
21 thinking, you know, I can solve a later indemnity
22 question by having the jury just answer this other
23 question. Hey, jury, answer this question. And
24 the Court said you can't do that. And in the
25 underlying litigation here, there was no coverage

1 dispute. There is no question about insurance
2 going on in front of the jury. And there
3 shouldn't have been. That's the whole point. We
4 shouldn't be going in front of the jury talking
5 about what's insured, what's not insured, what's
6 covered and not covered.

7 So for those -- and let me mention
8 something about how important that arbitrator's
9 point is, Your Honor. State verses Inman, it's
10 recorded at 395 South Carolina 539. Here's what
11 the Court said about bench trials: It's well
12 established that it is a near insurmountable
13 burden for a defendant to prove prejudice in the
14 context of a bench trial as the judge is presumed
15 to disregard prejudicial or inadmissible evidence.
16 So that's what I was talking about. In the
17 arbitration setting, insurance company can
18 intervene all day long if they wanted to. It
19 doesn't matter. You've got an arbitrator there
20 who can sift through that, and it's not going to
21 be affected by it. In a jury setting, no.
22 Insurance company can not go intervene in that,
23 inject the issue of insurance in that underlying
24 trial. It's prejudicial to the insured. Why is
25 it prejudicial? Well, the jury is sitting there.

1 They go wow, these guys are suing these
2 contractors. Oh, there's insurance that covers it
3 all. Oh well, we're fine. We'll grant the big
4 verdict. Insurance will cover it. That's the
5 well-known prejudice that comes from injecting
6 insurance into that issue into the underlying
7 trial. That's all I'm gonna say unless Your Honor
8 has any questions about general verdict rule.

9 I wanted to mention two quick other
10 things, and then I'll sit down. The issue of
11 reopening the case about the cancelation, Your
12 Honor. The two reasons why what Mr. Henry has
13 written in this order for you to execute that you
14 have executed are wrong. One, it is clear that a
15 question to reopen a case is up to Your Honor's
16 discretion. That is clear. However, there is
17 guidance out there about what that discretion
18 should mean or what you should do in exercising
19 your discretion. There's a case called -- I don't
20 have the full cite, I'm sorry. It's Daniel,
21 reported 32 Southeast 2nd, 5. It's a relatively
22 short case. But it basically says the discretion
23 that should be exercised is you should be trying
24 to ascertain the truth and be fair. That's
25 basically the two guiding principles. Well, the

1 truth, as Mr. Calamari said, is this policy was
2 canceled. Is it fair to him, Mr. Henry's clients,
3 to not let them get coverage under this canceled
4 policy? Of course it is. They didn't pay for it.
5 So yes, that's absolutely fair. They should not
6 get a windfall just because this insurance notice
7 of cancelation was not found until after the
8 evidence was closed. Why was it not found? Well,
9 the only evidence of record why it wasn't found is
10 that the department about these insurance policies
11 moved several times from various cities, and it
12 was misplaced. But, Your Honor, I would submit
13 that the discretion of the Court should have been
14 exercised to find that policy was canceled.

15 Last point, and I'm not going to go
16 back over things that Mr. Calamari said, I'll try
17 not to, about the reservation of rights issue.
18 That whole issue, Your Honor, is just -- should
19 not be in your order, with all due respect. This
20 alternative ruling that Mr. Henry put in there
21 about well, I'm gonna find that the reservation of
22 rights letters weren't sent, number one. They
23 weren't specific enough, number two. Therefore,
24 I'm gonna find there is no South Carolina law on
25 it. That you're estopped from disputing any

1 coverage. All of those things, number one, they
2 weren't argued by Mr. Henry in his pre-trial
3 brief. I think he mentions in a footnote that
4 some Courts have found that reservation of rights
5 letters that aren't valid or fails to provide
6 reservation of rights that the carrier is
7 estopped. I think he mentioned in a footnote that
8 some Courts have held that. That was the extent
9 of what he said in the pre-trial brief about it.
10 This is just not something that the Court should
11 be issuing an order on, with all due respect. And
12 secondly, he has the Court saying about this -- I
13 wanted to mention this about the cancelation. I
14 forgot to mention this, Your Honor. Let me go
15 back to that one second. He has the Court on the
16 cancelation saying that there was not conclusive
17 proof of the cancelation in any event. And I just
18 wanted to mention that's not the standard. The
19 Court is supposed to use the preponderance of
20 evidence standard. There's a case call Noysette
21 verses Ismael in the Court of Appeals. It was
22 overruled in part but not in that part, that says:
23 Notice of cancelation is competent evidence of
24 cancelation to satisfy preponderance standards.
25 But getting back to reservation of rights -- I'm

1 sorry for skipping around there. When documents
2 are unavailable, original documents are
3 unavailable, secondary evidence is allowed.
4 There's a case out there where actually no -- I
5 think it was Penn National. Penn National comes
6 in and says we don't have any insurance coverage
7 on this. The insured -- the alleged insured can't
8 prove. He can't present a binder. He can't
9 present a policy. He can't present a canceled
10 check or paid for anything. Guess what, the Court
11 found there was coverage anyway based on secondary
12 evidence. So just because you don't have a
13 particular reservation of rights letter, the
14 original, doesn't mean there can't be secondary
15 evidence put in to prove that.

16 As Mr. Calamari said, the end is
17 amalgamated anyway. He mentioned -- Mr. Calamari
18 mentioned the default, and that's important
19 because under the Roach case, Roach verses Young
20 Brothers case, 504 Southeast 2nd, 311. It's well
21 settled the defaulting party is deemed to admitted
22 the truth of plaintiff's allegations and to have
23 conceded liability. So you got to look at the
24 allegations. Well, the insureds all admitted
25 things like some or all of the damage was expected

1 or intended by us. They admitted that.
2 Mr. Henry's order he's provided to you says that
3 you find there wasn't any expected or intended
4 damage. But the insured already admitted it
5 through the default. They admitted that there
6 were coverage issues through the default. And
7 finally, as I mentioned, the agreement of the
8 parties in any event to litigate this in
9 subsequent litigation, Your Honor, completely
10 trumps any kind of reservation of rights argument
11 that they submit that this letter wasn't good
12 enough. The parties had agreements between the
13 lawyers meeting with each other, as Mr. Calamari
14 said, where they agreed they were gonna litigate
15 these issues in subsequent litigation.
16 So for all those reasons, Your Honor,
17 the reservation of rights letter ruling is wrong.
18 It should be vacated, with all due respect. The
19 Court should reopen the matter and allow that
20 notice of cancelation and find that cancelation to
21 be valid. And third, Your Honor, I would really
22 submit and ask the Court to consider heavily the
23 true application and really whether there is
24 really any application of the general verdict rule
25 in this case. I would submit this type of case it

1 does not apply because of the nature of the
2 damages that are required to be proven in a
3 construction defect matter. Thank you.

4 THE COURT: Mr. Henry. I guess you
5 need to address those issues raised first, and
6 then raise your own issues.

7 MR. HENRY: Your Honor, you know, it's
8 a little difficult, Your Honor, because they
9 skipped all around out of order, and I thought we
10 would argue in the order in which we submitted our
11 briefs. But there's a lot of things that they
12 have said that were not included, and also are
13 news to me.

14 I'll address one of them which is that
15 the testimony of Mr. Wright concerning the
16 reservation of rights letters was excluded. The
17 only thing that I recall in the record that was
18 excluded was he tried to introduce what they
19 termed an affidavit from Mr. Van Wie which turned
20 out not to be an affidavit because it wasn't even
21 notarized, and the Court noted that in the record
22 that it was excluded.

23 The rulings on the grounds never
24 asserted. The testimony of Mr. Baden was excluded
25 because it was irrelevant. Now, in his order or

1 in his motion to alter or amend, he says that the
2 Court came up and said it was speculative, and I'm
3 gonna address that in just a minute. But just to
4 address these things in a cursory fashion to begin
5 with. The testimony of Mr. Baden was that his
6 estimate had no relationship to the jury verdict.
7 His estimate didn't even relate back to when the
8 jury verdict was rendered. It didn't have
9 anything to do with labor rates or -- in fact, he
10 had never seen the scope of repair or the damages
11 that were submitted to the jury upon which the
12 scope of repairs were, and that's the reason.
13 Now, he says in his order that I didn't object on
14 the ground of speculation. Well, to me, any
15 speculative evidence is not relevant. And I don't
16 think it makes one bit of difference whether the
17 ruling is that it's speculative or irrelevant. It
18 is irrelevant because it does not prove any fact
19 or disprove any fact in issue. And that's the
20 test. It related to nothing. And if he can do
21 that, then we have -- then the insurance carrier
22 can put the insured to having another case, and
23 there are a lot of cases that say this, to go and
24 have to re-litigate damages. And that's just what
25 the Newman case says. You had a chance to

1 intervene. And while I'm on that subject, Your
2 Honor, and Mr. Brown was intimately involved in
3 that case, and they asked the Court to let them
4 then reallocate damages, and the Court said no.
5 You took over the defense of the case. You had an
6 opportunity at trial to allocate damages, and you
7 didn't do it. Same thing in Owners verses
8 Clayton. That was a jury trial. And Pleicones
9 writing for the Court said you submitted two items
10 of damages to the jury. If one of them is
11 covered, the whole verdict is covered. And the
12 reason for that is they're not going to allow the
13 insurance company who controls the defense and can
14 place -- it's like the Tiger River said that you
15 cited in the order, that the insurance company
16 controls the defense, so they're in a position
17 they can say heads you win, tails I lose. They
18 are controlling the defense. And you have to
19 think of it in this way. If they don't get an
20 allocated verdict, who should suffer for that, the
21 insured or the insurance company. And I think the
22 insurance company and Newman and Owners verses
23 Clayton and all the general verdict, Mr. Brown is
24 clearly wrong that this case does not come under
25 the general verdict rule.

1 Mr. Calamari said that you've excluded
2 90 percent of the evidence. He proffered
3 testimony of Mr. Baden. You excluded hearsay
4 between the insured and the insurance company.
5 And I would bring to the Court's attention the lee
6 verses Gulf Insurance Company case which you also
7 cite in the order. And in Lee, they tried to do
8 the same thing. The insurance company -- Lee was
9 third party claimant, and insurance company tried
10 to introduce a statement between them and the
11 insured, and the Court said no, that's hearsay.
12 They would not allow it, and the Supreme Court
13 upheld that. In addition, Your Honor, Lee says
14 the injured party who brings a suit against the
15 liability carrier is possessed of all rights of
16 the insured and subject to all defenses that exist
17 as between the insured and the insurance carrier.
18 They brought us in. He says in his motion there
19 is no provision in the policy that provides that
20 they can sue us. Well, there is. It's right in
21 the policy. It's clearly in the policy. We
22 therefore put in the position, we had to have a --
23 do a mandatory counter-claim.

24 The next item, Your Honor, is the
25 occurrence. He says that there is improper ruling

1 that all damages are an occurrence. The Court
2 didn't find that all of the damages resulted from
3 an occurrence. The Court found that because of
4 the general verdict rule that all the damages --
5 the entire general verdict was covered. Mr. Brown
6 acts like he's been in the jury room and knew what
7 the jury allocated damages to. That's the whole
8 point. I have the damages here on this chart,
9 Your Honor, that we submitted to the jury in both
10 cases. And if they think it's unfair to them, the
11 homeowners fixed \$525,000 worth of these damages,
12 and applying the time on the risk rule to that
13 where they've spent the money back here, that's
14 not fair to them. But I'm gonna get into that
15 argument too. But there's no question that
16 covered claims and uncovered claims were submitted
17 to the jury. How the jury made that allocation,
18 they did not give us what we asked for. They gave
19 us about half of what we asked for.

20 And Bob says Cook can't be an
21 occurrence. And this was also argued by them,
22 that because the contractor, he says the insured
23 intended the construction exactly as built. Well,
24 there's no question that they intended to
25 construct what they constructed in the way they

1 constructed it. But the problem that they have
2 with their argument is the test as to whether
3 there's an occurrence, that is an accident is a
4 two prong test. You got to show that they
5 intended the act, and they intended the results of
6 that act. And that's exactly what Your Honor's
7 order says. And Lee Wright testified he had no
8 evidence that these insureds intended to damage
9 anybody or intended any kind of water intrusion
10 into the buildings. If I get out here and drive
11 70 miles an hour, I intend to drive that 70 miles
12 an hour. But if I run into somebody, I didn't
13 intend to run into them. The insurance company
14 can't come in and say well, you were intentionally
15 driving 70 miles an hour, so it's no accident.
16 It's the same thing. Same general theory.

17 One of the major issues here is the
18 general verdict, the failure to intervene, and to
19 ask for allocation. I'm not gonna stand here,
20 Your Honor, and criticize anybody for what they
21 did or what they didn't do. Whether they, you
22 know, decided to intervene, didn't decide to
23 intervene or what. There is a long body and
24 history of law in South Carolina that says that
25 when the insurance carrier takes over the defense

1 of its insureds, it assumes a high responsibility
2 to its insureds. And if they take an action,
3 whatever their action is, they're responsible for
4 it. And whatever they don't do, they're
5 responsible for because their main responsibility
6 is to protect their insureds, not them. The Court
7 in Tiger River rejected the theory that the
8 insurance company was there to protect their own
9 interests. They're there to protect the insured.
10 Now, Your Honor, correctly excluded testimony as
11 to why they didn't intervene. It makes absolutely
12 no difference. It's like the Supreme Court saying
13 you should have intervened -- I mean you should
14 have objected to that testimony, and you say well,
15 I was in another case and another judge said he
16 overruled that objection. The idea that they
17 didn't intervene because some other judge said
18 they couldn't. And this is not a new thing, Your
19 Honor. It's clearly not a new theory. What the
20 Courts have said is that an insurance company who
21 takes over the defense of the insured has the
22 responsibility to get a verdict that is subject to
23 allocation, and if it's not subject to allocation,
24 the insured doesn't take the hit, the insurance
25 company did, because they control the defense,

1 they control whether it's settled or not. They
2 control everything. And the insured, if they
3 can't intervene, there are tons of cases to this
4 effect. And some of these were cited in Your
5 Honor's orders. But if the insurance company is
6 not permitted to intervene, they have to go to
7 their insured and say: Listen, some of these
8 damages may be covered and some of them may not be
9 covered. And if you allow an allocated verdict --
10 an unallocated verdict, we're not gonna cover your
11 claim because we won't know whether they had a
12 decision or verdict on covered or non-covered.
13 Lee Wright testified he did not do that. He did
14 not tell his insureds that. So it doesn't matter
15 the reason they didn't intervene. They didn't
16 intervene. And Mr. Brown can turn the Newman case
17 any way he wants to, and say it's a lot different
18 if it's an arbitration. The Court has done this,
19 and Your Honor listed in a footnote, I don't know
20 how many cases on the general verdict rule where
21 defendants, insurance companies want to go back
22 and allocate damages, and they said no. They said
23 no in arbitration. They said no in a jury -- in
24 many, many jury verdict trials. And if you think
25 about, well, Harleysville didn't know what to do

1 because this was kind of a new thing. Well, guess
2 what. It was very new in Newman. Because they
3 for the first time delineated, specifically
4 delineated in a construction setting what was
5 covered and what was not. And Harleysville or
6 Mitch Brown, whoever was representing them, came
7 back to the Court and said we want to allocate.
8 The Court said 'huh-uh, no. You had that
9 opportunity back when the arbitrator was making
10 his decision, and you didn't do it. So the entire
11 verdict is covered. Same thing with Owners verses
12 Clayton. Judge Pleicones said if one of these
13 damages or items of damage submitted to the jury
14 is covered, it's all covered because there's a
15 general verdict.

16 Punitive damages, Your Honor. He
17 mentioned punitive damages.

18 Could I have a glass of water?

19 THE COURT: You'll have to take it at
20 your own risk. They didn't unlock the room. I
21 don't know that they put fresh water.

22 MR. HENRY: Punitive damages. The
23 Court cited two cases right in point on punitive
24 damages. Punitive damages, he says in number
25 eight, is not an occurrence. Well, punitive

1 damages are awarded because of an occurrence. And
2 clearly there was an occurrence here. I don't
3 think they have argued that there was no
4 occurrence at all. There was some occurrence.
5 And the punitive damages clearly came from the
6 actions of the defendants, and the actions of the
7 defendants came during the policy period because
8 after the policy period, they were long gone.
9 Punitive damages, he also says, are not awardable
10 because they have to be for punitive damages to be
11 awarded, there has to be intent, which is clearly
12 not the case. And Your Honor cited cases in South
13 Carolina that said you do not have to be -- there
14 do not have to be any intent for intent to harm to
15 award punitive damages.

16 In reference to the default of the
17 insureds, there are a number of cases out there
18 that say that the default of the insureds has no
19 bearing or prejudice upon third party claimants.
20 And of course, they made us parties. And we
21 stepped into their shoes and we were subject -- I
22 mean if they had contended, for example, Your
23 Honor, that non-cooperation with the insured, we,
24 according to what they're saying is we have to sit
25 back and do nothing and let them prove there was

1 no cooperation from the insured, and that's
2 clearly not the law.

3 On the reservation of rights letters,
4 Your Honor. My recollection is that you did not
5 exclude testimony from Lee Wright on the
6 reservation of rights letter. There was a lot of
7 testimony, a lot of cross examination. Bob
8 introduced the reservation of rights letters.
9 They never objected and said that we didn't have a
10 standing to raise that issue. They were -- they
11 raised that issue by putting the reservation of
12 rights letters into evidence. And we, of course,
13 stood in the shoes of the insured. And in
14 reference to the reservation of rights letters
15 that they didn't produce. Mr. Wright, he just
16 blanket testimony is I'm a hundred percent sure we
17 sent one. Well, did you see the reservation of
18 rights? No. Did you talk to the guy? What
19 have you done to try to find it? Did you call a
20 witness? No. He didn't do anything to say that
21 there was a reservation, just his blanket
22 statement. And the Court can certainly determine
23 that because there was no copy, there was no
24 email, there was no witness called. Mr. Lee
25 Wright didn't even write the reservation of rights

1 letters. This other guy wrote all of them. And
2 so they could have certainly called him to testify
3 that there were reservation of rights letters sent
4 to these other people.

5 And in number 14, again, it's sort of
6 the same thing that we've talked about before is
7 that the work that was completed was intended by
8 the insured, and it was, but there was no
9 testimony. And Lee Wright said he had no proof
10 concerning the intent of the insured to cause
11 harm. They brought in -- introduced the testimony
12 of Mr. Graham, I think it's David Graham, who was
13 the window guy. And it was simply, as Your Honor
14 pointed out, a dispute between window manufacturer
15 and how they were installing them. And the window
16 manufacturer said they were installing them wrong.
17 And the contractor said no, something is wrong
18 with the windows. It turned out to be both.

19 And per building time on the risk, of
20 course, my contention is, Your Honor, that, and
21 I'm gonna argue that in just a moment, that time
22 on the risk is not applicable in this case and
23 can't be applied in this case for a number of
24 reasons. But the Court in Crossman, I believe,
25 said the Court is to fashion a remedy on time on

1 the risk that would be equitable between the
2 parties.

3 So in any event, Your Honor, post
4 judgment interest, he makes a statement in number
5 16 that there is nothing in the policy that allows
6 -- requires Harleysville to pay post judgment
7 interest. In fact, on page 6 of the policy, it
8 says: All interest on the full amount of the
9 judgment that accrues after entry of the judgment
10 and before we have paid, they will not reduce the
11 limits of insurance. That's one thing they say
12 they pay is the prejudgment interest, post
13 judgment interest, the costs of the action, all of
14 those.

15 We've already talked about exclusion
16 of expert testimony. You excluded Baden's expert
17 testimony. What I recall you excluded on
18 Mr. Wright as far as his testimony was concerned,
19 was he was trying to take Drew Brown's report and
20 say which in these categories was resulting damage
21 and not. And Your Honor excluded that testimony
22 because he did not -- he did not qualify as a
23 witness, and it did not.

24 Mr. Calamari in number 18 says that
25 the time on the risk can not be applied because it

1 applies to non-covered damages. Well, again, we
2 don't know what the jury awarded. In effect, he's
3 agreeing with me that the damages, non-covered
4 damages and covered damages was submitted to the
5 jury. And I want to argue this a little more
6 fully in a moment, but that's the whole point that
7 I've tried to make in my contention that time on
8 the risk can not apply to a general verdict is
9 that we don't know what the jury allocated damages
10 to. He says that time on the risk should be
11 applied to punitive damages. Well, the punitive
12 damages occurred -- didn't occur over a period of
13 time. As far as I know, they occurred when the
14 defendants were working on the building and caused
15 all the problems they caused. That they didn't --
16 the punitive damages had to have arisen before the
17 policies expired because the insureds were gone by
18 that time. So the punitive damages arose out of
19 their conduct during the policy -- during when the
20 time the policies were in effect.

21 And loss of use, Your Honor, number
22 20, he says that the Court erred in its failure to
23 apply time on the risk the loss of use. Under
24 paragraph 15 of the policy, loss of use is deemed
25 to occur at the time of the event caused by it.

1 So it's deemed to occur at one time, and the event
2 had to be during the policy period. So the Court
3 was clearly correct in not applying time on the
4 risk to loss of use..

5 In exception number 22, he says it was
6 improper finding of fact. Number 22 stating that
7 damage began 30 days following the CO. Mr. Brown
8 testified that damage began around the time of the
9 CO, at or near the time of the CO. And I have
10 already addressed the issue with the reservation
11 of rights letter.

12 And I have already addressed the issue
13 under number 24, the decision that Harleysville
14 made not to intervene. If you look at the
15 testimony of Lee Wright, he says two things.
16 First of all, he testified that nothing was
17 covered because there couldn't be any occurrence
18 because they intended the work like they did. The
19 second thing he said is they told the insureds,
20 the grand -- quote, grand majority, end quote, of
21 the claims weren't covered. Now, it sounds like
22 to me he knew some of them may be covered. And so
23 I don't think they can say that they thought
24 everything was covered so they didn't seek to
25 intervene, or everything was not covered, and

1 didn't seek to intervene. And again, what the
2 Court did or what they did in some other case, the
3 fact of the matter remains that they made no
4 attempt to intervene, and they made no attempt to
5 advise the insurance that -- to advise the insured
6 that the devastating consequences that could arise
7 (from a general verdict.. And Harleysville
8 basically took the position that nothing was
9 covered, so they didn't need to do anything at
10 all, and they didn't do anything as far as trying
11 to get an allocated verdict or advise the insured,
12 and they were there in the courtroom. They were
13 there consulting with defense attorneys. And they
14 don't have to inject insurance into the case, Your
15 Honor. This is done all the time. The jury finds
16 a verdict, and then you submit special
17 Interrogatories to them and ask them how they
18 allocated the verdict, you know. And if you know
19 ahead of time that you're gonna do that, you can
20 try -- you can categorize those things. And to
21 apply time on the risk to the general verdict
22 denies both the carrier and us an opportunity of a
23 jury trial on those issues.

24 The rest of it is that the basis for
25 Harleysville not intervening, which I've

1 addressed. Twenty-seven and 28, the proffer of
2 evidence which I've addressed is in 27.
3 Twenty-nine is affidavit of Roger Van Wie. And
4 we've already discussed that. And that it would
5 be hearsay and not admissible. And if you look at
6 the affidavit in any event, Your Honor, had
7 nothing to do with this case. It had all to do
8 with Harleysville trying to avoid a bad faith
9 action. That's all it was. It didn't have
10 anything whatsoever to do with this case. Nobody
11 -- nobody denied -- this is under 30, nobody
12 denied that Harleysville had discussions with its
13 insured. Lee Wright testified to that. That was
14 not excluded that he had discussions with their
15 insureds. In fact, Your Honor, in Newman, when
16 they wanted to allocate damages, the Court said
17 you took over the defense. You had an agreement
18 with your insured that you litigate damages after
19 the verdict. And so it was up to you to get an
20 allocated verdict so it would be possible, but you
21 let them get a general award in this arbitration,
22 and so who's gonna take the fault. We're not
23 gonna allow a re-litigation of damages. So I
24 think Newman clearly disposes of that argument
25 concerning arbitration and the general verdict

1 rule.

2 In 31, he talks about the Harleysville
3 understanding of the law and not intervening. I'm
4 not sure -- well, I take the position that what
5 their understanding of the law was, and what it
6 turned out to be is of no relevance whatsoever.
7 And again, they go into reasons for not
8 intervening. And the River Oaks transcript, they
9 wanted to introduce it to show that they tried to
10 intervene in that case, I think. And Your Honor
11 correctly held that that had nothing to do with
12 this case.

13 Thirty-five, they asked for Drew
14 Brown's -- they asked Mr. Wright to interpret Drew
15 Brown's report. Mr. Wright was not submitted
16 as an expert, and the Court properly sustained an
17 objection to his doing that. He says that
18 Riverwalk opened the door. And I want my argument
19 basically the same, Your Honor, to go to both
20 cases, unless I've got one thing that is
21 otherwise. But Drew Brown's report clearly, Your
22 Honor correctly excluded the testimony from Lee
23 Wright on that. And Baden's testimony was not
24 proper cause it had nothing to do with this case.
25 And in reference to the policy, Your Honor, it's

1 clear throughout this case that I had a very
2 difficult time getting the policies. And then
3 when they got the policies, they said these are
4 the policies. They introduced them and
5 represented to the Court these are the policies.
6 I understand you can make a mistake. But supposed
7 they'd say well, two or three more of these
8 policies were canceled or whatever. And then we
9 got another -- we got to go to discovery and all
10 that sort of thing so that the Court correctly did
11 not allow them to reopen the case to submit that
12 policy.

13 Your Honor, I want to address, and I
14 know I'm being a little long-winded. I want to
15 make sure I get all of this, and this -- I want to
16 argue now --

17 THE COURT: Let me ask you one
18 question.

19 MR. HENRY: Sure.

20 THE COURT: One of the issues they
21 raised I failed to make a specific argument on the
22 default motion. A specific order on the default
23 motion.

24 MR. HENRY: Right.

25 THE COURT: And I think I covered the

1 default. Looking now, I can't remember. It looks
2 like it may have been a part of the order
3 dismissing the claims against National Surety, and
4 their counter-claims and cross-claims as opposed
5 to being incorporated into the principle order.

6 MR. HENRY: Right.

7 THE COURT: Do you have an opinion one
8 way or the other?

9 MR. HENRY: I do not, Your Honor. I
10 don't believe you've issued an order of default.
11 But my position is it's of no consequence because
12 the order of default against the insureds does not
13 bind the third party claimants, and there's a body
14 of law to that effect.

15 THE COURT: I honestly thought I had
16 included that in my general order. I see where I
17 addressed it somewhat in my order relating to
18 National Surety. And I may end up just taking
19 some language. I don't think it prejudices the
20 rights of the underlying plaintiffs in this
21 matter, but I did intend to acknowledge that you
22 had filed it, that the underlying insureds had not
23 answered, but that underlying plaintiffs were not
24 prejudiced by that.

25 MR. HENRY: Very well, Your Honor. I

1 want to now argue my motion to alter, amend, and
2 this applies to both the Newman -- I mean, sorry,
3 Riverwalk and Magnolia cases. To be quite candid
4 with Your Honor, I have looked throughout the
5 country, and I have got West Law to look for a
6 case that said you could do or couldn't do what we
7 have done here. And frankly, I could not find a
8 case dealing with time on the risk and a general
9 verdict where different damages were submitted to
10 the Court. But as I've said previously, I believe
11 that Owners and Newman dispose of that issue. In
12 addition, Your Honor, if you look at the pleadings
13 in this case, what Mr. Calamari -- the relief
14 Mr. Calamari asked for was that the Court allow
15 the allocation of the general verdict, and then
16 the application of time on the risk to the covered
17 damages. I can't find in the pleadings anywhere
18 where he sought application of time on the risk to
19 a general verdict. I can not believe that
20 Harleysville wants a ruling that time on the risk
21 applies to a general verdict because substantial
22 prejudice could happen. It could be occurring
23 here. I don't know. We don't know what the jury
24 did. But you start out, Your Honor, with what's
25 the purpose of time on the risk. And Crossman

1 makes it very clear, and all the other cases that
2 I found make it very clear that time on the risk
3 applies only to progressive damages. That's all
4 it applies to. It's a way to divide liability up
5 between insurance carriers where damage happens
6 over a period of time and successive policies. In
7 order for the Court, and this is in the cases, in
8 order for the Court to apply time on the risk, it
9 must first determine what the progressive damages
10 are. That is the first exercise in applying time
11 on the risk is to determine what the progressive
12 damages are. Here we don't know. We can't know.
13 There's no way for us to know because of the
14 general verdict. And so in all due respect, Your
15 Honor, by applying time on the risk, you are doing
16 what you did not allow Bob to do in that you are
17 basically saying that all of the damages were
18 progressive damages. And we don't know that. And
19 that's the reason for the general verdict rule
20 when an insurance company takes over the defense
21 and allows a general verdict because it is
22 clearly, clearly prejudicial to one party or the
23 other party or maybe even both. And as I showed
24 you here, Your Honor, the damages that were
25 submitted were all over the board. There are

1 contingencies, there is money that the homeowners
2 spent. And to take the money that the homeowners
3 have already spent and apply -- if the jury gave
4 us that, to apply time on the risk to that is
5 prejudicial to them. I would say that in the
6 Prime South proposal, there are probably -- well,
7 no question. In the Prime South proposal there
8 are damages that were probably not covered. But
9 we don't know what the jury did as far as those
10 damages are concerned. As trial lawyers, and all
11 of us in here are trial lawyers. We know what the
12 jury probably did. They got back there and said
13 the plaintiff wants this and defendant wants that,
14 and we'll come somewhere in the middle.

15 But there's another aspect of this,
16 Your Honor, that needs to be considered. In both
17 cases, in Magnolia North, three causes of action
18 were submitted to the jury. Negligence, breach of
19 warranty of workmanlike service, and breach of
20 fiduciary duty. The jury found in the plaintiff's
21 favor on all three of those. In Riverwalk, two
22 causes of action were submitted to the jury.
23 Well, actually three. Negligence, breach of
24 warranty of fiduciary duty, and breach of warranty
25 of habitability. That breach of warranty of

1 habitability related to the class action.

2 Breach of warranty of habitability --

3 I'm sorry, breach of fiduciary duty occurs at the

4 time that the common elements are turned over to

5 the homeowners. That was in 2002. I have the

6 dates here somewhere in my argument. I have the

7 dates as to when -- and they're in the record as

8 to when they were turned over. So we don't know

9 if the jury found breach -- well, we know they

10 found that, but we don't know how they allocated

11 damages. They didn't allocate any damages. So

12 if you look at breach of warranty of fiduciary

13 duty, the time on the risk should be stopped at

14 that time. Now, it is correct that the Goddard

15 case says that the damages for breach of fiduciary

16 duty are those damages that it would take to

17 either put money in the reserves for the

18 homeowners to fix the damages, or whatever it

19 would cost to fix the damages, and the continued

20 deterioration of the buildings. So true that they

21 may or may not have awarded continued

22 deterioration of the building. If they didn't, it

23 would only be fair to stop the time on the risk in

24 2002 when they found breach of warranty of

25 fiduciary duty. They didn't award us -- they did

1 not award us all that we asked for. So who is to
2 say, Mr. Brown knew a lot about what the jury was
3 doing, but who was to say that the jury didn't say
4 well, when those homeowners got those common
5 elements, they should have fixed them right then.
6 And we're gonna deduct whatever else the damages
7 were that continued after that. Now, that's total
8 speculation. But that's the point. To apply time
9 on the risk, we've got to speculate about a lot of
10 things in the jury that the jury did.

11 Here are my dates. The breach of
12 warranty of fiduciary duty occurred in Riverwalk
13 on May 29th of '02. And Your Honor stopped the
14 damages in '04, two years and a month after the
15 breach. And then in Riverwalk, -- I'm sorry, in
16 Magnolia North, the breach of warranty occurred
17 September the 9th of '02, and that's in the Court
18 of Appeals decision. And Your Honor stopped the
19 clock May the 5th of '04.

20 Your Honor, I don't want you to get
21 the impression from my saying this that I agree
22 that the time on the risk would apply to the
23 general verdict because my position is that it
24 doesn't.

25 And another thing, Your Honor, that

1 also needs to be considered is the verdict we got,
2 the general verdict we got had an offset to it of
3 over a million dollars in each one. If you can
4 apply -- if we had known that you could apply time
5 on the risk to a general verdict, we could have
6 taken that set off and distributed it so it
7 benefited us in time on the risk. And so we are
8 getting a deduction for time on the risk, and then
9 we are getting a deduction on top of that for set
10 off. There's a case, Your Honor, and frankly, I
11 have not read it very closely, but it's a Colorado
12 case that says that set off is not applied when
13 time on the risk is used.

14 Now, the last thing I want to say,
15 Your Honor, and then I'll mercifully sit down, is
16 that we need to think on applying time on the risk
17 the precedential effect that such a ruling would
18 have. In this case, the insured are out of
19 business and leaving them as you are with this
20 verdict, with this decision, a multi-million
21 dollar verdict against them is of no consequence.
22 But suppose these were going concerns and this
23 happened. I'm not sure that we would be doing the
24 same thing. We may be. But I'm sure there'd be
25 14 other lawyers sitting back here trying to stop

1 such a verdict because it is devastating to the
2 insured. They have nothing to do with the case.
3 Well -- they had nothing to do with the defense.
4 Harleysville took over the defense. And
5 Harleysville because they didn't intervene or ask
6 for an allocated verdict is sticking their
7 insureds with a multi-million dollar verdict, and
8 it just ain't fair. It's not right. And, Your
9 Honor, you could think of all kind of examples
10 that if this is the rule of law would be extremely
11 prejudicial to the insurance carrier. And I don't
12 think they want a decision that time on the risk
13 can be applied to a general verdict. You take a
14 situation where you've got let's say a ten-story
15 condominium building, and the windows are
16 defective which are not covered and it's caused a
17 hundred thousand dollars worth of rot, and it's
18 gonna cost \$5 million to replace the windows, and
19 a general verdict is rendered. The insurance
20 company is gonna take it on the chin. They gonna
21 get much more. And I don't want you to get the
22 impression I'm worried about the insurance
23 company.

24 THE COURT: I did not.

25 MR. HENRY: But you can turn that

1 around. You can turn that around and make it
2 terribly unfair to the insured also.

3 So, Your Honor, my contention is that
4 the order should remain as it is, and you
5 should -- except you should eliminate time on the
6 risk which can not be applied to a general verdict
7 with various items of damages. I might mention,
8 Your Honor, time on the risk was for pollution
9 cases. It's only been recently where it's been
10 applied to construction cases. And generally in a
11 pollution case, you get one verdict and they apply
12 time on the risk to it for pollution. Here,
13 you've got a general verdict with all grades of
14 damages, and a general verdict that you don't know
15 how the damages were allocated, and we would ask
16 Your Honor to alter your order by eliminating time
17 on the risk.

18 THE COURT: We have been going for a
19 couple of hours. Let's take a few minutes, step
20 to the powder room and that kind of stuff. Then
21 I'll hear you briefly.

22 (A recess transpired.)

23 THE COURT: All right. Mitch, you
24 gonna speak?

25 MR. BROWN: Yes, sir. Just briefly in

1 reply to that, a couple of points, Your Honor. I
2 would commend, Your Honor. I know Your Honor has
3 already read it, but the Duke verses Hoch, case,
4 H-O-C-H, is interestingly cited by both sides in
5 the case, which is an odd thing. But when you
6 read that case, I think it reveals that the law is
7 a little bit different from what Mr. Henry is
8 trying to convince the Court with respect to the
9 insurance company's duty. What the Duke case
10 really says is that the insurance company can't
11 take over the defense of a case, allow a general
12 verdict to occur, and then say, you know, we
13 outsmarted you, insured. We allowed this general
14 verdict to occur, and so you can't prove that
15 there's anything covered, therefore, you lose, you
16 don't have any coverage. That's what the Duke
17 case says the insurance company can't do. All
18 right. And so when the insurance company doesn't
19 try to create an allocated verdict, what the Duke
20 case stands for is the insurance company can't
21 stand on that burden of proof that ordinarily
22 rests with the plaintiff, insured rather, and
23 insist that the plaintiff prove up what is covered
24 and not covered because you got a general verdict.
25 But then and very importantly, the Duke case

1 stands for the proposition that in subsequent
2 litigation, that allocation will be determined.
3 That's what the Duke case does in fact. It
4 remands back to the trial judge for a
5 determination of the proper allocation. And so
6 basically it's a slightly different principle that
7 applies here.

8 THE COURT: Duke, was that a federal
9 case?

10 MR. BROWN: Yes, sir. It's a fifth
11 circuit case, but there are a lot of cases that
12 cite to it.

13 THE COURT: Got any South Carolina
14 cases that cite to it for that proposition?

15 MR. BROWN: No, Your Honor. Your
16 Honor's order has this case kind of prominently
17 featured. That's one reason I wanted to bring it
18 up as well. But the very argument that Mr. Henry
19 advances here to Your Honor was made in the Duke
20 case and rejected in the Duke case. The insured
21 argue that the insurance company should have been
22 estopped from litigating coverage and litigating
23 allocation. It says because coverage could have
24 been presented and decided and not having been
25 presented might not now be raised. And the Court

1 said the short answer is coverage was not decided
2 cause that's not an issue in the underlying case.
3 And as to the latter, we have already addressed
4 this which is the point about allocation. Then
5 they remand the case and tell the district judge
6 look back at the prior evidence in the underlying
7 trial and try to determine an allocation from that
8 evidence, and if it's impossible, introduce
9 additional evidence to determine that. So that's
10 what the Duke case stands for.

11 I was very glad to hear Mr. Henry
12 remind me that in Newman, the very first time
13 anybody had talked about this delineation of oh,
14 actually there's some things covered, some things
15 not covered is when this second opinion was
16 released. And that's very important because what
17 was being litigated in Newman is the insurance
18 company was saying nothing is covered. There is
19 no occurrence. Faulty workmanship means no
20 occurrence. Insured was saying everything is
21 covered. No one was arguing any allocation.
22 Nobody raised that issue. Nobody presented that
23 in any pleadings. When the Court came out, as
24 Mr. Henry points out, with its second opinion and
25 says: Well, we're not gonna rule in favor of

1 either one of you. We're gonna say some things
2 are covered, some things are not covered. But we
3 can't tell -- the issue of allocation wasn't
4 raised. We can't tell from this verdict what's
5 allocated and what's not. We're not gonna render
6 an allocation decision now. So that's the
7 important point is this really wasn't as issue.

8 My second point is what I've already
9 said is that if you want to say Newman stands for
10 that anyway despite the fact it wasn't briefed,
11 you can still distinguish it because it was an
12 arbitration proceeding.

13 And finally, let me mention the other
14 case on which he relies. The Owners Insurance
15 Company. That's the other key case that Mr. Henry
16 has cited numerous times. And the articulation of
17 the general verdict rule in that case is very
18 important to read. It's very short, but this is
19 the key. And it's on page 561 of the opinion. It
20 says: Where general verdict is supported by at
21 least one theory, it will be upheld on appeal.
22 And that key word supported is the point I've been
23 trying to make. Here we have a verdict that
24 everybody knows has some non-covered damages in
25 it. It has some covered damages, but we know it

1 in fact has some not covered damages. After all,
2 you got to repair the defective workmanship.
3 That's part of the damage. And so the general
4 verdict rule really just does not apply to this
5 particular kind of a fact pattern, Your Honor.

6 MR. CALAMARI: I would like to address
7 Mr. Henry's motion. I kind of go in reverse. I
8 won't take too long. I know we've been here
9 awhile. His last one is the lasting effect this
10 might have on a going concern who's an insured.
11 Well, in the Crossman case, Beazer is now a going
12 concern. That case started off Beazer was alleged
13 to have had damages of, I think, 34 million,
14 something like that. They worked it out to where
15 it was alleged to be 16.8 million when they
16 settled the case. They sought 7.2 million back
17 against Harleysville, and the Court ended up
18 ruling that they had 1.5 million. So I wouldn't
19 worry about any lasting effect in this case when
20 there's no insured because we already have the
21 going concern that got a fraction of what they
22 sought in the case.

23 Just one objection on the front end,
24 and I don't even see it in his post-trial motion.
25 I don't think there's ever been anything raised

1 because there's different causes of action. I
2 don't think it matters, but I don't think you can
3 raise something -- it's not even raised in the
4 motion, and the argument was there was negligence,
5 breach of warranty, breach of fiduciary duty. And
6 also, I think there was some statement that
7 occurred in 2002 or later which is after the
8 policy period. So I don't think that's an issue.

9 But on the larger scale, all he's
10 asking for in the case on those charts, and I've
11 printed out copies I don't need to submit. But
12 he's asking for construction related damages. If
13 there is one thing clear in the second Crossman
14 case, construction related damages are subject to
15 time on risk. So what's he asking for in this
16 case? He is asking for all the damages because
17 it's a general verdict. The damages in the
18 general verdict are comprised of covered damages
19 and non-covered damages. He says you take the
20 non-covered damages and put them in this category.
21 You apply time on risk to it. So now he's getting
22 the time on risk damages to covered damages and
23 time on risk to non-covered damages. The point I
24 made in my motion was you should allocate because
25 now he's getting -- necessarily getting time on

1 risk to non-covered damages. To say that well, we
2 don't know what the jury said, so we're not gonna
3 apply time on risk because I might get a hundred
4 percent of all non-covered damages under the
5 general verdict. That's not fair. I don't think
6 the Supreme Court would ever rule on that. If you
7 give a hundred percent of those damages, you would
8 necessarily be saying the jury only awarded
9 damages for the repair of the defective work, and
10 therefore, I'm gonna give you a hundred percent of
11 the non-covered damages. I don't think that's
12 right. I think you picked an appropriate damage
13 period and applied time on the risk.

14 I'm going kind of in reverse here.
15 The only other thing was something Mr. Henry
16 brought up when he said that the policies. The
17 policies were admitted into evidence. I think
18 it's Exhibit number 17 is that book of policies.
19 That policy is not in there. We never could find
20 that policy. There was a hard time finding a few
21 of the policies. We found all but that one. That
22 policy is not in there. The only place that
23 policy is, is listed on I think it's Exhibit 16
24 which is a summary of the policies that are in
25 that book. So essentially now we're having a

1 policy period on a policy that's not in evidence
2 based on some confusion.

3 THE COURT: That issue my
4 understanding was, was at the time we were being
5 presented with testimony that these were the
6 policies, that there was some missing policies
7 from the book. But that the listing of policies
8 was the policies, and not to worry about whether
9 it was a particular policy in there or not in
10 there because they were all the same language in
11 the policies. And so I have accepted because I
12 think it occurred in the first December 10 trial.
13 It occurred that way in the December 11 trial.
14 I'm just not gonna go back and re-open the
15 evidence for a change on something that was
16 presented to me as being the policies I think in
17 two different exhibits. I think you're right.
18 There was the book, and then I think there was an
19 Exhibit 32 or something that was another listing
20 of the policies. I can't remember that exhibit.

21 MR. HENRY: I think that was a
22 prototype, Your Honor, if I remember correctly.

23 THE COURT: But I think the evidence
24 is one of those things, you know, maybe it was
25 what it was. But it's just one of those things I

1 don't know it's appropriate at this point in time
2 after two hearings to come up and say oops, we
3 finally found a cancelation that we couldn't find
4 in time to make it a part of our presentation. So
5 I'm gonna decline again opening the record back to
6 receive any additional information about policies.

7 Does National Surety want to get into
8 this argument?

9 MS. MCCARTHY: Just very briefly, Your
10 Honor. Karin McCarthy and Laura Evans with
11 National Surety. We fully support the Court's
12 order of dismissal as to National Surety. We
13 object to any attempt by Harleysville to
14 eviscerate the effects of that order.
15 Essentially, the way we read it, we think it's
16 clear that National Surety may bring its
17 counter-claims to the extent there is a final
18 judgment that exceeds the Court's judgment in
19 these cases. We think that the Court's findings
20 were fully supported by the record. Harleysville
21 submitted its policies, and Exhibit 17 included
22 its chart which National Surety objected to, and
23 it's not to say that we are litigating the subject
24 of National Surety's counter-claims here. We are
25 not as an excess carrier bound by Harleysville's

1 allocation of the damages to the policy periods.
2 However, we think that the Court could find based
3 on the evidence that the damages were fully
4 covered under the \$54 million of Harleysville
5 limits that were before the Court, particularly
6 whereas here as Harleysville just pointed out to
7 you, the entities were amalgamated, and they just
8 argued that a reservation of rights as to one
9 should apply to all. We feel the same way as to
10 those policy limits, and the Court could certainly
11 apply a horizontal exhaustion of the primary
12 policies to the damages in this case which would
13 more than cover the \$7 million, approximately \$7
14 million of damages as to both cases.

15 And as to briefly on the time on the
16 risk, as Mr. Henry correctly pointed out, the
17 Court can fashion an equitable time on the risk
18 application where we would not necessarily object
19 to the institution of a time on the risk to
20 commence at the commencement of each certificate
21 of occupancy for each building. In this case, it
22 would be particularly inequitable to National
23 Surety because you have a truncated damages time
24 on the risk period as to damages because the Court
25 ended the damages period at the time when it

1 determined that Drew Brown and the underlying
2 cases had found that all of the repairs would have
3 been necessary in about 2003 and 2004. I can't
4 remember which case was which on those dates.
5 However, we have now truncated that time on the
6 risk period. We're going to truncate that further
7 which is going to end up shifting a greater amount
8 of the damages into the National Surety policy
9 period which, as you know, is allegedly excess to
10 an exhausted primary Heritage policy. So that
11 would end up to the extent that Harleysville
12 obtains any kind of a ruling as to the National
13 Surety policies being triggered because its
14 policies are exhausted. That time on the risk
15 period would be very inequitable to National
16 Surety.

17 We also just want to point out that
18 the judgments, the final judgment that we
19 certainly support the determination that the
20 policies are not triggered by these judgments, but
21 that is judgment as to damages that does not
22 include interest. The Court has found that
23 Harleysville was obligated to pay as of the date
24 of the judgments is the Harleysville obligation.
25 Therefore, National Surety would not be subject to

1 any interest calculations. So the final judgments
2 would only be as to the damages.

3 Oh, just one other thing. On the
4 bifurcated counter-claims. We do have outstanding
5 discovery in the cases that were bifurcated.
6 However, we would like certainly to get an order
7 that Harleysville will preserve that evidence, or
8 be subject to exfoliation order. Alternatively,
9 they're free to produce the evidence now, but we
10 don't want to be subject to prosecuting our
11 counter-claims without that evidence.

12 THE COURT: Specifically, you mean
13 specific evidence that you're talking about?

14 MS. MCCARTHY: Yeah, we certainly may
15 tailor that discovery. We certainly didn't ask
16 for a tremendous amount of material. It basically
17 pertains to the exhaustion of the Heritage
18 policies, which claims to have exhausted the amount
19 of settlement of the policies that were issued to
20 all the entities involved, and to the extent that
21 Harleysville claims that it doesn't have that
22 evidence, we think we be entitled to a presumption
23 that there would be similar type coverage for
24 other entities, other insured entities as there
25 are in this case, and additional insured coverage

1 for Heritage as well as if that evidence is not
2 available. That's it. Thank you very much.

3 THE COURT: You have served discovery
4 on Harleysville on the counter-claim?

5 MS. MCCARTHY: Yes.

6 THE COURT: And what you would like
7 would be simply to have Harleysville keep it in
8 its possession?

9 MS. MCCARTHY: That's all we're
10 asking.

11 THE COURT: All that evidence that
12 would be responsive to your discovery request?

13 MS. MCCARTHY: Yes, Your Honor.
14 Thank you.

15 THE COURT: Would Harleysville have
16 any objections?

17 MR. CALAMARI: I don't think we have
18 any intention of destroying evidence, but I have a
19 feeling they're out of the case.

20 MS. MCCARTHY: We feel like Michael
21 Corleone. Every time we think we're out, they
22 pull us back in.

23 MR. CALAMARI: The other thing is the
24 time on the risk per building actually benefits
25 them. I don't know why they objected to it.

1 MR. HENRY: Your Honor, since Mitch
2 brought up the Duke verses Hoch, could I just
3 comment on that very, very quickly?

4 THE COURT: Sure.

5 MR. HENRY: I've read that case and
6 200 other cases around the country involving the
7 same issue. Duke verses Hoch was a little
8 different because in that case, if I remember
9 correctly, it was against an accountant. And the
10 accountant had stolen money out of his trust
11 account, and the Court directed a verdict on that
12 which made it very easy or much easier to
13 determine what was covered. And if you look at
14 the line of cases after that in most
15 jurisdictions, it says before we send this back
16 for an allocation of damages, you have the burden,
17 insurance company, to show that there's a basis
18 upon which you can determine how the jury
19 allocated damages. That's what all the cases say.
20 They don't just say oh, you know, and they talk
21 about the burden. Most of these cases are on the
22 burden. The burden is on the insured to bring it
23 into the coverage, but if they don't get an
24 allocated verdict, the burden shifts to them to
25 prove what the jury did. And if it's impossible,

1 the vast majority of cases are that they pay the
2 entire verdict as in the Clayton. And I won't go
3 over, but all the cases, Your Honor, are kind of
4 summed up by the recent case in 2010 of Jenkins
5 verses Feud that says: Defendant contributed to
6 drafting the general verdict form, and general
7 verdict makes it impossible to determine how the
8 jury allocated damages. The Court will not
9 speculate on how the Court allocated damages. And
10 that's exactly the case we have here, your Honor.

11 THE COURT: My reading of Crossman
12 raises sort of two matters. A progressive damage
13 question, and it also raises the question of what
14 is the proper way to treat an insurance company
15 who's issued a policy. Because it seems like in
16 Crossman there were more than one insurance
17 company involved. And the Court was saying in
18 essence that it's not proper for there to be
19 coverage and responsibility for an insurance
20 company to pay a verdict when it didn't have a
21 contract of insurance with the insured. And so it
22 was talking in terms of sometimes there could be
23 insurance, and sometimes there may be a time frame
24 when there was no insurance. And if there was no
25 insurance, then the insured bore the burden of

1 that period of time where nothing was covered.
2 What it didn't say but what's the practical effect
3 is so did the damaged plaintiff had to
4 individually bear the burden of no insurance if
5 you had a bankrupt insured at the time. Certain
6 events occurred that there was no coverage. It
7 would be nice if there was some insurance
8 requirement or some state mandate that homeowners
9 be able to provide by some kind of policy for
10 continuing coverage that an insurance company had
11 to draft, and then there would be coverage all the
12 way down the line. But that's not where Crossman
13 has us. I think that I can take this general
14 verdict that clearly has some elements of covered
15 and non-covered damages, repair of the defective
16 work verses consequences of the defective work,
17 and apply the time on risk to that. I think the
18 testimony of plaintiff's expert in the underlying
19 case was he believed damages began 30 days out in
20 the certificate of occupancy. I also think that
21 that testimony was that it was either that May of
22 2004 or May of 2003, showed that by that point in
23 time while there may have been some ongoing
24 damages, it was bad enough then that it was gonna
25 have to be fixed and repaired. And so I use that.

1 as the stop date. I don't like the concept of
2 doing a per building allocation for time on risk
3 because I then think I really am speculating about
4 how much damage occurred to this building verses
5 how much damage the jury said occurred to that
6 building. But I think that the general verdict
7 rule keeps me from going and trying to allocate
8 based on how much was covered and how much was
9 non-covered. But the Crossman case indicates that
10 I can create an order that can do justice in these
11 situations relating to when an insurance company
12 provided coverage, and when it did not provide
13 coverage, and that necessarily hurts the
14 plaintiff. But I don't think that the Supreme
15 Court seemed to consider that as much of a problem
16 as it considered the equity to the insurance
17 company for when it had insurance verses when it
18 did not have insurance.

19 I don't think I have to accept all of
20 the evidence into a non-jury case, and I try to
21 shuffle what's relevant and what's not relevant.
22 I think that there are likewise cases that tell me
23 I should rule on admissibility of evidence to
24 insure that when I'm making a ruling that I have
25 not considered evidence that's inadmissible. So I

1 think having given an opportunity to make a
2 proffer is the way to handle that so that the
3 Supreme Court sees the proffer, and if they
4 determine I've made a mistake and should have
5 allowed it as evidence, then they have that which
6 can be considered, and they can say I ruled
7 improperly, and they can remand it for once again
8 to be tried by someone as a trial court. And so I
9 think I handled that appropriately.

10 If I have made rulings on grounds that
11 had not been asserted to me, I apologize. But
12 here today, it's always hard to prove in absence
13 of something, but nobody has said: Judge, there's
14 no way in this transcript you could have possibly
15 considered this evidence cause it's just not
16 there. So I think that if I have got some rulings
17 on grounds that have not been asserted at trial or
18 based on evidence that I have excluded but then
19 kept it in, I will invite y'all to present that
20 appropriately to the appellate.

21 I think the punitive is not an
22 intended act. I think the punitives are covered.
23 I think that it was not an act that intended to
24 cause damage to the owner. I think it was an
25 intended act, but I think there is a significance

1 in that difference that the punitive damages are
2 covered as well.

3 I will issue a separate order
4 incorporating the language basically that's in the
5 order dismissing the National Surety matter
6 providing that while the named insureds are in
7 default, there is no prejudice to the underlying
8 plaintiffs as a result of their having chosen to
9 not effectively participate, which is not unusual
10 where an entity no longer exists, and they got no
11 money to pay lawyers. And this is not the kind of
12 case where it's gonna be pro bono for a lawyer to
13 come in and take a position. So I don't think
14 that the way this thing shakes out that the
15 plaintiff should be prejudiced in something like
16 this.

17 I don't think that I need to set out
18 all of the reasons that Harleysville chose not to
19 make a motion to intervene. I don't think that
20 those are necessarily that relevant. I can recall
21 in the time that I was on the bench that motion
22 after motion after motion was filed in the
23 railroad cases about where was the proper venue.
24 And some of my friends on the bench were being a
25 little more blustery, and others would be a little

1 stronger in their rulings. But finally that issue
2 got presented, and it got ruled on by the Court,
3 and we now know about venue. I don't think that
4 because somebody had chewed Harleysville out
5 previously for trying to intervene is any reason
6 for not trying to intervene. And I don't think
7 asking for an allocated verdict simply because
8 you're afraid it might prejudice somebody, and not
9 giving the Court a chance to determine whether or
10 not the special verdict form was in fact
11 prejudicial is a reason for saying I didn't think
12 I could do it. I think if you had made the
13 motion, and it had been a ruling on the motion,
14 you made the request, there had been a ruling on
15 the request, there would be something that could
16 be dealt with.

17 So I think that, you know, it was a
18 decision by Harleysville that they made. I'm just
19 me. If you made it to me, I never get mad at you
20 because I know you got to make it. If you don't
21 make it, you stub your toe maybe down the road.
22 But I'm not gonna change my ruling on that as
23 well.

24 If there was a certificate of
25 occupancy, then I think the building was built.

1 So I don't think I have required damages to be
2 awarded on buildings that were not built. I think
3 I used the certificates of occupancy
4 appropriately.

5 I think, you know, my ruling with
6 respect to National Surety is correct. If this
7 case gets handled in such a way that they can
8 potentially become liable, then there ought to be
9 a request at that time to go forward with a full
10 battle royal between Harleysville and National
11 Surety on whether or not you properly handled your
12 allocations and whether or not they've got some
13 responsibility in the matter. And I don't think
14 that it is required because I think it's implicit
15 in something like this that while these issues are
16 outstanding that no good lawyers are going to
17 dispose of evidence that might become relevant at
18 some point in time. But I may make some slight
19 modification in my National Surety that just says
20 that both sides shall retain all evidence that
21 might be relevant in the event that there is some
22 future litigation between the two of them, because
23 if there's to be such language it ought to be both
24 of you so each one of you are on notice if you go
25 and screw with the evidence, you're gonna likely

1 be subject to a spoliation charge and whatever
2 else the trial judge wants to do with you. So I
3 will -- I can do more detailed orders on my
4 denial.

5 Of course, the ones where I would do
6 orders, I got to issue something. So I got to
7 modify the motion on the default. I got to modify
8 the National Surety order, for lack of a better
9 phrase, so I can get those things. Otherwise, we
10 can treat the record of this hearing. I'll just
11 do an order that says that I have denied the
12 motions of both parties, and let the transcript
13 handle my rulings in it.

14 MR. BROWN: Your Honor, couple things.
15 I think that would be fine. There is no need for
16 any additional written orders other than
17 something, a form order that said denied. But
18 just thinking through the National Surety piece.
19 There's already going to be duties on us to
20 preserve evidence and not destroy evidence and
21 things like that. And I'm just wondering if the
22 Court wants to have itself issuing an order if
23 some subsequent litigation comes up in which there
24 is an allegation that somebody did something with
25 the evidence. We're gonna be in some other court

1 but needing to come back to you because you issued
2 this order. Are we in violation of your order?
3 So I just would like to bring that to Your Honor's
4 attention.

5 THE COURT: There are judges who
6 retire and have issued orders. I don't know that
7 you have to go back to the judge on everything
8 with respect to an order, particularly if it's an
9 order that says preserve the evidence. If you got
10 an order that says don't trespass, you got Judge
11 Smith who issued that, and Judge Jones who is
12 hearing the motion, and they violated your order
13 for trespassing. I think that the subsequent
14 judge can handle those things. I will probably
15 just put some generic language in there to that
16 effect.

17 MR. HENRY: Your Honor, would you at
18 least consider my argument about the end date of
19 the time on the risk being the date that the
20 breach of fiduciary duty occurred?

21 THE COURT: I've thought about those
22 damages for breach of fiduciary duty, and did a
23 little research, and it seems like damages for
24 breach of fiduciary duty, as you indicated, are
25 the cost to the repair type thing.

1 MR. HENRY: Progressive and
2 non-progressive damages.

3 THE COURT: Yeah. And I think that it
4 is a fairer remedy just to use the 2004 date by
5 which your expert said all the damages that needed
6 to occur to require replacement would be
7 appropriate, or otherwise I could be in Bob's
8 situation of making award for things that are
9 covered.

10 MR. HENRY: Your Honor, if you look at
11 the transcript, Drew Brown testified that he did
12 his report in 2003, and the scope of repair was
13 done in 2003. That's what was submitted by us to
14 the jury was the scope of work on the 2003.
15 That's clear in the second hearing.

16 THE COURT: I thought that the report
17 said that he went out there --

18 MR. HENRY: He went out there, Your
19 Honor, in 2004, I think. But he also testified
20 that he did -- the report was done in 2003. And
21 that 2003 report is the one he based his -- is the
22 one that the cost estimate of repair was based on.
23 It makes -- I see no reason to take it to 2004
24 when he was just out there the last time. He had
25 done his report --

1 THE COURT: I thought he was out there
2 for a reason. Just to see what the status of
3 things were. I'll have to go back and look at
4 that, but my order is pegged on when it was my
5 understanding that Drew Brown found the damages
6 had progressed to the point where all of this work
7 was required. And I thought that was the May 2004
8 report.

9 MR. HENRY: May I submit something to
10 you on that, Your Honor? Rather than delaying
11 this transcript or going through, but I am very
12 positive that he testified that his report was
13 done in 2003, and that's what the cost estimate
14 was based upon.

15 MR. CALAMARI: Your Honor, all of the
16 evidence is that these are progressive damages
17 that continued well on through today. The other
18 thing is this is not raised anywhere in the
19 post-trial motions. His post-trial motions just
20 simply says don't apply time on risk. And to say
21 now that he's contesting the end date of the
22 damage period is improper. But you based it on
23 the expert report which was when he went out there
24 and took the pictures and decided on the labor
25 cost and everything else when that was issued.

1 And there were damage estimates that happened as
2 late as 2008 that were changes in damage
3 estimates. But his motion doesn't raise any of
4 these issues at all and is not properly before the
5 Court.

6 MR. HENRY: It's discussed, Your
7 Honor, on page 45 of the second hearing.

8 THE COURT: I'm sorry, page 45 of the
9 transcript of the second hearing?

10 MR. HENRY: Yes, Your Honor.

11 THE COURT: I think what Bob is saying
12 is that's not something you complained about when
13 you filed your motion to alter or amend. And that
14 you're now trying to bring up something that had
15 not been presented in court to be a part of the
16 hearing for today.

17 MR. HENRY: Well, I said it didn't
18 apply at all, but I was just saying if it's gonna
19 be applied, it needed to be applied with the
20 correct dates. I mean --

21 MR. CALAMARI: That's not anywhere in
22 this motion.

23 MR. HENRY: I didn't put that in my
24 motion, that specific language.

25 THE COURT: I guess this is the best

1 way to handle it. I think I have applied the
2 correct date for when the damages were in
3 existence and ran and reached the point where the
4 work needed to be done. If I misconstrued the
5 evidence, bring it to the attention of the
6 appellate courts.

7 All right. Thank y'all very much.

8 ALL ATTORNEYS: Thank you, Your Honor.

9 (The hearing was concluded at 1:45 p.m.)
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CERTIFICATE OF REPORTER

I, Bonnie L. Sabados, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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 official seal this 16th day of April, 2013, at Conway, Horry County, South Carolina.

Bonnie L. Sabados
Registered Professional
Reporter
My Commission expires
July 8, 2015

I N D E X

	Page
MR. CALAMARI.....	4
MR. BROWN.....	32
MR. HENRY.....	46
MR. BROWN.....	73
MS. MCCARTHY.....	82
MR. HENRY.....	87
THE COURT.....	88
CERTIFICATE OF REPORTER.....	101

REQUESTED INFORMATION INDEX

(No Information Requested)

E X H I B I T S

(No Exhibits Proffered)

STATE OF SOUTH CAROLINA

COUNTY OF Horry

2005-CP-26-3289

2003-CP-26-7169

TONY L. POPE and LYNN S. POPE,
individually and representing as a
class all unit owners of Riverwalk
at Arrowhead Country Club Horizontal
Property Regime,

Plaintiffs,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants,

--- AND ---

RIVERWALK AT ARROWHEAD COUNTRY CLUB
PROPERTY OWNERS' ASSOCIATION, INC.,

Plaintiff,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants.

B E F O R E:

HONORABLE CLIFTON NEWMAN

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

JOHN P. HENRY, Esquire
PHILLIP C. THOMPSON, Esquire
Attorney for the Plaintiffs

ERIC G. FOSMIRE, Esquire
ANDREW C. COLE, Esquire
Attorneys for the Defendants

VOLUME II of IX
January 6, 2009

1 Your Honor.

2 THE COURT: All right.

3 (Witness excused).

4 MR. THOMPSON: Your Honor, we now call Jennifer
5 Harmon, if you can give me just one second to get my
6 exhibits back in order.

7 THE COURT: All right. The name again?

8 MR. THOMPSON: Jennifer Harmon.

9 THE COURT: Jennifer Harmon?

10 MR. CLARK: Yes.

11 THE COURT: We'll be at ease a couple minutes to
12 get a chance to refocus.

13 (Recessed at 10:45 a.m.).

14 (Reconvened at 10:51 a.m.).

15 THE COURT: Yes, sir.

16 MR. THOMPSON: Your Honor, the plaintiff calls
17 Jennifer Harmon.

18 JENNIFER HARMON,
19 after being first duly sworn, testified as follows:

20 THE CLERK: State your name for the Court and
21 spell your last name, please.

22 THE WITNESS: Jennifer Harmon, H-a-r-m-o-n.

23 DIRECT EXAMINATION

24 BY MR. THOMPSON:

25 Q Miss Harmon, who are you employed by?

1 A The Noble Company of South Carolina.

2 Q How long have you been with the Noble Company?

3 A Since 1986, so 23 years.

4 Q Okay. Can you tell the Court what the Noble
5 Company does?

6 A Well, we are a full service real estate agency but
7 our emphasis is basically homeowner association
8 management.

9 Q Okay. And as a homeowners association managing
10 company what are the duties of the Noble Company?

11 A Well, we, basically like to think of it as a two
12 prong approach. We have to manage the physical assets
13 on the property itself, meaning we take care of the day
14 to day maintenance on the buildings, make sure pools
15 are kept clean, buildings are clean, that sort of
16 thing. And then we also do the financial management
17 hopefully as well. We set up budgets, collect dues,
18 pay bills, help the Board procure insurance, those type
19 things.

20 Q Okay. And do you also schedule and organize Board
21 of Director meetings and homeowner association
22 meetings?

23 A Yes.

24 Q Okay. And do you also make a record of those
25 meetings through meeting minutes?

1 A Yes, we do.

2 Q Okay. So, the Noble Company is responsible for
3 that?

4 A Yes, sir.

5 Q Okay. And the purpose of the Board meetings are
6 basically -- generally what is the purpose of the Board
7 meetings?

8 A Well, the Board regularly gets together and they
9 review finances, they review any building issues,
10 day-to-day work and so forth.

11 Q Okay. What is your position in Noble Company?

12 A I'm vice-president of operations.

13 Q Okay. What does that entail?

14 A Basically all the HOA employees, supervisors,
15 administrative people, accounting people, they
16 eventually answer to me.

17 Q Okay. And how long have you been in that
18 particular position?

19 A Probably the last maybe five or six years.

20 Q And before that you were director of operations?

21 A Right. .

22 Q What is the difference between those?

23 A Not a lot. I think more people answer to me,
24 that's all.

25 Q Do you have any degrees, licenses or certificates

1 as it relates to being a property manager?

2 A Well, obviously I graduated from USC years ago
3 with a degree in journalism. I actually have my IREM,
4 Institute of Real Estate Management, I hold a real
5 estate license, I'm a member of the that Board, local
6 Board, South Carolina Board, all those things.

7 Q Okay. Is the Noble Company the property
8 management company for Riverwalk?

9 A Yes, we are.

10 Q Okay. And how long has the Noble Company been the
11 manager?

12 A I think we took over out there somewhere around
13 June 1st of 1999.

14 Q '99, okay. Initially who was it that hired the
15 Noble Company in '99 to be the property management
16 company at Riverwalk?

17 A We were hired by Heritage Communities,
18 specifically Roger Van Wie.

19 Q Okay. And so, Mr. Van Wie was acting as an
20 officer of Heritage Communities in hiring the Noble
21 Company, is that correct?

22 A Yes, sir.

23 Q Do you know how he was involved in Heritage
24 Communities?

25 A Well, he served as, not Heritage Communities, as

1 that meeting on Wednesday, March 15 of 2000.

2 Q Okay. And were you in attendance at this meeting?

3 A I was.

4 Q Okay. And was there anyone from Heritage
5 Communities there also?

6 A Yes, Quinn Hardester was there.

7 Q And what was Quinn Hardester's title at that time
8 with Heritage Communities?

9 A He was president and COO of Heritage Communities.

10 Q On this date, March 15, 2002, was the Board still
11 controlled by the developer?

12 A It was.

13 Q Okay. And if you would, read the last paragraph
14 on the first page.

15 A "Mr. Hardester then informed the membership about
16 the problems with the decks. He told the membership
17 that Heritage Communities has finally found the problem
18 with the leaking decks and the problem with the mold on
19 the decks. There was a product called Hydro-Seal
20 installed on the decks and when the railings on the
21 decks were installed the screws penetrated the
22 waterproofing, allowing water to get into the decks and
23 caused the mold problem on the decks and the leaking
24 inside the units. Heritage has done an inspection of
25 the property and determined that there are

1 approximately sixty decks with this problem at
2 Riverwalk. Heritage Communities will be going back and
3 sealing the holes in the waterproofing, repairing the
4 decks and repairing any interior damages caused by the
5 leaking decks. This will all be at Heritage
6 Communities' expense. He asked that anyone who has
7 this problem and does not know if they are on the list
8 to be repaired to please contact Heritage Communities."

9 Q All right. And if you would, look on the second
10 page, public input. The third sentence of that
11 paragraph which continued on the fourth page, all I
12 want is the third sentence, if you would?

13 A I'm sorry, again?

14 Q Under public input, down at the bottom of the
15 second page.

16 A Okay.

17 Q Just the third sentence, starts with the homeowner
18 stated.

19 A "The homeowner stated that she was told that there
20 would be only seventeen buildings in Riverwalk and now
21 they are starting on phase two."

22 Q So, on March 15th of 2000 there are still the last
23 two buildings of Riverwalk that are being constructed?

24 A That is correct.

25 Q Okay. And I'm going to have you read those out

1 loud but the last, the next four paragraphs there, are
2 homeowners complaining about punch list problems?

3 A They are.

4 Q Okay. And is Mr. Hardester assuring the
5 membership Heritage is going to take care of those
6 punch list items?

7 A He is.

8 Q Okay. And were the homeowners and the homeowners
9 association relying on these assurances?

10 A They were.

11 Q Was Noble Company relying on these assurances?

12 A Definitely.

13 Q And at this time the developer is still in control
14 of the homeowner association, correct?

15 A They are.

16 Q Okay, that's all I have with that one.

17 Plaintiffs' Exhibit Number 4, would you identify
18 what that is, please?

19 A This is the Riverwalk Property Owners Association
20 Board of Directors meeting December 15th of 2000.

21 Q Okay. And I hate to do this to you again but I
22 would like for you to read that. I put some water
23 there if you need some. If you would, read that, the
24 entire meeting minutes, publish it, please.

25 A "On December 15th, 2000, at 5:00 p.m. Dr. Jack L.

1 MR. THOMPSON: Your Honor, the next thing we have,
2 we have two depositions that we will publish to the
3 Court.

4 THE COURT: All right.

5 MR. THOMPSON: The first is going to be Quinn
6 Hardester. I'll have my paralegal Gina Woodbury read
7 it.

8 This is the deposition of Quinn Hardester, it was
9 taken Monday, December the 29th, 2008, in my office
10 here across the street. I was taking the deposition,
11 Mr. Fosmire was there.

12 Miss Woodbury, if you would, let's go to page 12,
13 start on page 12. Line 1.

14 Q "When did you join Heritage Communities,
15 Incorporated?

16 A That would have been January or February, 1998."
17 I'm sorry, let me back up a minute. I meant to start
18 on page 6. my fault.

19 MR. FOSMIRE: Your Honor, for purposes of reading
20 the deposition, I understand it is going only to the
21 equitable estoppel issue. There are quite a few
22 objections that I have to the testimony as it relates
23 to other projects and what not. I understand Mr.
24 Thompson intends to call Mr. Hardester live at trial,
25 so I don't want to, what I'm saying is, for purposes of

1 equitable estoppel only in an effort to go ahead and
2 get the testimony in I'm not going to be objecting to
3 references to other projects or references to
4 bankruptcy or those issues that we dealt with in the
5 motion in limine, otherwise we'll be stopping quite a
6 bit, stopping Miss Woodbury quite a bit in the testimony
7 as we go through it. I'm sure the Court will ferret
8 through that information, I just call that to the
9 Court's attention.

10 THE COURT: All right.

11 MR. THOMPSON: Miss Woodbury, let's go back to
12 page 6, line 21 is where I'm going to start.

13 Q "Okay, good, I'm going to need your entire name
14 for the record, please sir?

15 A William Quinn Hardester.

16 Q Your address currently, where do you reside?

17 A 387 Oakmont Court, Murrels Inlet, South Carolina
18 29526 -- 29576.

19 Q How long have you lived there?

20 A Four and a half years.

21 Q Where did you live prior to that?

22 A I lived at 4428 Richmond Hills Drive in Murrels
23 Inlet, the same state, the same zip, for five and a
24 half years.

25 Q So, for the last nine and a half years, though,

1 you have been right there?

2 A In Murrels Inlet.

3 Q Murrels Inlet?

4 A Yes."

5 MR. THOMPSON: Now let's go to that other page,
6 page 12. I'm going to start up at the top.

7 Q "When did you join Heritage Communities,
8 Incorporated?

9 A That would have been January or February, 1998.

10 Q I saw in a previous deposition of yours, I think
11 Avion, at one time you said '95 and one time you said
12 1998?

13 A I think -- no, it wouldn't be '95 because '95 is
14 when I, that's when I met Patty Van Wie, was '95, as a
15 patient, '98 is when I joined Heritage because I was
16 with a company by the name of Omni Glow until November
17 of 1997, because that was my 50th birthday, so I joined
18 them the year after I turned 50, which would have been
19 1998.

20 Q Prior to joining Heritage Communities had you ever
21 been involved in any type of residential development?

22 A No.

23 Q Had you ever been involved in any type of
24 residential construction?

25 A No.

1 Q The same questions with regard to commercial
2 development or commercial construction?

3 A No.

4 Q Had you taken any courses or attended any seminars
5 in either of those industries?

6 A No.

7 Q How was it that you came to be involved with
8 Heritage Communities?

9 A I was a patient of Patty Van Wie, as was my wife,
10 and my wife often would speak to Patty about my world
11 travels and experience and the benefits I brought to
12 the company I was currently working for. I was
13 traveling 75 percent of my time and was looking for
14 something to do locally, domestically where the travel
15 wouldn't be quite as extensive, and Patty recommended
16 that I speak with Roger Van Wie, her husband. And I
17 spoke with Roger and he said that he thought that I
18 could add some value to their company from a managerial
19 standpoint as well as from a marketing standpoint and
20 so I joined them as, initially as their VP of sales and
21 marketing in 1998, February '98.

22 Q Patty Van Wie is?

23 A Dentist.

24 Q Dentist at the beach?

25 A Yes.

1 Q As the VP of sales and marketing what were your
2 responsibilities?

3 A In the short term my responsibility was to oversee
4 the sales department of Heritage, which was Prudential
5 Burroughs and Chapin provided agents to Heritage
6 Communities and I oversaw those sales agents that were
7 somewhat, I guess you would say a rental, rental agent,
8 so they were dedicated to Heritage but they were
9 licensed under Burroughs and Chapin Prudential and so I
10 managed that group of sales people as well as managing
11 their marketing efforts.

12 Q Got you.

13 A Advertising, et cetera.

14 Q Do you know, I'm talking about initially, do you
15 know who the owners of Heritage Communities,
16 Incorporated were?

17 A At that time yes, it was Jack Green and Roger Van
18 Wie.

19 Q Did you know who was on the Board of Directors of
20 the Heritage Communities, Incorporated?

21 A You know, to my knowledge at that time it was only
22 those two, Jack Green and Roger Van Wie.

23 Q Is that the only company you were employed by?

24 A Yes.

25 Q Heritage Communities, Incorporated?

1 A Yes.

2 Q Do you know who the officers of the Heritage
3 Communities, Incorporated, was when you first started?

4 A The only two I knew were Roger Van Wie and Jack
5 Green, that I recall. There may have been, Lynn
6 Anderson may have been, I don't know if she was
7 officially an officer or Board member but she may have
8 been an officer simply because she signed checks and
9 was responsible for most of the bookkeeping but I don't
10 recall if she was an officer or not.

11 Q Who was involved in the day-to-day construction
12 activities?

13 A Roger.

14 Q Roger? Was Jack Green ever involved in that type
15 of --

16 A Rarely.

17 Q That end of it?

18 A Rarely, and then it typically was essentially
19 cursory. "This is what we're doing." "Yes, that's
20 fine," but rarely involved on an intimate basis.

21 Q And Lynn Anderson was not involved in the day to
22 day construction activity?

23 A Not the short term. The long term, she was.

24 Q What do you mean by that?

25 A Lynn eventually was the president of BuildStar

1 which was one of the subsidiary companies.

2 Q As far as Heritage Communities, Incorporated,
3 went?

4 A No, no.

5 Q Were there any employees of Heritage Communities,
6 Incorporated, other than I guess you would be one, Lynn
7 Anderson would be one, would Roger have been an
8 employee?

9 A Yes.

10 Q Any others?

11 A Yes. There were, gosh, forty employees. It was a
12 sizeable company.

13 Q And these were employees of Heritage Communities,
14 Incorporated?

15 A You know, that's an interesting question because I
16 don't know by whom they were paid but they were
17 responsible for construction but they may or may not
18 have been Heritage employees, Heritage Communities'
19 employees. I don't remember whether they were or they
20 weren't.

21 Q So, there were other subsidiaries of Heritage
22 Communities, Incorporated?

23 A There were two.

24 Q Which were?

25 A One was BuildStar which was essentially the

1 construction company who handled the oversight of
2 construction with subcontractors for Heritage
3 Communities, and there was, there was an architectural
4 firm. I don't remember the name of the --

5 Q Tuscan?

6 A Yes, Tuscan Architectural firm was the other firm
7 and between those two firms they handled 98 percent of
8 the construction oversight along with subcontractors.
9 They were primarily supervisory personnel that oversaw
10 subcontractors.

11 Q Riverwalk condominiums or development, there was
12 also a company called Heritage Riverwalk, Incorporated.
13 Are you familiar with that?

14 A No.

15 Q You never heard of it?

16 A No. What was it? What was its function?

17 Q I was going to ask you the same thing.

18 A I have no idea, I have no idea. I understood that
19 each individual property was incorporated, so it would
20 have been Heritage Riverwalk, Heritage Magnolia Place,
21 Heritage Avion. Each one was an individual entity so
22 that under that circumstance that would be the only
23 reason why I would know that there might be another
24 entity but I think it was simply to identify the
25 expenses and the costs associated with that. It was

1 almost like a cost center. So, each one of the
2 projects had to be discreetly identified from a cost
3 center standpoint and that would be the only reason I
4 can think that I did -- this is old, you know, I'm
5 having to dig way back there to get this.

6 Q That's my understanding, too. I just wanted to
7 ask you.

8 A As I recall, I think that's the case, yes, yes, I
9 think that's the case. I just had to think about it
10 for a minute to get it out of there.

11 Q Do you know where the corporate offices for
12 Heritage Communities, Incorporated, were located?

13 A Ginn Drive.

14 Q When you were employed there it was Ginn Drive.
15 The Ginn Drive building was a relatively new office
16 building when you arrived?

17 A It was brand new. As a matter of fact, when I
18 went to work there Roger and Dr. Green and Jimmy Watts
19 were still working out of Dr. Green's upstairs office,
20 so when I arrived we moved right into the, right into
21 the building, that was the first place I occupied an
22 office.

23 Q Where was Dr. Green's office?

24 A Adjacent to the Heritage Communities property. As
25 a matter of fact, I think Dr. Green may have owned that

1 property at one time.

2 Q Was that on 48 North?

3 A Dr. Green was, the Ginn Drive office was on Ginn
4 Drive but was adjacent to Dr. Green's office. Dr.
5 Green may have owned the property at some time.

6 Q I know we talked about several different companies
7 here. What did you consider specifically to be the
8 business of Heritage Communities, Incorporated?

9 A Selling and manufacturing condominiums, selling,
10 marketing, selling, marketing, manufacturing
11 condominiums.

12 Q Do you know how many different properties Heritage
13 Communities, Incorporated, developed?

14 A Sure. Obviously Riverwalk, Magnolia North,
15 Magnolia Place, the Gardens at Cypress Bay, Azalea
16 Lakes, Avion Forest and the final, the final one is
17 Heatherstone, which is in Charlotte.

18 Q Were you involved in the development of each one
19 of those developments?

20 A Yes.

21 Q You were?

22 A Yes.

23 Q Heatherstone in Charlotte, how large a development
24 was that, how many condominiums, do you recall?

25 A Gosh, you know, I don't remember. I would have,

1 I'm only guessing maybe ten buildings, ten, twelve
2 buildings, same size configuration as Magnolia North, I
3 don't recall. I was not, I was peripherally involved
4 in that one. There was another manager, another
5 president of Heritage Heatherstone that was, he was
6 somewhat, I was somewhat responsible for him but he was
7 the broker in charge as well as the president, so I was
8 very, it was very tangential to what I did.

9 Q You mentioned earlier that you're also familiar
10 with BuildStar Corporation?

11 A Yes.

12 Q And again BuildStar Corporation's business was
13 what?

14 A To -- they primarily oversaw the construction of
15 the condominiums that were sold by Heritage
16 Communities.

17 Q Did they have any employees who performed work or
18 did they sub everything out, BuildStar employees?

19 A They had some employees but those employees were
20 primarily supervisory but they did have a punch and
21 finish crew post sale.

22 Q Did you have any role with BuildStar?

23 A No -- well, yes, I did have a role in that we had
24 a weekly meeting which I chaired after I had been with
25 the company for six months or so and that, the chairing

1 of that meeting was primarily to summarize the prior
2 week's activities and to strategically plan the
3 upcoming week, months, the year's strategy as it
4 pertained to the sales and building and the typical
5 planing as most any other construction company would
6 need, so I chaired that but that was the extent of my
7 involvement. Beyond that I just chaired the meeting
8 and served as the mediator for the roundtable
9 discussion.

10 Q And that meeting consisted of officers from
11 Heritage Communities, Incorporated?

12 A Yes.

13 Q And officers from BuildStar, Incorporated?

14 A Yes, sir.

15 Q Officers from Tuscan Architectural?

16 A Yes.

17 Q Any others?

18 A It was pretty much everyone who had worked for the
19 company. It was about a 40 person meeting every Monday
20 morning.

21 Q Where was that meeting conducted?

22 A Ginn Drive, Heritage Communities' Ginn Drive Board
23 room.

24 Q Do you know who the owners of BuildStar
25 Corporation were, the shareholders?

1 A No, I don't.

2 Q Do you know who was on the Board of Directors of
3 BuildStar Corporation?

4 A No, I don't. No, I don't. I don't know.

5 Q Do you know who the officers of BuildStar
6 Corporation were?

7 A No, I don't.

8 Q Didn't you state that Lynn Anderson became an
9 officer?

10 A She eventually was, was president of BuildStar but
11 I don't recall the structure of it. I knew that it
12 was, it functioned primarily as a supervisory, as a
13 supervisory oversight for construction but I really
14 didn't get involved in forming it nor in the oversight
15 of it or the management of the people within it, so I'm
16 not real sure.

17 Q And I believe you said there were a number of
18 employees who just provided construction supervision.
19 Is that right?

20 A Construction supervision, punch work and post
21 construction or post closing punch work.

22 Q And the corporate offices of Build Star were also
23 at Ginn Drive?

24 A That's right.

25 Q Was it involved in the construction of all the

1 properties you told me about before?

2 A Yes, it was.

3 Q Including Heatherstone?

4 A Yes, it was -- well, yes it was.

5 Q Do you know who held a South Carolina general
6 contractor's license for BuildStar?

7 A I did not.

8 Q Did you ever know if Lynn Anderson had a
9 contractor's license or residential building license
10 for South Carolina?

11 A If she did, I don't recall that she did.

12 Q And Heritage Riverwalk, Incorporated, you didn't
13 have any role with Heritage Riverwalk, Incorporated?

14 A No.

15 Q So, would you know who the owners of that would
16 be?

17 A No.

18 Q Or the officers or the directors?

19 A I could have then but I honestly don't recall, I
20 don't recall.

21 Q Do you even know where the corporate offices for
22 Heritage Riverwalk, Incorporated, was?

23 A No, I would only assume.

24 Q Would you assume?

25 A I would assume it would be Ginn Drive.

1 Q Ginn Drive?

2 A Can we go off the record a second? Could we go
3 off the record just a second?"

4 MR. THOMPSON: Go down to page 25, line 5:

5 Q "as far as Tuscan Architectural goes, where were
6 the corporate offices for Tuscan Architectural?

7 A I would assume Ginn Drive.

8 Q Do you know who the owners of that were?

9 A Yes, I think I know that one. I think Robin
10 Roberts was a part owner but I'm not sure what share,
11 what percentage, along with Roger and Jack. I think I
12 recall that.

13 Q Who did you consider to be in charge of Heritage
14 Communities, Incorporated, BuildStar Corporation,
15 Tuscan Architectural, who did you consider to be in
16 charge of that?

17 A Roger Van Wie.

18 Q How about as far as Heritage Riverwalk,
19 Incorporated, who did you consider to be in charge of
20 that?

21 A Roger Van Wie.

22 Q How about any of the other subsidiary corporations
23 for each individual development?

24 A Roger Van Wie.

25 Q You eventually became the president of Heritage

1 Communities, correct?

2 A That's right.

3 Q When was that?

4 A Worst day of my life. I can't remember the date,
5 I can't remember the date.

6 Q But you said it was about six months after you
7 started, is that right?

8 A Gosh, you know, I don't, you know, I don't
9 remember, Phil, I don't remember the exact date. I
10 remember the circumstances but not the date.

11 Q Well, tell me the circumstances.

12 A The circumstances were I was the primary
13 intermediary as my responsibilities grew, actually I
14 evolved with VP of sales and marketing to chief
15 operating officer, to president-chief operating
16 officer, and each time I made one of those changes in
17 the role and range Roger also made a change in the role
18 and range so that he was always at the top of the
19 management pecking order. The primary reason for being
20 elevated to president was simply one of, one of
21 logistics, because the banks required in the
22 development of, of this sort of real estate you're
23 constantly, not quite 24 hours a day but pretty much 24
24 hours a day in contact with banks and establishing your
25 construction loans and the terms of those construction

1 loans, the percentage of sales, as to the amount of
2 money you can draw from those construction loans. It's
3 typical and the bank required that, that either the
4 president or the chairman of the Board of the company
5 be able to not only negotiate but sign those loan
6 documents on behalf of Heritage. At that minute in
7 time Dr. Green was not as available as we would like.
8 He had experienced some personal issues and was not as
9 available as we would like, so the business actually
10 would slow down until such point as we were able to get
11 our arms around Dr. Green. The bank wouldn't accept
12 Roger's signature because of his historical problems
13 with bankruptcy and so I was kind of the last man
14 standing who understood the business, who was already
15 an officer and who understood their banking
16 relationship, so I was asked to step in and become
17 president so that I could sign bank documents as well
18 as real estate closings. That's how I became
19 president. I didn't want to be there, they needed
20 someone to be there, Dr. Green couldn't be there, so
21 again I was pretty much the last guy standing.

22 Q So, Dr. Green was the president?

23 A He was the president.

24 Q Before you?

25 A Yes, and then he became a co-chairman with Roger,

1 Dr. Green was the president before me.

2 Q You mentioned Roger's history with bankruptcy.

3 What is your knowledge of that?

4 A I know that he had had at least one if not two
5 prior companies in similar industry go bankrupt.

6 Q Do you know where that was?

7 A Actually I didn't even know it until I had been
8 working there six months. I might have changed my
9 tenure. No, I had no idea. I just, I knew it was
10 local but just from rumor but I have no idea of the
11 history.

12 Q As we're sitting here today, the time you spent
13 with Heritage Communities, Incorporated, who would you
14 consider to be the most knowledgeable of the day-to-day
15 activities in the history of Heritage Communities,
16 Incorporated?

17 A Roger Van Wie.

18 Q The same question with regard to BuildStar,
19 Incorporated?

20 A Roger Van Wie.

21 Q And the same question with regard to Heritage
22 Riverwalk, Incorporated?

23 A Roger Van Wie.

24 Q Do you know where Mr. Van Wie is as we sit here
25 today?

1 A I know he's in Horry or Georgetown County
2 somewhere but I don't know where. I have seen him but
3 I don't know where he resides.

4 Q When is the last time you have seen him?

5 A It's probably been six months or so ago at the
6 grocery store in Georgetown, in Murrels Inlet.

7 Q Do you know what he's doing?

8 A I have no idea.

9 Q I know the answer to this but are you familiar
10 with the Riverwalk condominiums at Arrowhead Country
11 Club?

12 A Yes, I am.

13 Q When did you first become involved with them?

14 A When I became an employee the project was already
15 under way.

16 Q Do you recall how far along the project was when
17 you got there?

18 A Significantly along. It was, it may have been, it
19 may have been as much as 75 percent built out, pretty
20 significantly built out, maybe not, maybe half, half to
21 75 percent but quite a bit.

22 Q Do you know who would have been involved in
23 acquisition of land for Riverwalk?

24 A No.

25 Q You weren't?

1 A No.

2 Q Of course do you know who was responsible for the
3 design, layout of the condominium complex?

4 A No.

5 Q Do you know who was involved in the choice of
6 architects?

7 A Roger Van Wie.

8 Q Who would have been responsible for choosing
9 building or construction equipment?

10 A The subcontractors.

11 Q Did Roger Van Wie have any --

12 A I'll have to think about that for a minute. Do
13 you want to turn that off while I think for a minute
14 because I don't, I'm trying to think of an instance
15 where I would have even been in a meeting or involved
16 or listening. I would say the majority of that was
17 done by the subcontractor. It was all cost driven, it
18 was all cost driven. You have a cost of a certain
19 number of condominiums, you have a certain selling
20 price, the build price, if there is enough margin
21 there, then you build it but that, the materials were
22 all specked out based on BuildStar specifications and
23 how the building materials were chosen from that point
24 I wouldn't know. I wouldn't know, that's the best I
25 can do there."

1 MR. THOMPSON: Go over to page 33. Take a drink
2 of water if you need to. Page 33, I'm going to start
3 on line 4.

4 Q "As it relates to contract administration, that is
5 one of the jobs an architect sometimes has, they draw
6 the plans up and then they administer the contract and
7 make sure that the construction is in accordance with
8 the plans. All right?

9 A Yes, I have heard the term, yes, I have heard the
10 term, I understand now what you mean.

11 Q Okay. Do you know if anyone on the Riverwalk job
12 had contract administration duties?

13 A For the benefit of Tom Pegram?

14 Q For the benefit of the development?

15 A Well, there was a building supervisor, there was a
16 property superintendent for each property.

17 Q They worked for?

18 A For BuildStar and/or Heritage Communities, I'm not
19 sure who they were paid by but they worked for either
20 BuildStar or Heritage Communities and there was, there
21 was a superintendent responsible for each of those
22 properties specifically.

23 Q But there was no architect on the job?

24 A No.

25 Q To administer the contract?

1 A Not to my knowledge, no.

2 Q As the president of Heritage Communities were you
3 familiar with the warranty process?

4 A Very much. That was one of my duties.

5 Q Did Heritage Communities have a warranty manual?

6 A Yes."

7 MR. THOMPSON: Your Honor, this exhibit was marked
8 in this case, the warranty manual. However I talked to
9 Mr. Fosmire, we have agreed just to refer to it as what
10 we have marked for trial, which is Plaintiff's Exhibit
11 Number 12 for the purpose of this.

12 Where did I leave off?

13 Q "All right, I want to show you this copy and if
14 you would look through that and let me know if that's
15 a copy of the warranty manual.

16 A I recall this is Magnolia North, isn't it?

17 Q I don't see any specific name.

18 A Yes, it is, that is the picture on the front, that
19 is what Magnolia North is supposed to look like.

20 Q On the back cover?

21 A Magnolia North, it has everybody.

22 Q Everybody?

23 A Yes.

24 Q So, this warranty manual is for all of the
25 developments for Heritage Communities?

1 A I'm very familiar with this.

2 Q Who prepared that warranty manual?

3 A It was prepared when I arrived.

4 Q Had it already been prepared?

5 A Already been prepared, yes.

6 Q Were you responsible for the warranty process?

7 A Yes.

8 Q When did you pick up those duties, immediately or
9 when you became president?

10 A No, when I was promoted from specific simply sales
11 and marketing to chief operating officer, at that time
12 I assumed the role of warranty as well as contract
13 administration, which is why I was asking the question
14 earlier, contract administration meant I supervised the
15 processing of all of the loan documents and sales
16 documents up to the point of closing, so that is why I
17 was questioning contract administration a moment ago.
18 So, yes I did, when I became chief operating officer,
19 which was probably six months into my tenure there.

20 Q Is this something that was kept in the ordinary
21 course of the business records of Heritage Communities?

22 A Yes.

23 Q Is that, as you look at it today, an accurate copy
24 of the original?

25 A As far as I can tell. You know, I don't know if,

1 I don't know if it's changed but it looks as though, it
2 looks like the original copy, yes, it's pretty
3 boilerplate, so yes, it's as close as I can say without
4 not having the original.

5 Q Let me show you that document and ask you what
6 that is?

7 A It's an original.

8 Q That's an original?

9 A It is -- typically we would, you would have a
10 signature in the front that someone had actually given
11 this to a client or homeowner and they would have
12 filled in their address and would have signed that they
13 have received it. Typically that would have been
14 completed.

15 Q Which is on page 19?

16 A Yes. That would have been completed and then a
17 Heritage Communities person would have, I know Myra
18 Smith who worked for me would have signed that she had
19 physically given this to the person at closing and that
20 person understood the issues associated with the
21 warranty manual.

22 Q When was this document given to anyone?

23 A Typically at closing.

24 Q And was it given to the purchaser at closing?

25 A That's right.

1 Q And was it explained to the purchaser at closing?

2 A Typically, yes.

3 Q By whom?

4 A There were two people, Myra Smith was the punch
5 coordinator, she was the person who oversaw most of the
6 post closing punch issues, the person -- gosh, what was
7 Linda's, Linda, Linda -- bear with me a minute. Linda
8 Caldwell was our closing coordinator, Linda Caldwell
9 would walk through the condominium the day of the
10 closing or the date prior to the closing, she would do
11 a little punch list which was typical, explain the
12 procedure as to what needed to be done to repair or to
13 fix any issues that were of concern and she would
14 present them with that manual at that time.

15 Q And this warranty manual, did it also apply to the
16 Riverwalk development?

17 A It did.

18 Q And you -- look in it for a second, I'll tell you
19 where I want you to go. Beginning on page two, two
20 through four, it looks like there are basically three
21 phases of the warranty process?

22 A Uh-huh.

23 Q Phase one, is that just a punch list?

24 A Typically.

25 Q And is that something that would be -- and that is

1 something that would be whose responsibility for
2 repair?

3 A Employees of Heritage Communities, they had punch
4 crews that were assigned to each property.

5 Q And the second page, is it just a limited warranty
6 period for certain items? What is that? Explain that
7 to me if you would, what you understand.

8 A I will have to refresh my own memory here.

9 Q Okay.

10 A The phase two portion was issues that were not
11 Heritage specific, as it says here, appliances, really
12 primarily appliances. The remainder of the issues were
13 all handled by the homeowner assistance manager who was
14 Myra Smith and then those issues were communicated
15 either to me or directly to the punch list people or to
16 the supervisors, the property supervisors, who would
17 then contact the subcontractor who would then remedy
18 it. Based on whatever the subcontractors's warranty
19 was or responsibility was to Heritage, they would be
20 contacted and they would remedy whatever they needed to
21 remedy within this one or two year closing period, one
22 year closing period.

23 Q And, so, Heritage had a warranty procedure set up?

24 A Yes.

25 Q For the owners to follow?

1 A Yes, they did.

2 Q And then the third phase, what is that? If you
3 would, just take your time and read it.

4 A Yes. These, the phase three are issues that were
5 primarily taken up by, as you pointed out, by the Noble
6 Company and Jennifer Harmon. Bigger issues that
7 entailed exterior issues, grounds, pool, anything like
8 that was really external to the condominium itself.
9 The internal issues were managed up to the one year, up
10 to the one year by Heritage. External issues were
11 managed by the property management group the Noble
12 Company.

13 Q And the Noble Company, who were they hired by
14 initially?

15 A Heritage Communities.

16 Q I want you to flip over to page seven, if you
17 would. There is a section here, I believe that is
18 Roman Numeral I, section D, what you can expect from
19 the developer. Are you familiar with this section, and
20 it goes through --

21 A Yes, I am.

22 Q -- page 12?

23 A Yes, I am.

24 Q This actually goes through page 14. What's the
25 purpose of this section?

1 A This is a section that are greater than punch
2 issues. Punch issues would be explained as superficial
3 scratches, scrapes, dings, things that could be
4 repaired in a matter of, you know, a few hours or a
5 day. These are issues that are larger, take a longer
6 period of time, more invasive construction issues and
7 it's another portion of the guarantee or the warranty
8 by the developer.

9 Q Over on page 8, section 2-D, and if you would,
10 read that to yourself, if you could just read it.

11 A "Observation. During rains water appears on
12 interior of glazed window unit."

13 Q And then the performance guidelines?

14 A Oh, I'm sorry.

15 Q That's okay.

16 A "Performance guidelines. Water leakage from
17 improper installation is unacceptable. Corrective
18 measure. The contractor shall repair any deficiencies
19 attributed to improper installation."

20 Q My question is at the beginning part of this is
21 what you expect from the developer. It says outlined
22 below are some of the most often asked about punch
23 items along with what you can expect from Heritage
24 Communities.

25 Were there questions about leaking windows while

1 you were at Heritage Communities?

2 A Yes.

3 Q Is that why this was included in this warranty
4 manual?

5 A I don't think it was included because of that. I
6 think, I think leaking windows are common in many
7 constructions, I think it's just a common problem and
8 something that you recognize that will have to be
9 addressed if it occurs.

10 Q Did you consider the leaking windows that you
11 referred to at Riverwalk to be common leaks or were
12 they --

13 A I don't remember any leaking windows at Riverwalk.

14 Q You do not?

15 A No, not leaking windows, no, I don't.

16 Q Do you remember any leaking windows at any of the
17 developments?

18 A Magnolia Place.

19 Q When did you first become aware of those?

20 A As a matter of fact I think that was ongoing. I
21 think I inherited that problem, that was ongoing before
22 I ever arrived.

23 Q What was the problem?

24 A Leaking windows.

25 Q Was it windows or the installation of the windows?

1 A You have to ask which, whether it be the chicken
2 or the egg. As I recall, the ultimate cause and the
3 solution was the windows were improperly installed
4 because they were installed with the flashing pushed--
5 into the window versus being on the outside of the
6 window case itself and so there was no, there was the
7 capacity for there to be water intrusion because there
8 was no moisture barrier?"

9 MR. THOMPSON: Stop right there. Let's go down to
10 line 18, pick up right there.

11 Q "Were those problems corrected at Magnolia Place?

12 A They were being done so.

13 Q Were they completed?

14 A No.

15 Q Why not?

16 A For the same reason, the company, the company
17 failed, we no longer had funds to continue the process
18 but they had begun to, they begun from the oldest to
19 the newest to repair at Heritage Communities' expense
20 those improperly installed windows that had been
21 identified as either improperly installed and/or a
22 defective window construction itself.

23 Q Were the same type of windows at Magnolia Place
24 installed at Riverwalk?

25 A No. The company that installed the windows at

1 Magnolia Place was no longer in business.

2 Q Meaning the manufacturer of the windows?

3 A The manufacturer of the windows, yes.

4 Q Do you remember the name of the manufacturer of
5 the windows?

6 A Pelican.

7 Q Was that the distributor or the manufacturer?

8 A I think they actually made their own windows. I
9 don't, I don't know that for a fact but I'm pretty sure
10 they made their own windows at that time.

11 Q On the first seventeen buildings at Riverwalk, I
12 will show you some photographs here from R. V. Burric.
13 R. V. Burric is the company the homeowners had hired to
14 look at their buildings?

15 A Uh-huh.

16 Q I want to show you, this is one of the first
17 seventeen, is that the front of the building, just so
18 you can orient yourself. I want to ask you about the
19 sides and the back.

20 A Uh-huh.

21 Q As you can see on this side there is two things.
22 Number one, you've got three windows?

23 A Uh-huh.

24 Q With a half round over --

25 A Uh-huh.

1 document, I don't remember seeing the specific
2 document.

3 Q Okay. If you would, go to page four and look at
4 page 2.4, exterior facade of building.

5 A Yes.

6 Q Read to yourself the first, third, fourth and
7 fifth paragraphs.

8 A Okay.

9 Q Do you recall those issues existing at Riverwalk?

10 A You know, in Riverwalk I don't recall window
11 intrusion issues, I don't.

12 Q Do you recall water stain or mildew on the
13 ceilings of the porches?

14 A I do. I do remember that portion.

15 Q Do you recall or do you know what the problem was
16 there, what was causing that?

17 A As I recall, it was the same problem that was
18 persistent throughout most of the community in that the
19 subcontractors who installed the moisture barrier on
20 the porches installed the moisture barrier without
21 informing the framers who followed them up to put rails
22 and other attachments to the porches they weren't
23 supposed to, weren't supposed to drive nails through
24 them and I think, as I recall, that was one of the, one
25 of the causes of leaks. I don't know that it ever

1 achieved a point of being resolved because of the
2 company's ultimate demise.

3 Q Is that something you believe Heritage Communities
4 was responsible for repairing?

5 A I think that was a subcontractor responsibility
6 because it was, it was identified that the
7 subcontractors, the framing subcontractor was not
8 persistent or understood there was a moisture barrier
9 there, nor did they ask. I remember having this
10 discussion before.

11 Q Was it something you believed the homeowner could
12 look to Heritage Communities to resolve?

13 A Yes, under the terms of the warranty, yes.

14 Q And did Heritage Communities or any of their subs
15 ever begin the work --

16 A They did.

17 Q -- to resolve it?

18 A Yes, they did, they did.

19 Q Had Heritage Communities stayed in business would
20 those problems have been resolved?

21 A I believe so, yes."

22 MR. THOMPSON: Skipping down to line 24.

23 Q "And as the president of the homeowners
24 association or property owners association did you
25 attend any Board of Director meetings or homeowners

1 association annual meetings?

2 A For?

3 Q For Riverwalk in this case.

4 A You know, I was trying to remember. I knew you

5 were going to ask that question. I'm trying to

6 remember if I ever attended a Riverwalk POA meeting.

7 We never, never had a Board meeting.

8 Q You never had a Board --

9 A Never had a Board meeting but I can't, but I

10 can't, I'm prone to address issues on an ad hoc basis

11 but I don't recall. We may have but I don't recall

12 ever having a Riverwalk Board meeting, I mean, I'm

13 sorry, a POA meeting.

14 Q Do you recall how long you were the president of

15 Heritage Communities?

16 A Not very long. Maybe six months, you know,

17 probably maybe six months.

18 Q Do you recall how long you were the president of

19 the Riverwalk Property Owners Association?

20 A The same amount of time. It was all done

21 simultaneously.

22 Q Before that who was the president?

23 A Jack Green.

24 Q Okay. Do you know when your tenure as president

25 on the Board was terminated?

1 Q What are the names of those developments, if you
2 would read them into the record?

3 A Magnolia North, The Gardens, Avion Forest,
4 Riverwalk, Azalea Lakes and Heatherstone, assuming -- I
5 stand corrected. I don't know if there are issues with
6 Heatherstone because I haven't been part of that and
7 don't know the history of it since I have left the
8 company, so I'm not sure.

9 Q With regard to the other?

10 A The other five, yes.

11 Q The bulk of them were involved in construction
12 litigation?

13 A Yes.

14 Q Was Heritage Communities responsible for putting
15 defective condominiums into the stream of commerce?

16 A I don't think so. I think it was a collective
17 effort of poor oversight between Heritage and the
18 subcontractors.

19 Q Who were the ultimate sellers of the condominiums
20 constructed by Heritage Communities?

21 A Prudential Burroughs and Chapin.

22 Q They were partners, correct?

23 A They were actually the sales agents who worked for
24 Prudential Burroughs and Chapin.

25 Q I understand. The developer of these condominiums

1 A I can't answer that.

2 Q Who could?

3 A Roger Van Wie.

4 Q Did Heritage represent to homeowners that the
5 problems would be taken care of?

6 A Yes, I think, I think you can assume that. I
7 don't think anyone, I don't think anyone maliciously
8 was attempting to mislead the homeowners. I, you know,
9 I think there are many representations that Heritage
10 was building substandard product and selling
11 substandard product and full well knew it. I think
12 when they recognized they had problems they attempted
13 as best they could, given their financial difficulties,
14 to try to rectify them and unfortunately the weight was
15 larger than their capacity to address it so, you know,
16 and you can take each individual incident and look at
17 it and criticize it but on the other hand I think had
18 the company survived I think everyone would have
19 survived, it wouldn't have been fun but I think it all
20 would have survived.

21 Q Okay, thank you, Mr. Hardester, that's all I have.

22 A You're welcome."

23 MR. FOSMIRE: Just a few counter-designations.

24 THE COURT: Yes, sir.

25 MR. FOSMIRE: If you would, go to page 86, line

1 12. Are you with me? I'll start at line 12 with the
2 question.

3 Q "I also have some follow-up. When you say there
4 is nothing malicious, would you agree it was Heritage's
5 intent to build quality condominium units?

6 A Yes.

7 Q The purpose was to build units hat were
8 satisfactory so that they could keep moving forward as
9 a company?

10 A Yes.

11 Q It was your intention at that point to help grow
12 the company, continue the company in existence?

13 A Of course.

14 Q Isn't that true?

15 A Of course.

16 Q So, as it relates to these units at Riverwalk,
17 there is nothing to your knowledge about these units
18 that rendered them at any point during the development
19 process uninhabitable?

20 A No.

21 Q Out at Riverwalk?

22 A Not at Riverwalk, no.

23 Q So, when we talk about these units, Mr. Thompson
24 was asking you some questions about whether Heritage
25 placed defective units in the stream of commerce but I

1 A "Yes.

2 Q Heritage Communities, Inc., warrants the home
3 against defective materials or workmanship for one year
4 time frame.

5 A Yes.

6 Q Do you agree with that?

7 A Yes.

8 Q Is it your testimony that this document would have
9 been given to every unit owner?

10 A Yes.

11 Q And in fact at page 5, item number four toward the
12 bottom of the page you actually have the Riverwalk
13 property owner listed there, among others?

14 A Yes.

15 Q I'm sorry, the Riverwalk property listed there,
16 among others?

17 A Yes.

18 Q So, Riverwalk owners who were purchasing would
19 have been given a warranty manual which advised that
20 any defects as to materials or workmanship need to be
21 brought within a year and it would be addressed by
22 Heritage Communities?

23 A Yes.

24 Q Subject to that one year limitation?

25 A Yes.

1 Q Do you agree with that?

2 A Yes."

3 MR. FOSMIRE: Thank you, Miss Woodbury.

4 MR. THOMPSON: Your Honor, that's all we have of
5 this deposition. We have the deposition now of Lynn
6 Anderson.

7 THE COURT: We're going to break for lunch. Come
8 back at 1:45.

9 (Recessed at 1:06 p.m.)

10 (Reconvened at 2:10 p.m.).

11 THE COURT: Yes, sir.

12 MR. HENRY: This will be much shorter, Judge.

13 Your Honor, we don't have the original on this. One of
14 the parties we settled with noticed it and they have
15 the original so we agreed to just submit that. We're
16 going to publish portions of the deposition of Lynn
17 Anderson and, Your Honor, we have agreed on the parts
18 and I'm going to read what they have designated and
19 what I have designated also, to save a little time.

20 THE COURT: All right.

21 MR. COLE: Your Honor, this is also offered
22 obviously with the same caveat from the first
23 deposition, that for the purposes of this portion of
24 the hearing. There are portions of it that reference
25 the other projects and we continue our objection to use

1 Q "As an accountant did Heritage Communities just
2 get over extended, did it do too much too fast?

3 A Well, it was fine. As sales slowed down in the
4 fall of '99, then we ended up with inventory that
5 wasn't selling.

6 Q Okay.

7 A Cash flow kind of died and --

8 Q So, you got in a sales slump?

9 A Pretty much.

10 Q All right."

11 MR. HENRY: And 59, if you can find it.

12 Q "Okay. And do you recall who the officers were in
13 that, in that, in the Riverwalk, the Heritage Riverwalk
14 company?

15 A Not specifically. I probably was secretary so I
16 could run back and forth to the bank and sign closing
17 documents.

18 Q Right.

19 A But I don't remember exactly --

20 Q Okay.

21 A -- who it was.

22 Q I have, I've looked at some of the amendments to
23 the master deed.

24 A Okay.

25 Q And Heritage Riverwalk, Inc., of course produced a

1 master deed and the amendments?

2 A Right.

3 Q And you signed as Lynn Anderson, Secretary?

4 A Okay.

5 Q So, you were the Secretary of that corporation?

6 A Okay.

7 Q Heritage Riverwalk, Inc., correct?

8 A Correct."

9 MR. HENRY: And then page 69, beginning at line
10 15.

11 Q "Let's suppose in 1996 that one of the Riverwalk
12 or that the Riverwalk project was having problems with
13 the decks, they were not draining, they were getting
14 rot in them and that sort of thing. What would the
15 homeowners association or what would the homeowners,
16 how would they handle a problem like that?

17 MR. COLE: Object to the form.

18 A They would call the office and we had a crew that,
19 a couple guys that did punch work and that kind of
20 thing. If it was something that they could deal with
21 they would and if it was a subcontractor's issue they
22 would probably get them to get back and do it or fix
23 it, correct it, whatever the problem was.

24 Q All right. And when these people bought these
25 condominiums were they assured that if they had

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

2005-CP-26-3289

2003-CP-26-7169

TONY L. POPE and LYNN S. POPE,
individually and representing as a
class all unit owners of Riverwalk
at Arrowhead Country Club Horizontal
Property Regime,

Plaintiffs,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants,

--- AND ---

RIVERWALK AT ARROWHEAD COUNTRY CLUB
PROPERTY OWNERS' ASSOCIATION, INC.,

Plaintiff,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants.

B E F O R E:

HONORABLE CLIFTON NEWMAN

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

JOHN P. HENRY, Esquire
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Attorneys for the Defendants

VOLUME III of IX
January 7, 2009

1 THE COURT: All right. Are you ready for them?

2 MR. THOMPSON: The plaintiff is ready.

3 MR. HENRY: Yes, Your Honor.

4 THE COURT: Okay. Let's bring them on.

5 (The jury returned to the courtroom).

6 THE COURT: All right, the jury is in, good
7 morning. Welcome back, juror number three.

8 You may proceed.

9 MR. THOMPSON: Thank you. The plaintiff calls
10 Jennifer Harmon.

11 THE COURT: Let's deal with the note taking issue
12 first.

13 THE COURT: Ladies and gentlemen, you can take
14 notes if you want. You don't have to take notes.

15 THE CLERK: Judge, they do need to put their
16 names on the back.

17 THE COURT: It's a personal notebook. Just one
18 note taker? Two?

19 JENNIFER HARMON,
20 after being first duly sworn, testified as follows:

21 THE CLERK: State your name for the Court.

22 THE WITNESS: Jennifer Harmon.

23 DIRECT EXAMINATION

24 BY MR. THOMPSON:

25 Q Where do you live?

1 A Little River.

2 Q How long have you lived in Horry County?

3 A All my life.

4 Q You graduated high school here locally, is that
5 correct?

6 A Conway High School.

7 Q Went to college?

8 A I went to USC in Columbia.

9 Q All right. And are you currently employed?

10 A I am.

11 Q All right. Who are you employed with?

12 A I work for the Noble Company of South Carolina.

13 Q How long have you worked with the Noble Company?

14 A I believe I'm starting my twenty-third year.

15 Q Okay. And what does the Noble Company do, what is
16 its job?

17 A Well, we're a full service real estate company
18 with a special emphasis on homeowner association
19 management.

20 Q All right. And as a property manager for
21 homeowner associations what does that entail, what do
22 you have to do?

23 A Primarily we're responsible for the day-to-day
24 work going on on a property. Basically we keep up the
25 exterior of it, meaning we vacuum hallways if they have

1 carpet, and of course we do pool maintenance, we do
2 ground maintenance or if they have a separate contract
3 we administer the contract for those services.

4 Q You basically maintain the properties, being the
5 buildings and landscaping?

6 A Right.

7 Q And do you also maintain the financial assets of
8 the homeowners association?

9 A We do. We receive funds from the HOA, all the
10 members pay dues, then we actually pay bills from that,
11 we help prepare a budget each year and actually do
12 monthly financial statements.

13 Q Okay. And as far as homeowner association Board
14 meetings, you all organize those type things?

15 A Right. Generally the Board will determine how
16 often it wants to meet and we'll help set that up,
17 provide conference space, I'll provide people to take
18 minutes and things like that.

19 Q Okay. What is your position with Noble Company?

20 A I'm vice-president of operations.

21 Q And you have been in that position for how long?

22 A I'm going to say about five or six years.

23 Q How about before that?

24 A I was director of operations.

25 Q Is it very much difference?

1 A Not really. I would say that I probably have a
2 little less time these days to get out of the office
3 than what I used to.

4 Q Okay. Do you hold any type or is there any
5 requirements of any type of license or certificates to
6 be a property manager for a homeowners association?

7 A South Carolina really doesn't require it but I do
8 hold a South Carolina real estate license, I'm a member
9 of the local Board of Realtors, South Carolina Board of
10 Realtors, National Board of Realtors. I also hold a
11 CPM designation which is from the Institute of Real
12 Estate Management. That takes about five years to get.
13 There aren't too many of us in Horry County.

14 Q Okay. Approximately how many different
15 residential developments or property owner associations
16 does the Noble Company manage?

17 A I knew you were going to ask that. Somewhere
18 between the 40 and 50 range.

19 Q Does that from year to year stay average?

20 A It averages around there. Again, we tend to have
21 long term relationships with people.

22 Q Okay. Do you know approximately about how many
23 people the Noble Company employs?

24 A I think last count we had about 86.

25 Q Okay. The Nobles Company is located in Myrtle

1 Beach?

2 A Right. We're right off 48th Avenue North, near
3 Bob Grissom Parkway.

4 Q So, who is it that typically employs the Noble
5 Company to manage the property?

6 A Usually the Board of Directors, specifically the
7 president of that association will usually sign a
8 contract with us.

9 Q Okay. And is that the governing Board of the
10 property owners association in each case?

11 A That's right, every homeowners association has a
12 Board of Directors.

13 Q Okay. So, the Noble Company would take its orders
14 from the Board of Directors?

15 A Surely, yes, sir.

16 Q Okay. Does the Noble Company manage the Riverwalk
17 Property Owners Association that we're here for today?

18 A Yes, sir, we do.

19 Q Okay. How long has the Noble Company managed that
20 property?

21 A I think we started maybe June 1 of 1999.

22 Q Okay. And did the Board of Directors at the
23 Riverwalk Property Owners Association hire Noble
24 Company in June of 1999?

25 A They did.

1 Q And who did that Board of Directors consist of?

2 A At the time Roger Van Wie was its president, I
3 believe Quinn Hardester and Lynn Anderson were on the
4 Board at that time.

5 Q Okay. Was Dr. Jack Green ever on that Board?

6 A Yes, he was.

7 Q Okay. Who is Dr. Jack Green?

8 A Dr. Green is a local orthodontist, he actually has
9 an office not far from ours.

10 Q Okay. And Dr. Green and Roger Van Wie, were they,
11 as you knew it, connected with the developer of the
12 Riverwalk Condominiums?

13 A Right, I knew them as Heritage Communities.

14 Q Okay. All right. So, when you were employed by
15 the Board of Directors at Riverwalk the Board members
16 were also the developer, is that right?

17 A Right, back in '99.

18 Q Okay. And Mr. Pope, you were here yesterday when
19 Mr. Pope testified?

20 A Yes, sir.

21 Q And he testified in September of 2002 when the
22 Board turned over control or the developer turned over
23 control to the homeowners, before September of 2002
24 what was your understanding of who the Board consisted
25 of, not individuals but --

1 A The Board before September of 2002 consisted of
2 the developer.

3 Q Okay. So, the Board was controlled by the
4 developer until September of 2002?

5 A Yes.

6 Q Okay. Is it your understanding there are nineteen
7 buildings out at Riverwalk?

8 A Yes, sir, nineteen buildings.

9 Q That is what you manage for the Board of
10 Directors.

11 A Yes.

12 Q When the Noble Company took control or started
13 managing Riverwalk in June, 1999, how many buildings
14 were there at that time?

15 A About fourteen. They were actually finishing,
16 working on some of the buildings.

17 Q So, there were more, there was more construction
18 going on when you took over?

19 A Yes.

20 Q And as the property manager do you have to be
21 familiar with the master deed for each development?

22 A I have to be familiar with it, yes, sir. I don't
23 always commit it to memory, it is a pretty big
24 document.

25 Q And the master deed, what is its purpose

1 A Yes, I have.

2 Q And what is that?

3 A This is a Riverwalk Property Owners Association
4 2000 annual homeowners meeting Wednesday, March 15,
5 2000, the minutes from that meeting.

6 Q And is the Noble Company responsible for keeping
7 minutes of meetings?

8 A We are.

9 Q Okay. Is this something kept in the ordinary
10 course of the Noble Company business activities?

11 A It is.

12 MR. THOMPSON: Your Honor, we offer the Wednesday,
13 March 15, 2000, annual homeowners meeting as
14 Plaintiffs' Exhibit Number 3.

15 MR. COLE: Your Honor, no objection.

16 THE COURT: They're admitted.

17 (Homeowner association minutes marked and
18 received in evidence as Plaintiff's Exhibit.
19 Number 3).

20 BY MR. THOMPSON:

21 Q Miss Harmon, in the first paragraph it states some
22 of the people who were present. Can you tell the jury
23 if there was anyone there on behalf of Heritage
24 Communities?

25 A Yes, there was.

1 Q All right. Who was that?

2 A Quinn Hardester.

3 Q And do you know what position Quinn Hardester held
4 with Heritage Communities?

5 A At this point in time he was the president and
6 COO.

7 Q Okay. Was Mr. Hardester also on the Board of
8 Directors for Riverwalk?

9 A He was.

10 Q Okay. At this time?

11 A He was, yes, sir.

12 Q All right. If you would, Miss Harmon, read the
13 third paragraph, it's a little lengthy but if you
14 would, read the last paragraph on that page, please,
15 ma'am.

16 A Okay. "Mr. Hardester then informed the membership
17 about the problems with the decks. He told the
18 membership that Heritage Communities has finally found
19 the problem with the leaking decks and the problem with
20 the mold on the deck. There was a product called
21 Hydro-Seal installed on the deck and when the railings
22 on the decks were installed the screws penetrated the
23 waterproofing, allowing water to get into the deck and
24 cause the mold problem on the deck and the leaking
25 inside the units. Heritage has done an inspection of

1 the property and determined that there are
2 approximately 60 decks with this problem at Riverwalk.
3 Heritage Communities will be going back and sealing the
4 holes and the waterproofing, repairing the decks and
5 repairing any interior damages caused by the leaking
6 deck. This will all be at Heritage Communities'
7 expense. We ask that anyone who has this problem and
8 does not know if they are on the list to be repaired
9 please contact Heritage Communities."

10 Q Who normally is invited to attend the homeowners
11 annual meeting?

12 A Well, all the homeowners are invited.

13 Q Okay. And at this time Mr. Hardester, he was
14 addressing the homeowners?

15 A He was addressing the membership present, yes,
16 sir.

17 Q Okay. These were assurances he was providing
18 these homeowners?

19 A He was, yes, sir.

20 Q And if you would, look on the bottom of the second
21 page, the third sentence. Just read that one sentence
22 where it starts with the homeowner.

23 A "The homeowner stated that she was told that there
24 would only be seventeen buildings at Riverwalk and now
25 they are starting on phase two."

1 Q I'm going to show you Plaintiff's Exhibit Number 4
2 and ask you if you recognize that document?

3 A I do.

4 Q And what is that document?

5 A This is the Riverwalk Property Owners Association
6 Board of Directors meeting on December 15th, 2000.

7 Q And is this a document that is kept in the
8 ordinary course of the Noble Company's business
9 activities?

10 A Yes, it is.

11 MR. THOMPSON: Your Honor, we would offer the
12 December 15th, 2000, Board of Directors meeting as
13 Plaintiff's Exhibit Number 4.

14 MR. COLE: No objection, Your Honor.

15 THE COURT: Admitted.

16 (Meeting minutes marked and received in evidence
17 as Plaintiffs' Exhibit Number 4).

18 BY MR. THOMPSON:

19 Q Miss Harmon, I apologize but could you read this
20 entire document to the jury?

21 A Okay. "On December 15th, 2000, at 5:00 p.m. Dr.
22 Jack L. Green as the sole remaining officer for
23 Heritage Communities called a special meeting to
24 appoint new Board members for all the properties
25 developed by Heritage Communities which still remained

1 under developer authority and control as of December
2 15, 2000. Dr. Green appointed himself to serve as the
3 president of the Board of Directors --"

4 MR. COLE: Your Honor, could we address a matter,
5 a matter in front of you real quick?

6 THE COURT: All right.

7 THE COURT: Ma'am, when you're reading, read a
8 little slower.

9 THE WITNESS: Okay.

10 (Unrecorded bench conference).

11 BY MR. THOMPSON:

12 Q Miss Harmon, if you would, continue reading the
13 paragraph two.

14 MR. COLE: Your Honor, just for the record, let me
15 object for the record here on the basis of prejudice
16 and relevancy.

17 THE COURT: The objection is noted and overruled.

18 A "Dr. Green appointed himself to serve as president
19 of the Board of Directors for Magnolia North, Azalea
20 Lakes, Riverwalk, Avion Park and the Gardens at Cypress
21 Bay property owners associations. Jimmy Watson, an
22 employee of Heritage Communities, was appointed to
23 serve as vice-president for the associations named
24 above. Jason Green was appointed to serve as
25 secretary/treasurer for the associations named above as

1 That is it, it is Defendant's Exhibit Number 61.

2 If you will refer to that as Defendant's Exhibit 61.

3 BY MR. THOMPSON:

4 Q On this date, September 24th, 2002, what was the
5 purpose of this special homeowners meeting?

6 A To elect a five member Board of Directors.

7 Q Okay. And the Board of Directors that was
8 elected, are you familiar with those five people?

9 A Yes, sir.

10 Q Okay. Were they all homeowners at Riverwalk?

11 A They were.

12 Q Okay. Now, Exhibit Number 10, Plaintiff's Exhibit
13 Number 10?

14 MR. COLE: That might --

15 Q Do you recognize that document?

16 A I do.

17 Q All right. Is this a document that is kept in the
18 ordinary course of business activities of the Noble
19 Company?

20 A Yes, sir, it is.

21 Q Okay. And what is the title of this document?

22 A Riverwalk Property Owners Association Board of
23 Directors Meeting, December the 9th, 2002.

24 MR. THOMPSON: Your Honor, we would offer the
25 Board of Directors meeting of December 9, 2002, as

1 Plaintiff's Exhibit Number 10.

2 I think that might be Defendant's 64, we might
3 already have it.

4 THE COURT: All right.

5 MR. THOMPSON: That is Defendant's Exhibit Number
6 64, Your Honor. We will refer to that as Defendant's
7 Exhibit Number 64.

8 BY MR. THOMPSON:

9 Q On the top of the second page, did the Board of
10 Directors vote on this date to hire anyone to come in
11 and look at their construction problems?

12 A They did.

13 Q And is this three months after the homeowners were
14 elected, being homeowners at Riverwalk, to be in
15 control of the Board?

16 A Yes, sir, it is.

17 Q This is three months after the developer turned
18 over control. Is that right?

19 A Yes, sir, it is.

20 Q Now, when the developer turned over control of
21 Riverwalk to the homeowners association were there
22 still construction deficiencies at Riverwalk?

23 A Yes, sir, there was still construction problems.

24 Q Okay. Was the construction problems some of the
25 construction problems that were identified in those

1 less than eight, they were, I think delinquent.

2 Q Are any of those reserves set aside to make
3 repairs to construction deficiencies that were
4 identified in those previous reports?

5 A Absolutely not.

6 Q None?

7 A No.

8 Q So, did the developer turn this property over to
9 the homeowners with construction defects?

10 A They turned it over with construction problems,
11 yes, sir.

12 Q That they knew about?

13 A Yes, sir.

14 Q And with no money to repair them?

15 A They did not contribute money, no, sir.

16 Q One other thing, Miss Harmon. I show you
17 Plaintiff's Exhibit Number 11 and ask you if you have
18 ever seen that document before?

19 A I have.

20 Q Okay. And is this a document that was prepared by
21 the Noble Company?

22 A It was.

23 Q Is this a document you keep in the ordinary course
24 of your business activities.

25 A For Riverwalk, yes, sir.

1 Q .Okay. What is it? Tell the Court what it is.

2 A This is basically a description since 2000, since
3 January of 2003 of any expenses that the association
4 has made for items that we believe were construction
5 problems, construction related issues, so it is
6 basically keeping a running total of those expense
7 because this is money that came out of the reserves for
8 that.

9 Q Who instructed you to prepare this document?

10 A My Board of Directors there at Riverwalk.

11 Q Okay.

12 MR. THOMPSON: Your Honor, we would offer this
13 document as Plaintiff's Exhibit Number 11, which is a
14 list of repair costs at Riverwalk.

15 MR. COLE: No objection to the summary, Your
16 Honor.

17 THE COURT: It's admitted without objection.

18 (Expense summary marked and received in
19 evidence as Plaintiffs' Exhibit Number 11).

20 BY MR. THOMPSON:

21 Q Miss Harmon, what year does this cover?

22 A It covers from the beginning, again 2003, through
23 and including the end of 2008.

24 Q Okay. And what is the total amount that has been
25 spent?

1 A 126,577.48.

2 Q And again these costs were made for what type of
3 repairs at Riverwalk?

4 A These are what we believe are construction defects
5 all the way through.

6 Q Okay. And if these repairs had not been made
7 would there be a danger to the homeowners' safety?

8 A I think, yes, sir, certainly from the idea of
9 rotten wood and things like that. I mean, people could
10 step through them, I mean.

11 Q Okay. Were there costs in there for repairs of
12 rails?

13 A There were areas around the railings. I know
14 where it attaches, where the railings attach to the
15 flooring there is a lot of it.

16 Q And what was the problem there, what was being
17 repaired?

18 A Well, essentially where it attaches to the deck
19 floor it would rot, it rots the floor out, I mean,
20 water gets into it, it was plywood board there, it is
21 covered with waterproof membrane but it is not OSB
22 board.

23 Q Were repairs made to make these rails safe?

24 A Oh, yes.

25 Q Were there repairs made to the breezeway walkway?

1 A Yes.

2 Q Okay. And why were those repairs made?

3 A To make them safe so that people didn't step
4 through them.

5 Q Were those repairs or any of those repairs on this
6 document, were they wholesale permanent repairs?

7 A No. The Board instructed us early on to make all
8 safety repairs every time we came upon a problem, every
9 time we got a call from a homeowner to go investigate
10 it and make whatever repairs had to be made for safety.
11 We were never instructed and never told to make
12 permanent long term wholesale, do an entire floor
13 repairs.

14 Q As part of the just ordinary maintenance out at
15 Riverwalk has the Noble Company been involved with
16 replacement of carpet on the breezeways?

17 A Yes, sir I believe we did that in about 2003.
18 That was a regular routine maintenance, however, it
19 doesn't have anything to do with this. It is just part
20 of a regular reserve schedule.

21 Q Okay. Were you here yesterday when Mr. Fosmire
22 gave his opening statement to this jury?

23 A Yes, sir.

24 Q All right. Did you hear him talk about the rot on
25 the breezeways?

1 A Yes, sir.

2 Q Okay. When the carpet was pulled up on the
3 breezeways did you find or are you aware of any rot,
4 any places that had to be repaired in the middle of the
5 breezeway as opposed to around the columns?

6 A Yes, it was all inclusive, as if they went all the
7 way even to the unit door.

8 Q So, was that more than just one place?

9 A Yes, sir, I'm pretty confident I remember several.
10 Again, we were working it and we had people out there
11 who repaired them and so forth.

12 Q Okay. And we talked a little bit about Jack
13 Green, his involvement in this. Where does Jack Green
14 live?

15 A He lives in Myrtle Beach.

16 Q Where does Jack Green work?

17 A Myrtle Beach.

18 Q Do you see Jack Green in this courtroom anywhere
19 today?

20 A No, sir.

21 MR. THOMPSON: Thank you, Miss Harmon. That's all
22 I have. These attorneys will have questions for you.

23 THE COURT: Mr. Cole.

24 MR. COLE: Thank you, Your Honor.

25 Do you need some water before you start?

1 janitorial.

2 Q This appeared to be stuck in the individual
3 folders you have for the months?

4 A Right.

5 Q That one is -- that one should be --

6 A Actually October, 2008.

7 Q So, in October, 2008, the monthly maintenance fee
8 for that one is about \$3,800?

9 A Right, that is the management fee.

10 Q Management fee. And then you also, for the
11 maintenance, was that the cost that you were paid to
12 maintain the property and you used that money to --

13 A No, that's the actual cost for the employees. I
14 have employees on the property.

15 Q Okay. So, the employees that you have that are
16 Noble employees doing maintenance, that was
17 approximately \$5,600 per month?

18 A Right. There is two employees, they each work 40
19 hours a week, monthly pay.

20 Q All right, I'll take that back. So, the
21 management fees, you're earning about \$45,600 per year,
22 if we just multiply that number by twelve, right?

23 A Okay, sure.

24 Q If my math is correct. I used a calculator.

25 A I'm sure you're correct.

1 Q The contract maintenance, that is about 67,000 per
2 year, correct?

3 A Yes. Those are employees.

4 Q If my math is correct?

5 A Right.

6 Q Your offices, you said it is off of 48th, is that
7 correct?

8 A That's correct.

9 Q Can you see the plaintiffs' office up on the top
10 floor as you look across, can you actually see their
11 office?

12 A Are you talking about Heritage?

13 Q Thompson and Henry.

14 A Well, their Myrtle Beach office is across the
15 pond, there is a pond, then a street, then their
16 office, yes.

17 Q Okay. All right. You were asked earlier about --
18 do you have a copy of the master deed in front of you?

19 A I do not.

20 Q Plaintiff's Number 1. All right, Plaintiff's
21 Number 1 previously entered, this is a copy of the
22 master deed, correct?

23 A Yes, it is.

24 Q You have seen this master deed before and I'm not
25 going to ask you to tell us what you memorized from it.

1 A Right. Yes, sir, I have seen it.

2 Q And every property that has a homeowners
3 association should have a master deed, correct?

4 A Yes, sir, it does.

5 Q Okay. And the date on this master deed, on the
6 front it says filed Horry County, South Carolina. What
7 does that mean?

8 A It was given to the, they keep it as a record.

9 Q So it is officially filed with the county,
10 correct?

11 A Sure.

12 Q And so the first portion of the master deed, what
13 is the file date?

14 A October 30th of 1997.

15 Q Okay. And there are actually eighteen amendments
16 to this master deed, correct?

17 A Yes, there would be eighteen.

18 Q Okay. That is because building one was the first
19 master deed and then you amend it every time you add a
20 building, correct?

21 A Well, the developer would but yes.

22 Q Okay. And the eighteenth amendment, when was that
23 filed?

24 A February 29th of 2000 -- I'm sorry, there is two
25 different file dates on here. There is one on

1 February, then on January the 4th.

2 Q So, apparently they filed it first January 4th,
3 2000, and then they filed it again for some reason on
4 February 29th, 2000. Correct?

5 A Yes.

6 Q Okay. The master deed, if you would flip to --
7 actually let me ask you this question first. What
8 you're managing is the common elements, correct?

9 A Correct, I don't do any interior.

10 Q The master deed, at pages four and five of the
11 main document, I'm not going to ask you to read that to
12 the jury but that defines what a common element and
13 what other elements are out there, correct?

14 A Yes, sir, it defines units' common elements.

15 Q And for the common elements generally that is the
16 common areas like the walkways and the brick and the
17 structures and I think you mentioned the paving and the
18 roofs and other portions that are part of the
19 maintenance schedule, that is common elements, correct?

20 A Generally, yes.

21 Q And that is what the homeowners association is in
22 charge of, those common elements, right?

23 A Yes.

24 Q That is what you helped to maintain, those
25 particular common elements? I say you, the Noble

1 Company?

2 A Right.

3 Q If you would flip to page 15, which is in the
4 master deed, Roman Numeral 23, this is the maintenance
5 and repair common elements by the association. That
6 third paragraph down there, you have already testified
7 that there is a requirement for an annual maintenance,
8 I'm just referring to this, this is the actual section
9 that says this is why you have a required one year
10 inspection, correct?

11 A Right. It says Board of Directors shall require
12 one to be done.

13 Q Okay. And it says here that it should be
14 evaluated annually by a professional engineer,
15 architect, qualified property inspector or other
16 qualified professional who shall then render a
17 maintenance recommendation report?

18 A Right.

19 Q And if you flip to section Z, actually which is
20 Exhibit F, which is kind of near the back, I guess page
21 Z. It looks like nine pages from the back, I think.

22 A Would Z be the articles of incorporation?

23 Q I think it is, let's see. It is right after the
24 articles, yes.

25 A Right after the articles?

1 Q Yes. Look on your left there.

2 A Yes.

3 Q Okay. And I think you have given some general
4 testimony before about what you keep reserves for. Is
5 this sort of the initial list, at least, of what the
6 reserves were?

7 A Yes, sir, this was one of the lists.

8 Q Okay. And you have already said that something
9 like paving, that might be something that you have,
10 correct?

11 A Right.

12 Q Okay. We have here, it says painting fascia trim
13 and handrails.

14 A Right.

15 Q It has a number to the right. What is that
16 number?

17 A That is the required frequency of action in years.

18 Q What is that saying when you look at this, what is
19 that telling you that you need to do with regard to
20 painting fascia, trim and handrails?

21 A It says essentially you should paint your building
22 face, the board and things like that, trim and the
23 handrails. Part of the handrails at whichever walk are
24 wood and part are not.

25 Q By the master deed, how frequently are you

1 supposed to do that?

2 A Every three years.

3 Q Okay. And the caulking, sealants, doors, windows?

4 A That's the next one, right.

5 Q It is recommended for how long?

6 A Every year and a half.

7 Q Okay. I think you've testified you replaced some
8 carpet out there, right?

9 A Yes.

10 Q The next one is actually carpet replacement. What
11 is the frequency for that?

12 A Every five years.

13 Q Then you have pressure wash. When were you
14 supposed to do that?

15 A Every year.

16 Q In fact haven't you all pressure washed and
17 painted, you have sort of done that together?

18 A Yes, we've done that.

19 Q And at some point this was modified with the time
20 lines, correct?

21 A Yes. Later when the Board of Directors was, you
22 know, homeowner controlled they did some modification
23 on it.

24 Q And did they lengthen or did they shorten the time
25 period that they had in there for the different

1 elements?

2 A I think in some cases they probably lengthened
3 them and in some cases they added some things that were
4 not on here originally.

5 Q Okay. You're aware of what building permits are,
6 correct?

7 A Yes.

8 Q I hand you what has been previously marked as
9 Defendant's Exhibit Number 2, which is a packet of
10 information that are Horry County permit applications.
11 Do you recognize that?

12 A Yes.

13 Q And you have seen permit applications before in
14 your dealings as property manager, correct?

15 A Occasionally.

16 Q A permit application, that is when you actually
17 get to start constructing the building, correct?

18 A Right, you apply for an application to be able to
19 construct, start construction.

20 Q Okay. So, whoever the builder is, and we're
21 looking at the first page, that is for the first
22 building out there, correct?

23 A It says subdivision, Riverwalk, lot number one.

24 Q Okay. When we have taken depositions we have done
25 this, everybody has understood lot one means building

1 one. Is that a fair assumption, at least that is what
2 everybody else says?

3 A Okay, I'll go along with that.

4 Q All right. And the date they actually requested
5 the permit to be able to start building that first
6 building was what?

7 A It looks like 6/30/97.

8 Q Okay. So, that would have been the day they could
9 have broken ground, presumably?

10 A That's correct, yes, sir.

11 Q Okay. Could you flip to the last one? What I'm
12 trying to do is just get, is get a time line here. The
13 last permit application in that packet, what is that
14 for?

15 A It says Riverwalk Arrowhead, phase two, Riverwalk
16 Arrowhead and it has lot number five.

17 Q Lot number five, that was one of the two buildings
18 constructed in phase two, correct?

19 A I would believe so, yes, sir.

20 Q And that was the building with the street address
21 of 1514, correct?

22 A I would say you're right.

23 Q I believe that was the one that backed up to the
24 intracoastal waterway?

25 A There are two do that, buildings three and five in

1 phase two. The addresses are not committed to memory.

2 Q And this permit was pulled when?

3 A The date that the permit application was made was
4 7/2/99.

5 Q Okay. And you're familiar with certificates of
6 occupancy, aren't you?

7 A I have seen them, yes, sir.

8 Q Okay.

9 MR. COLE: Your Honor, I will move Exhibit Number
10 2 into the record, I think it's without objection.

11 MR. HENRY: Without objection.

12 THE COURT: Admitted.

13 (Building permits marked and received in evidence
14 as Defendant's Exhibit Number 2).

15 BY MR. COLE:

16 Q Exhibit Number 3, this is a packet of
17 certificates of occupancy. You have seen these
18 before, correct?

19 A Yes, sir.

20 Q What is the certificate of occupancy?

21 A It is a certificate that the Department of Code
22 Enforcement has looked at the building and I believe
23 says you can live in it at that point.

24 Q Is it fair to say you can't move into the building
25 until you actually get a certificate of occupancy?

1 A I would say that's a fair statement, sir.

2 Q And that's because if you're under the code when
3 you're building something in the county or whatever
4 municipality is controlling that you have to, they have
5 to tell you if it is okay to move in?

6 A They have to give you a certificate of occupancy,
7 yes, sir.

8 Q That first certificate of occupancy, that was
9 issued October, 1999, correct?

10 A It was.

11 Q Would you pull out the master deed, number 18, the
12 last amendment to that. They are double sided pages,
13 but the third page from the back.

14 A All right.

15 Q Is that a certificate of occupancy that's attached
16 to the amendment for the master deed, number 18?

17 A It is.

18 Q What is the date that certificate of occupancy was
19 issued?

20 A 12/30/99.

21 Q Okay. And, so, one of the buildings at the end of
22 the project had a certificate of occupancy by the end
23 of 1999, correct?

24 A 12/30, yes, sir.

25 Q Would you look at the last certificate of

1 occupancy that we have in this packet here?

2 A 11/24/99.

3 Q Okay. So, that's the, that's the certificate of
4 occupancy, that appears to be for the other building
5 over in phase two, correct?

6 A Building five, yes, sir.

7 Q Okay. So we've got, we know when the buildings
8 were permitted, we know the first was '97 when it was
9 permitted, we know by the end of 1999 the certificate
10 of occupancy was issued and soon after, in January of
11 2000 is when the last master deed amendment was filed,
12 correct?

13 A Yes, 2000.

14 Q I'm going to try to keep the number of exhibits
15 that have already been entered, the numbers are going
16 to start jumping together for everybody, so I'm going
17 to try to keep this consistent.

18 Would you pull out Plaintiff's Exhibit 2, please.
19 All right, this is the October, 1999, report from
20 Kimmerly Horne, correct?

21 A Yes.

22 Q This is the first report that was obtained when
23 the Noble Company was the management company, correct?

24 A That's correct.

25 Q Okay. And there is, I think you testified earlier

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

2005-CP-26-3289

2003-CP-26-7169

TONY L. POPE and LYNN S. POPE,
individually and representing as a
class all unit owners of Riverwalk
at Arrowhead Country Club Horizontal
Property Regime,

Plaintiffs,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants,

--- AND ---

RIVERWALK AT ARROWHEAD COUNTRY CLUB
PROPERTY OWNERS' ASSOCIATION, INC.,

Plaintiff,

-vs-

HERITAGE COMMUNITIES, INC.; ET AL,

Defendants.

B E F O R E:

HONORABLE CLIFTON NEWMAN

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

JOHN P. HENRY, Esquire
PHILLIP C. THOMPSON, Esquire
Attorney for the Plaintiffs

ERIC G. FOSMIRE, Esquire
ANDREW C. COLE, Esquire
Attorneys for the Defendants

VOLUME IV of IX
January 8, 2009

1 A Yes.

2 Q Have you formed an opinion to a reasonable degree
3 of certainty, based on your experience as a contractor
4 and forensic expert, as to whether or not the
5 contractor and the developer in this case breached
6 their standard of care?

7 A Yes.

8 Q And what is your opinion?

9 A That the standard of care was breached.

10 Q Okay. All right. Do you have a copy of your
11 scope of repair?

12 A Yes, I have a copy. It is just a little easier to
13 read than off the screen.

14 Q All right. Have you given the homeowners
15 association recommendations on how these buildings are
16 to be repaired?

17 A Yes. The recommendations were contained within
18 the report that we discussed.

19 Q Okay. That was -- what is the date of that
20 report, please?

21 A The May 28th, 2004.

22 Q So that recommendation is how old?

23 A Five years, coming up on five years.

24 Q In your other investigations do you sometimes give
25 new estimates?

1 it?

2 A You're talking about now the width of a pencil
3 when you're looking down at that scale. He indicated
4 in the drawing a gap that was there but during my years
5 of constructing buildings and if the architect on the
6 many projects that were providing architect
7 administration had come out and I hadn't provided a
8 backer rod and sealing joint and I told him he didn't
9 put enough distance between the lines on his plans,
10 that would not have floated.

11 MR. FOSMIRE: I'm about to go into another
12 subject. Would this be a good time to take a break?

13 THE COURT: All right, we'll take a break. Do you
14 want a break? I'm not going to ask the jury.

15 All right, we'll take a break.

16 (The jury was excused from the courtroom).

17 (Recessed at 4:29 p.m.).

18 (Reconvened at 4:45 p.m.).

19 (The jury return to the courtroom).

20 THE COURT: All right, the jury is back, you may
21 continue.

22 MR. FOSMIRE: Thank you, Your Honor.

23 BY MR. FOSMIRE:

24 Q Mr. Brown, you talked a little bit with Mr.
25 Henry about window testing. We saw that big spray rack

1 hanging down in front of the window.

2 A That's correct.

3 Q Your purpose was to see if there was any water
4 intrusion around the window or the window frame?

5 A During our window testing, yes.

6 Q You know we're reworking all those window frames
7 with the ABS scope, the brick, you know that?

8 A Once again, the ABS scope, I have looked at it.

9 When you say frames, window frames, does that mean the
10 windows are being removed and replaced, the actual
11 window frame?

12 Q The window openings, the windows are being removed
13 and the opening reworked and the window re-installed?

14 A Yes, I understand that's their scope.

15 Q You said on direct that the windows which were
16 installed were code compliant as far as wind load, is
17 that right?

18 A That's correct.

19 Q The windows were accepted by the code official or
20 the building inspector?

21 A That's correct.

22 Q You said something in your, something about the
23 windows, though, which I didn't quite understand. Is
24 it your testimony that all the windows have to be
25 replaced?

1 A Yes.

2 Q Your testimony is all the windows have to be
3 replaced because they're defective?

4 A Yes, that is part of the reason, yes.

5 Q The building code inspector approved all of them?

6 A They did.

7 Q Now, knowing that we were going to trial, you all
8 went and did that spray rack testing in October of last
9 year?

10 A The last phase of the testing was done in 2008,
11 October, yes.

12 Q In October, literally just a few months ago?

13 A We did do spray rack testing back during our
14 original investigation as well.

15 Q There was a question about that and you all went
16 back out there in October of 2008 because you all knew
17 we were going to trial?

18 A Well, there was an issue, there was new
19 information that became available to us and we felt
20 like we needed to fully complete our testing so that we
21 could render an opinion, an appropriate opinion on the
22 current windows.

23 Q You prepared this book, right?

24 A Yes.

25 Q Is that yours? I'll put it up. That is your

1 window test report?

2 A Yes.

3 Q November 12, 2008, is actually two months ago, you
4 prepared the report but the testing was actually, I
5 think Halloween?

6 A During the week of.

7 Q Week of Halloween?

8 A That's correct.

9 Q Here is you all's report about the field testing.
10 What you all did, you all went out there, the windows
11 were tested for conformance to resist water
12 penetration, correct?

13 A That's correct.

14 Q That's a standard you are using, AAMA 502,
15 specifications for field testing of windows, right?

16 A As well as ASTM 1105 is another standard.

17 Q What that test does, not only are you running
18 water up against it, not only are you running water
19 across the windows but you have also got a device where
20 you're pulling air against it and using negative
21 pressure to pull against the other side, because the
22 window testing is performed with ASTM 1105 and it uses
23 pressure differential across the exterior surface, with
24 water at a regulated rate, right?

25 A Yes, that's correct.

1 Q So you are using, you are using pressure from the
2 inside to draw against the window?

3 A During a portion of the test using a differential
4 pressure, actually using a vacuum on the inside to
5 create differential pressure.

6 Q When you did that you found, you found that the
7 windows, you did six specimens, right, you found, your
8 six specimens, you found the windows themselves leaked
9 by doing that test?

10 A That's correct.

11 Q Are you aware you used the wrong standard?

12 A We did not use the wrong standard, in my opinion.

13 Q Are you familiar with; you said you used AAMA 502,
14 are you familiar with AAMA 511?

15 A Yes.

16 Q This is AAMA 511, the document itself, have you
17 got it?

18 A I have a copy of it.

19 Q AAMA 511, note one, which is the introduction, it
20 says, "Diagnostic testing is an integral part of
21 systemic investigation, however this type testing
22 differs significantly from other AAMA testing
23 documents. The purpose of diagnostic testing is to
24 recreate water leaks that are known to occur. On the
25 other hand, AAMA 502 and 503 field testing procedures

1 are intended for evaluating newly installed
2 fenestration products or to provide evidence of
3 compliance with the project specifications."

4 Now, these weren't newly installed, because in
5 2008 you are over ten years old on these buildings.
6 Isn't that right?

7 A That's correct.

8 Q So, they weren't newly installed and evidence of
9 compliance with project specifications means testing it
10 at like the manufacturer's facilities to see if it is
11 in fact coming out of the factory as they specify?

12 A That's incorrect.

13 Q Here it says provide evidence of compliance with
14 the project specifications?

15 A This project specification addressed here would be
16 the project specification as prepared by design
17 professionals such as Mr. Pegram, that we reviewed.
18 The 502 and 503 is a field testing procedure, as you
19 can see, and you said tested at the laboratory. That
20 is incorrect. It is a field testing procedure.

21 Q For newly installed products. They are ten years
22 old at this point?

23 A That was the intent of the 502, 503, in this
24 particular document they are saying.

25 Q Now, we get to the notes, number four, note four.

1 "Because building leaks sometimes go unnoticed for a
2 significant period of time, careful consideration must
3 be made to ensure that the reported leak history
4 correlates with field observations."

5 Now, did you read any of the depositions of the
6 unit owners for those units?

7 A No.

8 Q We'll get to that in a minute. "Additionally, in
9 many cases the investigators use inappropriate field
10 testing adaptations to AAMA 502 and 503 to investigate
11 the purported water penetration. A common incorrect
12 adaptation involves performing differential pressure."

13 And you just said in your report a minute ago, I
14 just showed you here, you were using differential
15 pressure. "A common incorrect adaptation involves
16 performing differential pressure water testing on
17 fenestration products which are often higher than the
18 pressures the fenestration products routinely
19 experienced during wind driven rain events that
20 produced water penetration."

21 Now, did you examine any of the weather reports or
22 consider the actual wind driven rain experienced by
23 these unit owners over the ten years they have been in
24 the units?

25 A No. The purpose of the, of this --

1 Q Let me stop you.

2 MR. HENRY: He can explain his answer.

3 Q The answer is?

4 A The answer is no.

5 Q Go ahead and explain..

6 A If we could go back to the previous page, I think
7 it is very important to understand what 511 is, because
8 we have not talked about the document in its entirety,
9 511, as you can tell, is also preceded by the dash 08,
10 meaning this standard was just developed and released
11 in '08. The work that we were doing on this point, as
12 we talked about, the vast, vast majority of it preceded
13 '08. Just the last series of window testing we did
14 would have occurred in '08. If we go to the page that
15 you were reading, I failed to follow along and read
16 down farther in that photograph, if we could go back
17 one slide.

18 Q Go to whatever page you like.

19 A Back one to the introduction and pick up with
20 where you left of. "On the other hand, AAMA 502 and
21 AAMA 503 field testing procedures are intended for
22 evaluating newly installed fenestration products or to
23 provide evidence of compliance with a project
24 specification."

25 We discussed that. It goes on to say that, "ASTM

1 E 3128 describes the procedure necessary for a
2 systematic forensic investigation, allowing for the
3 adaptation of testing procedures such as AAMA 502 and
4 AAMA 503."

5 That is the ASTM 2128 which is the standard for
6 general forensics investigations that allow you to
7 adopt the 502 and 503 to test not only newly installed
8 but to use these procedures to test as a forensic or
9 building diagnostics test, as well as the standard of
10 ASTM 1105, which also provides a standard for in-field
11 testing regardless of the age of the product.

12 Q You seem to quibble about the applicability. I
13 mean, you know, this is 2008 when you did the test. So
14 you're telling me that the only standard I'm quoting is
15 not applicable?

16 A It would, in my opinion, for this case would not
17 be applicable and the ASTM 2128 does not recognize the
18 standard yet, so it is, you prefaced this, "Are you
19 aware, Mr. Brown, you used the wrong standard in
20 investigating these windows," and I said I did not
21 agree with that, and that is the basis for my
22 disagreement.

23 Q So, my question to you was did you consider the
24 actual weather events experienced in Horry County or
25 read the deposition of any of the unit owners prior to

1 doing this test?

2 A No.

3 Q "Field testing at these high pressures may result
4 in new leaks and false conclusions that the
5 fenestration product is the cause of all purported
6 water penetration." Do you agree with me that is what
7 it says in this note?

8 A What it is talking about --

9 Q Do you agree with me that is what it said in these
10 notes?

11 A I agree you read the words. Now let's discuss the
12 note because we left off where we were talking about it
13 before. It talks about, "A common incorrect adaptation
14 involves performing differential pressure water testing
15 on fenestration products which are often higher than
16 the pressures the fenestration products routinely
17 experienced during wind driven rain events that
18 produced water penetration. Field testing of these
19 high pressures may result in new leaks and the false
20 conclusion that the fenestration product is the cause
21 of all of the reported water penetration."

22 If you are only testing at differential pressures
23 that are very high that is exactly right. That is why,
24 as you talked about our report you said, "Mr. Brown,
25 you always apply differential pressure," and I had to

1 correct you and say no. The first test we run is with
2 zero differential pressure, and some of the windows at
3 Riverwalk failed to resist water intrusion under zero
4 differential pressure.

5 Q Are you through? When you did your testing, these
6 were the specimens that you tested, right?

7 A That's correct.

8 Q This is the building and unit number, right?

9 A That's correct.

10 Q Specimen two. You already said, I think, that you
11 didn't read any of the depositions. Do know the owner
12 of that unit is a guy name Mike Voyles?

13 A I do not know that siting here today.

14 Q Mr. Voyles is a grocery store owner who lives up
15 in Indiana. Mr. Voyles testified that he had no
16 problems whatsoever with his windows. Are you aware of
17 that?

18 A I was not aware of that, no.

19 Q Mr. Voyles testified that he has been down here
20 from Indiana, he has been down here on rainy days and
21 he has had no problem whatsoever with his windows. You
22 have not read that?

23 A I have not read that.

24 Q Specimen five, 694, unit 101. You also have not
25 obviously read the deposition of Sue Ann Hodges, have

1 you?

2 A No.

3 Q Miss Hodges is a resident, lives really not far
4 away from Riverwalk but also owns a condominium. Miss
5 Hodges uses the condominium as a place for her family
6 to come down and she testified that she has no problems
7 whatsoever with her windows.

8 You have not seen that testimony?

9 A I have not.

10 Q Have you asked Mr. Thompson or Mr. Henry for the
11 depositions of these unit owners?

12 A No. We worked in conjunction with the Noble
13 Company in trying to secure information on any reported
14 problems, unit owner reports of any type of problems
15 during our investigation phase in the 2002, 2003 time
16 frame and we received reports of window leaks in some
17 units.

18 Q My point is, not all the windows leaked out there?

19 A Well, you know, I think the point that you're
20 making is a very good point, that not all the unit
21 owners are aware of problems with their windows. As we
22 have talked about, sometimes window leaks can create
23 hidden damages. Just like missing flashing, I doubt
24 that if these particular individuals have one of those
25 roll locks outside their house where we were looking at

1 pictures of damages to the sheathing where the flashing
2 was improper, that they know they have damaged
3 sheathing. But the forensic part of the test, that is
4 why we pull apart the sample and you can see in some of
5 the photographs of the reverse isolation test where
6 water was showing up exactly where there had been
7 damage before reported.

8 Q 694, 101. Mr. Voyles' unit. You didn't go and
9 open up that wall and find if there was any damage, did
10 you?

11 A We opened up the wall around all the windows that
12 we investigated.

13 Q Did you find hidden damage under 694, 101?

14 A We would have to go back and correlate it, I
15 cannot recall. We would also have to look at the
16 outside moisture readings as far as his sheathing
17 damage created from water intrusion on the exterior.

18 Q I will use one of these examples. Here, this is
19 your first test, you said the failure was from an
20 improperly designed, manufactured seal in the
21 horizontal molding. That is a window product coming
22 from the factory. Isn't that right?

23 A Well, it's a window product issue. It's been, it
24 is a horizontal mulling issue. That horizontal mullion
25 is the half moon that sits on top of the triple gang

1 windows on our palladium windows we described. That
2 mullion process can take place in one of three
3 locations. It can take place at the factory. It is a
4 factory assembled part that is provided. It can take
5 place at the dealership that is distributing the
6 windows, or sometimes takes place in the field where
7 the windows are mulled together in the field.

8 Q As it relates to the window repair sequence, have
9 you seen these?

10 A Yes.

11 Q Your testimony is that you think it might just be
12 too tight to put in the flashing?

13 A I'm just saying the addition of those materials, I
14 think that is something that needs to be taken into
15 consideration. That wood framing where the arrow is
16 pointing to at the top of the palladium will need
17 adjustment, in my opinion, in many locations to provide
18 the proper clearance.

19 Q This is a proper sequence, you have the wood
20 framing, the window is out, you have the frame?

21 A That's correct.

22 Q And the sheathing?

23 A Correct.

24 Q Then you put the flashing in, this is the wrap,
25 weather resistant barrier?

1 A That's correct.

2 Q And you question about putting the pan in there
3 but that is what is being shown and what Allen and
4 Steve recommend is put pan flashing in there?

5 A I think the pan is an excellent idea. It is a
6 very good, it is a very good sill treatment but my
7 point being that when you add these component together
8 you can tell that you are going to create additional
9 thickness that is not under the present window now,
10 because I understand your scope that you just described
11 to me was to remove and reset these windows using the
12 same windows that were in place, then additional
13 framing would have to be done at the top. If a new
14 window was being installed that may not be the case.

15 Q And you run flashing to your weather resistant
16 barrier?

17 A That's correct.

18 Q Flashing up the side?

19 A That's correct.

20 Q Put the window back in?

21 A That's correct.

22 Q Flexible flashing over the top?

23 A That's correct.

24 Q There is your new lintel, correct?

25 A That's correct.

1 Q You are starting to put your brick back in?

2 A That's correct. The only, the only caveat that I
3 would also suggest into this assembly would be that
4 there be a protective flashing or flexible flashing
5 that would cover the lintel such that when, to give it
6 protection as the water would come down, too, but that
7 is a systematic approach to installing a window with a
8 rough opening flashing, with a proper through wall
9 flashing much as is consistent with the Pegram document
10 of design and had it been done in this case it would
11 have been a proper brick veneer installation.

12 Q Well, you prepared a scope of repair that has been
13 given to Prime South. A guy name Al Best will be here
14 tomorrow to talk about that. Have you worked with Mr.
15 Best as far as the scope and the estimate?

16 A Yes. He will testify to it.

17 Q And did you provide for him the amount of
18 sheathing or framing allowances that are included in
19 his estimate?

20 A No.

21 Q So, you didn't tell him how much framing or
22 sheathing to provide for in his estimate?

23 A No.

24 Q Are you aware he has listed some \$13,000 worth of
25 framing per building? Are you aware of that?

1 A I have seen his estimate, yes, I'm aware. Much
2 like the other estimate we talked about, I don't recall
3 it in detail but I have looked at it and worked with
4 him on that.

5 Q When you're talking about framing you are talking
6 about those members, right?

7 A What?

8 Q That structure.

9 A Well, framing, the sheathing, it also includes the
10 sheathing that is on the exterior as well.

11 Q He has a separate number for sheathing. I'm
12 talking framing.

13 A Okay.

14 Q So, only framing, \$13,000 buys a lot of 2X4's?

15 A Well, it buys 2X4's but as me and Mr. Henry talked
16 about, framing into existing walls and putting
17 temporary shoring up to carry loads is very, is the
18 most expensive wood framing you can do.

19 Q He has \$3,000 per building for sheathing. Are you
20 aware of that?

21 A I have worked --

22 Q You have seen that?

23 A I have seen the scope. I have not done a detailed
24 analysis on the scope. Me and Mr. Best worked together
25 as far as talking about the scope of our suggested

1 repairs and integrating that but not to the specific
2 details of his estimate.

3 Q So, since you haven't gone into the specific
4 details of his estimate you can't sit up there and
5 adopt his number, can you?.

6 A I' not adopting his number. I looked at his
7 estimate scope that flowed from our repair scope and
8 our discussions and it seemed to be an appropriate
9 scope to provide the repairs that will be needed at
10 Riverwalk.

11 Q The answer is no, you are not adopting his
12 numbers?

13 A I have not done the analysis to be able to adopt
14 his numbers.

15 Q Now, when you talk about, when you talk about a
16 scope of repair, he has included in his estimate
17 something that's called A and E, architectural and
18 engineering fees. Are you aware of that?

19 A That's correct.

20 Q There is some \$600,000 worth, maybe more, of
21 architectural and engineering fees that he has included
22 in his multi-million dollar estimate. Did you have any
23 input into those architectural and engineering fees?

24 A As to the number, as to the recommendation to have
25 design professionals it was in our recommendation. Our

1 scope recommendations that we previously went over, it
2 was to have professional design contract
3 administration. But as far as the amount of those
4 fees, no, I have not provided any dollar figure for
5 those fees.

6 Q Are any of those dollars going to you or Burric?

7 A No.

8 Q So, none of that A and E is going to go to you all
9 for putting up this scope?

10 A No.

11 Q Not only in October did you all go back and do
12 window testing but you all were taking one more stab at
13 the building, weren't you?

14 A Will, we did a walk-by and took some photographs
15 of one of the buildings that as we, as we have all
16 looked at and commented on, a lot of time had passed
17 since 2003 and 2004 issuance of the report and as we
18 looked back through those documentations of conditions
19 that particular building didn't have as many
20 photographs. The issues, we recalled being present but
21 we wanted to just do a walk around of that particular
22 building.

23 Q So, you knew we were going to trial, here was your
24 opportunity for a building where you had no photos, to
25 go and try and document it to prove it to this jury

1 settlement whatsoever.

2 THE COURT: All right.

3 MR. HENRY: He didn't even work for them.

4 THE COURT: We'll let you proffer him and we'll
5 see how this goes.

6 MR. HENRY: All right.

7 THE COURT: I probably won't rule on anything
8 today, its 6:15, but we'll proffer it.

9 MR. FOSMIRE: While he's walking up I will just
10 say, Your Honor, we don't have any pending claims
11 against BetterBuilt, summary judgment was granted
12 against us on that.

13 JIM GRAHAM,
14 after being first duly sworn, testified as follows:

15 THE CLERK: State your name for the Court, please.

16 THE WITNESS: Jim Graham.

17 MR. HENRY: Your Honor, I'm going to try to
18 shorten things.

19 THE COURT: Yes, sir, please, sir.

20 DIRECT EXAMINATION

21 BY MR. HENRY:

22 Q Mr. Graham, where do you live?

23 A Catawba, North Carolina.

24 Q Do you have any kind of agreement with us or
25 anybody else to be paid to come down here?

1 A No.

2 Q Are you connected in any way with BetterBilt?

3 A No.

4 Q When is the last time that you worked for
5 BetterBuilt?

6 A Around 2000.

7 Q Around 2000?

8 A Yes.

9 Q Okay. And why did you leave BetterBuilt?

10 A I was downsized.

11 Q Okay. And tell me, Mr. Graham, when you first,
12 when did you first get any knowledge of this
13 litigation? Do you recall when that was?

14 A When I received a phone call from your office.

15 Q Okay. No, I'm not talking about this lawsuit that
16 we're doing, I'm talking about when you first knew that
17 a lawsuit was going on? Did Mr. Kaplan call you or
18 somebody else call you?

19 A Not until --

20 Q Mike Freeman?

21 A Mike Freeman?

22 Q Yes. A lawyer?

23 A Yes. That was a couple months ago.

24 Q A couple months ago?

25 A Yes.

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

2005-CP-26-3289

2003-CP-26-7169

TONY L. POPE and LYNN S. POPE,)
individually and representing as a)
class all unit owners of Riverwalk)
at Arrowhead Country Club Horizontal)
Property Regime,)

Plaintiffs,)

-vs-)

HERITAGE COMMUNITIES, INC.; ET AL,)

Defendants,)

--- AND ---)

RIVERWALK AT ARROWHEAD COUNTRY CLUB)
PROPERTY OWNERS' ASSOCIATION, INC.,)

Plaintiff,)

-vs-)

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Defendants..)

B E F O R E:

HONORABLE CLIFTON NEWMAN

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Attorneys for the Defendants

VOLUME V of IX
January 9, 2009

1 JIM GRAHAM,

2 After being first duly sworn, testified as follows:

3 THE CLERK: Have a seat, please. State your name
4 for the Court, please.

5 THE WITNESS: Jim Graham.

6 DIRECT EXAMINATION

7 BY MR. HENRY:

8 Q Mr. Graham, would you tell the jury where you
9 live?

10 A Catawba, North Carolina.

11 Q Okay. How long have you lived in Catawba, North
12 Carolina?

13 A Five years now.

14 Q Okay. And have you always lived in the North
15 Carolina area?

16 A Not always, no. I'm a foreigner, I originally
17 come from Toronto, Canada.

18 Q Okay. But for the past five years -- how long
19 have you resided in North Carolina?

20 A Since 1998 -- I'm sorry, '78.

21 Q Since 1978?

22 A Yes, sir.

23 Q Okay. I want to, I want you to tell the jury a
24 little bit about your work history, where you worked
25 beginning in 1978 and coming forward.

1 A My work history is forty years, forty plus years,
2 I know I don't look it, but forty plus years of
3 building material industry. The last twenty odd years
4 primarily in the window and door business.

5 Q Okay.

6 A In sales, marketing and management.

7 Q All right. And have you ever worked for the
8 BetterBilt window folks?

9 A Yes.

10 Q Okay. When did you start with the BetterBilt
11 window folks?

12 A I believe it was late '90, early '91, somewhere
13 around there.

14 Q All right. And what were your duties, what were
15 your duties and responsibilities when you went to work
16 for BetterBilt?

17 A They called us territorial managers, which is
18 sales representatives, in a two and a half state area,
19 North and South Carolina and Virginia, Tidewater area.

20 Q Okay. And were you assigned a territory?

21 A Uh-huh, yes.

22 Q And where was your territory?

23 A North and South Carolina and the Tidewater area.

24 Q Okay. Now, as the area sales manager what were
25 your responsibilities?

1 A They were broken into a couple phases. Number
2 one, we would call on architects, contractors and
3 builders and promote our windows and doors. The other
4 aspect is we had distributors set up in these markets
5 and we would go around to the distributors and do
6 inventory checks, go with them to make builder calls,
7 support the distributors.

8 Q Okay. And did your territory include the Myrtle
9 Beach area?

10 A Yes, sir.

11 Q Okay. And in addition to the duties and
12 responsibilities you named, did you have any I will
13 term it troubleshooting responsibilities?

14 A When there was a claim of trouble, yes, we jumped
15 all over it and we would go out and investigate what
16 the problem was.

17 Q And did you do that in this area?

18 A Yes, sir.

19 Q Okay. Were you ever called -- let me ask you this
20 first. Who was your distributor of BetterBuilt windows
21 in the Myrtle Beach area?

22 A Pelican Building Center.

23 Q And were you ever called in by Pelican to
24 investigate any problems that they were experiencing
25 with your windows relative to the Heritage projects?

1 A Yes.

2 Q Okay. And what, what response did you make when
3 they called you?

4 A Well, it was immediate because Pelican was our
5 largest distributor, and B, it was a problem. They
6 indicated to us that they had water intrusion in the
7 window itself and so we would jump all over those
8 things.

9 Q And about what year was this?

10 A You know, I'm going to say '97, '98.

11 Q And the first time you came who did you meet with,
12 if you recall, at Pelican?

13 A Oh, at Pelican?

14 Q Yes.

15 A With two or three of their sales representatives
16 that were handling the different projects.

17 Q And did you go out to the site?

18 A Yes.

19 Q Okay. Now, were you selling or was
20 BetterBilt/Pelican selling the same windows to all the
21 Heritage projects?

22 MR. FOSMIRE: Your Honor, I object to the
23 reference to any other projects.

24 THE COURT: The objection is overruled.

25 Q Was Pelican selling the same identical windows to

1 all the Heritage projects?

2 A Yes, sir.

3 Q Okay. And the first time you were notified and
4 came down to look at a problem that Heritage was having
5 you met with Pelican and then --

6 MR. FOSMIRE: Your Honor, I object to leading. I
7 have given him a lot of leeway on that. I ask he ask
8 direct questions.

9 THE COURT: Don't lead the witness, please.

10 Q What did you do when you came from North Carolina
11 to Pelican?

12 A Well, when we would receive a call from one of the
13 distributors it was our standard practice that we would
14 go with the distributor representative to the job site
15 and working with the distributor representative and
16 someone from the job site, we would go to the unit that
17 they were complaining about and where they indicated
18 the problem was.

19 Q Okay. And is that what you did with the Heritage
20 project?

21 A Yes.

22 Q And did you look at the problems they were having?

23 A Yes.

24 Q And what did you determine their problem was?

25 A Well, they indicated to us that there was water

1 infiltration coming through the window, so when we
2 would get a complaint like this our standard procedure
3 was to put a water test on there.

4 Q All right. And did you go out to one of the
5 Heritage projects?

6 A Yes.

7 Q Do you recall which one you went to first?

8 A I think we went to Plantation first.

9 Q Magnolia?

10 A Yes, Magnolia, that was being completed.

11 Q Okay.

12 MR. FOSMIRE: Your Honor, I appreciate, I still
13 have an objection to any reference to other projects.

14 THE COURT: Yes, sir. The objection is overruled.

15 Q What did you do when you got out to Magnolia?

16 A When we got out there they told us what unit it
17 was and we would do a standard procedure of a water
18 test, which was we would have someone go on the inside
19 and they would be the spotter, and as the distributor I
20 was the guy that had to get wet and take the water hose
21 and spray it on the window, and we would do this in a
22 fashion we would start at the top of the window and our
23 responsibility as a window manufacturer was from the
24 frame, in. It had a frame and glass and so what we
25 would do is start at the top and spray it and spray it

1 all the way down and the spotter from the inside would
2 indicate, hey, we got water or we don't.

3 Q Okay. And is that what you did in the first time
4 you went to Magnolia Place?

5 A Yes.

6 Q And what did you determine?

7 A There was no water infiltration on the window.

8 Q Where was the water infiltration?

9 A On a couple units we couldn't, we couldn't find
10 any but on a bunch of others you could see around in
11 the corners that water was coming through. The window
12 was acting like a channel or eve drop. It was
13 directing the water and it was coming through the
14 drywall, you could see it from the inside.

15 Q And did you determine why it was coming in to the
16 drywall?

17 MR. FOSMIRE: Your Honor, I object to any opinion.
18 He is not qualified as an expert, never been declared
19 an expert and trying to give expert opinion at this
20 point would be inappropriate. He can say what he
21 observed.

22 Q Did you observe where the water was coming in?

23 A Yes.

24 Q And did you determine why it was coming in?

25 MR. FOSMIRE: Objection, he can't give an opinion.

1 MR. HENRY: He is not giving an opinion, Your
2 Honor, he's going to testify as to what he saw.

3 MR. FOSMIRE: Why is an opinion.

4 BY MR. HENRY:

5 Q What did you see or observe that was allowing the
6 water to go in?

7 A What was I seeing? I saw water stain, I saw, you
8 could see the drywall acting like a sponge, you could
9 see water coming through the drywall.

10 Q Did you see anything that would tell you why the
11 water was going in?

12 MR. FOSMIRE: Objection. He can't say what. That
13 is an opinion.

14 MR. HENRY: He can say if he saw a hole or --

15 THE COURT: Ladies and gentlemen, I'm going to
16 have you go to the jury room just for a moment.

17 (The jury was excused from the courtroom).

18 THE COURT: All right.

19 MR. HENRY: Your Honor, he's observed hundreds if
20 not thousands of windows. He is the trouble guy for
21 BetterBilt. I would certainly think that he could say
22 what he saw that was allowing the water to come into
23 the room, if he saw any, if he saw it. I mean, he
24 eventually is going to testify there was no flashing
25 and there were no sealants. Under Rule 701 he can

1 testify to opinions or inferences that are rationally
2 based on the perception of the witness and it does not
3 require special knowledge, skill, experience or
4 training.

5 THE COURT: Mr. Fosmire?

6 MR. FOSMIRE: Your Honor, the exact reason they
7 are trying to introduce it, they want to cloak Mr.
8 Graham with, Mr. Graham is a very pleasant guy and I'm
9 not disputing his long work history in the field, but
10 they want to cloak him with the authority of an expert.
11 701 is for those common things where someone is drunk
12 or someone doesn't have their wits about them. That is
13 lay testimony. Here what they are doing is they have
14 gone into a field which is certainly outside the area
15 of expertise of the jury and trying to elicit expert
16 opinion testimony on a project not Riverwalk, Magnolia,
17 from this witness. They are arguing causation. It is
18 essentially what he's trying to say. He is trying to
19 get an opinion from Mr. Graham as to, put onto Heritage
20 or BuildStar or its subcontractors of why the window
21 was leaking. He said, "Our window didn't leak." He
22 can testify to his observation but as far as cause and
23 why, if that is what they wanted from him they should
24 have declared him as an expert a long time ago. It is
25 an inappropriate use of the testimony, Your Honor, and

1 we object to it and it is highly prejudicial because it
2 compounds the other project issue.

3 THE COURT: Well, it's clear to me that he is an
4 expert in the field. The problem is whether he was
5 designated as an expert.

6 MR. FOSMIRE: Never.

7 MR. HENRY: No, Your Honor, we did not designate
8 him as an expert but I'm not asking him his opinion,
9 I'm asking him what he observed.

10 THE COURT: Well --

11 MR. HENRY: I asked him what he observed, did he
12 observe anything that was allowing the water to go into
13 the window. I mean, it may be a broken pane, if he
14 observed it he can. I would think he could testify, he
15 may not, he may say he didn't observe what the problem
16 was.

17 THE COURT: You want his opinion as to why the
18 water was coming in?

19 MR. HENRY: I want to know if, if he saw what it
20 was that was allowing the water to go into the window.

21 THE COURT: Well, I mean, it is pretty clear
22 what's happening here, he's an expert, you want an
23 expert opinion and he hasn't been designated as an
24 expert. He can give his observations and all that but
25 Mr. Fosmire is right, when it comes to giving an

1 opinion that's beyond the knowledge of ordinary lay
2 people he can't do it because you didn't meet him in
3 time. So, I sustain that objection.

4 MR. FOSMIRE: Thanks, Your Honor.

5 THE COURT: All right. Bring them back.

6 MR. COLE: Your Honor, while the jury is coming in
7 can I move the podium a little bit?

8 THE COURT: Yes, sir.

9 MR. FOSMIRE: Your Honor, would you note for the
10 jury the objection was sustained?

11 THE COURT: Yes. We may as well stand for a
12 moment while we're waiting for them.

13 (The jury returned to the courtroom).

14 THE COURT: The jury is back. The objection is
15 sustained.

16 Mr. Thompson, Mr. Henry?

17 BY MR. HENRY:

18 Q Mr. Graham, what did you do? Did you discuss what
19 you observed with anybody there on site?

20 A Yes. We talked with the superintendent, whoever
21 that was on whatever job site it was, and indicated
22 that it wasn't a window problem.

23 Q And why did you indicate it wasn't a window
24 problem?

25 A Well, they claimed that the water was coming in --

1 MR. FOSMIRE: Object to hearsay.

2 THE COURT: The objection is overruled.

3 Q Go ahead.

4 A They claimed that there was water leakage coming
5 in. We water tested the window, there was no water
6 coming in.

7 MR. FOSMIRE: Object to the opinion, Your Honor.

8 THE COURT: The objection is overruled.

9 Q You can answer it..

10 A There was no water coming in, so it wasn't a
11 window problem.

12 Q And you reported that?

13 A Yes.

14 Q Okay. What did you do after that? Did you come
15 back at all?

16 A He were requested to come back to different sites
17 on different occasions, yes.

18 Q Okay. And did you ever go to Riverwalk?

19 A Yes.

20 Q Okay. And tell me, what stage of construction
21 when you first went to Riverwalk, if you recall, was
22 that project in?

23 A I'm thinking the early stages, like the first
24 seven, eight buildings of Riverwalk.

25 Q All right. And was BetterBilt selling the same

1 window at Riverwalk that they sold at the other
2 Heritage projects?

3 A Yes.

4 Q And were the application instructions for all of
5 these windows the same?

6 A Yes.

7 Q Okay. What was the reason that you went to
8 Riverwalk?

9 A As I indicated, why I went there was water
10 infiltration in a unit.

11 Q And when you went out to Riverwalk, this was in
12 1998?

13 A I believe so.

14 Q Okay. And when you went to Riverwalk were you
15 able to observe a window that had not been encased in
16 brick or covered up?

17 A Right, they were in different stages at Riverwalk.

18 Q Okay. And what did you observe in reference to
19 how they were installing the windows?

20 A What I noted there was they were taking the window
21 and they were nailing it directly to the 2x4 stud or
22 frame and it wasn't a good building practice in that
23 everyone in the industry, in the building industry was
24 using a caulking and a flashing type, sticky material
25 that would protect any water infiltration behind the

1 nailing fin.

2 Q And were they using this construction practice?

3 A No.

4 Q And did you inform anyone of this?

5 A Yes.

6 Q Okay. Who did you inform?

7 A The job superintendent, whoever that was.

8 Q And what response did you get?

9 MR. FOSMIRE: Object to the hearsay.

10 THE COURT: Mr. Henry?

11 MR. HENRY: Your Honor, he's talking to their
12 general contractor.

13 MR. FOSMIRE: Hearsay.

14 MR. HENRY: It's a defendant.

15 THE COURT: The objection is overruled.

16 BY MR. HENRY:

17 Q What response did you get?

18 A It was a negative response at Riverwalk in that
19 they indicated that it was the windows' problem and
20 they would switch suppliers.

21 Q Okay. And --

22 A Or switch manufacturers, I should say, not
23 supplier.

24 Q Okay. What did you tell them?

25 A I said have at it, you know, you will have the

1 same problem.

2 Q And did you ever attend a meeting with the people
3 from BuildStar, Heritage?

4 A Yes.

5 Q Okay. Tell me about that meeting. How were you
6 notified to come to a meeting?

7 A I got a call from Pelican who was our distributor
8 saying that they wanted a meeting to discuss the
9 problems that were going on in Heritage.

10 Q All right. In Heritage generally?

11 A Yes.

12 Q All right. Did you attend that meeting?

13 A Yes. I was the representative that attended on
14 behalf of BetterBilt.

15 Q All right. And who was there? Was anyone there
16 from BuildStar, Heritage?

17 A Yes. Mr. Roger Van Wie.

18 Q All right.

19 A I'm not sure whether it was other executives or a
20 lawyer, there was a couple people from Pelican, Dan
21 Carver I remember, who was the chief purchasing agent
22 for Pelican, and myself. There was about six or eight
23 of us there.

24 Q Okay. And what was the general nature of the
25 discussion?

1 A They presented a list --

2 Q When you say they, who are you talking about?

3 A Heritage.

4 Q Right.

5 A Gave us a list of windows that they claimed were
6 defective.

7 Q All right.

8 A In three locations or three job sites, and there
9 was some figures that they said that it would cost to
10 repair those windows.

11 Q All right. That was in 1998?

12 A Yes.

13 Q Was Heritage one, I'm sorry, Riverwalk one of the
14 projects that they wanted you to replace or repair
15 windows?

16 A Yes, sir.

17 Q Okay. Can you identify for me Exhibit 45?

18 A Yes. This was, this was faxed to me because when
19 I got a call from Pelican they said hey, you know,
20 we're going to a meeting and we're going to discuss the
21 cost of replacing these windows or repairing these
22 windows and we'll send you a copy of the letter we got,
23 so that's what this is, this is a copy that I got.

24 Q And was this the letter that was discussed with
25 Heritage at that meeting?

1 A Yes, sir.

2 Q Okay.

3 MR. HENRY: We would move to admit that into
4 evidence, Your Honor.

5 MR. FOSMIRE: Subject to the prior objection,
6 Judge.

7 THE COURT: All right. It's in, admitted over
8 objection.

9 (Letter marked and received in evidence as
10 Defendant's Exhibit Number 45).

11 BY MR. HENRY:

12 Q All right. Tell the jury what they wanted you to
13 do in reference to the windows at Riverwalk.

14 A They wanted us to pay a portion of the cost to
15 repair these windows that they claimed were defective.

16 Q And how many windows at Riverwalk in 1998 did they
17 want you to repair or replace?

18 A 144 series 540, which was single hung, and 48 of
19 the series, they have here 150, that would be the half
20 round, quarter rounds.

21 Q All right. So, a total of what, 192 windows?

22 A Yes.

23 Q Did you respond to them --

24 A Yes.

25 Q -- when they asked you to do that?

1 A Yes, sir.

2 Q What did you tell them?

3 A We just said no.

4 Q Why?

5 A Water was not coming in through the window. As I
6 said before, our responsibility as a manufacturer was
7 from the outside frame, into the center of the window,
8 that was our responsibility. In our water test there
9 was no water infiltration on the window and we said no.

10 Q And were these the same windows that you observed
11 they were not flashing or caulking?

12 A Yes, sir.

13 Q By the way, Mr. Graham, how long, are you still
14 with BetterBilt?

15 A No.

16 Q When did you leave BetterBilt?

17 A Downsized in 2000, I believe it was.

18 Q Downsized in 2000?

19 A Yes, sir.

20 Q And you haven't worked with them since?

21 A No.

22 Q Okay. Where did you go to work after BetterBilt?

23 A I went to a company called Lock Screen out of
24 Columbia, South Carolina.

25 Q And are you retired now?

1 A Yes, sir, that's what the government says.

2 MR. HENRY: Answer any questions these gentlemen
3 may have.

4 CROSS EXAMINATION

5 BY MR. FOSMIRE:

6 Q Mr. Graham, your testimony would be that the
7 BetterBilt windows installed at Riverwalk don't leak
8 and that it is our, it's our installation details that
9 are improper? That is the essence of your testimony?

10 A Yes.

11 Q Okay. So, if your BetterBilt windows don't leak,
12 then they don't need to be replaced, do they?

13 A No.

14 Q So the windows don't need to be replaced that are
15 BetterBilt windows out there, right?

16 A Right.

17 Q Okay. And the, this testimony about being at the
18 Heritage project, actually you were at Riverwalk and
19 you put water on one window, right?

20 A Yes.

21 Q You did a spray test on it?

22 A That's right.

23 Q The one window you tested, that window didn't
24 leak?

25 A Right.

1 Q The issue for BuildStar in this memo that the jury
2 will get, the first paragraph reads, follow along with
3 me, correct me if I'm wrong, "Following is the average
4 expense that BuildStar Corporation is spending to
5 repair leaking BetterBilt windows."

6 Do you see that.

7 A Yes.

8 Q So that would lead you to believe that Heritage
9 was doing something affirmative to deal with the window
10 issue, correct?

11 A Yes.

12 Q Because it places in the affirmative BuildStar is
13 spending this money, right?

14 A Yes.

15 Q You all disagreed with that?

16 A Right.

17 Q And in disagreeing with that actually BuildStar,
18 you know, threatened and then actually changed window
19 manufacturers?

20 A Right.

21 Q Right. And that was at a substantial cost to your
22 company?

23 A Yes.

24 Q That account was worth millions of dollars to
25 BetterBilt?

1 A Yes.

2 Q Because windows are expensive and there were quite
3 a few condominiums being built?

4 A Right.

5 Q So, Heritage was not really satisfied with you
6 all's response, they did switch window manufacturers,
7 right?

8 A Yes.

9 Q You know that through Pelican because they weren't
10 buying BetterBilt windows through Pelican anymore?

11 A Right.

12 Q The windows, you unfortunately were here all day
13 yesterday, weren't you?

14 A Yes.

15 Q You heard Drew Brown all day, didn't you?

16 A Yes.

17 Q All right. And he said something about
18 specifications of the windows were bad. He ment
19 BetterBilt windows you all were selling in Horry County
20 back at that time, you all weren't selling windows that
21 didn't meet specifications, would you?

22 A Exactly.

23 Q You would not have sold improper windows?

24 A Right.

25 Q Every window that BetterBilt sold in that time

1 frame was code compliant. Correct?

2 A Correct.

3 Q And at that time back in that '97, '98 time frame,
4 what we now call a DP rating, that DP rating wasn't in
5 place in Horry County yet, was it?

6 A Right.

7 Q Because DP ratings or design pressures didn't come
8 in until about the 2000 time frame, right?

9 A Yes.

10 Q So everything you all sold through Pelican that
11 was then installed by Heritage, all those windows would
12 have been code compliant?

13 A Yes.

14 MR. FOSMIRE: Thank you, Mr. Graham.

15 MR. HENRY: A couple other questions.

16 REDIRECT EXAMINATION

17 BY MR. HENRY:

18 Q You indicated, excuse me, that the windows that,
19 the BetterBilt windows didn't need to be replaced,
20 correct?

21 A Based on his question, yes.

22 Q All right. If you learned that the windows,
23 BetterBilt windows had a lintel with significant dead
24 load on the top of them since they were put out there
25 would you know whether or not they needed to be

1 replaced?

2 MR. FOSMIRE: Objection, Your Honor. That is
3 talking about loading, that is an expert opinion, he
4 has never been declared an expert.

5 THE COURT: The objection is overruled.

6 Q If you knew that they had constructed these bricks
7 so that they were bearing down on these windows could
8 that damage those windows?

9 A Oh, yes, yes, it's going to rack the window.

10 Q Going to rack the window?

11 A Yes.

12 Q Then would you have to replace it?

13 A Yes, sir.

14 Q No question about that?

15 A No question about that.

16 Q And have you ever done any kind of spray rack test
17 on those windows?

18 A A spray rack?

19 Q Yes.

20 A Like Drew was doing yesterday?

21 Q Right.

22 A No.

23 Q Have you ever seen the specifications that
24 required certain tests to be done to determine if the
25 water resistance of a window was, I'm not talking about

1 the code, I'm talking about what the architect
2 required, have you ever seen that?

3 A Yes, I saw it, witnessed it in our laboratory.

4 Q I'm talking about the specifications, not the
5 test. Do you know whether or not these windows
6 actually met what the architect required on that site?

7 MR. FOSMIRE: Your Honor, I object. Again he is
8 getting way beyond the scope, it is well into expert
9 testimony. I object.

10 Q Have you ever seen the specifications?

11 A For these windows?

12 Q Yes.

13 A For this particular job?

14 Q From the architect.

15 A No.

16 MR. HENRY: That's all I have, Your Honor.

17 THE COURT: Mr. Fosmire?

18 RE CROSS EXAMINATION

19 BY MR. FOSMIRE:

20 Q You don't know that any of these windows were
21 racked, do you?

22 A No.

23 Q Drew Brown didn't testify yesterday any of them
24 had been racked, you didn't hear that word come out of
25 his mouth, did you?

1 A No.

2 MR. FOSMIRE: That's all I have.

3 THE COURT: You may step down, sir.

4 (Witness excused).

5 THE COURT: Your next witness.

6 MR. HENRY: The plaintiff would call Al Best.

7 THE COURT: Mr. Best.

8 ALBERT BEST,

9 after being first duly sworn, testified as follows:

10 THE CLERK: Have a seat, please.

11 State your name for the Court, please.

12 THE WITNESS: Albert Best.

13 DIRECT EXAMINATION

14 BY MR. HENRY:

15 Q Mr. Best, where do you presently reside?

16 A I live in Wilmington, North Carolina.

17 Q And how long have you lived in Wilmington?

18 A Since 1990.

19 Q Where did you live prior to Wilmington?

20 A I lived in Raleigh, North Carolina.

21 Q All right. And you have always been in North

22 Carolina?

23 A Since I have graduated from college.

24 Q Okay. And let me get some background from you.

25 Where did you finish college?

1 A Wake Forest University.

2 Q And what degree did you receive from Wake Forest?

3 A B.S. in applied mathematics.

4 Q Okay. Now, once you finished college what did you
5 do?

6 A I went to work in the construction industry, I
7 started out on a framing crew.

8 Q Was that a family business or you just --

9 A No, it was, it is somebody that was starting a
10 framing company and wanted me to help him and so we, he
11 started it and I worked for him for a year or two and
12 then we partnered up later.

13 Q About what year was that?

14 A I believe that was 1983.

15 Q 1983?

16 A Yes.

17 Q What was the, you said you partnered up with him
18 and formed a business, what was the name of that
19 business?

20 A The framing company was James Contracting but we,
21 after I worked shortly as a superintendent for James
22 Contracting we later formed Prime South Construction in
23 1987.

24 Q In 1987?

25 A Yes.

1 Q And is Prime South still in business?

2 A It is.

3 Q Okay. And have you been employed by Prime South
4 since 1987?

5 A Yes.

6 Q Okay. Tell the jury a little bit about Prime
7 South, what Prime South does and that sort of thing.

8 A Okay. We currently do mostly restoration of
9 houses that have water intrusion damage in the South
10 Carolina area. There is also a branch of the company
11 in Raleigh, North Carolina that does exterior stucco as
12 well as renovations.

13 Q All right. And how long has Prime South been
14 doing exterior renovations?

15 A Well, we have done a little all along since 1987
16 but I would say in the last ten years it's been the
17 primary focus of the company.

18 Q Okay. Are you a licensed general contractor?

19 A Yes, I am.

20 Q And how long have you been a licensed general
21 contractor?

22 A I was, I was qualified in 1986 as a residential
23 contractor and then I think it was 1987 or '88 as a
24 commercial contractor in North Carolina and then I
25 requalified in the mid 1990's as a commercial and

1 residential contractor, and we have held a license ever
2 since.

3 Q Is Prime South a licensed contractor in South
4 Carolina?

5 A Yes.

6 Q Okay. Do you know about how long they have been a
7 licensed contractor in South Carolina?

8 A It would be sometime in early 2000.

9 Q Okay. You have indicated to the jury that you all
10 mostly have done residential?

11 A No. We started out mostly in residential.

12 Q All right. And what other kind of projects does
13 Prime South do besides single family residential
14 rehabilitation?

15 A We have restored a number of condominium
16 complexes.

17 Q All right.

18 A We built a couple houses, we built commercial
19 buildings.

20 Q Do you have an office in Horry County?

21 A We have an office in Little River.

22 Q All right. And have you also had an office and a
23 business in Columbia?

24 A We have, we had an office in Columbia, we have had
25 an office in Wilmington and we currently have an office

1 in the Wake Forest area --

2 Q And --

3 A -- of North Carolina.

4 Q All right. And does Prime South do rehabilitation
5 in both North and South Carolina?

6 A Yes, we do.

7 Q Okay. What position do you hold, what office do
8 you hold with Prime South?

9 A Well, I'm the sole owner now so it's an LLC, so
10 I'm a managing member.

11 Q And --

12 A And I'm the exam qualifier for the license.

13 Q Okay. In connection with your construction
14 experience have you from time to time had to give or
15 given and prepared estimates?

16 A Yes, I have.

17 Q In the past years since you started with Prime
18 South can you give me a guesstimate of how many
19 estimates you have been involved in preparing?

20 A It would be in the hundreds.

21 Q Okay.

22 A I don't know.

23 Q All right. Do you have someone that assists you
24 in your business in giving estimates for different
25 projects?

1 A I have had a number of estimators that have worked
2 on different projects over the years.

3 Q Okay. Now, let me show you some of the --

4 MR. FOSMIRE: Your Honor, I have never seen these.

5 MR. HENRY: I'm sorry.

6 MR. FOSMIRE: No objection to the demonstrative
7 evidence, Your Honor.

8 THE COURT: All right.

9 BY MR. HENRY:

10 Q Are these some of the projects you have been
11 involved in, Al?

12 A Yes.

13 Q Okay. What project is that, do you know? Is that
14 Lightkeepers?

15 A No, I think that -- no, I think that might be
16 Spinnaker.

17 Q Where is Spinnaker Cove located?

18 A Little River.

19 Q Okay. How about this one?

20 A Yes, this is, this is Lightkeeper by name, that is
21 also located in Little River.

22 Q Give me the general nature of what you're doing at
23 Lightkeeper.

24 A We are repairing the structure that has been
25 damaged from water intrusion. We have taken off all

1 the siding. It had siding, stucco, has brick. We are
2 pulling out the windows that were not flashed properly.
3 We are re-waterproofing balconies.

4 Q How about this one right here?

5 A This is a condominium building in Charleston,
6 South Carolina.

7 Q Okay. How about this one?

8 A This is also Spinnaker Cove, and it's a
9 condominium complex and has a large scope of work.

10 Q And that is?

11 A We took off, they had stucco on I think three
12 buildings and they had T-111 siding on maybe nine or so
13 buildings, I can't remember the number of buildings but
14 we are removing the siding.

15 Q And it's in Little River?

16 A In Little River.

17 Q Now, has Prime South been sued before?

18 A Yes, we have.

19 Q And for what?

20 A Well, back in the early nineties, I had mentioned
21 that we had a branch of the company in Raleigh that was
22 doing stucco, back in the early nineties there was a
23 synthetic stucco product out on the market and we had
24 maybe 300 residential houses or more that had synthetic
25 stucco on them.

1 Q And did that experience lead to any different
2 business with Prime South?

3 A Well, early on we were trying to figure out what
4 was going on in the buildings so we started doing, we
5 started a forensic wing of our company to investigate
6 what was actually taking place. We actually built some
7 test, window test chambers in our office and tested
8 some different details for water intrusion to figure
9 out how the water was getting in, and we started
10 repairing stucco houses as a result of what we learned
11 and that kind of branched out to repairing other types
12 of houses and eventually condominium complexes.

13 Q Can you give the jury a sense of the volume of
14 projects that Prime South has been involved in similar
15 to Riverwalk, Lightkeepers, those large multi-story,
16 multi-building projects?

17 A Well, we started in the late 1990's. The first
18 condominium property that we re-clad had similar scope
19 to Riverwalk was in Chapel Hill, North Carolina. We've
20 had multiple condominium buildings under reconstruction
21 for the past three to four years.

22 Q Okay.

23 A We're currently, we're redoing Sea Dunes
24 condominiums and Sea Breeze.

25 Q Are you still working out at Lightkeepers?

1 A We are, we're still working at Lightkeeper.

2 Q And as part of all of these projects do you bid
3 some projects?

4 A Yes, we do.

5 Q And do you prepare estimates for those projects?

6 A We do.

7 Q Is there any difference in the way you prepare an
8 estimate that is in litigation as opposed to an
9 estimate that you're going to submit for a bid?

10 A I don't understand the question.

11 Q Is there a difference in the way you prepare
12 estimates for litigation as opposed to where you're
13 submitting a bid?

14 A The estimates are all -- you prepare an estimate
15 the same way every time you prepare an estimate.

16 Q You don't do it any different because it's going
17 to trial or being in litigation?

18 A No.

19 Q And when you are preparing an estimate how do you
20 go about the preparing of that estimate, putting it
21 together?

22 A Well, it depends. On new construction you
23 typically have a site plan, architectural plans, maybe
24 an engineering plan, maybe a set of specifications, and
25 you take all that information and you calculate what

1 your expenses are and prepare an estimate. If you're
2 doing a lot of refurbishing jobs you're given a
3 generalized scope but you don't have a lot of details.
4 Sometimes we don't get plans and so we go out and we
5 field measure the buildings and we count the number of
6 windows, we take a scope of work from somebody and we
7 apply everything that we've learned on how to repair
8 the buildings in the past and we come up with a number
9 and that's generally how we estimate it.

10 Q Okay. Now, do most of the projects you're
11 involved in have what I would term hidden damage?

12 A The restoration projects that are designed to cure
13 water intrusion, long term water intrusion issues
14 always have a fair amount of hidden damage, which is
15 damaged sheathing, damaged framing, wall insulation,
16 sometimes there is interior damage, floor damage.

17 Q Okay. How do you go about estimating hidden
18 damage?

19 A Well, since it's hidden you obviously can't
20 quantify it, so what we normally do is try to judge by
21 the age and the amount of water intrusion, sometimes we
22 have forensic evaluations from an engineering,
23 architect firm, and then we compare that to other
24 buildings that are similar, have kind of a similar
25 construction, and extrapolate what our damage, what we

1 spend on hidden damages on those projects and kind of
2 use that as a gauge. We use all these things as a
3 gauge come up with a general allowance.

4 Q How many buildings do you think, just giving an
5 approximate number, that Prime South, where Prime South
6 has been involved in hidden damage, damage behind
7 brick, damage behind stucco, damage behind cladding of
8 any kind?

9 A All buildings?

10 Q Just a general estimate of how many of those you
11 have done?

12 A Structures?

13 Q Yes.

14 A Two or three hundred.

15 Q You have records you can go back and look at to
16 estimate what you have done in the past and apply that
17 to what you believe will happen in a certain building?

18 A We do.

19 Q In a rehabilitation project, I want you to tell
20 the jury what allowances are and why allowances are put
21 in one of these estimates and what the difference
22 between an allowance and a contingency is.

23 A Okay. An allowance is a cost that you know you're
24 going to have but you can't quantify yet. In other
25 words, you can count the windows, they're there, you

1 know how much they cost, but there is hidden damage
2 behind, inside, the amount of sheathing damage, framing
3 or how bad something is rotten or whether there is
4 termites or any number of things you don't know yet but
5 you know you're going to have some expense and so you
6 make, you make some assumptions based on all your
7 information and you put in a number that you feel is
8 reasonably close proximity to what you will spend.
9 That's an allowance.

10 A contingency is something that the estimator puts
11 in because he missed it on his estimate. It's
12 something that will end up being covered in the
13 contract but he didn't, you know, he missed it, or his
14 guys do something wrong on the job site and he has to
15 redo it. It is something that is a cost that a
16 contractor has, that he adds in to make sure that, you
17 know, he's covered.

18 Q Now, suppose, suppose you give an estimate and you
19 give an allowance in one of these cases and that
20 allowance doesn't pan out to what you think it's going
21 to be. Let's suppose you give a \$13,000 allowance for
22 framing, sheathing, whatever damage, and you go out
23 there, you find more and it's going to cost twenty
24 instead of thirteen. What do you do then?

25 A We charge whatever the difference is between our

1 allowance and what it actually comes to, which is why
2 it's an allowance. So, that would be a charge to the
3 homeowner or whoever signs the contract.

4 Q And if there are scope differences, let's suppose
5 you get out there and the scope or repair is more than
6 the scope provides for, what do you do then?

7 A If the scope is clearly defined and some work is
8 done that is outside the scope, that is a change in the
9 contract. If there is associated costs with it that is
10 added to the contract.

11 Q Have you been qualified as an expert in giving
12 estimates in cases in the courts of South Carolina?

13 A Yes, I have.

14 Q Any other, in courts in North Carolina?

15 A No, I have not.

16 Q Okay. Have you done estimates in the past for me?

17 A Yes, I have.

18 Q And have you done rehabilitation projects or rehab
19 projects that I have been involved in?

20 A Yes, I have.

21 Q Have you provided estimates for both plaintiffs
22 and defendants?

23 A Yes, I have.

24 Q Do you remember the first time you and I met?

25 A I believe that I had provided an estimate for a

1 defendant in a case where you were representing the
2 plaintiffs.

3 Q Right. And, so, you work with a number of law
4 firms for both plaintiff and defendant?

5 A Yes, I have.

6 Q Do you change your estimate depending on who you
7 are working for?

8 A No.

9 MR. HENRY: Your Honor, at this time we would
10 tender Mr. Best as an expert in the field of
11 estimating, reconstruction, rehabilitation project
12 estimating, reconstruction, rehabilitation projects.

13 MR. FOSMIRE: No objection to qualifications,
14 Judge.

15 THE COURT: He is admitted.

16 BY MR. HENRY:

17 Q Al, were you asked by me to prepare an estimate
18 for the Riverwalk project?

19 A Yes.

20 Q Okay. Now, when you are asked to give an estimate
21 for a project are you usually supplied information, in
22 addition to the scope, are you usually supplied
23 information about the forensic analysis of that
24 building?

25 A A lot of the time we are.

1 Q And in this case have you reviewed the Burric
2 report or pictures of what the situation is at
3 Riverwalk?

4 A Yes, I have.

5 Q Okay. Now, has -- let me ask you this. If you
6 deem, if you get a scope, for example, and it says take
7 off all this brick and it doesn't say anything about
8 damaged sheathing but you see it in the pictures, what
9 do you do as far as damaged sheathing? Do you just
10 leave it out because it's not in the scope?

11 A Well, after we have, after we have reviewed all
12 the information and we're given the scope our estimate
13 then encompasses everything it would take to fix the
14 building in that scope. That includes any hidden
15 damage that's underneath.

16 Q Okay. So, you would not just rely on the scope,
17 you would rely on the pictures of the damage and that
18 sort of things?

19 A Yes, and we would rely on our experience in doing
20 similar types of construction, of what we would expect
21 to find.

22 Q And in the Riverwalk estimating have you worked
23 with Drew Brown, met with him, conferred with him about
24 what your, what your fix is or proposed fix is as
25 opposed to his scope and the pictures and all of that

1 sort of thing?

2 A Yes, I have.

3 Q Okay. And have you met with him numerous times?

4 A Yes, I have.

5 Q Have you also been out to Riverwalk?

6 A Yes, I have.

7 Q How many times do you think you have been out
8 there?

9 A I've probably been out there four, maybe five
10 times. I have had estimators out there at least half a
11 dozen times.

12 Q Okay. And when you, when you do one of these
13 estimates do you have people in your firm that assist
14 you in that?

15 A Yes.

16 Q And in the Riverwalk case who usually assisted
17 you?

18 A When the case, when we first went out there, which
19 was maybe four or more years ago, Chris Cooper and
20 Mitch Carpenter out of the South Carolina office went
21 out there and I conferred with both of them, and more
22 recently Mitch Carpenter has done a bulk of the field
23 work.

24 Q And when you say field work, what field work is
25 there to do in preparing these estimates?

1 A Measuring, counting, quantifying, putting into
2 spread sheets, obtaining subcontractor quotes.

3 Q That was my next question. Putting one of these
4 estimates together, do you, do you get quotes from
5 vendors, subcontractors and that sort of thing?

6 A Well, on a lot of the, a lot of the expenses we
7 use our in-house numbers because we're doing it all the
8 time, and some of the specialized things we call and
9 get vendors to go out and give us quotes and then some
10 other areas where we have a vendor we're using a lot
11 they will just give, we'll just let them know what
12 we're dealing with and maybe they will give us a verbal
13 quote.

14 Q Okay. And in preparation of the Riverwalk
15 estimate have you, have you gotten quotes from other
16 vendors, subcontractors and that sort of thing?

17 A Yes, we have.

18 Q What have you gotten from them?

19 A We got a quote for the scaffolding for the
20 buildings, we got a quote for the windows going in, we
21 got a quote for the brick installation, we got some
22 verbal unit pricing for the waterproofing, for some of
23 the demolition, for the painting.

24 Q Other things you have relied on what you're doing
25 now in other projects?

1 A Yes.

2 Q Okay. Now, when do you think that you were first
3 involved with going out to the Riverwalk project and
4 providing an estimate?

5 A I believe that it was maybe 2005.

6 Q Okay. And has your estimate changed several times
7 from 2005?

8 A Well, we've had several versions of the estimate.
9 We have changed some of our numbers based on some new
10 quotes, we have had some scope changes that we've
11 discussed with Drew Brown, and we have had maybe four
12 or five derivations of estimates.

13 Q When it has been this long is there anything
14 unusual about changes in the estimate?

15 A No.

16 Q And we're going to go into these in just a minute,
17 but is the change in estimate from the first one you
18 gave, to today, much different?

19 A No. Basically it's the same scope of work with
20 some variations.

21 Q All right.

22 (Unrecorded bench conference).

23 THE COURT: Ladies and gentlemen, we're going to
24 take a break at this time. Members of the jury, please
25 do not discuss the case.

1 (The jury was excused from the courtroom).

2 THE COURT: Yes, sir, you may step down. Please
3 do not discuss your testimony. We'll take about five
4 minutes.

5 (Recessed at 11:13 a.m.).

6 (Reconvened at 11:33 a.m.).

7 THE COURT: Ready for them?

8 MR. HENRY: Yes, Your Honor.

9 THE COURT: All right, bring them in.

10 MR. FOSMIRE: We have no objection to these
11 exhibits.

12 THE COURT: All right.

13 (The jury returned to the courtroom).

14 THE COURT: All right, the jury is back. You may
15 proceed.

16 MR. HENRY: Thank you, Your Honor. I'm going to
17 try to work this technology, Your Honor, we may have a
18 little problem.

19 BY MR. HENRY:

20 Q Al, can you tell me the date of the first proposal
21 that Prime South prepared in the Riverwalk case?

22 A It was June 27th of '05.

23 Q Okay. And what was the scope that you used?

24 A We had an architect's report and in it had a list
25 of recommendations and we took that list of

1 recommendations and site visits and some of the
2 pictures --

3 Q Speak up a little bit.

4 A Some of the pictures and we went out and used that
5 to perform the estimate.

6 Q Move that mike a little closer. We're having
7 trouble hearing you.

8 I'm going to get to the details of these
9 estimates, but this was the first estimate you
10 performed?

11 A Yes, it was.

12 Q And what was the amount of the first estimate?

13 A It was \$8,828,342.

14 Q Okay. And let me show you the second estimate
15 that you performed. What is the date of it?

16 A June 30th of 2005.

17 Q Do you recall why the change was? I think it was
18 three days different.

19 A I believe after we submitted the estimate to you
20 we had gotten a window quote from the window
21 distributor, he called us up and said that he had
22 faxed, the quote he had faxed us was not correct and so
23 he sent over a revised quote and we changed the
24 estimate.

25 Q All right. And what is the date of the next

1 estimate you prepared?

2 A September 6th of 2006.

3 Q Okay. And what is the amount of that estimate?

4 A \$9,823,912.

5 Q Okay. And what was, what is the difference in
6 that estimate and the one you did before?

7 A I believe that the majority of it was, was the new
8 code enforcement of Horry County to the windows, where
9 they were requiring high impact glass for the windows
10 and so we had to revise the windows.

11 Q What is the next estimate you did?

12 A It was November 25th of 2008.

13 Q Okay. And it went to what?

14 A \$8,809,299.

15 Q All right. And why did it go from nine million to
16 eight million eight?

17 A If I recall, when we originally did the estimate
18 we went out there, the buildings are situated where
19 seventeen are in one place and two are in the other and
20 we only saw the seventeen, and when we sent our
21 estimate out we only had seventeen, and then we got a
22 call from Pat Henry's office that said there are two
23 more buildings and they are identical, so we changed
24 the estimate to nineteen. That was early on.

25 And subsequent to this estimate we had learned

1 that two of the buildings were in fact different and so
2 that is one of the changes, was to change those
3 buildings, and there are some other changes in the
4 scope of work to the brick and then we got new, we got
5 some new quotes because the bid was three years old and
6 there was some, we changed from, we were using treated
7 wood sheathing which was called out in the scope and we
8 changed that to regular sheathing for the deck
9 underlayment for the waterproof porches, so we changed
10 that and a few other things but that was basically the
11 reason for the change.

12 Q Do you know why the change was made from treated
13 to a nontreated plywood?

14 A I believe the specifications for Hydro-Stop, I
15 don't think they have a warranty over treated material.

16 Q Okay. That was a decrease in the price?

17 A It was.

18 Q And what is, can you tell me what Exhibit 40 is,
19 A1?

20 A That's a proposal, I believe it is dated December
21 22nd of '08.

22 Q Okay.

23 A It's the last estimate that we did out there.

24 Q Okay. We'll go over this but your contracts say
25 that the estimate, the estimates you give are good for

1 how long?

2 A They're good for thirty days.

3 Q Okay. And what was the reason for changing to

4 \$8,662,147?

5 A I believe that during the derivations of these
6 estimates that we originally had removing the brick off
7 of the end walls on the first seventeen buildings in
8 phase one and one of the changes was to just do
9 selected brick repair. I believe that we originally
10 were only removing roll lock brick on the buildings
11 eighteen and nineteen and I think that scope was
12 changed to removing all of the brick. I think those
13 are the main reasons.

14 Q And those were what you term as scope changes?

15 A Yes.

16 Q Okay. What is exhibit 48?

17 A That's an addendum where when we went out to the
18 project, the first time our estimate was based on one
19 building, and there were seventeen of them that we were
20 assuming to be identical, and somewhere along in the
21 process we discovered that eight of them or so had more
22 columns than the rest of the buildings in that first
23 phase, so there was an adjustment to redo those
24 columns.

25 Q Okay. And one more. First of all, Al, did that

1 increase the price, the additional columns?

2 A Yes, it did, it did increase the price.

3 Q By \$19,152?

4 A Yes.

5 Q Is that per building or the entire estimate?

6 A No, that is the entire estimate.

7 Q Okay. And finally Exhibit 40-B, what is that?

8 A That's a decrease. When we were doing the cutting
9 and pasting and changing all these estimates one of the
10 cells inadvertently picked all numbers from the other
11 cell and put it in there, and we deleted it on the
12 computer, and on the printed out page it had a number
13 that wasn't supposed to be there, and so the number was
14 supposed to be 500, as I said before, and it was 14,000
15 and something.

16 Q You just discovered that?

17 A We did. We just discovered that recently.

18 Q Was that an increase or decrease in the proposal?

19 A That's a decrease. Also in that addendum we had
20 the new brick quote that we had included, the
21 through-wall flashing, and we still had some
22 through-wall flashing work that we had priced in that
23 was left in from a previous derivation of the estimate
24 and we discovered that also and removed it.

25 Q Okay. Al, take the jury through the process of

1 what you propose to do in reference to Riverwalk.

2 A Okay. We're going to go out, we're going to
3 scaffold all the buildings and we're going to remove
4 the trim from around the windows on the balconies.

5 Q What is the trim?

6 A It's some kind of a composite material, ABTCO, I
7 believe is what I was told. And we're going to remove
8 the windows on all the porches, the front walkways.
9 And we're going to leave the siding in place there.

10 And on the side of the building we have proposed
11 two different ways. One is to remove all the brick and
12 the other is to do selective, to cut around the windows
13 and install new lintels and new sills and replace those
14 windows, and we're going to take from the front, we're
15 going to take all the column cladding off and we're
16 going to remove the handrails and we're going to remove
17 the waterproof deck, carpet and sheathing, and we're
18 going to reframe the decks so they have slope and then
19 we're going to resurface, put the sheathing back on the
20 decks, we're going to resurface them with waterproofing
21 and new carpet and we're going to put in columns, new
22 siding and trim on the columns, and on the rear of the
23 buildings we're going to, we're going to do the same
24 thing on the balconies, the process I described on the
25 front, we're going to remove sheathing and the

1 waterproofing and slope those, and that's going to
2 necessitate removing some of the siding, maybe the
3 first couple layers around the bottom so we can reflash
4 up against the wall. And then there are two bays of
5 bricks on the back and we're going to remove the brick
6 from those two bays and redo the brick and re-install
7 those windows with the correct flashing integrated in
8 the walls.

9 Q How about the sheathing?

10 A We have an allowance in the proposal that accounts
11 for all the hidden damage, which would include the wall
12 sheathing, the wall framing, insulation. We're going
13 to have some interior trim. The majority of the
14 windows out there have interior trim. There is some
15 interior trim damage and there will be some sheetrock
16 damage, so we're going to have painting and trim repair
17 and a little bit of drywall repair on the interior.

18 Q Okay. Now, the windows you're replacing are only
19 the exposed windows, correct?

20 A No. We're replacing all -- there is 39 windows
21 and I believe they are all being replaced.

22 Q Okay. Let's talk about the second page, Al. What
23 are these, what are these figures here?

24 A Well, we typically on our projects where we're
25 doing this type work we have a defined scope where we

1 can estimate its actual value and then we have, as I
2 have discussed earlier, the hidden damages, things that
3 we know we're going to have but can't yet quantify.
4 This is just an average breakdown of what we expect to
5 spend out there. It constitutes about 10 percent of
6 the contract and in our experience in doing condominium
7 projects n the Little River area the hidden damages
8 allowance section runs between 10 and 30 percent. The
9 two condominium projects we're on now, I believe one of
10 them, one of them is running at 10 percent and the
11 other one is running at 29 percent.

12 Q Okay. And that's the, that's all those figures?

13 A That's that first group of figures that you see
14 that start with repair damage, wall and ends, with
15 landscaping, grading.

16 The second number on there is
17 architectural/engineering fees for the project.

18 Q All right. Now, the landscape and grading
19 repairs, what is that?

20 A Anytime we do, where you tear off the brick and
21 you put new brick on the surrounding landscaping is
22 pretty much destroyed. There is mortar that falls all
23 over the place, the plants get destroyed, they take
24 wheelbarrows through the yard, there is all kind of
25 ruts. It is almost impossible to redo brick on a house

1 and not have to repair the landscaping.

2 Q Do you have any money in this to repair inadequate
3 drainage that is out there now?

4 A No, we don't.

5 Q Okay. This landscaping and grading is simply what
6 you're going to destroy when you go out there?

7 A That's correct.

8 Q And again these allowances are based on what?

9 A They're based on the previous buildings that we
10 have done that have similar scopes of work, and this is
11 on the, this is the low end of what we have spent on
12 similar projects.

13 Q Okay. Now, the next item down is architectural
14 and engineering fees for the entire project. Do you
15 see that?

16 A Yes.

17 Q Okay. This project is going to take how many
18 years to complete?

19 A It will probably take somewhere in the three years
20 plus range.

21 Q Okay. And where did you get the, this figure for
22 architectural and engineering fees?

23 A That constitutes 10 percent of the overall cost of
24 the project, and that is a typical architectural and
25 engineering fee for someone that comes in and does

1 management for the homeowner, from contract
2 administration, to approving the draws, to design
3 specifications, to supplying engineered drawings from
4 time to time for inspection departments and any kind of
5 other details that are required.

6 Q All right.

7 A It's an industry standard.

8 Q All right. Do you, do you welcome the oversight
9 of an architect and engineer when you're the
10 contractor?

11 A Sometimes we do, sometimes we don't. It depends
12 on who it is. But from the homeowners' perspective
13 they need somebody out there that has some experience
14 and knowledge and can represent their interest, make
15 sure whatever contractor is selected out there does
16 everything the way it's supposed to be done.

17 Q Okay. And is that the normal architectural,
18 engineering fees that you see on this kind of project?

19 A It is.

20 Q Do you know whether or not architectural and
21 engineering fees are generally higher on rehabilitation
22 projects than they are on new construction?

23 A Well, there are parts of them that are higher and
24 there are parts of them that are lower. On the new
25 construction typically there is money, a lot more money

1 spent on the drawing plans, and on refurbishing
2 property there is a lot more time spent on site
3 supervision because you can't do all the phases at once
4 because it's an open building and, you know, it's
5 occupied, it has furnishings, drywall, so you have to
6 do it in small phases, so whoever does the site
7 management is coming down more often because, you know,
8 you might do a little part here and fix that and a
9 little part there and fix that. So, there is a lot
10 more project management and communication with the
11 homeowner on the refurbishing and a lot less on the
12 plans.

13 Q The next note on that page is if brick cannot be
14 matched on end walls add \$19,562 per building to
15 replace brick on ends.

16 Where did that come from?

17 A In the original set of recommendations that we got
18 from R. V. Burric he instructed us to attempt to save
19 the brick on the end of the building by cutting around
20 the windows and doing repairs, and he wrote in his note
21 that if the brick couldn't be matched, then to estimate
22 it with that scope.

23 Q And the number that's on this estimate -- strike
24 that.

25 After that did he give you different instructions

1 in reference to the brick on the ends?

2 A We have had several discussions about the brick,
3 kind of going, you know, in both directions about how
4 to do this, and there is a great concern that the
5 cavities are filled up with mortar because there is
6 some site inspections where they have looked down in
7 there and they see that the brick is not in conformance
8 with the code. There has also been an inspection out
9 there that notes that when they looked in the wall they
10 didn't see any brick ties, and there is a debate about
11 whether we can, the Lightkeeper project we're on at
12 Little River right now, the areas where we have taken
13 off the brick the damage is worse than anywhere else on
14 the building and so there is great concern as to
15 whether we can adequately repair the sheathing and
16 framing behind the brick without taking it all off, and
17 so I believe the consensus is that we're probably going
18 to end up taking all the brick off the two ends.

19 Q Okay. Now, the next part is a note that says the
20 extent of the construction will create hazardous
21 conditions, the buildings should be unoccupied during
22 construction, the duration of construction of each
23 building is estimated to be about four months.

24 Correct?

25 A That's correct.

1 Q Okay. Tell the jury why you want that building
2 unoccupied.

3 A Well, let's imagine that you're living in one of
4 those units and we erect scaffolds around the whole
5 building and we take the handrails down off the
6 walkways and then we remove the stairs and then we
7 remove all the sheathing on the balcony so that when
8 you walk, if you look out the door there is just spaces
9 in between a bunch of joists. The sequences of all
10 that work and the staging, the weather, all those
11 things are going to require that we kind of operate in
12 what is in the best interest of the building repair and
13 not what really is in the best interest of maybe a
14 person living there. So, it is going to be a very
15 hazardous condition, there will be falling debris
16 because there is a lot of demolition, so it really
17 won't be a very safe and healthy environment to reside
18 in.

19 Q And is there any way you could do it and keep
20 people in it, Al?

21 A We can. We have done it before. We have made
22 some special allowances for handicapped people and
23 other things, we have built handicap access ramps, we
24 have built pedestrian easements, we have built some, we
25 have allowed for temporary stairs, we have put up

1 temporary handrails. The problem is all that stuff may
2 affect the flow and it may affect the cost and you're
3 going to pay for it somewhere, and even a temporary
4 rail that we put up for OSHA will allow a child or an
5 elderly person to go through it because it's not really
6 meant for that. We prefer that nobody was in the
7 buildings but it's not impossible. It will just be
8 more expensive to do the work.

9 Q Okay. All right, you've got the total price
10 without replacing the windows, remove and re-install
11 existing, it would change the price to \$6,600,447,
12 correct?

13 A That is correct.

14 Q Okay. Have you had experience with trying to
15 replace windows?

16 A We have.

17 Q Okay. Tell the jury some of the problems that you
18 have encountered in trying to replace windows.

19 A Well, we have had success on some projects and
20 we've had other projects where we didn't have as much
21 success, and it's based on the conditions that the
22 window was in, how it was built, how easy it was to
23 take it out and put it back in. Some windows we
24 actually, wood windows we actually repair, we can take
25 part of the windows out and rebuild them. Sometimes

1 the windows aren't even still in manufacture.

2 Q If the window is in some way damaged in taking it
3 out or if it has been in a condition it's going to be
4 damaged or has been damaged do you have any money in
5 there to replace that window?

6 A We do not.

7 Q Okay. Would Prime South warrant or guarantee
8 those windows in any way if you take them out and put
9 them back in?

10 A We won't warranty the performance of the window.
11 We'll warranty the installation, the integration into
12 the wall but oftentimes, because the windows get jarred
13 in and out, the seals will break and the glass will
14 have to be replaced and we don't warranty that. And
15 sometimes we experience windows that have had excessive
16 loading and a lot of times those windows when we go to
17 take them out they come apart at the corners and when
18 that happens we generally order new windows.

19 Q Okay. What do you mean, excessive loading?

20 A Well, there are a number of times that that
21 happens. Sometimes the headers, the structural members
22 rot or the deck, the deck supports cave in, and the
23 sliding glass doors, the pressure on the head is
24 excessive. Sometimes in brick veneer jobs the lintels
25 don't, either are undersized and flexed or didn't go

1 far enough in the brick veneer and they don't support
2 the masonry. There again the pressure on the head
3 forces the miters to open on the corner.

4 Q And your recommendation is to replace the windows.
5 Is that correct?

6 A No. We generally, we generally leave the decision
7 of whether to replace the windows up to the forensic
8 investigators.

9 Q What is this provision in your contract, Al?

10 A It is just a standard form where many years ago it
11 was written primarily for residential houses, where we
12 were doing, where we were stripping the buildings and
13 recladding them.

14 Q Okay.

15 MR. HENRY: Do we have an IT person?

16 THE WITNESS: Give it a second, it'll auto focus.

17 MR. HENRY: Okay.

18 BY MR. HENRY:

19 Q What is this page, Al? Get yours out if you would
20 like.

21 A This?

22 Q Yes. This is the last one.

23 A This is the last one, okay.

24 Q This first page is in reference to building 1512,
25 correct?

1 A That's correct.

2 Q And that's in phase two?

3 A Yes.

4 Q The first items are in reference to, and we won't
5 go over each one of these because it would take too
6 long but anyway, you're including the price of a
7 building permit?

8 A Yes. This estimate basically has mobilization,
9 where we supply a permit and a job trailer and storage
10 trailer and we run electricity to the job trailer and
11 run electricity to the temporary poles and we supply
12 dumpsters to haul away the debris, and porta johns for
13 the workers to use and we put up some signs and
14 barricade to keep people out of the construction site.

15 Q And are these items normally in your estimate?

16 A They are.

17 Q Okay. What is the equipment?

18 A The equipment is the overall scaffolding setup
19 that goes around the building like you saw in those
20 pictures. In addition we've got a cost in there for
21 forklift to go around the job site and deliver material
22 because there is going to be so much work going on that
23 we're going to have to have a staging area where we
24 store the materials and a way to get it sufficiently
25 over to the work area. And then we have also

1 miscellaneous tool renting, concrete saws and other
2 things that we don't normally keep.

3 Q Okay. And where did the scaffolding price come
4 from?

5 A We got a quote from Sunbelt Rentals.

6 Q All right. What does demolition include?

7 A Demolition includes all the work to get down to
8 the substructures and the elements that we're going to
9 repair, that I went over earlier, the stairs, the
10 columns, the siding, the balcony, carpet, sheathing and
11 waterproofing, the brick.

12 Q Okay. And where do those prices come from?

13 A The estimator used square footages and quantities
14 to come up with various prices. We've got a couple
15 unit prices that we got from subs and we are using some
16 hourly, some hourly wages that we've extrapolated from
17 other projects that have similar work.

18 Q And that is projects that are going on now?

19 A Yes.

20 Q Okay. You've got protection, six mill poly, and
21 tape and tacks?

22 A The protection is basically, we're going to open
23 up sections of the building and we're going to have
24 weather so we're going to cover it up temporarily with
25 plastic. We're going to be going in and out of the

1 unit to get to the inside of the windows and do some
2 repairs and so that the guys can keep their shoes on
3 and track through the place we will put down carpet
4 runners, and when they deliver dumpsters and stuff and
5 we work over the top of the asphalt we put plywood
6 protection underneath.

7 Q All right. The next page is carpentry, framing.
8 What does that include?

9 A That's the, that's basically the part of the
10 contract that is not in the allowance section that
11 includes reframing the stairs and re-installing the
12 sheathing on the balcony.

13 Q Where is -- under demolition you have stair demo?

14 A Yes.

15 Q Is that correct?

16 A That's correct.

17 Q Okay. And somewhere over later on you provide for
18 replacement of those stairs?

19 A That's under the stair installation there, and the
20 carpentry and framing, it is not on the sheet you have
21 up there but it is in the estimate.

22 Q Why are you replacing the stairs?

23 A The R. V. Burric report has directed us to replace
24 the stairs on all the units out there.

25 Q Okay. And where the stairs are bearing -- are you

1 doing anything to the landings where the stairs bear?

2 A No, but we are reconfiguring the stairs so that
3 they will properly bear on the landing.

4 Q All right. Now, the next thing you have is
5 balcony floor sheathing. What is that?

6 A That's when we pull all the sheathing up off the
7 balconies to get down to the joists, to put the slope
8 on the decks so they shed the water, that balcony
9 sheathing is putting the sheathing back on so we can
10 put on waterproofing and the carpet.

11 Q Okay. And then you're installing stairs?

12 A We're installing new stairs.

13 Q Would these, where would these stairs come from?
14 You build them?

15 A We would build them. We just order treated
16 lumber, put the stairs together and then erect them.

17 Q Have you ever had any experience with taking out
18 what they call shop built stairs?

19 A We have taken them out. We have not re-installed
20 them.

21 Q Why not?

22 A The shop built stairs typically come where
23 somebody else writes the specs, they are not in the,
24 they are not in the prescriptive code language, so the
25 person that designed them and built them is responsible

1 for their performance, and it is just like a truss or
2 anything else that is prepared, we don't go in and
3 alter it because we're then accepting the performance
4 of the stairs, and in these stairs in particular, which
5 appeared to be coming apart in places and falling off,
6 we certainly wouldn't attempt that here.

7 Q Okay. All right, what's the next category,
8 flashing, waterproofing? I'm sorry, we've got window
9 replacement. Do you see that?

10 A Yes. We just have an expense in there to take the
11 windows out of the building and put new windows back
12 in.

13 Q All right. Now, Mr. Brown, Drew Brown testified
14 yesterday that the windows under the front walks were
15 not being replaced. Do you have that in here?

16 A We have 39 windows. It is my understanding all
17 the windows were being replaced.

18 Q Okay. If the windows, if the windows do not have
19 to be replaced under the walkway can you subtract those
20 out or check and see if those are in the, in your
21 estimate, because I want to get them out if they're in
22 your estimate?

23 A I would have to get, we would have to analyze the
24 cost that we got from the window manufacturer and
25 create a different expense for windows.

1 Q Okay. We'll talk about that in a few minutes.

2 Partial flashing, waterproofing. What is that?

3 A This is probably the key part. It's what is not
4 done on most projects. That is integrating all of the
5 different various components into the structure so that
6 it doesn't leak into the structure and cause decay and
7 wood rot, interior damage.

8 Q Okay. And what is the importance of that, Al?

9 A Will, almost every building where we go in and we
10 take stuff off those areas that were the leading
11 contributor to all the problems on the buildings, on
12 their interiors.

13 Q All right. And carpentry, cladding?

14 A That's going back, we're redoing the siding that
15 we took off, we're redoing the trim, redoing the
16 columns, we're redoing, putting the guard rails back
17 on, we're redoing the, redoing the brick.

18 Q That's to go back and put the things on you have
19 taken off?

20 A It is.

21 Q The next one is column cladding installation.

22 A Yes. That's under the carpentry, cladding. That
23 is where we're putting, we had a bunch of columns that
24 we had taken all the siding and trim off and we're just
25 simply putting it back on.

1 Q Is there money in your estimate where there is
2 rotten board inside the columns, to replace those?

3 A No.

4 Q Exterior finishes, what is that?

5 A That's painting.

6 Q Okay. And then -- where are you replacing carpet?

7 A Carpet that came off with all the waterproofed
8 decks, the carpet is going back on.

9 Q Okay. Wall components, what is that?

10 A That's all of the things that we took off the
11 building before we could start taking off the
12 claddings.

13 Q Okay.

14 A There were downspouts, they are all attached to
15 buildings, and there are dryer vents and there are
16 lights and electrical outlets and signs, various things
17 that all come off, and we have taken them off on the
18 front end and restored them and now we're putting those
19 things back on on the back end.

20 Q Okay. Now, interior finishes. This is inside the
21 unit?

22 A This is inside the unit.

23 Q And why is it necessary to do work inside the
24 unit?

25 A Well, when we, when you, when you pull off the

1 siding and the brick and you pull out the windows there
2 is jarring that goes on and typically you have what are
3 called nail pops in the drywall and so you have to go
4 back in and coat the nail pops. That is one reason to
5 have interior finishes. We go in and out the front
6 doors and we know from experience that they get dings
7 and when we leave the homeowners want it to look like
8 it isn't dinged, so we normally include door touch-ups,
9 window touch-ups and a cleaning service.

10 Q All right. There will be, in your proposal you
11 are taking, or estimate, you are taking the windows
12 out. Correct?

13 A Yes.

14 Q Do you need to move the furniture to do that and
15 to repair the drywall around the windows?

16 A Yes, and it kind of depends on sometimes there is,
17 there is damage in the walls and we do get in and have
18 to reframe a section of a wall and if there is
19 something against that, against that wall we have the
20 property management company have that moved.

21 Q Okay. Let me now show you the inside of one of
22 these units. Can you tell me what that is?

23 A It appears to be an interior view of a window with
24 an arched top. I can't really tell.

25 Q All right. Do you see that board or that wood

1 that goes around the window?

2 A No. You have to focus in more clearly.

3 Q Let me give you another picture. Look at it right
4 from that picture there, right here.

5 A Yes, that appears to be part of the trim that goes
6 around the window and a jamb extension, or extensions
7 around the top.

8 Q All right. In removing those windows is that wood
9 going to have to come out?

10 A Sometimes it does and sometimes it doesn't. When
11 we did our field inspections out there those atriums
12 appeared to be stapled and kind of, I don't know if any
13 were done at the factory or not but kind of mortised
14 into those windows and it didn't appear to be very
15 thick, and I also talked to somebody that was out
16 there, that had done window repairs out there and they
17 said they also had trouble, they had some interior trim
18 damage trying to get the windows out.

19 Q Okay.

20 A Which is very typical of this type of work.

21 Q Do you have money in your estimate to replace that
22 trim?

23 A We don't but we do have, we do have an allowance
24 for some interior trim damage. It is very minor.

25 Q All right.

1 A So the attempt is to try to save as much trim as
2 we can.

3 Q Now, who would be responsible, in this photograph
4 here who would be responsible for moving anything out,
5 the curtains, the pictures on the walls and that sort
6 of thing so that the windows could be taken out and any
7 repairs done?

8 A Well, before we work on it, on the wall at all we
9 send out a letter requesting that the homeowners remove
10 pictures and anything attached to the walls because of
11 the vibrations that are going to occur, and any window
12 coverings and anything in front of the windows, any
13 furniture, that type nature, that all gets moved by
14 either property management companies or by individual
15 homeowners.

16 Q Do you have any money in your estimate to do any
17 moving of this type of furniture?

18 A We do not.

19 Q Or treatment on the wall, on the windows?

20 A No, we do not.

21 Q Is this the next page of that?

22 THE COURT: Let's stand for a moment.

23 (Brief pause).

24 THE COURT: Okay.

25

1 BY MR. HENRY:

2 Q The last page, what are freight charges for, Al?

3 A We, a lot of times we'll have expenses that show
4 up for having things shipped that aren't on the
5 materials or products or other things.

6 Q What are gas expenses?

7 A That's having people run up to get miscellaneous
8 items as we're under construction, that we don't have
9 delivered in bulk.

10 Q Okay. And what are the rest of these items?

11 A Well, there is contingency that we have in there.

12 Q Okay. The contingency covers what?

13 A The contingency covers items that we missed in the
14 proposal or things we break or mistakes we make that
15 we're obligated to perform under the contract.

16 Q And A and E would be the architectural,
17 engineering?

18 A Yes.

19 Q And a percentage of that is in the total?

20 A No. The A and E is not listed on here.

21 Q But it's -- is it in the total?

22 A It's in the total, listed on the front page of the
23 estimate. It is not on this page.

24 Q And, so, for building 1512 the grand total is
25 what?

1 A It would be, it would be 415,954, that would be
2 our contract amount.

3 Q All right.

4 A And then the A and E fees would be 10 percent and
5 the bond would be two percent.

6 Q All right. And what is, what is the bond for?

7 A The bond is an expense for the homeowners. It's
8 an insurance policy basically that if the work isn't
9 performed under the contracted amount, then the
10 insurance company will come in and finish the job and
11 make sure that everyone was paid.

12 Q All right. And the next building is?

13 A The next building is building 1514.

14 Q And is it practically identical to 1512?

15 A It's generally the same size. It has, it's shaped
16 differently.

17 Q I'm trying to avoid going through this again.

18 A It has all the general same scope of work.

19 Q Okay. And the next page says?

20 A That's the first page of the spread sheet for the
21 seventeen buildings in phase one.

22 Q Okay. Now, the mobilization is basically the
23 same, based upon what we have already been over?

24 A Yes, all these categories are basically the same
25 as all the ones we just went over.

1 Q And these are the seventeen buildings in phase
2 one?

3 A Yes.

4 Q Are there differences in the seventeen buildings
5 than the nineteen buildings, I mean than the two
6 buildings in phase two?

7 A The configuration is different. There is, the
8 brick only goes up one floor on the two buildings.

9 Q On the two buildings? This estimate, though,
10 replaces all of the brick, on the back and the sides?

11 A No. This estimate, this spread sheet totals,
12 replaces the brick on the, on the two back bays and has
13 brick repairs on the sides.

14 Q Okay.

15 A And there is an add on that was listed on page two
16 of the proposal that added on for the, if the brick was
17 replaced on the two ends.

18 Q All right. And the \$8,662,147 contemplates that
19 all of the brick or a portion of the brick will be
20 replaced?

21 A It contemplates a portion of the brick. You would
22 have to add \$332,554.

23 Q Okay. And what is the total estimate with taking
24 all the brick off and replacing the windows?

25 A That would be \$8,991,669.

1 Q How about doing that a little slower.

2 A \$8,991,669.

3 Q Okay.

4 MR. HENRY: Your Honor, may we approach?

5 THE COURT: Yes, sir.

6 (Unrecorded bench conference).

7 BY MR. HENRY:

8 Q Al, you want your estimate to be as accurate as

9 possible, correct?

10 A Yes.

11 Q And if you've got windows in here being taken out

12 because of the, because all the windows -- first of all

13 get Burric's scope and see what he says in reference to

14 the windows. Just take your time and look.

15 A It says remove and replace BetterBilt windows,

16 install proper rough opening building paper and

17 flashing.

18 Q Okay. He has not communicated to you the windows

19 under the balconies are to be left in place?

20 A That is correct.

21 Q Okay. Can you drop that out of your estimate,

22 drop the windows under the covers out of your estimate?

23 A Yes.

24 Q Okay. Can you do that now?

25 A Possibly.

1 Q Okay.

2 MR. HENRY: Can we take a break and let him try to
3 do that, Your Honor, himself?

4 THE COURT: Mr. Fosmire?

5 MR. FOSMIRE: Sure but there can't be any more
6 communication about it.

7 MR. HENRY: I won't communicate with him, Your
8 Honor.

9 THE COURT: All right. Ladies and gentlemen, take
10 a short break. Please go to the jury room. Please do
11 not discuss the case.

12 (The jury was excused from the courtroom).

13 THE COURT: Mr. Fosmire.

14 MR. FOSMIRE: I was just going to ask if we can be
15 at ease.

16 THE COURT: Yes, sir. How many minutes do you
17 need, Mr. Henry?

18 MR. HENRY: Al, how long is it going to take you
19 to do this?

20 THE WITNESS: I'm looking to make sure I have all
21 the necessary information. I probably need a pen and
22 scratch paper or possibly calculator.

23 THE COURT: All right, we'll take a short break.

24 (Recessed at 12:20 p.m.).

25 (Reconvened at 12:50 p.m.).

1 THE COURT: All right, thank you. Did you all
2 want to take a lunch break now?

3 MR. HENRY: That would be perfect, Your honor.

4 MR. FOSMIRE: Fine.

5 THE COURT: Since the jury is out, I would like to
6 press on, however we'll start back about 1:30, 1:35.

7 MR. COLE: All right.

8 MR. FOSMIRE: I think with the Court present, I
9 think we need to advise Mr. Best of the rule, we're not
10 trying to be difficult but he just can't communicate
11 when he's on the stand.

12 THE COURT: While you're on the stand being
13 examined, about to be cross-examined, you cannot confer
14 with anyone.

15 THE WITNESS: Yes, sir.

16 THE COURT: All right. We'll start back at 1:35.

17 (Recessed at 12:52 p.m.).

18 (Reconvened at 1:35 p.m.).

19 THE COURT: Mr. Henry.

20 MR. HENRY: I don't know if he has been able to
21 refigure because I can't talk to him. I thought the
22 object of the Court was to give the jury the correct
23 information. He has obviously made an error and it
24 would to me, he may not need this but I think that
25 there needs to be an inquiry. He may need additional

1 documents or information, he might not, he may have it
2 done but, you know, the court isn't a place where it's
3 a I got you sort of thing and if he needs additional
4 information or something to figure, to correct --

5 THE COURT: I don't dispute anything you say. I'm
6 just here for the trial, the jury is here for the
7 trial, you all are here for the trial. What do you
8 want us to do, leave, quit?

9 MR. HENRY: All I was saying is if he needs to
10 come down and get additional information or something,
11 and he may not, I can't talk to him but I'm trying --

12 THE COURT: Part of your case to the jury, this
13 happened a long time ago and they are finally getting
14 justice. that is why you all are here, why we're here.
15 The case is supposed to be prepared and ready to go.
16 Beyond that I don't know, what can I say. Mr. Fosmire
17 might have something.

18 MR. FOSMIRE: I don't have anything else to add.
19 Really it's an awkward situation and I don't know, we
20 want to get to the truth, the jury now obviously sees
21 there is an error, I can cross-examine him on it.

22 THE COURT: What do you want to do?

23 MR. HENRY: I want to ask him if he has enough
24 information in front of him.

25 THE COURT: Why don't you ask him that now?

1 MR. HENRY: Yes, Your Honor.

2 THE COURT: All right.

3 BY MR. HENRY:

4 Q Al, do you have enough information there to deduct
5 the windows under the breezeway?

6 A I do for seventeen of the nineteen buildings.

7 Q And what would you need additional for the two
8 other buildings?

9 A The window quote that was originally done. He
10 only did one building out of the seventeen. Subsequent
11 conversations were had between Mitch and the window
12 manufacturer, he calculated what the other two
13 buildings are. I don't have that information here so
14 I'm not privy to that information to be able to give
15 you the information that you have asked me for here
16 today on those two buildings.

17 Q Where is it, where is that information?

18 A I assume that Mitch would be able to figure it out
19 because the information came from Mitch that was put in
20 the spread sheet for those two buildings and it isn't
21 broken down.

22 Q Don't we have a window quote?

23 A The window quote, the window quote was done for
24 one of those seventeen buildings. The window
25 manufacturer didn't go to eighteen or nineteen when he

1 delivered that quote. He and Mitch subsequently had a
2 conversation where they thereby determined what the
3 appropriate cost was for those two buildings. We took
4 that information and put it in the estimate.

5 Q Can you get that information?

6 A I'm sure that I can get it. I can't get it right
7 now.

8 Q Why not?

9 A Because I would have to talk, I mean, I would have
10 to talk to them and discuss it, and I'm not allowed to
11 do that.

12 MR. FOSMIRE: What does he need, to make a phone
13 call?

14 Q Do you need to make a phone call?

15 A Yes, I need to call Mitch and tell him what
16 information you need, what needs to be done. Or Chris
17 can call Mitch and tell him what information he needs.

18 MR. HENRY: I apologize to the Court for this,
19 Your Honor, but it caught me off guard. I thought he
20 had gone through and gotten everything merged together.
21 My fault. Drew's estimate, I believe, scope of work
22 clearly says replace the windows, it doesn't say don't
23 replace them under the breezeway. That is what it says
24 and that is what he priced and Drew testified, of
25 course, yesterday that the windows, that even though

1 the windows had the same problem, they were not exposed
2 to the weather and he said as a practical matter he
3 thought you could leave them there.

4 Your Honor, after conferring with Mr. Fosmire, he
5 has been very graceful in allowing me to withdraw this
6 witness, let him go find it and then we'll put him
7 back on the witness stand on Monday morning, of course
8 if Your Honor will permit that.

9 THE COURT: Mr. Fosmire?

10 MR. HENRY: And I won't talk to him, I won't have
11 any conversation with him whatsoever.

12 MR. FOSMIRE: This whole purpose is to let him
13 finish, he is trying to do a calculation, I understand
14 that, and he's just asking to withdraw him so he can
15 get the information that he needs to finish the
16 calculation and then they will get us whatever that
17 new number is but in the interim he can have no
18 further communication with Pat, he is just going to go
19 finish his work, he can have no further communication
20 with Pat or Drew Brown or anybody else. He has got to
21 finish the calculation from whatever resources are
22 available to him from Prime South.

23 THE COURT: Do you have other witnesses here?

24 MR. HENRY: Yes, Your Honor. We have one more
25 witness, yes, I just -- during our lunch break I got a

1 voice mail message from Mr. DeSentes. He said that the
2 surgeon, he had spoken with the surgeon and the surgeon
3 said his wife would be taken out of intensive care this
4 weekend, put into a regular hospital room, and assuming
5 that occurs, he will be ready, you know, next week. I
6 have not --

7 THE COURT: He will be ready next week, as in on
8 Monday or what?

9 MR. HENRY: I'm assuming Monday but I haven't
10 called him back. I hated to, the man is at the
11 hospital with his wife. We're going to have to put Al
12 back up Monday anyway.

13 MR. THOMPSON: I do have one witness this
14 afternoon is ready to testify, it will probably take
15 about, I don't know, 45 minutes, an hour.

16 THE COURT: All right. All right, sir, you may
17 step down.

18 (Witness excused from the witness stand).

19 MR. HENRY: Al, do you understand the instructions
20 that you are not to speak with me, that you are to go
21 do these calculations, you are not to have any
22 communication with anyone at Burric or anyone else
23 about it?

24 Can you answer that?

25 THE WITNESS: Yes.

1 MR. HENRY: Okay.

2 MR. FOSMIRE: Just a question, Your Honor. I
3 guess all sort of unusual things happen in trials but
4 what is going to be said to the jury about it, the
5 witness has been withdrawn to be recalled Monday?

6 THE COURT: Yes.

7 MR. FOSMIRE: Okay.

8 MR. HENRY: Fine.

9 THE WITNESS: Do I leave now?

10 THE COURT: Yes, sir.

11 (Witness excused from the courtroom).

12 MR. COLE: Your Honor, what time Monday are we
13 going to start our witness here?

14 THE COURT: Probably 10:00 o'clock.

15 Do you need that screen for the next witness.

16 MR. THOMPSON: No, sir.

17 MR. HENRY: Thank you for the Court's indulgence,
18 Your Honor.

19 THE COURT: Yes, sir.

20 All right, ready for the jury.

21 (The jury returned to the courtroom).

22 THE COURT: All right, the jury is back.

23 Ladies and gentlemen, the last witness has been
24 withdrawn and will return on Monday. We plan to call
25 the next witness.

1 MR. THOMPSON: Thank you, Your Honor. The
2 plaintiff calls Mr. Quinn Hardester.

3 QUINN HARDESTER,
4 after being first duly sworn, testified as follows:

5 THE CLERK: State your name for the Court, please.

6 THE WITNESS: Quinn Hardester. Excuse me, I have
7 a cold.

8 DIRECT EXAMINATION

9 BY MR. THOMPSON:

10 Q Mr. Hardester, good afternoon. Where do you
11 reside?

12 A In Georgetown County, in Murrels Inlet.

13 Q And how long have you lived there?

14 A I have lived in Horry and Georgetown Counties for
15 about fifteen years.

16 Q All right. And are you married?

17 A Yes.

18 Q And who are you married to?

19 A Dr. Gail Royal.

20 Q What type doctor is she?

21 A She's an ophthalmologist.

22 Q All right. And what do you do for a living?

23 A I am an entrepreneur. My primary business is
24 import, export product in Asia and exporting products
25 to other parts of the world, excuse me, primarily to

1 Europe.

2 Q Okay, primarily to what?

3 A To Europe.

4 Q What type products?

5 A Distilled spirits.

6 Q Alcohol?

7 A Yes.

8 Q Okay. We're involved -- were you involved in the
9 development of the Riverwalk condominiums?

10 A Yes, I was an employee of Heritage Communities.

11 Q Heritage Communities?

12 A Yes..

13 Q Okay. And what was the business of Heritage
14 Communities?

15 A To develop, market and sell condominiums
16 primarily.

17 Q When did you join them?

18 A In February of 1998.

19 Q All right. And prior to joining them had you had
20 any type of experience with commercial or residential
21 development or construction?

22 A No, sir, I had not.

23 Q Okay. And when you were hired by them what was
24 your title and mission?

25 A Vice-president of sales and marketing.

1 Q And while you were there did you receive any
2 promotions?

3 A I did.

4 Q To what?

5 A The first promotion was to chief operating officer
6 and the second promotion was to chief operating officer
7 and president.

8 Q Okay. And do you remember about when you, when
9 you were hired by them?

10 A February of 1998.

11 Q And when did you become the COO, chief operating
12 officer?

13 A You know, we went over this a number of times.
14 It's been so long, I think it was about a year after I
15 had served as -- about a year, like early 1999.

16 Q Early 1999, and when did you become the president?

17 A Not too long after that, maybe five or six months.
18 It's vague, it's been a long time.

19 Q So maybe about the fall of 1999 you became
20 president?

21 A Probably so. I honestly don't recall.

22 Q Okay. And who hired you?

23 A Roger Van Wie.

24 Q And how did you know Roger?

25 A His wife was my wife's dentist.

1 Q Okay. And did you approach him, did he approach
2 you? How did that come about?

3 A No, he approached me. My history, employment
4 history was one of international sales and marketing
5 for Fortune 500 companies, Johnson & Johnson and other
6 Fortune 500 companies, and I was considering a career
7 change because of the amount of traveling I was doing.
8 Mr. Van Wie was just growing their company,
9 expeditiously at that point and was looking for someone
10 who had out of market experience, meaning non-Myrtle
11 Beach experience, to come in and to handle sales and
12 marketing and contract administration for Heritage
13 Communities.

14 Q Okay. And when you say contract administration
15 what are you talking about?

16 A Specifically the contract between the homeowner
17 and the real estate company as far as their mortgage
18 and financing was concerned, not contracting as it
19 applies to construction.

20 Q Okay. And at all times that you worked for
21 Heritage who was your boss?

22 A Roger Van Wie.

23 Q Even when you were the COO and president he was
24 your boss?

25 A He was the man.

1 Q Okay. And was Mr. Van Wie an owner of Heritage
2 Communities?

3 A Yes, he was.

4 Q All right. Who did he own it with, do you know?

5 A Yes. In the beginning it was Dr. Jack Green, then
6 ultimately his wife Patty Van Wie. They were all
7 owners in the business. I'm not sure what time frame
8 but eventually the three of them were the primary
9 owners.

10 Q Okay. And do you know who was on the Board of
11 Directors for Heritage Communities?

12 A At that time it was Roger Van Wie and Dr. Jack
13 Green.

14 Q Okay. And do you know who the officers of
15 Heritage Communities, Incorporated, were? I know we
16 talked about you. Do you know the other officers?

17 A At that time it was Roger Van Wie and Dr. Jack
18 Green.

19 Q Who controlled the day to day activities of
20 Heritage Communities, Incorporated, even when you were
21 president?

22 A Roger Van Wie.

23 Q And where were the corporate offices of Heritage
24 Communities, Incorporated?

25 A On Ginn Drive in Myrtle Beach.

1 Q Now, were there other companies that were owned by
2 Mr. Van Wie and Dr. Green with regards to the
3 construction and sale of the buildings at Riverwalk
4 condominium?

5 A Yes, sir. They owned two subsidiary companies.
6 One was the BuildStar Corporation which primarily was
7 responsible for construction oversight, and Tuscan
8 Architecture which after the prior architect no longer
9 was involved with Heritage Communities became the
10 architect of record for building going forward. I'm
11 not sure of the time frame of Tuscan Architecture but
12 those were the three primary companies.

13 Q Okay. With regard to BuildStar Corporation, you
14 said it was a general contractor?

15 A To my knowledge, yes.

16 Q Okay. And they were responsible, BuildStar was
17 responsible for the actual construction itself?

18 A No, sir. They were, they had an oversight
19 management group whereby each of the properties had a
20 supervising or a job superintendent and they oversaw
21 the building and the subcontractors.

22 Q Did they perform contract administration work as
23 it relates to the buildings out there, the
24 construction?

25 A The superintendents?

1 Q Yes.

2 A No, they didn't.

3 Q Who did?

4 A I'm sorry, ask me the question, I know I have
5 misunderstood your question.

6 Q Contract administration in the sense of what an
7 architect would normally do, overseeing the
8 construction of the buildings?

9 A Yes.

10 Q Okay.

11 A Sorry.

12 Q They did?

13 A Yes.

14 Q Okay. And was BuildStar Corporation controlled by
15 Roger Van Wie?

16 A Yes.

17 Q And where were the corporate offices of BuildStar?

18 A The same building, Ginn Drive in Myrtle Beach.

19 Q Same place as Heritage Communities?

20 A Yes.

21 Q Okay. Now, you mentioned Tuscan Architecture. Do
22 you know who owned that?

23 A That was a joint venture between Roger Van Wie,
24 Dr. Green as the owners and directors of Heritage and
25 an architect by the name of Robin Roberts.

- 1 Q Okay. And do you know where the corporate offices
2 for Tuscan Architects was?
- 3 A Yes, they would be the same building.
- 4 Q Okay. Have you ever heard of Heritage Riverwalk,
5 Incorporated?
- 6 A Yes, sir.
- 7 Q Okay. Do you know what Heritage Riverwalk,
8 Incorporated, is?
- 9 A The same building.
- 10 Q Pardon?
- 11 A It was in the same building.
- 12 Q Okay. It was located in the same corporate
13 offices?
- 14 A Yes.
- 15 Q What was its business?
- 16 A The Heritage Riverwalk, Inc.?
- 17 Q Yes, sir.
- 18 A It was the, it was a separate corporation set up
19 to, for off site management of that particular property
20 as was each one of Heritage Communities' properties
21 were all individually assigned corporations.
- 22 Q Okay. So, there were other developments that
23 Heritage Communities was developing?
- 24 A Yes, sir.
- 25 Q What were they?

1 A Magnolia Place, Magnolia North.

2 MR. FOSMIRE: For the record, same objections as
3 to all these other properties beyond Riverwalk.

4 THE COURT: Yes, sir. The objection is overruled.

5 Q Can you answer?

6 A Magnolia Place, Magnolia North, the Gardens at
7 Cypress Bay, Riverwalk and Azalea Lakes and there was
8 another one in Charlotte by the name of Heatherstone.

9 Q Okay. Now with regards to, jumping around a
10 little bit, with regards to Heritage Riverwalk,
11 Incorporated, who was in charge of that business?

12 A Mr. Van Wie.

13 Q Okay. And did Heritage Riverwalk also hold title
14 to the properties, the individual companies as you were
15 talking about for each development, did they hold title
16 to the property?

17 A As I recall, yes.

18 Q Okay.

19 A Because they transferred the deed when the
20 property was sold, so they would have been the property
21 owner.

22 Q Okay. How many employees did each of these
23 companies employ?

24 A None of the individual properties had employees.

25 Q Okay. When you say individual --

1 A Meaning Riverwalk specifically had no specific
2 employees.

3 Q Okay.

4 A As an explanation, my primary role was 99.9
5 administration and operations, and so the oversight of
6 the administration and operation of those properties
7 really fell under my purview with reporting up to Roger
8 Van Wie.

9 Q Okay. How many employees did Heritage Communities
10 have?

11 A Including the supervisory people on site?

12 Q Well --

13 A Or the administrative people in the building?

14 Q I guess the question is could you differentiate
15 between the Heritage Communities employees versus the
16 BuildStar employee?

17 A I'm not sure how they were paid but there were,
18 the delineation there is pretty vague. They all
19 reported up to Roger Van Wie.

20 Q Okay.

21 A If that's your question.

22 Q Did all of the employees or officers of these
23 three companies, or four including Tuscan, did they
24 ever have joint meetings together?

25 A Yes, sir. We had a meeting most every Monday that

1 involved all the supervisory personnel in the field as
2 well as those of us that were on the executive
3 management group, along with Dr. Green and Mr. Van Wie
4 as the chair of those meetings.

5 Q Okay. Were you ever the chair of those meetings?

6 A Yes.

7 Q And what, what did you do, what business did you
8 take up in those meetings?

9 A Primarily my role there was, since I was primarily
10 the PR person or the spokesperson for the company it
11 was my responsibility to gather the information, the
12 reports from each one of the individuals on a weekly
13 basis and then to ask each individual to report back to
14 the committee or the general meeting a progress report
15 of the prior week and then Mr. Van Wie with that
16 oversight would determine what the strategy was going
17 to be for the upcoming week and plan strategically
18 going forward.

19 Q You mentioned that you were the PR person for the
20 company. Why was that, why you?

21 A Probably because I was new to Myrtle Beach and had
22 a -- I was new to Myrtle Beach.

23 Q As the former president of Heritage Communities,
24 president and COO, who would you consider to be the
25 most knowledgeable person with regards to the

1 day-to-day activities and the history of these three
2 companies, Heritage Communities, Heritage Riverwalk and
3 BuildStar Corporation?

4 A Mr. Van Wie.

5 Q Mr. Van Wie?

6 A Yes.

7 Q What is your understanding of the allegations in
8 the complaint in this case?

9 A My understanding is that there are issues
10 associated with water intrusion with windows and decks.

11 Q Okay. And were there problems such as that with
12 the other developments Heritage was involved in?

13 A There were, there were problems specifically with
14 Magnolia Place, and I do recall some minimal issues
15 with decks at Riverwalk but I don't recall any of those
16 issues with Magnolia North and even though there are
17 some documents that say otherwise, I just don't
18 specifically remember overseeing them, excuse me,
19 overseeing them myself.

20 Q Do you know if those other developments were
21 involved in construction litigation?

22 A Yes, sir, I do.

23 MR. FOSMIRE: Object to reference to other
24 litigation, Your Honor.

25 THE COURT: The objection is overruled.

1 Q Did any of those other projects that we have just
2 mentioned developed by Heritage have problems with
3 leaks at or near windows as a result of the improper
4 installation of the windows?

5 A Yes, sir.

6 Q Can you tell me which ones?

7 A Specifically Magnolia Place.

8 Q Okay. And was Magnolia Place constructed before
9 or after Riverwalk?

10 A Before.

11 Q Okay. And was it the same configuration of
12 windows used at Riverwalk that was used at Magnolia
13 Place?

14 A I think so, yes.

15 Q Did Heritage Communities have a warranty process?

16 A Yes, they did.

17 Q All right. And was that one of your duties, to
18 oversee that warranty process?

19 A Yes, it was.

20 Q All right. And did Heritage Communities have a
21 warranty manual?

22 A Yes, they did.

23 Q And are you familiar with that warranty manual?

24 A Yes, sir.

25 Q I'm going to show you Plaintiff's Exhibit Number

1 12 and ask you to look at that.

2 A That appears to be it.

3 Q Okay.

4 MR. THOMPSON: Your Honor, we would offer the
5 warranty manual as Plaintiff's Exhibit 12.

6 MR. FOSMIRE: It's already in.

7 MR. THOMPSON: Already in?

8 BY MR. THOMPSON:

9 Q Mr. Van Wie, was --

10 A Hardester.

11 Q I'm sorry.

12 A Please.

13 Q I'm sorry, Mr. Hardester. I have been living with
14 this for five years.

15 A I've been living with it for ten.

16 Q I'm sorry.

17 A No problem.

18 Q Mr. Hardester, was BuildStar Corporation the
19 contractor, general contractor on all of the buildings
20 at Riverwalk?

21 A Yes, sir.

22 Q That warranty manual, was it given to all of the
23 purchasers who purchased a unit at Riverwalk?

24 A Yes, sir.

25 Q All right. Was it explained to the purchasers by

1 employees of Heritage?

2 A Yes, sir.

3 Q All right. And who was it that explained those
4 warranties to the purchasers?

5 A For the majority of the time I don't remember if
6 anyone ever filled this responsibility. We had what
7 was called a closing coordinator who did a pre walk
8 through before closing and then at the point of closing
9 would present the warranty manual, explain the warranty
10 manual and then do a post walk through to the closing.

11 Q Okay. And what were their names?

12 A Her name was Linda Caldwell.

13 Q Okay. Was Myra Smith also involved in that?

14 A She was. Myra was the, was really the quality
15 control specialist who handled all of the post closing
16 issues that were associated to construction.

17 Q Okay. I want you to look at one section, page
18 seven, section Roman Numeral I-D.

19 A Yes, sir.

20 Q What is this section about, what is the purpose of
21 this?

22 A I-D?

23 Q Roman Numeral I-D, yes, sir.

24 A These are the expectations that -- the developer
25 is expected to live up to these particular expectations

1 based on this manual.

2 Q Okay. And what's the last sentence under Roman
3 Numeral I-D up at the top?

4 A Outlined below are some of the most often asked
5 about punch items along with what you can expect from
6 Heritage Communities, Inc., regarding each particular
7 item.

8 Q All right. And if you would, flip over to page
9 eight. There is a section that actually starts at the
10 bottom of page seven dealing with windows, window
11 questions. Do you see that?

12 A Yes, sir.

13 Q All right. Flip over to II-D, which is the last
14 one under window section, and could you read the
15 observations, performance guidelines and corrective
16 measures for the jury?

17 A Yes. "During rains water appears on interior of
18 glazed window unit."

19 Q And the performance and guideline is?

20 A "Performance and guidelines. Water leakage from
21 improper installation is unacceptable. And corrective
22 measure, "The contractor shall repair any deficiencies
23 attributed to improper installation."

24 Q So, under this warranty manual Heritage is telling
25 purchasers that water intrusion from windows is

1 unacceptable and they are going to fix it, right?

2 A That's correct.

3 Q Do you agree with that?

4 A Yes, sir.

5 Q And did Riverwalk Development have problems with
6 leaks at or near windows?

7 A You know, my recollection was it did not.

8 However, as you guys refreshed my memory during
9 deposition, I didn't recall it because it was new,
10 because Riverwalk was a relatively new development for
11 us, but it did have some problems.

12 Q Okay. And was Heritage still selling units at
13 Riverwalk when they knew they had problems with
14 windows?

15 A Yes, sir.

16 Q Okay.

17 A Well, I mean, as far as Riverwalk is concerned, I
18 think that is a difficult thing to say because there
19 were very few in the short term at Riverwalk but yes,
20 they were still selling units.

21 Q Okay. While they had problems with windows?

22 A Yes, sir.

23 Q Okay. And did Heritage or BuildStar inform future
24 purchasers of that problem?

25 A No, sir.

1 Q And should they have?

2 A In my opinion, yes.

3 Q While you were president of Heritage were you

4 aware of any problems with the balconies and breezeways

5 at any of the developments?

6 A Yes, sir.

7 Q What was that problem?

8 A There was an issue whereby the moisture membrane

9 had been penetrated with screws and/or nails and so the

10 water leaked through to the underside and sheetrock of

11 the balconies below.

12 Q Okay. And was that a problem at Riverwalk?

13 A Not that I recall. I don't remember that one. I

14 think it was probably in a letter at some point but --

15 Q I'll show you Exhibit, Plaintiff's Exhibit 3,

16 which is the 2000 annual homeowners meeting, Wednesday,

17 March 15, 2000. In the first paragraph -- do you

18 recall being at this, in attendance at this meeting?

19 A Yes, sir.

20 Q And the second paragraph under welcome it says

21 you're the president and COO of Heritage Communities?

22 A Yes, sir.

23 Q Look at paragraph, the last paragraph on the page

24 and let me know if you recall any problems with the

25 decks.

- 1 A I do, I see it here.
- 2 Q Okay. And who are you talking to at this meeting?
- 3 A The property owners.
- 4 Q All right. The unit owners at Riverwalk?
- 5 A Yes, sir.
- 6 Q And what are you telling them about the problem
- 7 with the balconies and porches?
- 8 A That there are problems, that they have identified
- 9 what the problems are and are beginning to rectify
- 10 those problems on a first in first out basis.
- 11 Q Okay. And that Heritage Communities is going to
- 12 fix the problem?
- 13 A Yes, sir.
- 14 Q And Heritage Communities is going to fix the
- 15 problem at their own expense?
- 16 A That's correct.
- 17 Q Okay. Are you also familiar with the Riverwalk at
- 18 Arrowhead Country Club Property Owners Association?
- 19 A Yes, I am.
- 20 Q All right. And were you the president of the
- 21 property owners association?
- 22 A Yes, I was.
- 23 Q Okay. How did you become the president of the
- 24 property owners association?
- 25 A I would like to say by accident but it was part of

1 the responsibility of administrative oversight for the
2 chief operating officer to be the president of each of
3 the homeowners associations, primarily to give it
4 continuity so that if there were issues like this, then
5 we could address them at other properties.

6 Q Okay. And so on March 15, 2000, were you also the
7 president of the property owners association?

8 A Yes.

9 Q Okay. And while you were president of the
10 property owners association were there other members of
11 the Board on the Board of the property owners
12 association with you?

13 A As I recall, yes.

14 Q And were they all some way connected with the
15 developer, Heritage?

16 A Yes, sir.

17 Q Okay. Did Heritage ever fix all the original
18 construction deficiencies that you were aware of while
19 you were involved with Heritage or president of
20 Heritage?

21 A No, sir, they didn't complete them because of the
22 insolvency of the company and the ultimate closing of
23 the company.

24 Q Okay. Did Heritage place any defective,
25 defectively constructed condominiums into the stream of

1 commerce?

2 A Knowingly, I don't think so.

3 Q But did they?

4 A They did.

5 Q Okay. Did Heritage as a developer of residential
6 condominiums have a duty to provide purchasers with a
7 condominium that was free from defects?

8 A Yes, sir.

9 Q Free from water intrusion?

10 A Yes, sir.

11 Q Free from rot?

12 A Yes, sir.

13 Q Should they have provided a condominium that was,
14 that complied with the building code?

15 A Yes.

16 Q Do you know why Heritage kept selling units when
17 they knew that they were having problems out there?

18 A Again I don't believe Heritage, I think they
19 thought they had the problem solved simply because they
20 had addressed it in reverse of the other issues they
21 had. So, I don't think they would have continued to
22 sell buildings they knew they were improperly
23 installing windows in. They did but I don't think they
24 would have done so proactively.

25 Q But the fact was they were selling them?

1 A That, they were, yes.

2 Q What were the circumstances surrounding your
3 becoming president of Heritage Communities?

4 A One of the duties and roles of the chief operating
5 officer or the president, a company of this nature is
6 also required to have a very close relationship with
7 the borrower's banks. All developers, 99.9 percent of
8 developers typically borrow money from the bank on a
9 construction loan very much the same way you would when
10 you build a house. And there are draws against that
11 construction loan based on the percentage of units that
12 you have sold. That allows you to continue to build
13 but not overdraw beyond what your building capacity is.
14 I think that is a general rule for most banks. An
15 administrator within the corporation has to manage the
16 responsibility or manages that relationship between the
17 bank to understand to what percent that building is
18 built and then serve as the relationship manager
19 between the bank and Heritage Communities, and the
20 banks required that there be an officer of the company,
21 particularly the president, sign those loan documents
22 and to be intimately involved with the banks so they
23 would have a direct line to the day-to-day activities
24 of where and how their money was being spent. And so I
25 was promoted to president simply for the reason of the

1 administrative role with those banks.

2 Q Why not Dr. Green?

3 A Dr. Green was a dentist, full time dentist, I was
4 the president at that time and he was not involved on a
5 day-to-day basis in the company.

6 Q Why not Roger Van Wie?

7 A I think Roger had a history that they would prefer
8 him not be involved.

9 Q Had Heritage stayed in business would they have
10 fixed the construction deficiencies at Riverwalk?

11 A In my opinion, yes.

12 Q You were with Heritage in October of '99, weren't
13 you?

14 A Yes, sir.

15 Q Were you ever shown the Kimmerly Horne annual
16 maintenance survey for Heritage, or Riverwalk, I'm
17 sorry?

18 A You know, I think I had seen it but I hadn't
19 recalled it until you brought my attention to it again
20 but I'm familiar with the document.

21 Q Okay. Were you familiar with the document while
22 you were at Heritage?

23 A I don't believe so.

24 Q Wouldn't that have been something important for
25 you to see as the president of the Heritage Communities

- 1 and the president of the homeowners association?
- 2 A Absolutely.
- 3 Q But nobody ever provided that to you?
- 4 A Not as I recall.
- 5 Q Okay. Who would have gotten that document?
- 6 A The property management company, the Noble
- 7 Company.
- 8 Q And who else?
- 9 A More than likely Roger Van Wie.
- 10 Q Okay. When you left Heritage were there still
- 11 construction deficiencies at Riverwalk?
- 12 A Yes, sir.
- 13 Q Okay. And when you left Heritage were you aware
- 14 of any sums of money that were left for the homeowners
- 15 out there to repair these construction deficiencies?
- 16 A Yes, sir.
- 17 Q You were? How much money?
- 18 A I have no idea.
- 19 Q Okay.
- 20 A I just know the repairs had not been made and that
- 21 homeowners were required to either find a way to do
- 22 that on their own or to do it themselves in order to
- 23 solve the water intrusion issues.
- 24 Q So --
- 25 A They were not all repaired.

1 Q They were left for the homeowners to take care of?

2 A Yes.

3 Q Mr. Hardester, what did you mean by Roger's
4 history?

5 MR. FOSMIRE: Your Honor, I object.

6 THE COURT: The objection is sustained.

7 MR. FOSMIRE: Thank you, Your Honor.

8 BY MR. THOMPSON:

9 Q Mr. Hardester, tell this jury whether these
10 homeowners are entitled to money, enough money to fix
11 all the construction problems they had out there, have
12 out there now that are related to original construction
13 deficiencies.

14 A I think they are entitled to have their repairs
15 made.

16 MR. THOMPSON: Thank you.

17 MR. FOSMIRE: If it please the Court.

18 THE COURT: Yes, sir..

19 CROSS EXAMINATION

20 BY MR. FOSMIRE:

21 Q When you say they are entitled to have their
22 repairs made, we don't disagree. Have you ever seen
23 their scope of repairs?

24 A No.

25 Q Or their estimate?

1 A No.

2 Q By making that comment are you not adopting their
3 position as far as the scope of repairs?

4 A No, only what I'm familiar with when I left the
5 company.

6 Q What you are familiar with is, you had initially
7 said there were, you just didn't recall any window
8 complaints out there at Riverwalk but you were shown
9 maybe a punch list document with a couple window
10 issues?

11 A That's right.

12 Q All right. And let's get back to the corporate
13 organization just a minute. I showed this to the jury
14 at the outset of the case. You hadn't seen this, have
15 you?

16 A No, sir.

17 Q All right. I put Heritage Communities up here.
18 Heritage Communities is the parent company of Heritage
19 Riverwalk, Inc., and BuildStar Corporation?

20 A That's correct.

21 Q Heritage Riverwalk, Inc., was a separate
22 corporation?

23 A That's right.

24 Q That was the seller of Riverwalk and sold units to
25 homeowners, meaning they were the official one?

1 A Yes.

2 Q Is that right?

3 A That's right.

4 Q BuildStar Corporation was the general contractor
5 that built Riverwalk and used subcontractors and is
6 also a subsidiary of Heritage Communities, Inc.?

7 A That's correct.

8 Q All right. These were properly formed
9 corporations under South Carolina law?

10 A To my knowledge they were.

11 Q And they operated as corporate entities, correct?

12 A That, they did.

13 Q They had their own separate Boards set up?

14 A Yes, sir.

15 Q Correct?

16 A Yes, sir.

17 Q There was some cross-over between some people but
18 they were separate corporate entities?

19 A That's right.

20 Q Each one with it's own separate responsibility?

21 A That's right.

22 Q All right. Now, you talked about the development
23 of Riverwalk and the time frames. You said at one
24 point Tuscan Architectural became the architect of
25 record. Are you specifically familiar with how many

1 buildings Pegram was on when Tuscan came on?

2 A I was not.

3 Q So, you wouldn't be able to verify that
4 information?

5 A No, sir, I wouldn't.

6 Q Okay. As it relates to Riverwalk's operations in
7 selling these condo units out there, we gave everyone a
8 warranty manual, didn't we?

9 A That's right.

10 Q We told them right up front that there may be,
11 this is new construction, there may be issues that have
12 to be fixed or dealt with. Correct?

13 A That's right.

14 Q We're not going to go through the whole warranty
15 manual, the jury will have it back there with them, but
16 we have listed in here a whole bunch of performance
17 criteria which we said we would meet?

18 A That's true.

19 Q And the expectation is that we would meet that
20 criteria, right?

21 A That's right.

22 Q And BuildStar had its own punch list crews that
23 worked out there at Riverwalk?

24 A That's correct.

25 Q So, there were employees whose specific job was to

1 go out there and take care of these punch list issues?

2 A That's right.

3 Q Whether a socket that doesn't work or a faulty

4 air-conditioning or something, that was to be dealt

5 with by BuildStar for Heritage Communities?

6 A That's correct.

7 Q All right. And not only did we have our own punch

8 list folks out there, we had a group of folks that we

9 hired as the property manager, didn't we?

10 A That's right.

11 Q That we hired?

12 A That's correct.

13 Q For Riverwalk?

14 A That's correct.

15 Q And that company was the Noble Company?

16 A That's right.

17 Q Which is a reputable company who performs property

18 management, right?

19 A Correct.

20 Q And you would expect the Noble Company to meet

21 their duties for property management, wouldn't you?

22 A Yes.

23 Q And the Noble Company would be responsible for

24 keeping minutes of HOA meetings?

25 A Right.