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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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 THREE

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Country Club Property Owners
Association, Inc.

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

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Certificate of Counsel

1 Q And they would essentially, they would run the
2 meeting in the sense that they would call the meeting
3 and start the introductions and people would get up and
4 talk?

5 A That's right.

6 Q And we touched on it, again we're not going to go
7 into it, the jury will have it, but that one meeting
8 where you stood up you addressed the issues that were
9 occurring out there at Riverwalk from the deck
10 standpoint?

11 A Yes.

12 Q You weren't running from it, were you?

13 A No.

14 Q You had said we looked at it and here is what we
15 believe the issue to be, right?

16 A That's correct

17 Q We were dealing with that issue -- take a minute
18 to get Plaintiff's Exhibit 3 again, it's the March 15,
19 2000 minutes.

20 A Yes, I have it in front of me.

21 Q There is financial reporting for the HOA, and then
22 on page two there is a carryover, and you may recall
23 talking about this but in any of the public input that
24 was made do you recall any complaint about any window
25 issues out there?

1 A No, sir, and that's why I didn't recall it.

2 Q Okay. None reflected in these minutes?

3 A No, sir.

4 Q All right. And this was a meeting back in 2000?

5 A That's right.

6 Q And in fact if you will look at right under
7 minutes on the very first page, the second sentence,
8 the meeting was held at the Myrtle Beach Convention
9 Center?

10 A Yes.

11 Q Now, BuildStar is out there building these units.

12 BuildStar was the general contractor and it hired
13 subcontractors, correct?

14 A That's right.

15 Q The expectation would be that those subcontractors
16 would be reliable and skilled in their trade?

17 A Correct.

18 Q Whether they were an air-conditioning man or
19 plumbing guy or the brick guy, we were relying on those
20 trades to do what they were supposed to do?

21 A That's correct.

22 Q In addition to those trades, doing what they are
23 supposed to do from the trade standpoint, we had our
24 own supervisor on site?

25 A That's right.

1 Q And of course you had the building inspector
2 process that you deal with from Horry County, is that
3 correct?

4 A That's correct.

5 Q And you were, you started out on the sales and
6 marketing side and then got more into the operational
7 side, you couldn't sell the unit until you got the
8 certificate of occupancy?

9 A Well, actually you could pre-sell them. You
10 couldn't close them.

11 Q You couldn't close them?

12 A That's right.

13 Q So, you can't get the money for them?

14 A That's right.

15 Q But the issue being that you couldn't get that
16 unit sold, when you were sales and marketing, until the
17 certificate of occupancy was issued?

18 A That's correct.

19 Q And you also had a sales force that was affiliated
20 with Burroughs and Chapin?

21 A That's right.

22 Q Because you had some, Burroughs and Chapin was
23 doing some marketing for the project, is that fair to
24 say?

25 A No, they weren't.

1 Q Well, they had -- I'm sorry, go ahead, explain how
2 they, how the Burroughs and Chapin relationship
3 existed.

4 A The relationship primarily was that Heritage
5 Communities purchased their property on which they
6 built their condominiums from the Burroughs and Chapin
7 company. In response to that, because Heritage
8 Communities did not have its own sales people, it
9 utilized sales people that were, I guess you would say
10 on loan or rent from Burroughs and Chapin Prudential
11 and those sales people would occupy a sales center on
12 each site and then they would sell that property.
13 Burroughs and Chapin served as the real estate broker
14 for those properties because Heritage really wasn't in
15 the broker business.

16 Q So, when you had Burroughs and Chapin, those
17 Monday meetings that Mr. Thompson was bringing up --

18 A Yes.

19 Q -- they were present?

20 A Yes, sir.

21 Q They knew what was going on?

22 A Yes, sir.

23 Q They knew if there were any issues, say decks or
24 what not, the expectation was as you are selling those
25 units that those issues are going to be addressed?

1 A Yes.

2 Q It is interesting, because you said it wasn't
3 intentional or malicious. Let's just cut to the chase.
4 The plaintiffs are trying to portray Heritage as an
5 entity that is out there knowingly putting bad
6 condominiums in the marketplace. That is not the
7 truth, is it?

8 A No, sir.

9 MR. FOSMIRE: Thank you, Quinn. I have nothing
10 further.

11 REDIRECT EXAMINATION

12 BY MR. THOMPSON:

13 Q Mr. Hardester, I'm looking for Exhibit Number 45.

14 A Number 45?

15 Q Here you are. Have you ever seen Exhibit 45
16 before?

17 MR. FOSMIRE: Your Honor, that is nothing I
18 covered on cross. For redirect it is not proper to go
19 into anything else.

20 MR. THOMPSON: Your Honor, he asked him if they
21 knew they were putting defectively constructed
22 condominiums in the stream of commerce and this is a
23 document that came from BuildStar that shows they knew
24 they had problems.

25 THE COURT: The objection is overruled.

1 BY MR. THOMPSON:

2 Q Mr. Hardester, doesn't that document, isn't it a
3 BuildStar document?

4 A Yes, sir.

5 Q Okay. And how many windows total is BuildStar
6 trying to get replaced by the window manufacturer?

7 A Let's see.

8 Q For Riverwalk?

9 A For Riverwalk, I'm sorry, 144 plus 48.

10 Q Okay. And what is the fax date on the top of that
11 document?

12 A September 3rd, 1998.

13 Q So, in 1998 Heritage knew there were problems with
14 windows at Riverwalk?

15 A Yes, sir.

16 Q Okay.

17 A According to this document.

18 Q Okay. In 1998 was Heritage still selling units
19 out at Riverwalk?

20 A Yes, sir.

21 Q Okay. The sales force that Mr. Fosmire was
22 talking to you about, Burroughs and Chapin, who oversaw
23 them?

24 A Mike King primarily and myself secondarily.

25 Q Okay.

1 A Mike King was the supervisor.

2 Q So, you oversaw that sales force from Burroughs
3 and Chapin?

4 A I oversaw them from Heritage Communities'
5 standpoint but not from Burroughs and Chapin's
6 standpoint. That was Mike King.

7 Q BuildStar Corporation oversaw and supervised all
8 the construction out at Riverwalk, correct?

9 A Yes, sir.

10 Q They were ultimately responsible for it. Correct?

11 A That's right.

12 Q And the Noble Company, while they were employed by
13 the property owners association, when the property
14 owners association was controlled by the developer who
15 did the Noble Company have to answer to?

16 A Heritage Communities.

17 Q Okay. And lastly, Mr. Fosmire was asking you
18 about the separate corporate entities that were
19 involved. All these entities were controlled by Roger
20 Van Wie, were they not?

21 A Yes, sir.

22 Q Okay. And the same people, whether they had
23 separate Boards or not, the same people served on those
24 Boards, didn't they?

25 A Yes, sir.

1 MR. THOMPSON: Okay, thank you, sir.

2 MR. FOSMIRE: Nothing further.

3 THE COURT: All right.

4 MR. FOSMIRE: Thank you, Your Honor.

5 (Witness excused).

6 THE COURT: Is this our witnesses for the day?

7 MR. THOMPSON: That's all we have today, Your
8 Honor.

9 THE COURT: All right. Ladies and gentlemen,
10 we're going to stop for today and start back at 10:00
11 Monday morning, 10:00 Monday morning. You all have a
12 good weekend, we'll see you Monday morning.

13 (Jury excused from the courtroom).

14 THE COURT: Any additional matters?

15 MR. HENRY: Nothing today, Your Honor.

16 THE COURT: All right. Mr. Fosmire?

17 MR. HENRY: Maybe an Excedrin.

18 MR. FOSMIRE: Two issues, Your Honor, that I
19 think we can address. I'm not sure if the plaintiffs
20 still want to try to publish something from Allen
21 Campbell's deposition. Since we're still in their
22 case I call that to the Court's attention to see if
23 that is something we need to deal with.

24 The other thing is from the standpoint of our
25 motion for a jury view we would again, I guess, renew

1 that motion. I know the Court has it under
2 consideration but I anticipate the plaintiff is going
3 to rest, probably get to rest Monday.

4 MR. HENRY: Hopefully, if we can get Mr. Desentes.

5 MR. FOSMIRE: If the timing works out. I told
6 them, too, Your Honor, the reason I say this just from
7 a timing standpoint and getting our witnesses lined up
8 so that we can roll, if they still have an issue with
9 DeSentes I told them we can call him out of order if
10 they want to call DeSentes in our case, if the Court
11 wants to keep moving.

12 THE COURT: All right.

13 MR. FOSMIRE: But from that standpoint, if the
14 Court is going to allow us to have a jury view of the
15 premises we would like to make sure we can have
16 whatever arrangements need to be made, whether it is
17 using -- I just don't know if the county has vans or
18 gets the sheriff to do it or we need to hire vans
19 ourselves. I'm just trying to get a grip of what we
20 need to do logistically if that is going to take place.
21 I just bring that to the Court's attention.

22 DEPUTY SHERIFF: We take care of the
23 transportation with the jury, if that's the case.

24 THE COURT: All right.

25 MR. HENRY: We still object to the jury view, Your

1 Honor, on the grounds we stated before.

2 THE COURT: All right. I grant the motion for a
3 jury view.

4 MR. FOSMIRE: Thank you, Your Honor. Do you want
5 to do it at the end of the case, between the
6 plaintiff's case and the defense case, or just pick a
7 morning if the weather is good to take them out there?
8 What can we do to make it happen?

9 THE COURT: We could have done it this afternoon.

10 MR. HENRY: The jury view, Your Honor, should be
11 after all the testimony is in.

12 MR. FOSMIRE: Fair enough.

13 THE COURT: We'll do it after all the testimony.

14 MR. HENRY: And, Your Honor, as long as Mr.

15 Fosmire assures me, and I'm not too worried about this,
16 that he's going to put Mr. Campbell on the witness
17 stand I withdraw my request to read parts of his
18 deposition.

19 MR. FOSMIRE: Mr. Campbell will be our witness, I
20 guarantee it.

21 THE COURT: Okay. Anything else, then?

22 MR. FOSMIRE: I don't think so.

23 THE COURT: We're in recess, then, until Monday
24 morning.

25 MR. FOSMIRE: Thank you, Your Honor.

1 THE COURT: Very good.

2 THE COURT: Mr. Fosmire and Mr. Thompson,
3 regarding the manual that you all indicated was in, the
4 court reporter says he doesn't have it in.

5 MR. FOSMIRE: Maybe we didn't do it. I thought we
6 had.

7 THE COURT: Do you all agree it is?

8 MR. THOMPSON: Do you agree it's in?

9 MR. FOSMIRE: Your Honor, I said I believed it was
10 in because we argued about it on a motion in Lemine,
11 which we were talking about exhibits and I objected to
12 the references to other projects and you asked me to
13 point out the pages on which there was a problem of
14 references to other projects and I cited one like page
15 five or seven inside and the back cover. I had
16 understood you to overrule that objection and therefore
17 it went in. Maybe we didn't say that clearly
18 thereafter but that was my recollection of the
19 sequence.

20 MR. THOMPSON: I agree.

21 THE COURT: Which number?

22 MR. THOMPSON: Twelve.

23 THE COURT: Plaintiff's 12.

24 MR. THOMPSON: In as Plaintiff's 12 following a
25 ruling on the objection.

1 THE COURT: Plaintiff's 12 is in.

2 MR. FOSMIRE: Right, okay.

3 MR. THOMPSON: I agree.

4 MR. COLE: I think it was in from our colloquy.

5 THE COURT: The court reporter needs a copy of it.

6 He needs to be certain he has a copy because it is in.

7 MR. FOSMIRE: Here it is.

8 (Warranty manual marked and received in evidence
9 as Plaintiff's Exhibit Number 12).

10 THE COURT: Very good.

11 (Recessed at 2:57 p.m., January 9, 2009).

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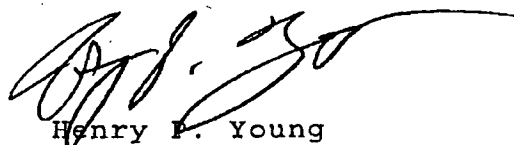
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Horry County, South Carolina, on the 5th through 15th days of January, 2005.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 18, 2009



Henry P. Young
Court Reporter

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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Attorney for the Plaintiffs

ERIC G. FOSMIRE, Esquire
ANDREW C. COLE, Esquire
Attorneys for the Defendants

VOLUME VI of IX
January 12, 2009

1 (Reconvened at 1016 :a.m, January 12, 2009)

2 THE COURT: Good morning. Any matters before the
3 jurors come in?

4 - MR. HENRY: Your Honor, we have admitted two more
5 documents into evidence, two more exhibits without
6 objection by the defense. We have already shown it to
7 the court reporter and to the defense, 40-C and 40-D,
8 which is the new addendum for Prime South deleting
9 windows.

10 THE COURT: Do you agree to the stipulations, the
11 admissibility?

12 MR. FOSMIRE: Yes, Your Honor, 40-C and 40-D.

13 THE COURT: So ordered.

14 MR. HENRY: Do you want the witness to go ahead
15 and retake the stand, Your Honor?

16 THE COURT: That will be fine.

17 ALBERT BEST,

18 being previously sworn, testified further on direct
19 examination as follows:

20 THE COURT: You're still under oath.

21 MR. HENRY I want to get exhibit 40-C.

22 THE COURT: All right, they can come on.

23 (The jury returned to the courtroom)

24 THE COURT: All right, good morning. Welcome back
25 to week number two. This witness has retaken the

1 stand. Continuing on with the examination by Mr.

2 Henry.

3 Mr. Henry, you may proceed.

4 MR. HENRY: Thank you, Your Honor.

5 BY MR. HENRY:

6 Q Al, welcome back. I guess you had a good night
7 last night with Wake Forest and North Carolina?

8 A Pretty good.

9 Q I hope you don't have any North Carolina fans on
10 the jury.

11 A My apologies.

12 Q When we left off you had talked about your
13 estimate of December the 22nd, 2008. Is that correct?

14 A Yes, it is.

15 Q All right. And would you get that out? It's
16 Exhibit 40. It should be up there in front of you.

17 A Okay.

18 Q You rendered -- before I ask you that, the
19 opinions that you're giving today are with a reasonable
20 degree of estimating certainty?

21 A Yes, Exhibit 40.

22 Q That estimate dated the 22nd, 2008, which is
23 Exhibit 40, was how much?

24 A For the base scope of work it was \$8,662,147.

25 Q All right. And then look at Exhibit 40-A.

1 A Okay.

2 Q And what is Exhibit 40-A?

3 A 40-A is an addendum to the contract where -- the
4 general contract price was based on all the buildings
5 having the same number of columns, and there are eight
6 buildings out there that have three additional columns
7 and it's a price for the additional reconstruction of
8 those columns.

9 Q And how much addition was that?

10 A It was 19,152.

11 Q All right. And then there was, if you will look
12 at Exhibit 40-B?

13 A Okay.

14 Q What is Exhibit 40-B?

15 A 40-B is an exhibit where we had a deduction to the
16 contract for -- there are two reasons. One is we had,
17 we had deleted the through-wall flashing because the
18 subcontractor, the brick mason had included it in his
19 work and it was being double charged. And the other is
20 one of the sills had an erroneous number in it that we
21 discovered.

22 Q All right. That was a deduct?

23 A Yes, sir, that was a deduct.

24 Q Of how much?

25 A 22,184.

1 Q Okay. Now, if you would, take the estimate, the
2 estimate of December the 22nd and make the calculations
3 where you add the nineteen and deduct the 22,000?
4 A Okay.
5 Q And what does that figure come out to be?
6 A 8,659,115.
7 Q All right. Now, that estimate included a partial
8 removal of the brick on the ends of the building, is
9 that correct?
10 A That estimate had the two end walls, it was just
11 doing brick repairs on the ends of the building.
12 Q All right. And all of the brick was to be removed
13 on the back of the building?
14 A That's correct.
15 Q Okay. And that was gotten through the scope you
16 were given several years ago?
17 A That's correct.
18 Q Okay. Now, Mr. Best, you weren't here when Mr.
19 Brown testified, were you?
20 A I was not.
21 Q He testified the bricks on the end of the
22 building, he determined should all come off. Do you
23 have, on Exhibit 40 do you have an option for taking
24 all the brick off?
25 A Yes, we do.

1 Q Okay. And look at Exhibit 40 and tell me what
2 that option is.

3 A That option is 19,562 per building for the
4 seventeen buildings in phase one.

5 Q All right. Would you make the calculation as to
6 what that would add to the estimate?

7 A That would be 332,554.

8 Q All right. And that would make the estimate then
9 increase to what amount of money?

10 A 8,991,669.

11 Q All right. Then during your testimony on Friday
12 it was discovered that you were taking all the windows
13 out and that number you just gave us included taking
14 all the windows out and replacing them even under the
15 breezeway, is that correct?

16 A That is correct.

17 Q And at my request, I know you weren't here when
18 Mr. Brown testified but he said he had determined that
19 the windows under the breezeway, since they were out of
20 the weather, could be left there. At my request did
21 you determine what deduct that would be from your
22 estimate?

23 A Yes.

24 Q Okay. And if you would look at Exhibit 40 and
25 40-D and tell the jury what those documents are. I'm

1 sorry, 40-C and 40-D.

2 A Okay. 40-C is an addendum for a deduct for
3 \$480,244, and that is to leave the remaining, leave the
4 windows in all the walkways for all the nineteen
5 buildings in place.

6 Q All right. And what is 40-D?

7 A 40-D is the spread sheet calculations that came up
8 with those numbers.

9 Q Okay. That came up with leaving the windows in
10 place under the breezeway?

11 A That's correct.

12 Q All right. Al, 40-D, you can't just deduct the
13 cost of the window, you have to deduct the labor and
14 the flashing, caulking, all that sort of thing. Is
15 that correct?

16 A That's correct.

17 Q And is that what 40-D does?

18 A 40-D basically takes all the work that's just
19 associated with pulling the window out and putting it
20 back in and deducting that, plus the overheard, the A
21 and E fees and the percent of the bond that were all
22 part of the contract.

23 Q Okay. And is that, after you deduct the 408,244
24 what is the final total of your estimate to do the work
25 at Riverwalk?

1 A That would be 8,511,425.

2 Q Okay. And do you have an opinion to a reasonable
3 degree of certainty as to what the figure is that will
4 do the work with the scope that we modified at
5 Riverwalk?

6 A Yes.

7 Q And what is that opinion?

8 A That opinion is that the amount to do that work is
9 8,511,425.

10 Q All right. Al, let me ask you this. Is there
11 ever a perfect estimate? In other words, does an
12 estimate usually come out to the very penny that you
13 have estimated?

14 A No.

15 Q Have you ever had one do that?

16 A No.

17 Q And you regularly bid jobs against Mr. Watkins'
18 company, Watkins Services, is that correct?

19 A Occasionally.

20 Q Okay. And sometimes -- have you ever had the same
21 amount in your bid that he had in his?

22 A No.

23 Q That almost never happens, does it?

24 A Not that I'm aware of.

25 Q One of the difficulties in estimating a rehab

1 project is the hidden damages and things you are going
2 to run into that you don't anticipate. Right?

3 A That is correct.

4 Q And if someone gives additional information that
5 changes the scope of what you have here or modifies it
6 or you have increases or decreases in prices this
7 estimate, by the time they get there, could go up or
8 down, is that correct?

9 A That is correct.

10 Q But the information we have today, the number you
11 have given the jury is your best estimate of what it
12 will take to do this work?

13 A Yes.

14 Q Now, let's suppose you are doing this work and you
15 have estimated \$13,000 for sheathing damage, framing
16 damage, whatever, and it turns out that there is much
17 more there than you anticipate. What do you do in that
18 situation such as that?

19 A That's an allowance item and since we couldn't
20 quantify it going in, whatever the cost of it is we
21 charge that to the homeowner, so if it is more than
22 that we would supply a change order.

23 Q Would you submit it to the homeowner?

24 A That's correct.

25 MR. HENRY: Thank you very much, Mr. Best. Answer

1 any questions Mr. Fosmire may have.

2 THE COURT: Yes, sir, Mr. Fosmire.

3 MR. FOSMIRE: If it please the Court.

4 THE COURT: Yes, sir.

5 CROSS EXAMINATION

6 BY MR. FOSMIRE:

7 Q Mr. Best, what you're giving is only an estimate
8 based on the Burric scope, correct?

9 A That is correct.

10 Q And you are assuming certain things in your scope,
11 is that right?

12 A That's correct.

13 Q The first thing you are assuming is that the
14 Burric scope is in fact right?

15 A That's correct.

16 Q So, if there is something in the Burric scope that
17 is wrong your estimate is correspondingly wrong?

18 A That is correct.

19 Q So when you looked at this window issue -- your
20 first estimate in this case came out in 2005. Do you
21 remember that?

22 A Yes.

23 Q And then even through your most recent estimate in
24 December of 2008 you were still maintaining that all
25 the windows had to be replaced?

1 A That was the scope of work that we were pricing.

2 Q Okay. Because you assumed that all the windows
3 had to be replaced?

4 A Because that's the scope of work we had been
5 given.

6 Q You mean to tell me that Drew Brown told you that
7 all of the windows had to be replaced?

8 A I mean that we had a scope of work that was
9 presented to us in 2005 and we were still using that
10 scope of work.

11 Q And you have had three years to investigate and
12 communicate and talk with Mr. Brown and it wasn't until
13 you were sitting on the stand Friday that you figured
14 out, whoops, those windows shouldn't have been
15 included?

16 A No, I didn't figure that out. We priced the scope
17 of work that we understood. What I found out on the
18 witness stand Friday was that there had been another, a
19 change in the scope of work and that was not reflected
20 in our estimate.

21 Q And what had been presented since 2005 about all
22 the windows having to be replaced was in error?

23 A I don't know whether it was an error or wasn't an
24 error. We haven't done any evaluation out there.
25 We're simply pricing the scope of work that we had

1 gotten. Whether or not there was a communication error
2 between us and Drew Brown sometime subsequent to when
3 the decision was made not to take those windows out
4 that may in fact be the case but I was not aware that
5 there was a scope change.

6 Q And that is my point, Mr. Best. You have done no
7 independent evaluation of what needs to be done out
8 there?

9 A That's correct.

10 Q So you can't sit here and testify whether the
11 brick has to come off or not?

12 A That's correct.

13 Q So the guess that all the brick has to come off
14 the side walls is relying on Mr. Drew Brown's opinion?

15 A Yes. Once again we're not -- I'm not classifying
16 it as a guess. It is a scope of work. If we're asked
17 to price taking all the brick off the end that's what
18 we price. If we're asked not to we don't price it.

19 Q So you don't have any evidence that the brick on
20 the side walls is insufficient, you don't have any
21 independent evidence that the, that there are
22 insufficient brick ties on the side wall?

23 A I do not.

24 Q And you have -- what you're relying on for these
25 allowances that you're talking about are photographs

1 from Drew Brown?

2 A In part, yes.

3 Q You all obviously weren't communicating about the
4 window issue. What was he telling you about the
5 allowances? Did he tell you a certain figure to put
6 into your estimate for allowances?

7 A No.

8 Q So, there is no communication there?

9 A I'm not, I'm not aware of any communication where
10 he told us what to put in for the allowances.

11 Q How many actual condo rehab jobs have you all done
12 as far as number of buildings?

13 A You mean how many buildings total?

14 Q Yes, condominiums, condo buildings.

15 A Maybe fifty.

16 Q So you have done maybe fifty condo buildings over
17 the last five or six years?

18 A Yes.

19 Q Before that you all did primarily or did a
20 substantial amount of residential work, is that right?

21 A Yes.

22 Q In fact Mr. Henry covered with you the fact that
23 you all had a problem with your company with this EFIS
24 product, the stucco product, correct?

25 A That's correct.

1 Q And your company Prime South had been applying
2 that stucco product to residences and it turned out
3 that product was not very effective?

4 A That is correct.

5 Q And as a result of that you all got sued many
6 times over as a result of that, isn't that right?

7 A That is correct.

8 Q Because you had been applying a product which you
9 had expected to perform?

10 A That is correct.

11 Q But over the course of time that product did not
12 perform?

13 A Mostly that's correct.

14 Q And you all were sued for insufficient
15 installation details and not properly applying the
16 product, isn't that right?

17 A That is correct.

18 MR. FOSMIRE: Your Honor, I don't want to have to
19 send the jury out to re-orient. Could we just put the
20 screen down?

21 THE COURT: Sure.

22 Q Al, I'm not trying to turn my back to you, I'll
23 speak up, okay?

24 A Okay.

25 Q Your very first estimate was June 30, 2005. Do

1 you see that?

2 A Yes.

3 Q This is Prime South, right?

4 A I see that. That's the second estimate.

5 Q I'm sorry, the second. In your estimate, and this

6 portion is where you started putting in allowances for

7 what you all were just assuming you all would have to

8 have done?

9 A Right.

10 Q In there there are two allowances. The very first

11 one is saying \$13,000 per building to repair damaged

12 walkway, balcony and -- I'm sorry, wall, balcony and

13 walkway framing. Do you see that?

14 A Yes.

15 Q All right. You know that the framing under the

16 walkways is treated lumber?

17 A Yes.

18 Q And you -- have you seen the photographs that Drew

19 Brown, the very worst of the photographs that Drew

20 Brown has had to try and show damaged walkway framing?

21 A I'm not sure that I have seen all the photographs

22 but I have seen photographs.

23 Q Okay. You have in there \$3,000 per building to

24 repair damaged wall sheathing, is that right?

25 A That's correct.

1 Q When we talk about wall sheathing we're talking
2 about the OSB sheathing, right?

3 A If that is what is on the buildings.

4 Q You don't know, do you?

5 A No.

6 Q If you don't know what is on buildings how can you
7 price it?

8 A Well, until everything is stripped off we can't
9 tell what is under there, so we have to make the
10 assumptions of what is under there, so --

11 Q Mr. Brown has been involved in this case for years
12 and has yet to show you to your satisfaction what is
13 under the veneer?

14 A Unless it is all stripped off that can't be done.

15 Q It might be different on different buildings or
16 different wall faces.

17 A It's sheathing.

18 Q This is a piece of OSB, right?

19 A Yes.

20 Q You can get a sheet of OSB, walk into Lowe's, Home
21 Depot, get a sheet of OSB anywhere from nine to twelve
22 bucks today, right?

23 A Probably.

24 Q And if you were to get even thicker, like
25 three-quarter plywood that might run you \$15?

1 A Probably.

2 Q All right. So, a four by eight sheet of OSB that
3 can be had for twelve bucks today down at Lowe's?

4 A Probably, yes.

5 Q Then what you do, you take off the contract price,
6 you add architectural/engineering fees as a percentage
7 of the entire project. Right?

8 A That's correct.

9 Q All right. And architectural/engineering fees are
10 in case you have to get someone else involved to
11 specify or to check or do design and engineer and stamp
12 affix what you all are doing out there. Is that
13 correct?

14 A That's one of the things they would do, yes.

15 Q And they would consult about the work that's being
16 done out there, right?

17 A That's another one of the things they would do.

18 Q And you said that basically your rule of thumb you
19 have used for these estimates, at least that I have
20 seen, is that you are using 10 percent architectural,
21 engineering fees for the project?

22 A That's correct.

23 Q Okay. So, when you talk about 10 percent you
24 basically have your engineering the same figures all
25 across these nineteen buildings, is that right?

1 A For the most part that's correct.

2 Q The scope of work is generally the same across
3 these buildings, right?

4 A It is.

5 Q And we basically, so the engineering fix on
6 building one will be, if you're working on a lintel
7 issue and you need an engineering issue for the
8 lintels, your engineering fix on building one for the
9 lintel ought to be the same as building seven for the
10 lintel. Right?

11 A Basically, yes.

12 Q You're not going to have to re-engineer a lintel
13 fix over the window for every single window?

14 A That's correct.

15 Q Because the windows are essentially the same you
16 are fixing out there, or the same sets of window, as
17 far as type goes. Does that make sense?

18 A It does.

19 Q So when you talk about types of buildings, except
20 for the column differential, you basically have two
21 types of buildings out there, the one with the Hardy
22 Plank siding up above the first course, right?

23 A Correct.

24 Q Do you know that is the phase two buildings?

25 A Yes.

- 1 Q All right. And then you have the first seventeen
2 buildings which also have brick on the sides and the
3 back all the way up?
- 4 A That's correct.
- 5 Q So when you talk about your architectural and
6 engineering fees, basically whoever, if anyone is
7 having to do the A and E on the project you're dealing
8 with really two buildings, two types of buildings?
- 9 A That's correct.
- 10 Q Except for a --
- 11 A Basically.
- 12 Q Except for a column differential on some of the
13 buildings in phase one, right?
- 14 A And a slight variation in the two buildings in
15 phase two.
- 16 Q All right. Let's look, that was your general
17 allowance that you had put there but actually within
18 your estimate you have more line items for allowances.
19 And you have got, you have got all these factors in
20 there, rather than calculating the actual figure you
21 have just left this completely in round numbers, all
22 the way up and down you have left each one of these as
23 an allowance?
- 24 A That's correct.
- 25 Q Wall framing damage, wall sheathing damage, top of

1 walkway framing, screen repair, insulation damage.

2 Tell me this. I don't ever recall seeing any
3 photographs from Drew Brown about any insulation
4 damage.. Do you recall any?

5 A No.

6 Q Interior sheetrock damage. Is this because you're
7 having to pull the windows and rework the windows?
8 Actually you're claiming that you have priced putting
9 new windows in, right?

10 A That's correct.

11 Q So is this interior sheetrock damage based on
12 having to rework the window openings because you might
13 damage the sheetrock pulling the windows out?

14 A It is not.

15 Q What is the interior sheetrock damage?

16 A You're going to have, when you tear everything off
17 the outside of the building you are going to have
18 cracks and nail pops in the drywall, you are going to
19 have areas where you change out the studs in the wall,
20 you are going to have interior sheetrock damage, and
21 that is to fix the damage on the inside as a result of
22 construction. That is why it's an allowance item.

23 Q That is if you have to change out studs?

24 A It is.

25 Q That is assuming you have damage to your studs?

1 A It is.

2 Q Assumption?

3 A Yes.

4 Q Interior trim, interior paint. The jury can read
5 this. All these are allowances that are contained in
6 each, for each building within this estimate. Correct?

7 A That's correct.

8 Q Because what you have done is you have taken these
9 figures along with the other components of your
10 estimate and you multiply it times nineteen?

11 A That's correct.

12 Q And that was a mistake on these early estimates
13 because not all the buildings were the same. Right?

14 A That's correct.

15 Q I know you all didn't realize in these early
16 estimates that you had two different types of buildings
17 out there in phase one and phase two.

18 A That's correct.

19 Q Now, your control joint ventilation. That is for
20 the walkway ceilings?

21 A It is.

22 Q Hopefully the jury is going to be able to get out
23 there and see these buildings, weather permitting.

24 You're talking about the control joint
25 ventilation, you are talking about cutting a joint in

1 certain lengths in order to get the sheetrock ceiling
2 on the walkways where you walk in, right above you you
3 will see cracks in the sheetrock, what you're saying is
4 all you have to do is cut in a joint right there?

5 A It is what a control joint is, yes. But the
6 numbers, you have described and asked some questions
7 about what that says up there but you haven't asked me
8 what they all encompass, and that one down there on the
9 bottom is for sheetrock repair underneath those decks
10 and you have to realize that we're tearing everything
11 up off the top of it, they are no longer going to be
12 waterproof, they are going to be out in the weather,
13 they are going to get rain. The survivability of any
14 of those sheetrock ceilings is very low.

15 When you asked me about whether it was treated
16 wood under the balcony walkway framing, you notice the
17 first two categories say damage, the third one doesn't.
18 The balconies are all being resloped and so there is
19 going to be a lot of framing work that is involved on
20 every single joist out there. And so that is why that
21 number, you categorized it as 13,000 in the estimate
22 but there are a lot of other things that go on.

23 In addition, those allowances that are listed up
24 there, each one of those items, those numbers are not
25 going to be reflective of what is actually spent. That

1 is why they are round numbers. But what we do know is
2 that in the fifty something buildings I mentioned we
3 have roughly between 10 and 30 percent of hidden damage
4 costs historically in all of those buildings, and we
5 put the 10 percent, the 10-percent allowance. We just
6 broke them all out to give an idea of what we might
7 spend, but that's the aggregate amount of what we're
8 going to spend on hidden damage in those buildings.

9 Q You talked about that balcony and walkway framing,
10 \$8,000?

11 A Yes.

12 Q That assumes resloping the balconies?

13 A Yes, it does.

14 Q And if you can rework the balconies without having
15 to reslope them to provide water protection you don't
16 have to spend that, do you?

17 A That's correct.

18 Q The same thing down here, control joint and
19 ventilation. Are you putting vents in the walkway
20 ceiling?

21 A I don't think that we are.

22 Q You know it might be a fire code violation to put
23 those in?

24 A It might be.

25 Q Then does that number need to be backed up?

1 A No. That's a category, the wording came from Drew
2 Brown's scope of work.

3 Q Let me get to November 9 of '06. Do you remember
4 that estimate?

5 A Yes.

6 Q And that estimate, your number went up. Now
7 you're up to \$9,823,912 in 2006, right?

8 A That's correct.

9 Q Back then you were still -- in 2006 you still did
10 not know you had two different sets of buildings out
11 there and you're multiplying your base number times
12 nineteen. Right?

13 A I don't know that we weren't aware that buildings
14 were different but we did just simply make the
15 adjustment to the windows, is what we were asked to do.

16 Q So even if the buildings, even if the buildings
17 weren't the same you were treating all the buildings
18 the same because what you did you came down here and
19 got a per building basis and then even though our
20 buildings are different you just multiplied them out by
21 nineteen, right?

22 A That's correct.

23 Q April 6, April of last year, less than a year ago
24 you basically issued a letter April, '08, reaffirming
25 the 9.8 million dollar estimate as still being valid,

1 right?

2 A That's correct.

3 Q All right. So that estimate had been sitting out
4 there for two years and in April of '08 you all came in
5 and said that estimate is still on the money?

6 A That's correct.

7 Q You're providing these estimates, you're
8 expectation is that you would, if that money is
9 awarded, that you would get the contract to do that
10 work, that is why you're providing the estimate, right?

11 A That's correct.

12 Q Then we get to November 25th of '08. Are you with
13 me, do you see it?

14 A Yes.

15 Q And you all have, since April of '08 you all have
16 dropped a million dollars out of your estimate. You
17 have now gone, in November of '08 you have dropped a
18 million out and you're down to 8.8. Do you see that?

19 A That's correct.

20 Q Now we get to the estimate that we were working
21 off of beginning Monday, this is an estimate from
22 12/22/08. Right?

23 A That's correct.

24 Q You listed here -- is that as of 12/22/08? I
25 can't get the whole thing in here, but that line item

1 seven, just two weeks ago, three weeks ago, happy
2 holidays, right, we were all working, it says replace
3 existing brick veneer on rear elevation and on end
4 around building, around windows. Right?

5 A Yes.

6 Q So up until when you issued this on 12/22 the
7 assumption was that we were only reworking or from the
8 plaintiffs' standpoint you were only going to rework
9 around the windows on the ends. Right?

10 A I'm not sure I understand the question. We were
11 asked to give an option for replacing all the brick on
12 the ends and an option for doing brick repairs on the
13 ends.

14 Q We'll talk about the options in just a minute.
15 Here what it says is as far as the brick goes on and
16 around windows, what we're talking about is the first
17 seventeen buildings, this is reworking around the
18 window itself without having to pull all that brick.
19 Right?

20 A That's correct.

21 Q All right. As it relates to the brick ends, this
22 note right below, going to the note right below
23 architectural engineer, do you see that?

24 A Yes.

25 Q And the basis for putting in the option was only

1 if the brick could not be matched. It didn't say
2 anything about lack of ties or any need to pull it back
3 out so you can see the whole thing, or any need to
4 rework the bricks because they are insufficient. The
5 option was a match option. That is why that option was
6 in there. Right?

7 A Yes. That scope came directly from Drew Brown's
8 report.

9 Q And only had to do with whether or not the bricks
10 could be matched, had nothing to do with pulling out
11 the entire end wall?

12 A Well, I don't know exactly what it had to do with
13 because we haven't done any evaluation out there, but
14 the marching orders in the report we got from Drew said
15 that if you couldn't match the brick on the end, to
16 replace it.

17 Q And it said nothing about insufficient brick ties
18 or having to pull all the end brick off?

19 A That's correct, he didn't.

20 Q And the allowances that we started with back in
21 2005 are all still there in '08, right?

22 A That's correct.

23 Q At the same figures?

24 A That's correct.

25 Q If you will indulge me, I won't make you do the

1 calculation. Do you know what the total is of those
2 allowances?

3 A I don't know, maybe roughly 40,000.

4 Q Okay. It is actually 42,000. But you take these
5 allowances, \$42,000, and multiply it because your
6 allowances stay the same per building, right?

7 A That's correct.

8 Q Even though you know you have differentials in
9 buildings you still used the same allowances in
10 buildings eighteen and nineteen as you used in the
11 first seventeen?

12 A That's correct.

13 Q And you take the 42,000 times nineteen and your
14 allowances in this case for the whole project are
15 798,000?

16 A That's correct.

17 Q Then not only do you have these allowances per
18 building, but you have a contingency of \$10,000 per
19 building?

20 A That's correct.

21 Q On top of your allowances you are allowing another
22 \$10,000 in case there is something that you all just
23 missed, is that right?

24 A That's correct.

25 Q And that contingency is present on every one of

1 these buildings also, right?

2 A It is.

3 Q So then you add 10,000 times 19 and that's
4 \$190,000 in contingencies, right?

5 A It is.

6 Q And if you add those two figures for this project,
7 out of the total you have \$988,000 of allowances and
8 contingencies in your estimate?

9 A That's correct.

10 Q Have you done any condominium rehab projects where
11 you have pulled the windows and re-installed them?

12 A We have.

13 Q All right. So it's feasible to pull the window
14 and re-install it in a condo rehab project as long as
15 the window is serviceable, right?

16 A It is.

17 Q In this case what you have priced for the windows
18 aren't the same type windows, what you have priced are
19 impact resistant windows. Isn't that right?

20 A That's correct.

21 Q Because there has been a code change since 1996
22 regarding the types of windows that you can install in
23 a condominium in Horry County?

24 A Yes, sir, that's correct.

25 Q So if these homeowners get this window it's an

1 has rested its case. It is now the defense's turn.

2 Mr. Fosmire?

3 MR. FOSMIRE: Your honor, we just note the motions
4 and Mr. Cole has our first witness, Your Honor.

5 MR. COLE: We call Lynn Anderson, Your Honor, as
6 our first witness.

7 THE COURT: All right.

8 LYNN ANDERSON,

9 after being first duly sworn, testified as follows:

10 THE CLERK: State your name for the Court, please.

11 THE WITNESS: Lynn Anderson.

12 MR. COLE: Are you ready?

13 THE COURT: Yes, Mr. Cole.

14 MR. COLE: All right.

15 DIRECT EXAMINATION

16 BY MR. COLE:

17 Q Miss Anderson, let's just start out and get a
18 little background for the jury.

19 A Okay.

20 Q What is your current residence?

21 A Myrtle Beach.

22 Q And your education?

23 A Five years of college, did not graduate.

24 Q Okay. And your work history in the last ten years
25 or so?

1 A Primarily accounting and construction.

2 Q Okay. And were you at one point employed by
3 Heritage Communities?

4 A Yes. I was employed by Heritage Communities from
5 '93 until 2000.

6 Q Okay. And while you were there what was your
7 position?

8 A Accounting primarily.

9 Q And where did you work when you were working with
10 Heritage Communities?

11 A Physical location?

12 Q Yes.

13 A Originally we were in a small office over Dr.
14 Green's dental practice, and then we moved into an
15 office on Ginn Drive, which was just off 48th Avenue.

16 Q That is 48th and Grissom?

17 A Yes, in that area.

18 Q Okay. And did you all actually construct the
19 building that you moved into?

20 A Yes.

21 Q And who was in that building when you moved to
22 that, the one you were talking about behind Dr. Green's
23 office?

24 A It was a new building.

25 Q What companies moved into that building?

1 A After we moved out?

2 Q No, when you moved in what company was moving in
3 that building?

4 A Heritage Communities.

5 Q Okay. I was trying not to confuse you or me with
6 this.

7 And Heritage Communities, what kind of entity was
8 that?

9 A Developer.

10 Q And they developed Riverwalk condominiums?

11 A They did.

12 Q And who was Heritage Riverwalk, Inc.?

13 A Heritage Riverwalk is a subsidiary of Heritage
14 Communities.

15 Q And who was BuildStar?

16 A BuildStar was also a subsidiary of Heritage
17 Communities.

18 Q Were Heritage Communities, Heritage Riverwalk and
19 BuildStar separate companies?

20 A Yes, they were.

21 Q And what kind of work did Heritage Communities do
22 with the development?

23 A Heritage Communities was the corporate center.

24 That was where the employees were that did the
25 accounting, did the marketing, that type of thing. The

1 Heritage Riverwalk would do the development for the
2 properties, sales and marketing. BuildStar would do
3 the construction.

4 Q Okay. So BuildStar was the general contractor?

5 A Yes.

6 Q And Heritage Riverwalk, did they sort of lease
7 employees from someone else for the sales force?

8 A Yes. Burroughs and Chapin did all the sales.

9 Q And when the properties were transferred were
10 those transferred through the Heritage Riverwalk?

11 A Yes.

12 Q With BuildStar, did you sort of become an officer
13 of BuildStar eventually?

14 A Yes. In 2000 I was president of BuildStar.

15 Q Okay. So, near the end of your tenure with them?

16 A Yes.

17 Q And do you or did you hold any licenses while you
18 were working there?

19 A Yes. In the end of '99 I got my general
20 contractors license.

21 Q And why did you do that?

22 A Basically for respect, I guess to prove a point.
23 It is tough to be in that business and working with
24 those guys and get them to pay attention to you.

25 Q And you're talking about subcontractors?

1 A Yes.

2 Q And you were in charge of writing the checks to
3 the subcontractors, is that correct?

4 A Yes.

5 Q And were all the finances, the checks that were
6 being written by Heritage Communities coming across
7 your desk?

8 A For all the companies, yes.

9 Q How did you all pay your subcontractors? Would
10 you take me through that process?

11 A Subcontractors would submit bills, or suppliers.
12 They would be, if a subcontractor was submitting a bill
13 it would be submitted to the property manager that was
14 on site. They would review the bill, verify that the
15 work was complete, sign off on it, bring it in to the
16 office, submit it to the payables department, be
17 matched up with construction take-offs, entered into
18 the system, approved for payment and paid from there.

19 Q When a subcontractor sent you an invoice saying
20 they wanted to be paid did you just automatically send
21 them a check?

22 A No.

23 Q What did you do?

24 A The on site project manager would look at the
25 invoice, check the work. If they were asking for, for

1 framing, say, they would go out and look, or they would
2 look at the building, is the first floor framing done,
3 has it passed inspection, that kind of thing. If it
4 was they would sign off on it and turn it in. If it
5 wasn't done we would never see the bill.

6 Q After you went through that process would the bank
7 automatically release the funds for you to then pay the
8 subcontractors?

9 A We would have to submit an AIA, which is a form
10 that the bank recognizes, and then generally the bank
11 would have to inspect, themselves, to make sure that
12 what we said was done was done and then the bank would
13 release the funds.

14 Q And the buildings at Riverwalk, we've got this
15 exhibit that we've looked at before, does this give you
16 a general idea of when the buildings were started and
17 when they were finished out there?

18 A Yes.

19 Q Okay. So, June of '97 is about when the first
20 building would have started?

21 A Right.

22 Q And the last one would have been in December of
23 '99, or November, December, '99?

24 A Right.

25 Q Okay. So that's the time period we're talking

1 about here with the construction of Riverwalk, correct?

2 A Right.

3 Q We've got in the file a copy of the master deed

4 which I believe is Plaintiff's Exhibit Number 1. Do

5 you have that in front of you? For my question, I

6 don't think you need to answer that.

7 The master deed, was this amendment to the master
8 deed, were those filed before or after the certificates
9 of occupancy were issued?

10 A It would have to be after.

11 Q Why?

12 A Because the building would have to be complete.

13 Q Okay. So in order for you to have an amendment to
14 the master deed --

15 A You would have to have the building --

16 Q The county would have had to say you can occupy
17 it?

18 A Right.

19 Q While you were doing the accounting in the office
20 were there certain subcontractors that were working out
21 at Riverwalk?

22 A Sure.

23 Q And do you recall any of the names of those
24 subcontractors that were working out there?

25 A Yes.

1 Q What are they?

2 A Right Way Construction would have been doing the
3 framing, Booker Electric would have been doing the
4 electrical, Dunn Numbering was doing the numbering.

5 Q Did you also hire masons?

6 A Sure.

7 Q Roofers and other trades like that?

8 A Certainly. Everything was subbed out. We were
9 strictly management.

10 Q Would BuildStar, as a general contractor were they
11 actually out there performing any of that work?

12 A No.

13 Q Okay. So they relied on the subcontractors that
14 they hired?

15 A Yes.

16 Q And some of those subcontractors might have had
17 subs, subcontractors that weren't directly involved
18 with BuildStar?

19 A That's certainly possible.

20 Q And the buildings themselves, I think you said
21 they were inspected by the county?

22 A Yes.

23 Q Okay. And the county has to either pass or fail
24 the buildings in order to get the final CO, right?

25 A Right.

1 Q You weren't involved with the CO process, you just
2 know that is part of the construction process?

3 A Right.

4 Q While you were there working for Heritage do you
5 recall any issues out at Riverwalk?

6 A I really don't.

7 Q While the developer still controlled the
8 homeowners association who was the property manager?

9 A Originally I believe it was Allied Property
10 Management and then it was switched over to Noble, the
11 Noble Company.

12 Q And do you recall about when it was switched?

13 A It was probably between '98 and '99, sometime in
14 that time frame.

15 Q And Noble Company has been the property manager
16 ever since then?

17 A As far as I know.

18 Q Was it the property owners association that
19 actually hired Noble Company?

20 A No. I believe it was Jack Green, Roger Van Wie.

21 Q Jack Green at the time was the president of the
22 homeowners association?

23 A I'm not sure.

24 Q Okay. In the master deed, we have gone over this
25 with another witness, we have a schedule of maintenance

1 items. Are you familiar with those?

2 A Yes, the reserves, yes.

3 Q Can you describe a little bit to me what is that
4 reserve schedule?

5 A The schedule is a list of items, roof repair and
6 eventual re-roofing, asphalt, caulking, painting,
7 replacing pool furniture, pool decks, that kind of
8 thing in the normal course of the life of a building or
9 structure that this needs to be maintained. It is just
10 like at your house, you just kind of put money aside a
11 little bit here and there to make sure you have it when
12 it's time to fix it or replace it.

13 Q Is that because there are certain parts of the
14 building that might wear out over time?

15 A Certainly, just like the roof on your house.

16 Q Roof or caulk or waterproof the walkway, something
17 like that?

18 A No different, yes.

19 Q And did Heritage Communities, when the developer
20 was still in charge of the property owners association
21 did they in fact have money that was put into that
22 reserve?

23 A Certainly. It was built into the dues.

24 Q And everybody who owned a piece of property out
25 there was paying into those funds, correct?

1 A If they were paying their monthly homeowners
2 assessment they were paying into it.

3 Q I'm going to hand you what is premarked as
4 Defendant's 50 and 51. Do you recognize what those
5 two documents are?

6 A Yes. They are financial statements for year end
7 '98 and '99 for Riverwalk..

8 Q And Exhibit Number 50 is the 1998 one, correct?

9 A Correct.

10 Q All right. Would you flip -- let me ask you this
11 first. Did you all have someone look at the box and
12 check sort of the math on the year end statements?

13 A Yes. It is required, you have to have it audited
14 every year.

15 Q In fact the first page of this says audited
16 financial statement for the year ending December 31,
17 1998?

18 A Correct.

19 Q And would you flip to page number five, please?

20 A Okay.

21 Q All right. Does that page show how much cash is
22 in reserves for the property owners association by the
23 end of December of '98?

24 A Yes. There is 77,000 in designated funds.

25 Q Okay. And this, if you look at page six, how many

1 buildings do we have that are completed here, in that
2 second paragraph under organization?

3 A The second paragraph? It says there is 180 units.

4 Q Okay. Is that about fourteen buildings, if my
5 math is right? I did that in my head.

6 A Okay.

7 Q I remember doing it earlier. About fourteen or
8 fifteen buildings probably completed at that time?

9 A Okay.

10 Q So we have \$77,000 in reserves, and that is the
11 reserves we're talking about before we're doing the
12 maintenance, correct?

13 A Correct.

14 Q Okay. And at that time, at the end of 1998 you
15 were not aware of any issues at Riverwalk?

16 A Huh-uh.

17 Q Exhibit number 51, this is the next year, the end
18 of the next year, right?

19 A Right.

20 Q And if you flip in there over to, page eight would
21 be the easier one to look at, what is the amount of the
22 reserves accumulated by the end of the following year?

23 A 171,000.

24 Q Okay. And so that money over the span of the year
25 has increased, correct?

1 A Correct.

2 Q Okay. And we have a few more units that are out
3 there at this point. I think I did my math wrong
4 before, 180 units, that should be fifteen buildings,
5 now we have at least seventeen buildings, correct?

6 A Right.

7 Q Okay. And those funds that were put in, were
8 those funds the developer could take out at any point
9 to use for their own uses?

10 A No.

11 Q What was that money used for if in fact it was
12 used?

13 A If it was used it would have been used, if you
14 look at the last page of this report --

15 Q Okay.

16 A That would be the schedule that is in the master
17 deed of the reserve schedule.

18 Q Okay.

19 A Something like caulking and sealant has an
20 estimated life of a year.

21 Q Okay.

22 A Some that would have rolled through, so perhaps
23 they would have done some caulking and sealing or
24 something that maybe has two years, if they had to do
25 some curb repair, repainting a fascia or trim or

1 something like that.

2 Q Does that last page show that the amount of the
3 reserves is actually more than what they were
4 projecting might be necessary to do the repairs in the
5 year 2000?

6 A 2000 funding requirements, with the designation,
7 it appears that way.

8 Q Okay. And again at the end of '99, I guess this
9 was close to when you were leaving the company.
10 Correct?

11 A Eight months out, yes.

12 Q At this point were you aware of any problems out
13 at Riverwalk?

14 A No, I wasn't.

15 Q In your capacity writing the checks on behalf of
16 Heritage Communities if there were major repairs out
17 there at Riverwalk would the checks for you to sign to
18 pay the subcontractors, would those have been going by
19 your desk?

20 A I would think so, yes.

21 Q Do you recall about when you left your employment
22 with Heritage Communities?

23 A In August of 2000.

24 Q Do you recall about when Heritage Communities
25 actually stopped constructing buildings out there,

1 first at Riverwalk, I guess we looked at the
2 certificate of occupancy so we kind of know about when
3 they finished at Riverwalk?

4 A Probably the end of '99, I would imagine, yes.

5 Q And do you know when Heritage Communities stopped
6 constructing buildings altogether?

7 A I believe it was in June of 2000.

8 Q Okay.

9 MR. COLE: Excuse me a second.

10 That's all I have, Your Honor.

11 THE COURT: All right. Ladies and gentlemen,
12 let's stand. Does anyone need some water?

13 All right. Miss Anderson, the jurors need you to
14 speak up a little louder or into the mike.

15 THE WITNESS: Okay.

16 MR. HENRY: If it please the Court.

17 THE COURT: Yes, sir.

18 CROSS EXAMINATION

19 BY MR. HENRY:

20 Q Good afternoon, Miss Anderson, how are you?

21 A Fine, thank you.

22 Q Good. I want to first of all thank you for coming
23 to take the place of people that should be here, like
24 Dr. Jack Green.

25 MR. COLE: Your Honor, I object to this. That is

1 not proper for direct, cross or any examination.

2 THE COURT: The objection is sustained as to the
3 statements at the first of the question.

4 Q Where is Dr. Green?

5 A I don't know.

6 Q Did he ask you to come here?

7 A No.

8 Q Where is Mr. Van Wie?

9 A I don't know that either.

10 Q Did he ask you to come here?

11 A No.

12 Q Now, Heritage Communities, BuildStar and Heritage
13 Riverwalk had basically the same officers, directors
14 and that sort of things. Correct?

15 A Yes.

16 Q And they all shared the same office?

17 A Yes.

18 Q And if you called one telephone number you got
19 them, correct?

20 A We were all in the same building, yes.

21 Q And you were the vice-president of finance, is
22 that correct?

23 A Yes.

24 Q Okay. You know Mr. Van Wie. I think you
25 testified that you were not aware of any problems at

1 Riverwalk. Is that correct?

2 A Yes.

3 Q Who would be the person that could get on this
4 witness stand and tell the jury about those problems?

5 A I don't know.

6 Q Mr. Van Wie?

7 A You could ask him but I don't know.

8 Q Okay. He was out there on the site all the time
9 or most of the time, was he not?

10 A I don't think he was, I mean, he was in the
11 office.

12 Q What was he, what was he doing?

13 A What was Roger Van Wie doing?

14 Q Yes. Well, what did he have to do with the
15 construction?

16 A Well, he worked in the office, I mean, the project
17 manager would be out there.

18 Q Mr. Van Wie wasn't out there?

19 A No. He is not a project manager.

20 Q When did you find out that the architect at Tuscan
21 was not a licensed architect?

22 A You told me that.

23 Q Okay. That is the first time you knew that?

24 A Yes.

25 Q Okay. Now, have you been involved with the Sea

1 Dunes, Magnolia Place, Magnolia North, the Gardens?

2 MR. COLE: Your Honor, we object to reference to
3 the other projects, for the record.

4 THE COURT: The objection is overruled.

5 Q Have you been involved in the Sea Dunes, Magnolia
6 Place, Magnolia North, The Gardens, Riverwalk, Avion
7 and Azalea Lakes litigation?

8 A Some of those.

9 Q Some of those?

10 A Uh-huh.

11 Q Do you remember which ones?

12 A Magnolia Place, The Gardens, Avion Forest.

13 Q All right. And was Tony Bell involved in those
14 projects?

15 A To some extent, I'm sure.

16 Q Okay. And Right Way Construction Company did
17 what?

18 A They were the framers.

19 Q They put the windows in?

20 A Yes.

21 Q Okay. They framed the building?

22 A Right.

23 Q They framed the decks?

24 A Right.

25 Q They did all the carpentry work on the outside.

1 Correct?

2 A Yes.

3 Q Okay. And Tony Bell had some real concerns about
4 Right Way Construction, didn't he?

5 A Not that I remember.

6 Q Don't you -- excuse me. Don't you remember
7 telling me that you had Tony Bell put in writing, this
8 is in your deposition, this document that says if it
9 becomes necessary to continue Right Way --

10 MR. COLE: Your Honor, we object to that. He is
11 reading something not applicable to the Riverwalk case.

12 THE COURT: Mr. Henry?

13 MR. HENRY: She has been involved in all of these,
14 Your Honor, and Right Way has been in every one of
15 them.

16 THE COURT: Let me see you.

17 (Unrecorded bench conference).

18 BY MR. HENRY:

19 Q Miss Anderson, you said that you got your
20 contractors license to get some respect, is that what
21 you said?

22 A Yes, sir.

23 Q Okay. When did you become aware that BuildStar,
24 that you were the qualifier for the license at
25 BuildStar Corporation?

1 A At deposition you said that I was the qualifier
2 but I think everybody who had a license was under
3 BuildStar, I wasn't the only qualifier.

4 Q Okay. Do you see that came from the Secretary of
5 State's office?

6 A Right. You showed me that at the deposition.

7 Q Okay. And what does it say above your name up
8 there, what is that word?

9 A It says supervisors, so that says BuildStar
10 supervises me as far as I understand it.

11 Q They supervised you?

12 A Right.

13 Q Okay. Do you know your license number was 96682?

14 A I think that's BuildStar's license number.

15 Q BuildStar doesn't get a license number.

16 A I don't --

17 Q An individual is issued a license number.

18 A I don't have a license number.

19 Q What was your license number?

20 A I don't have a license number as far as I know.

21 Q You know they were pulling the licenses with your
22 permit, permits with your license, don't you, they were
23 pulling the permits with your license?

24 A What does it say my license number is?

25 Q 96682.

1 A What is the permit date?

2 Q Huh?

3 A What is the permit date?

4 Q 7/2/99.

5 A I didn't have my license then.

6 Q You didn't have a license then?

7 A No.

8 Q Who's license is that?

9 A BuildStar's.

10 Q Let me ask you this. You were not aware of any of
11 the problems they were having out at Riverwalk?

12 A I really wasn't.

13 Q You weren't aware that they were having deck
14 problems, window problems?

15 A I really wasn't.

16 Q You don't remember the meeting at the office on
17 the window issues?

18 A I don't have any recollection of problems at
19 Riverwalk.

20 Q Okay. When you studied for your, when you studied
21 for your exam --

22 A The contractor's?

23 Q Yes.

24 A Yes.

25 Q They told you how important it was to meet the

1 requirements of the code, didn't they?

2 A You pretty much had to memorize it, I think.

3 Q You had to memorize the code, okay, and anybody
4 that took that license exam knew how important it was
5 to meet the code. Correct?

6 A Correct.

7 Q All right. And whoever was out there at Riverwalk
8 supervising that construction, they knew that?

9 A They certainly should have.

10 Q Okay. And no question that BuildStar was
11 supervising the subcontractors?

12 A Certainly.

13 Q Okay. Now, why didn't Heritage repair the
14 problems that they were having out at Riverwalk?

15 A Any problems that I know about Heritage repaired.

16 Q Okay. And you were aware that Mr. Quinn Hardester
17 who became the president of BuildStar, I'm sorry, of
18 Heritage, went before the homeowners at a homeowners
19 meeting and advised them that they had found the
20 problems with the decks and they were going to fix
21 them?

22 A I heard that the other day.

23 Q All right. And did you hear also that back in
24 1998 that Heritage was trying to get BetterBilt to
25 repair or fix or replace 198 windows, 192 windows?

1 Heritage should have fixed that, don't you think?

2 A I think Heritage was doing everything they could
3 up until Heritage existed. What happened when Heritage
4 turned over the homeowners association, I wasn't there,
5 that was in 2002.

6 Q So you think they did everything they needed to
7 do?

8 A That I was aware of.

9 Q Okay. Could some of that money have gone for
10 airplanes for Mr. Van Wie?

11 A No.

12 Q Didn't they have an airplane?

13 A They did.

14 Q He would regularly fly to the Bahamas?

15 A No.

16 Q No. Where did he fly to?

17 A I don't believe anybody flew to the Bahamas.

18 MR. COLE: Your Honor, Mr. Van Wie's vacation
19 plans are not relevant to the proceedings here today.

20 THE COURT: Mr. Henry, any response?

21 MR. HENRY: We're trying -- she has testified,
22 Your Honor, that they left money with the homeowners to
23 fix these problems, at least the financial, he has
24 tried to insinuate that these financials that he showed
25 her left a lot of money for these homeowners to fix

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 VII of IX
January 13, 2009

1 JURORS: Good morning.

2 THE COURT: Someone with the defense continue with
3 the defense's case.

4 MR. COLE: The defense will call Mr. David Eiland.

5 DAVID EILAND,

6 after being first duly sworn, testified as follows:

7 THE CLERK: State your name for the Court, please.

8 THE WITNESS: It's David W. Eiland, E-I-L-A-N-D.

9 DIRECT EXAMINATION

10 BY MR. COLE:

11 Q Mr. Eiland, first where do you live?

12 A I live in Surfside Beach.

13 Q What is your educational background?

14 A I have had five and a half years of college at
15 several different colleges.

16 Q And did you go to several different colleges
17 because you were in the Air Force for a while?

18 A Both the Air Force and as a police officer in
19 Washington, D.C., yes.

20 Q When were you in the Air Force?

21 A In the Air Force from 1962 until January, 1969.

22 Q And were you honorably discharged?

23 A Yes, I was, twice.

24 Q All right. After you left the Air Force what did
25 you do?

1 A Went on the Metropolitan Police Department,
2 Washington D.C.

3 Q How long were you on the police department in
4 Washington, D.C?

5 A Just under nine years. I was forced on medical
6 disability, line of duty.

7 Q This case we're here for today is about alleged
8 construction defects. What is your construction
9 background?

10 A Since I was about fifteen years old or shortly
11 before that I worked with my father in the construction
12 industry, he was active Army but obtained
13 subcontracting for repairs on Aberdeen Proving Grounds
14 in Maryland through a contractor, and he had my brother
15 and I work for him for 50 cents an hour. He was an
16 Auburn graduate in electrical engineering and he knew
17 all the construction trades and we were taught pretty
18 hard at 50 cents an hour but we made a lot of money and
19 learned a lot.

20 Later throughout my military and my police
21 department career I did little part-time jobs to
22 supplement supporting a family, doing some part-time
23 construction work. And following that, after
24 retirement from the police department I went back into
25 construction on and off, worked for Charles County

1 government as a building inspector, both residential
2 and commercial, for seven and a half years.

3 Q Was that up in Maryland?

4 A That was in Maryland.

5 Q Okay.

6 A And was certified in all the code, applicable code
7 in that jurisdiction.

8 Q Let me stop you. You said certified in code.

9 What does that mean, what code are you talking about?

10 A The codes in Maryland at the time were the BOCA
11 code, the Building Officials and Code Administrators,
12 which covered all your commercial buildings, and then
13 the CABO code, C-A-B-O, is the Code Administrators and
14 Building Officials code system, and then Maryland state
15 plumbing code, which Maryland had their own plumbing
16 code separate, and various other sub-codes that the
17 jurisdiction chose in the different counties, they
18 supplemented the building code. And then I had some
19 other federal certifications such as underground fuel
20 storage tank certification and some other minor code,
21 fuel and gas, et cetera. Those were required to do
22 inspections in the state of Maryland and I was in a
23 subdivision there of Charles County in Maryland where
24 we did all our inspections.

25 Q And after you, or you were working with a company

1 up there, what were you doing in Maryland with that
2 company?

3 A Okay. I worked with Washington Homes,
4 Incorporated, which was a major building, both
5 residential and commercial, major builder, on the New
6 York stock change, and I was at one time a
7 superintendent on two different sites and later became
8 what they called a field production manager, I had 22
9 sites with superintendents and assistants and punch-out
10 men on those sites in a 200 mile radius in the
11 Washington, D.C. area.

12 Q And how long were you with that company up in
13 Maryland?

14 A Washington Homes, actually I made two visits with
15 them. At one time I was a service manager for the
16 entire Chesapeake division of Washington Homes and
17 later as the field production manager and as a
18 superintendent. Prior to that I think the total was
19 like three and a half or four years total time with
20 them.

21 Q And when you left them what did you do?

22 A I came to Myrtle Beach, South Carolina and went to
23 work for Horry County Code Enforcement.

24 Q When did you move to Myrtle Beach?

25 A In May of 1997.

1 Q And so your first job in Horry County, excuse me,
2 first job in Horry County was working for the code
3 officials department?

4 A Yes. I went on interviews with them prior to
5 making my move and made the move the day before they
6 decided to hire me.

7 Q Well, good timing I guess, then.

8 With Horry County that was in 1997 and you were
9 with them until what time?

10 A December, December 19 of 2008, just this last year
11 I retired.

12 Q Okay. So not even a month ago is when you
13 retired?

14 A Exactly.

15 Q And you're spending time with your granddaughter
16 and her horse, expensive horse?

17 A Yes. I have a nine year old that is a horse
18 lover, that we're raising, and a lot of time there.

19 Q And with your work with the Horry County and the
20 previous code offices had you received any training or
21 other continued education?

22 A Yes. It's a requirement, it was in Maryland as
23 well as in South Carolina, and we have gone through
24 various code organizations. Originally here it was the
25 Southern Building Code and as I mentioned before it was

1 inspect them under the new codes.

2 Q And your inspections at Riverwalk of the work that
3 was done by the subcontractors and supervised by
4 BuildStar at Riverwalk, was that sort of a typical
5 subcontractor arrangement or typical type of contractor
6 that you inspected?

7 A I don't recall any unusual contract arrangements
8 other than what they were doing.

9 Q I think I asked the question poorly. The question
10 is, essentially were your inspections where you went
11 out and inspected the property and looked at the work,
12 was the work atypical from what you were inspecting at
13 that time?

14 A It was pretty standard throughout the county,
15 theirs was.

16 MR. COLE: Thank you, Mr. Eiland. That's all the
17 questions I have for you. Please answer any questions
18 that the other side might have for you.

19 THE COURT: We'll stand for a moment, first,
20 before we proceed.

21 All right, Mr. Thompson.

22 MR. THOMPSON: Thank you, Your Honor.

23 CROSS EXAMINATION

24 BY MR. THOMPSON:

25 Q Good morning Mr. Eiland.

1 THE COURT: Your next witness, please.

2 MR. FOSMIRE: Call Alan Campbell, Your Honor.

3 THE COURT: Before Mr. Campbell comes up we'll
4 take a few minutes. Please go to the jury room, please
5 do not discuss the case. A few minutes break.

6 JUROR: Smoke?

7 THE COURT: Seven minutes.

8 (Jury excused from the courtroom).

9 (Recessed at 11:20 a.m.).

10 (Reconvened at 11:26 a.m.).

11 THE COURT: All right, ready for the jury?

12 MR. FOSMIRE: Yes, Your Honor.

13 THE COURT: All right, let's have that jury.

14 (The jury returned to the courtroom).

15 THE COURT: The jury is back. Your next witness.

16 MR. FOSMIRE: Your Honor, again we call Alan
17 Campbell.

18 THE COURT: Mr. Campbell.

19 ALAN CAMPBELL,

20 after being first duly sworn, testified as follows:

21 THE CLERK: State your name for the Court, please,
22 sir.

23 THE WITNESS: Alan Owens Campbell.

24 DIRECT EXAMINATION

25

1 BY MR. FOSMIRE:

2 Q Mr. Campbell, where do you live?

3 A Mt. Pleasant, South Carolina.

4 Q How long have you lived in the greater Charleston
5 area?

6 A Well, since I went to the Citadel, ever since I
7 got out of the Citadel. I have lived there my whole
8 entire adult life.

9 Q What do you do for a living?

10 A I'm a consultant engineer.

11 Q What is the name of your business?

12 A Applied Building Sciences.

13 Q How long have you had the firm Applied Building
14 Sciences.

15 A We started that firm in 2004. I had a partner for
16 about six years prior to that and we split, dissolved
17 that company and then restarted under Applied Building
18 Sciences, so it's been five years this year.

19 Q What type services does Applied Building Sciences
20 offer?

21 A Engineering, architectural, environmental
22 consulting.

23 Q So, within your firm you have employees who are
24 licensed in those disciplines?

25 A Yes, sir, we do.

1 Q Does that take care of the water penetration issue
2 around the windows to the extent it exists in limited
3 spots?

4 A Yes.

5 Q Number eleven, remove MDF trim at the top of the
6 brick.

7 A Correct. Once again, where the MDF trim is
8 installed, then it is to be removed.

9 Q You heard the testimony the other day. Has MDF
10 turned out to be a product that has not worked very
11 well in the exterior environment?

12 A It goes both ways. There are areas where it
13 hasn't performed as you would expect but also in many
14 of those areas it hasn't been installed as it should
15 have been. The manufacturer has some very specific
16 installation requirements and where damage has occurred
17 in many circumstances the MDF trim has been improperly
18 installed so, you know, in those cases it needs to be
19 removed and replaced.

20 Q In an effort to get away from that we're changing
21 products to Hardy product, is that correct?

22 A Yes. It's a more durable product, what is being
23 installed, yes.

24 Q Number twelve.

25 A Mr. Brown described that as dissimilar cladding,

1 STEVE WATKINS,
2 after being first duly sworn, testified as follows:
3 THE CLERK: State your name for the Court, please,
4 sir.

5 THE WITNESS: Steve Wayne Watkins.

6 DIRECT EXAMINATION

7 BY MR. FOSMIRE:

8 Q Mr. Watkins, where do you live?

9 A I live in Myrtle Beach.

10 Q How long have you lived in the Myrtle Beach area?

11 A We came to Myrtle Beach in 1976.

12 Q What do you do for a living?

13 A I'm a general contractor, licensed in North
14 Carolina, South Carolina, Mississippi and a few other
15 states through reciprocity

16 Q Tell the jury a little bit about your experience.
17 How did you grow up in the construction trades and how
18 did you evolve into your company today, Watkins'
19 Services?

20 A Well, my father as I was growing up was a roofing
21 and sheet metal man, also a small project remodeler,
22 and I basically grew up in the business and watched the
23 older folks work and do their thing and learned by that
24 way and learned what he taught me and just sort of grew
25 up in it. When I graduated from high school in 1966 I

1 went a couple years to business school, I got drafted
2 into the Vietnam war in 1968, I got out alive,
3 obviously, in '70, released from active duty,
4 discharged in '74 with an Honorable Discharge. By '72
5 we had two children. Like I said, in '76 we came to
6 the beach, '78 I started this effort that is now an
7 unlimited general contracting company and at that time
8 we were roofers and waterproofers, primarily in
9 commercial work and almost solely on existing
10 buildings.

11 And over the years, by working on existing
12 buildings rather than new building, when they would
13 have leaks and things of that nature, would have
14 damage, we got to repairing that damage and just sort
15 of moved into doing that full time.

16 Q What does it mean to have an unlimited general
17 contractor's license?

18 A It means if somebody is willing to give us a
19 contract we can get a permit to do general contracting
20 without any dollar amount. It could be ten million, it
21 could be ten dollars.

22 Q If someone wanted to put up a hundred million
23 dollar high rise you would be qualified to do it?

24 A The State says I am. I don't know if I would be
25 qualified to build a hundred million dollar high rise

1 Q You have backup documentation for that in the
2 following pages, is that right?

3 A That's correct.

4 Q So your summary put the total figures, to jump to
5 the end first, at \$2,391,619?

6 A Yes. That's based on the ABS scope.

7 Q The next part of your estimate package is the ABS
8 scope, right?

9 A That's correct.

10 Q A few pages there, you have reviewed that scope?

11 A I have.

12 Q And it includes their column survey. Have you
13 seen that?

14 A It does.

15 Q Then we get into your estimate itself?

16 A Yes, sir.

17 Q And you said, I may have to go from side to side,
18 you said it is 38 pages long. Why is that?

19 A There are, there is an estimate for each building.
20 As I said before, there is a little bit of variation in
21 the buildings for various reasons, so we did an
22 estimate for each building, so there is two pages per
23 building, 19 buildings, 38 pages.

24 Q Okay. Would you go through and show the jury --
25 at the top, at the top of each page will be the

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 IX of IX
January 15, 2009

1 block already checked, that is what we would propose on
2 our form, already have that checked off when it goes
3 back to the jury so they only decide the other two.
4 Our objection is that additional language in there is
5 too strong of an instruction to the jury and it would
6 be further prejudicial to us.

7 THE COURT: All right. Any thoughts about that?

8 MR. THOMPSON: Your Honor, I fashioned this after
9 the Avion Forest verdict form which you used last year,
10 that was a good form and it does state what the law is,
11 that you directed a verdict and the damages, it is just
12 up to the jury to determine damages, the amount.

13 THE COURT: Are you seeking to have the jury award
14 separate damages for breach of fiduciary duty and
15 breach of warranty and habitability?

16 MR. THOMPSON: No, sir, Your Honor, just one
17 verdict, one amount of damages for all those causes of
18 action.

19 THE COURT: You just want them to answer the
20 question --

21 MR. THOMPSON: How much.

22 THE COURT: Under warranty, the warranty claims?

23 MR. THOMPSON: Yes, sir. That was, the question
24 that goes to the jury, again this is the way we did it
25 in Avion Forest last year.

1 THE COURT: You want them to decide that, then
2 decide total damages?

3 MR. HENRY: Yes.

4 THE COURT: Including for the negligence?

5 MR. THOMPSON: Yes, sir. I believe both our
6 verdict forms have that same question on them.

7 MR. FOSMIRE: We agree generally on that format.
8 It is just our objection is that additional instructive
9 language decide the cause of action, then award a gross
10 amount, if any.

11 THE COURT: Well, I have to tell them some kind of
12 way and the plaintiffs' verdict form, once we tell them
13 why they have to award damages, yours is, you want me
14 to check a box and tell them that I have already
15 decided that question?

16 MR. FOSMIRE: I think, yes, Your Honor, our
17 suggestion, in your charge, I think you did it in the
18 Avion Forest charge, you instructed them orally that
19 issue has been resolved, that negligence has been
20 determined. We just don't, we object to the additional
21 language, the written language.

22 THE COURT: All right. I'm going to use the
23 plaintiffs' format. What language do you want me to
24 take out?

25 MR. FOSMIRE: That paragraph.

1 THE COURT: I can't take out the entire paragraph.
2 Then there would be no more. As to the negligence
3 cause of action, what?

4 MR. FOSMIRE: I just think it's not necessary to
5 have that instruction in there. It is just you have
6 advised them or you had to put the line in there and
7 just check that box for the negligence cause of action.

8 THE COURT: Would you like me to check the box the
9 jury found, or just check the box and don't tell them
10 how they get there.

11 MR. FOSMIRE: Check the box and advise them orally
12 that issue has been determined. The charge comes from
13 the bench and Your Honor charges the law, what has been
14 determined under the law. The verdict form itself is
15 not a charge. Essentially we're including that aspect
16 of the charge on there and we just respectfully suggest
17 it is an undue influence.

18 THE COURT: Perhaps if I have as to the negligence
19 cause of action were the defendants negligent in the
20 construction of the Riverwalk condominium, and where
21 you have yes, no, I will check the box yes in advance.

22 MR. FOSMIRE: That has already been determined.
23 That is our suggestion. I mean, that was basically
24 our, the format on our form for that aspect of it.

25 THE COURT: All right. Anything further on that

1 question, then?

2 MR. THOMPSON: Actually we would rather have it
3 this way so there is no confusion when they get back
4 there. Under this they can award normal damages.
5 There is nothing to tell them how much to award but
6 just that they need to award something because Your
7 Honor found they were negligent.

8 THE COURT: I have already told them I have
9 determined as a matter of law that the defendants were
10 negligent in the construction of Riverwalk. So if
11 there is a box that says yes/no, and the yes is already
12 selected.

13 MR. THOMPSON: Your Honor, will you instruct them
14 that the Court has already checked the box for them?

15 THE COURT: I will do that but I won't have your
16 language there. It will simply state as to the
17 negligence cause of action were the defendants
18 negligent in the construction of the Riverwalk
19 condominiums and there will be a yes/no box just as you
20 have it for the fiduciary duty and warranty claims but
21 a yes box will already be checked. I will explain to
22 them why it has already been checked.

23 MR. THOMPSON: Okay.

24 THE COURT: Then regarding punitive damages, the
25 defense proposed does the jury find by clear and

1 convincing evidence that the defendants were willful,
2 wanton and reckless. It would be and/or grossly
3 negligent. I read all those cases, including the
4 Kennedy case, which says that punitive damages can be
5 awarded based on gross negligence. If the answer is no
6 proceed no further, if the answer is yes go to the next
7 paragraph.

8 In the instructions regarding this gross
9 negligence it will be the language that gross
10 negligence that constitutes willful indifference, some
11 of the language from the cases that say mere gross
12 negligence is insufficient. In effect that is the
13 gross negligence that constitutes recklessness.

14 MR. FOSMIRE: That was our homework, Your Honor.

15 THE COURT: I'm sorry?

16 MR. FOSMIRE: That was our homework.

17 THE COURT: That was your homework, okay. You
18 have to have a chance to turn in your homework.

19 MR. FOSMIRE: Gross negligence has to be so gross
20 that it is willful, wanton and reckless. Negligence is
21 the lack of due care. Gross negligence is the want of
22 any care whatsoever but mere gross negligence does not
23 rise to, is not sufficient to award punitive damages,
24 it has to be so gross as to be willful, wanton and
25 reckless. As long as that language is there.

1 JURORS: Good morning.

2 THE COURT: Ladies and gentlemen, you have heard
3 all the testimony. It is now time for closing
4 arguments. If you will, give the lawyers your
5 attention.

6 Mr. Henry?

7 MR. HENRY: If it please the Court.

8 THE COURT: Yes, sir.

9 MR. HENRY: Good morning.

10 JURORS: Good morning.

11 MR. HENRY: I told you when we started this case
12 that I would get to speak with you a couple more times
13 and that is it and you are probably very happy that I'm
14 not going to speak to you but a couple more times. I
15 also told you that you would probably hear a lot of
16 testimony over and over and you would say get to the
17 point, let's get on with this, and we have done some of
18 that and I apologize. There used to be a lawyer that
19 practiced here, he still lives in Conway, his name was
20 Robert Rankin. He used to tell the jury, he would say
21 ladies and gentlemen, don't hold it against my client
22 because he couldn't afford a better lawyer. And so I
23 know we made some mistakes and I'm sure you picked up
24 on that but we tried our best to present to you all of
25 the evidence that we could present so that you could

1 make a final decision in this case called a verdict,
2 and as Mr. Fosmire pointed out, it means to speak the
3 truth and that is what we all want, is a verdict that
4 speaks the truth.

5 We have chosen you, the lawyers have chosen you
6 and of course to be candid the lawyers try to choose
7 people they think are going to be favorable to them and
8 that is always the way it's been done since our justice
9 system was started. But as Winston Churchill once
10 said, the greatest service that a person can give to
11 their country is jury service during time of peace, and
12 you are providing a very important and necessary
13 service.

14 We used to decide issues by going into the streets
15 and having a duel but we don't do that anymore. We
16 have juries that decide disputes that come before you.
17 That's the way we do it and it's a wonderful system
18 because every one of you brings different experiences,
19 life experiences to this jury room. Each one of you
20 has had life experiences different from others. You
21 come from different backgrounds, you come from
22 different educational experiences.

23 There were some questions of some of the
24 witnesses, well, do you have a degree in economics or
25 whatever that is. A formal education is wonderful and

1 I'm lucky to have that but life teaches a lot more than
2 college. It teaches an awful lot more than college and
3 when you came through that metal detector this morning
4 you didn't check your common sense, they didn't take
5 your common sense from you. They may have taken a
6 pocket knife from you but they didn't take your common
7 sense from you and that's the beauty of a jury system.
8 You bring your common sense and life experiences and
9 that's what you use to make a decision in a case like
10 this and that is all we ask that you do, that you have
11 heard the testimony, you have heard the evidence and it
12 is up to you to make a final decision in this case.

13 During one of the arguments in this case my good
14 friend Andy Cole, and these are wonderful lawyers and
15 wonderful people to work with and we have worked
16 together and I don't think you have seen much fighting
17 among the lawyers but we are both advocates for our
18 clients and we're going to advocate for them as hard as
19 we can so that you can make a decision, but Andy was
20 arguing to the judge about something, I don't even
21 recall what it was and he said, you know, "Mr. Henry
22 has been practicing law for four decade, he ought to
23 know so and so." And I corrected him and I said,
24 "Well, you know, that's not quite the truth. I have
25 only been practicing law for three and a half decades."

1 And he said, "Well, suffice it to say you were
2 practicing before I was born."

3 Now, age has some advantages and privileges and
4 one of the advantages or privileges that I have had is
5 to practice law during a time that some notable lawyers
6 practiced law in this circuit and one of those lawyers
7 was a man by the name of J. Ruben Long. Some of you
8 probably knew Mr. Ruben, as we called him. All the
9 lawyers called him Mr. Ruben. The detention facility,
10 that is the correct political word now, the detention
11 facility, the jailhouse is named after Mr. Ruben. But
12 I had the privilege of trying some cases with Mr. Long
13 and never won a case where I had a case with him but it
14 was like going to a schoolhouse because he taught you a
15 lot of things. And one of the things that I remember
16 that Mr. Ruben said was, he would always say ladies and
17 gentlemen, if you want to see which way the wind is
18 blowing you don't look at the trunk of the tree, you
19 look at the limbs and branches and that is where you
20 find where the wind is blowing.

21 And I think that what he meant by that was that
22 there are a lot of small things that enter into making
23 a decision. There are a lot of small things that might
24 seem sort of insignificant but they are the things you
25 look at to know what is really going on in a case.

1 Those are the things you look at.

2 In a few moments the judge is going to charge you
3 with the law. He is the sole determiner of the law
4 that applies to this case. He tells you what the law
5 is and then you take the facts and you apply it to the
6 law to make a decision.

7 And in just a moment he's going to tell you that
8 he has made a decision in this case, and it's a very
9 important decision, and that is he has found as a
10 matter of law that these defendants were negligent in
11 the construction of these condominiums. So, you don't
12 have to make that decision. He has already made that
13 decision and it is then up to you to determine what the
14 extent of the damages are, and we're going to talk
15 about that in just a moment or two.

16 You will see on the verdict forms some questions
17 that the judge will give to you that you will need to
18 answer, and one of them is the breach of fiduciary
19 duty. Our courts, and I have been in the construction
20 law business for a long time, our courts have been at
21 the vanguard, the leaders, if you will, of construction
22 law and one of the things that our court has said is
23 that it is intolerable to allow builders and developers
24 to build houses in a negligent, a negligent and
25 defective manner and to sell those to the citizens that

1 come into South Carolina. They said it's intolerable,
2 it is not our policy to allow that.

3 And they say that a builder, developer that does
4 that is negligent, is liable to those people that they
5 sell those buildings to, and so His Honor has found
6 that they did that. They did that.

7 And the other, another question that you will be
8 asked to answer is a theory in the law called breach of
9 fiduciary duty. You're going to see that on your jury
10 form, a breach of fiduciary duty, and you listen to
11 what His Honor says but what that means is that in
12 certain situations where you impose a trust and
13 confidence in someone and they are acting on your
14 behalf that they have a duty to you to act in a fair
15 and reasonable manner and to keep your best interest at
16 heart.

17 And what we have alleged and I believe we have
18 proven beyond any sort of question is that these
19 developers, contractors, and by the way the Court has
20 said these people are amalgomated together. Their
21 legal distinction, and why they formed so many
22 corporations, I don't know, but their legal distinction
23 has been put together by the judge. He said they are,
24 a fancy word, amalgomated, together, they are the same
25 and one entity.

1 And what they did, they built these condominiums,
2 they knew they were defective, they knew in 1998 the
3 windows had significant problems. They were asking for
4 192 windows to be replaced. They knew the decks were
5 leaking and they had problems with that. They were
6 telling the homeowners, "We'll fix all this." And
7 instead of fixing it and then turning the association
8 over to the homeowners they kept on building,
9 negligently built these and then when things got bad
10 they just dumped it on the homeowners and said, "It's
11 your problem, it's not ours anymore, we're going."

12 And so you're going to be asked to determine
13 whether they breached that fiduciary duty, and the
14 courts have said if they, if they put these
15 condominiums on you, then that, that is, they just turn
16 the association, the homeowner association over to you,
17 then they have got to either fix it, fix the problems
18 or they've got to leave you with sufficient money.
19 You've heard the testimony about whether or not they
20 left sufficient money and I don't think there is any
21 question they didn't. They had reserves, there is no
22 question about it, but Lynn Anderson, Miss Anderson and
23 Jennifer Noble, both testified that those were simply
24 reserves for maintenance, there was no money in there
25 for repair of all of these deficiencies. So, it's

1 clear that they breached a fiduciary duty.

2 Now, one of the duties of the jury is to judge the
3 credibility, the believability, if you will, of
4 witnesses, and in determining that the jury can take
5 into consideration any bias or prejudice that witness
6 may have. And that is a theory in the law and theory
7 of common sense that when a person takes the witness
8 stand you have got to ask yourself do they have any
9 reason to be biased or prejudiced. Not whether they
10 are lying or not but whether they, and you can
11 determine that, too, but not whether they are actually
12 telling the truth, but do they have a reason to testify
13 in a certain manner, and those are one of the branches
14 that Mr. Long used to talk about, in determining what
15 this case is, what it's all about, and you can question
16 why witnesses weren't called, you can question why Dr.
17 Green didn't come testify or Mr. Van Wie didn't come
18 testify or anyone. Miss Anderson said, "I didn't have
19 anything to do with this," although the Secretary of
20 State's record showed that she was actually the
21 qualifier for the construction company. But you can
22 question all of that and you can use that to determine
23 the ultimate issue of how much money these homeowners
24 should get.

25 Now, I know that I got on Mr. Campbell pretty hard

1 and he and I have been in these Heritage cases and we
2 don't see eye to eye, as you can see, and if I offended
3 anyone by examining him pretty hard I apologize to you
4 for it but he is a paid witness, he is a paid
5 testifier, as he said, he's been in all these cases,
6 all these Heritage cases, he's their guy, he's their
7 testifier.

8 You remember I asked him about his invoices. His
9 guy Eddie Polk, we're going to look at some of Mr.
10 Polk's pictures that they didn't show you in the trial,
11 but we're going to look at some of those. Mr. Polk was
12 the guy from Campbell, from Mr. Campbell's firm that
13 did all the work on this case. He was there during the
14 destructive testing, he was there when they did the
15 window tests, he was there taking pictures, he was
16 there, he's the one that put the little level on the
17 floors, he's the one that did all of that. He charged
18 over \$16,000 to the file.

19 Mr. Campbell charged four and most of that was
20 meeting with the lawyers. He's the guy that comes in
21 here and testifies and leaves the people that really
22 know what was going on back at the office. He's the
23 paid man. And so you can take those things into
24 consideration. Why didn't they call Mr. Polk? He
25 works for their guy, why didn't they call him, who went

1 out there.

2 And while we're talking about that, I think it's a
3 good time for me to mention the windows. You have
4 heard the argument about the windows and the
5 discussions about the windows and that sort of thing.
6 You know, in this business you have to do everything
7 with experts. If somebody takes a garden hose and
8 sprays it on my window and water comes through it I
9 don't have to have a Ph.D to know my window is leaking.
10 I just don't think that's necessary, you know your
11 window is leaking, and there are all these fancy tests,
12 Mr. Fosmire pulled up on the Board all these technical
13 things that, you know, questioning Drew Brown. Well,
14 guess what. Eddie Polk was there. This is not a game
15 of I got you. If they thought that Drew Brown was
16 doing the test wrong, the window test wrong, you know,
17 if you want to get to the truth why didn't they do any
18 tests?

19 Mr. Campbell testified, "Oh, our firm does those
20 tests but we don't have the burden." Well, I think it
21 goes farther than that. There is a burden, there is a
22 burden to come before this jury openly and fairly and
23 give you the information you need to make a decision
24 and we tried to do that. Mr. Brown went out there
25 twice. The first time we did it, you know, there was

1 homeowners through this litigation for five years?

2 Five years.

3 They never told me they were liable. They got up
4 here and told you they were liable for at least 2.391
5 million dollars but they have drug us through this
6 lawsuit for five years.

7 MR. FOSMIRE: Your Honor, I've got to object. I
8 know it's closing argument but that is not an accurate
9 statement, I object.

10 THE COURT: The objection is overruled.

11 MR. FOSMIRE: I hate to object at closing but
12 that's not accurate.

13 THE COURT: The objection is overruled, you may
14 proceed.

15 MR. HENRY: Thank you, Your Honor.

16 Let's go on and read what Mr. Watkins says.
17 "We're usually rifled in by our employer to look at
18 what they say needs to be done and we're not asked to
19 look for anything or do anything like when we're with
20 the plaintiffs and we are trying to help cover all the
21 aspects that could be involved in one, that we are
22 asked while we're helping do the destructive testing to
23 see if there is anything we can find. I don't think
24 it's oxymoronic at all. "It is just there are two
25 different missions. The mission of the plaintiff, the

1 mission of the plaintiff, Mr. Pope and the homeowners,
2 is to find all potential problems and get a complete
3 number to get a complete fix, correct?" "Yes". "The
4 job, if you are, you know, if you're hired by the
5 plaintiffs' engineer or something, or the architect"?
6 "Yes, that's usually what we want to know, that is what
7 we want to know when we're working for the plaintiff,
8 is what is a complete fix. If we've got these problems
9 with the building let's find out what the problems are
10 that we have." That's what Mr. Watkins says, "Right."

11 "So it's usually a request from the, from the owners or
12 from whoever hires you?" "Right". "And you were not
13 requested to do that in this case?" "No."

14 They were requested to do exactly, price exactly
15 what Mr. Watkins was told by Mr. Campbell, and this is
16 a trick, ladies and gentlemen, this is the oldest trick
17 in the world, this is that contract he came in and
18 said, "Oh, this is a contract, I'm ready to sign it,
19 I've already signed it." He's got three copies here to
20 give to the homeowners. This is no more a fixed price
21 contract than -- I mean, it's a trick, that is all it
22 is, is a trick. It's a trick because it is a very
23 extremely limited scope and there are seven, I believe
24 I counted them right, seven allowances, and it is
25 important and I know you understand, especially you

1 that have built a house or something, you get
2 allowances that say, "I'm allowing you a thousand
3 square feet of carpet but if you go over that it's
4 yours." And that is so important because if they go
5 over whatever allowances are in the contract he can't
6 submit the change order to the jury, it goes to the
7 people who are innocent in this case, who did nothing
8 in this case but buy a condominium from Heritage and
9 paid them what they asked. That's all they did and any
10 doubts ought to be resolved in their favor.

11 Ladies and gentlemen, as you can see, that is a
12 lot of money in anybody's book. I don't care who you
13 are, that's a lot of money.

14 Al Best, I mentioned allowances, Al Best has
15 allowances in his contract, there is no question about
16 it, in his estimate, you can look at it, there are
17 allowances, there are a number of allowances in there
18 because no reputable contractor will ever give you a
19 contract price to do this kind of work because there is
20 hidden damage, you don't know, you may get into it and
21 you may find all kind of problems that you never knew
22 existed. We don't know how far that rot extends out,
23 we don't know what they're going to get into when they
24 get into those decks and where water has gotten down in
25 them and ponded, we don't know any of that, so Al Best

1 or no other reputable contractor is going to give you a
2 contract price. Al Best found during his
3 investigation, and as Steve Watkins said, it is nothing
4 unusual for these things to change, he found that there
5 were different columns, and you have got to understand
6 there are nineteen buildings out there, there are, they
7 found out there were more columns on some of the
8 buildings than not, so he added that. Then he found an
9 error in his, his computation, computer error where
10 they transposed HVAC with the brick or something of
11 that nature and he gave a credit back for that because
12 he found an error, so he deducted that.

13 And that's the subtotal.

14 And then he gave an option to replace all the
15 brick and that's, if you replaced all the brick instead
16 of just a portion of it that's what he says it will
17 cost. Now, that's a big number and Steve says, "Oh, I
18 got scaffolding in there." If you look, if you look at
19 Prime South's scaffolding estimate, it is a huge number
20 because you've got two buildings you're working on at a
21 time that you are going to have to scaffold. Just like
22 those pictures we showed you of the buildings that
23 Prime South was doing, the scaffolding all around it,
24 that is a huge number because you rent that
25 scaffolding.

1 Now, Mr. Watkins, "Oh, my sub, my subcontractor,
2 my mason, he is just going to supply the scaffolding."
3 That is unheard of, ladies and gentlemen. That is
4 absolutely unheard of, that your mason is going to
5 provide you scaffolding and not charge you. I think
6 there might be \$30,000 worth of scaffolding rental in
7 Prime South's estimate, may even be more than that,
8 won't be surprised because scaffolding is a very
9 expensive process.

10 That's the subtotal of replacing all of the brick
11 and then there is a spread sheet where Mr. Brown,
12 unknown, and this was my fault, I apologize, but you
13 remember Al Best was testifying and we got to the
14 windows and we stopped because Mr. Best was not aware
15 that Mr. Brown had testified that he had decided that
16 you could leave the windows under the cover. And I
17 want to say something about that. It doesn't mean that
18 those windows are okay, they are not flashed, they are
19 not caulked but, "We found no evidence of any damage
20 under those windows," and even though they are not
21 flashed or caulked, and flashing and caulking is not
22 only to keep out the water, but it's to keep air from
23 getting in the wall cavities, but Mr. Brown said,
24 "Okay, we'll leave those in there." So we took that
25 out and we got a Prime South total of \$8,511,425.

1 Then we had the Atlantic Group loss of use. Mr.
2 DeSentes came in and testified that over the, each unit
3 would be closed down four months, over three to four
4 years, and that's the total. And I want to talk to you
5 a bit about that because that's very important. This
6 is one of those areas that you're going to have to
7 decide between \$227,000 or \$928 or nothing. Because
8 Steve Watkins of course said, "We're not going to have
9 to close these buildings, you know, we'll just be in
10 their unit." I'm not sure what you men up here's wife
11 would say about that but I'm not sure that my wife
12 would want men coming into your condo, coming into your
13 house, taking out drywall around the windows and the
14 framing around the windows, taking your wall treatments
15 off, going out on the deck, fixing, you know, putting,
16 cutting your columns and putting flashing up there, and
17 going up in the attic and all that sort of thing. I'm
18 not sure about that.

19 But again this is scope. There may be some way to
20 do Watkins scope to keep people in those units. I tell
21 you one thing, if I came down there and I have rented a
22 condominium and I had workers running in and out of my
23 unit I would not be a happy camper, I would not be a
24 happy camper.

25 But I think the most important thing for you to

1 understand on that is in this country property rights
2 are a valuable right and the law says if you take away
3 a property right of mine even for a temporary time
4 you've taken a right away from me, a valuable right, a
5 right that can have an economic value. In other words,
6 if we went to the lot on 501, I don't use it, I don't
7 rent it, I don't do anything with it, it is just a
8 piece of property I bought for investment, the Highway
9 Department comes along and says, "We're going to
10 temporarily take your property, you can't rent it, you
11 can't use it, you can't go on it, you cannot do
12 anything with it, you can't hunt on it," whatever, you
13 have taken away a valuable right of mine, because we
14 learned in law school, that was many years ago for me
15 but we learned that if you own property it carries a
16 number of rights. It carries a right to possess it, it
17 carries the right too sell it, it carries the right to
18 do whatever you want to with it as long as you don't
19 harm your neighbors, and if you take, somebody takes
20 that away from you, and the Highway Department is a
21 good example, if they come and take something away from
22 you they pay you for it, and Mr. Teel, or Dr. Teel,
23 said, "Oh, no, I didn't do it like that. A person has
24 a condominium down there and they don't use it very
25 much, they don't get anything. I didn't figure that

1 loss of use." We didn't sue for loss of profit, we
2 sued for loss of use. If you take my right to send
3 somebody to that condominium, if you take my right away
4 to rent that condominium you've taken a valuable right
5 from me whether I do it or not.

6 It would be like you getting in a wreck, your car
7 is damaged and you have another car to use and they
8 say, "Oh, we don't owe you anything because you got
9 another car." That's not the law, ladies and
10 gentlemen. It's the right, it's your right. So, Dr.
11 Teel's damages have total irrelevancy in this case, and
12 how do you, how do you determine what that right is
13 worth?

14 I will tell you how you determine it. What can I
15 go across the street and rent, if I've got a two
16 bedroom condominium, what can I go across the street
17 and do and rent it? I can rent one. That's the price,
18 the fair rental value of the time you have deprived me
19 of my right to use it.

20 There was no objection or contention I know of to
21 these \$126,000 in repairs that those homeowners have
22 had to spend trying to patch and keep up and keep those
23 units safe because of Heritage. And that is the total
24 damage with the loss of use, previous repairs, Al Best
25 of \$9,566,217, and that is the amount we ask this Court

1 to award.

2 There is another damage that our law provides for
3 and this is solely and entirely up to you, and that is
4 an award of punitive damages. Now, what are punitive
5 damages? His Honor is going to talk to you about
6 punitive damages. Those are damages that are meant to
7 punish the defendant, and I have to prove to you by
8 clear, cogent and convincing evidence that these, my
9 clients are entitled to an award of punitive damages.

10 Now, why do you award punitive damages? There has
11 to be a gross and willful conduct. I asked Jennifer
12 Harmon, you know, they were selling all these
13 condominiums, where was all the money going? It sure
14 wasn't repairing these buildings, it sure wasn't
15 following plans and specifications. These people
16 unquestionably knew, if they knew anything about
17 construction at all, that they were building defective
18 condominiums and they were putting them in the stream
19 of commerce, they were selling to innocent people these
20 condominiums and they did it over a long period of time
21 and you can consider that.

22 And, ladies and gentlemen, we need in this county,
23 and it's like I say, it is up to you, but we need in
24 this county somebody to tell these developers and
25 contractors that do this the jurors, the people of

1 the whole story. He's got allowances in here way above
2 the allowances he came into court with.

3 I mean, why would he do that? I don't know. You
4 will have to decide that. But if you put the windows,
5 code compliant windows in he and Prime South are neck
6 and neck. It is just like, you know, when he, when
7 Steve and those bid against each other they are neck
8 and neck, and that, ladies and gentlemen, is the true
9 estimate of both parties, it's over \$8,000,000 for both
10 parties and we would ask you to find for the plaintiffs
11 the figures that we have presented to you and I thank
12 you very much.

13 THE COURT: Ladies and gentlemen, we're going to
14 take about a three minute break. She said seven, a
15 seven minute break. Seven minutes exactly. Please do
16 not discuss the case.

17 (The jury was excused from the courtroom).

18 THE COURT: All right.

19 (Recessed at 12:01 p.m.).

20 (Reconvened at 12:26 p.m.).

21 THE COURT: You may bring the jury in.

22 (The jury returned to the courtroom).

23 THE COURT: Madam Foreperson and members of the
24 jury you have heard the testimony and evidence and
25 arguments of the plaintiff and the defendant. I will

1 now explain to you the law that applies to this case.

2 Under the Constitution and laws of South Carolina
3 you are the finders of the facts in this case. I do
4 not have the right to pass upon the facts or even to
5 express any opinion that I might have as to them. You
6 are also the judges, the sole judges of the
7 credibility, that is, the believability of the
8 witnesses who have testified in this case. In passing
9 upon their credibility you may take into consideration
10 many things, such as the demeanor or manner of
11 testifying, whether the witness had reason to be biased
12 or prejudiced, whether a witness' testimony was
13 contradicted on the one hand or supported and
14 corroborated on the other hand. You certainly do not
15 determine this credibility or believability by counting
16 the number of witnesses for either side. You may
17 believe a small portion of a witness' testimony and
18 disregard the larger, or vice versa. You may believe
19 many witnesses against one or one witness against many.

20 Now, the plaintiffs have the burden of proving the
21 claims alleged in this case. The plaintiffs must meet
22 this burden as to actual damages by proving the claims
23 by the preponderance of the evidence. A preponderance
24 of the evidence simply means the greater weight of the
25 evidence. It is evidence which as a whole shows that

1 the fact sought to be proved is more likely true than
2 not true. This can best be illustrated by imagining a
3 set of scales. When the case begins the scales are
4 even. After all the evidence has been presented, if
5 the scales should remain even or if they tip even
6 slightly in favor of the defendant, then the plaintiffs
7 have failed to meet this burden of proof and would not
8 be entitled to recover the damages sought. If on the
9 other hand the scales tip even slightly in favor of the
10 plaintiffs the plaintiffs will have met the burden of
11 proof and would be entitled to recover the damages
12 sought. The preponderance of the evidence is not
13 determined by the number of witnesses. Instead, it
14 must be determined by the greater weight of all the
15 evidence.

16 Now, the rules of evidence ordinarily do not
17 permit witnesses to testify as to their opinions or
18 conclusions. An exception to this rule exists,
19 however, as to those whom we call expert witnesses.
20 Expert witnesses are witnesses who by education and
21 experience have become expert in some art, science,
22 profession or calling. These witnesses may state their
23 opinions as to relevant and material matter in which
24 they profess to be an expert and may also state the
25 reasons for the opinion. You should consider expert

1 opinions received in evidence in this case and give
2 them such weight as you think it deserves.

3 If you should decide that the opinion of an expert
4 witness is not based upon sufficient education and
5 experience or if you should conclude that the reasons
6 given in support of the opinion are not sound or if you
7 feel that it is outweighed by other evidence you may
8 disregard the opinion entirely.

9 There have been some stipulations entered into in
10 this case. A stipulation is an agreement as to a fact.
11 Once a fact is stipulated to that fact becomes
12 established for purposes of the case and cannot be
13 questioned or contradicted. In this case the parties
14 have stipulated that the 1994 and 1997 Standard
15 Building Code were the codes that governed the
16 construction of the Riverwalk condominium buildings.

17 Now, the same constitution and law which makes you
18 the finders of the facts and the evidence, as I have
19 discussed with you, I am the judge, I am as the judge
20 made the sole and only instructor in the law. You must
21 accept as correct the law which I charge you and apply
22 it to the evidence as you find it and then reach your
23 verdict. And finally I charge you in this regard that
24 you should not be concerned about what you think the
25 law ought to be, but rather what I charge you the law

1 to be.

2 As was explained at the beginning of this trial
3 there are two lawsuits that are combined for this
4 lawsuit and for this trial. The first is the action
5 brought by Riverwalk at Arrowhead Country Club Property
6 Owners Association, the POA. This lawsuit was brought
7 by the Board of Directors of the property owners
8 association. The property owners association lawsuit
9 seeks damages for repairs past and future, including
10 any other related costs incidental thereto.

11 The second lawsuit was brought by Tony L. Pope and
12 Lynn S. Pope individually and representing as a class
13 all unit owners of Riverwalk at Arrowwood Country Club
14 Horizontal Properties Regime, referred to as the class
15 action. These plaintiffs seek damages for loss of use
16 of the condominium unit during the repairs to be made.

17 The plaintiffs have asserted several claims
18 against the defendants. The plaintiffs and the
19 property owners association suit have asserted claims
20 against the defendants for negligence, breach of
21 fiduciary duty and breach of the warranty of
22 habitability. The plaintiffs in the class action have
23 asserted claims against the defendants for negligence
24 and breach of the warranty of habitability.

25 BuildStar was the general contractor for the

1 construction of the Riverwalk Condominiums, Heritage
2 Riverwalk was the entity created to develop and sell
3 the Riverwalk condominiums, Heritage Communities was
4 the parent company to Heritage Riverwalk and BuildStar.
5 All three defendants shall be treated as one for
6 determining any liability.

7 Now, the plaintiffs allege that the defendants
8 negligently constructed the Riverwalk Condominiums.
9 Negligence is the failure to exercise the degree of
10 care which a person or entity of ordinary reason and
11 prudence would exercise under the same or similar
12 circumstances as exists in this case. Carelessness and
13 negligence means the same thing.

14 To establish negligent construction the plaintiff
15 must prove four essential elements. One, that there
16 was an undertaking to construct a building by the
17 defendants, that the defendants were negligent or
18 careless or reckless, willful and wanton in the
19 performance of that construction work, or stated
20 another way, that they did not perform the work in a
21 good and workman like manner.

22 Three, that the negligence or carelessness or
23 recklessness, willfulness and wantonness of the
24 defendants in performing that construction work was a
25 proximate cause of any damages sustained by the

1 plaintiffs.

2 And four, the resulting damages must be shown.

3 Negligence is not actionable unless it proximately
4 causes the plaintiffs' damages. Proximate cause is the
5 efficient or direct cause of damages. Proximate cause
6 requires proof of both causation in fact and legal
7 cause. Causation in fact is proven by establishing the
8 plaintiffs's damages would not have occurred but for
9 the defendant's negligence. Legal cause is proven by
10 establishing foreseeability. And foreseeability is not
11 determined from hindsight but rather from the
12 Defendant's perspective at the time of the complained
13 of act.

14 I charge you that as a matter of law I have
15 determined that the defendants were negligent in the
16 construction of these condominiums. As a result you
17 must award the plaintiff property owners association
18 damages for the cost of repairs and other costs, and
19 any other costs related incidental thereto, to the
20 extent these damages have been proven by a
21 preponderance of the evidence.

22 As to the class action lawsuit brought by Tony and
23 Lynn Pope you must determine the nature and extent of
24 any damages suffered by the unit owners for the loss of
25 use of the condominiums during any repairs.

1 The plaintiffs also claim that the defendant
2 Heritage Riverwalk, Incorporated, breached the implied
3 warranty of habitability. Now, a seller of a
4 condominium gives the purchaser an implied warranty
5 that the condominium is habitable. The habitability of
6 a dwelling does not turn on whether a person lives
7 there or rents the unit. Rather, habitability is
8 defined as the condition of a building in which
9 inhabitants can live free of serious defects that might
10 harm health and safety. A breach of this warranty
11 would occur if the condominium can not be lived, the
12 condominium or condominiums cannot be lived in without
13 serious defect that might harm health and safety. If
14 you find that these condominiums cannot be lived in
15 without serious defect that might affect, that might
16 harm health and safety, then you must find for the
17 plaintiffs on this claim.

18 The plaintiffs and the property owners association
19 claim, the plaintiffs, the property owners association
20 plaintiffs claim that the defendant developers are in
21 breach of a fiduciary duty owed to them. A fiduciary
22 relationship is founded on the trust and confidence of
23 one entity in the integrity and fidelity of another, or
24 the trust and confidence of one party in the integrity
25 and fidelity of another. A fiduciary relationship

1 exists when one imposes a special confidence -- I'll
2 restate that sentence. A fiduciary relationship exists
3 when one imposes a special confidence in another so
4 that the latter in equity and good conscience is bound
5 to act in good faith and with due regard to the
6 interests of the one imposing the confidence. The law
7 requires that parties in a fiduciary relationship must
8 fully disclose to each other all known information that
9 is significant and material. One standing in a
10 fiduciary relationship with another is subject to
11 liability to the other for harm resulting from a breach
12 of duty imposed by that relationship. If you find that
13 the developers breached this duty you must find the
14 defendants liable for any damages proximately resulting
15 from the breach.

16 In addition to determining the damages suffered by
17 the plaintiffs for the cost of repair of a negligently
18 constructed condominium you must also consider if the
19 plaintiffs have proven by a preponderance of the
20 evidence whether the defendants have breached this
21 fiduciary duty to the property owners association and
22 whether the defendants breached the warranty of
23 habitability to the property owners association and to
24 the class of unit owners.

25 Your next step is to decide how much money the

1 defendants should be required to pay. We call such an
2 award damages. Damages are divided into two
3 categories, actual damages and punitive damages.
4 Actual damages are intended to compensate the party
5 suffering damages. That is, to put the damaged party
6 as near as possible in the same position that the party
7 would be in but for suffering damages. In other words,
8 actual damages would be the actual loss which the
9 plaintiffs have suffered as a result of the defendant's
10 negligence and/or breach of warranty of habitability
11 and/or breach of fiduciary duty.

12 In determining actual damages you must determine
13 the total amount of actual or compensatory damages as
14 have been proven to you by the preponderance of the
15 evidence. That is to say such damages and such
16 naturally and approximately resulting from the
17 negligence and or breach of a warranty or fiduciary,
18 breach of warranty or fiduciary duty or breach of
19 warranty of habitability by the defendants.

20 As to the measure of damages concerning the
21 plaintiff property owners association claim of
22 negligence and/or breach of warranty of habitability or
23 breach of fiduciary duty, as to the property owner's
24 claim the general measure of damages from negligence is
25 the cost to repair the units, past and future,

1 including any other related costs incidental thereto.
2 The plaintiffs are not required to prove that the
3 repairs have actually been made. A competent estimate
4 of the cost of repairs is sufficient to create a
5 factual issue for the jury regarding these damages.

6 The measure of damages in the plaintiffs' class
7 action suit on behalf of the unit owners regarding the
8 claims of negligence and breach of the warranty of
9 habitability. To recover damages for the loss of use
10 of a condominium unit there must be proof of the value
11 of the loss of the use suffered or to be suffered by
12 the unit owners.

13 If you find that the plaintiffs are entitled to
14 recover for the loss of use of their condominium units
15 you should award damages for the fair value of the use
16 while the property is to be repaired.

17 A party suffering damages has a duty to exercise
18 reasonable care and diligence to minimize its damages.
19 No recovery may be had for losses of which the damaged
20 party might have prevented by reasonable efforts and
21 expenditures. The damaged party is required to do only
22 that which would be reasonable. In other words, the
23 damaged party is required to do that which an ordinary,
24 prudent person or party would do under similar
25 circumstances to mitigate its damages. However, the

1 damaged party is not required to unreasonably exert
2 itself to incur substantial expense in an effort to
3 mitigate the damages. Where no evidence is given that
4 damages could reasonably have been reduced the damaged
5 party is not required to have done more. Yet a party
6 will not be allowed to sit back and wait and then seek
7 to recover damages when reasonable attempts would have
8 mitigated the damages. There is no obligation to
9 minimize or avoid damages where a party has a vested
10 right to recover the full amount sought.

11 In this case the plaintiff seeks punitive damages
12 in addition to actual damages. Punitive damages, also
13 known as exemplary damages, are imposed as punishment.
14 They are not intended to compensate. Punitive damages
15 are allowed in the interest of society in the nature of
16 punishment and as a warning and example to deter the
17 wrongdoer and others from committing like offenses in
18 the future. Moreover, they serve to vindicate a
19 private right by requiring the wrongdoer to pay money
20 to the damaged party.

21 Punitive damages serve at least three important
22 purposes. Punishment of a defendant's recklessness,
23 willfulness, wantonness or malicious conduct, the
24 deterrence of similar future conduct by defendant or
25 others, and compensation for the reckless and willful

1 invasion of the plaintiffs's rights. The paramount
2 purpose for awarding punitive damages -- the paramount
3 purpose for awarding punitive damages is not to
4 compensate the plaintiffs but to punish and set an
5 example for others.

6 Now, what would justify an award of punitive
7 damages? As you consider the issues of punitive
8 damages the highest burden of proof known to the civil
9 law is applicable. Section 15-13-135 of the South
10 Carolina Code provides that in any civil action where
11 punitive damages are claimed the plaintiffs have the
12 burden of proving such damages by clear and convincing
13 evidence. Punitive damages can only be awarded where
14 the plaintiffs prove by clear and convincing evidence
15 that defendants' actions were willful, wanton,
16 malicious and in reckless disregard of the plaintiff's
17 rights or where Defendant's actions were so grossly
18 negligent as to imply a willfulness or wantonness. A
19 conscious failure to exercise due care constitutes
20 willfulness. It is the present consciousness of
21 wrongdoing that justifies the assessment of
22 punitive damages against the wrongdoer.

23 Punitive damages will be allowed even when a
24 defendant does not realize it is invading the
25 plaintiff's rights so long as the act is committed in

1 such a manner that a person of ordinary prudence would
2 conclude that it was done in reckless disregard of the
3 rights of another.

4 The plaintiffs cannot recover punitive damages
5 based on negligent conduct. Negligence is the doing of
6 some act which a person of ordinary prudence would not
7 have done under similar circumstances or failure to do
8 what a person of ordinary prudence would have done
9 under similar circumstances. Mere negligence will not
10 support a punitive damages award. To recover punitive
11 damages the plaintiffs must prove by clear and
12 convincing evidence that the defendants' actions were
13 willful, wanton or reckless or so grossly negligent as
14 to imply a willfulness or wantonness.

15 The word recklessness, willfulness and wantonness
16 are synonymous. The terms are used to describe a
17 conscious failure to exercise and observe reasonable or
18 due care. Recklessness is distinguished from
19 negligence. Negligence is the failure to use due care.
20 Negligence is carelessness, as mentioned earlier.
21 Negligence is a failure by omission or commission to
22 exercise due care as a person of ordinary reason and
23 prudence would exercise in the same circumstances.
24 Recklessness is a higher degree of culpability and
25 responsibility. Recklessness signifies a conscious

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 05-CP-26-3289

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.)

THIRD AMENDED
SUMMONS

(JURY TRIAL DEMANDED)

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc.,)
BuildStar Corporation,)
Right Way Construction, Inc.,)
Pegram Associates, Inc.,)
Tuscan Architectural Group, Inc.,)
Louisiana-Pacific Corporation,)
MI Home Products, Inc.,)
Bill Evans d/b/a Top Notch Painters,)
BR Brick & Masonry, L.P., and)
Weaver Co., Inc.,)
Ronialdo Vilarino d/b/a)
RAV Carpentry,)
AK Construction, Inc.,)
Profiro Borjas d/b/a)
Siding by Profiro, and Robert Shaw,)
Boss Management Services, Inc.,)
Novar, Inc., Caradon, Inc.,)
Honeywell International, Inc., and)
LBS Masonry, Inc.)
Defendants.)

2008 JUL 22 PM 3:26
CLERK OF COURT
HORRY COUNTY

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Third Amended Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their office, at 1318 Third Avenue, Conway, South Carolina, within thirty (30) days after the service

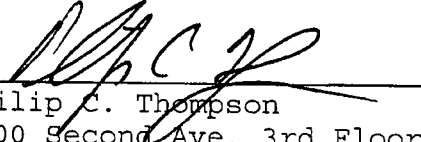
hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court for the relief demanded in the Complaint.

Conway, South Carolina

7/21

2008

THOMPSON & HENRY, P.A.


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Conway, South Carolina 29528
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Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) CASE NO. 05-CP-26-3289

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.)

THIRD AMENDED
COMPLAINT

(JURY TRIAL DEMANDED)

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc.,)
BuildStar Corporation,)
Right Way Construction, Inc.,)
Pegram Associates, Inc.,)
Tuscan Architectural Group, Inc.,)
Louisiana-Pacific Corporation,)
MI Home Products, Inc.,)
Bill Evans d/b/a Top Notch Painters,)
BR Brick & Masonry, L.P., and)
Weaver Co., Inc.,)
Ronialdo Vilarino d/b/a)
RAV Carpentry,)
AK Construction, Inc.,)
Profiro Borjas d/b/a)
Siding by Profiro, and)
Robert Shaw, Boss Management Services)
Inc., Novar, Inc., Caradon, Inc.,)
Honeywell International, Inc., and)
LBS Masonry, Inc.)
Defendants.)

Plaintiffs, complaining of Defendants, would respectfully
show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiffs are the owners of Condominium Unit
Number 13-303 of the Riverwalk At Arrowhead Country Club Horizontal

Property Regime and bring this action in their individual names and pursuant to Rule 23 of the *South Carolina Rules of Civil Procedure* as representing a class composed of each and every homeowner in Buildings 670, 674, 679, 682, 683, 686, 687, 690, 691, 694, 695, 698, 699, 702, 703, 705, 706, 1512, and 1514 (hereinafter "the Buildings"). The Plaintiffs would further allege and show:

- a. The class is so numerous that joinder of all members is impracticable;
- b. There are questions of law and fact common to the class;
- c. The claims of the Plaintiffs are typical of the claims of the class;
- d. The Plaintiffs will fairly and adequately protect the interest of the class; and
- e. The amount in controversy exceeds One Hundred (\$100.00) Dollars for each member of the class.

2. The Buildings, the subject of this action, are multi-family buildings all having multiple units in the Buildings.

3. The Defendant Heritage Communities, Inc. (hereinafter "Heritage"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina, and transacts business in the State of South Carolina. Heritage Communities, Inc. expressly warranted the

condominium at the Riverwalk At Arrowhead Country Club Horizontal Property Regime.

4. The Defendant Heritage Riverwalk, Inc. (hereinafter "Heritage Riverwalk"), is a South Carolina corporation and developed the Riverwalk At Arrowhead Country Club Horizontal Property Regime. Riverwalk is composed of a number of tracts of real estate submitted to the Horizontal Property Regime and is composed of 19 three story buildings containing 12 units per building.

5. The Defendant BuildStar Corporation (hereinafter "BuildStar") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. BuildStar is engaged in the business of general contracting, and on information and belief, constructed the buildings, the subject of this action.

6. Upon information and belief, Heritage or Heritage Riverwalk entered into a contract with BuildStar to construct the units comprising Riverwalk.

7. The Defendant Pegram Associates, Inc. (hereinafter "Pegram") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. Pegram is an architectural firm, and on information and belief, designed some of the buildings, the subject of this action.

8. The Defendant Tuscan Architectural Group, Inc.

(hereinafter "Tuscan") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. Tuscan is an architectural firm, and, on information and belief, designed some of the buildings, the subject of this action.

9. The Defendant Louisiana-Pacific Corporation (hereinafter "LPCorp") is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware, headquartered in Portland, Oregon, and registered with the South Carolina Secretary of State as a foreign corporation. LPCorp is a manufacturing company, and, on information and belief, designed and manufactured the ABTco™ Trim Product that was used in the construction of the buildings, the subject of this action.

10. Upon information and belief, Heritage, Heritage Riverwalk, or BuildStar entered into contracts with Pegram and Tuscan to design the units comprising Riverwalk.

11. The Defendant Right Way Construction, Inc. (hereinafter "Right Way"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and conducts business in Horry County, South Carolina. Upon information and belief, Right Way was a subcontractor on the buildings of Riverwalk, the subject of this action.

12. Upon information and belief, BuildStar subcontracted with Right Way to build the units comprising Riverwalk.

13. The Defendant MI Home Products, Inc. (hereinafter "Home Products") is, upon information and belief, a corporation organized and existing under the laws of the State of California and is doing business in Horry County, South Carolina. Home Products is a manufacturing Company, and, on information and belief, designed and manufactured the windows that were used in the buildings, the subject of this action.

14. The Defendant Bill Evans d/b/a Top Notch Painters (hereinafter "Evans") is, upon information and belief, a citizen and resident of Horry County, South Carolina, and was at all times relevant hereto, doing business as Top Notch Painters. Evans was, on information and belief, the caulking, painting, and waterproofing subcontractor for the buildings, the subject of this action.

15. The Defendant BR Brick & Masonry, L.P. (hereinafter "BR Brick") is, upon information and belief, a limited partnership organized and existing under the laws of the State of Texas and at all times relevant hereto, was doing business in Horry County, South Carolina, as an unauthorized business entity. BR Brick is, on information and belief, a masonry subcontractor that performed work on the construction of the buildings, the subject of this action. BR Brick was formerly known as BR Brick and Masonry, Inc., but converted to a limited partnership by the filing of the Articles of Conversion with the Secretary of State of Texas on

January 2, 2002.

16. The Defendant Weaver Co., Inc. (hereinafter "Weaver"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and does business in Horry County. Weaver is a grading and paving contractor, and, on information and belief, performed the grading and paving at the Riverwalk Horizontal Property Regime, the subject of this action.

17. The Defendant Ronialdo Vilarino d/b/a RAV Carpentry (hereinafter "RAV") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a sub-contractor for Right Way, and installed the siding on various buildings, the subject of this action.

18. The Defendant AK Construction, Inc. (hereinafter "AK") was at all time material hereto a corporation organized and existing under the laws of the State of South Carolina, who was a sub-contractor for Right Way, and installed the siding on various buildings, the subject of this action.

19. The Defendant Profiro Borjas d/b/a Siding by Profiro (hereinafter "Profior") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a sub-contractor for Right Way, and installed the siding on various buildings, the subject of this action.

20. The Defendant Robert Shaw (hereinafter "Shaw") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a sub-contractor for Right Way, and installed the siding on various buildings, the subject of this action.

21. The Defendant Boss Management Services, Inc., (hereinafter "Boss") is, upon information and belief, a Corporation organized and existing under the laws of the State of Texas and was a sub-contractor for BR Brick, providing masonry services on various buildings, the subject of this action.

22. The Defendant LBS Masonry, Inc., (hereinafter "LBS"), is, upon information and belief, a Corporation organized and existing under the laws of the State of South Carolina and was a masonry sub-contractor of either BR Brick or Boss on various buildings, the subject of this action.

23. The Defendants Honeywell International, Inc. (hereinafter "Honeywell"), Novar, Inc., (hereinafter "Novar"), and Caradon, Inc. (hereinafter "Caradon") are, upon information and belief, Corporations organized and existing under the laws of the State of Delaware, and are doing business in Horry County, South Carolina, as Manufacturing Companies of the Better Built windows that were used in the buildings, the subject of this action.

24. Subsequent to the buildings of Riverwalk being opened for occupancy, some of the buildings began to exhibit

evidence of moisture intrusion into the interior of the walls.

25. Upon further investigation and inspection, the Plaintiffs learned that there was inappropriate sequencing, means, methods, design, and supervision of construction, and, in addition, inappropriate use of materials and negligent application of materials in the construction of the buildings of the Riverwalk At Arrowhead Country Club Horizontal Property Regime.

FOR A FIRST CAUSE OF ACTION

26. The Defendants were negligent, grossly negligent, willful, and wanton in the construction of the Riverwalk buildings, the subject of this action, in numerous particulars including, but not limited to, the following:

- a. In failing to properly sequence the construction which allowed water to be trapped within the walls during the construction process.
- b. In failing to properly grade the site such that water is directed towards the buildings.
- c. In failing to properly install or failing to install control joints, balcony membranes, handrails, masonry, masonry cavity wall weep system, flashing, building paper, paving, and firewall, in violation of the applicable building codes, industry standards, and

manufacturers requirements.

- d. In failing to construct the buildings using water tight means and methods in violation of the applicable building codes, industry standards, and manufacturers' requirements.
- e. In failing to properly or adequately slope the masonry and seal penetrations through masonry.
- f. In using inappropriate materials which have resulted in water intrusion and rotting of the exterior and, on information and belief, interior portions of the buildings.
- g. In failing to properly design and inspect the construction of the project so as to assure compliance with the applicable plans, specifications, industry standards, manufacturers requirements, applicable code, including, but not limited to, the standard building code and good construction practices.
- h. In the particulars as set forth in the Report of R. V. Buric, which Report is incorporated herein and made a part and parcel hereof.

27. The above set forth negligent and grossly negligent construction, violates the applicable building codes, industry standards, and manufacturers' requirements.

28. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness, of the Defendants as set forth herein, numerous parts of the buildings' have been continuously and repeatedly exposed to leaks causing moisture infiltration resulting in mold, rot, rust, and degradation of the building. Also, other direct and consequential damages have resulted including, but not limited to, those set forth in the expert reports produced by the Plaintiff, reference to which is craved as forming a part and parcel hereof. In addition, many of the defective products, such as windows and siding, have caused the building to be continuously and repeatedly exposed to moisture entering the building, walls and units resulting in mold, mildew, rot, rust and degradation to the building. The incorporation of defective products and defective construction will necessitate substantial demolition of the building in order to get to and correct or remove the defective products and defective construction. The deficiencies and the incorporation of defective products have caused damage to parts of the building and the building as a whole.

29. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants in a sum sufficient to correct any damage to their units and a sum sufficient to compensate them for loss of use and rental of their units, replacement costs for those items the individual unit owners are

responsible for pursuant to the Master Deed of Riverwalk, loss of reputation of the buildings, and consequential and punitive damages.

FOR A SECOND CAUSE OF ACTION

30. The allegations of the Statement of Facts and the First Cause of Action are incorporated herein and made a part and parcel hereof.

31. Heritage expressly warranted the workmanship and construction of the buildings comprising Riverwalk and made representations through its advertising and in order to entice the members of the Association to purchase the units.

32. This expressed warranty has been breached as set forth in hereinabove.

33. That as a direct and proximate result of the breach of their expressed warranties of quality construction, the Plaintiffs have been damaged as set forth in hereinabove.

34. The Plaintiffs are entitled to judgment against the Defendants as set forth hereinabove.

FOR A THIRD CAUSE OF ACTION

35. The allegations of the Statement of Facts and the First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

36. Heritage Riverwalk by virtue of its development and sale of the condominium units, made implied and expressed

warranties, including, but not limited to, the warranty of habitability and fitness for the intended use of the buildings, including the common elements.

37. Heritage Riverwalk breached its implied and express warranties, including the warranties of habitability and fitness as set forth hereinabove.

38. As a direct and proximate result of the breach of the warranties by Heritage Riverwalk, the Plaintiffs have been damaged as set forth hereinabove.

39. Plaintiffs are informed and believe that they are entitled to judgment against Heritage Riverwalk as set forth hereinabove.

FOR A FOURTH CAUSE OF ACTION

40. The allegations of the Statement of Facts and the First, Second, and Third Causes of Action are incorporated herein and made a part and parcel hereof.

41. BuildStar and Right Way, on information and belief, constructed all of the buildings comprising the Regime. Evans, on information and belief, performed the caulking, painting, and waterproofing of decks and balconies on all of the buildings comprising the Regime. BR Brick, Boss and LBS on information and belief, installed the brick and masonry on all of the buildings comprising the Regime. Weaver performed the site work, grading, and paving in the Regime. RAV, AK, Profiro, and Shaw installed

siding on variuos buildings in the Regime. In performing their respective trades in the construction of said buildings and Regime, these Defendants extended to the Plaintiff an implied warranty of workmanlike service.

42. BuildStar, Right Way, Evans, BR Brick, Boss, LBS Weaver, RAV, AK, Profiro, and Shaw breached their warranties of workmanlike service as set forth hereinabove.

43. As a direct and proximate result of the breach of BuildStar, Right Way, Evans, BR Brick, Boss, LBS, Weaver, RAV, AK, Profiro, and Shaw of their warranties of workmanlike service, Plaintiff has been damaged as set forth hereinabove.

44. The Plaintiff is informed and believes that it is entitled to judgment against BuildStar, Right Way, Evans, BR Brick, Boss, LBS, Weaver, RAV, AK, Profiro, and Shaw as set forth hereinabove.

FOR A FIFTH CAUSE OF ACTION

45. The allegations of the Statement of Facts and the First, Second, Third, and Fourth Causes of Action are incorporated herein and made a part and parcel hereof.

46. The Defendants Pegram and Tuscan, through their design of the buildings, expressly and implied warranted compliance with applicable industry standards, manufacturers requirements, applicable building codes, including, but not limited to, the standard building code, and good construction and design practices.

47. These warranties have been breached as set forth hereinabove.

48. As a direct and proximate result of the breach of the express and implied warranties by Pegram and Tuscan, the Plaintiffs have been damaged as set forth hereinabove.

49. The Plaintiffs are informed and believe that they are entitled to judgment against Pegram and Tuscan as set forth hereinabove.

FOR A SIXTH CAUSE OF ACTION

50. The allegations of the Statement of Facts and the First, Second, Third, Fourth, and Fifth Causes of Action are incorporated herein and made a part and parcel hereof.

51. The Defendant LPCorp, through its design and manufacture of the ABTco™ Trim Product, made express and implied warranties including, but not limited to, warranty of merchantability and fitness for a particular purpose.

52. These warranties have been breached in that the ABTco™ Trim Product has begun to deteriorate allowing water to intrude into the buildings causing actual and consequential damages including, but not limited to, growth of mold, mildew, and other fungi; rot resulting from water intrusion; stigma upon the buildings; and the necessity to close the buildings during remediation and restoration of the buildings.

53. The Plaintiffs are informed and believe that they

are entitled to judgment against the Defendant LPCorp as set forth hereinabove.

FOR A SEVENTH CAUSE OF ACTION

54. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, and Sixth Causes of Action are incorporated herein and made a part and parcel hereof.

55. The ABTco™ Trim Product manufactured by LPCorp and sold by LPCorp was expected to and did reach the Plaintiffs without substantial change in the condition in which it was purchased.

56. The ABTco™ Trim Product was in a defective condition, unreasonably dangerous to Plaintiffs and to Plaintiffs' property when it left LPCorp's possession or control in that under normal conditions, usage and application, it deteriorated and caused water to accumulate behind the Trim Product resulting in deterioration of the substrate, and promotion of mold, mildew, fungi, and insects to invade the buildings.

57. The Defendants were in the chain of distribution of the defective ABTco™ Trim Product when they sold and/or purchased said system and subsequently applied it to the buildings. The Plaintiffs' use of this ABTco™ Trim Product was in a manner in which it was intended for use and it was foreseeable to be used in such manner by the Defendants.

58. The ABTco™ Trim Product was inherently defective and is incapable, no matter how meticulously applied, of being applied

so as not to deteriorate and entrap water behind the exterior cladding.

59. The Defendants failed to provide to the Plaintiffs either directly or indirectly, through sufficient warnings, the deficiencies in the system and the risk and dangers inherent in the use of the product.

60. As a direct and proximate result of the defective ABTco™ Trim Product, the Plaintiffs have been damaged as set forth hereinabove.

61. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendant LPCorp as set forth hereinabove..

FOR AN EIGHTH CAUSE OF ACTION

62. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action are incorporated herein and made a part and parcel.

63. The Defendant MI Home Products, Inc., Honeywell, Novar and Caradon, through their design and manufacture of their windows, made express and implied warranties including, but not limited to, the warranty of merchantability and fitness for a particular purpose.

64. As a direct and proximate result of the breach of the Defendants MI Home Products, Honeywell, Novar and Caradon of their warranties, Plaintiffs have been damaged as set forth

hereinabove.

65. Plaintiffs are informed and believe that they are entitled to judgment against the Defendants MI Home Products, Honeywell, Novar and Caradon as set forth hereinabove.

FOR A NINTH CAUSE OF ACTION

66. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action are incorporated herein and made a part and parcel hereof.

67. The windows manufactured by Home Products, Honeywell, Novar and Caradon and sold by those Defendants were expected to and did reach the Plaintiffs without substantial change in the condition in which they were purchased.

68. The windows were in a defective condition, unreasonably dangerous to Plaintiff and the Plaintiff's property when they left Home Products', Honeywell's, Novar's and Caradon's possession and control and that under their control, conditions, usage, and application, they allowed water to intrude into the buildings resulting in deterioration of the substrate, and promotion of mold, mildew, and fungi; rot resulting from water intrusion, stigma upon the buildings, and the necessity for further testing and investigation and substantial costs in remediation and restoration of the buildings.

69. The Defendants were in the chain of distribution of the defective windows when they sold and/or purchased said products

and subsequently installed them into the buildings. The Plaintiffs' use of the windows was in a manner in which it was intended for use and it was foreseeable to be used in such manner by the Defendants.

70. The windows were inherently defective and are incapable, no matter how meticulously applied, of being applied so as not to allow water to intrude behind the exterior cladding.

71. The Defendants failed to warn the Plaintiffs either directly or indirectly, through sufficient warnings, the deficiencies in the windows and the risk and dangers inherent in the use of the product.

72. As a direct and proximate result of the defective Home Products windows, the Plaintiffs have been damaged as set forth hereinabove.

73. The Plaintiffs are informed and believe that they are entitled to judgment against the Defendants Home Products, Honeywell, Novar, and Caradon as set forth hereinabove.

FOR A TENTH CAUSE OF ACTION

74. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Causes of Action are incorporated herein and made a part and parcel hereof.

75. Heritage and Heritage Riverwalk were the developers of the Riverwalk at Arrowhead Country Club Condominium Project and subjected the property to a Horizontal Property Regime under a

Master Deed and Bylaws prepared by the developer, reference to which are craved as if set forth herein verbatim. All unit purchasers were required to be a member of the Association.

76. Heritage and Heritage Riverwalk had a fiduciary duty to the Association and its members which included the duty to bring the Common Elements up to standard before turning them over to the Association.

77 Heritage and Heritage Riverwalk were negligent, reckless, willful, and wanton, and breached their fiduciary duties in turning the Common Elements over to the Association in one or more of the following particulars:

- a. In allowing the construction of the Condominium Project with substandard materials, and in allowing the use of inappropriate methods and means of construction;
- b. In failing to assure that the Condominiums were properly designed and constructed, including, but not limited to, those set forth hereinabove;
- c. In failing to investigate the condition of the Project before turning over the Condominium Project to the Association; and
- d. In turning the Common Elements over to the Association in a substandard and deteriorated

condition.

78. As a direct and proximate result of the negligent, willful, and wanton conduct of Heritage and Heritage Riverwalk as hereinabove set forth, the Plaintiff has been damaged as set forth hereinabove.

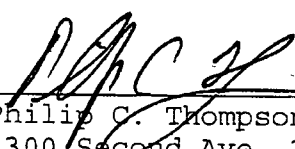
79. The Plaintiff is entitled to judgment against the Defendants Heritage and Heritage Riverwalk as set forth hereinabove.

WHEREFORE, Plaintiffs prays for judgment against the Defendants as hereinabove set forth.

Conway, South Carolina

7/21, 2008

THOMPSON & HENRY, P.A.


Philip C. Thompson
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Conway, South Carolina 29528
(843) 248-5741
Attorney for Plaintiffs

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CASE NO. 03-CP-26-7169

Riverwalk At Arrowhead Country)
Club Property Owners' Association, Inc.)
)
Plaintiff,)

vs.)

FOURTH AMENDED COMPLAINT
(Jury Trial Demanded)

Heritage Communities, Inc.,)
Heritage Riverwalk, Inc.,)
BuildStar Corporation,)
Right Way Construction, Inc.,)
Pegram Associates, Inc.,)
Tuscan Architectural Group, Inc.,)
Louisiana-Pacific Corporation,)
MI Home Products, Inc.,)
Bill Evans d/b/a Top Notch Painters,)
BR Brick & Masonry, L.P.,)
Weaver Co., Inc.,)
Ronialdo Vilarino d/b/a)
RAV Carpentry,)
AK Construction, Inc.,)
Profiro Borjas d/b/a)
Siding By Profiro, and)
Robert Shaw, Boss Management Services,)
Inc., Novar, Inc., Caradon, Inc., Honeywell)
International, Inc., LBS Masonry, Inc.,)
)
Defendants.)
)

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CLERK OF COURT

Plaintiff, complaining of the Defendants, would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiff, Riverwalk At Arrowhead Country Club Property Owners' Association, Inc., (hereinafter "Association"), is an eleemosynary corporation organized and existing under the laws of the State of South Carolina. The Association is responsible for the maintenance and upkeep

of the common elements in the Riverwalk At Arrowhead Country Club Horizontal Property Regime, all as set forth in the Riverwalk At Arrowhead Country Club Horizontal Property Regime Master Deed and Amendments thereto, reference to said Master Deed being craved as forming a part and parcel hereof.

2. The Defendant Heritage Communities, Inc. (hereinafter "Heritage"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and transacts business in Horry County, South Carolina. Heritage expressly warranted the condominiums at the Riverwalk At Arrowhead Country Club Horizontal Property Regime (hereinafter "Regime").

3. The Defendant Heritage Riverwalk, Inc. (hereinafter "Heritage Riverwalk"), is a South Carolina corporation and developed the Regime. The Regime is composed of nineteen (19) wood frame three story structures with four (4) units per floor for a total of two hundred twenty-eight (228) units.

4. The Defendant BuildStar Corporation (hereinafter "BuildStar") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. BuildStar is engaged in the business of general contracting, and on information and belief, constructed the buildings, the subject of this action.

5. Upon information and belief, Heritage and/or Heritage Riverwalk entered into a contract with BuildStar to construct units comprising Riverwalk At Arrowhead Country Club.

6. The Defendant Right Way Construction, Inc. (hereinafter "Right Way"), is, upon information and belief, a corporation organized under the laws of the State of South Carolina. Right Way was engaged in the business of general subcontracting, and on information and belief,

subcontracted with BuildStar to construct the buildings, the subject of this action.

7. The Defendant Pegram Associates, Inc. (hereinafter "Pegram") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. Pegram is an architectural firm, and on information and belief, designed some of the buildings, the subject of this action.

8. The Defendant Tuscan Architectural Group, Inc. (hereinafter "Tuscan") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. Tuscan is an architectural firm and, on information and belief, designed some of the buildings, the subject of this action.

9. The Defendant MI Home Products, Inc. (hereinafter "Home Products") is, upon information and belief, a corporation organized and existing under the laws of the State of California, and is doing business in Horry County, South Carolina. Home Products is a manufacturing company, and, on information and belief, is the successor to Caradon Better Bilt, Inc., and designed and manufactured the windows that were used in the buildings, the subject of this action.

10. Upon information and belief, Heritage, Heritage Riverwalk, or BuildStar entered into contracts with Pegram and Tuscan to design the units comprising the Regime.

11. The Defendant Louisiana-Pacific Corporation (hereinafter "LPCorp") is, upon information and belief, a corporation organized and existing under the laws of the State of Delaware, headquartered in Portland, Oregon, and registered with the South Carolina Secretary of State as a foreign corporation. LPCorp is a manufacturing company, and, on information and belief, designed and manufactured the ABTco™ Trim Product that was used in the construction of the buildings, the subject of this action.

12. The Defendant Bill Evans d/b/a Top Notch Painters (hereinafter "Evans") is, upon information and belief, a citizen and resident of Horry County, South Carolina, and was at all times relevant hereto, doing business as Top Notch Painters. Evans was, on information and belief, the caulking, painting, and waterproofing subcontractor for the buildings, the subject of this action.

13. The Defendant BR Brick & Masonry, L.P. (hereinafter "BR Brick") is, upon information and belief, a limited partnership organized and existing under the laws of the State of Texas and at all times relevant hereto, was doing business in Horry County, South Carolina, as an unauthorized business entity. BR Brick is, on information and belief, a masonry subcontractor that performed work on the construction of the buildings, the subject of this action. BR Brick was formerly known as BR Brick and Masonry, Inc., but converted to a limited partnership by the filing of the Articles of Conversion with the Secretary of State of Texas on January 2, 2002.

14. The Defendant Weaver Co., Inc. (hereinafter "Weaver"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina and does business in Horry County. Weaver is a grading and paving contractor, and, on information and belief, performed the grading and paving at the Riverwalk Horizontal Property Regime, the subject of this action.

15. The Defendant Ronialdo Vilarino d/b/a RAV Carpentry (hereinafter "RAV") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a subcontractor for Right Way, and installed the siding on various buildings, the subject of this action.

16. The Defendant AK Construction, Inc. (hereinafter "AK") was at all times material hereto a corporation organized and existing under the laws of the State of South Carolina, who was a subcontractor for Right Way, and installed the siding on various buildings, the subject of this

action.

17. The Defendant Profiro Borjas d/b/a Siding By Profiro (hereinafter "Profiro") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a subcontractor for Right Way, and installed the siding on various buildings, the subject of this action.

18. The Defendant Robert Shaw (hereinafter "Shaw") was at all times material hereto a citizen and resident of Horry County, South Carolina, who was a subcontractor for Right Way, and installed the siding on various buildings, the subject of this action.

19. The Defendant Boss Management Services, Inc., (hereinafter "Boss") is, upon information and belief, a Corporation organized and existing under the laws of the State of Texas and was a sub-contractor for BR Brick, providing masonry services on various buildings, the subject of this action.

20. The Defendant LBS Masonry, Inc., (hereinafter "LBS"), is, upon information and belief, a Corporation organized and existing under the laws of the State of South Carolina and was a masonry sub-contractor of either BR Brick or Boss on various buildings, the subject of this action.

21. The Defendant's Honeywell International, Inc. (hereinafter "Honeywell") Novar, Inc., (hereinafter "Novar"), and Caradon, Inc. (hereinafter "Caradon") are, upon information and belief, Corporations organized and existing under the laws of the State of Delaware, and are doing business in Horry County, South Carolina, as Manufacturing Companies of the Better Built windows that were used in the buildings, the subject of this action.

22. Subsequent to the buildings of the Regime being opened for occupancy, some of the buildings began to exhibit evidence of moisture intrusion.

23. Upon further investigation and inspection, the Plaintiff learned that there was

inappropriate sequencing, means, methods, design, and supervision of construction, and in addition, inappropriate use of materials and negligent application of materials in the construction of the Regime.

FOR A FIRST CAUSE OF ACTION

24. The Defendants were negligent, grossly negligent, willful, and wanton in the construction of the Regime buildings and parking lots, the subject of this action, in numerous particulars including, but not limited to, the following:

- a. In failing to properly sequence the construction which allowed water to be trapped within the walls during the construction process;
- b. In failing to properly grade the site such that water is directed towards the buildings;
- c. In failing to properly install or failing to install control joints, balcony membranes, handrails, masonry, masonry cavity wall weep system, flashing, building paper, paving, and firewall, in violation of the applicable building codes, industry standards, and manufacturers requirements;
- d. In failing to construct the buildings using water tight means and methods in violation of the applicable building codes, industry standards, and manufacturers requirements;
- e. In failing to properly or adequately slope the masonry and seal penetrations through masonry;
- f. In using inappropriate materials which have resulted in water intrusion and rotting of the exterior and, on information and belief, interior portions of the buildings;
- g. In failing to properly design and inspect the construction of the project so as to assure compliance with the applicable plans, specifications, industry standards, manufacturers requirements, applicable code, including, but not limited to, the standard building code and good construction practices;
- h. In failing to manufacture products used in the construction of the buildings which allowed water to intrude into the buildings.

25. The above set forth negligent and grossly negligent construction, more particularly outlined in the Report of R. V. Buric Construction Consultants, Inc., dated May 8, 2003, and May 28, 2004, reference to which is craved as forming a part and parcel hereof, violates the applicable building codes, industry standards, and manufacturers' requirements.

26. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness of the Defendants as set forth herein, numerous parts of the buildings have been continuously and repeatedly exposed to leaks causing moisture infiltration resulting in mold, rot, rust and degradation of the buildings. Also, other direct and consequential damages have resulted including, but not limited to, those set forth in the expert reports produced by the plaintiff, reference to which is craved as forming a part and parcel hereof. In addition, many of the defective products such as windows and trim board have caused the buildings to be continuously and repeatedly exposed to moisture and unconditioned air entering the buildings, walls and rooms resulting in mold, mildew, rot, rust and degradation of the buildings. The incorporation of defective products and defective construction will necessitate substantial demolition of the buildings in order to get to and correct or remove the defective products and defective construction. The deficiencies and the incorporation of defective products have caused damage to parts of the building and the building as a whole and will cause loss of use of the building.

27. Plaintiff is informed and believes that it is entitled to judgment against the Defendants in an amount sufficient to completely repair, restore, and remediate the buildings together with all consequential damages and punitive damages as this Court might deem appropriate.

FOR A SECOND CAUSE OF ACTION

28. The allegations of the Statement of Facts and the First Cause of Action are incorporated herein and made a part and parcel hereof.

29. Heritage expressly warranted the workmanship and construction of the buildings comprising the Regime and made representations through its advertising and in order to entice the members of the Association to purchase the units.

30. This expressed warranty has been breached as set forth hereinabove.

31. That as a direct and proximate result of the breach of their expressed warranties of quality construction, the Plaintiff has been damaged as set forth hereinabove.

32. The Plaintiff is entitled to judgment against the Defendants as set forth hereinabove.

FOR A THIRD CAUSE OF ACTION

33. The allegations of the Statement of Facts and the First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

34. Heritage Riverwalk by virtue of its development and sale of the condominium units, made implied and expressed warranties, including, but not limited to, the warranty of habitability and fitness for the intended use of the buildings, including the common elements.

35. Heritage Riverwalk breached its implied and express warranties as set forth hereinabove.

36. As a direct and proximate result of the breach of the warranties by Heritage Riverwalk, the Plaintiff has been damaged as set forth hereinabove.

37. Plaintiff is informed and believes that it is entitled to judgment against Heritage Riverwalk as set forth hereinabove.

FOR A FOURTH CAUSE OF ACTION

38. The allegations of the Statement of Facts and the First, Second, and Third Causes of Action are incorporated herein and made a part and parcel hereof.

39. BuildStar and Right Way, on information and belief, constructed all of the buildings comprising the Regime. Evans, on information and belief, performed the caulking, painting, and waterproofing of decks and balconies on all of the buildings comprising the Regime. BR Brick, Boss and LBS, on information and belief, installed the brick and masonry on all of the buildings comprising the Regime. Weaver performed the site work, grading, and paving in the Regime. RAV, AK, Profiro, and Shaw installed siding on various buildings in the Regime. In performing their respective trades in the construction of said buildings and Regime, these Defendants extended to the Plaintiff an implied warranty of workmanlike service.

40. BuildStar, Right Way, Evans, BR Brick, Boss, LBS, Weaver, RAV, AK, Profiro, and Shaw breached their warranties of workmanlike service as set forth hereinabove.

41. As a direct and proximate result of the breach of BuildStar, Right Way, Evans, BR Brick, Boss, LBS, Weaver, RAV, AK, Profiro, and Shaw, of their warranties of workmanlike service, Plaintiff has been damaged as set forth hereinabove.

42. The Plaintiff is informed and believes that it is entitled to judgment against BuildStar, Right Way, Evans, BR Brick, Boss, LBS, Weaver, RAV, AK, Profiro, and Shaw as set forth hereinabove.

FOR A FIFTH CAUSE OF ACTION

43. The allegations of the Statement of Facts and the First, Second, Third, and Fourth Causes of Action are incorporated herein and made a part and parcel hereof.

44. The Defendants Pegram and Tuscan, through their design of the buildings, expressly and implied warranted compliance with applicable industry standards, manufacturers requirements, applicable building codes, including, but not limited to, the standard building code, and good construction and design practices.

45. These warranties have been breached as set forth hereinabove.

46. As a direct and proximate result of the breach of the express and implied warranties by Pegram and Tuscan, the Plaintiff has been damaged as set forth hereinabove.

47. The Plaintiff is informed and believes that it is entitled to judgment against Pegram and Tuscan as set forth hereinabove.

FOR A SIXTH CAUSE OF ACTION

48. The allegations of the Statement of Facts and the First, Second, Third, Fourth, and Fifth Causes of Action are incorporated herein and made a part and parcel hereof.

49. The Defendant LPCorp, through its design and manufacture of the ABTco™ Trim Product, made express and implied warranties including, but not limited to, warranty of merchantability and fitness for a particular purpose.

50. These warranties have been breached in that the ABTco™ Trim Product has begun to deteriorate allowing water to intrude into the buildings causing actual and consequential damages including, but not limited to, growth of mold, mildew, and other fungi; rot resulting from water intrusion; stigma upon the buildings; and the necessity for further tests and investigations and substantial costs in remediation and restoration of the buildings.

51. The Plaintiff is informed and believes that it is entitled to judgment against the Defendant LPCorp in an amount sufficient to completely repair, restore, and remediate the buildings together with all consequential damages and punitive damages as this Court might deem appropriate.

FOR A SEVENTH CAUSE OF ACTION

52. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, and Sixth Causes of Action are incorporated herein and made a part and parcel hereof.

53. Heritage and Heritage Riverwalk were the developers of the Riverwalk at Arrowhead Country Club Condominium Project and subjected the property to a Horizontal Property Regime under a Master Deed and Bylaws prepared by the developer, reference to which are craved as if set forth herein verbatim. All unit purchasers were required to be a member of the Association.

54. Heritage and Heritage Riverwalk had a fiduciary duty to the Association and its members which included the duty to bring the Common Elements up to standard before turning them over to the Association.

55. Heritage and Heritage Riverwalk were negligent, reckless, willful, and wanton, and breached their fiduciary duties in turning the Common Elements over to the Association in one or more of the following particulars:

- a. In allowing the construction of the Condominium Project with substandard materials, and in allowing the use of inappropriate methods and means of construction;
- b. In failing to assure that the Condominiums were properly designed and constructed, including, but not limited to, those set forth hereinabove;
- c. In failing to investigate the condition of the Project before turning over the Condominium Project to the Association; and
- d. In turning the Common Elements over to the Association in a substandard and deteriorated condition.

56. As a direct and proximate result of the negligent, willful, and wanton conduct of Heritage and Heritage Riverwalk as hereinabove set forth, the Plaintiff has been damaged as set forth hereinabove.

57. The Plaintiff is entitled to judgment against the Defendants Heritage and Heritage Riverwalk as set forth hereinabove.

FOR AN EIGHTH CAUSE OF ACTION

58. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Causes of Action are incorporated herein and made a part and parcel hereof.

59. The Defendant MI Home Products, Inc., Honeywell, Novar and Caradon, through their design and manufacture of their windows, made express and implied warranties including, but not limited to, the warranty of merchantability and fitness for a particular purpose.

60. These warranties have been breached in that the windows have allowed water to intrude into the buildings causing actual and consequential damages including, but not limited to, growth of mold, mildew, and other fungi; rot resulting from water intrusion; stigma upon the buildings; and the necessity of further testing and investigation and substantial costs in remediation and restoration of the buildings.

61. The Plaintiff is informed and believes that it is entitled to judgment against the Defendants Home Products, Honeywell, Novar and Caradon in an amount sufficient to completely repair, restore, and remediate the buildings, together with all consequential damages and punitive damages as this Court might deem appropriate.

FOR A NINTH CAUSE OF ACTION

62. The allegations of the Statement of Facts and the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action are incorporated herein and made a part and parcel hereof.

63. The windows manufactured by Home Products, Honeywell, Novar and Caradon, were expected to and did reach the Plaintiff without substantial change in the condition in which they were purchased.

64. The windows were in a defective condition, unreasonably dangerous to Plaintiff and the Plaintiff's property when they left Home Products' Honeywell's, Novar's and Caradon's possession and control and that under their control, conditions, usage, and application, they allowed water to intrude into the buildings resulting in deterioration of the substrate, and promotion of mold, mildew, and fungi; rot resulting from water intrusion, stigma upon the buildings, and the necessity for further testing and investigation and substantial costs in remediation and restoration of the buildings.

65. The Defendants were in the chain of distribution of the defective windows when they sold and/or purchased said products and subsequently installed them into the buildings. The Plaintiff's use of the windows was in a manner in which it was intended for use when it was foreseeable to be used in such manner by the Defendants.

66. The windows were inherently defective and are incapable, no matter how meticulously applied, of being applied so as not to allow water to intrude behind the exterior cladding.

67. The Defendants failed to provide to the Plaintiff either directly or indirectly, through sufficient warnings, the deficiencies in the windows and the risk and dangers inherent in the use of

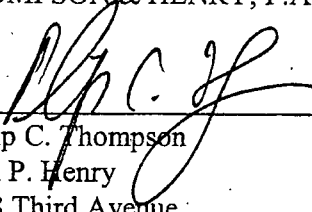
the product.

68. As a direct and proximate result of the defective windows, the Plaintiff has and will suffer numerous injuries as hereinabove set forth which will include, but not be limited to, the complete removal and replacement of the windows and exterior cladding of the buildings with nondefective products.

69. The Plaintiff is informed and believes that it is entitled to judgment against the Defendants in an amount sufficient to completely repair, restore, and remediate the buildings together with all consequential damages and punitive damages as this Court might deem appropriate.

WHEREFORE, Plaintiff prays for judgment against the Defendants as hereinabove set forth.

THOMPSON & HENRY, P.A.



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Conway, South Carolina
April ____, 2006

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
03-CP-26-03202

MAGNOLIA NORTH PROPERTY OWNERS' ASSOCIATION,)

PLAINTIFF,)

vs.)

HERITAGE COMMUNITIES, INC.,)

HERITAGE MAGNOLIA, INC., AND)

BUILDSTAR CORPORATION,)

DEFENDANTS.)

TRANSCRIPT OF RECORD

MAY 11-20, 2009
CONWAY, SOUTH CAROLINA

BEFORE:

THE HONORABLE, CLIFTON NEWMAN; AND A JURY

APPEARANCES:

BY: JOHN P. HENRY, ESQ.
PHILIP C. THOMPSON, ESQ.
ATTORNEYS FOR MAGNOLIA NORTH
PROPERTY OWNERS' ASSOCIATION

BY: STEPHEN L. BROWN, ESQ.
JEFFREY J. WISEMAN, ESQ.
ATTORNEYS FOR HERITAGE COMMUNITIES, INC.,
HERITAGE MAGNOLIA, INC., AND BUILDSTAR CORPORATION

BRENDA R. BABB
Circuit Court Reporter

1 WERE REPRESENTING TO THE HOMEOWNERS THAT THESE PROBLEMS
2 WOULD BE FIXED AND THE HOMEOWNERS WERE RELYING ON THEM THAT
3 THESE PROBLEMS THAT THEY WERE HAVING WOULD BE FIXED.

4 IN 2000 THE DEVELOPER AND THEIR, THEIR, LET ME
5 EXPLAIN AND I'M SURE MR. BROWN WILL EXPLAIN THIS ALSO TO
6 YOU, BUT WHEN HERITAGE FORMED THEY FORMED A COMPANY CALLED
7 HERITAGE COMMUNITIES INC. AND THEN WHEN THEY, AND THEY ALSO
8 FORMED A COMPANY CALLED BUILDSTAR WHICH WAS THE GENERAL
9 CONTRACTOR. THEY WERE ACTING AS THE GENERAL CONTRACTOR IN
10 BUILDING THESE UNITS AND THEN THEY WOULD FORM ANOTHER
11 CORPORATION IN THIS CASE HERITAGE MAGNOLIA NORTH INC. TO
12 ACTUALLY SELL THE CONDOMINIUMS AND THEN THEY WOULD ALSO
13 FORM A HOMEOWNERS ASSOCIATION AND THEY WOULD TAKE CONTROL
14 OF THE HOMEOWNERS ASSOCIATION AND THAT'S A NORMAL COURSE
15 FOR A DEVELOPER TO DO. I'M NOT INDICATING THERE'S ANYTHING
16 WRONG WITH THAT. THEY KEEP CONTROL OF THE CONDOMINIUM
17 ASSOCIATION SO THAT THEY CAN CONTROL THE PHASES AND THE
18 ADDING OF THE PHASES AND ALL THAT SORT OF THING INTO THE
19 CONDOMINIUM REGIME, AS THE LAW CALLS IT THE HORIZONTAL
20 PROPERTY REGIME, AND THEY DID THAT UNTIL THEY GOT THESE 21
21 BUILDINGS.

22 AS I SAID THEY HAD SIGNIFICANT CONSTRUCTION
23 PROBLEMS AND PROMISED THESE HOMEOWNERS THAT THEY WOULD FIX
24 ALL THESE PROBLEMS. WELL THEY DIDN'T FIX THEM AND THEN
25 THEY JUST TURNED THE ASSOCIATION OVER AND LEFT TO THESE

1 HOMEOWNERS AND THESE HOMEOWNERS TOOK THAT ASSOCIATION OVER
2 AND THEY HAD INVESTIGATORS OR CONSTRUCTION PEOPLE TO COME
3 IN TO SEE WHY IN THE WORLD THEY WERE HAVING ALL OF THESE
4 CONSTRUCTION PROBLEMS AND THEY FOUND OUT THAT THERE WAS
5 SIGNIFICANT CONSTRUCTION DEFICIENCIES THAT THESE
6 CONDOMINIUMS WERE NOT BUILT UP TO CODE. THEY WERE NOT
7 BUILT TO INDUSTRY STANDARDS. THEY APPLIED PRODUCTS THAT
8 WERE NOT INSTALLED IN ACCORDANCE WITH MANUFACTURERS
9 RECOMMENDATIONS. THEY INSTALLED WINDOWS THAT DIDN'T MEET
10 CODE AND LEAKED AND THEY BROUGHT THIS LAWSUIT AND THAT'S
11 WHY WE ARE HERE TODAY AND YOU'RE GOING TO SEE AN AWFUL LOT
12 OF EVIDENCE AND TESTIMONY.

13 WE HIRED OR THE HOMEOWNERS ASSOCIATION HIRED A
14 CONSTRUCTION, A CONSULTING FIRM OUT OF WILMINGTON WHO CAME
15 IN KNOWN AS THE R.V. BURIC AND THEY DID SIGNIFICANT
16 INVESTIGATIONS OF THE PROBLEMS OUT THERE AND THEY ISSUED
17 REPORTS TO THE HOMEOWNERS AND YOU WILL HEAR ALL ABOUT THOSE
18 REPORTS.

19 LET ME, LET ME EXPLAIN TO YOU THE, WHAT LAWYERS
20 CALL THE CAUSES OF ACTION THAT WE HAVE BROUGHT. WE HAVE
21 BROUGHT CAUSES OF ACTION IN NEGLIGENCE AND AS HIS HONOR
22 SAID JUST A MOMENT AGO HE IS THE DETERMINER OF THE LAW.
23 WHATEVER I TELL YOU THE LAW IS HE TRUMPS THAT. HE IS THE
24 DETERMINER OF WHAT THE LAW IS AND YOU LISTEN TO HIM BUT
25 NEGLIGENCE IS SIMPLY THE, THE FAILURE TO USE DUE CARE, TO

1 USE THE KIND OF SKILL AND CARE THAT YOU WOULD EXPECT A
2 PERSON OF THAT PROFESSION OR OCCUPATION TO USE, AND WE SAY
3 THEY DIDN'T DO THAT. WE SAY THEY NEGLIGENTLY CONSTRUCTED
4 THESE CONDOMINIUMS.

5 WE'RE ALSO SAYING THAT THERE WAS A BREACH OF WHAT
6 THE LAW CALLS A FIDUCIARY DUTY ON THE PART OF THIS
7 DEVELOPER. A FIDUCIARY DUTY IS WHERE YOU WOULD POSE A
8 TRUST IN SOMEONE TO DO SOMETHING AND THAT PERSON TAKES ON
9 THAT TRUST AND THEY HAVE THE OBLIGATION AND DUTY TO, TO ACT
10 IN YOUR BEST INTEREST, TO ACT IN GOOD FAITH, AND WE SAY
11 THAT THE LAW PREVENTS THAT DEVELOPER FROM TAKING THIS
12 CONDOMINIUM THAT WAS FULL OF CONSTRUCTION DEFICIENCIES AND
13 SIMPLY DUMPING ON THESE HOMEOWNERS AND SAYING IT'S YOUR
14 PROBLEM, IT'S YOUR RESPONSIBILITY, AND WE SAY THAT THEY
15 BREACHED THAT FIDUCIARY DUTY TO THESE HOMEOWNERS AND THAT'S
16 OUR SECOND CAUSE OF ACTION.

17 THE NEXT CAUSE OF ACTION I WANT TO EXPLAIN TO YOU
18 IS THE WARRANTY OF WORKMAN LIKE SERVICE. YOU'VE PROBABLY
19 NEVER HEARD THAT. THERE ARE WRITTEN WARRANTIES AND THERE
20 ARE CERTAIN WARRANTIES APPLIED BY THE LAW. THEY'RE
21 UNWRITTEN LAWS. WHEN YOU GO TO A STORE AND BUY SOMETHING
22 THEY DON'T, THEY DON'T WRITE OUT A WARRANTY FOR YOU IN MOST
23 THINGS. SOME THINGS THEY DO, YOU BUY A T.V. YOU GET A
24 WARRANTY AND YOU BUY A TOASTER YOU GET A WARRANTY, BUT IN A
25 LOT OF THINGS YOU BUY YOU DON'T GET A WARRANTY. WELL THE

1 LAW SAYS IN A LOT OF THINGS THERE IS IMPLIED WARRANTY.
 2 THERE'S A WARRANTY THAT, THAT YOU ARE GIVEN THAT'S NOT
 3 WRITTEN DOWN AND THE WARRANTY OF WORKMAN LIKE SERVICE OUR
 4 SUPREME COURT HAS SAID A BUILDER WHO BUILDS A BUILDING AND
 5 SELLS IT TO A PERSON GIVES THAT PERSON AN UNWRITTEN
 6 WARRANTY CALLED THE WARRANTY OF WORKMAN LIKE SERVICE AND
 7 THAT'S WHAT WE SAY THESE BUILDER DEVELOPER DID AND GAVE US,
 8 SOLD TO THESE PEOPLE THIS PRODUCT AND THEY BREACHED THAT
 9 WARRANTY OF WORKMAN LIKE SERVICE BECAUSE THEY WERE FULL OF
 10 CONSTRUCTION DEFICIENCIES.

11 WARRANTY WORKMAN LIKE SERVICES IS A LITTLE
 12 DIFFERENT THAN NEGLIGENCE. WARRANTY WORKMAN LIKE SERVICE
 13 IS A WARRANTY WITHOUT FAULT. THAT IS LESS SUPPOSE A PERSON
 14 GOES AND BUYS A CHEVROLET AND YOU HAVE THE BATTERY MESSES
 15 UP AND YOU TAKE IT BACK, RIGHT AFTER YOU GET IT YOU TAKE IT
 16 BACK TO THEM AND THE BATTERY IS MESSED UP AND THEY SAY, OH,
 17 SORRY, WE DIDN'T MANUFACTURE THAT BATTERY, SOMEBODY ELSE
 18 MANUFACTURED THAT BATTERY SO WE'RE NOT RESPONSIBLE, YOU GO
 19 TALK TO THE PEOPLE WHO MANUFACTURED THE BATTERY AND THE LAW
 20 SAYS, UH-UH, THE WARRANTY WORKMAN LIKE SERVICE SAYS YOU GOT
 21 THE WINDOWS, YOU BOUGHT THE TRIM, YOU BOUGHT THE SIDING YOU
 22 BOUGHT THE BRICK, YOU BOUGHT THE WINDOWS, YOU PUT THEM IN
 23 THERE AND YOU SOLD THEM TO THESE PEOPLE AND YOU WARRANTED
 24 THAT THAT WAS GOOD. IF THERE'S A PROBLEM YOU GO TALK TO
 25 THE MAN, YOU SOLD IT TO THESE PEOPLE YOU GOT A PRICE AND SO

1 YOU'RE RESPONSIBLE FOR IT AND WE SAY THAT THESE DEFENDANTS
2 BREACHED THAT WARRANTY AND RESPONSIBLE TO THESE PEOPLE, THE
3 HOMEOWNERS, TO MAKE THAT GOOD.

4 YOU'RE GOING TO HEAR TESTIMONY FROM THEIR CEO,
5 COO, CHIEF OPERATING OFFICER AND PRESIDENT. YOU'RE GOING
6 TO SEE A VIDEO OF HIS DEPOSITION AND WE'RE GOING TO SHOW IT
7 TO YOU AND HE'S GOING TO TELL YOU IF WE PROMISED THESE
8 PEOPLE WE'D FIX IT WE SHOULD HAVE FIXED IT. WE WENT OUT OF
9 BUSINESS AND WE DIDN'T FIX IT. THAT'S WHAT HE'S GOING TO
10 TELL YOU AND WE BELIEVE THAT WHEN ALL THE EVIDENCE AND
11 TESTIMONY IS IN BEFORE YOU YOU WILL CONCLUDE THAT YOU MUST
12 REACH A VERDICT FOR THESE PLAINTIFFS BECAUSE IT IS FAIR, IT
13 IS JUST, AND IT WOULD BE A VERDICT THAT SPEAKS THE TRUTH.

14 SOMEBODY SAID THAT JURY SERVICE NEXT TO MILITARY
15 SERVICE IN TIME OF WAR IS THE MOST IMPORTANT SERVICE THAT
16 YOU CAN GIVE TO YOUR COUNTRY, I FIRMLY BELIEVE THAT, AND SO
17 WE WOULD ASK YOU TO LISTEN TO THE TESTIMONY AND TO THE
18 EVIDENCE AND RENDER THAT KIND OF VERDICT.

19 THERE'S ONE OTHER THING I WANT TO MENTION TO YOU,
20 WE HAVE ALSO I THINK THE, THE JUDGE INDICATED TO YOU THERE
21 ARE TWO LAWSUITS AND THEY'VE BEEN COMBINED FOR TRIAL.
22 THERE'S A CLASS ACTION SUIT THAT THE HOMEOWNERS HAVE
23 BROUGHT FOR POTENTIAL LOSS OF USE THAT THEY WILL LOOSE THE
24 USE OF THEIR CONDOMINIUMS DURING THE RECONSTRUCTION OF
25 THESE CONDOMINIUMS AND WE SAY THAT THESE DEVELOPERS, THESE

1 DEFENDANTS OUGHT TO PAY THEM FOR THE LOSS OF THAT USE.

2 WE WILL HAVE AN EXPERT THAT WILL COME IN. WE
3 WILL HAVE AN EXPERT THAT WILL COME IN AND TELL YOU WHAT
4 IT'S GOING TO COST TO FIX THESE UNITS AND TO BRING THEM UP
5 TO THE KIND OF STANDARDS THAT WAS REPRESENTED TO THESE
6 PEOPLE SUCH AS THEY REPRESENTED THEM WITH BROCHURES SAYING
7 THAT YOU'RE GETTING THE TOP QUALITY AND ALL THESE SORTS OF
8 THINGS AND WHAT WE, WHAT WE SAY IS THAT IN ADDITION TO THE
9 PRICE TO FIX THE BUILDINGS THAT THESE HOMEOWNERS SHOULD BE
10 ENTITLED TO COMPENSATION FOR LOOSING THE USE OF THEIR
11 BUILDINGS DURING CONSTRUCTION AND WE ASK YOU TO FIND AND
12 RENDER A VERDICT IN THAT CLASS ACTION ALSO.

13 THANK YOU VERY MUCH FOR BEING HERE. WE
14 APPRECIATE YOUR TIME AND ATTENTION. THIS IS GOING TO BE A
15 LONG CASE; WE'RE GOING TO HAVE A LOT OF WITNESSES AND I
16 KNOW THAT YOU WILL GIVE IT KIND OF ATTENTION THAT IT
17 DESERVES AND THAT YOU WILL REACH A VERDICT THAT SPEAKS THE
18 TRUTH AND THAT'S ALL WE ASK, THANK YOU VERY MUCH.

19 THE COURT: YES, SIR, MR. BROWN.

20 MR. BROWN: THANK YOU, YOUR HONOR, MAY IT PLEASE
21 THE COURT?

22 THE COURT: YES, SIR.

23 OPENING STATEMENT

24 BY MR. BROWN:

25 I'M GOING TO SLIP THIS AROUND JUST A TOUCH IF I

1 NORTH?

2 A YES, AT THAT POINT IN TIME DR. GREEN IS THE
3 DEVELOPER WHO REPLACED THE VAN WIE, HARDISTER, ANDERSON
4 PEOPLE.

5 Q OKAY, MR. HAIRFIELD, I WANT TO SHOW YOU
6 WHAT'S MARKED PLAINTIFF'S EXHIBIT NUMBER 9, I'M GOING TO
7 ASK YOU IF YOU RECOGNIZE THAT DOCUMENT?

8 A IT'S A MAGNOLIA NORTH PROPERTY OWNERS
9 ASSOCIATION ANNUAL HOMEOWNERS MEETING MONDAY MARCH 26TH
10 2001, THE MINUTES.

11 Q ALL RIGHT, WERE YOU AT THIS MINUTE, MR.
12 HAIRFIELD?

13 A I WAS.

14 MR. THOMPSON: OKAY, YOUR HONOR, AT THIS TIME
15 WE'D OFFICER PLAINTIFF'S EXHIBIT NUMBER 9 INTO EVIDENCE.

16 MR. BROWN: BEG THE COURT'S INDULGENCE FOR ONE
17 MINUTE, YOUR HONOR.

18 YOUR HONOR, WE DO HAVE A RUNNING OBJECTION
19 PURSUANT TO THE PREVIOUS MATTER THAT WE DISCUSSED.

20 THE COURT: IT'S ADMITTED, YOU MAY PROCEED.
21 IT'S ADMITTED, YOU MAY PROCEED.

22 MR. THOMPSON: THANK YOU, YOUR HONOR.

23 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 9 ENTERED
24 INTO EVIDENCE.)

25 MR. THOMPSON: (CONTINUING)

1 A NOT AT THAT MEETING.

2 Q OKAY, LET ME SHOW YOU PLAINTIFF'S EXHIBIT
3 NUMBER 11 AND ASK YOU IF YOU RECOGNIZE THAT DOCUMENT?

4 A I DO.

5 Q OKAY, AND WHAT IS THIS DOCUMENT?

6 A THAT'S THE MINUTES OF A BOARD OF DIRECTORS
7 MEETING OF SEPTEMBER 9, 2002.

8 MR. THOMPSON: OKAY, YOUR HONOR, AT THIS TIME
9 WE'D OFFER THIS DOCUMENT AS PLAINTIFF'S EXHIBIT NUMBER 11.

10 MR. BROWN: NO OBJECTION.

11 THE COURT: IT'S ADMITTED.

12 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 11 ENTERED
13 INTO EVIDENCE.)

14 MR. THOMPSON: (CONTINUING)

15 Q MR HAIRFIELD, IF YOU WOULD READ THE SECOND
16 AND THIRD PARAGRAPH TO THE JURY, PLEASE SIR?

17 A "AT A MEETING OF THE BOARD OF DIRECTORS DR.
18 GREEN STATED THAT OUT OF THE SOLE CLASS II MEMBER OF THE
19 ASSOCIATION HE INTENDED AT THIS MEETING OF THE BOARD TO
20 APPOINT THREE NEW BOARD MEMBERS PURSUANT TO ARTICLE 2 PART
21 A SECTION 1-3 ON PAGES K AND L OF THE BYLAWS OF MAGNOLIA
22 NORTH PROPERTY OWNERS ASSOCIATION. CLASS II CONTROL WILL
23 STILL BE MAINTAINED BY DR. JACK GREEN AS GRANTOR UNTIL SUCH
24 RIGHTS ARE RELINQUISHED, TERMINATED, OR CONVEYED BY LAW.
25 THERE WAS A UNANIMOUS VOTE OF THE MEMBERS OF THE BOARD TO

1 JUST SLIPPED OUT TO THE BATHROOM, I APOLOGIZE, I'VE GOT
2 SOMEONE GOING OUT TO LOOK FOR.

3 THE COURT: OKAY.

4 MR. THOMPSON: WE WOULD CALL JENNIFER HARMON.

5 JENNIFER HARMON

6 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

7 MADAM CLERK: PLEASE STATE YOUR FULL NAME FOR
8 THE COURT.

9 THE WITNESS: JENNIFER HARMON.

10 DIRECT EXAMINATION

11 BY MR. THOMPSON:

12 Q MS. HARMON, WHERE DO YOU LIVE?

13 A I LIVE IN THE LITTLE RIVER AREA.

14 Q OKAY, HOW LONG HAVE YOU LIVED IN THE HORRY
15 COUNTY AREA?

16 A ALL MY LIFE.

17 Q ALL RIGHT, WHERE DID YOU GO TO HIGH SCHOOL?

18 A I WENT TO CONWAY HIGH SCHOOL.

19 Q OKAY, HOW ABOUT COLLEGE?

20 A WENT TO USC.

21 Q ALL RIGHT, AND WHAT TYPE OF DEGREE DID YOU
22 GET FROM THERE?

23 A I HAVE A JOURNALISM DEGREE.

24 Q ALL RIGHT, ARE YOU EMPLOYED?

25 A YES, I AM.

1 Q BY WHOM?

2 A BY THE NOBLE COMPANY OF SOUTH CAROLINA LLC.

3 Q HOW LONG HAVE YOU BEEN EMPLOYED BY THEM?

4 A SINCE 1986.

5 Q ALL RIGHT, WHAT IS THE BUSINESS OF THE
6 NOBLE COMPANY?

7 A WE'RE A FULL SERVICE REAL ESTATE AGENCY
8 WITH AN EMPHASIS IN HOMEOWNER ASSOCIATION MANAGEMENT.

9 Q WHAT IS HOMEOWNERS ASSOCIATION MANAGEMENT,
10 WHAT DOES THAT CONSIST OF?

11 A WELL WE TYPICALLY WORK FOR BOARDS OF
12 DIRECTORS AND WE'RE PRIMARILY RESPONSIBLE FOR A SORT OF TWO
13 FOLD RESPONSIBILITY, TYPICALLY TO MANAGE THE PHYSICAL
14 ASSETS OUT THERE ON PROPERTY AND THE FINANCIAL PORTION OF
15 IT.

16 Q OKAY, WHEN YOU SAY PHYSICAL ASSETS WHAT IS
17 THAT?

18 A WELL BASICALLY WE'RE RESPONSIBLE FOR
19 MAINTAINING GROUNDS, POOLS, BUILDINGS, MAKING SURE THEY'RE
20 CLEAN AND SO FORTH, ANYTHING PRIMARILY OUTSIDE THE FRONT
21 DOOR.

22 Q DO YOU HELP THEM PREPARE BUDGETS?

23 A WE DO.

24 Q OKAY, AND ARE THOSE ANNUAL BUDGETS THAT YOU
25 PREPARE?

1 A WE DO.

2 Q OKAY, DO YOU SCHEDULE AND ORGANIZE MEETINGS
3 FOR THE HOMEOWNERS ASSOCIATION?

4 A YES, SIR, WE DO.

5 Q WHAT TYPES OF MEETINGS?

6 A BOTH ANNUAL AND BOARD MEETINGS.

7 Q THE MEETING MINUTES THAT WE'VE BEEN GOING
8 OVER SO FAR WITH MR. HAIRFIELD ARE THOSE MEETING MINUTES
9 THAT THE NOBLE COMPANY PREPARES?

10 A YES, SIR.

11 Q ALL RIGHT, WHAT'S YOUR POSITION AT THE
12 NOBLE COMPANY?

13 A I'M VICE PRESIDENT OF OPERATIONS.

14 Q HOW LONG HAVE YOU HELD THAT POSITION?

15 A GOSH, QUITE A FEW YEARS.

16 Q ALL RIGHT, WHAT ARE THE RESPONSIBILITIES OF
17 THAT POSITION?

18 A WELL PRIMARILY ALL THE DIFFERENT PROPERTY
19 SUPERVISORS WORK FOR ME. THOSE ARE THE PEOPLE WHO HAVE A
20 CERTAIN NUMBER OF PROPERTIES THAT THEY MIGHT MANAGE OR
21 MAINTAIN. THE EMPLOYEES, OF COURSE, ON THOSE PARTICULAR
22 SITES WORK FOR THEM BUT THEY IN TURN WORK FOR ME DIRECTLY.
23 I ALSO HAVE A COUPLE OF ADMINISTRATIVE ASSISTANTS AND
24 ACCOUNTING PEOPLE WHO ANSWER TO ME AND DIRECTOR OF
25 OPERATIONS.

1 Q AS A HOMEOWNER MANAGEMENT COMPANY,
2 HOMEOWNER ASSOCIATION MANAGEMENT COMPANY WHAT ARE YOUR
3 DUTIES WITH REGARDS TO THE PHYSICAL ASSETS, WHAT, WHAT DO
4 YOU HAVE TO DO WITH IT?

5 A WELL TYPICALLY AGAIN WE'LL HAVE A JOB
6 DESCRIPTION FOR DAILY, YOU KNOW, PERSONNEL WHO ARE THERE.
7 THOSE PEOPLE MIGHT BE OUR OWN EMPLOYEES AND THEY MIGHT BE,
8 YOU KNOW, OUTSIDE CONTRACTORS, JUST DEPENDS ON THE SITE.

9 Q OKAY, DO YOU HAVE ANY PROFESSIONAL DEGREES
10 OR LICENSES OR CERTIFICATES WITH REGARDS TO PROPERTY
11 MANAGEMENT?

12 A I AM A CERTIFIED PROPERTY MANAGER WITH THE
13 INSTITUTE OF REAL ESTATE MANAGEMENT THAT TAKES A FEW YEARS
14 TO GET AND I'M ONE OF THE FEW OF THEM IN HORRY COUNTY OR
15 PEOPLE.

16 Q I'M SORRY?

17 A THERE ARE A HANDFUL IN HORRY COUNTY.

18 Q WHO'S THE PRESIDENT OF THE NOBLE COMPANY?

19 A D. P. NOBLES.

20 Q HOW MANY DIFFERENT HOMEOWNERS ASSOCIATIONS
21 DOES THE NOBLE COMPANY MANAGE PRESENTLY?

22 A APPROXIMATELY 40.

23 Q WHO IS IT THAT COMES TO THE NOBLE COMPANY
24 TO HIRE THEM TO, TO MANAGE A PROPERTY ASSOCIATION?

25 A USUALLY THE BOARDS OF DIRECTORS.

1 Q WHO RUNS THE PROPERTY OWNERS ASSOCIATION,
2 WHO IS IT GOVERNED BY?

3 A IT'S GOVERNED BY THE BOARD OF DIRECTORS.

4 Q DOES THE NOBLE COMPANY MANAGE THE MAGNOLIA
5 NORTH PROPERTY?

6 A WE DO.

7 Q HOW LONG HAVE YOU BEEN DOING THAT?

8 A WE WERE THERE FROM ITS INCEPTION.

9 Q WHO HIRED THE NOBLE COMPANY TO RUN THE
10 MAGNOLIA NORTH PROPERTY OWNERS ASSOCIATION?

11 A THE DEVELOPER WHO WAS THE ORIGINAL BOARD OF
12 DIRECTORS.

13 Q ALL RIGHT, WHO WAS THE DEVELOPER?

14 A ROGER VAN WIE AT THE TIME.

15 Q ALL RIGHT, DO YOU RECALL WHO WAS ON THE
16 FIRST BOARD OF DIRECTORS AT THE TIME YOU WERE HIRED?

17 A ROGER VAN WIE, GWYN HARDISTER, AND LYNN
18 ANDERSON.

19 Q AND WHO IS IT THAT YOU UNDERSTOOD THAT THEY
20 WERE EMPLOYED OR WHO DID THEY REPRESENT?

21 A THEY WERE HERITAGE COMMUNITIES, HERITAGE
22 MAGNOLIA NORTH.

23 Q OKAY, AND WAS THAT THE DEVELOPER OF THE
24 MAGNOLIA NORTH PROPERTY?

25 A THAT'S CORRECT.

1 Q OKAY, CAPITAL RESERVES WHAT, IS THE NEXT
2 LINE, WHAT IS A CAPITAL RESERVE?

3 A CAPITAL RESERVE IS SOMETHING FOR A LONG
4 TERM EXPENSE THAT'S GOING TO COME IN THE FUTURE LIKE WHEN
5 YOU HAVE A ROOF THAT'S GOING TO COME DUE IN, YOU KNOW, 10
6 YEARS OR 20 YEARS OR WHATEVER YOU'RE SETTING ASIDE A
7 CERTAIN AMOUNT OF MONEY EVERY MONTH FOR THAT EVENTUAL
8 EXPENSE.

9 Q ALL RIGHT, CAPITAL RESERVES DESIGNED TO
10 FUND UNEXPECTED EMERGENCIES?

11 A TYPICALLY, NO, TYPICALLY THERE'S A SCHEDULE
12 FOR THOSE AS TO WHAT EXACTLY WHAT THEY ARE FOR.

13 Q OKAY, ARE CAPITAL RESERVES DESIGNED TO FUND
14 THE REPAIRS OF ORIGINAL CONSTRUCTION DEFICIENCIES BY THE
15 ORIGINAL GENERAL CONTRACTOR OR DEVELOPER?

16 A NO, THEY'RE NOT.

17 Q ALL RIGHT, ON THE DATE THAT THIS HOMEOWNERS
18 ASSOCIATION WAS TURNED OVER TO THE UNIT OWNERS OUT AT
19 MAGNOLIA NORTH IN SEPTEMBER OF 2002 WERE THE CONSTRUCTION
20 DEFICIENCIES WERE THEY STILL IN EXISTENCE AT THAT TIME?

21 A YES, SIR.

22 Q HAD THE DEVELOPER MADE REPAIRS TO THOSE
23 CONSTRUCTION DEFICIENCIES?

24 A NO, SIR.

25 Q HAD THE DEVELOPER LEFT ANY MONEY WHATSOEVER

1 A OH, YES, SIR.

2 Q ALL RIGHT, IS THE HOMEOWNERS ASSOCIATION
3 BOARD IN AGREEMENT WITH THE, OR DO, HAVE THEY ADOPTED THOSE
4 COSTS OF REPAIRS IN THE LOSS OF USE ANALYSIS AS BEING THE
5 DAMAGES THAT THEY ARE SEEKING?

6 A YES, SIR.

7 Q ALL RIGHT, THERE'S ALSO BEEN SOME
8 DISCUSSION ABOUT SOME REPAIRS THAT HAVE BEEN MADE BY THE
9 HOMEOWNERS SINCE THEY GAINED CONTROL OF THE HOMEOWNERS
10 ASSOCIATION, HAVE YOU KEPT UP WITH THOSE NUMBERS?

11 A YES, SIR.

12 Q ALL RIGHT, THE FIRST DOCUMENT I WANT TO
13 SHOW YOU IS PLAINTIFF'S EXHIBIT NUMBER 30, HAS BEEN
14 ADMITTED WITHOUT OBJECTION --

15 MR. BROWN: THAT'S CORRECT.

16 MR. THOMPSON: (CONTINUING)

17 Q WHAT IS THIS DOCUMENT?

18 A THIS IS SORT OF A RUNNING TOTAL IF YOU
19 WILL, FROM THE YEARS BASICALLY BEGINNING IN 2003 THROUGH
20 JANUARY OF 2009.

21 Q ALL RIGHT, WHAT TYPE OF REPAIRS ARE
22 INCLUDED IN THIS DOCUMENT?

23 A THEY'RE PRIMARILY DECK REPAIRS. THEY ARE
24 TRIM WORK REPAIRS, SHEETROCK CEILING REPAIRS, A LOT OF MORE
25 OF THE SAME, HANDRAILS, I MEAN ALL SORTS OF THINGS LIKE

1 THAT.

2 Q OKAY, ARE THESE REPAIRS THAT WERE MADE AS A
3 RESULT OF THE ORIGINAL CONSTRUCTION DEFICIENCIES?

4 A YES, SIR.

5 Q ALL RIGHT, AND WHAT IS THE TOTAL NUMBER YOU
6 HAVE ON THERE?

7 A \$314,790.25.

8 Q ALL RIGHT, WHO PAID FOR THESE REPAIRS?

9 A THE HOMEOWNERS.

10 Q DID THE DEVELOPER PAY FOR THESE REPAIRS?

11 A NO, HE DID NOT.

12 A WITH REGARDS TO THE PAVING I WANT TO SHOW
13 YOU PLAINTIFF'S EXHIBIT 4 AND ASK YOU IF YOU RECOGNIZE THAT
14 DOCUMENT?

15 A YES, SIR, THIS WAS THE SIGNED APAC CONTRACT
16 FOR THE ASPHALT REPAIR.

17 Q AND HOW MUCH IS IT FOR?

18 A \$209,296.88.

19 Q AND THE CHANGE ORDER THAT'S ON ATTACHMENT
20 1, IS THAT A RESULT IN A REDUCTION OF THIS PRICE?

21 A IT IS, YES, SIR.

22 Q ALL RIGHT, SO 290,296.88 MINUS THE CHANGE
23 ORDER OF HOW MUCH?

24 A LOOKS LIKE 29,587.12.

25 Q OKAY, IS THAT WHAT THE HOMEOWNERS

1 ASSOCIATION PAID TO MAKE THE REPAIRS AND COMPLETE THE
2 PAVING IN MAGNOLIA NORTH?

3 A YES, SIR.

4 Q AND WAS THAT WORK BASED UPON A SCOPE OF
5 WORK PREPARED BY SOMEONE?

6 A YES, SIR.

7 Q ALL RIGHT, AND WHO WAS THAT PREPARED BY?

8 A WELL IT WAS S&ME WHICH WAS I THINK HIRED BY
9 BURIC.

10 Q OKAY, AND WERE THEY HIRED FOR LITIGATION
11 PURPOSES?

12 A NO, THEY WERE, THEY WERE HIRED BECAUSE
13 BURIC DOES NOT NECESSARILY DO A LOT OF PAVEMENT BUT S&ME
14 NEEDED TO DO THE CORE BORES AND THINGS LIKE THAT TO MAKE
15 SURE WE DID THIS PROPERLY.

16 Q LET ME SHOW YOU PLAINTIFF'S EXHIBIT 15 AND
17 ASK YOU IF YOU RECOGNIZE THAT DOCUMENT?

18 A YES, SIR.

19 Q AND PLAINTIFF'S EXHIBIT NUMBER 15 HAS BEEN
20 ADMITTED WITHOUT OBJECTION, WHAT IS THIS DOCUMENT?

21 A THIS IS A BILL FROM PALMETTO SEALING OR
22 PALMETTO PAVING.

23 Q WHAT WAS THIS WORK FOR?

24 A THIS WAS I BELIEVE A DRAINAGE AREA THAT HAD
25 FAILED, IT WAS, I WANT TO SAY IT WAS ABOUT BIG, BIG

1 THE REPAIR SIDE OF A PROJECT THAT GIVES US CLUES AS TO WHAT
2 SOME OF THE PROBLEMS MIGHT BE.

3 Q OKAY, YESTERDAY AND YOU, AGAIN YOU WEREN'T
4 HERE IN THE COURTROOM BUT THERE WAS SOME CROSS EXAMINATION
5 OF MS. HARMON ABOUT WELL THE REPAIR INVOICES WERE ONLY, I
6 THINK HE SAID 40 SOME THOUSAND DOLLARS, \$44,000 THAT YOU
7 GAVE DREW BROWN, AND THERE ARE \$41,477.19, YOU SEE THAT?

8 A YES.

9 Q OKAY, WHEN DID THESE, WHEN ARE THESE REPAIR
10 INVOICES FOR, WHEN DO THEY START AND WHEN DO THEY END?

11 A WELL THEY, I BELIEVE THE EARLIEST, THE
12 EARLIEST DATE OF REPAIR INVOICE I HAD WAS IN '01, JANUARY
13 OF '01 AND THEN THEY ENDED IN, THEY ENDED IN APRIL OF '04
14 AND OUR REPORT WAS ISSUED IN MAY OF '04 SO THERE WAS NONE
15 CONTAINED, OF COURSE, AFTER APRIL OF '04.

16 Q SO YOU DIDN'T HAVE ANY OF THE INVOICES
17 AFTER APRIL OF '04?

18 A THAT'S CORRECT.

19 Q OKAY, AND WHEN, WHEN DID THE HOMEOWNERS
20 HAVE TO START OUT THERE REPAIRING DECKS, I MEAN WHAT IS THE
21 EARLIEST DATE?

22 A WELL THERE WAS A DATE OF 1/18/01 WHERE
23 FLOOR JOIST UNDERNEATH STAIRWELL ON THE GROUND FLOOR WAS
24 NEEDED TO BE REATTACHED AND THERE WAS SOME INDICATION OF
25 STAIRWELL ISSUES.

1 (WHEREUPON, THE COURT PERSONNEL COMPLIES.

2 MR. BROWN: (CONTINUING)

3 A YES, THE SCOPE OF REPAIR IS, IS UNDERLYING
4 BASIS WOULD BE THE RECOMMENDATIONS THAT WERE CONTAINED IN
5 THE 2004 REPORT AS WELL AS ADDITIONAL INFORMATION THAT WAS
6 GAINED SINCE OUR REVIEW OF THE PROJECT IN 2004 SUCH AS
7 WE'VE TALKED ABOUT, OTHER EXPERTS PHOTOGRAPHS, ADDITIONAL
8 SITE REVIEWS, AND OTHER EVIDENCE, AND THE SCOPE WAS PUT
9 TOGETHER WITH AN OVERVIEW SECTION THAT JUST DESCRIBES THE
10 PROJECT AND ITS LOCATION.

11 IT TALKS ABOUT THE BASIS OF THE SITE VISIT AND
12 DOCUMENTS REVIEWED TO PREPARE THE SCOPE OF WORK AND LET ME
13 GET INTO THE SPECIFIC BULLET BY BULLET ITEMS THAT WE ARE,
14 ARE PROVIDING IN THE SCOPE OF THE REPORT, EXCUSE ME, I MEAN
15 LET ME REPHRASE THAT. LET ME GET INTO THE BULLET BY BULLET
16 ITEMS IN GENERAL CLASSIFICATION SUCH AS EXTERIOR CLADDING,
17 MASONRY, WINDOW REMOVAL AND REPLACEMENT, PRIVATE BALCONY
18 AND DECK REPAIRS, AND MISCELLANEOUS REPAIRS; AND THEN WE
19 HAVE A GENERAL CLARIFICATION SECTION WHICH IS INSTRUCTIONS
20 TO THE BIDDERS AS TO WHAT IS EXPECTED AND WHAT SHOULD BE
21 DONE DURING THE COURSE OF IMPLEMENTING THIS SCOPE OF
22 REPAIR; AND THEN WE ALSO PROVIDE FOR AN ALTERNATE THAT
23 WE'LL DISCUSS IN JUST A SECOND AND, AND SOME JUST GENERAL
24 PROPOSAL NOTES. WE ALSO ATTACHED TO THIS FORM A BID SHEET
25 FOR THE CONTRACTORS.

26 AS WE GOT INTO THE SCOPE OF REPAIRING ROMAN

1 FOR HOW MANY HOURS OR MINUTES?

2 MR. BROWN: AT LEAST A COUPLE OF HOURS I'M
3 GUESSING. *

4 MR. HENRY: I WOULD THINK AT LEAST A COUPLE OF
5 HOURS.

6 THE COURT: ALL RIGHT, WE'LL SEE HOW IT GOES,
7 SEE HOW IT GOES. ALL RIGHT, WE'RE READY FOR THEM.

8 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
9 1:59 P.M.)

10 THE COURT: ALL RIGHT, THE JURY IS BACK, GOOD
11 AFTERNOON, MR. HENRY, YOU MAY PROCEED.

12 MR. HENRY: THE PLAINTIFF WOULD CALL MR. CHRIS
13 COOPER.

14 THE COURT: COME AROUND, MR. COOPER.

15 CHRIS E. COOPER

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 MADAM CLERK: STATE YOUR NAME FOR THE COURT,
18 PLEASE SIR?

19 THE WITNESS: CHRIS EDWARD COOPER, C-O-O-P-E-R.

20 DIRECT EXAMINATION

21 BY MR. HENRY:

22 Q MR. COOPER, WHERE DO YOU PRESENTLY RESIDE?

23 A IN LONGS, SOUTH CAROLINA.

24 Q OKAY, AND GIVE THE JURY THE BENEFIT OF YOUR
25 EDUCATIONAL BACKGROUND?

1 HAD FAILED AND WE HAD TO TOTALLY DISASSEMBLE THOSE BALCONY
2 AREAS. THEY WERE NOT USEABLE. WE HAD TO TEAR T111 SIDING
3 OFF WHICH IS A WOOD SIDING THAT COMES IN A FOUR BY EIGHT
4 PANEL. WE HAD TO TEAR STUCCO OFF. WE HAD TO TAKE WINDOWS
5 OUT AND A LITTLE BIT OF CONCRETE WORK AND PUT THE BUILDINGS
6 BACK TOGETHER, A LOT OF WATERPROOFING WORK ON THE WALKWAYS
7 AND BALCONIES.

8 Q HOW MANY BUILDINGS AT SPINNAKER COVE?

9 A ELEVEN.

10 Q ELEVEN?

11 A YES.

12 Q OKAY, LET'S TAKE YOUR PROPOSAL THAT YOU
13 SUBMITTED TO MR. BROWN, BY THE WAY DID, DID, DID ANYONE AT
14 THOMPSON AND HENRY DISCUSS OR HAVE ANY INPUT IN TELLING YOU
15 OR INSTRUCTING YOU ON WHAT TO BID?

16 A NO, THEY DID NOT.

17 Q OKAY, LET ME, LET ME, HOW ABOUT JUST GOING
18 THROUGH THIS BRIEFLY AND TELLING ME EXACTLY WHAT YOU'RE
19 DOING AND WHAT, LOOK, LOOK AT MR. BROWN'S SCOPE OF WORK?

20 A THE BID FORM?

21 Q NO, THE SCOPE OF WORK?

22 A OH, THE SCOPE OF WORK.

23 Q RIGHT, AND THEN TAKE YOUR ESTIMATE AND GO
24 THROUGH AND, AND EXPLAIN TO THE JURY EXACTLY WHAT, WHAT
25 YOU'RE GOING TO DO? DO YOU HAVE YOUR PROPOSAL?

1 A I DON'T HAVE PRIME SOUTH'S PROPOSAL, NO.

2 THE COURT: LET'S STAND FOR A MOMENT, LADIES AND
3 GENTLEMEN.

4 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
5 2:06 P.M.)

6 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER 36A MARKED
7 AND ENTERED INTO EVIDENCE BY STIPULATION.)

8 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
9 2:24 P.M.)

10 THE COURT: OKAY, MR. HENRY?

11 MR. HENRY: (CONTINUING)

12 Q MR. COOPER, WHEN WE TOOK A SHORT RECESS
13 YOU, WE WERE LOOKING FOR THE PROPOSAL FROM PRIME SOUTH; DO
14 YOU HAVE THAT NOW, IT'S 36A?

15 A I DO.

16 Q OKAY, IS THIS THE PROPOSAL THAT YOU
17 PREPARED?

18 A YES, IT IS.

19 Q OKAY, AND WAS THIS THE FIRST PROPOSAL THAT
20 YOU PREPARED FOR PRIME SOUTH?

21 A THE FIRST ONE I PREPARED, YES.

22 Q OKAY, GET THE, THE SCOPE OF WORK AND I
23 DON'T WANT TO GO THROUGH IT LINE BY LINE BUT I WANT TO, I
24 WANT YOU TO TELL THE JURY EXACTLY, WELL FIRST OF ALL LET ME
25 ASK YOU THIS, WERE YOU ASKED TO GO OUT THERE AND DETERMINE

1 WHAT WAS WRONG?

2 A NO.

3 Q OKAY, YOU PRICED THE SCOPE THAT MR. BROWN
4 GAVE YOU?

5 A THAT'S CORRECT.

6 Q IF HE TOOK SOMETHING OFF THE SCOPE THE
7 PRICE MAY GO DOWN?

8 A THAT'S CORRECT.

9 Q IF HE PUT SOMETHING BACK ON THE SCOPE THE
10 PRICE MAY GO UP?

11 A THAT'S RIGHT.

12 Q AND THAT'S THE WAY THESE KIND OF PROPOSALS
13 ARE DONE?

14 A THAT'S RIGHT.

15 Q NOW LET'S LOOK AT THE SCOPE AND YOUR
16 PROPOSAL AND, IF YOU WOULD TELL, TELL THE JURY EXACTLY WHAT
17 YOU'RE DOING AND HOW YOU'RE GOING TO DO IT AT MAGNOLIA
18 NORTH?

19 A WELL BASICALLY THE SCOPE AND THE PROPOSAL
20 ARE PRETTY MUCH ONE IN THE SAME, DO YOU WANT ME TO REVIEW
21 THE SCOPE AND THEN REVIEW THE PROPOSAL?

22 Q WELL YOU CAN JUST GO TO THE PROPOSAL, YEAH,
23 JUST GO THROUGH THE PROPOSAL AND TELL THE JURY EXACTLY
24 WHAT, WHAT YOU'RE DOING AND WHEN I MEAN THE PROPOSAL I MEAN
25 THE, JUST TAKE, WE DON'T NEED TO GO THROUGH, YOU'VE GOT A

1 SEPARATE ESTIMATE FOR EACH BUILDING IN HERE?

2 A THAT'S CORRECT.

3 Q OKAY, SO EACH BUILDING HAS A SEPARATE
4 ESTIMATE?

5 A YES.

6 Q WHY WOULD ALL THE, I'VE LOOKED AT THIS, IT
7 DOESN'T APPEAR TO ME THAT ALL THE BUILDINGS ARE THE SAME?

8 A THEY'RE NOT, THERE'S SOME VARIATIONS WITHIN
9 THE BUILDINGS.

10 Q WHAT KIND OF VARIATIONS ARE THERE?

11 A THEY'RE DESIGNED SLIGHTLY DIFFERENTLY,
12 THEY'RE SHAPED DIFFERENTLY, MAINLY THAT'S IT, THE SHAPE AND
13 SIZE.

14 Q WOULD THEY HAVE MORE COLUMNS OR LESS
15 COLUMNS OR MORE WINDOWS OR LESS WINDOWS?

16 A YES, THERE'S VARIATIONS LIKE THAT, YES.

17 Q OKAY, AND THAT WOULD MAKE THE PROPOSAL FOR
18 EACH ONE BE DIFFERENT?

19 A YES, I BELIEVE THERE'S TWO BUILDINGS THAT
20 ARE IDENTICAL AND THEN THERE'S ANOTHER EIGHT THAT ARE
21 IDENTICAL AND THEN THE REST ARE INDIVIDUAL STYLES.

22 Q OKAY, AND YOU'VE DONE A PROPOSAL FOR EACH
23 ONE OF THEM?

24 A YES.

25 Q OKAY, TELL THE JURY BASED ON THE SCOPE

1 PROVIDED TO YOU MR. BROWN WHAT, WHAT EXACTLY YOU'RE DOING?

2 A OKAY, SHOULD I START WITH BUILDING PERMITS
3 THE WHOLE THING OR WE TALKING ABOUT JUST THE, JUST OF THE
4 WORK ---

5 Q YOU CAN GO THROUGH, YOU DON'T NEED TO READ
6 IT LINE BY LINE BUT --

7 Q OKAY, WELL JUST IN A NUTSHELL WE GOT TO GET
8 THE BUILDING PERMITS AND COORDINATE INSPECTIONS AND WE HAVE
9 TO TAKE JOB DOCUMENTATIONS OF WHAT'S GOING ON ON THE JOB.
10 WE'RE SUPPLYING JOB PROJECT MANAGEMENT SUPERVISION. WE
11 HAVE TO HAVE AN OFFICE TRAILER WHICH IS A JOB TRAILER,
12 STORAGE CONTAINER, DUMPSTER, AND PORTABLE JOHNS OUT THERE.
13 WE HAVE TO HAVE SCAFFOLDS TO ACCESS THE AREAS ON THE WALLS
14 THAT WE'RE GOING TO BE WORKING ON. WE'RE REPLACING ALL THE
15 FIBER WORK TRIM WITH FIBER CEMENT SIDING. WE'RE REPLACING
16 THE LAP SIDING IN THE AREAS SPECIFIED BY THE CBS SCOPE OF
17 WORK. WE'RE REPLACING BRICK AND THE SAME THING IN AREAS AS
18 SPECIFIED BY THE CBS SCOPE OF WORK.

19 Q IS THAT ON THIS EXHIBIT WHERE THE GREEN --

20 A YEAH, LET'S SAY AS SPECIFIED BY THE CBS
21 SCOPE OF WORK IT'S OUTLINED IN EXHIBIT NUMBER 70 WHERE HE
22 HAS GREEN HIGHLIGHTED AREAS ON THE WALLS AND ON THE BRICK
23 SHOWING THE STYLES OF, YOU KNOW, OF WHAT SECTIONS HE WANTS
24 TO BE REPLACED OR HE WANTS FLASH TO BE REPLACED.

25 Q ALL RIGHT?

1 A AND WE'VE GOT ADDING FLASHING ON THE ROW
2 LOCK, REPLACING THE WINDOWS WITH AS SPECIFIED BY CBS WITH
3 PGD HIGH IMPACT WINDOWS, INSTALL PROPER FLASHINGS AT THE
4 WINDOWS. A LOT OF PLACES ON THIS WHERE WE'RE INSTALLING
5 THE PROPER FLASHINGS IT'S SPECIFIED IN THE SCOPE OF WORK TO
6 REFER TO THE ORIGINAL ARCHITECT'S PLANS AND SO WE'LL BE
7 INSTALLING THE FLASHINGS THAT WERE NOT INSTALLED TO BEGIN
8 WITH. USE TYVEK HOUSE WRAP AS A SECONDARY WATER BARRIER
9 WHICH I BELIEVE YOU DID A GOOD JOB EXPLAINING WHAT THAT WAS
10 IN GOING OVER THE WALLS. WE HAVE TO REMOVE THE HANDRAILS
11 SO THAT WE CAN REPAIR THE WALKWAYS. REPAIRING THE WALKWAY
12 IS GOING TO ENTAIL THE WALKWAYS AND THE BALCONIES. I
13 USUALLY CALL THE WALKWAYS THE FRONT AREAS OF THE BALCONIES
14 AND THE BALCONIES THE REAR PRIVATE BALCONIES BUT THOSE HAVE
15 TO BE REPLACED CAUSE THEY'RE NOT SLOPING AS PRE DISCUSSED,
16 AND WE HAVE TO REMOVE THE CARPET, THE SHEATHING OFF THE TOP
17 OF THOSE. WE HAVE TO ADD SHIMS, BY SHIMS I MEAN STRIPS OF
18 WOOD THAT CLOSER TO THE BUILDING IS A LITTLE BIT THICKER
19 AND AS YOU GET AWAY FROM THE BUILDING TAPER DOWN SO THAT
20 THE NEW SHEATHING SLOPES PROPERLY TO ALLOW THE WATER TO
21 DRAIN AWAY FROM THE BUILDING.

22 Q SINCE YOU'RE EXPLAINING THAT I ASKED YOU TO
23 BRING SOME PICTURES TO EXPLAIN TO THE JURY, IF YOU WANT TO
24 COME DOWN HERE, CHRIS, SINCE WE'RE TALKING ABOUT THE
25 BALCONIES --

1 A RIGHT HERE YOU SEE A GUY AND HE'S ROLLING
2 THE CARPET UP OFF OF A WATERPROOF BALCONY, THIS IS THE
3 WATERPROOFING BELOW THE CARPET ON THIS PARTICULAR BALCONY.
4 I'M SORRY --

5 Q NO, GO AHEAD?

6 A I DON'T HAVE IT ON THIS, ON HERE ANYWHERE,
7 BUT UNDERNEATH THIS WATERPROOFING THIS IS SOME SHEATHING
8 AND THAT SHEATHING HAS TO COME OFF AS WELL SO THAT WAY YOU
9 EXPOSE THE FRAMING WHICH YOU SEE IN SEVERAL OF THESE
10 PICTURES. THIS IS A GOOD ONE SHOWING SOME EXPOSED FRAMING,
11 AND THIS IS SHOWING HOW THIS PARTICULAR BALCONY ON THIS
12 PROJECT WAS LEVEL AND THAT'S WHY I HAVE THE LEVEL THERE IN
13 THE CLOSE UP PHOTO. ACTUALLY BY THE WAY OF THE BUBBLE ON
14 THIS PICTURE IT'S ACTUALLY HAVE A NEGATIVE SLOPE OF THE
15 WATER ON THIS BUILDING, IT'S COMING BACK TOWARD THE WALL,
16 AND WHAT WE HAVE TO NEXT IS ADD SOME FURRING WHICH IS WHAT
17 YOU SEE RIGHT HERE IN A CLOSE UP MODE WHICH IS ---

18 Q TURN AROUND SO THESE JURORS CAN ---

19 A SORRY ABOUT THAT, SOME FURRING STRIPS ON
20 TOP OF THESE JOISTS SO THAT, AND YOU MIGHT NOTICE IN THIS
21 PICTURE IT GETS LARGER HERE AND IT GETS SMALLER TOWARD THE
22 END AND THAT'S MAKING IT TAPER OR SLOPE AWAY FROM THE
23 BUILDING BECAUSE THIS BALCONY WAS ALSO BUILT INCORRECTLY
24 WHERE IT WAS BUILT LEVEL AND WASN'T PROVIDING A NEGATIVE
25 SLOPE AWAY FROM THE BUILDING.

1 THOSE PICTURES KIND OF REPEAT THAT SAME THING BUT
2 YOU CAN'T SEE IT AS WELL BUT IT HAS SOME SHIMS ON TOP OF
3 IT.

4 THIS SHOWS SOME TONGUE AND GROOVE TREATED PLYWOOD
5 SHEATHING THAT'S GOING ON TOP OF THESE DECKS AND IT, OF
6 COURSE, WHEN THESE, WHEN THIS TONGUE AND GROOVE PLYWOOD
7 GOES ON TOP OF THE DECKS, ON TOP OF THESE SHIMS YOU CAN
8 TELL THAT IT'S GOING TO MAKE A SLOPE FROM THAT POINT AS IT
9 SHOULD BE.

10 AND THIS IS A FINISHED PICTURE OF THE SHEATHING
11 UP AND THAT'S PRETTY MUCH ON IT HERE THERE'S NO
12 WATERPROOFING.

13 Q AND THAT'S BASICALLY WHAT THE SCOPE CALLS
14 FOR?

15 A THAT POINT, YES.

16 Q IS THAT CORRECT?

17 A WELL THAT'S CORRECT, BUT I MEAN THAT'S NOT
18 COVERING ALL OF IT BECAUSE AFTER THAT POINT WHERE YOU SEE
19 THE SHEATHING WE HAVE TO ADD WATERPROOFING ON TOP OF THAT,
20 WELL ACTUALLY FLASHING AROUND THE PERIMETER EDGE,
21 WATERPROOFING ON TOP OF THAT SO THAT WATER CAN'T SOAK IT
22 THROUGH AND THEN THE CARPET GOES ON TOP OF ALL THAT AND SO
23 THAT WAY IF IT RAIN THE WATER, YOU KNOW, STOPS AT THE
24 WATERPROOFING IF IT'S SLOPED PROPERLY. IF IT WASN'T SLOPED
25 PROPERLY AND THE WATER WAS ABLE TO SIT ON TOP OF THE

1 WATERPROOFING IT EVENTUALLY SOAKS THROUGH. IT'S KIND OF
2 LIKE A, LIKE A ROOF YOU KNOW ON A ROOF YOU HAVE A SLOPED
3 ROOF, IF YOU HAVE SHINGLES OR A FLAT ROOF THEN AND WATER
4 SITS ON IT ALL THE TIME THEN IT WILL FIND ITS WAY IN AND
5 CAUSE DAMAGE SO THAT'S WHY YOU HAVE THE IMPORTANCE OF
6 HAVING A SLOPE, SO ANYHOW WE'VE THE SLOPE WATERPROOFING ON
7 TOP OF THAT AND THEN THE CARPET.

8 THEN WE HAVE TO, WELL I LEFT OUT A STEP, WE HAD
9 TO DETACH THE HANDRAILS IN ORDER TO DO THIS WORK. NOW WE
10 HAVE TO REATTACH THE HANDRAILS IN ORDER, YOU KNOW, GET THEM
11 BACK INTO PLACE. ON THE FRAMING ON MAGNOLIA NORTH, AND
12 IT'S CALLED THAT IN DREW'S SCOPE OF WORK, IT'S MISSING SOME
13 BLOCKING, I THINK HE POINTED OUT, WHERE THESE BOLTS CAN'T
14 ATTACH INTO ANYTHING EXCEPT FOR THE PLYWOOD. SO THE WAY
15 THESE BOLTS ARE THEY GO THROUGH THE PLYWOOD, YOU KNOW, EACH
16 PLACE HAS TWO FOUR BOLTS ON IT AND TWO GO INTO THE FRAME
17 AND ON THE OUTSIDE AS EXISTING AND TWO JUST KIND OF SPIN
18 AROUND FREELY IN THE SHEATHING ON THE INSIDE, THAT'S NOT
19 CORRECT. WE HAVE TO HAVE BLOCKING IN THERE. ALSO THE
20 COLUMNS ARE NOT BUTTING TO EACH OTHER. YOU'VE GOT A COLUMN
21 COMING DOWN FROM, FROM THE SECOND FLOOR MEETING THE COLUMN
22 ON THE FIRST FLOOR AND THERE'S SOME GAPS BETWEEN A LOT OF
23 THEM, I THINK MOST OF THEM, AND SO WE HAVE TO MAKE SURE
24 THOSE ARE SOLID BEARING INSTEAD OF A GAP BETWEEN THEM SO
25 YOU DON'T HAVE ANY SETTLEMENT WHICH CAUSED THAT BUCKLING

1 THAT YA'LL SAW IN THE PICTURES THAT DREW SHOWED I BELIEVE
2 YESTERDAY DURING THE MOVIE OR NOT THE MOVIE BUT THE
3 SLIDESHOW.

4 OKAY, THE CEILINGS, THE CEILINGS ARE CRACKED OUT
5 THERE AND ESPECIALLY AFTER THIS WORK IS DONE THERE'S GOING
6 TO BE MORE DAMAGE TO THE CEILINGS BUT THE CEILINGS DON'T
7 HAVE CONTROL JOINTS IN THEM AND THESE ARE FIRE RATED
8 CEILINGS. BASICALLY IF YOU HAVE A BUILDING IF THIS IS THE
9 BUILDING AND THIS IS YOUR BALCONY AND, AND YOU LIVE UP HERE
10 AND A FIRE STARTS DOWN BELOW HERE YOU WANT YOUR FIRE RATED
11 GYPSON BOARD BELOW THERE THAT GIVES YOU TIME TO ESCAPE AND
12 GET OUT BEFORE THE FIRE COMES THROUGH AND YOUR EGRESS IS,
13 IS BURNED TO PIECES AND YOU CAN'T ESCAPE. THE FIRE RATED
14 CEILINGS OUT THERE HAD CRACKS IN THEM AND I KNOW OVER TIME
15 THEY'VE BEEN REPAIRING THEM BUT THEY'RE GOING TO HAVE TO BE
16 REPLACED.

17 Q THEY ALSO HAVE WATER DAMAGE?

18 A OH, YEAH, THEY HAVE WATER DAMAGE WHERE
19 THEY'RE FALLING APART, COMING APART AND THEY DON'T HAVE
20 EXPANSION JOINTS AND THEY'RE NOT DONE PROPERLY SO THAT HAS
21 TO BE REPLACED ALSO.

22 WE'VE GOT SOME NEW ROOF FLASHING WHERE THERE'S
23 SOME ROOF AREAS THAT ARE ABUTTING TO THE SIDING AREAS. BY
24 ROOF FLASHING I MEAN IT'S A STEP FLASHING SO THAT WHEN
25 WATER COMES DOWN THE WALL IT GETS ON THAT FLASHING AND IT

1 RUNS OUT ON TOP OF THE SHINGLES INSTEAD OF, OR IN BETWEEN
2 THE SHINGLES THAT'S KIND OF LAPPED INTO THEM INSTEAD OF
3 GETTING DOWN INTO THE BUILDING ITSELF.

4 IN THIS PROCESS WE HAVE TO TAKE OFF WALL
5 COMPONENTS AND REPLACE THEM OR REINSTALL THEM SUCH AS
6 PERHAPS SOME DOWN SPOUTS, OTHER ITEMS THAT MAY BE, OTHER
7 COMPONENTS ATTACHED TO THE WALL.

8 WE HAVE TO SEAL THE FIREWALLS IN THE ATTICS IN
9 BETWEEN THE UNITS.

10 WHEN IT'S DONE EVERYTHING HAS GOT TO BE PAINTED
11 AND, OF COURSE, WE'LL HAVE BACKER ROD AND CAULK AROUND THE
12 WINDOW AND DOORS WHICH IS MISSING NOW.

13 WE HAVE BUILDERS RISK INSURANCE AND WE HAVE
14 PERFORMANCE AND PAYMENT BOND INCLUDED IN THIS AND THEN
15 WE'VE GOT TO DEMOBILIZED, TAKE ALL THE SCAFFOLD DOWN AND,
16 AND MOVE IT TO THE NEXT BUILDING. THAT'S KIND OF IN A
17 NUTSHELL.

18 Q AND THERE ARE SOME OWNERS CONTINGENCY I
19 NOTICE 758,717 WHICH IS FOR ALL THE 21 BUILDINGS, CORRECT?

20 A THAT'S CORRECT.

21 Q OKAY, AND THEN THERE'S A CONSTRUCTION
22 ADMINISTRATION FEE AS PER CBS TEN PERCENT, CORRECT?

23 A YES.

24 Q OKAY, AND WHAT IS THE, TO REPLACE ALL THE
25 BRICK?

1 A THERE'S AN ALTERNATE BECAUSE AS SHOWN IN
2 THESE PICTURES HERE, I GUESS TOWARDS THE BACK AND I KNOW
3 YOU GUYS CAN'T ALL SEE IT FROM THERE, BUT AS SEEN IN THE
4 PICTURES WHERE DREW HAS OUTLINED LIMITED AREAS OF BRICK TO
5 BE REMOVED HE HAS AN ALTERNATE TO JUST GO AHEAD AND REPLACE
6 JUST ALL OF IT JUST TO SEE HOW MUCH EXTRA THAT WOULD COST
7 BECAUSE IT'S DIFFICULT GETTING BRICK TO MATCH. WHEN YOU
8 TAKE BRICK OFF OF THE WALL AND YOU REPLACE NEW BRICK THERE
9 YOU CAN SOMETIMES SEE THAT IT'S NEW BRICK THERE SO IT CAN
10 BE DIFFICULT SOMETIMES GETTING BRICK TO MATCH. WE PRICED
11 IT, THOUGH, PER THE CBS REPORT AND ---

12 Q HOW DID YOU PRICE THAT?

13 A THE, THE ALTERNATE?

14 Q YES?

15 A WHAT WE DID IS WE TOOK THE PRICE TO REPLACE
16 ALL THESE OTHER AREAS OF BRICK THAT HE DID NOT HIGHLIGHT, I
17 GUESS WE QUANTIFY THOSE AREAS AND THEN WE CALCULATED WHAT
18 THE PRICE WAS GOING TO BE PER THE BRICK MASONS QUOTE.

19 Q OKAY, AND SO THAT CAME OUT TO 426,320?

20 A CORRECT.

21 Q OKAY, GO AHEAD?

22 A I DO HAVE A NOTE ON HERE THAT GARAGE
23 BUILDINGS ARE NOT INCLUDED IN THIS PROPOSAL. I, I DIDN'T
24 TAKE IT THAT THE, THAT THE DREW BROWN REPORT HAD US TO
25 INCLUDE THE GARAGE, GARAGE IN THE PROPOSALS AND I WAS JUST

1 THINKING YESTERDAY WHEN HE CAME IN WITH THIS PIECE RIGHT
2 HERE WHICH HAS ROT ON IT THAT HE TORE OFF, HE MENTIONED
3 THAT HE TOOK THAT OFF OF ONE OF THE GARAGES, OOPS, ANYHOW
4 HE TOOK THAT OFF OF ONE OF THE GARAGES AND WE DON'T THAT
5 INCLUDED IN OUR PROPOSAL.

6 Q OKAY, AND THAT WOULD COME OUT OF THE
7 CONTINGENCY, I ASSUME?

8 A THAT'S CORRECT.

9 Q ALL RIGHT, THE MOBILIZATION COSTS ---

10 A YES?

11 Q --- WHAT, WHAT, WHAT ARE MOBILIZATION
12 COSTS?

13 A WELL YOU HAVE TO GET ALL THE EQUIPMENT OUT
14 TO THE JOB. YOU HAVE TO GET THE SCAFFOLD OUT TO THE JOB,
15 YOU HAVE TO GET THE JOB TRAILER OUT THERE, YOU HAVE TO GET
16 THE DUMPSTER OUT THERE, THE PORTA JOHNS. WE LAY, WE LAY
17 PLYWOOD DOWN TO TRY TO PROTECT THE PAVEMENT, ALTHOUGH
18 DAMAGES WILL OCCUR TO THE PAVEMENT ON CONSTRUCTION OF THIS
19 MAGNITUDE WHICH I GUESS IS ANOTHER OWNERS CONTINGENCY, BUT
20 MOBILIZATION COST IS THE ERECTING OF SCAFFOLD, JUST, JUST
21 ITEMS TO, TO MOBILIZE TO GET THE EQUIPMENT AND MATERIALS
22 OUT TO THE JOB SITE THAT WE NEED IN ORDER TO DO THE WORK.

23 Q YOU DON'T NEED TO COME DOWN, BUT THIS IS A
24 RECENT JOB YA'LL DID? THESE ARE THE PICTURES YOU TOOK?

25 A I THINK THAT MIGHT BE MORE THAN ONE JOB.

1 Q THESE ARE SOME OF THE JOBS YOU'VE RECENTLY
2 DONE?

3 A THAT'S CORRECT.

4 Q OKAY, AND THE MOBILIZATION THAT'S OCCURRING
5 OUT IN THE PARKING LOT?

6 A YEAH, YOU'LL SEE THERE WHERE YOU SEE THE
7 BARRICADE TO STOP TRAFFIC AND YOU SEE A BUNCH OF MATERIALS
8 THAT'S COVERED UP, AND I'M POINTING AT THE CENTER PICTURE
9 THERE, YOU'LL SEE A DUMPSTER THERE, YOU'LL SEE SOME JOB
10 TRAILERS. I DON'T BELIEVE, YOU DON'T SEE THE PORTA JOHN IN
11 THAT, IN THAT PICTURE, AND YOU DON'T SEE THE OFFICE
12 BUILDING IN THAT PICTURE, THAT'S AROUND THE CORNER. IT'S
13 NOT REALLY, GIVES A FULL PICTURE OF THE MOBILIZATION,
14 THERE'S A LITTLE BIT MORE TO IT THAN THAT.

15 Q ALL RIGHT, AND THAT FIRST COLUMN, AND WE'RE
16 JUST GOING TO GO OVER ONE OF THESE, BUT THE FIRST COLUMN IS
17 DUMPSTER, PORTA JOHN, SIGNS, BARRICADES THAT'S, IS THAT,
18 ARE THOSE STANDARD IN THIS TYPE OF PROPOSAL?

19 A I APOLOGIZE, MR. HENRY, WHEN YOU SAY THE
20 FIRST COLUMN ARE WE TALKING ABOUT ---

21 Q I'M TALKING ABOUT ---

22 A --- THE SPREADSHEET?

23 Q THE FIRST BUILDING?

24 A BID FORM?

25 Q YEAH, 4811?

1 A OKAY.

2 Q RIGHT, THE MOBILIZATION THOSE ARE WHAT
3 YOU'RE TALKING ABOUT THERE?

4 A YES, THE FIRST ITEM IN THE COLUMN A IS
5 MOBILIZATION.

6 Q OKAY, AND THE BUILDING PERMIT HOW DID YOU
7 FIGURE THAT PRICE?

8 A THAT'S BASED, USUALLY \$500 PER \$100,000
9 WORTH OF WORK IS AN AVERAGE COST.

10 Q ALL RIGHT, AND THAT'S, THAT'S WHAT YOU
11 FIGURED FOR THIS JOB?

12 A THAT WOULD BE ABOUT WHAT WE FIGURED, YES.

13 Q AND HOW DID YOU PRICE, FOR EXAMPLE, THE JOB
14 TRAILER?

15 A I FIGURED ON THIS JOB LIKE WHAT WE DO ON
16 MOST JOBS IS, IS WE WHAT I CALL LEAP FROG. WHEN YOU HAVE
17 BUILDINGS IF YOU TRY TO DO THEM ALL AT ONE TIME IT'S JUST A
18 CHAOTIC MESS AND YOU REALLY DON'T HAVE ENOUGH MANPOWER TO
19 DO 21 BUILDINGS AT ONE TIME. LIKE WHEN THEY BUILT MAGNOLIA
20 NORTH I THINK THEY BUILT ONE BUILDING AND THEN THEY MAYBE
21 STARTED ANOTHER BUILDING HALFWAY THROUGH, I BELIEVE, THAT'S
22 TYPICALLY HOW YOU BUILD SOMETHING LIKE. THE SAME WAY IN
23 THE RENOVATION WE'LL START A BUILDING AND HALFWAY THROUGH
24 WE'LL START ANOTHER BUILDING AND HALFWAY THROUGH THAT WE'LL
25 START ANOTHER BUILDING SO THERE'S TWO UNDER CONSTRUCTION AT

1 ALL TIMES AND WE'LL TRY TO DO THEM CLOSE TOGETHER. SO WE
2 KIND OF CONTAIN THE CONSTRUCTION INTO SMALLER AREAS INSTEAD
3 OF THROUGHOUT THE ENTIRE PROJECT SO THE JOB TRAILER, WE'RE
4 ANTICIPATING THESE JOBS TO TAKE A MONTH AND A HALF OR, I'M
5 SORRY, THREE MONTHS EACH SO I HAVE A MONTH AND A HALF FOR
6 THE JOB TRAILER BECAUSE AS I SAID WE'RE DOING TWO BUILDINGS
7 AT ONE TIME AND SO THE JOB TRAILER IS BEING SHARED BETWEEN
8 TWO BUILDINGS SO INSTEAD OF HAVING A JOB TRAILER FOR THREE
9 MONTHS DEDICATED TO THIS BUILDING IT'S REALLY HALF THAT
10 TIME BECAUSE IT'S HALF DEDICATED TO THAT BUILDING AND HALF
11 DEDICATED TO ANOTHER ONE. I HOPE I EXPLAINED THAT WELL.

12 Q WHAT ARE TEMPORARY UTILITIES?

13 A THAT'S GOING TO BE POWER THAT WE NEED FOR
14 THE JOB TRAILER.

15 Q OKAY, AND THEN HOW ABOUT DUMPSTER?

16 A THE DUMPSTER IS JUST WHAT IT SAYS THERE,
17 IT'S A DUMPSTER FOR PUTTING GARBAGE IN, CONSTRUCTION DEBRIS
18 THAT NEEDS TO BE HAULED AWAY.

19 Q ARE THESE THE SAME PRICES YOU'VE RECENTLY
20 PAID IN SOME OF THESE OTHER JOBS?

21 A YES.

22 Q OKAY, SO YOU HAVE A HISTORY OF WHAT THESE
23 THINGS COST?

24 A WE HAVE A HISTORY PLUS WE HAVE QUOTES OF
25 WHAT THESE THINGS COST, TOO.

1 Q OKAY, PORTA JOHN, SIGNS, AND BARRICADES AND
2 THAT SORT OF THING?

3 A CORRECT..

4 Q ALL RIGHT, AND THEN YOU'VE GOT SCAFFOLDING,
5 THAT LOOKS LIKE A PRETTY EXPENSIVE ITEM?

6 A IT IS.

7 Q AND DID YOU GET SCAFFOLDING QUOTES?

8 A YEAH, I HAVE A SCAFFOLDING QUOTE FOR, FOR
9 SCAFFOLD PIECES. A LOT OF THIS IS, IS, IS BRICK BUILDING
10 AROUND THE BOTTOM AND THEN WE'RE GOING TO HAVE SOME TOWERS
11 GOING UP IN THESE CERTAIN AREAS WHERE HE HAS US TAKING THE
12 SIDING OFF TO THE TOP. SCAFFOLDING IS USUALLY ABOUT \$600
13 PER OR \$1600 PER 100 FRAMES PER MONTH AND, AND SO WE GOT
14 4.5 FOR THIS BUILDING SO WE'RE FIGURING IT'S A LITTLE BIT
15 MORE THAN 100 FRAMES BECAUSE WE'RE FIGURING A MONTH PER
16 BUILDING SO WE'RE FIGURING ABOUT 150 FRAMES FOR THIS
17 PARTICULAR BUILDING FOR THE THREE MONTHS DURATION OF THE
18 JOB AND THIS SCAFFOLD IS GOING TO BE A LITTLE MORE
19 EXPENSIVE BECAUSE ON ONE, ON YOUR BOTTOM ROW OF SCAFFOLD
20 YOU'VE GOT WHAT'S BALLED LEG JACKS AND THOSE ARE
21 STABILIZATION JACKS THAT GO DOWN AND YOU SCREW THOSE IN TO
22 MAKE THE SCAFFOLD LEVEL. FROM THAT POINT UP IT GOES UP
23 PRETTY FAST AND EASY BECAUSE YOU DON'T HAVE THOSE ANY MORE.
24 YOU JUST SET THE FRAME ON TOP, PUT A BRACE AND THE FRAME ON
25 TOP AND PUT A BRACE SO, BUT AROUND THIS ONE WE MOSTLY HAVE

1 JUST BOTTOM FRAMES TO THE SCAFFOLD.

2 Q OKAY, AND WHAT DO YOU NEED A FORK LIFT FOR?

3 A BECAUSE WE'VE GOT PGT WINDOWS WE'VE TO TO
4 LIFT UP TO CERTAIN HEIGHTS. THE WINDOWS WE HAVE TO INSTALL
5 NOWADAYS IN AREAS LIKE THIS ONE ARE HIGH IMPACT WINDOWS.
6 WHAT THAT IS THAT'S TWO PIECES OF GLASS ON THE INSIDE WITH
7 A RUBBER PIECE IN BETWEEN THEM AN AIR SPACE AND ANOTHER
8 PIECE OF GLASS AND IT'S DESIGNED SO THAT IF A PROJECTILE I
9 THINK A TWO BY FOUR AT FOUR FEET LONG AT 50 MILES AN HOUR
10 CANNOT BE SHOT THROUGH IT FOR HURRICANE PROTECTION BUT IT'S
11 CURRENT CODE YOU HAVE TO HAVE THAT.

12 Q IS THAT A CHANGE IN THE CODE?

13 A THAT'S A CHANGE IN THE CODE IN THE LAST
14 THREE YEARS I THINK.

15 Q YOU TAKE OFF A WINDOW OUT AND REPLACE IT
16 YOU'VE TO REPLACE IT WITH A CODE COMPLIANT WINDOW?

17 A YOU'VE GOT TO REPLACE IT WITH A CURRENT
18 CODE COMPLIANT WINDOW, THAT'S CORRECT.

19 Q AND HAVE YOU, HAVE YOU INVESTIGATED TO
20 DETERMINE IF MAGNOLIA NORTH REQUIRES CODE COMPLIANT
21 WINDOWS?

22 A YES, WELL NUMBER ONE DREW BROWN'S SCOPE OF
23 WORK CALLED FOR PGT WINDOWS, HIGH IMPACT WINDOWS, SO WE DO
24 IT BY HIS WORK BUT I DID MYSELF CALL THE INSPECTION
25 DEPARTMENT AND ASKED THEM DID THIS PARTICULAR JOB WHERE

1 IT'S AT AND EXPLAINED TO HIM AND TALKED TO THE MAN ACTUALLY
2 IN THIS BUILDING AND HE TOLD ME, YES, IT DOES HAVE TO HAVE
3 HIGH IMPACT WINDOWS PUT BACK INTO IT.

4 Q OKAY --

5 A THE FORKLIFT ALSO WE'VE GOT A LOT OF BRICK
6 WORK TAKING PLACE AND, AND YOU USE A FORKLIFT TO MOVE THE
7 BRICK AROUND. YOU'LL USE THE FORKLIFT TO MOVE THE SCAFFOLD
8 AROUND. WE USE THE FORKLIFT TO USE THE, TO MOVE THE SIDING
9 AROUND. NOW I DON'T HAVE THE FORKLIFT FOR THE DURATION OF
10 EACH BUILDING. WE'LL RENT IT FOR THE PERIOD WE NEED IT AND
11 SEND IT BACK BECAUSE I DON'T BELIEVE WE'RE GOING TO NEED IT
12 OUT THERE ALL THE TIME. IT WOULD NICE TO HAVE ONE OUT
13 THERE ALL THE TIME BUT IF WE ORGANIZE IT PROPERLY WE CAN DO
14 WITHOUT IT ALL THE TIME AND CUT DOWN ON THAT EXPENSE.

15 Q OKAY, AND THE DEMOLITION YOU'RE REMOVING
16 BRICK?

17 A THAT'S CORRECT.

18 Q OKAY, AND THOSE ARE THE BRICKS AROUND WHERE
19 THE GREEN AREAS ARE SHADED BY --

20 A THAT'S RIGHT, THE BRICKS AS OUTLINED ON THE
21 CBS REPORT.

22 Q OKAY, COLUMN CLADDING REMOVAL WHAT ARE YOU
23 DOING THERE?

24 A THE COLUMNS THAT YOU SAW ON THE FRONT OF
25 THE BUILDINGS ONCE THE, THE TRIM AND THE CLADDING REMOVED

1 FROM THAT.

2 Q AND IT WILL BE REPLACED?

3 A IT WILL BE REPLACED.

4 Q OKAY, THE NEXT ITEM YOU'VE GOT IS HARDY
5 PLANK REMOVED?

6 A ONCE AGAIN THAT'S THE HARDY PLANK REMOVAL A
7 LITTLE BIT DIFFERENT. HE'S GOT SOME AREAS HERE WHICH I
8 KNOW YOU CAN'T SEE WELL FROM THERE, BUT HE'S GOT THE HARDY
9 PLANK AREAS OUTLINED WHERE HE'S, HE'S WANTING THAT HARDY
10 PLANK REMOVED. WELL LIKE ON THE RIGHT SIDE OF THIS WINDOW
11 IT MAY COME OUT TWO OR THREE FEET WHERE HE'S WANTING THE
12 HARDY PLANK REMOVED TO DISCOVER THE DAMAGE AROUND THE
13 WINDOW. HARDY PLANK COMES IN 12 FOOT SECTIONS AND SO ON A
14 WALL SECTION LIKE, LIKE THIS ONE RIGHT HERE IT'S LESS
15 EXPENSIVE, MORE PRACTICAL, AND YOU CAN GET A BETTER JOB OUT
16 OF IT TO GO AHEAD AND TAKE OFF ALL THE HARDY PLANK ON THIS
17 SMALL WALL LIKE THIS INSTEAD OF TRYING TO TAKE OFF JUST
18 THIS LIMITED AREAS. SO IT WAS LEFT UP TO US TO DECIDE
19 WHICH IS GOING TO BE THE MOST PRACTICAL WAY TO DO IT AND IN
20 OUR EXPERIENCE, AND WE'VE DONE QUITE A BIT OF IT, YOU
21 WOULDN'T JUST TAKE OFF THAT AMOUNT. AS A MATTER OF FACT BY
22 THE, BY THE HARDY PLANK SPECIFICATIONS, SPECIFICATIONS YOU
23 CAN'T DO THAT BECAUSE YOU HAVE TO STAGGER THE SEAMS AND YOU
24 CAN'T JUST MAKE A STRAIGHT CUT DOWN THERE PLUS IT WOULD
25 LOOK AWFUL IF YOU DID DO IT THAT WAY SO WE HAVE TO TAKE OFF

1 IN THIS AREA, YOU KNOW, ALL THE HARDY PLANK IN THAT SPOT.

2 Q OKAY, DID THE ORIGINAL RECOMMENDATION BY
3 BURIC INCLUDE REMOVING ALL OF THE SIDING?

4 A YES.

5 Q YOU RECALL THAT?

6 A YEAH, I RECALL THAT FROM REVIEW. I WASN'T
7 100 PERCENT INVOLVED IN THE ORIGINAL ONES AS WE DISCUSSED
8 BUT I DO KNOW THAT, RECALL THAT IT DID CALL FOR REPLACEMENT
9 OF ALL THE HARDY PLANK REMOVAL ON THE BUILDING NOT JUST
10 ISOLATED AREAS SO EVEN THOUGH WE'RE GOING A LITTLE BIT
11 BEYOND THESE GREEN AREAS AS I JUST MENTIONED BECAUSE WE
12 HAVE TO DO TO DO IT CORRECTLY WE'RE STILL NOT TAKING ALL
13 THE HARDY PLANK OFF AROUND THE ENTIRE BUILDING LIKE THE
14 ORIGINAL QUOTES.

15 Q JUST AROUND THE WINDOWS, IT'S NOT TAKING IT
16 OFF IN THE FIELD OF THE WALLS WHERE THERE'S NOT DAMAGE?

17 A YEAH, HERE'S A GOOD EXAMPLE, THIS IS AN END
18 WALL AND THEN YOU HAVE THIS LITTLE BARRIER THAT STICKS
19 WHERE ALL THE HARDY PLANK ON THAT BARRIER AREA ON THE FACE
20 OF IT WE'RE TAKING OFF THE STUFF ON THESE WALLS HERE WE'RE
21 LEAVING, THAT'S NOT COMING OFF.

22 Q OKAY, WERE YOU IN FAVOR OF JUST DOING A
23 LIMITED AREA OF THE HARDY PLANK?

24 A I SEE THE REASONING BEHIND IT BUT WHEN I
25 WAS OUT IN THE FIELD I DID NOTICE IN SEVERAL AREAS THE

1 HARDY PLANK ON THE END WALLS WHERE THERE IS NO WINDOWS
2 FALLING OFF. I ALSO PULLED SOME OF IT BACK AND LOOKED AT
3 IT AND I NOTICED THAT THERE WAS AN IMPROPER NAILING PATTERN
4 BUT I WAS NOT OUT THERE TO INSPECT THE BUILDING. I WAS OUT
5 THERE ONLY TO SUPPLY SCOPE OF WORK TO PROVIDE, YOU KNOW,
6 PER THE DREW BROWN'S ESTIMATE.

7 Q OKAY --

8 A OR SCOPE.

9 Q ALL RIGHT ---

10 A I'M SORRY, PROVIDE AN ESTIMATE FOR THE DREW
11 BROWN'S SCOPE OF WORK.

12 Q OKAY, THE BALCONY WALK CARPET AND
13 SHEATHING?

14 A THAT'S UNDER DEMOLITION.

15 Q WHAT ARE YOU DOING THERE, YOU'RE JUST
16 TAKING THAT UP THAT'S UNDER THE DEMOLITION?

17 A YEAH, RIGHT NOW I DON'T KNOW IF YOU
18 MENTIONED IN THE BEGINNING BUT WE ARE UNDERNEATH THE
19 DEMOLITION CATEGORY. THE BALCONY WALKWAY AND CARPET AND
20 SHEATHING WE ARE TAKING THAT OFF, YES.

21 Q OKAY, AND, AND THAT'S TO REPAIR AND PUT A
22 SLOPE ON AND REPAIR THE RAILINGS?

23 A THAT'S TO ACCESS THE FRAMING BENEATH SO
24 THAT WE CAN PUT SOME SHIMS ON IT AS I DESCRIBED SO THAT WE
25 CAN REPAIR THE BALCONIES AND WALKWAYS AS THEY WERE INTENDED

1 TO BE BUILT TO BEGIN WITH.

2 Q WHAT'S THE TONNAGE FEE?

3 A THE TONNAGE FEE IS FOR THE BRICK. ON THE
4 DUMPSTER THEY CHARGE YOU EXTRA PER TON AND, AND WE'VE GOT
5 33 TONS OF BRICK THAT'S COMING OFF ON THIS PARTICULAR
6 BUILDING BASED ON THE AREAS OUTLINED IN GREEN ON HIS REPORT
7 HERE AND SO WE'VE GOT 33 TIMES \$35 WHICH IS YOUR TONNAGE
8 FEE SO WE HAVE TO HAVE THAT, ADD THAT IN EXTRA. IN OTHER
9 WORDS IF YOU FILL A DUMPSTER FULL OF CONCRETE OR BRICK
10 THEY'RE GOING TO CHARGE YOU MORE TO HAUL IT AWAY AND THE
11 LANDFILL IS GOING TO CHARGE MORE TO, TO ACCEPT IT.

12 Q HAVE YOU HAD EXPERIENCE WITH THAT IN THE
13 PAST?

14 A CERTAINLY.

15 Q OKAY, AND THIS, THESE PRICES YOU GOT ARE
16 BASED ON WHAT YOU RECENTLY PAID?

17 A YEAH, IT'S WHAT WE CURRENTLY PAY, YES.

18 Q ALL RIGHT, NOW ELECTRICAL WIRING AND
19 PANELS, WELL THERE'S NOTHING THERE, HVAC DISCONNECT?

20 A YES.

21 Q WHAT IS THAT FOR?

22 A THAT'S WHERE IT, IT'S THE AREAS IN, IN THE
23 BRICK AREAS IN DREW'S REPORT IT'S RIGHT BESIDE WHERE THIS
24 BRICK IS COMING OFF AND YOU'LL SEE THERE'S AN HVAC
25 DISCONNECT RIGHT ADJACENT TO IT THERE, WELL I GUESS YOU

1 CAN'T SEE IT FROM THAT POINT, BUT IF WE HAD THE PICTURE YOU
2 COULD, THERE'S ONE ADJACENT THERE. THERE'S ALSO A LOT OF
3 BRICK COMING OFF ABOVE IT AND SO WE WANT TO MOVE THOSE
4 DISCONNECTS OFF THE WALL AND MOVE THEM OUT OF HARMS WAY SO
5 WHEN THE BRICK COMES DOWN WE DON'T DESTROY THEM.

6 Q WOULD THE AIR CONDITIONER BE CUT OFF AT
7 THAT TIME?

8 A YES.

9 Q OKAY, WHAT ARE MISCELLANEOUS BUILDING
10 COMPONENT \$840.

11 A THAT'S GOING TO BE ITEMS SUCH AS YOUR DOWN
12 SPOUTS, IF THERE'S ANY ELECTRICAL COMPONENTS THAT'S ON THE
13 OUTSIDE, YOU HAVE VENTS ON IT, DRYER VENTS, BATHROOM VENTS,
14 KITCHEN VENTS, ANY ITEM THAT'S ATTACHED TO THE SIDING OR
15 THE CLADDING THAT HAS TO BE REMOVED AND WE HAVE TO TAKE
16 THAT OFF THEN WE CONSIDER THAT A BUILDING COMPONENT
17 REMOVAL.

18 Q OKAY, THEN WE, WE'VE GOT HANDRAIL REMOVAL
19 \$1120, YOU SEE THAT UNDER DEMOLITION?

20 A I'M NOT LOOKING UNDERNEATH 4811, I'M
21 LOOKING UNDERNEATH 4856 SO WE'RE IN A DIFFERENT ORDER. I
22 SEE HANDRAIL REMOVAL BUT AS FAR AS THAT AMOUNT IT'S NOT THE
23 SAME.

24 Q OH, OKAY, 4856?

25 A YEAH, BUT LET ME SWITCH TO 4811 IF YOU'D

1 LIKE?

2 Q THESE ARE THE SAME CATEGORIES, AREN'T THEY?

3 A THEY'RE THE SAME CATEGORIES BUT THE
4 BUILDINGS ARE DIFFERENT SO SOME OF THE NUMBERS ARE
5 DIFFERENT.

6 Q ALL RIGHT, HOW ABOUT BALCONY OR HANDRAIL
7 REMOVAL ON 4811?

8 A LET ME FIND 4811.

9 Q IT'S NOT THE FIRST ONE IN YOURS?

10 A NO, IT'S NOT.

11 Q OKAY, MINE IS --

12 A OKAY, I'M AT 4811.

13 Q ALL RIGHT, ITEM 39?

14 A 38?

15 Q I'M SORRY, YES, YOU'RE CORRECT, 38?

16 A THAT'S THE HANDRAIL REMOVAL BUT THE
17 HANDRAILS ARE GOING FROM THE COLUMNS, THEY'RE ATTACHED TO
18 THE COLUMNS AND THEY'RE ATTACHED DOWN TO THE BALCONIES AND
19 THE WALKWAYS SO WE HAVE TO TAKE OFF THE BALCONIES AND THE
20 WALKWAYS AND WE HAVE TO TAKE THE TRIM OFF THE COLUMN SO
21 NATURALLY WE HAVE TO DETACH THE HANDRAILS FROM THOSE AREAS
22 PRIOR TO DOING THAT AND THAT'S THE DEMOLITION FOR THAT.

23 Q ALL RIGHT, AND THE NEXT CATEGORY IS
24 PROTECTION, WHAT IS THAT?

25 A OKAY, YOU SKIPPED OVER BALCONY CEILINGS.

1 Q I'M SORRY, YOU'RE RIGHT AGAIN, BALCONY
2 CEILINGS?

3 A OKAY, THE BALCONY CEILINGS ARE THE FIRE
4 RATED CEILINGS THAT WE TALKED ABOUT WHERE THE BALCONY
5 CEILINGS HAVE TO COME DOWN AND TO BE REPLACED.

6 Q WE'RE JUST REMOVING AT THIS POINT?

7 A THIS IS JUST THE DEMOLITION CATEGORY OF THE
8 ESTIMATE, YES.

9 Q OKAY, AND THEN WE GO DOWN TO PROTECTION AT
10 42?

11 A YES.

12 Q OKAY, AND WHAT IS PROTECTION?

13 A PROTECTION IS, WELL IT GOES ON DOWN THE
14 LINE 43, 44, 45, 46. WE'VE GOT SOME SIX FOOT POLY WHICH IS
15 PLASTIC WHICH WHEN WE TAKE THE SIDING AND THE BRICK OFF THE
16 WALL IT DOESN'T ALL GET DONE IN A DAY NATURALLY AND WE
17 DON'T WANT TO CAUSE EXTRA, ANY MORE WATER DAMAGE THAN THERE
18 MAY ALREADY BE AND SO WE COVER UP THE WALLS WITH PLASTIC TO
19 PROJECT IT FROM THE WEATHER WHILE WE'RE NOT WORKING. SO,
20 YOU KNOW, YOU TAKE THE BRICK OR THE SIDING OFF THEN YOU
21 COVER THE WALL UP WITH A PLASTIC AND THEN YOU CONTINUE
22 WORKING ON IT THE NEXT DAY SO EVERY DAY THAT IT'S NOT
23 PROTECTED UNTIL THE POINT WHERE WE HAVE THE WEATHER BARRIER
24 LIKE THE TYVEK ON THERE WE NEED TO KEEP IT PROTECTED WITH
25 PLASTIC.

1 Q THAT'S \$660?

2 A YES.

3 Q -- OKAY --

4 A THE TAPE AND THE TACKS UNDERNEATH THAT IS
5 TO INSTALL THE PLASTIC THEN WE HAVE PLYWOOD WHICH IS NEXT
6 WHICH IS THE PLYWOOD, WE PUT PLYWOOD UNDERNEATH THE
7 DUMPSTER AND THE TRAILERS TO TRY TO PROTECT THE ASPHALT THE
8 BEST THAT WE CAN BECAUSE THESE ARE HEAVY PIECES OF
9 EQUIPMENT AND WE ALSO HAVE STORAGE CONTAINERS THAT, YOU
10 KNOW, WHAT THEY DO IS THEY ROLL OFF THE BACK OF A TRUCK, I
11 DON'T KNOW IF YOU'VE SEEN ONE DONE YET, BUT IT ROLLS OUT
12 THE BACK AND THEN IT HITS THE PARKING LOT THEN THEY DROP IT
13 AND IT MAKES A LOUD CLUNKING NOISE WELL THAT WOULD TEAR UP
14 THE ASPHALT IF WE DON'T PUT THE PLYWOOD THERE AND SO THAT'S
15 WHAT THAT'S FOR, HOWEVER DAMAGE DOES HAPPEN BUT THAT
16 MINIMIZES THE DAMAGE.

17 Q OKAY, CARPET RUNNERS?

18 A CARPET RUNNERS IS SO THAT WHEN WE WORK ON
19 THE INSIDE OF THE HOUSE TO REMOVE A WINDOW WE WILL LAY IT
20 ACROSS THE CARPET SO WE DON'T HAVE PEOPLE TRACKING
21 CONSTRUCTION DEBRIS THROUGHOUT SOMEBODY'S HOUSE. IT HELPS
22 PROTECT THE CARPET.

23 Q OKAY, WHAT'S, WHAT'S NEXT?

24 A CARPENTRY AND FRAMING.

25 Q RIGHT?

1 A DO YOU WANT ME JUST GO DOWN THAT CATEGORY
2 LIKE I JUST DID?

3 Q YEAH, RIGHT?

4 A ON THE CARPENTRY AND FRAMING WE HAVE FLOOR
5 SHEATHING AND ADHESIVE AND THAT'S FOR, I'M SORRY, NOT FLOOR
6 SHEATHING AND ADHESIVE, FLOOR SHEATHING ADHESIVE. THAT'S
7 FOR THE ON THE BALCONIES AND THE WALKWAYS WE'LL PUT THE
8 SHEATHING DOWN THAT HAS TO BE ADHERED DOWN WITH WHAT'S
9 CALLED CONSTRUCTION ADHESIVE, IT'S LIKE A GLUE THAT YOU
10 GLUE THE SHEATHING DOWN TO THE FRAMING WITH.

11 THE NEXT LINE DOWN IS FOR THE, THE BALCONY
12 WALKWAY TONGUE AND GROOVE SHEATHING. THAT'S FOR THE PIECES
13 OF PLYWOOD THAT YOU'VE SEEN DURING THIS CASE THAT IS
14 SUPPOSED TO BE USED ON THE BALCONIES IT GETS ATTACHED OVER
15 THE TOP OF OUR, OUR FURRING.

16 THE NEXT CATEGORY DOWN IS STAIR TOWER FRAMES.
17 THIS ONE HAD, THIS PARTICULAR BUILDING HAS ZERO BUT WHAT WE
18 DO HAVE IS SOME OF THE STAIR TOWERS WHEN THE COLUMNS AREN'T
19 FULLY BEARING AS DREW POINTED OUT AND THEY NEED SOME GROUT
20 OR CONCRETE SUPPORT ADDED UP UNDERNEATH IT SO IT'S FULLY
21 BEARING TO SUPPORT THE WEIGHT OF THE STAIRS ABOVE IT AND
22 SOME BUILDINGS HAVE IT AND SOME DON'T AND THIS PARTICULAR
23 ONES DOES NOT.

24 WE HAVE MONEY IN THERE FOR NAILS, OF COURSE, YOU
25 HAVE TO NAIL THE BUILDING OR THE PLYWOOD DOWN. WE HAVE THE

1 BALCONY AND THE WALKWAY FURRING. THE FURRING IS WHAT WE
2 HAD THE PICTURES OF WHERE YOU SAW THE TAPERED MEMBERS.
3 THIS IS GOING TO BE SLIGHTLY DIFFERENT ON THIS PARTICULAR
4 BUILDING BECAUSE OF THE WAY THE JOISTS ARE CONFIGURED BUT
5 NONETHELESS IT IS THE FURRING.

6 Q WHAT DO YOU MEAN THE WAY THE JOISTS ARE
7 CONFIGURED?

8 A WELL ON THE PICTURES THAT YOU SHOWED IT HAS
9 I BELIEVE TWO BY TEN JOISTS, TWO BY TEN FRAME PIECE OF WOOD
10 AND LET'S SAY THIS IS A WALL HERE AND IT HAS THE JOIST
11 COMING OUT PERPENDICULAR FROM A WALL.

12 Q YOU TALKING ABOUT IN THESE PICTURES?

13 A THE ONES YOU SHOWED A WHILE AGO, YEAH, AND
14 ON THIS PARTICULAR PROJECT WHAT WE HAVE IS WE HAVE
15 ENGINEERED FLOOR TRUSSES AND IF THIS IS THE FRONT WALKWAY
16 OF THE BUILDING AT MAGNOLIA NORTH WELL THESE TRUSSES ARE
17 RUNNING LONGWAYS PARALLEL WITH A WALL AS OPPOSED TO JOISTS
18 RUNNING OUT THIS WAY SO THEY HAVE TRUSSES RUNNING LONGWAYS,
19 I BELIEVE THERE'S THREE OR FOUR, AND THEN WHAT WE HAVE TO
20 IS WE HAVE TO ADD, BE CLOSER TO THE WALL A THICKER SHIM AND
21 THEN THE NEXT TRUSS DOWN A THINNER SHIM, THE NEXT TRUSS
22 OVER A THINNER SHIM, SO THAT EVERYTHING TAPERS DOWN, SO
23 INSTEAD OF PERPENDICULAR JOISTS LIKE YOU SAW IN THE
24 PICTURES WE HAVE ENGINEERED TRUSSES THAT IS THE WAY THEY
25 CONSTRUCTED THESE BUILDINGS OUT THERE, A DIFFERENT WAY OF

1 BUILDING IT, SAME AFFECT THOUGH.

2 Q OKAY, ALL RIGHT, WHAT'S NEXT?

3 A FLASHING AND WATERPROOFING.

4 Q ALL RIGHT, GO AHEAD?

5 A OKAY, OKAY, WE HAVE ROOF FLASHING WHICH I
6 EXPLAINED A WHILE AGO IS WHERE YOU HAVE YOUR ROOF JUNCTIONS
7 TOGETHER WITH THE, WITH THE WALLS WHERE THE WALLS MAY COME
8 DOWN AND ABUT TO A ROOF. WE HAVE WINDOW ROUGH OPENING
9 MEMBRANE WHICH IS A FLASHING THAT GOES INSIDE THE WINDOW
10 ROUGH OPENING SO THAT IF THERE'S ANY INCIDENT OF WATER
11 THAT, THE BACKER ROD CAULKING THAT GOES AROUND THE WINDOWS
12 STOPS WATER FROM COMING IN IS A MAINTENANCE ITEM AND SO IF
13 IT'S, IF IT'S, IF IT FAILS WHICH IT WILL DO EVENTUALLY AND
14 HAS TO BE RECAULKED WATER CAN GET IN AND WHAT YOU WANT TO
15 HAVE IS A SECONDARY WATER BARRIER AND FLASHING SO THAT THE
16 WATER DOESN'T GET IN AND CAUSE ANY DAMAGE AND SO THE WINDOW
17 ROUGH OPENING MEMBRANE IS A FLASHING INSIDE THE WINDOW AND
18 IT'S ON THE SIDE AND IT'S ON THE BOTTOM AND IT COMES UP AND
19 FORMS A PAN SO THAT IF WATER GETS IN BEYOND THE WINDOW THAT
20 IT CAN GET INTO THAT PAN AND ESCAPE OUT.

21 WE HAVE WINDOW HEAD FLASHING WHICH IS A HEADER
22 FLASHING ON TOP OF THE WINDOW AS DREW SHOWED IN THE
23 SLIDESHOW YESTERDAY WHICH IS MISSING. THESE DETAILS ARE
24 PRETTY MUCH BASICALLY STRAIGHT OFF THE SET OF PLANS THAT
25 YOU SHOWED YESTERDAY. I DON'T KNOW IF THAT'S ONE OF THEM.

1 Q PEGRAM'S PLANS?

2 A YEAH, THE ORIGINAL ARCHITECTURAL PLANS
3 THESE ARE THE, THESE ARE THE MISSING FLASHINGS THAT WERE
4 INTENDED TO GO INTO THE BUILDING THAT DID NOT THAT NEED TO
5 BE THERE TO PROTECT THE WALLS FROM DAMAGE.

6 BRICK ROW LOCK CAP FLASHING THAT'S THE TOP OF THE
7 BRICK WALL THAT HAS TO HAVE A FLASHING OVER THE TOP IF IT
8 COMING OUT SO THAT WATER CAN'T GET DOWN BEHIND THE BRICK.

9 BALCONY WALKWAY FLOOR WATERPROOFING, THAT'S A
10 WATERPROOFING THAT GOES ON TOP OF THE BALCONIES AND THE
11 WALKWAYS THAT WE TALKED ABOUT THAT GOES ON TOP OF THE
12 PLYWOOD THEN AFTER THAT SEVERAL LAYERS AND SOME FABRIC AND
13 AFTER THAT'S, YOU KNOW, SET AND DRIED UP THEN A CARPET GOES
14 ON THAT.

15 Q WHAT KIND, WHAT BRAND I GUESS I SHOULD SAY
16 OF WATERPROOFING DID YOU SPEC, HYDROSTOP?

17 A EITHER HYDROSTOP OR SEALOFLEX, I DON'T
18 RECALL ON THIS ONE, THEY'RE BOTH GOOD PRODUCTS.

19 Q ALL RIGHT, WHAT'S NEXT?

20 A MISCELLANEOUS LIQUID MEMBRANE AND WHAT THAT
21 IS THAT'S BASICALLY A FIVE GALLON CAN OF A MEMBRANE THAT
22 YOU BRUSH ON AND IT DRIES UP TO A HARD RUBBER AND IT'S A,
23 IT'S A VERY FLEXIBLE HANDY MEMBRANE FLASHING TO HAVE TO
24 KIND OF WATERPROOF AREAS THAT ARE DIFFICULT TO WATERPROOF
25 SUCH AS A PIPE COMING OUT OF A WALL OR, OR OTHER, YOU KNOW,

1 LITTLE HARD TO REACH CORNERS OR SOMETHING LIKE THAT. IT'S
2 JUST A REALLY GOOD FLASHING MEMBRANE.

3 WE'VE GOT HOUSE WRAPPING TACKS WHICH IS FOR
4 INSTALLING THE HOUSE WRAP AND WE ALSO ---

5 Q WHEN YOU SAY HOUSE WRAP WHAT ARE YOU
6 TALKING ABOUT?

7 A TYVEK STICKER WRAP.

8 Q OKAY, MISCELLANEOUS, WELL LET'S SEE --

9 A LOOKING DOWN HERE AND I DON'T SEE WHERE I
10 HAVE A TYVEK IN THIS CATEGORY, I'M SORRY, IT HAS HOUSE WRAP
11 TACKS AND TAPE SO THIS CATEGORY IS FOR THE TYVEK AS WELL AS
12 BUTTON CAPS AND TAPE FOR THE SEAMS.

13 THEN AFTER THAT IS MISCELLANEOUS SEALANTS.
14 THAT'S SEALANTS THAT WE USE IN VARIOUS AREAS BENEATH THE
15 CLADDING, ONCE AGAIN ANOTHER REDUNDANT STEP IN PROTECTING
16 THE BUILDING FROM WATER INTRUSION.

17 Q OKAY, WHAT'S NEXT?

18 A OKAY, AFTER THAT OUR NEXT CATEGORY IS
19 CARPENTRY AND CLADDING. WE'VE GOT THE COLUMN CLADDING AND
20 TRIM WHICH IS WHAT IS CALLED FOR IN THE DREW BROWN REPORT
21 WHICH IS GOING TO BE A HARDY MATERIAL WHICH IS A FIBER
22 CEMENT COMPOSITE BOARD.

23 WE'VE GOT EXTERIOR WALL TRIM WHICH IS THE SAME
24 TYPE OF MATERIAL.

25 WE'VE GOT THE 12 INCH TRIM BAND AT THE DECK AND

1 THE ROW LOCK WHICH IS THE SAME MATERIAL.

2 WE'VE GOT THE WINDOW TRIM WHICH IS THE SAME
3 MATERIAL.

4 WE HAVE EXTERIOR WALL ---

5 Q LET ME STOP YOU RIGHT THERE, THIS CEMENT
6 TRIM?

7 A FIBER CEMENT COMPOSITE TRIM, YES.

8 Q IS THAT WHAT A LOT OF PEOPLE CALL HARDY
9 PLANK?

10 A YEAH, HARDY PLANK IS A FIBER CEMENT
11 COMPOSITE BOARD BUT HARDY PLANK IS ABOUT A QUARTER INCH
12 PLANK, A PIECE OF SIDING YOU PUT ON THE WALL. THE HARDY
13 TRIM WOULD BE THAT SAME MATERIAL ONLY MUCH THICKER TO ACT
14 AS LIKE A ONE BY FOUR TRIM OR A ONE BY TWELVE OR WHATEVER
15 SIZE TRIM YOU NEED FOR THE AREA, SAME MATERIAL.

16 Q AND IT'S FOR EXTERIOR USE?

17 A YES.

18 Q GO AHEAD?

19 A WHICH LINE WAS I ON?

20 Q I BELIEVE YOU WERE ON 85?

21 A 85, OKAY, TWELVE INCH TRIM, ONCE AGAIN THE
22 SAME TRIM.

23 86, WINDOW TRIM, ONCE AGAIN THE SAME TYPE OF
24 TRIM.

25 EXTERIOR WALL HARDY PLANK AND THAT'S THE PLANK

1 WHERE I JUST DESCRIBED TO MR. HENRY WHICH IS A FIBER CEMENT
2 COMPOSITE PANEL. IT'S ACTUALLY A HARDY PLANK IS WHAT THEY
3 HAVE ON THE BUILDING NOW NOT INSTALLED CORRECTLY.

4 Q THAT'S WHERE YOU'RE REMOVING IT AND THAT'S
5 WHERE YOU'VE REMOVING IT AND WE SAW THAT IN THE DEMOLITION
6 AND NOW YOU'RE PUTTING IT BACK?

7 A THAT'S CORRECT, THIS IS PUTTING IT BACK IN
8 THE AREAS WHERE WE TOOK IT OFF AND THESE GREEN HIGHLIGHTED
9 AREAS.

10 Q WINDOW REPLACEMENT?

11 A I'M SORRY YOU JUMPED DOWN, OKAY, YEAH,
12 WINDOW REPLACEMENT, OKAY, WINDOW REPLACEMENT IS TAKING THE
13 OLD WINDOWS OUT AND PUTTING IN THE NEW PGT WINDOWS IN AS
14 OUTLINED IN THE CBS REPORT.

15 Q OKAY, HAVE YOU, HAVE YOU USE PGT WINDOWS
16 BEFORE?

17 A A FEW TIMES, YES.

18 Q OKAY, ARE THEY, YOU CAN BUY WINDOWS IN ALL
19 LEVELS, CAN'T YOU, CHEAP WINDOWS TO THE MOST EXPENSIVE
20 WINDOWS

21 A THERE'S A WIDE VARIETY OF MONIES YOU CAN
22 SPEND ON WINDOWS, YES.

23 Q PGT WINDOWS HAVE, WHERE DO THEY FALL,
24 THEY'RE THE BEST, THE HIGHEST PRICE OR THE CHEAPEST?

25 A NO, THEY'RE NOT THE TOP OF THE LINE WINDOW.

1 THEY'RE A VERY COMPETITIVE WINDOW USED IN COMMERCIAL
2 PROJECTS. THEY'RE NOT A, THEY'RE NOT THE CHEAPEST WINDOW
3 BUT THEY'RE CERTAINLY NOT A PELLAN WINDOW OR AN ANDERSON
4 WINDOW. THEY'RE, THEY'RE COMMONLY USED ESPECIALLY WITH THE
5 HIGH IMPACT RATINGS THEY CALL FOR NOW BUT THEY'RE A VERY
6 COMPETITIVELY PRICED WINDOW AND THEY FUNCTION VERY WELL.

7 Q DID YOU HEAR MR. BROWN TESTIFY THAT THERE
8 WERE CAPITAL WINDOWS OUT THERE?

9 A YEAH, I DID.

10 Q HAVE YOU EVER USED CAPITAL WINDOWS?

11 A NO, I'VE NEVER USED CAPITAL WINDOW BEFORE.

12 Q WHERE WOULD THEY FALL; DO YOU KNOW?

13 A THE VENDOR THAT I USE A LOT WITH BUILDERS
14 FIRST SOURCE AND I'VE USED THEM FOR YEARS HE REFUSES TO
15 SELL THEM TO ME. HE SAYS THEY'RE THE CHEAPEST WINDOWS ---

16 MR. BROWN: YOUR HONOR, HE'S HEARSAYING AGAIN.

17 Q DON'T GO INTO WHAT HE ---

18 A OH, OKAY.

19 Q DON'T GO INTO WHAT HE TOLD YOU?

20 A OKAY, THEY FALL INTO THE BOTTOM OF THE LINE
21 WINDOW YOU CAN GET, ABOUT THE LOWEST GRADE WINDOW YOU CAN
22 GET, CHEAP.

23 Q ALL RIGHT, LET'S GO ON TO BALCONY RAILS?

24 A OKAY, THAT'S WHERE YOU'RE INSTALLING THE
25 BALCONY RAILS IN THE AREAS WHERE WE HAD TO, WELL ALL THE

1 BALCONY RAILS BECAUSE WE HAVE TO TAKE THEM DOWN, WE HAVE TO
2 PUT THEM BACK UP, REINSTALL THEM.

3 Q BRICK ROW LOCK?

4 A BRICK ROW LOCK IS INSTALLING THE BRICK IN
5 THE ROW LOCK AREAS WHICH IS THE, A DIFFERENT PRICE CAUSE
6 IT'S NOT A FLAT WALL. A ROW LOCK IS A BRICK THAT SITS DOWN
7 AT AN ANGLE AND IT'S A DIFFERENT SHAPE AND IT GOES AT THE
8 SILLS AND IT GOES AT THE TOP OF ALL THE BRICK WALLS.
9 THE BRICK AROUND THE WINDOWS IS, IS WHERE IT'S BEEN TOO
10 THIN AROUND THE WINDOWS IN THESE AREAS RIGHT HERE AS
11 OUTLINED IN GREEN.

12 Q CAN YOU MAKE THOSE BRICKS MATCH?

13 A CLOSE, SOMETIMES YOU GET LUCKY AND
14 SOMETIMES YOU DON'T SO IT'S NOT A GUARANTEE THE BRICK IS
15 GOING TO MATCH. IT'S, THE MORTAR CERTAINLY WON'T MATCH
16 CAUSE YOU'RE GOING TO HAVE OLD MORTAR VERSUS NEW MORTAR.
17 WE CAN GET IT CLOSE BUT NOT A DEAD ON MATCH.

18 Q OKAY ---

19 A EVEN IF YOU ORDER THE SAME BRICK FROM THE
20 SAME COMPANY A YEAR LATER THEY HAVE DIFFERENT BATCHES AND
21 DIFFERENT MATCHES DON'T MATCH THE SAME SO ---

22 Q KIND OF LIKE CARPET?

23 A I GUESS KIND OF LIKE CARPET, I'M NOT A
24 CARPET EXPERT. I KNOW A LITTLE MORE ABOUT BRICK THAN
25 CARPET BUT, BUT IT WON'T BE AN EXACT MATCH.

1 Q ALL RIGHT --

2 A WHERE WE AT BALCONY CEILINGS?

3 Q YES?

4 A OKAY, THAT'S INSTALLING THE BALCONY

5 CEILINGS, THE FIRE RATED DRYWALL CEILINGS THAT WE HAD TO

6 TAKE OFF. THEN WE HAVE BALCONY PAINT AND THAT'S HAS TO BE

7 PAINTED.

8 THEN WE HAVE WINDOW JAMB EXTENSION WORK THAT HAS

9 TO BE DONE. WHAT THAT IS IS ON THE, IF YOU LOOK AT THE

10 INSIDE OF THE UNIT AND YOU'RE LOOKING OUT AND YOU HAVE YOUR

11 WINDOW AND YOU HAVE YOUR DRYWALL THERE'S A LITTLE RETURN OR

12 A LITTLE AREA ABOUT THAT WIDE WHERE THE WINDOW KIND OF

13 SETS, IT'S KIND OF RECESSED. WELL THE NEW WINDOWS AREN'T

14 GOING TO BE THE SAME THICKNESS AS THE OLD WINDOWS. THEY'RE

15 GOING TO BE A LITTLE BIT THICKER AND SO THAT, THAT WOOD OR

16 DRYWALL WHATEVER THE CASE MAY BE IS GOING TO HAVE TO BE

17 MODIFIED, IT'S GOING TO HAVE TO BE TAKEN OUT AND MADE TO

18 FIT SO THAT IT WILL ACCOMMODATE THE NEW WINDOW COMING IN,

19 THE NEW PGT WINDOW THAT COMES INTO PLACE.

20 INTERIOR WINDOW JAMB TRIM AND PAINT, IT HAS TO BE

21 PAINTED.

22 WALL BRICK, THAT'S A DIFFERENT PRICE, JUST A

23 LITTLE BIT LOWER THAN THE OTHER AREAS BECAUSE IT'S JUST

24 FLAT WALL BRICK AND SO WE PRICED THE BRICK ACCORDINGLY TO

25 THE DIFFERENT AREAS CAUSE SOME OF IT IS MORE EXPENSIVE TO

1 INSTALL, SOME OF IT'S LESS EXPENSIVE TO INSTALL ACCORDING
2 TO ---

3 Q WHY IS THAT?

4 A WELL BECAUSE THE BRICK ROW LOCK IS MORE
5 EXPENSIVE BRICK AND IT'S MORE TIME CONSUMING TO INSTALL,
6 FOR A BRICK MASON TO INSTALL THAT THAN IT IS JUST A FLAT
7 WALL BRICK. IN AREAS WHERE WE HAVE TO TOOTH THE BRICKS
8 AROUND THE WINDOWS HE HAS TO CLEAN OFF THE MORTAR AND TOOTH
9 IT IN TO THE, TO THE DIFFERENT BRICKS THAT ARE EXISTING AND
10 SO THAT'S MORE EXPENSIVE THAN JUST TAKING THE WHOLE FLAT
11 WALL AND, AND BUILDING IT FROM THE GROUND UP. THEY CAN,
12 THEY CAN KIND OF JAM OUT AND TO THAT PRETTY FAST WHEREAS
13 THE OTHER WORK IS MORE TEDIOUS AND SO THE PRICES REFLECT
14 THAT.

15 Q ALL RIGHT, EXTERIOR FINISHES?

16 A OKAY, WE'VE GOT PAINT AND CAULK ON THE
17 OUTSIDE. WE'VE GOT ---

18 Q LET ME ASK YOU ABOUT THAT, THAT'S PAINTING
19 ALL OF THE HARDY PLANK?

20 A THAT'S CORRECT.

21 Q WHETHER YOU'VE TAKEN IF OFF OR NOT?

22 A THAT'S CORRECT.

23 Q WHY ARE YOU DOING THAT OTHER THAN IT'S IN
24 THE SCOPE?

25 A WELL OTHER THAN IT'S IN THE SCOPE BECAUSE

1 IT WON'T MATCH. THE PAINT YOU HAVE OUT THERE NOW IS A FEW
2 YEARS OLD AND IF YOU WERE TO PAINT SOME OF IT BRAND NEW AND
3 THEN LEAVE THE OTHER PAINT THAT'S A FEW YEARS OLD EVEN
4 THOUGH THE PAINT MAY BE IN GOOD SHAPE IT'S NOT GOING TO
5 LOOK THE SAME SO IT WILL LOOK KIND OF HODGE PODGE. IT
6 WON'T MATCH SO EVEN IF IT'S BEEN PAINTED TWO YEARS AGO AND
7 THEN YOU GO AND PAINT ANOTHER RIGHT BESIDE IT TODAY IT'S
8 NOT GOING TO MATCH EVEN THOUGH THAT AREA ONLY HAS TWO YEARS
9 OF PAINT ON IT IT MAY CAN LAST ANOTHER THREE OR FOUR WHO
10 KNOWS IT'S NOT GOING TO MATCH UNLESS YOU PAINT THE WHOLE
11 THING.

12 THEN WE HAVE WALL COMPONENTS AND THAT'S WHERE
13 WE'RE REINSTALLING THE GUTTERS, THE DOWNSPOUTS, THE VENTS,
14 THE OTHER ITEMS THAT I MENTIONED A WHILE AGO THAT WE HAVE
15 TO TAKE OFF IN ORDER TO TAKE THE CLADDING OFF.

16 Q ALL RIGHT, WHAT'S NEXT?

17 A WALL REPAIR BEHIND THE BRICK AND IT'S
18 SHEATHING REPLACEMENT AND THIS AMOUNT WAS QUANTIFIED BY
19 DREW BROWN IN HIS REPORT.

20 Q IS THAT TO REPLACE THE ROTTEN SHEATHING
21 BEHIND THE ---

22 A BRICK.

23 Q --- BRICK AND THE WINDOWS THE HARDY PLANK
24 YOU TAKE OFF?

25 A AT THE BRICK WALL AREAS, YES.

1 Q OKAY ---

2 A NOT THE HARDY PLANK AREAS JUST THE BRICK.

3 Q OKAY --

4 A IN HIS REPORT IT'S QUANTIFIED THE, AS I
5 UNDERSTAND IT IT'S QUANTIFIED THE BRICK IS THAT NEED TO
6 COME OFF AND SO THAT'S HOW WE FOLLOWED IT ON OUR ESTIMATE
7 ON THE REPAIR. IT DID NOT QUANTIFY IT ON THE, ON THE HARDY
8 PANEL, JUST THE BRICK AREAS.

9 Q HOW, HOW, HOW MUCH, WHAT PERCENTAGE OF THIS
10 BID THAT YOU, THAT YOU SUBMITTED IS FOR REPAIR OF ROTTEN
11 SHEATHING?

12 A WELL I DON'T KNOW ABOUT JUST THE ROTTED
13 SHEATHING BUT ---

14 Q OR ROTTEN STUFF?

15 A WELL I DID AN ANALYSIS TO FIGURE OUT THE
16 WALL FRAMING DAMAGE, THE WALL SHEATHING DAMAGE BEHIND THE
17 BRICK AND THE HARDY PLANK, THE INSULATION AND THE INTERIOR
18 SHEETROCK DAMAGE AND REPAIRS THAT IS GOING TO BE REQUIRED
19 BECAUSE I WANTED TO SEE WHERE IT FELL INTO PLAY WITH OUR
20 OTHER JOBS THAT WE'VE, WE'VE DONE AND IT CAME IN AROUND
21 SIX, FIVE OR SIX PERCENT OF THE ENTIRE JOB.

22 Q OKAY, HOW DOES THAT, IN YOUR OPINION IS
23 THAT ADEQUATE?

24 A I DON'T BELIEVE SO.

25 Q AND WHAT DO YOU BASE THAT ON?

1 A WELL MOST RECENTLY I BASED IT ON THREE JOBS
2 WE DID, SPINNAKER COVE WAS A PROJECT SIMILAR TO THIS AND
3 THE, THAT PERCENTAGE OF HIDDEN DAMAGE WAS MORE, IS ABOUT 25
4 PERCENT. LIGHTKEEPERS VILLAGE WAS 16 CONDOMINIUMS AND THAT
5 DAMAGE WAS ABOUT 30 PERCENT. THE BUILDING WE'RE ON NOW
6 OCEAN BRIDGE AND THEY'VE GOT TERMITE DAMAGE AS WELL BUT A
7 LOT OF WATER DAMAGE AND THAT'S EXCEEDING 55 PERCENT. NOW
8 THOSE BUILDINGS ARE A LITTLE BIT OLDER, THE LAST ONE IS,
9 BUT THE OTHER TWO ARE NOT, THEY'RE ABOUT THE SAME AGE SO
10 THIS BEING IT'S AROUND FIVE TO SEVEN PERCENT, RIGHT AROUND
11 SIX PERCENT I THINK IT'S PRETTY LOW. HAD IT BEEN ME I
12 WOULD HAVE DONE IT DIFFERENT BUT I FOLLOWED THE CBS SCOPE
13 OF WORK.

14 Q ALL RIGHT, AND THEN YOU'VE GOT THE BAND
15 BOARD REPLACEMENT THAT'S THE REPLACEMENT OF THOSE BAND
16 BOARDS THAT WE SAW IN THE PHOTOGRAPHS?

17 A I APOLOGIZE WHAT LINE?

18 Q ONE HUNDRED-TWENTY, I BELIEVE?

19 A YEAH, YEAH, OKAY, THAT'S BAND BOARDS BEHIND
20 THE BRICK THEN BELOW THAT WE HAVE WALL STUD REPLACEMENT
21 BEHIND THE BRICK AND --

22 Q ALL RIGHT, AND THEN THE ALLOWANCES, WHAT,
23 WHAT ARE ALLOWANCES? WELL YOU'VE ALREADY DESCRIBED THAT,
24 WHY, WHY DO YOU USE ALLOWANCES FOR WALL FRAMING DAMAGE AND
25 WALL SHEATHING DAMAGE AND, AND, AND UNDER HARDY PLANK?

1 A WELL I DIDN'T UNDER THE BRICK BECAUSE DREW
2 CALLED FOR IT IN HIS REPORT TO ADD THIS AMOUNT. THE REASON
3 I DID IT IN THE HARDY PLANK AREAS IS BECAUSE IT WASN'T
4 THERE. IT WASN'T IN THE REPORT TO QUANTIFY IT IN THOSE
5 AREAS BUT I KNOW IT'S GOING TO BE THERE AND WHAT WE'VE DONE
6 IS I'VE TAKEN ABOUT A THIRD OF THE AMOUNT OF SQUARE FOOTAGE
7 OF THOSE AREAS AND FIGURED THAT THAT'S GOING TO BE DAMAGE
8 AND IN OUR EXPERIENCE ON THE BUILDING WE'VE DONE I BELIEVE
9 THAT TO BE AN EXTREMELY FAIR ASSESSMENT ALTHOUGH OVERALL,
10 YOU KNOW, LIKE WE JUST DISCUSSED THE PERCENTAGE WISE IT'S
11 STILL A LOT LOWER THAN WHAT I BELIEVE THE DAMAGE IS GOING
12 TO BE OUT THERE.

13 Q OKAY ---

14 A BUT IT'S AN ALLOWANCE BECAUSE IT'S NOT A
15 QUANTIFIABLE AMOUNT, I DON'T KNOW WHAT IT'S GOING TO BE
16 UNTIL WE TAKE IT OFF, UNTIL WE TAKE OF THE HARDY PLANK.

17 Q WELL YOU GET THIS JOB AND THE WALL
18 SHEATHING DAMAGE WHICH YOU'VE ESTIMATED HERE, THE \$1,094
19 UNDER THE HARDY PLANK IS MORE THAN THAT, WHERE DOES THAT
20 MONEY COME FROM?

21 A THE HOMEOWNERS.

22 Q OKAY --

23 A THAT'S WHY THEY HAVE THE HOMEOWNER
24 CONTINGENCY.

25 Q OKAY, ALL RIGHT, ALLOWANCES UNDER, THAT'S

1 THE FRAMING DAMAGE, INSULATION DAMAGE AND INTERIOR
2 SHEETROCK DAMAGE, WHAT ARE THOSE CATEGORIES?

3 A I'M SORRY, SAY THE INSULATION DAMAGE, THE
4 INTERIOR SHEETROCK DAMAGE?

5 Q YES?

6 A OKAY, THE INSULATION DAMAGE IS GOING TO BE
7 WHERE THERE'S WET INSULATION WHERE WATER GOT INTO THE WALL
8 CAVITY. THE INTERIOR SHEETROCK DAMAGE IS NOT LIMITED TO
9 STAINS OR ANY CRACKS THAT ARE EXISTING NOW. WHAT HAPPENS
10 IS WHEN YOU DO A RECLAD ON AN EXISTING STRUCTURE YOU'RE
11 DOING A LOT OF WALL VIBRATION. YOU'RE, YOU'RE TAKING BRICK
12 APART, YOU'RE TAKING THE HARDY PLANK OFF THE WALL, YOU'RE
13 PRYING, YOU'RE PULLING, YOU'RE SHAKING ON THIS WALL STUD
14 AND THAT CAUSES WHAT'S CALLED NAIL POPS ON THE SHEETROCK
15 WALLS ON THE INSIDE CAUSE THE DRYWALL ON THE INSIDE IS
16 ATTACHED WITH EITHER NAILS OR SCREWS THEN IT HAS A THIN
17 LAYER OF SHEETROCK MUD THAT GOES OVER THE OVER THE TOP OF
18 THAT. WELL THE WALL VIBRATION ENDS UP POPPING THAT LITTLE
19 SHEETROCK MUD OFF, IT ALSO CAUSES CRACKS, SO WHAT WE'RE
20 DOING BY DOING THE EXTERIOR WALL CLADDING REPLACEMENT WE'RE
21 DAMAGING THE WALL ON THE INSIDE. IT'S UNAVOIDABLE, BUT
22 IT'S NOT QUANTIFIABLE AND, AND THAT'S WHY IT'S UNDER
23 ALLOWANCES AND SO THAT IS VERY ---

24 Q WHAT KIND OF ALLOWANCE HAVE YOU GOT THERE?

25 A FOR THE INTERIOR SHEETROCK DAMAGE?

1 Q YES?

2 A I'VE GOT, IT'S, IT TOTALS UP TO BE 13,
3 \$1,380 FOR THIS ENTIRE BUILDING.

4 Q FOR THE ENTIRE BUILDING?

5 A WELL FOR THE AREAS IN THE BUILDING, THAT
6 DOESN'T MEAN FOR 1,380, WHEN I SAID THE ENTIRE BUILDING I
7 MEAN FOR THIS ONE BUILDING THAT'S OUR ALLOWANCE OF WHAT WE
8 ANTICIPATE ISOLATED DAMAGE TO BE. THAT'S NOT ENOUGH TO
9 COVER, I MEAN IF THE ENTIRE BUILDING IS DAMAGED ON THE
10 INSIDE THAT'S, THAT'S NOT GOING TO TOUCH IT.

11 Q RIGHT ---

12 A THAT'S NOWHERE NEAR ENOUGH.

13 Q OKAY, WHY DO YOU HAVE INTERIOR PAINT?

14 A BECAUSE IF WE HAVE DRYWALL DAMAGE, WHICH WE
15 WILL, AND WE HAVE TO PATCH IT THEN YOU HAVE TO PAINT THOSE
16 AREAS AS WELL.

17 Q OKAY, INTERIOR FLOOR FINISHES?

18 A THOSE ARE FOR AREAS ---

19 Q \$700 FOR THE WHOLE, WHAT --

20 A THE BUILDING, YEAH.

21 Q RIGHT --

22 A WHICH MAY OR MAY NOT BE ENOUGH MONEY FOR IT
23 AND THAT'S WHERE WATER COMES IN BENEATH THE WINDOW AS
24 YOU'VE SEEN IN THE DREW BROWN SLIDESHOW AND WHEN IT GOES
25 DOWN IT TRAVELS DOWNWARD AND OFTEN HITS THE FLOOR AND SO

1 YOU HAVE TO PULL THE FLOORING BACK AND THEN YOU HAVE TO
2 REPAIR THE FLOOR. WELL IT MAY HAVE CARPET THERE AND THE
3 CARPET MAY HAVE MOLD AND SOME CARPET MAY HAVE TO BE
4 REPLACED OR THERE'S GOING TO BE TILE IN SOME AREAS AND THEN
5 SO YOU'LL HAVE TO PULL THE TILE UP AND THE TILE HAS TO BE
6 REPLACED, THAT'S WHAT THAT COVERS.

7 Q IS THAT COMMON TO INCLUDE THAT IN, IN THESE
8 KINDS OF REPAIRS?

9 A THAT'S EXTREMELY COMMON, WE RUN ACROSS THAT
10 ALMOST ALL THE TIME.

11 Q ALL RIGHT, WHAT ARE THE, THE NEXT
12 CATEGORIES?

13 A I KEEP LOOKING AWAY FROM ---

14 Q ONE HUNDRED THIRTY-THREE?

15 A OKAY, WE HAVE, LET ME GO AHEAD AND COVER
16 THESE THREE AT THE SAME TIME, WE'VE GOT ELECTRICAL,
17 PLUMBING, AND HVAC.

18 Q AND HOW MUCH ARE EACH ONE OF THOSE?

19 A \$500.

20 Q ALL RIGHT --

21 A AND WHY WE HAVE MONIES IN THERE FOR THAT IS
22 BECAUSE WHEN WE'RE INSTALLING THE, WHEN WE'RE TAKING THE
23 FRAMING APART YOU HAVE, YOU HAVE PLUMBING RUNNING THROUGH,
24 YOU HAVE ELECTRICAL, AND YOU HAVE SOME HVAC WIRES RUNNING
25 THROUGH THE FRAMING SO SOMETIMES YOU HAVE TO DISCONNECT

1 THAT SO THAT YOU CAN DO YOUR FRAMING WORK AND THEN RERUN
2 THE WIRES THROUGH. ALSO WHAT OCCURS OFTEN IS WHEN YOU'RE
3 NAILING THE SHEATHING BACK UP YOU MAY END UP, YOU KNOW, IF
4 AN ELECTRICAL WIRE OR PLUMBING LINE OR HVAC LINE IS NOT IN
5 THE RIGHT PLACE, MAY BE TOO CLOSE TO THE EDGE OF THE WALL,
6 THEN YOUR NAIL COULD PENETRATE THAT LINE AND SO WHEN WE'RE
7 PUTTING OUR SHEATHING UP OR WE'RE PUTTING EVEN OUR HARDY
8 PANEL BACK, HARDY PLANK BACK UP AND THEN YOU PUNCTURE A
9 HVAC LINE, WHICH IS A VERY COMMON OCCURRENCE, I THINK WE
10 HAD IT HAPPEN AT LIGHTKEEPERS MAYBE ABOUT EIGHT TO TEN
11 TIMES I THINK, THEN YOU END UP PAYING ABOUT \$400 FOR THE
12 HVAC GUY TO COME OUT THERE AND FIND THE LEAK AND THEN FIX
13 THE LEAK AND THEN THAT ALL HAS TO BE REPAIRED.

14 Q OKAY, LANDSCAPE?

15 A THAT'S TO TRY TO REPAIR THE LANDSCAPE THE
16 BEST WE CAN FROM WHERE IT'S BEEN TORN UP AND IT GETS TORN
17 UP BECAUSE WE HAVE SCAFFOLD BUILT AROUND THE BUILDING AND
18 THEN WE'VE GOT A LOT OF FOOT TRAFFIC, SOMETIMES THE GROUNDS
19 WET AND THEN YOU GOT CONSTRUCTION WORKERS WALKING AROUND
20 AND IT CREATES PATHS IN THE GRASS AND THERE'S A LOT OF
21 DAMAGE THAT HAPPENS TO THE LANDSCAPE, WHEN YOU TAKE THE
22 BRICK PART FALLS DOWN IT SMASHES THE SHRUBS.

23 Q AND HOW MUCH DO YOU HAVE IN THERE FOR THAT?

24 A \$2500 FOR THIS BUILDING.

25 Q GARAGE WALKWAY ROOF TIE IN?

1 A THAT'S WHERE, THAT'S WHERE IT'S LIKE I SAID
2 A WHILE AGO SOME OF THE BUILDINGS HAVE THE GARAGE WALLS ARE
3 TIED INTO THE BALCONIES SOME DON'T. -- WHEN I SAID EARLIER
4 THIS PARTICULAR BUILDING DIDN'T THAT'S WHEN WE WERE LOOKING
5 AT DIFFERENT SETS OF BUILDINGS, I WAS NOT LOOKING AT 4811
6 WHICH YOU WERE, BUT THIS, THIS IS A REPAIR FOR THAT AREA
7 WHERE THE GARAGE WALK AND, AND THE ROOF TIE IN.

8 Q ALL RIGHT --

9 A THEN WE HAVE ATTIC FIREWALL REPAIR, THAT'S
10 \$1200 TO GO INTO THE FIREWALLS. THE FIREWALLS ARE WALLS
11 THAT EXTEND UP INTO THE ATTIC THAT DIVIDE THE UNITS UP SO
12 THAT IF ONE UNIT CATCHES ON FIRE IT GIVES THE PERSON IN THE
13 NEXT UNIT TIME TO ESCAPE TO AVOID CATCHING ON FIRE
14 THEMSELVES.

15 Q HOW MUCH DO YOU HAVE IN THERE FOR THAT?

16 A \$1200, IT'S THREE FIREWALLS AT \$400, THAT
17 WOULD BE ABOUT 200 BUCKS ON EACH SIDE.

18 Q OKAY, AND SCREEN PORCH ENCLOSURE?

19 A NOT ALL THE BUILDINGS HAVE OR NOT ALL THE
20 WALKWAYS HAVE SCREEN PORCH ENCLOSURES. ON THIS PARTICULAR
21 BUILDING I BELIEVE I GUESS TWO OF THEM DID AND, AND SO
22 WE'VE GOT TO TAKE THE SCREEN OFF ON THE PORCH AREA BECAUSE
23 WE'VE GOT TO DO ALL THE WORK AND THEN WE'VE GOT TO PUT THE
24 SCREEN BACK ON.

25 Q ALL RIGHT, THEN THE NEXT CATEGORY IS WHAT?

1 A MISCELLANEOUS LABOR EXPENSES, IT STARTS
2 WITH SUPERVISION. I'VE GOT IT AT SIX WEEKS ON THIS
3 PARTICULAR JOB WHICH IS ABOUT A MONTH AND A HALF FOR THIS
4 SUPERVISOR. THE REASON I ONLY HAVE HIM FOR A MONTH AND A
5 HALF ON A THREE MONTH JOB IS BECAUSE HE'S GOING TO BE
6 RUNNING TWO AT THE SAME TIME SO HIS EXPENSES ARE GOING TO
7 BE SHARED BETWEEN THE TWO BUILDINGS AND THAT'S ANOTHER
8 EFFORT TO REDUCE THE COST OF THE, OF THE PROJECT TO KEEP
9 THE PRICES DOWN.

10 AFTER THAT WE HAVE CLEAN UP WHICH I HAVE A TOTAL
11 OF \$200 FOR MATERIALS, YOU KNOW, FLOOR CLEAN UP AND 120
12 HOURS IN LABOR. WE CLEAN UP A JOB ON A DAILY BASIS. IF
13 YOU DON'T GO AROUND WITH A MAGNET THING AND PICK UP THE
14 NAILS ON A DAILY BASIS THEY GET KIND OF SMASHED DOWN IN THE
15 GROUND AND YOU NEVER END UP GETTING THEM SO YOU'VE GOT TO
16 GET ALL THE NAILS UP. IF THERE'S ANY TRASH, ANY, ANY CANS,
17 ANY CIGARETTE BUTTS OR SOMETHING LIKE THAT THAT GETS
18 CLEANED UP. ALSO YOU HAVE TO CLEAN UP YOUR WORK AREA. YOU
19 KNOW, THERE'S SAWDUST, PIECES OF WOOD AND EVERYTHING LIKE
20 THAT AND WE JUST --

21 Q HOMEOWNERS KEEP A PRETTY GOOD EYE ON THAT?

22 A OH, YEAH, WHEN SOMEONE RIDES BY THEY, THEY
23 WANT TO SEE A CLEAN JOB SITE BUT ALSO IT'S A SAFETY ISSUE.
24 I MEAN IF YOU KEEP AND MAINTAIN A CLEAN JOB SITE THEN IT'S
25 A CLEANER WORKING ENVIRONMENT THAT THE EMPLOYEES ARE

1 HAPPIER AND THEY'RE SAFER AND SO THAT'S SOMETHING THAT
2 WE'RE REAL BIG ON IS KEEPING IT CLEANED.

3 I'VE GOT MATERIAL PICKUP MEANING THAT'S FOR THE
4 TIMES THAT ALMOST ON A DAILY BASIS YOU HAVE TO SEND SOMEONE
5 TO LOWE'S OR HOME DEPOT TO PICK UP A VARIETY OF MATERIALS
6 OR SOMETHING, MAYBE A COUPLE OF TWO BY FOURS THEY'RE SHY OF
7 OR SOME BOLTS OR SOMETHING LIKE THAT.

8 Q AND ARE THESE PRICES THAT YOU'VE PUT IN
9 HERE FOR THESE ITEMS ARE THEY BASED ON WHAT YOU PAID
10 RECENTLY?

11 A YES.

12 Q OKAY, WHAT ARE WEEKLY MEETINGS?

13 A WE HAVE WEEKLY JOB MEETINGS AND SAFETY
14 MEETINGS. WE'RE REQUIRED BY OSHA TO HAVE SAFETY MEETINGS
15 AND, AND SO THAT'S SOME HOURS IN THERE THAT'S DOWN TIME FOR
16 THE, YOU KNOW, WEEKLY MEETINGS FOR THAT. ALSO IT'S WEEKLY
17 MEETING FOR THE PERSONNEL, WEEKLY JOB PROGRESS MEETINGS.

18 NEXT WE HAVE DEMOBILIZATION. IN THE BEGINNING WE
19 HAD MOBILIZATION WHERE YOU BROUGHT EVERYTHING OUT TO THE,
20 YOU KNOW, THE DUMPSTERS, THE PORTA JOHN, NOW YOU GOT TO
21 DEMOBILIZE, YOU'VE GOT TO TAKE IT AND YOU GOT TO MOVE IT
22 AWAY AND MOVE IT TO A, TO A DIFFERENT SPOT.

23 AFTER THAT WE HAVE PUNCH LISTS WHICH WE HAVE \$200
24 OF MATERIALS AND 200 HOURS AND LABOR FOR PUNCH LISTS.
25 PUNCH LISTS ARE ITEMS THAT MAYBE GOT BROKE DURING

1 CONSTRUCTION, YOU KNOW, YOU MAY HAVE PUT SOME HARDY PANEL
2 UP OR SOMETHING AND MAYBE THE PAINTER PUT A DENT IN SOME OF
3 THE HARDY PANEL AND SO YOU'VE GOT TO FIX THAT OR MAYBE
4 SOMETHING'S NOT DONE UP TO PAR. THERE'S ALWAYS PUNCH LIST
5 ITEMS ON, ON JOBS ESPECIALLY ONES OF THIS MAGNITUDE.

6 Q OKAY, WHAT'S NEXT?

7 A THE NEXT PAGE WE HAVE OTHER JOB COSTS WHICH
8 IS FREIGHT CHARGES. YOU'VE GOT TO PAY, OF COURSE, FREIGHT
9 CHARGES TO HAVE MATERIALS DELIVERED TO THE JOB SITES.

10 WE ALSO HAVE GAS EXPENSES. WE HAVE COMPANY
11 VEHICLES AND, OF COURSE, THAT EATS GAS AND WE'VE GOT TO
12 MAKE ---

13 Q WHAT DO YOU HAVE IN THERE FOR THAT?

14 A I'VE ONLY GOT 1,050 FOR THIS BUILDING.

15 Q OKAY, AND THEN CONTINGENCY?

16 A BUILDING CONTINGENCY.

17 Q IS THAT, AND WHAT IS THAT CONTINGENCY?

18 A WHAT IS THE AMOUNT?

19 Q NO, WHAT IS CONTINGENCY?

20 A IT'S AS WE DESCRIBED A WHILE AGO, IT'S FOR
21 ITEMS THAT MAY HAVE BEEN MISSED, IT'S FOR ITEMS THAT MAY BE
22 SOMETHING WAS DONE INCORRECTLY AND HAS TO BE REDONE, MAYBE
23 YOU ORDERED SOME MATERIALS AND THEY CAME IN WRONG AND SO
24 YOU HAVE TO REORDER IT AGAIN AND YOU'VE GOT DOWN TIME
25 THERE. IT'S KIND OF LIKE I SAID FOR ITEMS WE MISSED AND A

1 GOOD EXAMPLE OF THAT IS, IS, IS WHEN I FINISHED WITH THIS
2 PROPOSAL I NOTICED ON ONE OF THE BUILDINGS SOMEHOW WE
3 MISSED PUTTING THE WINDOWS IN, THE COST OF THE WINDOWS
4 WHICH WAS A PRETTY BIG NUMBER. FORTUNATELY I, IT WAS
5 POINTED OUT TO ME IN TIME AND, AND I CORRECTED THAT BUT HAD
6 THAT SLIPPED THROUGH THE CRACKS THEN THAT WE HAVE EATEN UP
7 ALL OUR CONTINGENCY SO THAT'S A GOOD EXAMPLE THAT, YOU
8 KNOW, ON A, ON A JOB THIS SIZE ---

9 Q IS THAT COMMON FOR, FOR REPAIR AND
10 RENOVATIONS WORK?

11 A A CONTINGENCY?

12 Q YES?

13 A IT'S, IT'S COMMON AND NECESSARY.

14 Q OKAY, AND DO YOU YOU ALWAYS HAVE THAT IN
15 YOUR PROPOSALS?

16 A ON A REAL SMALL JOB WHICH WE DON'T DO TOO
17 MUCH OF, NO, BUT ON JOBS LIKE THIS, YES.

18 Q AND HOW LONG IS THIS JOB EXPECTED TO LAST
19 IF YOU START LIKE YOU INDICATED AND WITH ONE BUILDING GET
20 HALFWAY THROUGH AND START ANOTHER BUILDING AND JUST KEEPING
21 THAT PROCESS GOING?

22 A YOU MEAN THE ENTIRE JOB OF ALL THE
23 BUILDINGS?

24 Q YES?

25 A I'D HAVE TO LOOK AT MY SCHEDULE, I DON'T

1 HAVE THAT NUMBER ON THE TOP OF MY HEAD BUT I DO HAVE A
2 SCHEDULE OF IT.

3 Q THIS IS 67?

4 A YES, I'VE GOT THIS STARTING IN JUNE 1ST OF
5 THIS YEAR AND ENDING ON FEBRUARY 27TH OF 2012.

6 Q 2012?

7 A YES.

8 Q OKAY --

9 A SO ALMOST BUT NOT QUITE THREE YEARS.

10 Q ALL RIGHT, IS YOUR COMPANY WILLING TO SIGN
11 A CONTRACT FOR THIS WORK TO, TO DO THIS WORK WITH THE BID
12 PROPOSAL YOU'VE GIVEN?

13 A YES.

14 Q OKAY, AND IN YOUR OPINION TO A REASONABLE
15 DEGREE OF ESTIMATING CERTAINTY IS THIS A FAIR AND
16 REASONABLE PRICE FOR THIS SCOPE OF WORK?

17 A CERTAINLY, YES.

18 Q OKAY, AND WHAT IS THE TOTAL PRICE OF THIS
19 SCOPE OF WORK?

20 A THE TOTAL PRICE OF THE SCOPE OF WORK IS
21 \$7,793,468.

22 MR. HENRY: OKAY, MAY I HAVE JUST A MOMENT,
23 YOUR HONOR?

24 THE COURT: YES, SIR.

25 MR. HENRY: (CONTINUING)

1 Q THE PRICE YOU JUST GAVE OF SEVEN-MILLION, I
2 DON'T HAVE IT IN FRONT OF ME, WHAT IS IT?

3 A \$7,793,468.

4 Q OKAY, THAT DOES NOT INCLUDE THE A&E FEES?

5 A NO, IT DOES NOT INCLUDE THE OWNERS
6 CONTINGENCY; IT DOES NOT INCLUDE THE CONSTRUCTION
7 ADMINISTRATIVE FEE. IF I ADD THOSE THEN THAT TOTALS UP TO
8 \$9.310,902.

9 MR. HENRY: OKAY, THANK YOU VERY MUCH.

10 THE WITNESS: YOU'RE WELCOME.

11 THE COURT: BEFORE CROSS EXAMINATION WE'LL TAKE
12 A BREAK, GO TO THE JURY ROOM. PLEASE DO NOT DISCUSS THE
13 CASE.

14 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
15 3:55 P.M. FOR A RECESS. THE FOLLWOING TAKES PLACE ON THE
16 RECORD AFTER THE RECESS.)

THE COURT: EVERYONE READY?

MR. BROWN: YES, SIR.

THE COURT: ALL RIGHT, LET'S BRING THEM ON.

(WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
4:21 P.M.)

THE COURT: ALL RIGHT, THE JURY IS BACK, CROSS
EXAMINATION.

MR. BROWN: THANK YOU, YOUR HONOR, PLEASE THE
COURT?

1 ENTITY FORMED TO DEVELOP THESE CONDOMINIUMS AND CLEARLY THE
2 LEGAL DISTINCTION BETWEEN THESE ENTITIES IS BLURRED. I
3 MEAN THEY'RE, THEY'RE ONE IN THE SAME JUST LIKE THEY WERE
4 IN KINCAID.

5 THE COURT ALSO SAID IN THESE OTHER CASES THAT
6 WHERE A DEVELOPER GETS INVOLVED, I'M SORRY, A LENDER GETS
7 INVOLVED SO INVOLVED WITH A DEVELOPER THAT THE LEGAL
8 DISTINCTION BETWEEN THEM IS BLURRED THEN THEY CAN BE
9 CONSIDERED, AND THE LIABILITY OF THE LENDER IS CO-EXTENSIVE
10 BASICALLY WITH THE BUILDER OF THE, OF THE PROJECT. SO WE
11 TAKE THE POSITION THAT HERITAGE COMMUNITIES, MAGNOLIA,
12 HERITAGE MAGNOLIA NORTH AND BUILDSTAR WERE, WERE THE SAME
13 ENTITY. THERE'S NO DISTINCTION OTHER THAN THE NAME BETWEEN
14 THESE THREE ENTITIES.

15 THE COURT: ALL RIGHT, MR. BROWN?

16 MR. BROWN: MAY I READ SOMETHING OFF THIS
17 COMPUTER AND THEN STAND UP TO ADDRESS THE COURT?

18 THE COURT: YES, SIR.

19 MR. BROWN: I'M SORRY, MY EYES ARE NOT THE BEST
20 IN THE WORLD. THE QUESTION WAS ASKED OF MR. HARDISTER AND
21 IT SAYS, OKAY, AND EXCEPT FOR THE LEGAL STRUCTURE OF THE
22 CORPORATIONS WOULD IT BE FAIR TO SAY THAT ALL OF THESE
23 CORPORATIONS WERE IN A SENSE ONE BUT THAT THEY WERE SET UP
24 FOR BOOKKEEPING PURPOSES; ANSWER, NO, THE INDIVIDUAL
25 CORPORATIONS WERE SET UP, AT LEAST WITH MY RECOLLECTION, AS

1 THE COURT: YES, SIR, BRING THEM ON.

2 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
3 10:49 A.M.)

4 THE COURT: ALL RIGHT, MR. FOREMAN, MEMBERS OF
5 THE JURY, GOOD MORNING.

6 JURY MEMBERS: GOOD MORNING.

7 THE COURT: EVERYONE IS HERE, CONTINUING WITH
8 THE PLAINTIFF'S CASE, MR. HENRY?

9 MR. HENRY: WE'RE INTRODUCING OUR NEXT WITNESS
10 MR. GWYN HARDISTER WHO WAS PRESIDENT AND C.O.O. OF
11 HERITAGE.

12 THE COURT: ALL RIGHT.

13 MR. HENRY: AND, YOUR HONOR, WE'VE TALKED ABOUT
14 SOME EXHIBITS IN THE DEPOSITION WHICH WERE MARKED AS
15 DEPOSITION EXHIBITS BUT WHEN THEY ARE INTRODUCED I WILL
16 ANNOUNCE THE EXHIBITS THAT ARE IN EVIDENCE.

17 THE COURT: OKAY, AND LADIES AND GENTLEMEN, A
18 VIDEO DEPOSITION, ALTHOUGH IT IS A VIDEO IT IS A
19 DEPOSITION. A DEPOSITION IS A TESTIMONY OF A WITNESS THAT
20 IS TAKEN OUTSIDE OF COURT THAT CAN BE PLAYED IN COURT
21 RATHER THAN HAVING THE WITNESS APPEAR AND IT'S DONE FOR
22 WHERE WITNESSES MIGHT BE UNAVAILABLE AND OTHER SIMILAR
23 SITUATIONS. YOU MAY PROCEED.

24 (WHEREUPON, VIDEO DEPOSITION OF GWYN HARDISTER
25 PLAYED IN OPEN COURT.)

MR. ROADY - DIRECT EXAMINATION BY MR. BROWN

1111

1 MR. BROWN: PRECISELY, YOUR HONOR HAS RULED ON
2 ALL THOSE ISSUES, THAT IS CORRECT, YOUR HONOR.

3 THE COURT: ALL RIGHT, OKAY, WE'LL KICK IT OFF
4 AT 2:30 THEN.

5 MR. BROWN: THANK YOU, YOUR HONOR.

6 (WHEREUPON, COURT WAS RECESSED FOR LUNCH AND
7 THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE LUNCH
8 RECESS.)

9 THE COURT: OKAY, EVERYONE READY?

10 MR. BROWN: YES, SIR.

11 THE COURT: BRING IN THE JURY.

12 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM
13 AT 2:40 P.M.)

14 THE COURT: ALL RIGHT, WELCOME BACK ONCE
15 AGAIN, CONTINUE WITH THE DEFENSE'S CASE, YOUR NEXT
16 WITNESS.

17 MR. BROWN: YOUR HONOR, WE'D CALL MR. DAVID
18 ROADY, PLEASE.

19 THE COURT: MR. ROADY.

20 DAVID ROADY

21 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

22 MADAM CLERK: FOR THE COURT, PLEASE, STATE
23 YOUR NAME AND SPELL YOUR LAST NAME.

24 THE WITNESS: DAVID M. ROADY, R-O-A-D-Y.

25 DIRECT EXAMINATION

1 BY MR. BROWN:

2 Q MR. ROADY, HOW ARE YOU THIS AFTERNOON?

3 A I'M FINE, SIR.

4 Q MR. ROADY, WOULD YOU MIND TELLING THIS
5 JURY A LITTLE BIT ABOUT YOUR PROFESSIONAL BACKGROUND IN
6 TERMS OF COLLEGE, THINGS OF THAT NATURE?

7 A WELL I GRADUATED IN 1983 FROM COLORADO
8 STATE UNIVERSITY WITH A BACHELOR OF SCIENCE IN CIVIL
9 ENGINEERING HAVING WORKED MY WAY THROUGH COLLEGE AS A
10 LABORER, AND A CARPENTER, AND AN UNDERGROUND MINER OUT IN
11 THE TRENCHES DOING CONSTRUCTION.

12 Q AND TELL THE JURY AFTER YOU GRADUATED
13 FROM COLORADO STATE WHAT DID YOU DO?

14 A WELL I WENT TO WORK FOR A LARGE GENERAL
15 CONTRACTOR FIRM FLUOR-DANIEL INTERNATIONAL WHO AT THE
16 TIME WAS, HAD CONTRACTS TO BUILD NUCLEAR POWER PLANT
17 PROJECTS IN THE SOUTHEAST AND SO I WORKED ON TWO OF THOSE
18 POWER PLANTS AS QUALITY CONTROL INSPECTOR AND A SYSTEMS
19 TURNOVER ENGINEER.

20 Q OKAY, AND AFTER YOUR TIME AT FLUOR-DANIEL
21 WHAT DID YOU DO?

22 A WELL IN 1987 I WENT TO WORK FOR A
23 CONTRACTOR BASED OUT OF CHARLESTON, RUSCON CONSTRUCTION
24 COMPANY WHO AT THE TIME WAS BUILDING A PHARMACEUTICAL
25 PLANT

1 IN NORTH CAROLINA. I STARTED THERE AND THEN TRANSFERRED
2 TO CHARLESTON AFTER THAT PROJECT WAS OVER WITH TO DO
3 PRIMARILY PROJECT MANAGEMENT AND COST ESTIMATING.

4 Q OKAY, AND TELL US A LITTLE BIT ABOUT THE
5 COST ESTIMATING YOU WOULD DO FOR RUSCON?

6 A WELL GENERALLY IT WAS HARD BIDS ON
7 PROJECTS MOSTLY HAVING TO DO WITH COMMERCIAL, RETAIL,
8 INSTITUTIONAL WORK, A LITTLE BIT OF RESIDENTIAL WORK BUT
9 THAT WAS IT MOSTLY, A LOT OF, A LOT OF PARKING GARAGES,
10 HOSPITALS, HOTELS, THAT TYPE OF THING.

11 Q OKAY, AND AFTER YOUR TIME AT RUSCON WHAT
12 DID YOU DO?

13 A I WENT TO WORK FOR A FORENSIC ARCHITECT
14 WHO AT THE TIME ALSO EMPLOYED A STRUCTURAL ENGINEER. HIS
15 NAME WAS WILLIAM REEDSBURG AND THE FIRM'S NAME WAS
16 HUMPHRIES, EXCUSE ME, REEDSBURG LONG ARCHITECTS AND IT
17 LATER BECAME REEDSBURG ARCHITECTS.

18 Q OKAY, AND WHEN YOU WORKED FOR MR.
19 REEDSBURG WHAT DID YOU DO GENERALLY?

20 A I DID GENERALLY DID FIELD INVESTIGATION
21 WORK, DRAFTING OF REPAIR SCOPES OF WORK AND I DID THE
22 COST ESTIMATING OF THOSE SCOPES OF REPAIRS.

23 Q AND WHEN YOU TALK ABOUT FIELD WORK WOULD
24 YOU MIND TELLING THE JURY WHAT TYPE FIELD WORK WOULD YOU
25 DO?

1 A WELL INVESTIGATION OF BUILDINGS SUCH AS
2 WHAT WE HAVE HERE AT MAGNOLIA WE GO OUT IN THE FIELD AND
3 UNDER THE DIRECTION OR MR. REEDSBURG SINCE HE WAS THE
4 PRINCIPAL IN CHARGE WE WOULD CONDUCT FIELD INVESTIGATIONS
5 AND I WOULD DO THAT WITH HIM.

6 Q OKAY, AND AFTER YOUR TIME WITH MR.
7 REEDSBURG DID YOU THEN MOVE ON TO ANOTHER JOB?

8 A YES.

9 Q OKAY, WHERE DID YOU END UP?

10 A WELL I WENT TO WORK FOR A COMPANY CALLED
11 CAMPBELL SNYDER AND ASSOCIATES WHO LATER BECAME APPLIED
12 BUILDING SCIENCES AND THAT'S WHERE I AM TODAY.

13 Q OKAY, AND WOULD YOU MIND TELLING THE JURY
14 WHAT DO YOU DO AT APPLIED BUILDING SCIENCE?

15 A WELL I'M A, AN ENGINEER THAT LOOKS AT
16 DISTRESSED BUILDINGS. WHAT I DO IS INVESTIGATE ALLEGED
17 DEFICIENCIES IN CONSTRUCTION AND DAMAGE TO BUILDINGS. IT
18 CAN RANGE ANYWHERE FROM FIRE RELATED DAMAGE TO WATER
19 INTRUSION PROBLEMS, SOME TRIP AND FALL WORK, BUT MOST OF
20 IT HAS TO DO WITH THE WEATHER ENVELOPE OF THE BUILDING
21 SUCH AS CLADDING.

22 Q OKAY, ARE YOU A PROFESSIONAL ENGINEER?

23 A YES, SIR.

24 Q AND WOULD YOU JUST TELL US BRIEFLY WHAT
25 YOU HAD TO DO TO GO THROUGH TO OBTAIN THAT

1 CLASSIFICATION?

2 A WELL THERE ARE A NUMBER OF REQUIREMENTS.
3 FIRST OFF YOU MUST HAVE PASSED A PRELIMINARY TEST CALLED,
4 AT THE TIME THAT I TOOK IT BACK IN, RIGHT AFTER COLLEGE
5 WAS THE ENGINEERING TRAINING EXAM, TODAY IT'S CALLED THE
6 ENGINEERING INTERN TEST WHICH IS AN EIGHT HOUR VERY
7 EXTENSIVE EXAM AND THEN YOU'RE SUPPOSED TO WORK FOR A
8 PERIOD OF FOUR YEARS UNDER THE DIRECTION OF A LICENSED
9 ENGINEER DOING ENGINEERING WORK AND THAT IS KIND OF AN
10 INTERNSHIP YOU MUST SERVE AND SO I DID THAT AND THEN YOU
11 HAVE TO PASS ANOTHER EVEN HARDER EXAM REALLY, I THINK.
12 IT'S AN EIGHT-HOUR EXAM THAT TESTS YOUR BREADTH AND DEPTH
13 OF, OF KNOWLEDGE OF THE ENGINEERING PROFESSION.

14 Q OKAY, AND ARE YOU A LICENSED ENGINEER IN
15 THE STATE OF SOUTH CAROLINA?

16 A YES, SIR.

17 MR. BROWN: YOUR HONOR, AT THIS TIME I WOULD
18 MOVE TO QUALIFY MR. ROADY AS AN EXPERT IN THE FIELD OF
19 ENGINEERING AS WELL AS BUILDING DIAGNOSTICS.

20 MR. HENRY: NO OBJECTION, YOUR HONOR.

21 MR. BROWN: THANK YOU VERY MUCH.

22 THE COURT: HE IS.

23 MR. BROWN: (CONTINUING)

24 Q MR. ROADY, LET ME SHOW YOU WHAT HAS BEEN
25 MARKED BY CONSENT WITHOUT OBJECTION AS EXHIBIT NUMBER 665

1 WHICH ARE TWO LETTERS THAT HAVE BEEN ATTACHED TOGETHER
2 AND ASK IF YOU'RE FAMILIAR WITH THOSE?

3 A YES.

4 Q OKAY, AND WOULD YOU TELL THE JURY WHAT IS
5 EXHIBIT 665?

6 A EXHIBIT 665 IS MY REPAIR SCOPE OF WORK
7 FOR OBSERVED DEFICIENCIES AT THE MAGNOLIA NORTH
8 DEVELOPMENT.

9 Q OKAY, AND, MR. ROADY, I DON'T WANT TO GO
10 OVER THE SAME ISSUE OVER AND OVER AGAIN BUT WERE YOU IN
11 HERE WHEN WE HAD THE TESTIMONY FROM MR. LEWIS?

12 A YES, SIR.

13 Q AND DO YOU AGREE WITH ME THAT THERE, DO
14 YOU AGREE THAT THERE ARE ISSUES AT MAGNOLIA NORTH WITH
15 REGARD TO THE TRIM PRODUCT?

16 A YES, SIR.

17 Q DO YOU AGREE WITH ME THAT THERE ARE
18 ISSUES AT MAGNOLIA NORTH WITH REGARD TO SOME FLASHING AND
19 IN PARTICULAR WITH THAT BRICK LEVEL OF THE BUILDINGS?

20 A YES, SIR.

21 Q AND DO YOU AGREE WITH ME THAT THERE ARE
22 SOME OTHER AREAS THAT WITH REGARD TO LIKE THE ROW LOCK
23 AND THINGS OF THAT NATURE THAT NEED TO BE ADDRESSED?

24 A YES.

25 Q AND HAVE YOU EVER TAKEN THE POSITION IN

1 THIS CASE THAT THERE WERE NO PROBLEMS OR NO DAMAGES OR NO
2 ISSUES AT MAGNOLIA NORTH?

3 A NO, SIR.

4 Q OKAY, TELL THE JURY WHAT WERE YOU HIRED
5 TO DO IN THIS CASE?

6 A WELL I WAS HIRED TO REVIEW ALLEGED
7 DEFICIENCIES AND IF THOSE DEFICIENCIES WERE DETERMINED TO
8 EXIST COME UP WITH A REPAIR SCOPE OF WORK WHICH IS WHAT I
9 DID.

10 Q OKAY, AND IS THAT PROPOSED SCOPE OF WORK
11 WHAT WE HAVE AS EXHIBIT 665?

12 A YES.

13 Q OKAY, LET'S WALK THROUGH THIS SCOPE AND
14 TALK A LITTLE BIT ABOUT EACH ITEM AND WHAT IT IS YOU
15 FOUND AND WHAT IT IS YOU WANT TO DO OUT THERE, IF THAT'S
16 OKAY WITH YOU?

17 A THAT'S FINE.

18 Q LET'S START WITH THE EXPOSED UNCOVERED
19 EXTERIOR WALLS?

20 A YES, SIR.

21 Q OKAY --

22 A WHAT I PLAN TO DO THERE THE EXPOSED
23 EXTERIOR WALLS ARE ALL THOSE EXTERIOR WALLS WHICH ARE NOT
24 COVERED BY A WALKWAY OR A REAR DECK PORCH WHAT HAVE YOU.
25 IN OTHER WORDS THEY'RE EXPOSED TO THE RAIN FALLING.

1 BECAUSE WE OBSERVED DETERIORATED HARDBOARD TRIM AROUND
2 THE SECOND AND THIRD FLOOR WINDOWS AND AT THE SECOND
3 FLOOR LINE THAT BAND TRIM THAT PEOPLE KEEP TALKING ABOUT
4 AND THE BOTTOM PORTIONS OF SOME VERTICAL TRIM AT INSIDE
5 BUILDING CORNERS, IN OTHER WORDS NOT AN OUTSIDE CORNER
6 BUT THE INSIDE CORNERS, AND ALSO AT THE COLUMN BASES IN
7 THE WALKWAYS THAT I BELIEVE MR. LEWIS SPOKE EARLIER ABOUT
8 WE'RE REPLACING THAT HARDBOARD TRIM WITH CEMENTIOUS TRIM
9 TO MATCH.

10 Q OKAY, AND IS IT YOUR BELIEF THAT CEMENTS,
11 I CAN'T SAY THE WORD, CEMENTIOUS TRIM THAT YOU WANT TO
12 PUT THERE THAT IT WOULD NOT HAVE THE SAME ISSUES THAT THE
13 LOUISIANA PACIFIC PRODUCT HAD?

14 A NO, IT WON'T.

15 Q OKAY, THE FIRST THING YOU SAID YOU WERE
16 GOING, YOU WERE GOING TO CHANGE OUT SOME OF THE TRIM, WAS
17 IT HERE OR INSIDE?

18 A IT WAS THERE ON THE RIGHT, IT WAS ON THE
19 INSIDE. THAT, THAT BOARD ON THE OUTSIDE IS ALREADY
20 CEMENT BOARD TRIM.

21 Q OKAY, SO WE HAVE THESE OUTSIDE CORNERS
22 HERE THAT'S ALREADY TRIMMED OUT WITH A CEMENT TYPE
23 PRODUCT?

24 A THAT'S CORRECT, IT IS, IT'S DOING FINE.

25 Q OKAY, AND WITH REGARD TO THESE INTERIOR

1 AREAS YOU WERE GOING TO TAKE OUT ANY OF THE INNER CLAD
2 WITH THOSE AREAS WHERE IT'S COME IN AND HAVE ISSUES WITH
3 THE FLASHING OR THE TRIM BAND, CORRECT?

4 A THAT'S RIGHT, I'M ANTICIPATING THAT THE
5 CONTRACTOR WILL REMOVE 12 INCHES, THE BOTTOM 12 INCHES OF
6 THAT TRIM BOARD BECAUSE IT'S, IN PLACES IT IS
7 DETERIORATED BECAUSE IT'S IN CONTACT WITH THAT METAL
8 FLASHING AT THE VERY BOTTOM.

9 Q AND THE AREAS WHERE YOU FOUND PROBLEMS
10 WITH WHAT THEY CALL, I HATE THESE WORDS BUT THEY CALL
11 THEM VERTICAL TRIM OR VERTICAL LEG, THIS THAT AND THE
12 OTHER, BUT HAS ALL THE PROBLEMS BEEN IN THAT GENERAL
13 BOTTOM AREA WHERE THEY WOULD COME TOGETHER WITH EITHER
14 THE FLASHING OR THE TRIM BAND?

15 A YES.

16 Q NO PROBLEMS UP IN THESE AREAS?

17 A I DIDN'T NOTICE ANY AND I LOOKED AT ALL
18 THE BUILDINGS OUT THERE.

19 Q HOW ABOUT THESE TRIM BANDS HERE, THE 12
20 INCH TRIM BAND WE'VE HEARD SO MUCH TALK ABOUT, WHAT YOU
21 GOING TO DO WITH THOSE?

22 A WELL I'M GOING TO TAKE THAT OFF AND
23 REPLACE IT WITH NEW CEMENT BOARD TRIM. THERE'S FLASHING
24 ABOVE AND BELOW THAT CEMENT BOARD TRIM THAT HAS TO COME
25 OUT AS WELL BECAUSE IT ISN'T PROPERLY INSTALLED EITHER.

1 IT'S NOT WEATHER LAPPED WITH BUILDING PAPER. IN OTHER
2 WORDS IT'S APPLIED ON TOP OF THAT BUILDING PAPER AND,
3 EXCUSE ME, THE WATER THAT COMES DOWN THE BUILDING PAPER
4 CANNOT, GOES RIGHT BEHIND THE FLASHING INSTEAD OF,
5 INSTEAD OF DOWN OVER THE VERTICAL LEG OF THAT FLASHING
6 AND THEN OUT. THE PURPOSE OF FLASHING, OF COURSE, IS TO
7 DIRECT THE WATER THAT GETS IN BEHIND THE OUTER CLADDING
8 AND GET IT OUT, GET IT OUT OF THAT WALL AND GET IT OUT
9 AND LET IT DRIP ONTO THE GROUND OUTSIDE SO IT'S, THE
10 FLASHING IS DOING NO GOOD.

11 Q SO YOU'RE GOING TO GO IN AND YOU'RE GOING
12 TO TAKE OUT THE TRIM PRODUCT AND YOU'RE GOING TO TAKE OUT
13 ANY OF THE BLOCKING BOARD THAT WAS USED TO SUPPORT THAT
14 HAD PROBLEMS AND YOU'RE GOING TO REFLASH THAT AREA,
15 CORRECT?

16 A THAT'S RIGHT.

17 Q THEN YOU'RE GOING TO PUT IN A NEW CEMENT
18 BASE PRODUCT IN THESE AREAS; IS THAT CORRECT?

19 A YES, SIR.

20 Q HOW ABOUT WITH REGARD TO WINDOWS, LET'S
21 TALK ABOUT THE WINDOWS ON THE SECOND AND THIRD FLOOR,
22 WHAT ARE YOU GOING TO DO WITH THIS TRIM PRODUCT AROUND
23 THESE WINDOWS?

24 A WELL I'M REMOVING ALL THAT TRIM. AGAIN
25 IT HAS ALSO DETERIORATED ESPECIALLY AT THE CORNERS AND --

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Q WHEN YOU SAY AT THE CORNERS ARE YOU
TALKING ABOUT THE TOP CORNERS, BOTTOM CORNERS?

A PRIMARILY AT THE BOTTOM CORNERS ALTHOUGH
THERE IS A LITTLE BIT OF OBSERVED FUNGAL GROWTH AT THE
UPPER CORNERS AS WELL.

Q OKAY, SO YOU'RE GOING TO TAKE OFF ALL THE
TRIM PRODUCT; IS THAT CORRECT?

A YES, SIR.

Q WHAT ABOUT THIS LAPPED SIDING THAT'S
UNDERNEATH IT AND AROUND IT WHAT ARE YOU GOING TO DO
THERE?

A WELL IF WE OBSERVE AREAS OF DETERIORATED
OSB SHEATHING THAT WILL HAVE TO BE TAKEN OFF IN ORDER TO
DEFECT THOSE SHEATHING REPAIRS. THE, SOME OF THE SIDING
RIGHT ABOVE THE HEAD OF THE WINDOW WILL HAVE TO COME OFF
IN ORDER FOR US TO INCORPORATE NEW FLASHING AT THE HEADS
OF THE WINDOWS. YOU CAN'T JUST TUCK IN A PIECE OF
FLASHING WITH, WITH THE SIDING STILL THERE. YOU HAVE TO,
YOU HAVE TO PRY UP THOSE BOARDS AND TAKE THEM UP ENOUGH,
HIGH ENOUGH ABOVE THE WINDOW IN ORDER TO GET THAT
FLASHING WEATHER LAPPED IN THERE PROPERLY.

Q AND TELL THE JURY WHAT ARE YOU GOING TO
DO WITH REGARD TO FLASHING AT THESE WINDOWS HERE AT THE
HEAD?

1 A WELL AT THE HEAD OF A WINDOW ON TOP OF
2 THAT TOP TRIM BOARD THERE THERE'S A PIECE OF FLASHING
3 THAT COMES DOWN BEHIND THE SIDING ABOVE AND THEN OVER THE
4 TOP OF THE FLASHING OF THE TRIM BOARD AND THEN WE'RE
5 REPLACING THAT TRIM, OKAY, AND WE'RE GOING TO WEATHER LAP
6 IT WITH THAT PAPER UP ABOVE THAT TRIM. BELOW THAT TRIM
7 BOARD IMMEDIATELY ON TOP OF THE WINDOW SO IN BETWEEN THE
8 TOP OF THE WINDOW AND THE BOTTOM OF THAT TOP TRIM BOARD
9 WE'RE PUTTING IN A SECOND PIECE OF FLASHING TO FURTHER
10 PROTECT THE WINDOW OPENING.

11 Q OKAY, AND DO YOU BELIEVE THAT TO BE A
12 REASONABLE AND AN APPROPRIATE WAY TO ADDRESS THE ISSUES
13 WITH THE TRIM PRODUCT AND WITH THESE PARTICULAR WINDOWS?

14 A YES.

15 Q NOW WITH REGARD TO THE, TO THE
16 CONDITIONAL FLASHING YOU'RE GOING TO DO WITH THESE SECOND
17 AND THIRD FLOOR WINDOWS IS THAT, IS THAT NECESSARY IN
18 PART BECAUSE YOU'RE REMOVING THE TRIM PRODUCT AND THAT'S
19 GOING TO DAMAGE THE FLASHING?

20 A YES, SIR.

21 Q WHEN YOU TAKE IT OUT?

22 A YES, SIR, IT MAY GET BENT UP AND NOT BE
23 LIKE A NEW, NEW PIECE OF FLASHING.

24 Q OKAY, AND WHAT ARE YOU GOING TO DO AROUND
25 THESE WINDOWS ON THE SECOND AND THIRD FLOORS?

1 A WELL WE'RE GOING TO TAKE A LOOK AT THE
2 OSB, THE CONDITION OF THE OSB.

3 Q OKAY, AND IF YOU FIND DAMAGE TO THE OSB
4 WHAT ARE YOU GOING TO DO, WHAT IS YOUR RECOMMENDATION
5 GOING TO BE?

6 A WE'RE GOING TO REPLACE THAT OSB WITH NEW
7 OSB.

8 Q OKAY, AND YOU'VE HEARD TESTIMONY, I'M
9 SURE AT LENGTH THIS MORNING, DID YOU HAVE AN OPPORTUNITY
10 TO OBSERVE TEST CUT AREAS OUT HERE?

11 A YES, I DID.

12 Q AND HAVE YOU OBSERVED AND NOT JUST FROM
13 THE EXPERTS THAT WE HEARD FROM TODAY AND FROM DREW BROWN
14 BUT FROM OTHER EXPERTS THAT WERE IN THE CASE AT VARIOUS
15 TIMES?

16 A YES, SIR.

17 Q OKAY, AND DID YOU AGREE THAT WITH REGARD
18 TO THE SECOND AND THIRD FLOOR AREAS MOST OF YOUR DAMAGE
19 OR IN FACT ALL THE DAMAGE THAT'S BEEN DOCUMENTED HAS BEEN
20 UNDERNEATH WINDOWS SLIGHTLY TO THE SIDE AND UNDERNEATH
21 IT?

22 A THAT'S CORRECT, AS, AS TO THE WINDOWS.
23 THERE'S, THERE'S ALSO DAMAGE ON A FEW OF THE TRIM BAND
24 LOCATIONS AT THE ENDS, YES.

25 Q BACK HERE WHERE WE HAD THE TRIM?

1 A YES.

2 Q IN TERMS OF THE WINDOWS THAT'S WHERE YOU
3 EXPECT TO FIND THOSE OSB ISSUES?

4 A YES, SIR.

5 Q AND DOES YOUR SCOPE COVER FIXING THOSE
6 PROBLEMS?

7 A YES, SIR.

8 Q AND THE TRIM PRODUCT THAT YOU'RE GOING TO
9 PUT AT THE WINDOWS AFTER YOU MAKE THESE REPAIRS WHAT TRIM
10 PRODUCT WOULD THAT BE?

11 A THAT BE A CEMENT BOARD TRIM AS WELL.

12 Q OKAY, AND THAT WOULD BE SOMETHING ALONG
13 THE LINES OF WHAT YOU HAVE IN SOME OF THE OUTSIDE AREAS
14 THAT HAS BEEN JUST FINE FOR ALL THESE YEARS?

15 A THAT'S CORRECT.

16 Q WHAT ABOUT WITH REGARD TO DRYER VENTS,
17 WE'VE SEEN SOME PICTURES THROUGHOUT WHERE THERE ARE SOME
18 DRYER VENTS, THIS IS HARD TO SEE, BACK IN THAT 12 INCH
19 TRIM BAND, ARE YOU AWARE OF THOSE?

20 A YES, SIR.

21 Q WHEN YOU TAKE THIS 12 INCH TRIM BAND OUT
22 IS THAT GOING TO REQUIRE YOU TO TAKE OUT THESE DRYER
23 VENTS?

24 A YES, YOU HAVE TO TAKE THE DRYER VENT OFF
25 AND TAKE THE TRIM BOARD OFF, REPAIR ANY DAMAGE AROUND

1 THAT PENETRATION WHERE THE DRYER VENT TO THE BOARD, THAT
2 TRIM BOARD AND THEN SIMPLY PUT THE NEW TRIM BOARD BACK ON
3 AND, WE'RE ACTUALLY WE'VE GOT SOME THE DRYER VENT GOING
4 BACK ON PROPERLY SEALED AND INSTALLED.

5 Q OKAY, AND ARE YOU GOING TO HAVE ---

6 A AND REPLACED IF NECESSARY, TOO, YES.

7 Q AND IN ADDITION TO REPLACING THEM WHERE
8 NECESSARY ARE YOU DOING TO HAVE THEM, WILL THERE BE
9 FLASHING IN ADDITION TO SEALING THERE?

10 A YES, YOU HAVE TO DO SOME FLASHING AND
11 SEALING, YES.

12 Q OKAY, NOW WELL LET'S START WITH THIS
13 PICTURE THEN WE'LL MOVE ON, WOULD YOU AGREE WITH ME THAT
14 WITH REGARD TO THE WINDOWS THAT ARE LOCATED AT THE BRICK
15 FIRST FLOOR OF THIS BUILDING THAT THERE IS SOME ABSENCE
16 OF SOME FLASHING AND WEEPING AT THE WINDOW HEADS?

17 A YES.

18 Q OKAY, AND WOULD YOU AGREE WITH ME THAT
19 THERE IS A PROBLEM WITH THE ROW LOCKS WHICH IS THAT
20 COURSE OF BRICKS THAT'S AT OPPOSITE ANGLE BETWEEN THE
21 BRICK AND THE TRIM?

22 A YES, SIR.

23 Q AND IS IT SUPPOSED TO SLANT HAVE A
24 CERTAIN DEGREE OF SLOPE TO THE BRICK?

25 A YES, IT'S SUPPOSED TO HAVE A 15 DEGREE

1 SLOPE.

2 Q OKAY, AND DOES THE BRICK ROW LOCK OUT
3 THERE MEET THAT REQUIREMENT?

4 A NO.

5 Q NOW DID YOU COME UP WITH A PROPOSED SCOPE
6 TO ADDRESS THAT?

7 A YES, I DID.

8 Q AND WHAT WAS THAT SCOPE?

9 A WELL WHEN WE'RE REPLACING THE FLASHING
10 THAT GOES IN AT THE BOTTOM OF THAT TRIM BAND JUST ABOVE
11 THE BRICK THAT NEW PIECE OF FLASHING WILL EXTEND OUT OVER
12 THAT BRICK THAT'S THERE RIGHT NOW THEREBY PROVIDING A
13 PERMANENT WEATHER COVER OVER THAT BRICK SO THERE'S NO
14 NEED TO SLOPE THE BRICK. YOU'RE GOING TO PUT BASICALLY A
15 LITTLE ROOF OVER IT.

16 Q OKAY, NOW LET ME ASK YOU A QUESTION,
17 INSTEAD OF TAKING THAT APPROACH WE WERE TO DO WHAT DREW
18 BROWN AND R.V. BURIC SAID AND TAKE OUT THE ROW LOCK AND
19 ALL THE AFFECTED BRICK IN THESE AREAS WOULD THAT DEAL
20 WITH THE SLOPE ISSUE? IN OTHER WORDS WOULD YOU JUST
21 REPLACE THE ROW LOCK IF THERE WAS GOING TO BE ROW LOCK
22 WITH SLOPES?

23 A YES, SIR, IT WOULD.

24 Q AND WOULD THAT ALSO DEAL WITH THE ROW
25 LOCK ISSUES AT THE WINDOW SILLS?

1 A YES, SIR.

2 Q AND IN YOUR OPINION WOULD THAT MORE THAN
3 LIKELY DEAL WITH THE MORTAR IN THE CAVITY ISSUES THAT
4 WE'VE HEARD TALKED ABOUT?

5 A YES, SIR.

6 Q AND HOW ABOUT THE LENTILS IF WE'RE DOING
7 THAT THEN WOULD THAT ALLOW US TO ADDRESS THE LENTILS?

8 A YES, SIR.

9 Q AND WHAT IS IT THAT YOU HAD, GO BACK TO
10 YOUR SCOPE FOR A MINUTE AS OPPOSED TO THIS, WHAT WERE YOU
11 RECOMMENDING THAT WE DO WITH REGARD TO THE WINDOWS?

12 A WELL BASED ON MY OBSERVATIONS 84 PERCENT
13 OF THE LENTILS AT THOSE BRICK WINDOW OPENINGS WERE, DID
14 NOT HAVE PROPER BEARING. IN OTHER WORDS NOT ENOUGH OR
15 ANY OF THE STEEL LENTIL, THE END OF THE STEEL LENTIL
16 BEARED ON THE BRICK AT THE, AT THE JAMBS OF THE WINDOW.
17 YOU'VE GOT TO HAVE THAT SUPPORT THERE FOR THE LENTIL TO,
18 TO SUPPORT THE BRICK ABOVE.

19 THE REASON WE HAVEN'T SEEN TOO MUCH FAILURE WAS
20 KIND OF POINTED OUT THIS MORNING BY MR. LEWIS THERE ISN'T
21 THAT MUCH WEIGH IN THE WEIGHT OF, IN THE WEIGH OF BRICK
22 WEIGHT ABOVE THAT LENTIL SO, BUT IT DOES NEED TO BE
23 SUPPORTED. IN SOME CASES THE LENTILS ARE TOO SHORT, THEY
24 WERE CUT TOO SHORT FOR THE, FOR THE WHOLE WINDOW OPENING
25 AND IN SOME CASES THEY WERE JUST MISPOSITIONED SO THAT,

1 FOR WHATEVER REASON, THEY DIDN'T HAVE THE PROPER BEARING
2 ON EITHER END.

3 Q AND WHAT TYPE OF LENTIL ARE YOU GOING TO,
4 HAVE YOU RECOMMENDED THAT WE REPLACE, THAT WE WOULD LIKE
5 TO REPLACE THESE WITH?

6 A WELL AT THE ONES THAT ARE CUT WAY TOO
7 SHORT AND YOU CAN'T USE AT ALL WE'RE GOING TO GO BACK
8 WITH GALVANIZED STEEL LENTILS, NOT, NOT PAINTED STEEL
9 LENTILS BUT GALVANIZED LENTILS, THAT WAY THEY WON'T RUST.

10 Q OKAY, AND SO THAT WOULD BE SOMETHING THAT
11 SEEMS TO BE OF A BETTER QUALITY THAN WHAT WAS THERE NOW?

12 A OH, YES.

13 Q WHAT ABOUT WITH REGARD TO THE, THE
14 FLASHING AT THE WINDOWS IN THE BRICK COURSE, WHAT IS YOUR
15 UNDERSTANDING AS TO WHAT WE PROPOSED TO DO WITH REGARD TO
16 FLASHING AT THOSE WINDOWS?

17 A WELL AT THE HEAD OF THE WINDOWS LIKE WE
18 JUST TALKED A FEW MINUTES AGO THE FLASHING WAS OBSERVED
19 TO BE MISSING, IT WAS NOT INSTALLED.

20 Q SHOULD IT HAVE BEEN THERE?

21 A YES, SIR, IT SHOULD HAVE, IT'S INDICATED
22 ON THE DRAWINGS TO BE THERE TO GO IN AND IT'S NOT THERE
23 AND IT'S AN INDUSTRY STANDARD OF BRICK CONSTRUCTION TO
24 PUT FLASHING OVER THAT LENTIL. IN FACT IT'S A CODE
25 REQUIREMENT. THEY DIDN'T INSTALL IT. THEY DIDN'T PUT

1 ANY BRICK WEEPS IN, IF THEY HAD PUT FLASHING IN THERE
2 WATER WOULD HAVE COME DOWN THE FLASHING AND TRIED TO GET
3 OUT AND IT COULDN'T HAVE GOTTEN OUT BECAUSE THERE WAS NO
4 BRICK WEEPS SO WE'RE GOING TO REFLASH AND PUT THE PROPER
5 WEEPS IN THAT ARE REQUIRED BY THE BRICK INDUSTRY
6 ASSOCIATION AND THE BUILDING CODE.

7 Q OKAY, AND THAT'S SOMETHING THAT
8 ENCOMPASSED WITHIN OR CONTAINED IN YOUR SCOPE, RIGHT?

9 A YES, SIR.

10 Q BUT BY THE SAME TOKEN IF WE TOOK OUT ALL
11 THE BRICK IN THE AFFECTED AREAS THAT WOULD ALSO GIVE US
12 THE OPPORTUNITY TO PUT IN THE FLASHING AND THE WEEPS AND
13 ALL THE THINGS THAT WE'VE HEARD TESTIMONY ABOUT HERE
14 TODAY, RIGHT?

15 A THAT'S RIGHT. THERE'S ALSO A PIECE OF
16 FLASHING OF WHAT THEY CALL THROUGH WALL FLASHING BUT IT'S
17 FLASHING BELOW THE WINDOW, IT'S METAL FLASHING THAT WAS
18 SUPPOSED TO GO IN BELOW THE WINDOW SILLS, IT WASN'T JUT
19 IN EITHER, AND SO OUR REPAIR CONTEMPLATES PUTTING THAT IN
20 AS WELL AND DOING A PROPER JOB WITH WEEP HOLES AND WHAT
21 NOT.

22 Q HOW ABOUT WITH REGARD TO THE HARDBOARD
23 TRIM AT WALKWAYS AND STAIR COLUMN BASES, WHAT DID YOU
24 FIND THERE?

25 A WELL I OBSERVED THE HARDBOARD TRIM TO BE

1 DETERIORATED AT THE COLUMN BASES.

2 Q AND LET ME SEE I THINK WE HAVE A PRETTY
3 GOOD PICTURE OF THAT FROM EARLIER, SO WHILE I'M LOOKING
4 FOR THAT PICTURE WHAT CAN YOU DO TO FIX THAT PROBLEM?

5 A YOU SIMPLY REMOVE THE HARDBOARD TRIM AND
6 PUT NEW CEMENT BOARD BACK IN ITS PLACE.

7 Q AND IS THAT SOMEWHAT OF A SUPERFICIAL
8 TYPE OF REPAIR THAT CAN BE DONE RATHER EASILY?

9 A YES, IT'S NOT HARD AT ALL.

10 Q IS THAT WHAT WE'RE TALKING ABOUT RIGHT
11 HERE?

12 A YES, SIR.

13 Q OKAY, THIS IS THAT LOUISIANA PACIFIC TRIM
14 PRODUCT?

15 A YES, SIR.

16 Q AND WHAT WE'LL DO IS TAKE THAT OFF AND
17 PUT A CEMENT BASE PRODUCT THERE INSTEAD?

18 A THAT'S RIGHT, BOTH THAT, THAT LARGE PIECE
19 THAT'S CRACKED UP HAS A CRACKED APPEARANCE AND THEN THE
20 VERY BOTTOM PIECE.

21 Q HOW ABOUT UP HERE IS ANY OF THIS THAT
22 LOUISIANA PACIFIC PRODUCT?

23 A NO, SIR, THAT IS, THAT'S CEMENT BOARD
24 TRIM AND CEMENT PANEL TRIM IN BETWEEN THOSE CORNER
25 BOARDS.

1 Q AND IS THAT CEMENT TRIM DOING FINE OUT
2 THERE IN YOUR OPINION?

3 A YES, SIR.

4 Q OR HOW IS IT DOING IN YOUR OPINION, I'M
5 SORRY?

6 A IT'S DOING FINE.

7 Q OKAY, LET'S TALK A LITTLE BIT ABOUT THE
8 CEILINGS, THE GYPSON CEILINGS, ARE YOU AWARE THAT THE
9 PLAINTIFF WANT TO TAKE OUT EVERY PIECE OF GYPSON ABOVE
10 THE CEILINGS?

11 A YES, I BELIEVE I'VE READ THAT.

12 Q OKAY, DO YOU BELIEVE THAT'S APPROPRIATE
13 OR REASONABLE UNDER THE CIRCUMSTANCES?

14 A NO, SIR, NOT AT ALL.

15 Q TELL ME WHY NOT?

16 A WELL FIRST OFF THERE ISN'T ANY LEVEL OF
17 DAMAGE TO THAT EXTENT THAT I OBSERVED. I ONLY OBSERVED
18 AREAS SUCH AS CRACKED DRYWALL JOINTS AT SOME OF THE
19 JOINTS, OTHER CRACKS IN THE DRYWALL CEILING THAT WE
20 ATTRIBUTE TO CONTROL JOINTS, THE CONTROL JOINT PROBLEM
21 THAT WE WERE TALKING ABOUT EARLIER I THINK.

22 Q OKAY, IS THIS A CRACK IN THE GYPSON
23 YOU'RE TALKING ABOUT THAT'S GOT THE SHADOWS IN THERE?

24 A RIGHT, YES.

25 Q OKAY --

1 A THEY'RE ALSO SOME THAT GO FURTHER ACROSS,
2 ALL THE WAY ACROSS THE WALKWAY.

3 Q OKAY, IS THAT UNCOMMON TO SEE CRACKS IN
4 GYPSON IN A DEVELOPMENT LIKE THIS?

5 A WELL IT'S, I WOULD EXPECT TO SEE IT TO
6 SOME EXTENT BECAUSE THESE ARE EXTERIOR CEILINGS EXPOSED
7 TO A LARGER THERMAL CYCLE, IN OTHER WORDS HOT AND COLD
8 TEMPERATURES BETWEEN DAY AND NIGHT MORE SO THAN YOU DO ON
9 THE INSIDE OF A BUILDING.

10 Q OKAY, AND IS THIS AN EXAMPLE OF A
11 CONTROLLED JOINT THAT YOU'RE TALKING ABOUT?

12 A YES, SIR.

13 Q OKAY, TELL THE JURY WHAT WOULD YOU DO
14 ABOUT DOING AGAIN TO FIX SOMETHING LIKE THIS?

15 A WELL FIRST OFF WE'RE GOING TO BE
16 INSTALLING AND I'VE ALLOWED UP TO SIX LINEAL FEET OF
17 CONTROL JOINT WHICH IS THE WIDTH OF A WALKWAY TO
18 SUPPLEMENT ANY OTHER EXISTING CONTROL JOINTS THAT ARE
19 THERE.

20 Q OKAY --

21 A THE SECOND THING THAT WE'RE DOING AT THE
22 WALKWAY CEILINGS IS WE ARE REPAIRING ALL OF THE CRACKED
23 AND DELAMINATED DRYWALL JOINTS THAT ARE OUT THERE. I
24 OBSERVED APPROXIMATELY ON AVERAGE 25 LINEAL FEET OF
25 DAMAGED JOINT PER WALKWAY CEILING.

1 Q OKAY, AND HOW DO YOU GO ABOUT REPLACING
2 OR REPAIRING THAT?

3 A IT'S SIMPLY A DRYWALL, AT THE DRYWALL
4 JOINTS IT'S A SIMPLE MATTER OF TEARING OFF THE DAMAGED
5 DRYWALL JOINT MATERIAL AND MUDDING IN A NEW JOINT. IT'S
6 DONE EVERY DAY ON EVER SINGLE DRYWALL, DRYWALL JOB. AS
7 FAR AS INSTALLING CONTROL JOINTS THAT'S A SIMPLE MATTER
8 OF CUTTING BACK THE GYPSON BOARD AT THE SUPPORTS AND
9 INSTALLING A NEW CONTROL JOINT, A METAL CONTROL JOINT
10 ACCESSORY THEY CALL IT. IT'S JUST A STRIP OF METAL
11 THAT'S GOT A SPECIAL SHAPE TO IT AND THEN RESTORING THE
12 GYPSON BOARD ON EITHER SIDE OF THAT AND PAINTING,
13 PAINTING THE FINISH ON IT.

14 Q OKAY, AND IF THERE'S ANY DETERIORATION
15 ANYWHERE IN THE GYPSON, IF THERE'S ANY DETERIORATION
16 GENERALLY WHAT ARE YOU DOING TO DO, LEAVE IT OR FIX IT?

17 A NO, WE'RE FIXING THAT, TOO. MY SURVEY AS
18 A WALK AROUND OF ALL THE BUILDINGS I CAME UP WITH AN
19 AVERAGE OF SIX SQUARE FEET OF AFFECTED AREA PER ON
20 AVERAGE PER WALKWAY CEILING. SOME, THERE'S A COUPLE
21 LOCATIONS THAT I OBSERVED ANYWAY WITH SOME SLIGHTLY
22 LARGER AREAS OF WATER STAINED GYPSON BOARD BUT THERE WERE
23 SOME WALKWAY CEILINGS THAT DIDN'T HAVE ANY WATER STAIN,
24 SO WE'RE ALLOWING SIX SQUARE FEET WHICH IS GRACIOUS
25 PLENTY.

1 Q AND THAT'S ON A PER FLOOR BASIS, RIGHT?

2 A YES, SIR.

3 Q ON EACH BUILDING?

4 A EVERY CEILING, YES.

5 Q THERE HAVE BEEN ALLEGATIONS IN THIS CASE
6 ABOUT THE STAIR COLUMN PEDESTALS, ABOUT THE PROPER
7 SUPPORT IN THOSE AREAS, LET ME SHOW YOU A PICTURE AND ASK
8 IF YOU CAN IDENTIFY WHAT THIS IS?

9 A THAT IS A WHAT WE CALL A STAIR COLUMN
10 PEDESTAL, YES.

11 Q OKAY, AND TELL THE JURY EXACTLY WHAT IT
12 IS IN THIS PICTURE?

13 A WELL WHAT THAT IS IS A SUPPORT POST FOR
14 THE STAIR LANDING UP ABOVE THAT YOU DON'T SEE IN THE
15 PHOTOGRAPH. IT IS CONNECTED TO THE CONCRETE SLAB WITH A
16 METAL, A WIDE METAL U-SHAPED PREMANUFACTURED CONNECTER
17 THERE THAT YOU SEE AND WHAT YOU DON'T SEE IN THAT PHOTO,
18 I DON'T BELIEVE IS -- THE GLARE IS --

19 Q I'M SORRY?

20 A TURN IT TOWARDS ME MAYBE.

21 Q I APOLOGIZE?

22 A OKAY, YEAH, WHAT YOU DON'T SEE IN THIS
23 PHOTO IS THERE IS A STEEL ROD THAT GOES DOWN INTO THE
24 CONCRETE THAT'S HID FROM VIEW THERE BUT IT'S IMBEDDED IN
25 THE CONCRETE AND IT HOLDS THAT, HOLDS THAT PIECE OF METAL

1 IN PLACE.

2 Q OKAY, AND AS A RESULT OF THIS IS THERE
3 ANY STRUCTURAL DAMAGE ON THESE STAIRCASES THAT YOU
4 DETERMINED?

5 A NO, NO, SIR.

6 Q HAVE YOU SEEN ANYBODY DOCUMENT ANY
7 STRUCTURAL ISSUES WHERE THIS IS AN ISSUE?

8 A NO, SIR, IN MY OPINION FROM WHAT I
9 OBSERVED IT DOESN'T HAVE ANY STRUCTURAL ISSUES.

10 Q AND IS THIS A WIDESPREAD PROBLEM OR
11 LIMITED PROBLEM OR WHAT TYPE OF PROBLEM?

12 A THIS IS A, THIS PROBLEM, NUMBER ONE, IT
13 ONLY OCCURS AT CERTAIN BUILDINGS AND I HAVE OUTLINED AT
14 WHICH BUILDINGS THOSE ARE. IT'S NOT ALL THE BUILDINGS.

15 Q OKAY ---

16 A BUT IT'S A GOOD, IT'S A FAIR, FAIR NUMBER
17 OF BUILDINGS, I DON'T KNOW HOW MANY OFF HAND.

18 Q NOW YOU ACTUALLY WENT OUT AND DOCUMENTED
19 IT AT EACH BUILDING WHERE IT WAS FOUND, CORRECT?

20 A YES, SIR.

21 Q OKAY, HOW YOU GOING TO FIX THIS?

22 A WELL, EXCUSE ME, YES, I DOCUMENTED WHAT I
23 FOUND AND I DON'T KNOW THAT I WENT TO EVERY SINGLE ONE OF
24 THOSE BUILDINGS BUT I WENT TO A FAIR REPRESENTATIVE
25 SAMPLE OF THOSE BUILDINGS AND OBSERVED UP TO FOUR COLUMNS

1 PER BUILDING NEEDING SOME REMEDIAL WORK AT THOSE
2 PEDESTALS.

3 Q LOOKS LIKE YOU WENT TO 15 OUT OF THE 21
4 BUILDINGS, DOES THAT SOUND ABOUT RIGHT?

5 A I WENT TO ACTUALLY ON THIS ISSUE I WENT
6 TO I BELIEVE SEVEN OR EIGHT.

7 Q SEVEN OR EIGHT, OKAY?

8 A SEVEN OR EIGHT, YES.

9 Q AND HOW WOULD YOU GO ABOUT FIXING THESE?

10 A WELL ALL YOU HAVE TO DO IS, AND THIS
11 PICTURE REALLY ISN'T A REALLY GOOD EXAMPLE OF IT, BUT IN
12 SOME, IN MOST OF THE CASES THE METAL, THE CASES THAT NEED
13 TO BE REPAIRED THAT METAL BRACKET DOESN'T BEAR, DOESN'T
14 HAVE FULL BEARING ON THE LITTLE CONCRETE CURB RIGHT BELOW
15 IT, THE LITTLE INCH AND A HALF TALL CURB, SO WHAT WE'RE
16 DOING IS WE'RE PROVIDING A FULL BEARING SURFACE BY GOING
17 IN THERE AND POURING GROUT UP UNDERNEATH THE UNSUPPORTED
18 EDGE OF THAT METAL BRACKET.

19 Q OKAY, AND IN YOUR OPINION WOULD THAT TAKE
20 AWAY ANY ISSUES WHATSOEVER WITH AREAS LIKE THIS?

21 A YES, SIR.

22 Q OKAY, NOW YOUR ORIGINAL REPORT WAS DATED
23 OCTOBER 11 OF 2006, CORRECT?

24 A THAT'S CORRECT.

25 Q AND THEN DID THERE BECOME A TIME LATER

1 WHEN YOU WERE ASKED TO GO OUT AND LOOK AT THE WALKWAYS
2 AND WHEN I SAW THE WALKWAYS I MEAN THE WAY YOU GET TO
3 YOUR CONDOMINIUMS OUT THERE, THE FRONT WALKWAYS?

4 A THAT'S CORRECT.

5 Q AND WHAT WAS YOUR UNDERSTANDING WAS THE
6 PRIMARY ISSUE WITH REGARD TO THESE FRONT WALKWAYS AND THE
7 RAILINGS?

8 A WELL THE PRIMARY ISSUE WAS THAT THEY HAD
9 LOOSE HANDRAILS UP THERE THAT WHEN YOU PUSH ON A HANDRAIL
10 OR A HANDRAIL POST IT WOULD GIVE AND BASICALLY THAT WAS
11 AN UNSAFE CONDITION.

12 Q OKAY, AND DOES THIS SHOW THE WALKWAYS
13 WE'RE TALKING ABOUT?

14 A YES, SIR, THAT SHOWS A STAIR, STAIR
15 COLUMN RIGHT THERE AND THEN THE WALKWAY TO THE RIGHT
16 HERE.

17 Q OKAY, AND WAS THERE A PARTICULAR AREA
18 WITH REGARD TO THESE RAILINGS SYSTEMS THAT WERE
19 PROBLEMATIC?

20 A YES, THE INTERMEDIATE POST AND YOU CAN
21 SEE ONE, YOU CAN SEE ONE RIGHT HERE ALMOST IT'S IN FRONT
22 OF A DOOR, IT'S A PLASTIC POST THAT IS IN BETWEEN TWO
23 MAIN BUILDING COLUMNS.

24 Q THE COLUMN, MAIN BUILDING COLUMN, ANOTHER
25 MAIN BUILDING COLUMN AND BETWEEN THESE TWO COLUMNS WE

1 CALL THE INTERMEDIATE POST?

2 A YES.

3 Q AND THAT'S THE AREA THAT WE'RE HAVING
4 SOME PROBLEMS WITH AT MAGNOLIA NORTH WITH THE RAILINGS?

5 A YES.

6 Q AND TELL THE JURY WHAT DID YOU TO GO
7 ABOUT DETERMINING WHAT THE PROBLEM WAS WITH THESE
8 RAILINGS?

9 A WELL ---

10 Q INTERMEDIATE POST RAILINGS?

11 A WE WENT TO THE WALKWAYS, WELL WE LOOKED,
12 ENDED UP LOOKING AT 15 OF THESE INTERMEDIATE RAIL POST
13 CONNECTIONS WHERE THEY ATTACHED TO THE FLOOR DECK AND
14 WHAT WE OBSERVED WHEN WE CUT INTO THE CEILING RIGHT BELOW
15 THE POST LOCATION WAS THAT AT THE LOOSE POST THERE TENDS
16 TO BE ONLY TWO SCREWS THAT WERE ENGAGED INTO THE LUMBER
17 DOWN BELOW. THERE WERE TWO SCREWS THAT WERE, THEY WERE
18 ONLY, THEY WERE ONLY SCREWED THROUGH THE OSB DECKING AND
19 NOT INTO ANY LUMBER DOWN BELOW SO THAT THAT WAS, THAT
20 CAUSED THE LOOSENESS IN THE, IN THE POST UP ABOVE.

21 Q OKAY, AND WAS THERE ANY WATER DAMAGE OR
22 ANY WIDESPREAD WATER DAMAGE IN THESE AREAS WHERE THOSE
23 BOLTS WERE GOING DOWN INTO THE OSB?

24 A NO, I ONLY OBSERVED TWO SMALL, AT TWO OF
25 THE TEST CUTS A VERY SMALL WATER STAINED AREA. I

1 DETERMINED THOSE, THOSE WATER STAINED AREAS WERE NOT
2 DAMAGED OSB BUT SIMPLY WATER STAINS. I PROBED THEM WITH
3 A AWL AND, WHICH IS MY USUAL METHOD OF DETERMINING
4 WHETHER OR NOT YOU GOT SOUND WOOD OR NOT, OF COURSE IN
5 MY, IN MY EXPERIENCE AS A, AS A FORENSIC INVESTIGATOR OF
6 BUILDINGS I'VE SEEN PLENTY OF ROTTEN WOOD AND I KNOW WHAT
7 IT FEELS LIKE TO THE TOUCH WHEN PROBED WITH A TOOL, SO I
8 SATISFY MYSELF THAT THE WOOD WAS AT LEAST AT THOSE
9 LOCATIONS WERE, WERE SOUND ALTHOUGH THERE WAS WATER
10 STAINED.

11 Q TELL US HOW YOU'RE GOING TO GO ABOUT
12 FIXING THESE INTERMEDIATE POSTS? WHAT DO YOU THINK IS AN
13 APPROPRIATE WAY TO FIX THESE ISSUES?

14 A WELL FIRST OFF YOU HAVE TO, IN MY REPORT
15 I'VE ALLOWED FOR 67 PERCENT OR TWO THIRDS OF THE HANDRAIL
16 POST NEED REPAIR.

17 Q HOW DID YOU COME UP WITH THAT NUMBER?

18 A WELL BASED ON MY SURVEYS, I WENT AROUND
19 TO LIKE I SAID 15 OF THESE THINGS AND, AND I ONLY FOUND
20 10 OF THEM THAT OR I FOUND 10 THAT WERE INSTALLED
21 IMPROPERLY.

22 Q OKAY ---

23 A AND SO BASED ON THAT NUMBER WHICH, WHICH
24 I BELIEVE TO BE A GOOD NUMBER BECAUSE I ALSO WALKED
25 AROUND OTHER WALKWAYS AND FELT THE RAILS AND I BELIEVE ON

1 THE BASIS OF TWO-THIRDS, YOU KNOW, THAT'S A GOOD NUMBER
2 FOR IMPROPER HANDRAIL POSTS OR LOOSE HANDRAIL POSTS.
3 ANYWAY IN ORDER TO FIX THE PROBLEM YOU HAVE TO FIRST
4 IDENTIFY WHICH ONES ARE BAD. I'VE ASKED THE CONTRACTOR
5 IN THE SCOPE OF REPAIR HERE TO TAKE A SPECIAL PIECE OF
6 EQUIPMENT CALLED A BORESCOPE, WHICH IS SIMPLY A LIGHTED
7 PROBE THAT'S HOOKED UP TO AN EYE PIECE WHERE YOU CAN SEE
8 UP INSIDE A SMALL AREA, AND ALL YOU HAVE TO DO IS JUST
9 DRILL A SMALL HOLE, MAYBE A HALF INCH IN DIAMETER, AND
10 STICK IT UP IN THERE AND SEE WHETHER OR NOT THERE'S ANY
11 BLOCKING AT THESE FASTENERS.

12 AT THE ONES THAT DON'T HAVE BLOCKING WE'LL HAVE
13 TO CUT THE CEILING OUT TO GAIN ACCESS TO THE UNDER SIDE
14 OF THAT HANDRAIL POST CONNECTION GO UP ON TOP TAKE THE
15 HANDRAIL POST OFF AND IT WILL PROBABLY GET DESTROYED WHEN
16 WE TAKE IT OFF CAUSE IT'S HARD PVC PLASTIC BUT WE'LL TAKE
17 THE POST OFF AND THAT WILL EXPOSE THE POST BASE. WE'LL
18 UNSCREW THE POST BASE INSTALL NEW BLOCKING FROM
19 UNDERNEATH AND THEN REATTACH THAT POST BASE DOWN TO THAT
20 BLOCKING. IF THERE'S ANY DAMAGE TO OSB SHEATHING RIGHT
21 THERE IT WILL BE REPAIRED. IF THERE'S ANY DAMAGE TO THE
22 WATERPROOFING RIGHT THERE IT SHOULD BE REPAIRED AS WELL.

23 FINALLY THE, THE HANDRAIL POST WILL BE, THE
24 OUTER COVER WILL BE PUT BACK ON AND THEN WE'LL SEAL THE
25 BOTTOM OF THAT POST WHERE THE WATERPROOF WEARING COAT

1 COMES UP TO IT.

2 Q OKAY, AND DO YOU BELIEVE IN YOUR
3 PROFESSIONAL OPINION AS A PROFESSIONAL ENGINEER THAT THAT
4 WILL BE APPROPRIATE TO ADDRESS THE DEFLECTION ON THE
5 RAILINGS THAT WE HAVE AT MAGNOLIA NORTH?

6 A YES, SIR.

7 Q AND WHEN WE SAY DEFLECTION WE'RE NOT
8 SAYING THAT THE RAILINGS ARE COMING LOOSE COMPLETELY, WE
9 JUST SAY THEY HAD GO MUCH GIVE IN THEM; IS THAT CORRECT?

10 A THAT'S CORRECT. THE AMOUNT OF GIVE IS
11 NOT REALLY THE CODE DEPARTMENT. THERE'S NO DEFLECTION
12 REQUIREMENT IN THE BUILDING CODE. WHAT IS THE CODE
13 REQUIREMENT IS THE AMOUNT OF LOAD, NUMBER OF POUNDS THAT
14 THE RAILING HAS TO WITHSTAND.

15 Q AND NOTWITHSTANDING WHATEVER THE CODE
16 REQUIRES IN TERMS OF LOAD WE'RE NOT QUIBBLING OVER THAT,
17 WE'RE SAYING THERE'S DEFLECTION AND WE'RE GOING TO FIX
18 IT, RIGHT?

19 A YES, I'M NOT SATISFIED THAT THEY WOULD
20 CARRY THE REQUIRED LOAD, YEAH.

21 Q NOW THERE'S SOME THINGS THAT AREN'T IN
22 YOUR SCOPE, YOU DON'T TALK ABOUT THE PRIVATE BALCONIES ON
23 BUILDINGS ONE THROUGH FIVE, DO YOU?

24 A NO, I DON'T.

25 Q AND WERE YOU ASKED TO ADDRESS THOSE?

1 A WELL I HAD READ SOME OF THE REPORTS BY I
2 BELIEVE R.V. BURIC AND MR. BROWN, HIS NAME HAS BEEN USED
3 HERE, I DID GO TO THREE DWELLING UNITS TO LOOK AT THE
4 TOPS OF REAR DECKS AND THEN I ALSO ON MY WALK AROUND
5 SURVEYS DOING, LOOKING AT VARIOUS OTHER ISSUES ON THE
6 PROJECT FROM TIME TO TIME I LOOKED AT THE UNDER SIDE OF
7 THESE CEILINGS.

8 Q AND AS AN EXPERT IN THIS CASE IS ONE OF
9 THE THINGS THAT YOU DO IS LOOK AT OTHER EXPERTS REPORTS
10 AND EXAMINE AND RELY UPON THEIR INFORMATION OF WHAT
11 THEY'RE LOOKING AT AS WELL?

12 A I TAKE IT INTO CONSIDERATION, YES.

13 Q OKAY, AND BASED UPON YOUR REVIEW OF MR.
14 BROWN'S REPORT AND PHOTOGRAPHS HAD HE DOCUMENTED ANY
15 DECK, PRIVATE DECK ISSUES OUT AT MAGNOLIA NORTH THAT YOU
16 SAW?

17 A NO, I DON'T REMEMBER.

18 Q YOU DON'T ADDRESS WINDOWS, THE WHOLESALE
19 REPLACEMENT OF WINDOWS AT MAGNOLIA NORTH, DO YOU?

20 A NO, SIR.

21 Q AND YOU'VE HEARD THE TESTIMONY EARLIER
22 TODAY ABOUT WINDOWS, DIDN'T YOU?

23 A YES, SIR.

24 Q AND DO YOU BELIEVE THAT THERE NEEDS TO BE
25 A WHOLESALE REPLACEMENT OF EVERY WINDOW OUT THERE WITH A

1 HIGH IMPACT WINDOW BASED UPON THE EVIDENCE WE HAVE IN
2 THIS CASE?

3 A NO, NOT BASED ON WHAT I OBSERVED EITHER.

4 Q NOW ONE OF THE QUESTIONS THAT WAS ASKED,
5 TALKED ABOUT EARLIER IN THIS CASE, LET ME GET A BETTER
6 PICTURE, BEAR WITH ME. I CAN FIND EVERY PICTURE BUT THE
7 ONE I WANT, IT'S NOT THE ONE I WANT BUT IT WILL DO. YOU
8 SAW, YOU'VE SEEN PHOTOS OR HAVE YOU SEEN PHOTOGRAPHS OF
9 DESTRUCTIVE TESTING DONE UNDERNEATH WINDOWS SUCH AS THIS?

10 A YES, SIR.

11 Q OKAY, WERE YOU IN COURT EARLIER TODAY
12 WHEN WE SAW SOME OF THE PHOTOGRAPHS THAT SHOWED OSB
13 DAMAGE UNDER THESE AREAS?

14 A YES, I WAS, I DIDN'T SEE THOSE PHOTOS
15 THAT WERE SHOWN BUT I HEARD TESTIMONY.

16 Q WOULD IT SHOCK YOU TO FIND DAMAGE TO OSB
17 UNDER THESE WINDOWS?

18 A NO, IT WOULDN'T.

19 Q AND YOU SAID, I BELIEVE YOU TESTIFIED
20 EARLIER WHERE THERE'S TRIM PRODUCT AND A PARTICULAR CUT
21 TO A TRIM PRODUCT IT WOULDN'T SURPRISE YOU TO SEE ANY
22 WATER INFILTRATION ISSUES UNDERNEATH THERE, CORRECT?

23 A THAT'S CORRECT.

24 Q HOW ABOUT MORE TOWARDS THE MIDDLE OF
25 THESE AREAS WHERE YOU HAVE THREE WINDOWS THAT HAVE BEEN

1 MULLED TOGETHER?

2 A WELL OCCASIONALLY YOU MIGHT FIND SOME
3 EVIDENCE OF WATER BELOW THE JOINT BETWEEN THE MULLED
4 WINDOWS.

5 Q OKAY, AND WHAT, WHAT DOES ONE PUT THERE
6 OR WHAT WOULD ONE USUALLY FIND THERE BETWEEN MULLED
7 WINDOWS?

8 A WELL USUALLY THE WATER STAINING IS WHAT
9 YOU END UP SEEING BUT IT'S A RESULT OF WATER THAT'S
10 GOTTEN IN BEHIND THE LITTLE PLASTIC COVER STRIP THAT GOES
11 OVER THAT WINDOW JOINT.

12 Q OKAY, AND IS THAT WHAT WE CALL A MULLING
13 TRIMMING CAP?

14 A YES.

15 Q OKAY, DO YOU BELIEVE WE NEED TO GO OUT
16 THERE, FIRST OF ALL ARE YOU AWARE THAT DREW BROWN
17 ORIGINALLY CALLED TO TAKE OFF ALL THE TRIM?

18 A YES, I BELIEVE THAT'S WHAT HE RECOMMENDS.

19 Q OKAY, ARE YOU AWARE THAT IN FEBRUARY OF
20 THIS YEAR HE DECIDED TO JUST GO AROUND WHAT HE CALLED HIS
21 BIG GREEN AREAS?

22 A YES.

23 Q SAME THING FOR THE BRICK, RIGHT?

24 A YES.

25 Q HE WAS GOING TO TAKE OFF ALL THE BRICK IN

1 AFFECTED AREAS?

2 A THAT'S RIGHT.

3 Q DO YOU BELIEVE YOU NEED TO DO ALL THESE
4 THINGS IN YOUR PROFESSIONAL OPINION TO ADDRESS THE ISSUES
5 AT MAGNOLIA NORTH?

6 A NO, I THINK YOU COULD TAKE OFF THE SIDING
7 AS FAR AS THE LAPPED SIDING YOU'D TAKE IT OFF AS NEEDED
8 TO AFFECT WHATEVER REPAIRS NEED TO BE DONE WHETHER IT'S
9 REPLACING DAMAGED TRIM OR DAMAGED OSB SHEATHING, SAME
10 THING AT THE BRICK.

11 Q OKAY ---

12 A EXCUSE ME, ALSO ON THE BRICK THERE WERE
13 OTHER ISSUES WITH THE BRICK, THERE WERE FLASHING AND
14 LENTIL AND THINGS THAT WE'RE HAVING TO DEAL WITH.

15 Q EXACTLY, BUT YOU TAKE OFF ALL THE ROW
16 LOCK IN ANY AREAS THAT'S AFFECTED ACCORDING TO DREW BROWN
17 AND R.V. BURIC THAT WOULD ADDRESS THOSE ISSUES, WOULDN'T
18 IT?

19 A THAT'S CORRECT, YES.

20 Q YOU DID NOT ADDRESS SLOPE ISSUES IN YOUR
21 REPORT, DID YOU?

22 A AS TO WHAT SLOPE?

23 Q DOESN'T TALK ABOUT SLOPE ON EITHER, ON
24 THE FRONT WALKWAYS FOR EXAMPLE?

25 A NO.

1 Q AND HAVE YOU HAD AN OPPORTUNITY TO REVIEW
2 DREW BROWN AND R.V. BURIC'S PHOTOGRAPHS?

3 A YES, THE LATEST ONES THAT THEY TOOK IN
4 FEBRUARY I BELIEVE, YES.

5 Q OKAY, BUT HAVE YOU EVER SEEN, BUT BEFORE
6 THAT EVEN NOT IN JUST THE FEBRUARY PHOTOS BUT THE 400 AND
7 SOME PHOTOS THEY USED THEY CALL THE DOCUMENTATION OF
8 CONDITIONS, ARE YOU FAMILIAR WITH ALL R.V. BURIC'S PHOTOS
9 FROM OUT THERE?

10 A I BELIEVE I AM GENERALLY, YES, THERE'S
11 QUITE A VOLUME OF PHOTOS.

12 Q AS AN ENGINEER AND SOMEONE WHO WORKS IN
13 SITUATIONS LIKE THIS WHERE YOU'RE TRYING TO DOCUMENT
14 PROBLEMS IF YOU HAVE PONDING WATER ON A SECOND OR THIRD
15 FLOOR WALKWAY IS THAT SOMETHING YOU WOULD EXPECT THAT
16 WOULD BE DOCUMENTED?

17 A I WOULD, ESPECIALLY IF IT APPEARED TO BE
18 LIKE PERMANENT PONDING WATER.

19 Q OKAY, AND HAVE YOU SEEN ANY PHOTOGRAPHS
20 OR EVIDENCE OF PONDING ON THESE SECOND OR THIRD FLOOR
21 WALKWAYS?

22 A NO, SIR.

23 MR. BROWN: OKAY, BEG THE COURT'S INDULGENCE.

24 IF YOU'D ANSWER ANY QUESTIONS THAT MR. THOMPSON
25 OR MR. HENRY HAVE I'D APPRECIATE IT.

1 Q ALL THE OPINIONS THAT YOU'VE GIVEN HERE
2 TODAY ARE THESE OPINIONS YOU HAVE TO A REASONABLE DEGREE
3 OF CERTAINTY WITHIN THE FIELD OF ENGINEERING AND BUILDING
4 DIAGNOSTICS?

5 A YES, SIR.

6 Q AND DO YOU BELIEVE THAT YOUR SCOPE HAS A
7 FAIR AND REASONABLE WAY TO FIX THE PROBLEMS THAT ARE OUT
8 AT MAGNOLIA NORTH?

9 A YES, SIR.

10 MR. BROWN: THANK YOU.

11 CROSS EXAMINATION

12 BY MR. HENRY:

13 Q GOOD AFTERNOON, DAVID.

14 A HOW ARE YOU, SIR?

15 Q GOOD, HOW ARE YOU?

16 A I'M FINE.

17 Q YOU AND I GO BACK A LONG WAY, DON'T WE?

18 A YES.

19 Q OKAY, YOU'VE DONE WORK FOR ME BEFORE,
20 HAVEN'T YOU?

21 A MANY PROJECTS, YES.

22 Q WHEN YOU WERE AT MR. REEDSBURG'S OFFICE?

23 A THAT'S CORRECT.

24 Q OKAY, YOU DID ESTIMATES?

25 A CORRECT.

1 Q FOR CLIENTS OF MINE?

2 A YES.

3 Q OKAY, AND YOU DID, YOU ASSISTED MR.
4 REEDSBURG IN FORENSIC INVESTIGATIONS, DID YOU NOT?

5 A YES, SIR.

6 Q OKAY, NOW WHILE YOU WERE OUT THERE AT
7 MAGNOLIA NORTH DID YOU DO ANY MOISTURE METER READINGS?

8 A I REMEMBER TAKING AT LEAST ONE MOISTURE
9 READER, METER READING.

10 Q OKAY ---

11 A I BELIEVE IT WAS AT A TEST CUT IN SOME
12 BRICK.

13 Q DID YOU BRING THAT WITH YOU?

14 A IT'S CONTAINED IN MY NOTES THAT I'VE
15 PRODUCED.

16 Q OKAY, SO YOU HAD A MOISTURE METER READER
17 OUT THERE AND YOU ONLY USED IT ONE TIME?

18 A YES.

19 Q OKAY, YOUR, YOUR COMPANY APPLIED BUILDING
20 SCIENCES THEY, THEY HAVE PEOPLE ON STAFF THAT TEST
21 WINDOWS, DO THEY NOT?

22 A YES.

23 Q OKAY, AND THEY HAVE PEOPLE THERE
24 QUALIFIED TO TEST WINDOWS?

25 A YES.

1 Q OKAY, AND A PART OF YOUR FORENSIC
2 ANALYSIS MANY TIMES INVOLVES TESTING OF WINDOWS, CORRECT?

3 A IT DOES ON OCCASION.

4 Q OKAY, WHEN YOU WERE WITH MR. REEDSBURG
5 YOU REGULARLY TESTED WINDOWS, DID YOU NOT, AT LEAST NOT -

6 --

7 A NOT ON A REGULAR BASIS, IT WAS REALLY FEW
8 AND FAR BETWEEN WITH MR. REEDSBURG, YES, SIR.

9 Q AND, BUT YOU DID A LOT OF SEAL DAM TEST,
10 DIDN'T YOU?

11 A NOT SO MUCH WITH REEDSBURG, NO.

12 Q OKAY, DO YOU KNOW HOW MANY DESTRUCTIVE
13 CUTS YOU MADE IN THE BRICK?

14 A I DIDN'T MAKE ANY CUTS, I OBSERVED CUTS
15 MADE BY MR. BROWN AND OTHER PARTIES IN THIS CASE.

16 Q OKAY, AND HOW MANY DESTRUCTIVE CUTS DID
17 YOU MAKE UNDER THE WINDOWS ON THE SECOND AND THIRD
18 FLOORS?

19 A THE SAME.

20 Q NONE?

21 A THOSE WERE CUTS MADE BY OTHER PEOPLE.

22 Q YOU JUST OBSERVED WHAT SOMEBODY ELSE DID?

23 A THAT'S RIGHT, I FELT, THOUGH, THEY WERE A
24 FAIR REPRESENTATIVE OF, OF THE CONDITIONS OR THE
25 LOCATIONS.

1 Q YOU THOUGHT R.V. BURIC WAS DOING A GOOD
2 JOB AND YOU, YOU RELIED ON WHAT THEY CUT?

3 A YES.

4 Q OKAY, DID YOU ALSO GO OUT AND TAKE
5 PICTURES WHEN THE GLAZING CONSULTANTS ENGINEERS WERE OUT
6 THERE?

7 A I DON'T REMEMBER IF I WAS THERE WHEN
8 GLAZING CONSULTANTS WAS THERE OR NOT, I'M TRYING TO
9 RECALL WHO MIGHT HAVE BEEN THERE FOR THEM. I DO RECALL
10 BEING OUT THERE OBSERVING CUTS MADE BY OTHER PERSONNEL,
11 MAY VERY WELL COULD HAVE THEM.

12 Q OKAY, LET ME GET YOU TO EXPLAIN A LITTLE
13 BIT TO THE JURY ABOUT HOW A CONSTRUCTION PROJECT IS, IS
14 HANDLED IN THE BEGINNING AND THEN WHEN YOU START
15 CONSTRUCTION? YOU DID A LOT OF THIS AT FLUOR-DANIEL, DID
16 YOU NOT?

17 A WELL NOT AT FLUOR-DANIEL. I PRIMARILY DID
18 GENERAL CONTRACTING WORK PROJECT MANAGEMENT AT RUSCON
19 CONSTRUCTION COMPANY.

20 Q OKAY, DO YOU HAVE A GENERAL CONTRACTOR'S
21 LICENSE?

22 A NO, SIR.

23 Q OKAY, WHEN YOU WERE AT RUSCON YOU WOULD
24 HAVE, GENERALLY THE OWNER WOULD HAVE AN ARCHITECT DRAW UP
25 THE PLANS, CORRECT?

1 A YES.

2 Q OKAY, AND THEN THE ARCHITECT WOULD TAKE
3 THOSE PLANS AND SPECIFICATIONS AND GO OUT TO BID,
4 CORRECT?

5 A THAT'S CORRECT.

6 Q OKAY ---

7 A THERE WAS ALSO A COMMON THING WHERE THE
8 ARCHITECT AND THE CONTRACTOR WOULD WORK TOGETHER KIND OF
9 A JOINT VENTURE RELATIONSHIP TO MUTUALLY DEVELOP A
10 PROJECT.

11 Q THAT'S WHAT WE CALL A DESIGN BUILD,
12 CORRECT?

13 A THAT'S CORRECT.

14 Q OKAY, AND ONCE THE BIDS CAME IN AND THEY
15 MAY HAVE BEEN A LITTLE TOO HIGH FOR THE OWNER'S STOMACH,
16 SO TO SPEAK, THEY STARTED TALKING ABOUT WELL WE CAN CUT
17 OUT THIS, WE CAN GO TO A LESS GRADE WINDOW, WE CAN GO
18 FROM THIS PRODUCT TO THAT PRODUCT, AND, AND DO WHAT THEY
19 CALL VALUE ENGINEERING, CORRECT?

20 A THAT IS A TERM THAT'S USED, THERE'S A
21 CAREFUL SELECTION MADE BY THE, BY THE ARCHITECT, THE
22 OWNER, DECISION MADE BY THE ARCHITECT, THE OWNER, AND THE
23 CONTRACTOR.

24 Q IN OTHER WORDS LET'S SAY THAT THE
25 ARCHITECT SPECKED A CERTAIN WINDOW, JUST TAKE A WINDOW

1 FOR EXAMPLE, AND HE, HE SPECKED THE TOP OF THE LINE, VERY
2 EXPENSIVE WINDOW, AND THE BIDS CAME IN TOO HIGH AND HE
3 SAID WELL CAN WE GO TO A CHEAPER WINDOW AND THEY WOULD
4 GET A PROPOSED SUBSTITUTE AND THEY WOULD GIVE IT TO THE
5 ARCHITECT, RIGHT?

6 A YES.

7 Q AND THE ARCHITECT WOULD EXAMINE THAT
8 SUBMITTAL AND SAY THIS WINDOW WON'T, WON'T MEET MY
9 REQUIREMENTS, YOU'RE GOING TO HAVE PROBLEMS WITH IT, I'M
10 NOT GOING TO ALLOW YOU TO SELECT SUCH A CHEAP WINDOW,
11 THAT HAPPENED DIDN'T IT?

12 A WELL THE, IT'S BEEN MY EXPERIENCE THAT
13 THE ARCHITECTS WOULD ONLY REALLY COMMENT ON THE
14 PERFORMANCE OF A, OF A PRODUCT. NOT NECESSARILY A COST.

15 Q OKAY, LET'S, LET'S SUPPOSE HE SAYS I'M
16 NOT GOING TO ALLOW THAT WINDOW BECAUSE IT'S, IT DON'T
17 MEET THE PERFORMANCE REQUIREMENTS THAT I'VE SET FORTH IN
18 MY DOCUMENTS?

19 A OR IT WAS NOT AESTHETICALLY ACCEPTABLE.

20 Q RIGHT, AND THEN THEY WOULD GO TO GET, AND
21 GET SOME, SOME OTHER WINDOW, CORRECT?

22 A YES.

23 Q OKAY, NOW ARE YOU AWARE IN THIS
24 PARTICULAR PROJECT THE ARCHITECT WAS NOT INVOLVED IN THAT
25 PROCESS?

1 A NO, I HAD NO KNOWLEDGE OF THAT PROCESS IN
2 THIS PROJECT.

3 Q YOU HAD NO KNOWLEDGE OF THAT, WELL THEN
4 IF THE CONTRACTOR AND THE OWNER WERE THE SAME PEOPLE AND
5 THE ARCHITECT HAD SPECKED A PARTICULAR PRODUCT AND THE
6 OWNER SAID TO HIS CONTRACTOR WHICH WAS IN HOUSE LET'S,
7 LET'S USE SOMETHING CHEAPER THE ARCHITECT IS NOT THERE TO
8 SAY, UH-UH, THAT DOESN'T MEET MY PERFORMANCE
9 REQUIREMENTS, CORRECT?

10 A WELL I THINK THE ARCHITECT ALWAYS HAS TO
11 BE A PART OF THE DESIGN DECISION MAKING PROCESS, THAT'S
12 BEEN MY EXPERIENCE ANYWAY.

13 Q RIGHT, THAT'S THE NORMAL WAY IT'S DONE?

14 A YES, SIR.

15 Q OKAY, HAVE YOU, DO YOU HAVE KNOWLEDGE IN
16 THIS CASE THAT THAT'S NOT WHAT HAPPENED?

17 A NO, I DON'T, I HAVE NO KNOWLEDGE OF THAT
18 PORTION OF THE PROJECT, THE DESIGN OF IT AND THE
19 DEVELOPMENT OF IT.

20 Q HAVE YOU EVER SEEN A SET OF ARCHITECTURAL
21 PLANS THAT HAD A DISCLAIMER FROM THE ARCHITECT ON THEM?

22 A YES.

23 Q OKAY, HAVE YOU SEEN THESE PLANS?

24 A YES.

25 Q AND THAT'S WHAT'S ON THERE?

1 A YES, THERE IS A TYPE OF DISCLAIMER, I
2 BELIEVE, FROM THE PEGRAM COMPANY.

3 Q OKAY, YOU EVER SEEN THAT ON ANY OTHER SET
4 OF PLANS AS LONG AS YOU'VE BEEN DOING THIS WORK?

5 A YES, I, IN FACT I USED IT ONCE MYSELF ON
6 A PROJECT.

7 Q AND WHY DID YOU USE IT ON THAT PROJECT?

8 A THE OWNER SPECIFICALLY DID NOT REQUEST
9 THAT WE DO OR, EXCUSE ME, THE OWNER SPECIFICALLY
10 REQUESTED THAT WE DO NOT INCLUDE ANY, ANY FEES IN OUR
11 ESTIMATE OR IN PROPOSAL FOR CONTRACT ADMINISTRATION.

12 Q OKAY, AND SO YOU PUT A DISCLAIMER ON
13 THERE THAT YOU WEREN'T GOING TO BE RESPONSIBLE IF THEY
14 DIDN'T HAVE AN ARCHITECT INVOLVED?

15 A WELL THE, AS I RECALL THAT STATEMENT WAS
16 THAT WE USED WAS SOMETHING TO THE AFFECT OF WE COULD NOT
17 BE HELD RESPONSIBLE BEYOND THE SERVICES PROVIDED BY
18 APPLIED BUILDING SCIENCES.

19 Q RIGHT, AND THAT WAS FOR WHAT REASON?

20 A TO PROTECT OURSELVES FROM, FROM ANY
21 ISSUES THAT MAY HAVE AROSE AS A RESULT OF NOT HAVING
22 CONTRACT ADMINISTRATION DUTY.

23 Q OKAY, WHEN YOU WERE AT MR. REEDSBURG'S
24 OFFICE DID YOU DO WORK MOSTLY FOR PLAINTIFFS?

25 A YES, MOST ALL OF IT WAS, YES.

1 Q OKAY, AND THEN WHEN YOU SWITCHED AND WENT
2 TO APPLIED BUILDING SCIENCES I THINK YOU SAID THAT 95
3 PERCENT OF YOUR WORK IS FOR DEFENDANTS?

4 A THAT WAS CORRECT, THAT WAS AT THE TIME OF
5 MY DEPOSITION. NOW IT'S RECENTLY IN THE LAST COUPLE OF
6 THREE YEARS IT SEEMS TO BE MAYBE 60 40 DEFENSE PLAINTIFF
7 WORKLOAD.

8 Q BUT WHEN YOU WENT FROM MR. REEDSBURG'S
9 OFFICE TO APPLIED BUILDING SCIENCES YOU DIDN'T CHANGE
10 YOUR PHILOSOPHY OR, OR THE WAY YOU DID FORENSIC
11 INVESTIGATIONS OR THE WAY YOU DID ESTIMATES AND THAT SORT
12 OF THING, DID YOU?

13 A I CERTAINLY DID, WHEN I WENT TO WORK FOR
14 MR. CAMPBELL I GREATLY INCREASED MY OPERATIONAL TEMPO BUT
15 TECHNICALLY, NO, I DIDN'T, I DIDN'T CHANGE MY PHILOSOPHY.

16 Q YOU, YOU'VE TESTIFIED MORE THAN ONCE IN
17 CASES WHEN YOU WERE WITH MR. REEDSBURG THAT A BUILDING
18 OWNER IS ENTITLED TO A BUILDING THAT AT LEAST MEETS THE
19 MINIMUM STANDARDS OF THE CODE, HAVE YOU NOT?

20 A I DON'T SPECIFICALLY RECALL THAT
21 TESTIMONY, IT WOULDN'T SURPRISE ME IF I MADE A STATEMENT
22 TO THAT AFFECT, THOUGH.

23 Q BUT YOU BELIEVE THAT, DON'T YOU?

24 A YES, THAT IS IN COMPLIANCE, IS THAT YOUR
25 QUESTION AGAIN?

1 Q YES?

2 A IT'S IN COMPLIANCE WITH THE CODE.

3 Q THE HOMEOWNER'S ENTITLED TO COMPONENTS IN
4 A BUILDING THAT MEETS THE MINIMUM STANDARDS OF THE CODE?

5 A THAT'S CORRECT.

6 Q OKAY, AND YOU HAVE AS AN ENGINEER WHEN
7 YOU WERE WITH MR. REEDSBURG YOU RECOMMENDED ON MANY MANY
8 PROJECTS, DID YOU NOT, THAT WINDOWS THAT DON'T MEET THE
9 CODE NEED TO BE REPLACED?

10 A WELL I THINK THAT MR. REEDSBURG MADE
11 THOSE RECOMMENDATIONS.

12 Q OKAY --

13 A THE REPAIR REPORTS ALWAYS WENT OUT UNDER
14 HIS SIGNATURE AND HE WAS RESPONSIBLE FOR THEM.

15 Q ALL RIGHT ---

16 A I WAS NOT A REGISTERED ARCHITECT.

17 Q BUT, BUT THE FIRM YOU WERE WORKING WITH
18 MADE THE RECOMMENDATION ON MANY MANY OF THE BUILDINGS ON,
19 IN MYRTLE BEACH THAT MASS AMOUNTS OF WINDOWS BE REPLACED
20 BECAUSE THEY DIDN'T MEET THE CODE EVEN IF THEY WERE NOT
21 LEAKING?

22 A YEAH, I DON'T REMEMBER ABOUT EVEN IF
23 THEY'RE NOT LEAKING PART. I DO REMEMBER THAT THE
24 PROJECTS INCLUDED WINDOW REPLACEMENT FOR VARIOUS
25 PERFORMANCE REASONS WHETHER IT WAS A STRUCTURAL

1 PERFORMANCE REQUIREMENT OR LEAKAGE, I DON'T REMEMBER
2 EXACTLY BUT THERE WERE MANY PROJECTS THAT HAD THAT, YES.

3 Q YOU REMEMBER WHEN YOU WERE WITH MR.
4 REEDSBURG THAT MR. REEDSBURG WOULD DETERMINE THE WIND
5 LOADS REQUIRED ON A BUILDING AND SOME OF THEM WERE HIGHER
6 AT THE EDGE ZONES AND SOME OF THEM HIGHER AT THE
7 INTERMEDIATE ZONES AND THEY DIDN'T MEET CODE AND HE WOULD
8 SAY THEY'VE GOT TO BE REPLACED BECAUSE THEY DIDN'T MEET
9 CODE?

10 A YES, AND IN A FEW CASES HE WAS ABLE TO
11 INSTEAD OF SAYING THEY NEEDED TO BE REPLACED HE WOULD
12 DESIGN A MODIFICATION OF THE WINDOW SO IT WOULD MEET THE
13 CODE REQUIREMENT.

14 Q RIGHT, AND YOU ASSISTED HIM ON NUMEROUS
15 OCCASIONS, DID YOU NOT, IN DOING WHAT WE'VE TALKED ABOUT
16 HERE AS SILL DAM TESTS?

17 A WITH REEDSBURG I DIDN'T DO THAT MUCH SILL
18 DAM TESTING. I THINK THAT WAS SOME OTHER TECHNICIANS
19 THAT USED TO WORK FOR REEDSBURG.

20 Q OKAY, YOU DIDN'T DO ANY?.

21 A MAYBE ONE OR TWO, I CAN'T REMEMBER WHICH
22 JOBS BUT IT WASN'T THAT MANY AT ALL.

23 Q WHAT WAS THE PURPOSE OF DOING A SILL DAM
24 TEST?

25 A USUALLY YOU'RE TRYING TO SEE IF THE, IF

1 THE SILL JOINT WITH, THE FRAME JOINT BETWEEN THE JAMB AND
2 THE SILL HAS INTEGRITY.

3 Q OKAY, AND WHILE YOU WERE WITH MR.
4 REEDSBURG YOU WOULD, MR. REEDSBURG AND YOU WOULD
5 ESTIMATE, FOR EXAMPLE, TAKING STAIRS OUT THAT WERE ONE, A
6 FRACTION OF AN INCH OUT OF TOLERANCE IN COMPLIANCE WITH
7 THE CODE, ISN'T THAT CORRECT?

8 A WELL MR. REEDSBURG HAD AN OPINION.

9 Q AND YOU, YOU PRICED IT?

10 A I PRICED UP HIS WORK, YES.

11 Q AND YOU TESTIFIED ABOUT IT?

12 A YES, SIR, ABOUT MY ESTIMATING, YES.

13 Q ABOUT YOUR ESTIMATING?

14 A YES, SIR.

15 Q ALL RIGHT, AND ARE YOU A MEMBER OF THE
16 AMERICAN SOCIETY OF CIVIL ENGINEERS?

17 A YES, SIR.

18 Q OKAY, HAVE YOU READ THEIR REQUIREMENTS
19 FOR STANDARDS ABOUT REPRESENTING DEFENDANTS IN
20 LITIGATION?

21 A IT'S BEEN A WHILE SINCE I'VE READ THEIR
22 THINGS.

23 Q OKAY, IT SAYS MANY TIMES IN A
24 CONSTRUCTION CASE LIABILITY IS CLEAR. THE DEFENDANT'S
25 STRATEGY, THEREFORE, GOES TOWARDS REDUCING THE DOLLAR

1 AMOUNT; IS THAT WHAT WE'RE DOING HERE?

2 A NO, I BELIEVE WHAT WE'RE DOING, WHAT I'M
3 DOING IS AND WHAT I'VE RECOMMENDED IS REPAIRING THE
4 DAMAGES THAT I'VE OBSERVED HERE.

5 Q AND IT'S ---

6 A NOTHING MORE.

7 Q IT SAYS IT IS HIGHLY UNETHICAL FOR
8 FORENSIC ENGINEERS TO TESTIFY, FOR EXAMPLE, THAT EVEN
9 THOUGH A CODE VIOLATION EXISTS THAT IT IS NON
10 CONSEQUENTIAL AND IRRELEVANT; DO YOU AGREE WITH THAT?

11 A I'D HAVE TO THINK ABOUT THAT. THERE MAY
12 BE GOOD REASONS FOR, FOR SOMETHING NOT TO COMPLY WITH,
13 STRICTLY WITH THE BUILDING CODE. THERE MAY BE ALTERNATE
14 NEW MEANS AND METHODS TO DOING SOMETHING THAT DOESN'T
15 NECESSARILY COMPLY WITH THE LETTER AND CODE. IT USUALLY
16 REQUIRES ADDITIONAL, ADDITIONAL ANALYSIS OR TESTING AND
17 THERE ARE PROVISIONS IN THE CODE FOR DOING THAT.

18 Q OKAY, YOU WERE RETAINED IN THIS CASE IN
19 WHAT YEAR?

20 A IN 1980, EXCUSE ME, 2004, YES.

21 Q IN 2004?

22 A YES.

23 Q THAT WAS RIGHT ABOUT THE TIME THE BURIC
24 REPORT CAME OUT?

25 A I BELIEVE THAT'S CORRECT, IT WAS SOMETIME

1 EARLY SPRING, LATE WINTER OF 2004.

2 Q AND YOU CHECKED BURIC'S CALCULATION ON
3 THE DESIGN PRESSURE REQUIREMENT OF THE CODE FOR THESE
4 WINDOWS AND IT WAS 34 PSF AND YOU FOUND THAT TO BE
5 ACCURATE, CORRECT?

6 A YES, SIR, IN THAT BALL PARK, SOMEWHERE
7 BETWEEN 30 AND 34, SOMEWHERE IN THAT AREA.

8 Q THERE'S A LOT OF DIFFERENCE IN DP'S IF
9 IT'S 30 OR 34, ISN'T IT?

10 A WELL THERE IS AND I WAS TRYING TO SPEAK
11 OFF OF MEMORY, I BELIEVE CAUSE I DIDN'T WRITE DOWN MY
12 CALCULATION, IT WAS JUST A QUICK CHECK IN THE CODE.

13 Q OKAY, DO YOU HAVE ANY DISAGREEMENT WITH
14 BURIC'S CALCULATION?

15 A NO, I HAVEN'T SEEN HIS, HIS, HIS ACTUAL
16 CALCULATION.

17 Q ALL RIGHT, AND THE ARCHITECT IN THIS CASE
18 SPECIFIED R40 WINDOWS, CORRECT?

19 A I BELIEVE THAT'S CORRECT, YES.

20 Q ALL RIGHT, AND YOU FOUND A LOT OF WINDOWS
21 OUT THERE DID YOU NOT, THAT DID NOT MEET THAT GRADE,
22 CORRECT?

23 A I FOUND ONE WINDOW LABEL TO HAVE DP30
24 LABEL.

25 Q LOOKS LIKE TO ME THAT YOU FOUND AT LEAST

1 TWO?

2 A I ONLY REMEMBER ONE.

3 Q YOU WANT TO LOOK AT THESE PICTURES?

4 A SURE. YEAH, THERE'S THREE DIFFERENT
5 RATINGS HERE.

6 Q OKAY, WHICH, WHAT ARE THE RATINGS?

7 A WELL ONE HAS A DOUBLE HUNG RESIDENTIAL
8 20/30; ONE HAS A DOUBLE HUNG RESIDENTIAL 40; AND THEN ONE
9 HAS A HUNG RESIDENTIAL 30.

10 Q OKAY, DO THE TWO 30'S MEET THE
11 REQUIREMENTS OF THE SPECIFICATION?

12 A NO, I BELIEVE THE SPECIFICATION CALLS FOR
13 DP40.

14 Q OKAY, DID YOU ASK LYNN ANDERSON, THE
15 PRESIDENT OF BUILDSTAR, WHY THEY CHANGED FROM AN R40 TO A
16 30?

17 A I HAVE NEVER HAD A CONVERSATION WITH MS.
18 ANDERSON.

19 Q HAVE YOU EVER TALKED TO ANYBODY AT
20 HERITAGE?

21 A NOT THAT I KNOW OF, NO, I CAN'T RECALL
22 ANY CONVERSATIONS.

23 Q THE ONLY PEOPLE YOU'VE TALKED TO ARE THE
24 LAWYERS, CORRECT?

25 A CORRECT.

1 Q OKAY, DO THESE WINDOWS OUT THERE MEET THE
2 CODE?

3 A WELL I DON'T KNOW, I AM IN AGREEMENT WITH
4 WHAT MR. LEWIS SAID EARLIER ABOUT THERE, YOU CAN DO WHAT
5 THEY CALL A RATIONAL ANALYSIS OF VARIOUS WINDOW SIZES TO
6 SEE IF A SMALLER WINDOW THAN WHAT WAS TESTED AND RATED
7 HAS A HIGHER WIND ALLOWABLE PRESSURE.

8 Q WELL LET ME ASK YOU THE SAME QUESTION I
9 ASKED MR. LEWIS, YOU HAD THIS REPORT SINCE 2004 YOUR
10 COMPANY DOES WINDOW TESTS, WHY HAVEN'T YOU TESTED THESE
11 WINDOWS?

12 A WELL I DIDN'T SEE ANY COMPELLING REASON
13 TO, I OBSERVED NO INTERIOR DAMAGE AT THE WINDOWS. THE
14 DAMAGE THAT I OBSERVED ON THE EXTERIOR I ATTRIBUTED
15 DIRECTLY TO THE INSTALLATION OF THAT TRIM AND THE
16 MISAPPLICATION OF FLASHING ABOVE THE WINDOWS IN ADDITION
17 TO OTHER BRICK DEFICIENCIES, SEALANTS, THAT TYPE OF THING
18 AROUND THE WINDOWS. I HAVE NO REASON TO BELIEVE THAT,
19 THAT, THAT THE WINDOWS ARE CAUSING THE DAMAGE OUT THERE.

20 Q OKAY, HOW MANY TIMES HAVE YOU PRICED
21 PROJECTS FOR MR. REEDSBURG WHERE YOU TOOK THE WINDOWS
22 OUT, DIDN'T REPLACE THEM BUT YOU TOOK THEM OUT JUST TO
23 PUT ROUGH OPENING FLASHING IN THEM?

24 A I DON'T RECALL.

25 Q THOUSANDS OF THEM, HAVEN'T YOU?

1 A I HAVE NO IDEA, IT'S A LARGE NUMBER BUT I
2 DON'T KNOW THAT IT WOULD BE THOUSANDS.

3 Q DID YOU EXAMINE THE PLANS IN THIS CASE?

4 A YES.

5 Q DID YOU KNOW THAT THE ARCHITECT REQUIRED
6 IN THIS CASE THAT THE WINDOWS BE DOUBLE WRAPPED? DO YOU
7 WANT TO LOOK AT IT?

8 A YES, IF I COULD, PLEASE?

9 Q THIS NOTE RIGHT HERE ON THE ARCHITECTURAL
10 PLANS?

11 A OKAY.

12 Q WAS THAT DONE?

13 A NO, HE'S CALLING FOR A DOUBLE LAYER OF
14 NUMBER 15 FELT, 15, YEAH, NUMBER 15 FELT.

15 Q RIGHT ---

16 A THAT WASN'T DONE.

17 Q WHICH COULD BE TYVEK OR FELT, CORRECT?

18 A WELL CERTAINLY TYVEK AND FELT ARE TWO
19 DIFFERENT MATERIALS. A DOUBLE LAYER OF TYVEK ISN'T
20 REALLY GOING TO GIVE YOU ANY MORE PROTECTION THAN A
21 SINGLE LAYER WILL.

22 Q BUT HE WANTED FELT, DIDN'T HE?

23 A HE DID, BUT HE ALSO CALLED FOR FELT
24 EVERYWHERE ON THE EXTERIOR WALLS.

25 Q WAS, WERE THESE WINDOWS DOUBLE WRAPPED

1 LIKE THE ARCHITECT CALLED FOR?

2 A NOT THAT I OBSERVED, NO.

3 Q HOW MUCH CHEAPER IN THE LABOR AND
4 MATERIAL WOULD IT BE IF YOU HAD A THOUSAND WINDOWS OUT
5 THERE IF YOU DIDN'T HAVE TO DOUBLE WRAP THEM?

6 A I HAVE NO IDEA.

7 Q BE A LOT CHEAPER, WOULDN'T IT?

8 A YEAH, SOMEWHAT, YEAH.

9 Q AND WINDOWS ARE ALL OVER THE SCALE,
10 AREN'T THEY?

11 A CLARIFY YOUR --

12 Q I'M TALKING ABOUT IN COSTS?

13 A OH, YES, THERE'S A WIDE RANGE IN COSTS.

14 Q OKAY, DO YOU KNOW WHAT KIND OF WINDOWS
15 WERE OUT THERE?

16 A I BELIEVE SOME OF THE WINDOWS WERE FROM
17 METAL INDUSTRIES. THEY'RE ALUMINUM WINDOWS AND THERE ARE
18 VINYL WINDOWS OUT THERE, I'VE SEEN THAT.

19 Q CAPITAL WINDOWS?

20 A I COULDN'T CONFIRM THE MANUFACTURER.

21 Q OKAY, DID YOU, DID YOU TAKE ANY TIME TO
22 DETERMINE WHETHER THESE WERE CHEAP WINDOWS OR EXPENSIVE
23 WINDOWS?

24 A NO, SIR.

25 Q OKAY, NOW IN YOUR DEPOSITION YOU

1 TESTIFIED CONCERNING SEALANTS, DO YOU AGREE THERE'S
2 INSUFFICIENT, THAT THERE WAS INSUFFICIENT SPACE LEFT FOR
3 SEALANT JOINTS?

4 A YES, SIR.

5 Q AND DID YOU FIND ANY BACKER ROD OUT
6 THERE?

7 A NO, SIR.

8 Q THE ARCHITECT SPECKED THAT, DIDN'T HE?

9 A I DON'T RECALL SPECIFICALLY RECALL WHAT
10 THE SPEC TALKS ABOUT WITH REGARDS TO BACKER ROD.

11 Q YOU DIDN'T FIND ANY, DID YOU?

12 A I DIDN'T OBSERVE IT, NO.

13 Q ALL RIGHT, THERE SHOULD HAVE BEEN BACKER
14 ROD?

15 A YES, AT SOME OF THOSE JOINTS, YES.

16 Q OKAY, AND HOW MUCH CHEAPER IS IT TO DO A
17 FILL IT SEALANT JOINT AS OPPOSED TO AN ENGINEERED SEALANT
18 JOINT WITH BACKER ROD?

19 A WELL IT IS LESS EXPENSIVE.

20 Q OKAY, AND YOU ALSO SAID THE IMPROPER
21 SEALANT JOINTS ARE A CONTRIBUTING CAUSE OF WATER
22 INTRUSION; DO YOU AGREE WITH THAT?

23 A YES, SIR.

24 Q OKAY, DID YOU DO ANY KIND OF
25 COMPREHENSIVE INVESTIGATION OF THE PENETRATIONS THAT WENT

1 THROUGH THE BRICK, WENT THROUGH THE SIDING, THAT SORT OF
2 THING?

3 A NO, I, I DIDN'T DO A COMPREHENSIVE
4 INVESTIGATION; I DID NOTICE SOME OF THE PENETRATIONS AS I
5 WALKED AROUND THE DEVELOPMENT.

6 Q AND HOW WERE THEY DONE?

7 A WELL THERE WAS A MIXTURE OF CONDITIONS
8 THERE, SOME OF THE, THE PIPE PENETRATIONS HAD BRICK
9 MORTAR AROUND THEM HARD UP AGAINST THE PIPE SO THEY WERE
10 SEALED WITH MORTAR. SOME HAD SILICONE SEALANT AROUND THE
11 PIPE AND SOME HAD, SOME OF THE AIR CONDITIONER LINES,
12 CONDENSATE LINES THAT GO OUT TO THE OUTSIDE CONDENSERS
13 THEY HAD SPRAY FOAM SEALANT.

14 Q OKAY, WAS THAT ACCEPTABLE?

15 A NO, YOU NEED TO HAVE A CAULKING TYPE
16 SEALANT, YES.

17 Q OKAY, AND DO YOU KNOW WHAT DAMAGE IS
18 BEHIND THOSE PENETRATIONS?

19 A NO, I DON'T, I DON'T SUSPECT ANY, THOUGH,
20 MR. HENRY.

21 Q YOU DIDN'T SUSPECT ANY?

22 A NO, SIR.

23 Q OKAY, YOU REALIZE, DON'T YOU, THAT WHEN
24 THIS JURY RENDERS ITS VERDICT, WHATEVER IT IS, THAT'S IT?
25 IF THEY FIND DAMAGE BEHIND THOSE PENETRATIONS THEY CAN'T

1 COME BACK TO THIS JURY AND SAY WE MISSED IT, WE NEED MORE
2 BECAUSE THERE WAS DAMAGE BEHIND THESE PENETRATIONS; YOU
3 UNDERSTAND THAT, DON'T YOU?

4 A YES.

5 Q OKAY, SO WE WANT TO BE AS ACCURATE AS WE
6 CAN SO THAT THE HOMEOWNERS CAN FIX THEIR BUILDING,
7 CORRECT?

8 A THAT'S CORRECT.

9 Q YEAH ---

10 A BUT TO THE EXTENT THAT WE KNOW THE DAMAGE
11 EXISTS.

12 Q OKAY, NOW WE'VE SEEN THAT THE DECKS ARE
13 NOT AS SPECKED BY THE ARCHITECT, CORRECT?

14 A THAT'S CORRECT, THE PLYWOOD.

15 Q THE PLYWOOD?

16 A YES.

17 Q WOULD YOU USE OSB ON A DECK?

18 A YES.

19 Q YOU DON'T SEE ANY PROBLEM WITH THAT?

20 A YES, IT'S AN EXTERIOR ONE RATING ON IT
21 AND THAT'S PERFECTLY FINE FOR DURING THE CONSTRUCTION OF
22 THE PROJECT AS LONG AS IT GETS COVERING.

23 Q IF I, IF I TOLD YOU, MR. ROADY, THAT I
24 WANTED YOU TO SPECIFY MATERIALS THAT WOULD GIVE ME THE
25 HIGHEST QUALITY DECK WOULD YOU SPECIFY OSB OR TREATED

1 PLYWOOD?

2 A WELL CERTAINLY THE TREATED PLYWOOD IS
3 BETTER, I MEAN IT'S A BETTER PRODUCT FROM A
4 WEATHERABILITY STANDPOINT.

5 Q OKAY, SEALOFLEX, THE MATERIAL THAT'S OUT
6 THERE, REQUIRES A 3/4 INCH TONGUE AND GROOVE PLYWOOD,
7 CORRECT?

8 A I DON'T RECALL SPECIFICALLY, I HEARD THE
9 TESTIMONY THIS MORNING, I DON'T RECALL SPECIFICALLY THEIR
10 RECOMMENDATION.

11 Q WOULD YOU AGREE WITH MR. LEWIS THAT NOT
12 PUTTING A SLOPE ON A DECK VIOLATES INDUSTRY STANDARDS?

13 A I WOULD HAVE TO SAY THAT IT'S GOOD DESIGN
14 PRACTICE. I WOULD NOTE HOWEVER THAT I ASKED MR. EDDIE
15 POPE, I BELIEVE YOU KNOW MR. POPE?

16 Q I SURE DO?

17 A HE ASSISTED ME IN SOME OF MY
18 INVESTIGATIONS OF THOSE WALKWAYS TO, TO MEASURE THE SLOPE
19 OR CHECK THE SLOPE ON SOME OF THEM AND HE FOUND ALL OF
20 THE DECKS TO HAVE A POSITIVE SLOPE AWAY AT THE ONES THAT
21 HE CHECKED. UNFORTUNATELY WE ONLY TOOK ONE PHOTOGRAPH OF
22 WE HAVE A RECORD OF THAT BUT, AND THEN ON THE BACK SIDE
23 OF THE BUILDING, OF COURSE, NO SLOPE WAS EVER DESIGNED
24 FOR THE, FOR THE REAR PORCHES.

25 Q DO YOU HAVE, YOU HAVE ONE PHOTOGRAPH, DO

1 YOU HAVE ANY FIELD NOTES?

2 A ALL I KNOW IS WE HAVE A RECORD OF I
3 BELIEVE THERE WAS 10 OR 12 BUILDINGS THAT WE WENT TO TO
4 LOOK AT THE WALKWAYS AND HANDRAIL POST ATTACHMENTS.

5 Q DID YOU, DID YOU, WHEN YOU WERE FIRST
6 RETAINED DID MR. BROWN OR MR. WISEMAN OR MS. CARLSON GIVE
7 YOU ANY REPAIR RECORDS WHERE THE HOMEOWNERS ASSOCIATION
8 HAD SPENT THOUSAND OF DOLLARS IN PATCHING THESE DECKS?

9 A I BELIEVE I'VE SEEN SOME REPAIR RECORDS
10 ASSOCIATED WITH DECKS OR WORD FROM THE LAWYERS ABOUT
11 THAT, YES.

12 Q AND YOU FOUND WHEN YOU, WHEN YOU SURVEYED
13 THESE BUILDINGS YOU FOUND PLACES WHERE THERE WAS WATER
14 STAIN ON THE PLYWOOD, ON THE SHEETROCK, CORRECT?

15 A ON THE FRONT WALKWAYS, I FOUND ON THE REAR
16 DECKS MOSTLY TO BE MILDEW.

17 Q WHERE IS THIS MOISTURE COMING FROM?

18 A WELL I BELIEVE SOME OF THESE HANDRAIL
19 POST ATTACHMENTS THAT MR. LEWIS SPOKE OF THERE'S SOME
20 ISOLATED AREAS WHERE THE, AGAIN WHERE HE SPOKE OF WHERE
21 THE STAIR COLUMNS AT THE EDGE OF THE WALKWAY LANDINGS
22 WHERE THEY ARE. I BELIEVE, I BELIEVE THAT'S IT MAINLY,
23 THERE'S NOT A WHOLE LOT OF CEILING STAINING.

24 Q THERE'S NOT?

25 A NO, AND THAT'S WHY WE'VE ALLOWED FOR I

1 THINK SIX SQUARE FEET FOR THE WALKWAY CEILING.

2 Q DID YOU, DID YOU MAKE ANY INVESTIGATION
3 TO DETERMINE WHAT WAS CAUSING THOSE CEILING STAINS WHERE
4 THE WATER WAS COMING FROM?

5 A WELL IT WAS APPARENT TO ME THAT IT WAS
6 COMING EITHER FROM A STAIR OR WALKWAY COLUMN INTERSECTION
7 OR THE HANDRAIL POST LOCATION.

8 Q DID YOU PULL BACK ANY CARPET TO SEE WHAT
9 THE CONDITION OF THE OSB WAS?

10 A I DON'T RECALL DOING THAT, MR. POPE MAY
11 HAVE DONE THAT, YEAH, HE DID PULL BACK THE CARPET IN
12 LOCATIONS TO VIEW THE SITUATION. IN ONE AREA A HANDRAIL
13 POST APPARENTLY HAD ALREADY BEEN REPAIRED BUT THE PLYWOOD
14 THAT WAS PUT DOWN AS A PATCH WAS NOT WATERPROOFED.

15 Q RIGHT ---

16 A IN ANOTHER AREA HE PULLED THE CARPET BACK
17 REVEALING THE EDGE OF WHERE THIS TRAFFIC COATING IS, THE
18 GREEN TOPPING COAT, THE WEARING COAT, AND WHERE WE HAVE
19 UNDERLYING WATERPROOFING.

20 Q OKAY, DID YOU FIND ANY DAMAGE TO THE OSB?

21 A NO, I DON'T RECALL, NO.

22 Q THIS IS THE ONLY PICTURE I FOUND IN YOUR
23 DOCUMENTS, CAN YOU SEE THAT OKAY? YOU SEE THOSE STAINS
24 ON THE CARPET COULD THAT BE WHERE WATER IS PONDING?

25 A I HAVE TO COME AROUND THERE?

1 Q SURE?

2 A IT'S HARD TO TELL, THERE MAY BE A,
3 THERE'S A DARKER AREA RIGHT HERE, I'M NOT SURE WHAT THAT
4 IS. I MIGHT SAY THAT THE WEARING IS CERTAINLY IN THAT --

5 -

6 Q STAND BACK?

7 A I'M SORRY, BUT THE GREEN WEARING COAT
8 SURFACE HAS A BLOTCHY APPEARANCE TO IT WHICH I BELIEVE IS
9 NATURAL AFTER HAVING TALKED TO A SEALOFLEX REPRESENTATIVE
10 THAT OVER TIME IT GETS THAT BLOTCHY LOOK.

11 Q ALL RIGHT, BUT I'M TALKING ABOUT THE
12 CARPET RIGHT HERE AND RIGHT HERE WHERE IT APPEARS TO ME
13 WHERE WATER WAS PONDING?

14 A YEAH, I NOTICE DARKER AREAS OUT THERE,
15 TOO, BUT THEY WERE DAMP OR WET. AS FAR AS THE CARPET
16 GOES THERE ARE CARPET AREAS OUT THERE THAT'S IN PRETTY
17 BAD SHAPE BECAUSE OF THE EXPOSURE TO THE WEATHER.

18 Q NOW YOU SEE THIS DARK AREA RIGHT HERE
19 BEHIND THIS POST?

20 A YES, SIR.

21 Q MR. POPE OPENED THAT UP?

22 A THAT'S CORRECT.

23 Q AND WHAT DID HE FIND THE CONDITION OF THE
24 OSB SHEATHING BEHIND THAT, BEHIND THAT PATCH?

25 A WELL HE'S GOT PARTIAL DELAMINATION OF THE

1 OSB, IT APPEARS THAT THE WATERPROOFING HAD BEEN CUT BACK
2 AS PART OF THIS REPAIR.

3 Q SO THAT'S, WHOEVER PUT IN THE
4 WATERPROOFING CUT, I MEAN THE CARPET CUT THE
5 WATERPROOFING AND THAT'S WHAT CAUSED THE DELAMINATION?

6 A WELL I SUSPECT, THOUGH, RATHER THAN THAT
7 WHOEVER DID THIS REPAIR MADE THIS CUT IN THE
8 WATERPROOFING AND DIDN'T REPAIR THE WATERPROOFING DAMAGE.

9 Q YOU THINK THAT'S WHAT HAPPENED?

10 A YES, SIR, I DO.

11 Q OKAY, IS THERE A FIX FOR THAT THAT YOU'VE
12 GOT IN YOUR SCOPE?

13 A I HAVE MADE AN ALLOWANCE FOR SIX SQUARE
14 FEET OF DECK REPAIR, OF, YOU KNOW, CEILING AND DECK
15 REPAIR UP ABOVE ALONG WITH WATERPROOFING REPAIR UP ABOVE.

16 Q THE OSB?

17 A YES.

18 Q AND YOU THINK THAT'S SUFFICIENT?

19 A YES, SIR.

20 Q ALTHOUGH YOU DIDN'T LOOK AT BUT ONE PLACE
21 AND WHEN YOU PULLED THE CARPET BACK AND IT WAS
22 DELAMINATED?

23 A WELL IT WAS MOSTLY BASED ON MY
24 OBSERVATIONS OF THE CEILING UNDERNEATH, YES.

25 Q NOW MY UNDERSTANDING IS THAT YOUR FIX ON

1 THE, ON THE ABTCO TRIM BOARD IS TO CUT UP 12 INCHES ON
2 THE CORNERS?

3 A YES, SIR.

4 Q WHERE WE SAW THAT WATER DAMAGE ON THE
5 CORNERS, CUT UP 12 INCHES AND PUT A PIECE OF CEMENT BOARD
6 THERE; IS THAT RIGHT?

7 A YES, SIR.

8 Q OKAY, AND SO YOU'RE GOING TO HAVE A JOINT
9 THERE?

10 A YES, SIR.

11 Q THAT THE HOMEOWNER IS GOING TO HAVE TO
12 MAINTAIN?

13 A WELL HE SHOULDN'T OR NOT ANY MORE THAN
14 YOU WOULD ORDINARILY MAINTAIN SIDING ANYWAY. THAT JOINT
15 IS GOING TO BE WHAT YOU CALL A SCARF JOINT. IT'S GOING
16 TO BE CUT ON AN ANGLE SO IT WILL SHED WATER, OKAY.

17 Q DO YOU KNOW THAT THE ABTCO INSTRUCTIONS
18 SAY DON'T MITER A CORNER?

19 A YES, BUT THEY'RE TALKING ABOUT VERTICAL
20 MITERS OF CORNERS WHICH WAS DONE AT THIS SECOND FLOOR
21 BAND TRIM. IN FACT THEY HAD A DETAIL ---

22 Q VERTICAL BAND TRIM, ISN'T IT?

23 A THAT'S TRUE, BUT THEY ALSO HAVE A DETAIL
24 FOR A SCARF JOINT WHERE YOU'RE BUTTING TWO BOARDS UP
25 AGAINST ANOTHER.

1 Q I UNDERSTAND THAT BUT I'M SAYING THE
2 WHOLE, FROM THE TOP, FROM THE THIRD FLOOR ALL THE WAY
3 DOWN THERE'S A MITERED CORNER, CORRECT?

4 A NO, IT IS A BUTTED CORNER.

5 Q YOU MEAN IT BUTTS?

6 A I BELIEVE, YES, I'VE SEEN SOMEBODY DID A
7 DESTRUCTIVE EXAMINATION, I BELIEVE, THERE AND IT'S JUST
8 BUTTED TOGETHER.

9 Q THAT CORNER IS NOT MITERED?

10 A AT THE, ARE WE TALKING ABOUT THE INSIDE
11 CORNER TRIM WHERE I'M JUST REMOVING 12 INCHES, RIGHT?

12 Q I'M TALKING ABOUT THE CORNER TRIM THAT
13 GOES ALL THE WAY FROM THE THIRD FLOOR DOWN?

14 A OKAY ---

15 Q ON THE CORNERS?

16 A ON THE OUTSIDE CORNERS?

17 Q YES?

18 A THAT'S CEMENT BOARD.

19 Q THAT'S, THAT'S CEMENT BOARD?

20 A AND WE'RE NOT TAKING THAT OFF EXCEPT AS
21 NEEDED TO DO THE OSB REPAIRS.

22 Q YOU'RE SURE THAT'S CEMENT BOARD?

23 A YES, SIR, I CUT INTO IT WITH A KNIFE AND
24 VERIFIED THAT.

25 Q DO YOU HAVE ANY PICTURES OF THAT?

1 A YEAH, I BELIEVE I DO.

2 Q OKAY, CAN YOU GET THAT FOR ME?

3 A ALL MY PHOTOS HAVE BEEN PRODUCED, I DON'T
4 HAVE IT ON ME.

5 Q HOW MUCH, HOW MUCH SHEATHING REPLACEMENT
6 HAVE YOU GIVEN TO MR. CARLSON TO PUT IN HIS ESTIMATE?

7 A I'VE ALLOWED 75 SQUARE FEET PER BUILDING,
8 THE, AND THAT'S BASED ON MY OBSERVATIONS OF THE TEST CUTS
9 THROUGHOUT THE DEVELOPMENT AND THE AFFECTED AREAS OF OSB
10 SHEATHING. THERE'S ALSO AN ALLOWANCE, OF COURSE, BEHIND
11 THE BAND TRIM FOR ROTTEN WOOD BLOCKING.

12 Q OKAY, AND ARE YOU FIXING ALL OF THE
13 PLACES WHERE THE OSB SHEATHING IS BEHIND THE FLASHING?

14 A YES, WHEREVER IT'S DAMAGED.

15 Q WHEREVER IT'S DAMAGED?

16 A WHEREVER IT'S DAMAGED, YES.

17 Q SO IF IT'S NOT, IF YOU HAVEN'T FOUND ANY
18 DAMAGE YOU'RE GOING TO LEAVE THE TYVEK BEHIND THE
19 FLASHING?

20 A NO, SIR, NO, SIR, AT FLASHING LOCATIONS
21 I'M PRETTY SPECIFIC IN MY SCOPE WE HAVE TO LEVEL LAP
22 THOSE THOSE FLASHINGS WITH THE TYVEK PAPER.

23 Q THE ORIGINAL SCOPE YOU HAD WAS NOT TO
24 TAKE THE, IN FACT I BELIEVE THE FIRST TIME YOU LEARNED
25 THAT MR. BROWN SAYING THEY'RE GOING TO TAKE THE ROLL

1 LOCKS OFF THE TOP OF THE WALL WAS TODAY, RIGHT?

2 A OR THIS, THIS PAST WEEK, YES.

3 Q RIGHT, BEFORE THAT YOU WERE JUST GOING TO
4 TAKE THE SILLS OUT UNDER THE WINDOWS, CORRECT?

5 A WELL I WAS GOING TO TAKE THE HEADS AND
6 THE SILLS OUT.

7 Q AND THE SILLS?

8 A YES.

9 Q BUT YOU WERE GOING TO LEAVE THE ROW LOCKS
10 LIKE THEY WERE AND PUT A PIECE OF FLASHING OVER THE TOP
11 OF THE ROW LOCK?

12 A THAT'S CORRECT.

13 Q AND YOU, YOU THOUGHT THE HOMEOWNERS WOULD
14 BE REALLY PLEASED WITH THAT?

15 A YES, IT WOULD PROVIDE A, A PERMANENT
16 WEATHER, CERTAINLY A BETTER FLASHING THAN WHAT WOULD HAVE
17 TO GO BACK IN THERE.

18 Q HOW WOULD IT LOOK?

19 A I THINK IT WOULD LOOK FINE, YOU'RE GOING
20 TO GO WITH A HIGH DOLLAR KINAR COATED ALUMINUM FLASHING,
21 YES.

22 Q AND YOU THINK IT WOULD LOOK FINE TO HAVE
23 BRICK SILLS DOWN HERE AND FLASHING UP HERE OFF THE TOP OF
24 THE WHOLE BRICK YOU THINK THEY'D JUST BE DELIGHTED WITH
25 THAT?

1 A YES.

2 Q OKAY, NOW WHEN YOU TAKE, WHEN YOU TAKE
3 THE TRIM OUT FROM AROUND THE SECOND AND THIRD FLOOR
4 WINDOWS IS ANY OF THE OSB, I'M SORRY, ANY OF THE HARDY
5 PLANK GOING TO HAVE TO COME OFF?

6 A YES, IN ORDER TO DEAL WITH THAT FLASHING
7 REMOVAL, WITH THE SIDING, TRIM REMOVAL, EXCUSE ME, AND
8 WITH THE FLASHING ALSO THAT WE'RE DOING AT THE HEADS OF
9 THE WINDOWS ANYWAY.

10 Q HOW MUCH IS GOING TO HAVE TO COME OFF?

11 A I DON'T KNOW, THAT'S REALLY UP TO THE
12 CONTRACTOR TO DO THAT.

13 Q OKAY, AND WHAT IF HE'S WRONG WHO PAYS FOR
14 THAT?

15 A THE CONTRACTOR WOULD.

16 Q THE CONTRACTOR WOULD?

17 A YES.

18 Q WELL HE GIVES AN ALLOWANCE, IF HIS
19 ALLOWANCE, IF HE GIVES AN ALLOWANCE HE GIVES US SO MUCH
20 THAT HE'S GOING TO DO AND THEN HE GIVES AN ALLOWANCE,
21 WHAT, WHAT IF, WHAT IF HE'S WRONG WHO PAYS FOR IT?

22 A WELL I'M NOT SURE IF HE GIVES AN
23 ALLOWANCE, WHAT WE'VE INSTRUCTED, WHAT I'VE INSTRUCTED IN
24 THE SCOPE OF WORK IS TO REMOVE THE CEMENTIOUS LAPPED
25 SIDING THAT IS NECESSARY TO DO THE WORK.

1 Q WELL HOW DOES HE KNOW HOW MUCH TO DO WHEN
2 THERE'S HIDDEN DAMAGE?

3 A WELL HE'S, ONCE HE FINDS DAMAGE THEN
4 HE'LL START REMOVING SIDING IN ORDER TO GET AT THE
5 DAMAGE, THAT AND BASED ON HIS CONSIDERABLE EXPERIENCE IN
6 REPAIRING BUILDINGS, I MEAN MR. CARLSON HAS BEEN DOING
7 THIS LONGER THAN I'VE BEEN ALIVE TODAY.

8 Q HE'S BEEN DOING IN A LONG TIME?

9 A YES, SIR.

10 Q BUT DID YOU TELL HIM WHAT PERCENTAGE OF
11 DAMAGE TO ANTICIPATE?

12 A NO, HE WALKED THE SITE WITH ME AND HIS
13 ESTIMATOR DID, TOO, AND SO WHEN I PUT TOGETHER MY SCOPE
14 OF WORK I INFORMED HIM THAT THAT INCLUDED 75 SQUARE FEET
15 OF OSB REPLACEMENT AND THAT HE, EXCUSE ME, HE DIDN'T HAVE
16 A PROBLEM WITH THAT.

17 Q HE DIDN'T HAVE A PROBLEM WITH THAT?

18 A NO, HE DID ACKNOWLEDGE THAT HE WAS GOING,
19 MIGHT HAVE TO REMOVE SOME OF THAT SIDING IN ORDER TO DO
20 THIS TRIM, TRIM REPLACEMENT AND FLASHING, YES.

21 Q MY QUESTION IS IF THERE'S 75, MORE THAN
22 75 SQUARE FEET WHO PAYS FOR THAT?

23 A DEPENDING ON HOW THE CONTRACT IS WRITTEN.
24 IF IT'S A LUMP SUM CONTRACT THE CONTRACTOR WOULD.

25 Q OKAY, IF IT'S ---

1 A I BELIEVE HE'S GOT ENOUGH, YOU KNOW,
2 CONTINGENCY BUILT INTO HIS PRICING STRUCTURE TO ---

3 Q YOU BELIEVE THAT?

4 A YES, I BELIEVE THAT, HE'S AN EXPERIENCED
5 CONTRACTOR.

6 Q TELL ME THIS SHOULD THERE BE A
7 CONTINGENCY IN HIS CONTRACT JUST IN CASE?

8 A THERE MAY BE ON A SEPARATE, I'VE HEARD
9 TELL OF THAT, USUALLY YOU CAN ASK THE CONTRACTOR TO HARD
10 BID THE THING, YOU KNOW, ONE LUMP SUM.

11 Q MR. ROADY, I'VE GONE BACK AND LOOKED AT A
12 NUMBER OF YOUR ESTIMATES ON THESE KINDS OF JOBS, THESE
13 REPAIR AND RENOVATION?

14 A YES, SIR.

15 Q AND IN EVERY CASE YOU PUT A 15 PERCENT
16 CONTINGENCY IN YOUR ESTIMATES?

17 A YES, AND THAT WAS PRIMARILY A DECISION
18 THAT I MADE WITH MR. REEDSBURG JOINTLY BASED ON HOW HE
19 FELT THE SCOPE OF WORK WAS.

20 Q YES, SIR, AND YOU CAME INTO COURT, YOU
21 CAME INTO DEPOSITIONS AND YOU TESTIFIED TIME AND TIME
22 AGAIN THAT A 15 PERCENT CONTINGENCY WAS REASONABLE?

23 A WAS REASONABLE FOR A SCHEMATIC REPAIR,
24 YES.

25 Q AND YOU BELIEVE THAT TODAY?

1 A I DO, YES.

2 Q OKAY, NOW YOU ALSO PUT IN EVERY ESTIMATE
3 THAT I SAW THAT YOU DID A 12.5 PERCENT ARCHITECT'S FEE
4 AND YOU TESTIFIED TIME AND TIME AGAIN THAT THAT WAS
5 REASONABLE AND YOU STILL BELIEVE THAT TODAY, DON'T YOU?

6 A I REMEMBER TESTIFYING THAT THAT WAS, THAT
7 WAS THE RATE THAT MR. REEDSBURG CHARGED WHICH THERE WAS
8 AN INDUSTRY KNOWN THAT MR. REEDSBURG WAS ONE OF THE MORE
9 EXPENSIVE FORENSIC ARCHITECTS OUT THERE.

10 Q OKAY, YOU THINK WE NEED TO GET AN
11 EXPENSIVE ARCHITECT SINCE THEY DIDN'T HAVE ONE OUT THERE
12 TO BEGIN WITH?

13 A I THINK THAT WHATEVER ARCHITECT YOU FIND
14 AND ESPECIALLY IN THIS DAY AND AGE WITH THE ECONOMY IT'S
15 GOING TO BE A WHOLE LOT CHEAPER. GOD REST HIS SOUL MR.
16 REEDSBURG AS YOU KNOW PASSED AWAY A COUPLE OF WEEKS AGO.

17 Q I SAW YOU AT THE FUNERAL?

18 A YES, AND BUT MR. REEDSBURG WAS PRICEY,
19 YES.

20 Q BUT YOU TESTIFIED THAT THAT WAS A
21 REASONABLE PRICE?

22 A I DON'T RECALL THAT, I THINK THAT MORE
23 OFTEN THAN NOT I TESTIFIED THAT THAT'S WHAT REEDSBURG
24 TOLD ME TO PUT INTO THE ESTIMATE. I DON'T, WHEN I DO
25 ESTIMATES TODAY AS AN ENGINEER ON FORENSIC JOBS I TEND TO

1 LOOK AT THE AMOUNT OF BUILDING THAT I THINK WILL INCUR IN
2 DOING A DESIGN REPAIR AND THEN WHATEVER PERCENTAGE THAT
3 WORKS OUT TO.

4 Q THERE'S BEEN TESTIMONY IN THIS CASE AND
5 I'M NOT SURE WHAT MR. CARLSON'S LENGTH OF REPAIR IS GOING
6 TO BE BUT IT'S GOING TO BE A MATTER OF A COUPLE OF YEARS.
7 I WOULD THINK, WOULD YOU AGREE WITH THAT OR DO YOU KNOW?

8 A I DON'T KNOW.

9 Q OKAY, IN YOUR ESTIMATE AND YOU ALWAYS PUT
10 A THREE PERCENT ESCALATION FEE; DO YOU RECALL THAT?

11 A YES.

12 Q OKAY, WAS THAT REASONABLE?

13 A AT THE TIME IT WAS.

14 Q IT'S NOT NOW?

15 A NO, I DON'T BELIEVE SO, NOT, NOT IN THE
16 LAST FIVE YEARS. THERE IS A SLIGHT ESCALATION THAT
17 HAPPENED THREE YEARS AGO IN METAL BUT I THINK PROBABLY
18 THE ESCALATIONS HAVE LEVELED OUT WITH THE ECONOMY.

19 Q YOU REMEMBER WHEN THE CHINESE STARTED
20 BUYING ALL THE CONCRETE AND GYP SHEATHING AND, AND METAL
21 AND THE PRICE?

22 A NO, I REMEMBER WHEN THEY BOUGHT THE METAL
23 AND THE GLASS.

24 Q OKAY ---

25 A YEAH, IS WHAT I REMEMBER.

1 Q AND THAT'S WHAT THAT KIND OF THING IS
2 DESIGNED TO COVER, CORRECT?

3 A JUST PRICE ESCALATION OVER TIME OF
4 MATERIAL COSTS, YES.

5 Q DO YOU BELIEVE AS YOU DID TESTIFIED TO
6 NUMEROUS TIMES IN THE PAST THAT ALL THE SUBCONTRACTORS
7 OUGHT TO BE BONDED?

8 A THAT WAS A DECISION OF MR. REEDSBURG'S.

9 Q OH, THAT WASN'T YOUR DECISION?

10 A NO, SIR.

11 Q BUT YOU TESTIFIED THAT YOU THOUGHT THAT
12 WAS A REASONABLE AMOUNT OR A REASONABLE PROVISION TO PUT
13 IN THE ESTIMATE?

14 A I REMEMBER SAYING THAT THE AMOUNT OF
15 MONEY THAT I HAD INCLUDED AND TYPICALLY IT WAS ONE AND A
16 HALF PERCENT WAS A REASONABLE AMOUNT.

17 Q NOW ---

18 A OR WAS A REASONABLE RATE TO USE.

19 Q MR. BROWN ASKED MR. COOPER IF A 20
20 PERCENT OVERHEAD AND PROFIT WAS REASONABLE, DO YOU THINK
21 THAT'S REASONABLE?

22 A I'VE USED 20 PERCENT IN MY ESTIMATES FOR,
23 FOR BOTH THE GC AND SUBCONTRACTORS, YES.

24 Q AND YOU THINK THAT'S REASONABLE?

25 A YES.

1 Q OKAY, YOU'VE USED AS HIGH AS 21 PERCENT,
2 HAVEN'T YOU?

3 A WELL IT'S CALLED 10 AND 10.

4 Q TEN AND 10?

5 A YEAH, YOU TAKE 10 PERCENT OVERHEAD AND
6 YOU APPLY A 10 PERCENT PROFIT TO THAT AND IT BECOMES
7 ACTUALLY 21 PERCENT WHEN YOU DO THE MATH.

8 Q YOU ACTUALLY USED TO PUT ICE WATER IN
9 YOUR ESTIMATES, DIDN'T YOU?

10 A YES, SIR.

11 Q IS THAT REASONABLE?

12 A I BELIEVE SO IN THE SUMMER TIME.

13 Q ALL RIGHT, AND YOU WOULD PUT CLEANING OF
14 THE UNITS \$350 PER UNIT, YOU BELIEVE THAT'S REASONABLE?

15 A YES, DEPENDING ON HOW BIG THE UNITS ARE,
16 YOU KNOW, WHAT YOU'RE DOING IN THERE. IF YOU'RE NOT
17 DOING ANYTHING THERE YOU DON'T NEED TO CLEAN THEM.

18 Q OKAY, DO YOU THINK THAT, THAT YOU OUGHT
19 TO HAVE INTERIOR DAMAGE, A CONTINGENCY IN OR SOME
20 ALLOWANCE IN WHERE YOU'RE GOING TO HAVE NAIL POPS AND
21 THAT SORT OF THING IF YOU'RE, IF YOU HAVE TO TAKE A
22 WINDOW OUT?

23 A ASK YOUR QUESTION AGAIN, I'M SORRY?

24 Q DO YOU THINK IT'S REASONABLE TO HAVE
25 MONEY IN YOUR ESTIMATE FOR INTERIOR DAMAGE IN CASE YOU

1 HAVE TO PULL A WINDOW OUT OR THERE ARE ROTTEN STUDS OR
2 WHATEVER?

3 A NO, I THINK THAT PROBABLY GOES TO THE
4 OVERALL CONTINGENCY STRUCTURE OF YOUR, AND RISK STRUCTURE
5 OF YOUR ESTIMATE.

6 Q SO YOU WOULD TAKE THAT OUT OF THE
7 CONTINGENCY?

8 A WELL IF NOT A SEPARATE LINE ITEM FOR
9 CONTINGENCY CERTAINLY I WOULD TAKE THAT INTO ACCOUNT OF
10 THE OVERALL PRICING OF THE WORK.

11 Q OKAY, DO YOU HAVE ANYTHING IN YOUR
12 ESTIMATE FOR REPAIRING ANY DAMAGED FRAMING?

13 A NOT A SPECIFIC LINE ITEM, I THINK I'VE
14 GOT MORE THAN ENOUGH ALLOWANCE IN THERE FOR OSB. OF
15 COURSE I DIDN'T ESTIMATE THE PROJECT, MR. CARLSTON DID, I
16 DID THE SCOPE OF WORK.

17 Q BUT YOU TOLD HIM WHAT THE SCOPE WAS,
18 DIDN'T YOU?

19 A YES, SIR.

20 Q AND, AND DID YOU TELL HIM TO ESTIMATE FOR
21 DAMAGED STUDS?

22 A NO, NOT SPECIFICALLY, NO, JUST ROTTEN
23 BLOCKING AND OSB SHEATHING.

24 Q SO, SO IF THERE'S ANY DAMAGED STUDS WHO'S
25 GOING TO PAY FOR THAT?

1 A WELL I'VE RESERVED NONE BUT SO I
2 ANTICIPATE NONE.

3 Q OKAY ---

4 THE COURT: MR. HENRY, LET'S TAKE A LITTLE
5 BREAK AND STAND UP IN PLACE.

6 MR. HENRY: ALL RIGHT.

7 THE COURT: YA'LL GO TO YOUR JURY ROOM FOR A
8 MOMENT, DO NOT DISCUSS THE CASE.

9 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM
10 AT 4:11 P.M.)

11 THE COURT: READY?

12 MR. HENRY: YES, YOUR HONOR.

13 THE COURT: OKAY, BRING THEM ON.

14 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM
15 AT 4:25 P.M.)

16 THE COURT: MR. HENRY?

17 MR. HENRY: MAY IT PLEASE THE COURT?

18 THE COURT: YES, SIR.

19 MR. HENRY: (CONTINUING)

20 Q MR. ROADY, LET ME ASK YOU A COUPLE OF
21 OTHER THINGS, YOU'VE TESTIFIED BEFORE, I BELIEVE, AND YOU
22 CORRECT ME IF I'M WRONG, THAT THERE'S NO WAY TO PUT HEAD
23 AND SILL FLASHING IN WITHOUT REMOVING THE WINDOWS; DO YOU
24 AGREE WITH THAT?

25 A ON THIS PARTICULAR PROJECT, NO, I DON'T.

1 Q WHY NOT?

2 A YOU COULD SIMPLY PUT THE HEAD FLASHING IN
3 ABOVE THE WINDOW.

4 Q HOW DO YOU PUT THE SILL FLASHING IN?

5 A YOU TUCK THE SILL FLASHING UP UNDER THE
6 NAILING FLANGE AND THIS WILL BE AT THE BRICK.

7 Q AND, AND CAN YOU DO IT WITH A WINDOW
8 THAT'S GOT A NAILING FLANGE?

9 A YES.

10 Q OKAY, YOU'VE INCLUDED IN YOUR ESTIMATES
11 IN THE PAST A PLAN REVIEW FEE THAT IS ONE HALF OF THE
12 BUILDING, ONE HALF THE COST OF THE BUILDING PERMIT, DO
13 YOU REMEMBER THAT?

14 A I REMEMBER PLAN REVIEW FEES BUT I DON'T
15 REMEMBER THE EXACT AMOUNT OF PERCENTAGE.

16 Q DO YOU THINK WE OUGHT TO HAVE ONE IN THIS
17 ONE?

18 A IF HORRY COUNTY OR THE MUNICIPALITY, I
19 BELIEVE THIS IS IN HORRY COUNTY, IF IT REQUIRES IT THEN,
20 YES, YOU WOULD HAVE TO ON ANY DESIGN, ANY DRAWINGS, YES.

21 Q DO YOU BELIEVE THAT THE LABOR BURDEN OF
22 49.15 PERCENT WOULD BE REASONABLE?

23 A I DON'T KNOW, LABOR BURDEN INCLUDES
24 WORKMANS COMPENSATION INSURANCE. AS A MATTER OF FACT THE
25 LARGEST SINGLE COMPONENT OF LABOR BURDEN IS WORKMANS

1 COMPENSATION INSURANCE AND THAT VARIES WITH THE TYPE OF
2 TRADES DOING THE WORK WHETHER IT'S CARPENTRY OR MASONRY
3 OR METAL WORK, THAT TYPE OF THING, SO IT VARIES DEPENDING
4 ON THE TRADE.

5 Q LET ME UNDERSTAND YOUR ROLE HERE YOU
6 PROVIDED A SCOPE OF WORK TO TOM CARLSON, CORRECT?

7 A YES, IT WAS GIVEN TO HIM BUT, YES, HE IS
8 MY SCOPE OF WORK.

9 Q RIGHT, YOU PROVIDED, AND WHEN WE SAY
10 SCOPE OF WORK TELL THE JURY WHAT YOU MEAN BY THAT?

11 A WELL WHAT THAT IS IS JUST WHAT MY, MY
12 LETTER, THE FRONT PAGE OF MY SCOPE OF REPAIR SAYS ---

13 Q WHO IS THAT TO?

14 A THIS IS ADDRESSED TO MR. JOHN HAYES OF,
15 WELL, EXCUSE ME, THERE ARE, THERE'S THE ORIGINAL ONE AND
16 THEN THERE'S AN ADDENDUM.

17 Q YOU DID AN ORIGINAL ONE FOR ED LAWSON?

18 A FOR MR. LAWSON WHEN, WHEN THIS WAS HIS
19 CASE.

20 Q HE'S A LOCAL ATTORNEY?

21 A YES.

22 Q OKAY, AND THEN YOU DID ANOTHER ONE FOR
23 MR. HAYES?

24 A THAT'S RIGHT, AN ADDENDUM TO THAT
25 ORIGINAL SCOPE OF WORK AND I ENTITLED IT PROPOSED SCOPE

1 OF REPAIRS ON THE ORIGINAL ONE.

2 Q OKAY, SO YOU DO A SCOPE OF REPAIR THAT
3 SAYS YOU DO THIS, THIS, THIS, AND THIS AND THEN YOU GIVE
4 THAT TO MR. CARLSON WHO'S THE GENERAL CONTRACTOR AND HE
5 PRICES IT?

6 A THAT'S CORRECT.

7 Q OKAY, HAVE YOU DONE THAT A NUMBER OF
8 TIMES BEFORE?

9 A YES.

10 Q OKAY, HAVE YOU WORKED WITH MR. CARLSON
11 BEFORE?

12 A YES.

13 Q OKAY, SO YOU PROVIDE HIM A SCOPE AND THEN
14 HE COMES IN AND SAYS TO THE JURY HERE'S A SCOPE I WAS
15 PROVIDED AND HERE'S WHAT I PRICED?

16 A THAT'S CORRECT.

17 Q OKAY, SO IF YOU GIVE HIM LET'S SAY THE
18 AMOUNT OF SHEATHING DAMAGE THAT YOU ANTICIPATE AS, HOW
19 MANY SHEETS OF SHEATHING DID YOU SAY?

20 A WELL 75 SQUARE FEET.

21 Q SEVENTY-FIVE SQUARE FEET?

22 A YES.

23 Q THAT'S WHAT HE PRICES?

24 A AND THAT'S PER BUILDING, THAT'S WHAT HE
25 PRICES, YES.

1 Q THAT'S PER BUILDING?

2 A YES.

3 Q THAT'S WHAT HE PRICES?

4 A YES.

5 Q SO IF YOU SAID INSTEAD OF 75 SQUARE FEET

6 YOU SAID 500 SQUARE FEET THAT'S WHAT HE WOULD PRICE?

7 A YES.

8 Q SO YOUR SCOPE DETERMINES WHAT HIS COST
9 IS?

10 A WELL IT DETERMINES THE EXTENT, THE
11 QUANTITY PORTION OF HIS COST, NOT, NOT, IT'S NOT THE
12 FINAL DETERMINATION OF HIS BOTTOM LINE. HE'S IN CHARGE
13 OF THAT AND ANY OTHER RISK ASSOCIATED IN DOING THAT WORK.

14 Q YOU GAVE HIM 75 SQUARE FEET OF SHEATHING
15 THAT'S, HOW, WHAT DID, WHAT, WHAT SIZE DO THESE SHEETS OF
16 OSB COME IN?

17 A WELL OSB IS, IS CONSIDERED A PLYWOOD, IT
18 COMES IN TYPICALLY FOUR BY EIGHT FOOT SHEETS SO THERE'S,
19 THAT'S EQUIVALENT TO ABOUT TWO AND A HALF SHEETS OF
20 PLYWOOD, YES.

21 Q SO WE'RE GOING TO HAVE TWO AND A HALF
22 SHEETS OF PLYWOOD TO FIX THIS WHOLE BUILDING?

23 A YES, THAT'S ALL THAT'S NEEDED BASED ON MY
24 OBSERVATIONS.

25 Q OKAY, WE'RE GOING TO HAVE, HOW MANY, MR.

1 LEWIS SAID THERE WERE, THERE WERE A THOUSAND WINDOWS OUT
2 THERE?

3 A YEAH, I HAVEN'T MADE MY OWN ESTIMATE OF
4 HOW MANY WINDOWS.

5 Q HOW MANY WINDOWS IS IN ONE BUILDING?

6 A WELL THERE ARE, LET'S SEE I DID THIS THE
7 OTHER DAY, ON AVERAGE I THINK 60 WINDOW CORNERS WHERE
8 WE'RE SAYING THERE'S OSB DAMAGE.

9 Q THIS IS A CUT THAT MR. LEWIS MADE UNDER
10 ONE WINDOW, SEE THAT?

11 A OKAY.

12 Q HOW MANY SHEETS OF PLYWOOD ARE WE GOING
13 TO TAKE FOR THAT WINDOW? YOU SEE THE CONDITION OF IT,
14 WE'RE GOING TO REPLACE THAT, RIGHT?

15 A YES, I DON'T KNOW EXACTLY HOW MANY
16 SHEETS. THERE APPEARS TO BE LOOKS LIKE IT MIGHT BE A
17 HALF A SHEET.

18 Q HALF A SHEET FOR THAT WHOLE WINDOW?

19 A YES, IT MIGHT BE, YES, DEPENDING ON THE
20 LEVEL OF DAMAGE BELOW THE CENTER THERE, CERTAINLY IN THAT
21 UPPER PICTURE, UPPER RIGHT PICTURE THAT AREA WOULD HAVE
22 TO BE REPLACED THERE.

23 Q HOW ABOUT HERE, YOU GOING TO REPLACE
24 THOSE?

25 A YEAH, IF IT'S, IF IT'S DECAYED, I'M NOT

1 SURE IF IT IS OR NOT.

2 Q OKAY, IF, IF ALL THAT IS DECAYED UNDER
3 THAT WINDOW HOW MANY SHEETS YOU GOING TO TAKE FOR THAT
4 ONE WINDOW?

5 A AGAIN I DON'T KNOW THE EXACT DIMENSIONS
6 BUT WHATEVER IT TAKES FOR SURE.

7 Q SO WE'VE GOT TWO AND A HALF SHEETS OF
8 SHEATHING ON THE WHOLE BUILDING?

9 A YES, BUT THIS IS FOR MR. HAYES, I'M
10 SORRY, I SHOULD CLARIFY, THIS IS BASED ON MY OBSERVATIONS
11 IN THE FIELD OF DAMAGED AREAS AND THE RELATIVE SIZE OF
12 THOSE DAMAGED AREAS. NOW THERE ARE SOME LARGER AREAS AND
13 THEN THERE ARE WINDOWS OR OPENINGS THAT DO NOT HAVE ANY
14 DAMAGE AT ALL SO IT'S AN AVERAGE NUMBER, YES.

15 Q ALL RIGHT, AND DID YOU SEE ALL THE
16 SHEATHING DAMAGE OF BURIC PICTURES WHERE THEY TOOK THE
17 BRICK ALL THE WAY DOWN TO THE CORE?

18 A YES, I SAW THOSE, I THINK THEY WERE DONE
19 IN FEBRUARY, YEAH, I HAD A CHANCE TO REVIEW THAT. WE
20 ALSO TOOK, I WAS ON SITE WHEN SOMEONE ELSE REMOVED THE
21 BRICK ALL THE WAY DOWN THE FOUNDATION AND I BELIEVE IT
22 WAS DRY DOWN AT THE FOUNDATIONS.

23 Q HAVE YOU SEEN, HAVE YOU SEEN ANY WINDOWS
24 OPENED UP AT THE BRICK WHERE THERE'S NO SHEATHING IN IT?

25 A YES.

1 Q YOU HAVE?

2 A OH, YES.

3 Q YOU GOT A PICTURE OF IT?

4 A THEY'RE IN AMONGST THE HUNDREDS OF
5 PICTURES THAT WE'VE TAKEN, YES, YES, THERE'S A GOOD, GOOD
6 AMOUNT OF OSB THAT'S TOTALLY UNDAMAGED IN THE BRICK.

7 Q NOW LET ME, LET ME GO DOWN AND MAKE SURE
8 WE'VE, WE'VE TALKED ABOUT EVERYTHING, WE'RE GOING TO PUT
9 SOME CONTROL JOINTS IN THE, IN THE GYP SHEATHING ON THE
10 CEILINGS OF THE WALKWAYS?

11 A YES, SIR.

12 Q WE'RE NOT GOING TO DO ANYTHING TO THE
13 BALCONY CEILINGS?

14 A NO, THEY'RE, THEY'RE SMALL ENOUGH WHERE
15 THEY NOT REQUIRE CONTROL JOINT.

16 Q OKAY, HOW ABOUT DID YOU, DID YOU, YOU
17 DIDN'T OBSERVE ANY STAINING ON THE BALCONY CEILINGS WHERE
18 WATER HAS COME THROUGH?

19 A ARE YOU TALKING ABOUT THE REAR BALCONIES?

20 Q YES, THE PORCH?

21 A NO, I DON'T RECALL IT WAS MILDEW, YES.

22 Q THAT'S MILDEW?

23 A YES, SIR, SURFACE MILDEW.

24 Q OKAY, HOW MANY BALCONIES DID YOU GO ON?

25 A OH, LORD, I WENT ON, ON THE INTERIOR OF

1 BUILDINGS I WENT ON SIX OF THEM AND THEN I VIEWED I DON'T
2 KNOW HOW MANY. ON EACH BUILDING I VIEWED THE GROUND
3 FLOOR ONES AT THE CORNERS OF THE BUILDINGS.

4 Q AND WE HAVE PICTURES OF THOSE?

5 A YES, SIR.

6 Q OKAY, WHY ARE YOU PUTTING A CONTROL JOINT
7 IN?

8 A BECAUSE ONE SHOULD HAVE BEEN DESIGNED FOR
9 THAT LOCATION BECAUSE IT'S SUCH A LONG SPREAD AND YOU
10 TYPICALLY NEED A CONTROL JOINT FOR EXPANSION AND
11 CONTRACTION.

12 Q AND THE CONTRACTOR SHOULD HAVE PUT ONE
13 IN?

14 A WELL IT'S KIND OF, IT'S KIND OF ODD.
15 THE, THE ACTUAL REQUIREMENT IN THE BUILDING CODE
16 REFERENCES A GYPSON ASSOCIATION INSTALLATION STANDARD AND
17 THEN WHEN YOU GO TO THAT STANDARD ALL IT DOES IS TELL THE
18 CONTRACTOR TO INSTALL CONTROL JOINTS AS INDICATED ON THE
19 DRAWINGS OR SPECIFIED BY THE ARCHITECT, OKAY. AND THEN
20 IT FURTHER GOES ON TO TELL THE ARCHITECT HOW FAR APART
21 THE CONTROL JOINTS OUGHT TO BE SPACED BUT IT DOESN'T THE
22 CONTRACTOR SHALL INSTALL. THEY LEAVE THAT UP TO THE
23 CONTRACTOR.

24 Q DO YOU THINK, DO YOU THINK THE, DID THE
25 CONTRACTOR VIOLATE HIS STANDARD OF CARE BY NOT PUTTING

1 CONTROL JOINTS IN?

2 A WELL I THINK A KNOWLEDGEABLE CONTRACTOR
3 SHOULD HAVE INSTALLED CONTROL JOINT, THAT ISN'T UNUSUAL
4 FOR A LONG RUN OF DRYWALL.

5 Q ALL RIGHT, WE HAVE OUT THERE ADHESION
6 COHESION FAILURES AND IMPROPER INSTALLATION OF SEALANT,
7 YOU FOUND THAT, CORRECT?

8 A YES.

9 Q AND THAT WOULD BE A VIOLATION OF THE
10 CODE?

11 A IT WOULD FAIL TO PREVENT WATER FROM
12 GETTING IN OR AFFECTING THE BUILDING CLADDING.

13 Q IT WOULD BE A VIOLATION OF THE CODE?

14 A YES.

15 Q FLASHING IMPROPERLY OR NOT INSTALLED?

16 A THAT'S A VIOLATION OF THE CODE.

17 Q OKAY, AND YOU FOUND THAT?

18 A YES.

19 Q DRAINAGE PROVISION NOT INSTALLED AT THE
20 MASONRY WALLS, THAT IS NO WEEP HOLES?

21 A I OBSERVED THAT, YES.

22 Q AND THAT'S A VIOLATION OF THE CODE?

23 A YES.

24 Q BRICK IMPROPERLY INSTALLED?

25 A I OBSERVED THAT, YES.

1 Q AND THAT'S A VIOLATION OF THE CODE OR
2 INDUSTRY STANDARD?

3 A INDUSTRY STANDARD CERTAINLY, YES.

4 Q OKAY, MORTAR BRICK INSTALLED IN THE
5 MASONRY CAVITY, DID YOU OBSERVE THAT?

6 A I OBSERVED MORTAR IN THE CAVITY BUT NOT
7 BRICK.

8 Q OKAY, AND THAT, THE CODE REQUIRES A ONE
9 INCH MINIMUM AIR SPACE, CORRECT?

10 A I BELIEVE THAT'S CORRECT.

11 Q AND THAT'S A ---

12 A THERE'S SOME VARIABLE THERE THAT YOU CAN,
13 YOU'RE ALLOWED TO DEAL WITH BASED ON ENGINEERING ANALYSIS
14 BUT, YES, AN AIR SPACE.

15 Q AND WHAT YOU SAW WAS A VIOLATION OF THE
16 CODE THOUGH, WASN'T IT?

17 A I SAW MORTAR SPANNING THAT, THAT AIR GAP
18 WHICH I BELIEVE LED TO A LOT OF THIS DAMAGE THAT WE SAW
19 ON THE OSB AT THE CORNERS OF THE WINDOWS.

20 Q RIGHT, AND IT ---

21 A AND BELOW THE WINDOWS.

22 Q THAT WOULD BE A VIOLATION OF THE CODE?

23 A YES, SIR.

24 Q ALL RIGHT, THE BRICK LENTILS WERE NOT,
25 DID NOT HAVE THE PROPER BEARINGS IN ACCORDANCE WITH THE

1 CODE, WOULD YOU AGREE?

2 A THAT'S CORRECT.

3 Q AND THAT WOULD BE A VIOLATION OF THE
4 CODE?

5 A THAT'S CORRECT.

6 Q AND YOU FOUND THAT?

7 A AND THE INDUSTRY STANDARD.

8 Q AND THE INDUSTRY STANDARD?

9 A YES, SIR.

10 Q THE SLOPE OF THE DECKS IS A VIOLATION OF
11 INDUSTRY STANDARDS?

12 A YES, CERTAINLY THE, WHAT WE OBSERVED ON
13 WALKWAYS WAS THAT THEY HAD SLOPE TO THEM AND WE
14 PHOTOGRAPHED ONE OF THOSE PLACES. THE REAR DECKS DID NOT
15 HAVE ANY SLOPE DESIGNED INTO THEM.

16 I MIGHT ADD THAT THEY ALSO APPEARED TO BE
17 PERFORMING OKAY. THE ONLY THING WRONG WITH THE DECKS IS
18 THE WEARING SURFACE NEEDS TO BE REPLACED.

19 Q OKAY, THE DECK MEMBRANE WAS IMPROPERLY
20 INSTALLED, DID YOU SEE ANY OF THAT?

21 A I SAW PLACES WHERE IT HAD BEEN CUT BUT
22 THE ORIGINAL INSTALLATION, IN ONLY ONE LOCATION AND MAYBE
23 POSSIBLY TWO LOCATIONS, BUT AT ONE COLUMN, THIS IS ON A
24 FRONT WALKWAY AND AT THE BASE OF EACH MAJOR BUILDING
25 COLUMN THE WATERPROOFER RAN THE WATERPROOFING UP THE SIDE

1 OF THE COLUMN, OKAY, AND YOU HAVE TO RUN IT UP A CERTAIN
2 DISTANCE AND AT ONE LOCATION WE DIDN'T OBSERVE THAT AT
3 THAT COLUMN, HOWEVER IT MAY HAVE BEEN CUT OUT DUE TO SOME
4 REPAIRS AT THAT ONE COLUMN. AT ANOTHER LOCATION IT
5 DIDN'T LIKE IT, IT LOOKED IT COULD HAVE BEEN RUN UP ABOUT
6 ANOTHER INCH HIGHER. I DON'T THINK IN EITHER ONE OF
7 THOSE LOCATIONS, THOUGH, WE DIDN'T OBSERVE, I DON'T
8 BELIEVE, ANY WATER STAIN OR DAMAGED ENVELOPE.

9 Q BUT IT WASN'T INSTALLED CORRECTLY?

10 A THAT'S CORRECT AT THOSE TWO LOCATIONS.

11 Q OKAY, HANDRAIL IMPROPERLY INSTALLED?

12 A YES, THE HANDRAIL POSTS, SOME OF THE
13 HANDRAIL POSTS WERE NOT PROPERLY ANCHORED.

14 Q AND THAT WAS A VIOLATION OF THE CODE?

15 A NOT TECHNICALLY, WHAT WAS IN VIOLATION IS
16 IT ALLOWED THE HANDRAIL TO DEFLECT UNDER LOAD.

17 Q DID YOU LOOK IN THE, UP IN THE ATTICS AT
18 THE DRAFT STOPPING WALL?

19 A YES, IT IS DRAFT STOPPING.

20 Q OKAY, AND DID YOU SEE AREAS THAT WERE
21 LEFT UNDONE?

22 A NO, SIR.

23 Q YOU DIDN'T SEE ANY?

24 A NO, I WENT INTO THREE ATTICS AND LOOKED
25 SPECIFICALLY FOR ANY OPENINGS IN THAT WALL AND THEY WERE

1 ALL SEALED UP AND AT THE TOP OF THE WALL I BELIEVE MR.
2 BROWN WAS CRITICAL THAT THERE WASN'T SEALANT UP THERE AND
3 THERE IS NO SEALANT NEEDED AT THE TOP OF THE WALL BECAUSE
4 THE DRYWALL IS ATTACHED TO THE FACE OF THE TRUSS MEMBER
5 AND NO AIR CAN GET THROUGH THAT. IT'S HARD UP AGAINST
6 THE ROOF DECK.

7 Q JUST A COUPLE MORE QUESTIONS. THIS, THIS
8 PICTURE I BELIEVE IS ONE YOU TOOK OF A CORNER CONDITION?

9 A YES, THIS WOULD BE AT A CORNER OF THE
10 SECOND FLOOR BAND TRIM OR WHAT'S BEHIND THERE I BELIEVE.

11 Q WOULD THAT STUD HAVE TO BE REPLACED?

12 A ACTUALLY I THINK THE PHOTO IS UPSIDE
13 DOWN.

14 Q OH, I'M SORRY?

15 A I'M NOT SURE, IT'S GOT, YOU'VE GOT SOME
16 BLOCKING RIGHT HERE, WHAT APPEARS TO BE BLOCKING RIGHT
17 HERE THAT WE'RE REPLACING. THE REST OF THAT IS A LITTLE
18 TRUSS THAT APPEARED TO BE OKAY WHEN I PROBED IT WITH MY
19 ICE PICK THAT I USE.

20 Q YOU PROBED IT?

21 A YES.

22 Q AND YOU DIDN'T FIND ANY PROBLEM?

23 A NO, SIR, IT WAS FINE.

24 Q DID YOU PUT YOUR MOISTURE METER IN IT?

25 A NO, I COULD TELL THAT IT WAS WET SO THERE

1 WAS NO SENSE OF PUTTING A MOISTURE METER ON A WET OBJECT.

2 MR. HENRY: EXCUSE ME JUST ONE MINUTE.

3 Q (CONTINUING) ONE OTHER QUESTION. IF I
4 WANTED TO COMPLY WITH WHAT THE ARCHITECT REQUIRED AND
5 DOUBLE WRAP THE WINDOWS WOULD I HAVE TO TAKE THE WINDOWS
6 OUT?

7 A YOU MAY HAVE TO.

8 Q HOW WOULD YOU DO THAT?

9 A HOWEVER I DON'T BELIEVE THAT THAT, THAT
10 WOULD COMPLY IN ANY WAY WITH TODAY'S STANDARDS.

11 Q OKAY, HOW, HOW WOULD YOU DO IT WITHOUT
12 TAKING THE WINDOW OUT?

13 A WELL YOU COULDN'T DO IT WITHOUT TAKING
14 THE WINDOW OUT.

15 MR. HENRY: THANK YOU VERY MUCH.

16 A YES, SIR.

17 THE COURT: YES, SIR?

18 MR. BROWN: BRIEFLY, YOUR HONOR.

19 REDIRECT EXAMINATION

20 BY MR. BROWN:

21 Q MR. HENRY HAS ASKED YOU A WHOLE LOT OF
22 QUESTIONS ABOUT THINGS YOU DID BACK WHEN YOU WORKED FOR
23 MR. REEDSBURG, CORRECT?

24 A THAT'S CORRECT.

25 Q AND BACK WHEN YOU WERE WORKING FOR MR.

CLOSING ARGUMENT BY MR. HENRY

1211

1 NEGLIGENT CONSTRUCTION. IT INCLUDES AND REASONABLE
2 DAMAGES FOR LOSS OF ITS EXPECTANCY, WHAT DO YOU SAY ABOUT
3 THAT, MR. --

4 MR. BROWN: AND THAT HE'S, AND THAT HE'S
5 AGREED TO TAKE IT OUT OF THAT ONE CHARGE I THINK IT ALSO
6 SHOULD BE TAKEN OUT OF THIS CHARGE AND THAT THERE'S NO
7 EVIDENCE OF LOSS OF EXPECTANCY IN THIS CASE.

8 MR. HENRY: I THINK THAT'S CORRECT, YOUR
9 HONOR.

10 THE COURT: ALL RIGHT, ALL RIGHT, ANYTHING
11 ELSE BEFORE WE BRING THE JURY? ALL RIGHT, LET'S BRING
12 THEM ON.

13 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM
14 AT 10:02 A.M.)

15 THE COURT: ALL RIGHT, GOOD MORNING, WELCOME
16 BACK ONCE AGAIN. MR. HENRY?

17 MR. HENRY: THANK YOU, YOUR HONOR, PLEASE THE
18 COURT.

19 THE COURT: YES, SIR.

20 CLOSING ARGUMENT

21 BY MR. HENRY:

22 GOOD MORNING, LADIES AND GENTLEMEN.

23 JURY MEMBERS: GOOD MORNING.

24 MR. HENRY: I WANT TO SAY I'VE BEEN DOING THIS
25 A LONG TIME BUT I STILL GET A LITTLE UPTIGHT AND A LITTLE

1 NERVOUS WHEN I START TO TALK TO THE JURY. MR. CARLSON
2 DESCRIBED ME AS A SEASONED TRIAL LAWYER AND HE'S RIGHT,
3 I'M OLD, BUT I'VE BEEN DOING THIS A LONG TIME AND I WANT
4 TO START OUT BY SAYING THANK YOU FOR BEING HERE. I KNOW
5 YOU'RE NOT HERE BY CHOICE AND I KNOW THAT THERE ARE A LOT
6 OF OTHER PLACES YOU HAD RATHER BE, BUT YOU'RE HERE AND
7 YOU'RE DOING A GREAT SERVICE AND I WANT TO THANK YOU ON
8 BEHALF OF MY STAFF, PHIL THOMPSON, AND GINA WOODBURY, AND
9 THE HOMEOWNERS OF MAGNOLIA NORTH FOR BEING SO ATTENTIVE
10 TO THE EVIDENCE AND THE TESTIMONY THAT YOU'VE SEEN AND
11 IT'S NOW TIME FOR YOU TO GO TO WORK AND, AND TO MAKE A
12 DECISION IN THIS CASE.

13 I HAVE BEEN VERY FORTUNATE AND PRIVILEGED TO
14 PRACTICE LAW IN CONWAY FOR 36 YEARS. I'VE RAISED A
15 FAMILY HERE AND, AND I'VE BEEN VERY BLESSED IN MY
16 PRACTICE AND I'VE APPEARED BEFORE A LOT OF JURIES, SOME
17 IN THIS COURTHOUSE BUT MOST IN THE OLD COURTHOUSE THAT
18 WAS HERE WHEN I GOT HERE AND THIS BUILDING WAS NOT HERE
19 BUT I HAVE, I'VE APPEARED BEFORE A LOT OF JURIES AND I'VE
20 OFTEN THOUGHT THAT THE STATE OUGHT TO PASS A LAW THAT
21 SAYS EVERY HIGH SCHOOL STUDENT OUGHT TO COME WATCH A JURY
22 TRIAL BEFORE THEY GRADUATE BECAUSE IT'S A REPRESENTATIVE
23 OF THE COMMUNITY AND ITS A REPRESENTATIVE OF DEMOCRACY.
24 IT'S SUCH AN IMPORTANT SERVICE BECAUSE IT'S HOW WE AS A
25 SOCIETY RESOLVE DISPUTES. THIS IS A DISPUTE BETWEEN TWO

1 PARTIES AND INSTEAD OF GETTING OUT THERE WITH DUELING
2 PISTOLS WE COME BEFORE YOU AND WE ASK YOU TO RENDER A
3 VERDICT THAT SPEAKS THE TRUTH.

4 JURIES REPRESENT THE COMMUNITY AND, AND THEY
5 SEND NOT ONLY DO THEY GIVE A VERDICT BUT BY THEIR VERDICT
6 THEY SAY THAT THE STANDARDS BY WHICH WE ACT ARE
7 REFLECTIVE OF WHAT WE DO AND THOSE AREN'T JUST PRETTY
8 WORDS, THOSE ARE TRUE. I REMEMBER YEARS AGO I TRIED A
9 DEATH CASE FOR A LITTLE GIRL THAT WAS KILLED IN A ROLLER
10 COASTER AND AS A RESULT OF THAT VERDICT THE STATE PASSED
11 A LAW REQUIRING AMUSEMENT RIDES TO BE INSPECTED AND SO
12 YOUR VERDICT IS IMPORTANT AND IT'S, IT'S IMPORTANT TO THE
13 COMMUNITY AND IT'S IMPORTANT TO HOW WE WANT OUR FELLOW
14 CITIZENS TO ACT IN THIS COUNTY.

15 THE HERITAGE GROUP AND THERE WAS, AS YOU'VE
16 HEARD THERE'S SEVERAL, A NUMBER OF CORPORATIONS THAT THEY
17 FORMED BUT HIS HONOR HAS DETERMINED THAT WE'RE GOING TO
18 TREAT THEM ALL AS ONE BECAUSE THERE WAS THE SAME OWNERS,
19 THE SAME SHAREHOLDERS, THE SAME OFFICERS, AND THEY ACTED
20 AS ONE. THEY WERE IN THE SAME OFFICES AND THAT SORT OF
21 THING SO YOU DON'T HAVE TO MAKE THAT DECISION, HIS HONOR
22 HAS ALREADY MADE THAT DECISION, BUT A GROUP OF MEN GOT
23 TOGETHER IN MYRTLE BEACH AND FORMED HERITAGE COMMUNITIES
24 INC. WHICH WAS A CORPORATION TO MAKE MONEY AND THERE'S
25 CLEARLY NOTHING WRONG WITH THAT. THAT'S DONE EVERY DAY

1 AND THAT'S DONE UNDER THE LAW AND THAT'S THE WAY WE DO
2 THINGS, BUT THEY DECIDED TO DEVELOP CONDOMINIUMS AND REAL
3 ESTATE IN Horry COUNTY AND THEY STARTED OUT BY HIRING AN
4 ARCHITECT AND WHICH IS THE WAY IT'S NORMALLY DONE BUT
5 THEY DID IT A LITTLE DIFFERENTLY AND I THINK IT STARTED
6 THE MISTAKE AND I THINK IT STARTED THE REASON THAT WE'RE
7 HERE TODAY.

8 GENERALLY THE WAY THESE THINGS WORK IS THEY,
9 THEY, THEY FORM THE CORPORATION, THEY BUY THE PROPERTY,
10 THEY HIRE AN ARCHITECT. THE ARCHITECT DRAWS THE PLANS
11 AND SPECIFICATIONS. THEY SEND THEM OUT TO CONTRACTORS
12 AND THOSE CONTRACTORS SEND IN BIDS AND THEN THEY A LOT OF
13 TIMES THEY WILL NEGOTIATE AND THEY WILL SAY, OKAY, WE, WE
14 CAN USE A CHEAPER WINDOW OR THIS OR THAT AND THE
15 ARCHITECT IS THE, HE'S THE GUY AT THE TOP, HE SAYS, NO,
16 YOU CAN'T, OR YES, YOU CAN, YOU CAN USE THAT OR YOU
17 CAN'T. BUT HERITAGE WAS THE OWNER, THEY WERE THE
18 DEVELOPER AND THEY WERE THE CONTRACTOR THAT WAS ALL IN
19 HOUSE, AND THEY DECIDED THAT THEY WEREN'T GOING TO USE
20 THE SERVICES OF THE ARCHITECT AND MR. PEGRAM DECIDED THAT
21 HE KNEW WHAT WAS COMING. HE ABSOLUTELY KNEW WHAT WAS
22 COMING AND AS LONG AS I'VE BEEN DOING CONSTRUCTION
23 LITIGATION I'VE NEVER SEEN THIS ON A SET OF PLANS AND
24 I'VE LOOKED AT HUNDREDS OF THEM. I'VE NEVER SEEN
25 ANYTHING LIKE THAT ON A SET OF PLANS. HE KNEW WHAT WAS

1 COMING AND HE SAID IF YOU'RE NOT GOING TO USE THE
2 SERVICES OF AN ARCHITECT IN THIS PROJECT, AND WE'RE
3 TALKING ABOUT HUNDREDS OF CONDOMINIUMS, SOMEBODY IS GOING
4 TO GET SUED AND I WANT TO BE INDEMNIFIED. I WANT
5 HERITAGE TO INDEMNIFY ME BECAUSE I KNOW WHAT'S COMING AND
6 SO HE PUT THAT ON THE PLANS AND THEY DIDN'T HAVE AN
7 INSPECTING ARCHITECT AND GENERALLY THE STOP GAP, AS I
8 SAID, IS THE ARCHITECT.

9 THE CONTRACTOR MAY SAY WELL TELL THE DEVELOPER
10 WE CAN GET THE PRICE DOWN IF WE USE THIS PRODUCT OR THAT
11 PRODUCT AND THE ARCHITECT WILL SAY, NO, THAT WON'T WORK,
12 THAT JUST IS NOT GOING TO WORK, AND IN THIS PROCESS THE
13 DEVELOPER FIGURES UP WHAT HE'S GOT TO SELL THESE
14 CONDOMINIUMS FOR AND SO HE PUTS IN THE COST OF THE LAND.
15 HE PUTS IN THE COST OF THE BUILDINGS, HE PUTS IN THE COST
16 OF THE AMENITIES, AND HE DOES A SPREADSHEET ON ALL THAT
17 AND HE COMES TO A PRICE THAT HE'S GOT TO SELL THESE
18 CONDOMINIUMS AT, AND SO WHEN THESE FOLKS BOUGHT THOSE
19 CONDOMINIUMS THEY PAID FOR THOSE AMENITIES. THEY PAID
20 FOR SWIMMING POOLS AND TENNIS COURTS AND ALL THAT SORT OF
21 THINGS AND THEN THEY FIGURE UP THE MARKETING COST AND
22 THAT'S THE WAY THEY GET THE PRICE.

23 AROUND 1997 THEY BEGAN BUILDING MAGNOLIA NORTH
24 AND THEY HAD ALREADY BUILT SEVERAL LARGE PROJECTS AND
25 THEY HAD ALREADY DEVELOPED THESE PROJECTS AND WERE

1 ALREADY HAVING PROBLEMS. AS YOU SAW IN THE VIDEO WE
2 PLAYED OF GWYN HARDISTER'S DEPOSITION, AND HE WAS THE
3 ONLY HERITAGE PERSON THAT TESTIFIED AND WE'RE GOING TO
4 TALK ABOUT THAT IN A LITTLE BIT, HE SAID BEFORE WE EVER
5 STARTED MAGNOLIA NORTH WE WERE HAVING DECK LEAKS AND WE
6 WERE HAVING WINDOW LEAKS AND THEY, THEY IGNORED THAT.
7 THEY JUST FLAT IGNORED THAT.

8 WHAT THEY DID THEY BEGAN TO MARKET THESE
9 CONDOMINIUMS AND WHO DID THEY MARKET THEM TO. GWYN
10 HARDISTER TOLD US THAT ONE OF THE DEMOGRAPHICS THEY USED
11 WAS 65 AND OLDER, AND THIS IS EXHIBIT 673, 65 AND OLDER
12 AND THEY SOLD THEM ON QUALITY. THEY SOLD THEM ON QUALITY
13 AND ONE OF WAYS THEY, THEY MARKETED THE QUALITY WAS WITH
14 A BROCHURE, AND THIS IS EXHIBIT 58, AND THEY HAD ALL KIND
15 OF PRETTY PICTURES IN HERE AND TOLD THEM WHAT THEY WOULD
16 DO AND, AND HAD POOLS AND SWIMMING POOLS AND ALL THAT
17 SORT OF THING AND AT THE TIME THEY WERE DOING THIS, AT
18 THE TIME THEY WERE SELLING THESE CONDOMINIUMS TO THESE
19 FOLKS HERE'S WHAT THEY KNEW.

20 THEY KNEW THEY WERE HAVING WATER INTRUSION
21 PROBLEMS AT THE OTHER DEVELOPMENTS. THEY KNEW THAT THEY
22 HAD DECK PROBLEMS. THEY KNEW THAT THEY HAD WINDOW
23 PROBLEMS. THEY KNEW THAT THEY WERE USING PRODUCTS THAT
24 WAS NOT SPECIFIED BY THE ARCHITECT. THEY KNEW THAT THEY
25 WERE USING CHEAPER PRODUCTS THAN WHAT HE HAD SPECIFIED

1 AND WHAT DID THEY DO, THEY KEPT ON USING THOSE SAME
2 PRODUCTS.

3 THEN THE MARKETING, AND PART OF THE MARKETING
4 PROCESS AS MR. MCCARTNEY DESCRIBED IT, THEY HAD SEMINARS,
5 I DON'T KNOW WHY YOU CALL THEM SEMINARS, THEY'RE SALES,
6 THEY'RE SALES AND MARKETING TOOLS, BUT THEY GO UP TO THE
7 PLACES IN THE NORTH AND THEY WOULD HAVE THESE PEOPLE TELL
8 THEM ABOUT ALL THESE PRETTY THINGS THEY WERE GOING TO DO
9 AND THEY WERE DOING TO SEND THEM DOWN TO MYRTLE BEACH
10 FREE OF CHARGE IF THEY BOUGHT A CONDOMINIUM AND, AND WINE
11 THEM AND DINE THEM AND HAVE THEM, HAVE THEM BUY THESE
12 CONDOMINIUMS. WE ALL KNOW EXACTLY WHAT HAPPENED, AND
13 THEN THEY WOULD TALK THEM INTO BUYING THESE CONDOMINIUMS
14 AND THEY WOULD THEN GET THEM TO SIGN A CONTRACT, AND THIS
15 IS EXHIBIT 695(A), AND LET ME JUST READ YOU, AND YOU'LL
16 HAVE ALL OF THESE DOCUMENTS BACK IN THE, BACK IN THE JURY
17 ROOM WITH YOU, LET ME JUST READ YOU WHAT WAS IN THE
18 CONTRACT.

19 "CONSTRUCTION, SELLER SHALL CAUSE THE PROPERTY
20 TO BE CONSTRUCTED SUBSTANTIALLY IN ACCORDANCE WITH THE
21 PLANS AND SPECIFICATIONS PREVIOUSLY REVIEWED BY
22 PURCHASER." THAT IS THE PLANS AND SPECIFICATIONS WE'VE
23 BEEN TALKING ABOUT HERE TODAY. THEY GO ON TO SAY AND
24 "PREPARED BY SELLER DATED NOVEMBER THE 15TH, 1997, SAID
25 PLANS AND SPECIFICATIONS BEING INCORPORATED HEREIN BY

1 COMPLAINTS ON BUILDINGS ONE THROUGH FIVE FOR DECKS ARE
2 WELL DOCUMENTED AND THEY'RE IN EVIDENCE AND WE'VE
3 CONCEDED THERE'S A PROBLEM WITH IT. I DON'T HAVE ANY
4 PROBLEM PAYING THE 120 SOME THOUSAND DOLLARS THEY PAID TO
5 FIX THOSE DECKS, OKAY, BUT WHERE IS THE EVIDENCE IN THIS
6 RECORD OF ALL THIS STUFF WE GOT HERE OF DECK PROBLEMS ON
7 BUILDINGS ONE THROUGH FIVE AFTER THEY FIXED THEM AND I
8 TELL YOU THERE AIN'T NONE. HOW ABOUT ALL THE OTHER DECKS
9 OUT THERE BUILDINGS SIX THROUGH 21 OR, THE NUMBER IS
10 COOKY BUT HOW ABOUT THE OTHER 16 BUILDINGS, IT'S NOT
11 THERE, BUT MASSIVE PORTIONS OF THIS SEVEN-MILLION DOLLAR
12 PLUS FIX HAS TO DO WITH THOSE PROBLEMS AND AGAIN I'D HAUL
13 THOSE COMPLAINTS IN LIKE THIS CAUSE THAT'S PRETTY GOOD
14 EVIDENCE IF YOU'VE GOT THAT.

15 STUD DAMAGE, THEY'VE MADE THIS BIG THING ABOUT
16 WELL, MR. BROWN, YOUR 2.5 MILLION DOLLAR DOESN'T ADDRESS
17 THE STUD DAMAGE. IT'S JUST SHEATHING. HOW MANY PICTURES
18 OF STUD DAMAGE HAVE YOU SEEN SITTING HERE ALMOST TWO
19 WEEKS. I'VE SEEN TWO AND I THINK THERE'S TWO PICTURES OF
20 THE SAME LOCATION. HOW MANY PICTURES OF DECK PROBLEMS
21 DID YOU SEE FROM DREW BROWN AND R.V. BURIC. HE LOOKED AT
22 ONE DECK ON BUILDINGS ONE THROUGH FIVE BEFORE THEY WERE
23 EVER FIXED BY THE HOMEOWNERS, ONE. HE DIDN'T HESITATE,
24 HOWEVER, DID NOT HESITATE TO PUT IN 34 PICTURES OF WHERE
25 HE'S GOING TO SHOW A LACK OF FLASHING OR 32 PICTURES OF

1 MILLION DOLLARS WILL FIX THOSE PROBLEMS, ABSOLUTELY. DO
2 I THINK THE PLAINTIFF'S ARE ENTITLED TO SOMEWHERE BETWEEN
3 THE 89,000 THAT THEY GOT IN COMPETITIVE ESTIMATES FOR
4 PAVING AND THE 170 THEY PAID I HAVE NO PROBLEM WITH THAT
5 WHATSOEVER, I THINK THAT'S FAIR AND REASONABLE, AND I
6 DON'T EVEN HAVE A PROBLEM WITH YOU MAKING MY CLIENT PAY
7 FOR THE REPAIRS ON DECKS 1 THROUGH 5 THAT THEY CLAIM
8 THEY'RE GOING TO TAKE OUT NOW BECAUSE THEY WOULD RATHER
9 TAKE OUT 100 AND SOME THOUSAND DOLLARS, ACTUALLY 120, AND
10 I'LL POINT THAT OUT, THAT'S EXHIBIT 698 IN THE RECORD
11 WHERE THE BOARD DETAILS NOT ONLY THE DECK REPAIRS BUT ALL
12 THE REPAIRS THEY WERE ABLE TO MAKE ON BUILDINGS 1 THROUGH
13 5 FOR \$120,000.

14 I TOLD YOU AT THE BEGINNING OF THIS CASE I
15 WANTED YOU TO DO WHAT WAS FAIR JUST AND REASONABLE AND I
16 HAVEN'T CHANGED IN THAT FROM THEN. I THINK YOU KNOW WHY
17 WE COULDN'T RESOLVE THIS CASE AND I THINK YOU KNOW WHY
18 PEOPLE HAVE COME IN HERE AND TESTIFIED TO WHAT THEY'VE
19 TESTIFIED TO.

20 I DESPERATELY WANT YOU TO DO WHAT'S FAIR AND
21 REASONABLE BUT YOU ALSO HAVE TO LISTEN TO WHAT THE JUDGE
22 TELLS YOU ABOUT THE LAW AND THE JUDGE IS GOING TO TELL
23 YOU THAT YOU CAN'T AWARD DAMAGES THAT ARE SPECULATIVE AND
24 HE'S GOING TO TELL YOU THAT EVERYTHING YOU DO IN TERMS OF
25 AN AWARD HAS TO BE FAIR JUST AND REASONABLE, THAT'S THE

1 THE LATTER, IN EQUITY AND GOOD CONSCIENCE, IS BOUND TO
2 ACT IN GOOD FAITH AND WITH DUE REGARD TO THE INTEREST OF
3 THE ONE IMPOSING THE CONFIDENCE.

4 THE LAW REQUIRES THAT PARTIES IN A FIDUCIARY
5 RELATIONSHIP MUST FULLY DISCLOSE TO EACH OTHER ALL KNOWN
6 INFORMATION THAT IS SIGNIFICANT AND MATERIAL. ONE
7 STANDING IN A FIDUCIARY RELATIONSHIP WITH ANOTHER IS
8 SUBJECT TO LIABILITY TO THE OTHER FOR HARM RESULTING FROM
9 A BREACH OF DUTY IMPOSED BY THE RELATIONSHIP.

10 THE DEVELOPER OWED A FIDUCIARY DUTY TO THE
11 PLAINTIFF TO ENSURE THAT THE COMMON AREAS OF THE
12 CONDOMINIUM BUILDINGS WERE IN GOOD REPAIR AT THE TIME THE
13 DEVELOPER RELINQUISHED CONTROL OF THE ASSOCIATION AND
14 TURNED THE ASSOCIATION OVER TO THE HOMEOWNERS.

15 YOUR NEXT STEP IS TO DECIDE HOW MUCH MONEY THE
16 DEFENDANTS SHOULD BE REQUIRED TO PAY. WE CALL SUCH AN
17 AWARD DAMAGES.

18 DAMAGES ARE DIVIDED INTO TWO CATEGORIES:
19 ACTUAL DAMAGES AND PUNITIVE DAMAGES.

20 ACTUAL DAMAGES ARE PROPERLY CALLED COMPENSATORY
21 DAMAGES, MEANING TO COMPENSATE, TO MAKE THE DAMAGED PARTY
22 WHOLE, TO PUT THE PARTY IN THE SAME POSITION IT WAS IN
23 PRIOR TO THE DAMAGES RECEIVED INsofar AS THIS IS
24 MONETARILY POSSIBLE. IN OTHER WORDS, ACTUAL OR
25 COMPENSATORY DAMAGES INCLUDE COMPENSATION FOR ALL DAMAGES

1 WHICH ARE NATURALLY THE PROXIMATE RESULT OF THE ALLEGED
2 WRONGFUL CONDUCT OF THE DEFENDANTS.

3 ACTUAL DAMAGES ARE AWARDED TO A LITIGANT IN
4 COMPENSATION FOR THE PARTY'S ACTUAL LOSS. ACTUAL DAMAGES
5 ARE SUCH AS WILL COMPENSATE THE PARTY FOR LOSSES
6 SUSTAINED. THEY ARE DAMAGES AS WILL SIMPLY MAKE GOOD OR
7 REPLACE THE LOSS CAUSED BY THE WRONG. ACTUAL DAMAGES ARE
8 DAMAGES IN SATISFACTION OF, OR IN RECOMPENSE FOR, A LOSS
9 OR DAMAGE SUSTAINED. THE GOAL IS TO RESTORE THE DAMAGED
10 PARTY, AS NEARLY AS POSSIBLE THROUGH THE PAYMENT OF MONEY
11 TO THE SAME POSITION IT WAS IN HAD THE DAMAGE NOT
12 OCCURRED.

13 THE BASIC MEASURE OF ACTUAL DAMAGES IS THE
14 AMOUNT NEEDED TO COMPENSATE THE PLAINTIFF FOR THE LOSSES
15 PROXIMATELY CAUSED BY THE DEFENDANTS ALLEGED WRONG SO
16 THAT THE PLAINTIFF WILL BE IN THE SAME POSITION IT WOULD
17 HAVE BEEN IN IF THERE HAD BEEN NO WRONGFUL DAMAGE.
18 ACTUAL DAMAGES INCLUDE COMPENSATION FOR ALL DAMAGES WHICH
19 ARE NATURALLY THE PROXIMATE RESULT OF THE ALLEGED
20 WRONGFUL CONDUCT OF THE DEFENDANTS.

21 THE PLAINTIFF BEARS THE BURDEN OF PROVING BY
22 THE PREPONDERANCE OF THE EVIDENCE THE NATURE AND EXTENT
23 OF ACTUAL DAMAGES.

24 THE EXISTENCE, CAUSATION, OR AMOUNT OF DAMAGES
25 CANNOT BE LEFT TO CONJECTURE, GUESSWORK, SPECULATION, OR

1 THE POSSIBILITY OF A WINDFALL. YOUR VERDICT SHOULD
2 INCLUDE AN AMOUNT TO COVER ANY DAMAGES THAT THE EVIDENCE
3 SHOWS WILL REASONABLY, WILL BE REASONABLY CERTAIN TO
4 OCCUR IN THE FUTURE. PROOF OF AMOUNT OF LOSS WITH
5 ABSOLUTE OR MATHEMATICAL CERTAINTY IS NOT REQUIRED.
6 DAMAGES MUST BE PROVEN TO A REASONABLE DEGREE OF
7 CERTAINTY. FUTURE DAMAGES NEED NOT BE PROVEN TO A
8 MATHEMATICAL CERTAINTY AND OFTEN MUST BE APPROXIMATED.
9 ANY FUTURE DAMAGES MUST BE REDUCED TO ITS PRESENT DAY
10 VALUE.

11 THE EVIDENCE PRESENTED BY THE PLAINTIFF MUST
12 ENABLE YOU, THE JURY, TO DETERMINE WHAT AMOUNT IS FAIR,
13 JUST, AND REASONABLE.

14 NOW AS THE PROPERTY OWNERS' CLAIM THE GENERAL
15 MEASURE OF DAMAGES FOR NEGLIGENT CONSTRUCTION IS THE COST
16 TO REPAIR THE UNITS, PAST AND FUTURE, INCLUDING ANY OTHER
17 REASONABLY RELATED COSTS INCIDENTAL THERETO PROXIMATELY
18 CAUSED BY THE DEFENDANTS NEGLIGENT CONSTRUCTION. THE
19 PLAINTIFF IS NOT REQUIRED TO PROVE THAT THE REPAIRS HAVE
20 ACTUALLY BEEN MADE. A COMPETENT ESTIMATE OF THE COST OF
21 REPAIRS IS SUFFICIENT TO CREATE A FACTUAL ISSUE FOR YOU
22 TO DETERMINE DAMAGES.

23 IF YOU DETERMINE THAT THE DEFENDANT DEVELOPERS
24 BREACHED ITS FIDUCIARY DUTY, THE PLAINTIFF IS ENTITLED TO
25 REASONABLE DAMAGES PROXIMATELY CAUSED BY THIS BREACH.

1 NOW A PARTY SUFFERING DAMAGES HAS A DUTY TO
2 EXERCISE REASONABLE CARE AND DILIGENCE TO MINIMIZE ITS
3 DAMAGES. NO RECOVERY MAY BE HAD FOR LOSSES WHICH THE
4 DAMAGED PARTY MIGHT HAVE PREVENTED BY REASONABLE EFFORTS
5 AND EXPENDITURES THE DAMAGED PARTY IS REQUIRED TO DO
6 ONLY THAT WHICH WOULD BE REASONABLE. IN OTHER WORDS, A
7 DAMAGED PARTY IS REQUIRED TO DO THAT WHICH AN ORDINARY
8 PRUDENT PERSON OR PARTY WOULD DO UNDER SIMILAR
9 CIRCUMSTANCES TO MITIGATE ITS DAMAGES. HOWEVER, THE
10 DAMAGED PARTY IS NOT REQUIRED TO UNREASONABLY EXERT
11 ITSELF AND INCUR SUBSTANTIAL EXPENSE IN AN EFFORT TO
12 MITIGATE DAMAGES.

13 WHERE NO EVIDENCE IS GIVEN THAT DAMAGES COULD
14 HAVE REASONABLY BEEN REDUCED, THE DAMAGED PARTY IS NOT
15 REQUIRED TO HAVE DONE MORE. YET, A PARTY WILL NOT BE
16 ALLOWED TO SIT BACK AND WAIT AND THEN SEEK TO RECOVER
17 DAMAGES WHEN REASONABLE ATTEMPTS WOULD HAVE MITIGATED
18 DAMAGES.

19
20 IN THIS CASE, THE PLAINTIFF SEEKS PUNITIVE
21 DAMAGES IN ADDITION TO ACTUAL DAMAGES. PUNITIVE DAMAGES,
22 ALSO KNOWN AS EXEMPLARY DAMAGES, ARE IMPOSED TO PUNISH,
23 IMPOSE AS PUNISHMENT. THEY ARE NOT INTENDED TO
24 COMPENSATE. PUNITIVE DAMAGES ARE ALLOWED IN THE INTEREST
25 OF SOCIETY IN THE NATURE OF PUNISHMENT AND AS A WARNING

1 AND EXAMPLE TO DETER THE WRONGDOER AND OTHERS FROM
2 COMMITTING LIKE OFFENSES IN THE FUTURE. MOREOVER, THEY
3 SERVE TO VINDICATE A PRIVATE RIGHT BY REQUIRING THE
4 WRONGDOER TO PAY MONEY TO THE DAMAGED PARTY.

5 PUNITIVE DAMAGES SERVE AT LEAST THREE IMPORTANT
6 PURPOSES: PUNISHMENT OF A DEFENDANTS RECKLESSNESS,
7 WILLFULNESS, WANTONNESS, OR MALICIOUS CONDUCT; DETERRENCE
8 OF SIMILAR FUTURE CONDUCT BY A DEFENDANT OR OTHERS; AND
9 COMPENSATION FOR THE RECKLESS OR WILLFUL INVASION OF THE
10 PLAINTIFF'S RIGHTS. THE PARAMOUNT PURPOSE FOR AWARDED
11 PUNITIVE DAMAGES IS NOT TO COMPENSATE THE PLAINTIFF, BUT
12 TO PUNISH AND SET AN EXAMPLE FOR OTHERS.

13 SO WHAT WOULD JUSTIFY AN AWARD OF PUNITIVE
14 DAMAGES? AS YOU CONSIDER THE ISSUE OF PUNITIVE DAMAGES,
15 THE HIGHEST BURDEN OF PROOF KNOWN TO THE CIVIL LAW IS
16 APPLICABLE.

17 SECTION 15-13-135 OF THE SOUTH CAROLINA CODE
18 PROVIDES THAT IN ANY CIVIL ACTION WHERE PUNITIVE DAMAGES
19 ARE CLAIMED, THE PLAINTIFF HAS THE BURDEN OF PROVING SUCH
20 DAMAGES BY CLEAR AND CONVINCING EVIDENCE.

21 CLEAR AND CONVINCING EVIDENCE IS AN ELEVATED
22 STANDARD OF PROOF, WHICH LIES BETWEEN THE LESSER STANDARD
23 OF "PREPONDERANCE OF THE EVIDENCE," USED IN MOST CIVIL
24 CASES, AND THE HIGHER STANDARD OF "BEYOND A REASONABLE
25 DOUBT," WHICH IS REQUIRED IN CRIMINAL CASES. CLEAR AND

JURY CHARGE

1297

1 CONVINCING EVIDENCE IS THAT DEGREE OF PROOF WHICH WILL
2 PRODUCE IN THE MIND OF YOU, THE JURY, A FIRM BELIEF AS TO
3 THE ALLEGATIONS SOUGHT TO BE ESTABLISHED. SUCH MEASURE
4 OF PROOF IS IMMEDIATE, I'M SORRY, SUCH MEASURE OF PROOF
5 IS INTERMEDIATE, MORE THAN A MERE PREPONDERANCE BUT LESS
6 THAN IS REQUIRED FOR PROOF BEYOND A REASONABLE DOUBT; IT
7 DOES NOT MEAN CLEAR AND UNEQUIVOCAL.

8 CLEAR AND CONVINCING EVIDENCE REQUIRES THAT
9 THE EVIDENCE MUST BE FOUND TO BE CREDIBLE; THE FACTS TO
10 WHICH THE WITNESSES TESTIFY MUST BE DISTINCTLY
11 REMEMBERED; THE TESTIMONY MUST BE PRECISE AND EXPLICIT;
12 AND THE WITNESSES MUST BE LACKING OF CONFUSION AS TO THE
13 FACTS IN ISSUE. THE EVIDENCE MUST BE OF SUCH WEIGHT THAT
14 IT PRODUCES IN THE MIND OF YOU, THE JURY, A FIRM BELIEF
15 OR CONVICTION WITHOUT HESITANCY, AS TO THE TRUTH OF THE
16 ALLEGATIONS SOUGHT TO BE ESTABLISHED.

17 WHEN THE LAW PLACES UPON A PARTY A BURDEN OF
18 PROOF BY CLEAR AND CONVINCING EVIDENCE, THE LAW MEANS
19 THAT THE EVIDENCE IS NOT AMBIGUOUS, DOUBTFUL, EQUIVOCAL,
20 OR CONTRADICTORY, BUT THE EVIDENCE IS POINTED TO THE
21 ISSUE AND SATISFACTORY IN THE SENSE THAT THE SOURCE FROM
22 WHICH IT COMES IS ONE IN WHICH YOU AS A JUROR CAN PLACE
23 CREDENCE.

24 PUNITIVE DAMAGES CAN ONLY BE AWARDED WHERE THE
25 PLAINTIFF PROVES BY CLEAR AND CONVINCING EVIDENCE THAT

JURY CHARGE

1298

1 DEFENDANTS ACTION WERE WILLFUL, WANTON, MALICIOUS, AND IN
2 RECKLESS DISREGARD OF THE PLAINTIFFS RIGHTS OR WHERE
3 DEFENDANTS ACTIONS WERE SO GROSSLY NEGLIGENT AS TO IMPLY
4 A WILLFULNESS OR WANTONNESS. A CONSCIOUS FAILURE TO
5 EXERCISE DUE CARE CONSTITUTES WILLFULNESS. IT IS THE
6 PRESENT CONSCIOUSNESS OF WRONGDOING THAT JUSTIFIES THE
7 ASSESSMENT OF PUNITIVE DAMAGES AGAINST THE WRONGDOER.

8 PUNITIVE DAMAGES WILL BE ALLOWED EVEN WHEN A
9 DEFENDANT DOES NOT REALIZE IT IS INVADING THE PLAINTIFFS'
10 RIGHTS SO LONG AS THE ACT IS COMMITTED IN SUCH A MANNER
11 THAT A PERSON OF ORDINARY PRUDENCE WOULD CONCLUDE THAT IT
12 WAS DONE IN RECKLESS DISREGARD OF THE RIGHTS OF ANOTHER.

13 THE PLAINTIFFS CANNOT RECOVER PUNITIVE DAMAGES
14 BASED ON NEGLIGENT CONDUCT. NEGLIGENCE IS THE DOING OF
15 SOME ACT WHICH A PERSON OF ORDINARY PRUDENCE WOULD NOT
16 HAVE DONE UNDER THE SIMILAR CIRCUMSTANCES OR FAILURE TO
17 DO WHAT A PERSON OF ORDINARY PRUDENCE WOULD HAVE DONE
18 UNDER SIMILAR CIRCUMSTANCES. MERE NEGLIGENCE WILL NOT
19 SUPPORT A PUNITIVE DAMAGES AWARD.

20 TO RECOVER PUNITIVE DAMAGES, THE PLAINTIFF MUST
21 PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE
22 DEFENDANTS ACTIONS WERE WILLFUL, WANTON, OR RECKLESS, OR
23 SO GROSSLY NEGLIGENT AS TO IMPLY A WILLFULNESS OR
24 WANTONNESS. THE WORDS RECKLESSNESS, WILLFULNESS AND
25 WANTONNESS OR SYNONYMOUS. THE TERMS ARE USED TO DESCRIBE

1 A CONSCIOUS FAILURE TO EXERCISE AND OBSERVE REASONABLE OR
2 DUE CARE.

3 RECKLESSNESS IS DISTINGUISHED FROM NEGLIGENCE.
4 NEGLIGENCE IS THE FAILURE TO USE DUE CARE. NEGLIGENCE IS
5 CARELESSNESS. NEGLIGENCE IS FAILURE BY OMISSION OR
6 COMMISSION TO EXERCISE DUE CARE AS A PERSON OF ORDINARY
7 REASON AND PRUDENCE WOULD EXERCISE IN THE SAME
8 CIRCUMSTANCES.

9 RECKLESSNESS IS A HIGHER DEGREE OF CULPABILITY
10 AND RESPONSIBILITY. RECKLESSNESS SIGNIFIES A CONSCIOUS
11 FAILURE TO EXERCISE DUE CARE. RECKLESSNESS IS A
12 CONSCIOUS INDIFFERENCE TO THE RIGHTS OF THE PLAINTIFF, OR
13 A RECKLESS DISREGARD OF THE RIGHTS OF THE PLAINTIFFS.
14 RECKLESSNESS IS AN AWARENESS OF WRONGFUL CONDUCT AND
15 CONTINUATION TO ACT REGARDLESS OF CONSEQUENCES.

16 GROSS NEGLIGENCE IS THE INTENTIONAL CONSCIOUS
17 FAILURE TO DO SOMETHING WHICH IS INCUMBENT UPON ONE TO DO
18 OR THE DOING OF A THING INTENTIONALLY THAT ONE OUGHT NOT
19 TO DO. NEGLIGENCE IS THE FAILURE TO EXERCISE DUE CARE
20 WHILE GROSS NEGLIGENCE IS THE FAILURE TO EXERCISE EVEN
21 THE SLIGHTEST DEGREE OF CARE. GROSS NEGLIGENCE IS A
22 RELATIVE TERM, AND MEANS THE ABSENCE OF CARE THAT IS
23 NECESSARY UNDER THE CIRCUMSTANCES. PUNITIVE DAMAGES ARE
24 RECOVERABLE FOR NEGLIGENCE SO GROSS OR RECKLESS OF
25 CONSEQUENCES AS TO IMPLY OR TO ASSUME THE NATURE OF

JURY CHARGE

1300

1 WANTONNESS, WILLFULNESS, OR RECKLESSNESS, BUT PUNITIVE
2 DAMAGES MAY NOT BE AWARDED FOR MERE GROSS NEGLIGENCE.

3 A TEST FOR DETERMINING WHETHER A TORT MAY BE
4 DEEMED RECKLESS, WILLFUL, OR WANTON IS WHETHER IT HAS
5 BEEN COMMITTED IN SUCH A MANNER OR UNDER SUCH
6 CIRCUMSTANCES THAT A PERSON OF ORDINARY REASON OR
7 PRUDENCE WOULD HAVE BEEN CONSCIOUS OF IT AS AN INVASION
8 OF THE RIGHTS OF THE PARTY SUFFERING DAMAGES.

9 THERE IS NO FORMULA OR STANDARD THAT CAN BE
10 USED AS A MEASURE FOR ASSESSING PUNITIVE DAMAGES.
11 HOWEVER, FACTORS RELEVANT TO YOUR CONSIDERATION OF
12 PUNITIVE DAMAGES ARE:

- 13 (1) THE CHARACTER OF THE DEFENDANTS' ACT;
- 14 (2) THE NATURE AND EXTENT OF THE HARM TO THE
15 PLAINTIFFS WHICH DEFENDANTS CAUSED OR INTENDED TO CAUSE;
- 16 (3) DEFENDANTS DEGREE OF CULPABILITY;
- 17 (4) THE PUNISHMENT THAT SHOULD BE IMPOSED;
- 18 (5) DURATION OF THE CONDUCT;
- 19 (6) DEFENDANTS AWARENESS OR CONCEALMENT;
- 20 (7) THE EXISTENCE OF SIMILAR PAST CONDUCT;
- 21 (8) LIKELIHOOD THE AWARD WILL DETER THE
22 DEFENDANTS AND OTHERS FROM LIKE CONDUCT;
- 23 (9) WHETHER THE AWARD IS REASONABLY RELATED TO
24 THE HARM LIKELY TO RESULT FROM SUCH CONDUCT; AND
25 (10) THE DEFENDANTS WEALTH OR ABILITY TO PAY.

JURY CHARGE

1301

1 THE EXISTENCE OF SIMILAR PAST CONDUCT MAY BE
2 CONSIDERED AS A FACTOR BUT YOU MAY NOT PUNISH THE
3 DEFENDANT SOLELY FOR THE CONDUCT TO OTHERS WHO ARE NOT A
4 PARTY TO THIS LAWSUIT.

5 THE FINANCIAL CONDITION OF THE DEFENDANTS IS A
6 FACTOR YOU SHOULD CONSIDER IN AWARDING PUNITIVE DAMAGES.
7 HOWEVER, THERE IS NO REQUIREMENT THAT THE DEFENDANTS BE A
8 PERSON OR ENTITY OF MEANS BEFORE YOU ARE JUSTIFIED IN
9 AWARDING PUNITIVE DAMAGES. WHILE THE WEALTH OF A
10 DEFENDANT IS A RELEVANT FACTOR IN ASSESSING PUNITIVE
11 DAMAGES, IT IS NOT NECESSARILY CONTROLLING. IN OTHER
12 WORDS, THE FINANCIAL WORTH OF A DEFENDANT IS A FACT
13 PROPERLY TO BE CONSIDERED BY YOU IN DETERMINING THE
14 AMOUNT TO BE AWARDED AS PUNITIVE DAMAGES, BUT EVIDENCE OF
15 NET WORTH IS NOT A PREREQUISITE TO A PUNITIVE DAMAGES
16 AWARD.

17 BEFORE YOU CAN AWARD PUNITIVE DAMAGES, YOU MUST
18 FIND THAT THE PLAINTIFF IS ENTITLED TO ACTUAL OR NOMINAL
19 DAMAGES. THERE MUST BE AN AWARD OF ACTUAL OR NOMINAL
20 DAMAGES FOR A VERDICT OF PUNITIVE DAMAGES TO BE
21 SUPPORTED. THIS RULE IS PREMISED ON THE FACT THAT
22 LIABILITY MUST BE ESTABLISHED BEFORE A PLAINTIFF CAN SEEK
23 PUNITIVE DAMAGES.

24 ACCORDINGLY, IF YOU SHOULD FIND THAT THE
25 PLAINTIFF IS ENTITLED TO RECOVER PUNITIVE DAMAGES IN

JURY CHARGE

1302

1 ADDITION TO ACTUAL DAMAGES, IT WOULD BE YOUR DUTY TO
2 INCLUDE SUCH DAMAGES IN YOUR VERDICT AND AWARD SUCH AN
3 AMOUNT AS YOU MAY DEEM REASONABLE AND PROPER IN LIGHT OF
4 THE FACTS AND CIRCUMSTANCES.

5 NOW, MR. FOREMAN AND MEMBERS OF THE JURY, YOU
6 HAVE BEEN SWORN TO GIVE BOTH PARTIES IN THIS CASE A FAIR
7 AND IMPARTIAL TRIAL, AND WHEN YOU HAVE DONE SO, YOU WILL
8 HAVE COMPLIED WITH YOUR OATH, AND NO ONE WILL HAVE THE
9 RIGHT TO CRITICIZE YOUR VERDICT. YOU MUST NOT BE
10 INFLUENCED BY OPINIONS OR EXPRESSIONS OF OPINION YOU MAY
11 HAVE HEARD OUTSIDE OF THIS COURTROOM, BUT RATHER YOU
12 SHOULD BASE YOUR VERDICT ONLY ON THE TESTIMONY OF THE
13 SWORN WITNESSES WHO TOOK THE STAND, ALONG WITH THE OTHER
14 EVIDENCE. YOU SHOULD NOT BE SWAYED BY CAPRICE, PASSION,
15 PREJUDICE OR IMPROPER SYMPATHY FOR OR AGAINST ANY OF THE
16 PARTIES IN THIS CASE. REMEMBER, YOU HAVE NO FRIENDS TO
17 REWARD OR ENEMIES TO PUNISH, AND BOTH PARTIES ARE
18 ENTITLED TO A FAIR AND IMPARTIAL TRIAL AT YOUR HANDS.

19 YOU MAY HAVE NOTICED THAT I HAVE READ THESE
20 INSTRUCTIONS AND I DO SO TO GIVE YOU THE LAW AS
21 ACCURATELY AS POSSIBLE. I WILL GIVE YOU A COPY OF THESE
22 INSTRUCTIONS TO HAVE IN THE JURY ROOM AND YOU MAY REFER
23 TO THESE INSTRUCTIONS TO ASSIST IN YOUR DELIBERATIONS.

24 OF COURSE, ANY VERDICT YOU REACH MUST BE A
25 UNANIMOUS ONE - THAT IS, IT MUST BE AGREED TO BY ALL OF

1 including any other related costs incidental thereto.
2 The plaintiffs are not required to prove that the
3 repairs have actually been made. A competent estimate
4 of the cost of repairs is sufficient to create a
5 factual issue for the jury regarding these damages.

6 The measure of damages in the plaintiffs' class
7 action suit on behalf of the unit owners regarding the
8 claims of negligence and breach of the warranty of
9 habitability. To recover damages for the loss of use
10 of a condominium unit there must be proof of the value
11 of the loss of the use suffered or to be suffered by
12 the unit owners.

13 If you find that the plaintiffs are entitled to
14 recover for the loss of use of their condominium units
15 you should award damages for the fair value of the use
16 while the property is to be repaired.

17 A party suffering damages has a duty to exercise
18 reasonable care and diligence to minimize its damages.
19 No recovery may be had for losses of which the damaged
20 party might have prevented by reasonable efforts and
21 expenditures. The damaged party is required to do only
22 that which would be reasonable. In other words, the
23 damaged party is required to do that which an ordinary,
24 prudent person or party would do under similar
25 circumstances to mitigate its damages. However, the

1 damaged party is not required to unreasonably exert
2 itself to incur substantial expense in an effort to
3 mitigate the damages. Where no evidence is given that
4 damages could reasonably have been reduced the damaged
5 party is not required to have done more. Yet a party
6 will not be allowed to sit back and wait and then seek
7 to recover damages when reasonable attempts would have
8 mitigated the damages. There is no obligation to
9 minimize or avoid damages where a party has a vested
10 right to recover the full amount sought.

11 In this case the plaintiff seeks punitive damages
12 in addition to actual damages. Punitive damages, also
13 known as exemplary damages are imposed as punishment.
14 They are not intended to compensate. Punitive damages
15 are allowed in the interest of society in the nature of
16 punishment and as a warning and example to deter the
17 wrongdoer and others from committing like offenses in
18 the future. Moreover, they serve to vindicate a
19 private right by requiring the wrongdoer to pay money
20 to the damaged party.

21 Punitive damages serve at least three important
22 purposes. Punishment of a defendant's recklessness,
23 willfulness, wantonness or malicious conduct, the
24 deterrence of similar future conduct by defendant or
25 others, and compensation for the reckless and willful

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

COURT OF COMMON PLEAS
CASE NO. 2003-CP-26-3202

MAGNOLIA NORTH PROPERTY
OWNERS' ASSOCIATION, Inc.,

TRANSCRIPT OF PROCEEDINGS

Plaintiffs,

VS.

May 19th, 2009
Conway, South Carolina

HERITAGE COMMUNITIES, Inc,

Defendants.

BEFORE:

THE HONORABLE CLIFTON NEWMAN, Judge

APPEARANCES:

JOHN D. HENRY, ESQ. &
PHILIP C. THOMPSON, ESQ.
ATTORNEYS FOR PLAINTIFFS

STEPHEN L. BROWN, ESQ. &
JEFFREY J. WISEMAN, ESQ.
ATTORNEYS FOR DEFENDANTS

HEATHER GAYLE BURNS, RDR
OFFICIAL COURT REPORTER
9TH JUDICIAL CIRCUIT

Carlson -- Direct

1 THOMAS JAMES CARLSON,
2 having been called as a
3 witness, is duly sworn and
4 testifies as follows:

5 DIRECT EXAMINATION BY

6 MR. BROWN:

7 Q And, mr. Carlson,
8 where do you live?

9 A I live in Mount
10 Pleasant, just north of
11 Charleston.

12 Q Okay. Will you tell
13 me a little bit about your
14 background.

15 A Sure. I started
16 working in construction part time
17 when I was in college, 1961, and
18 in 1963 went to work for a paving
19 grading company in Mount Prospect,
20 Illinois, which is suburban
21 Chicago. And when I graduated
22 from my, from college in 1966 I
23 went to work full time for
24 Millburn Brothers, and I did, had
25 done seasonally, put myself

Carlson -- Direct

1 through college working for them.
2 I've done supervision on paving
3 projects. When I went to work for
4 them full time in 1966 I went to
5 work for them as a sales engineer
6 which was a fancy name for
7 estimator in doing quantitative
8 analysis on unit price projects.
9 Did paving work. I call it
10 horizontal construction. It was
11 paving, grading. Paved about
12 three miles of the runways at
13 O'Hare Field. Worked on the
14 interstate. Did mass grading
15 projects.

16 In 1972 one of
17 Millburn Brothers' clients,
18 Building Systems Housing
19 Corporation, offered me a position
20 as a project manager. They had
21 two twelve-story building --
22 apartment buildings in Chicago
23 called Campus Green and I was the
24 project manager for that project.
25 That was in 1972, a seven million

Carlson -- Direct

1 dollar project. And we completed
2 that project in a year.

3 Following the
4 completion of that project I went
5 to work for the developer of the
6 Campus Green project, John Bayard
7 (phonetic), Bayard and Warner, a
8 real estate company. And I was
9 with them for several years before
10 moving to Colorado and going to
11 work for a contracting company in
12 Aspen, Colorado that build
13 multi-family, commercial, and
14 single family homes in the western
15 slope of Colorado and also in the
16 San Francisco bay area.

17 In 1983 I moved to
18 South Carolina and Callibogue
19 (phonetic) Construction Company
20 was founded in January, 1984 and
21 I've been with the company since
22 its inception twenty-five plus
23 years ago.

24 Q Can you tell the jury
25 briefly what does Calibogue

Carlson -- Direct

1 Construction Company do?

2 A We started out doing
3 repair work, moved into single
4 family new construction, and in
5 1989 an atmospheric event hit the
6 Charleston area called hurricane
7 Hugo and we were invited to go
8 from Hilton Head up to Charleston,
9 about a hundred miles or so, and
10 we bid a ocean front, seventy-two
11 unit ocean front project that some
12 of the buildings had just been
13 knocked flat called Beach Club
14 Villas in Wild Dunes in Isle of
15 Palms, and so from '89 to '92 we
16 had offices in both Hilton Head
17 and Charleston and I was spending
18 a lot of time running and down
19 Highway 17.

20 In 1992 or three we
21 closed our office in Hilton Head.
22 I shared it with a C. E. O. of a
23 Fortune 500 company and
24 unfortunately he suddenly passed
25 away and that was kind of the, the

Carlson -- Direct

1 dagger in the -- that forced me to
2 get realistic about not running up
3 and down the road as much, and we
4 moved our primary office to
5 Charleston where we've been since
6 1992.

7 Q Calibogue is an
8 actual construction company.
9 Correct?

10 A Yes, sir.

11 Q You all go out there
12 do work?

13 A Yes, sir. We do --

14 Q You all do work for
15 property owners' associations such
16 as the plaintiffs in this case?

17 A We've done probably
18 twenty-five million dollars' worth
19 of work since 1991 for
20 multi-family condominium regimes.

21 Q And that's going in
22 and making repairs for condominium
23 regimes?

24 A That's correct. It's
25 not been any new construction for

Carlson -- Direct

1 multi-family. It's been all -- we
2 call it remediation and
3 restoration.

4 Q Okay.

5 A You're fixing sick
6 buildings.

7 Q Let me ask you this:
8 Are you lucky enough to be in any
9 way kin to my legal assistant,
10 Miss Carlson?

11 A I am not.

12 Q Are you a licensed
13 general contractor?

14 A I am.

15 Q All right. Are
16 you -- you ever been qualified as
17 an expert before the courts in
18 this state?

19 A I've testified in
20 fourteen trials in the state of
21 South Carolina name.

22 Q And have you ever
23 testified for me?

24 A No, sir. This is
25 my --

Carlson -- Direct

1 Q Have you ever --

2 A My first time.

3 Q Sixteen years, have
4 you worked for other people in my
5 firm, though?

6 A I have. I've worked
7 for, for attorneys in the Young,
8 Clement, Rivers firm probably for
9 eighteen years.

10 MR. BROWN: Your Honor,
11 I would ask at this time that
12 Mr. Carlson be offered as an
13 expert in the field of -- as a
14 contractor and with regard to
15 the cost of repairs in this
16 case.

17 MR. HENRY: No
18 objection, your Honor.

19 THE COURT: He's so
20 admitted.

21 MR. BROWN: Thank you
22 so much, your Honor.

23 A Thank you.

24 MR. BROWN: One second
25 to ask Mr. Henry a question.

Carlson -- Direct

1 Q Mr. Carlson, tell the
2 jury what were you originally
3 called upon or asked to do in this
4 case?

5 A Had to check my file
6 because it's been a while. Five
7 years ago, in April of 2004, we
8 were asked by Mr. Buckley with
9 Young, Clement, Rivers to get
10 ourselves acquainted with the
11 Magnolia North project and we made
12 our first site visits in April of
13 2004.

14 Q Okay. And Mr.
15 Buckley is one of my law partners.
16 Correct?

17 A That is correct.

18 Q All right. Let me
19 show you what has been marked as
20 exhibit six six three and ask if
21 you can identify that document
22 which has been agreed to by the
23 parties to come into evidence?

24 A Yes, sir, I can.
25 This is a estimate that we

Carlson -- Direct

1 prepared in April of 2008,
2 approximately a year ago, for the
3 repairs as laid out by Mr. Dave
4 Roady of Applied Building
5 Sciences.

6 Q Let's talk a little
7 bit about the role of an estimator
8 in a case like this.

9 A Sure.

10 Q Is it correct that
11 you are given a scope that has
12 been prepared in this case, for
13 example, by Dave Roady, a
14 professional engineer?

15 A That is correct.

16 Q And you take that
17 scope and then price out what you
18 think it will take to do the
19 things in that scope?

20 A Absolutely correct.

21 Q And what do you base
22 that on, generally?

23 A Well, it's always
24 been my theory that you have to
25 look at each project with a clean

Carlson -- Direct

1 in affected areas, did you prepare
2 a new estimate?

3 A I did.

4 Q Let me show you
5 what's been marked by consent and
6 admitted by consent as exhibit six
7 nine six, and tell the jury if
8 that's your new estimate?

9 A We did a new estimate
10 for each one of the twenty-one
11 buildings. And the new estimate
12 total was, including the five per
13 cent engineering fee, was two
14 million, four hundred and
15 sixty-seven thousand, three
16 hundred and sixty dollars. So it
17 was about sixty thousand dollars
18 more than the estimate that I did
19 the year before.

20 Q And in preparing this
21 exhibit, six ninety-six, you're
22 two point four six seven million
23 dollar estimate, did you change
24 any other things or look at any
25 other things?

1 matter of law, the charge as a
2 matter, as a matter of law
3 that I've determined that the
4 defendants were negligent and
5 failed to perform the work in
6 a workmanlike manner in the
7 construction of these
8 condominiums and as a result
9 you must award the plaintiff
10 property owners association
11 damages for costs of repairs
12 and other costs for labor
13 incidental thereto to the
14 extent proven by a
15 preponderance of the evidence.

16 MR. THOMPSON: Thank
17 you, your Honor.

18 THE COURT: All right.
19 And on the verdict form the
20 "yes" will be checked as to
21 those two causes of action.
22 They've already been checked
23 as to those two causes of
24 action.

25 MR. HENRY: Will you

1 instruct them on that, your
2 Honor, that --

3 THE COURT: Yes, sir.

4 MR. HENRY: Okay.

5 THE COURT: All right.

6 Anything else for the time
7 being?

8 MR. BROWN: Nothing
9 other here, your Honor.

10 MR. HENRY: I think
11 that's it, your Honor.,

12 THE COURT: All right.

13 Now I will told the jury to
14 come back at 2:30. Do you all
15 want to finish this case today
16 or you do want me to leave it
17 up to the jury or --

18 MR. HENRY: I, I would
19 like to have a little time,
20 your Honor. We've been here
21 over a week and to get
22 everything together and that
23 sort of thing. Get closing
24 arguments ready. I mean we've
25 been, we've been at this, like

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

James G. McCartney as Trustee of the McCartney
Revocable Living Trust, Individually and
Representing as a Class All Unit Owners of Magnolia
North Horizontal Property Regime,

Plaintiffs,

-Versus-

Heritage Communities, et al.,

Defendants.

Magnolia North Property Owners' Association, Inc.,

Plaintiff,

-Versus-

Heritage Communities, Inc.; Heritage Magnolia
North, Inc.; BuildStar Corporation, Pegram
Associates, Inc.; Tuscan Architectural Group, Inc.;
Louisiana-Pacific Corporation; Right Way
Construction, Inc.; Weaver Co., Inc.; Ronialdo
Vilarino d/b/a RAV Carpentry, AK Construction,
Inc.; Profiro Borjas d/b/a Siding By Profiro; Paul
Miller d/b/a P & L Painters; Martin Masonry, and
MI Windows and Doors, Inc.;

Defendants.

THE VIDEO DEPOSITION OF
W. GWYN HARDISTER
Wednesday, April 15, 2009
a.m. -- 12:12 p.m.

10:10

The video deposition of W. GWYN HARDISTER, taken on
behalf of the Plaintiff, at the office of Thompson &
Henry, P.A., located at 1300 Second Avenue, Third Floor,
Conway, South Carolina, on Wednesday, April 15, 2009.

COURT OF COMMON PLEAS

Case No. 2005-CP-26-0044

Case No. 2003-CP-26-3202

Prestige Court Reporting, Inc.
413 Paul Street, Conway, SC

843/248-5252
www.prestigecourtreporting.com

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2
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9
10 FOR THE DEFENDANT:
11 (Heritage Communities, Inc.; Heritage Magnolia North, Inc.
12 and BuildStar Corporation)
13
14 Jeffrey J. Wiseman, Esquire
15 YOUNG CLEMENT RIVERS, LLP
16 28 Broad Street
17 Post Office Box 993
18 Charleston, South Carolina 29402-0993
19
20 COURT REPORTER:
21
22 Donna H. Martin, CVR
23 Certified Verbatim Reporter
24
25 VIDEOGRAPHER:
26
27 Miranda J. Burton
28 Verbatim Court Reporter
29
30

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1 STIPULATIONS

2

3 The video deposition will be taken before Donna H.
4 Martin, CVR, a Notary Public and Certified Court
5 Reporter in and for the State of South Carolina.

6

7 It is stipulated and agreed that this video
8 deposition is being taken for the purpose of
9 discovery, for possible use during the trial, and for
10 all other purposes permitted under the South Carolina
11 Rules of Civil Procedure.

12

13 It is stipulated and agreed between counsel and
14 the above witness that the reading and signing of the
15 above deposition be, and the same, are hereby waived.

16

17

18

19

20

21

22

23

24

25

1 PLAINTIFF'S EXHIBITS NUMBER 1 THROUGH 10 WERE MARKED
2 PRIOR TO THE COMMENCEMENT OF THE DEPOSITION.
3 MR. HENRY: MY NAME IS PAT HENRY, AND I
4 REPRESENT THE MAGNOLIA
5 NORTH PROPERTY OWNERS
6 ASSOCIATION AS WELL AS THE
7 HOMEOWNERS IN THAT ACTION
8 AND ALSO REPRESENT MR.
9 JERRY MCCARTNEY IN THE
10 CLASS ACTION CASE, AND I
11 PRACTICE LAW HERE IN CONWAY
12 AT 1300 2ND AVENUE, CONWAY.
13 MR. WISEMAN: MY NAME IS JEFF WISEMAN. I
14 REPRESENT HERITAGE
15 COMMUNITIES, INC., HERITAGE
16 MAGNOLIA NORTH, INC., AND
17 BUILDSTAR CORPORATION. I
18 PRACTICE LAW IN CHARLESTON,
19 SOUTH CAROLINA.
20 COURT REPORTER: MY NAME IS DONNA MARTIN.
21 I'M THE COURT REPORTER. I
22 WORK WITH PRESTIGE COURT
23 REPORTING, INC., IN CONWAY,
24 SOUTH CAROLINA.
25 VIDEOGRAPHER: MADAM REPORTER, YOU MAY NOW

1 SWEAR THE WITNESS.

2 W. GWYN HARDISTER, HAVING BEEN DULY SWORN, WAS

3 DEPOSED AS FOLLOWS:

4 EXAMINATION

5 BY MR. HENRY:

6 Q: Good morning, Mr. Hardister. As you know my name

7 is Pat Henry. We have met on previous occasions

8 in depositions in reference to the Heritage

9 Communities litigation. I will be the first

10 lawyer this morning asking you questions. I know

11 that you have given your deposition before and --

12 but I wanted to review some of the rules that's,

13 that our courts require us to follow before we

14 begin your deposition. But first of all, would

15 you please, sir, state your full name and present

16 resident address?

17 A: William Gwyn Hardister. I reside at 387 Oak Moss

18 Court, Murrells Inlet, South Carolina, Georgetown

19 County.

20 Q: How long have you resided in Georgetown County?

21 A: 13 years.

22 Q: Let me just briefly go over a couple of the rules

23 that I'm required by our rules to go over with

24 you. First of all, if during the deposition you

25 have a question about the testimony, you should

1 direct that question to me or the lawyer that is
2 asking you the questions. Do you understand
3 that?

4 A: Yes, I do.

5 Q: Also, if we take a break during the deposition,
6 you are not to discuss your testimony with anyone
7 at the break. Do you understand that?

8 A: I do.

9 Q: Also, this is not an endurance contest. If at
10 any time during the deposition you need a break,
11 just please indicate that, and we will go off the
12 record and take a short break.

13 Also, I would ask that you give verbal
14 answers to your questions. It is sometimes
15 difficult for the court reporter to pick up a
16 shake of the head although we are doing this by
17 video, but a verbal response instead of an uh-huh
18 (affirmative response) and huh-uh (negative
19 response) will be more appropriate so that we can
20 get the, your testimony down accurately.

21 First of all, as you know the court
22 reporter has sworn you as a witness at this
23 deposition. Do you understand that you are under
24 oath the same as you would be if you appeared in
25 the courtroom?

1 A: Yes, I do.

2 Q: It's my understanding that there is a problem
3 with your being at the trial of this case, which
4 is scheduled to begin on May the 11th. Is that
5 correct?

6 A: Yes, sir, it is.

7 Q: What is that problem?

8 A: I will be out of the country for business
9 reasons.

10 Q: And that is the reason we are taking your
11 deposition by video so that we can present this
12 to the jury at the trial of the case beginning
13 May the 11th?

14 A: Yes, sir.

15 Q: You have had your deposition taken in the past,
16 have you not?

17 A: I have.

18 Q: Okay. Approximately how many times have you had
19 your deposition taken?

20 A: In the high 30s.

21 Q: Were most of these depositions related to the
22 Heritage litigations?

23 A: Yes, sir, they were.

24 MR. WISEMAN: I'M GOING TO OBJECT JUST IN
25 REFERENCE TO LITIGATION

1 OTHER THAN WHAT WE ARE

2 DEALING WITH RIGHT HERE.

3 MR. HENRY: OKAY:

4 Q: Give me the benefit of your educational
5 background?

6 A: I have a number of years in college, various
7 areas of study, microbiology, biology, business,
8 nursing, medical industry, but unfortunately no
9 degree.

10 Q: Okay. And give the jury, if you would, the
11 benefit of your work history?

12 A: I'll go back, probably 10 years is the most
13 relevant. I've been employed by many Fortune
14 500, Fortune 100, companies in the area of
15 medical devices, microbiology and then in
16 executive positions of management, marketing,
17 sales in various, various companies.

18 Q: Okay. Have you been connected in any way with
19 the Heritage Communities, Inc. corporation?

20 A: Yes, sir. I was employed by Heritage Communities
21 beginning, I believe, it was in February of 1998.

22 Q: And in what position were you employed by
23 Heritage Communities?

24 A: I was originally hired as the vice president of
25 sales and marketing.

1 Q: Okay. Had you previously had any experience in
2 either the development field or the construction
3 field?

4 A: No, sir.

5 Q: Had you ever had a contractor's license?

6 A: No, sir.

7 Q: Had you ever had a residential contractor's
8 license?

9 A: No, sir.

10 Q: Had you ever been involved in the development of
11 a condominium project?

12 A: No, sir.

13 Q: How -- strike that. Explain the circumstances,
14 if you would, that brought you to go to work for
15 Heritage Communities.

16 A: The, the, the job I held prior to Heritage was
17 one that required a significant amount of
18 personal time away from my family in travel, and
19 I met the VanWies, primarily Patty VanWie, as a
20 patient. Ms. VanWie is a dentist; and during our
21 discussions she, my wife and I came to a
22 conclusion that her husband, Roger, was looking
23 for a person with my history and skills to
24 possibly add to some latitude and some growth to
25 their management team.

1 Q: Now tell, tell the jury, if you would, who Roger
2 VanWie is.

3 A: As related to Heritage, when I joined Heritage
4 Roger was the president and CEO of Heritage
5 Communities.

6 Q: Do you know at that time when you joined the
7 company, that is, Heritage Communities, who the
8 officers of that corporation were?

9 A: Yes, sir. At that time the officers were Roger
10 VanWie, Dr. Jack Green and James Miles Watson.

11 Q: And what, what office did Dr. Green hold if you
12 know?

13 A: Dr. Green was the, was the president of Heritage
14 Communities at that time and one of the boards of
15 director members.

16 Q: And how about Mr. Watson?

17 A: Mr. Watson was not on the board, but he was a
18 vice president with an unspecific title.

19 Q: When you joined Heritage Communities, did you
20 join as an owner, did you buy an ownership
21 interest, or were you simply an employee?

22 A: Simply an employee.

23 Q: Were you, were you, when you first joined, were
24 you made an officer of the corporation?

25 A: No, sir.

1 Q: Tell me exactly what your position was when you
2 were hired at Heritage Communities and what your
3 duties entailed.

4 A: I was hired as VP of sales and marketing. My
5 primary responsibilities were to, to oversee the
6 sales group, which was a group of real estate
7 professionals who were employed by Burroughs &
8 Chapin Prudential but were loaned to Heritage
9 Communities as on-site sales people for each of
10 their individual projects. I oversaw their daily
11 activities as well as to advance the marketing
12 and develop marketing materials for Heritage
13 Communities, and that was my primary duties when
14 I was hired.

15 Q: Okay. When you joined the Heritage Communities
16 organization, did -- what projects at that time
17 were under development if you remember?

18 A: Magnolia Place was nearing its completion,
19 Magnolia North was still on the drawing board,
20 The Gardens at Cypress Bay was underway, Azalea
21 Lakes was underway, Avian Forest was still on the
22 drawing board, Riverwalk was underway, and
23 Heather Stone in Charlotte was still on the
24 drawing board.

25 Q: Okay. And your, your responsibilities were to

1 oversee the marketing of all of these projects?

2 A: Yes, sir.

3 Q: And you also developed marketing materials; is
4 that what I understand?

5 A: Yes, sir.

6 Q: Let me show you what's been marked as Exhibit 1
7 and ask you if you can identify that document?

8 A: Yes, sir. That is a, a marketing piece that was
9 provided to potential homeowners at the sales
10 centers during the, the selling process.

11 Q: Did you have any responsibility or any part in
12 producing this particular brochure?

13 A: Yes, sir.

14 Q: And what, what part did you have in producing
15 this brochure?

16 A: Primarily oversight and the message Heritage
17 Communities wanted to convey to its potential
18 homeowners. The, the advertising agency was
19 Lesnik, Himmelsbach in Myrtle Beach. They were
20 the, the creative partner in this project.

21 Q: At the time this brochure was developed, and I
22 have not found a date on it, but at the time this
23 brochure was developed did, was, was Magnolia
24 North still on the drawing board or had it begun
25 to be constructed or do you recall?

1 A: At this time it was still, as I recall it was
2 still on the drawing board; but if you, if you
3 look at some of the information on the back page
4 where the company forecast 1998 sales in
5 excessive of 55 million, that, that assumes that
6 that year the projected sales would be 55
7 million. That would not have included sales for
8 Magnolia North.

9 Q: Okay.

10 A: And it says also here, "Magnolia North is being
11 developed by Heritage Communities," so at that
12 time it was still on the drawing board.

13 Q: All right.

14 MR. HENRY: WE WOULD, WE WOULD MOVE TO
15 INTRODUCE EXHIBIT 1 INTO
16 EVIDENCE.

17 MR. WISEMAN: NO OBJECTION.

18 PLAINTIFF'S EXHIBIT NUMBER 1
19 OFFERED INTO EVIDENCE.

20 MR. HENRY: OKAY.

21 Q: Now, let me ask you a few things about this
22 brochure. Did -- As part of your
23 responsibilities for Heritage did you have any
24 contact with potential or prospective purchasers?

25 A: Minimally. That would, that would only have

1 happened if I coincidentally was on-site working
2 with the salespeople and would happen to
3 encounter a homeowner or a potential homeowner
4 who may've been coming through a sales center,
5 but I was not involved in the direct sales of the
6 condominiums.

7 Q: Okay. Let me ask you a few questions about
8 Exhibit 1, which is the brochure we've been
9 speaking of and has been introduced. Let me
10 start at the top in the left-hand corner. It
11 says "1, 2 and 3 Bedroom Luxurious Brick Villas."
12 Were these brick villas, was that what was
13 eventually developed?

14 A: No, sir. The materials used for siding were, was
15 a material called Hardie board or HardiePlank,
16 which is a cementitious material. As I recall
17 there was a portion of the building that was
18 brick but not the entire building.

19 Q: Okay. Now, look at the bottom left-hand on the
20 front of that brochure, and would you read the,
21 the sentence that begins with "Featuring a
22 selection"?

23 A: "Featuring a selection of 1, 2 and 3 bedroom
24 floor plans (including an option for a garage),
25 Magnolia North will include additional lifestyle

1 amenities such as several outdoor pools, a lazy
2 river, tennis courts, an indoor swimming pool and
3 workout facility."

4 Q: Is that what was eventually put out there?

5 A: No, sir.

6 Q: What was not put out there?

7 A: None of the above.

8 Q: Okay. And why not?

9 A: Because Heritage ran out of funds and eventually
10 declared bankruptcy.

11 Q: Okay. Now, how long were you in the -- strike
12 that. The -- If you would look up on the right-
13 hand side under that block that says "Luxurious
14 Brick Villas from the \$50's to \$120's"; ---

15 A: Yes.

16 Q: --- do you see that?

17 A: Yes.

18 Q: It says -- Well, just read where it says "but its
19 impressive range."

20 A: "But its impressive range of quality features
21 like distinctive brick exteriors, beautiful floor
22 plans, landscaped courtyard pools with whirlpools
23 and spectacular views are also responsible for
24 much of its appeal."

25 Q: Were the -- Did Heritage provide any courtyard

1 pools with whirlpools?

2 A: No, sir.

3 Q: Open the brochure, if you would, to the second
4 page. Do you see where it says "The Quality
5 Surrounds You at Myrtlewood"?

6 A: Yes, sir.

7 Q: Do you see the, the sentence -- Well, I tell you
8 what. Just read the first sentence under "The
9 Quality Surrounds You at Myrtlewood."

10 A: "The Quality Surrounds You at Myrtlewood.
11 Myrtlewood Golf Club has long been recognized as
12 one of the premier names in the inner circle of
13 great Myrtle Beach golf courses. In keeping with
14 that tradition of excellence, Magnolia North has
15 been designed to deliver a level of quality far
16 beyond what one would expect in a villa in its
17 price range."

18 Q: What, what was that intended to convey to the
19 homeowner?

20 A: One, one would have to assume it meant it was
21 being built to deliver quality beyond what was
22 typically available in Myrtle Beach.

23 Q: And was that done?

24 A: In retrospect, no.

25 Q: Okay. Now, turn to the last page. It says under

1 "Building on a Tradition of Quality,
2 Affordability and Customer Satisfaction." Do you
3 see that?

4 A: I do.

5 Q: Read the next or the sentence that begins
6 "Magnolia North is being developed."

7 A: "Magnolia North is being developed by Heritage
8 Communities, Inc. a company that has sold more
9 than 1200 villas of similar design in the last
10 three years in the Myrtle Beach area. It
11 attributes much of its success to delivering high
12 homeowner value."

13 Q: Okay. And would you -- strike that. Did
14 Heritage deliver high homeowner value in
15 retrospect?

16 A: I think you can argue both sides of that
17 question. On one hand Heritage Communities
18 offered a value for the money that was below what
19 a similar destination would be in the Southeast;
20 but on the other hand, the problems that were
21 associated with the aftermath of some of the
22 building issues was not, did not deliver high
23 value.

24 Q: Okay.

25 A: The intention was to deliver a more valuable

1 product than other areas.

2 Q: The intention was to deliver a high-quality
3 building?

4 A: Yes, sir.

5 Q: And you would agree, I believe you've already
6 testified that was not done?

7 A: Yes, sir.

8 Q: And the next sentence reads "Heritage
9 Communities' mission is focused on achieving high
10 quality standards that insure high levels of
11 customer satisfaction." In retrospect, was that
12 done?

13 A: No, sir.

14 Q: Now if you look at the bottom right-hand corner,
15 it, the, the last sentence -- Well, let me ask
16 you, if you would, look over in the left corner
17 at the last paragraph that begins "Heritage
18 Communities" and read that paragraph to me please
19 sir.

20 A: "Heritage Communities has other exciting new
21 communities planned for this year, including
22 Heatherstone, our initial development in the
23 Charlotte area. It's as simple as this: if you
24 are looking for the most value in an affordably
25 priced villa in the Myrtle Beach area, you want

1 to take a close look at the quality of the
2 construction specifications and the desirability
3 of the location in all of our developments."

4 Q: And I am most interested in what was meant by
5 "quality of the construction specifications."

6 A: The, the intentions of the corporation were to
7 develop, to provide a high quality unit which was
8 at a better value than other southeastern
9 destinations.

10 Q: Okay. Would that include using materials for the
11 construction of these buildings that were
12 suitable?

13 A: Yes, sir.

14 Q: Do you know whether that was done in all
15 occasions?

16 A: To my knowledge, yes.

17 Q: Now, on the right side of this brochure it names
18 the projects that Heritage Communities is
19 developing. Do you see that?

20 A: I do.

21 Q: Do those -- does that list all of the projects?

22 A: No, sir. It does not list Avian Forest in
23 Litchfield.

24 Q: Okay. Other than Avian Forest it lists all of
25 those projects?

1 A: Yes, sir.

2 Q: Have you either ---

3 A: Oh, I'm sorry. It doesn't mention Magnolia

4 North.

5 Q: Okay. Have you either given a deposition or

6 testified in trial on all of those projects?

7 MR. WISEMAN: PAT, I'M GOING TO OBJECT TO

8 MENTION OF OTHER

9 LITIGATION. WHAT I CAN DO

10 IS I CAN DO A STANDING

11 OBJECTION AS TO ANY MENTION

12 OF ANY OTHER HERITAGE

13 LITIGATION; AND -- IS IT

14 OKAY WITH ---

15 MR. HENRY: YES.

16 MR. WISEMAN: --- YOU TO HAVE A STANDING

17 OBJECTION SO I'M NOT

18 INTERRUPTING EVERY TIME?

19 MR. HENRY: CERTAINLY.

20 MR. WISEMAN: OKAY.

21 MR. HENRY: WE CAN JUST STIPULATE THAT

22 ANY OF MY QUESTIONS

23 REGARDING ANY OTHER

24 PROJECTS OTHER THAN

25 MAGNOLIA NORTH YOU HAVE A

1 STANDING OBJECTION.

2 MR. WISEMAN: ANY OBJECTION IS BASED ON
3 RELEVANCE AND RULE 403 OF
4 THE SOUTH CAROLINA RULES OF
5 EVIDENCE.

6 MR. HENRY: RIGHT.

7 MR. WISEMAN: OKAY.

8 MR. HENRY CONTINUES:

9 Q: Let me, let me start over. There was Avian
10 Forest and Magnolia North and then these projects
11 that are listed on the brochure; is that correct?

12 A: What -- I'm not sure what your question
13 specifically asks.

14 Q: Well, first of all, I want to tie down, Mr.
15 Hardister, the projects that were developed by
16 Heritage Communities.

17 A: Yes, sir.

18 Q: And then I have some questions about those.

19 A: Okay. There are two that are missing from here.

20 One is Magnolia North, and the other is Avian
21 Forest.

22 Q: All right. And when you came to work for
23 Heritage -- and I believe you said '98?

24 A: That's correct.

25 Q: What projects were under construction or had been

1 constructed at that time if you recall?

2 A: Magnolia Place, Riverwalk, The Gardens, and
3 Azalea Lakes.

4 Q: Those had already been constructed?

5 A: That's -- or were under construction, yes.

6 Q: When is the first time you became aware of any
7 construction issues, that is, construction
8 defects, water intrusion issues, at any of these
9 projects?

10 A: Pretty soon after I joined Heritage one of my
11 evolving responsibilities after the first 30 days
12 of orientation or so were, was to manage the, the
13 quality control process after the sale. And, and
14 it became apparent that the Magnolia Place
15 project had some issues with water intrusion and
16 with water issues for decks and breezeways.

17 Q: How about window leaks?

18 A: Window leaks, yes, window leaks as well.

19 Q: Okay. And that was before they started Magnolia
20 North; ---

21 A: Yes.

22 Q: --- is that correct?

23 A: That's correct.

24 Q: Okay. Now, in each of the projects that Heritage
25 Communities has developed, have you either

1 testified in a trial or given a deposition
2 relative to your knowledge about construction
3 deficiencies?

4 A: I have.

5 Q: And in each one of these projects, has, has there
6 been construction deficiencies?

7 A: Yes, sir.

8 Q: And would you -- strike that. In each of the
9 projects, were the construction deficiencies
10 practically identical?

11 A: Yes.

12 Q: Okay. Now, it says on the left of this brochure
13 that they have sold more than 1200 villas of
14 similar design in the last three years in the
15 Myrtle Beach area. Do you know what -- would
16 that be correct?

17 A: Yes, sir.

18 Q: And the company -- down on below it says the
19 company -- "it is encompassing more than 5000
20 unit, individual units, with a retail housing
21 value in excess of \$440 million." Is that
22 correct?

23 A: Yes, sir.

24 Q: Was that eventually done?

25 A: No, sir.

1 Q: How much of that was not done?

2 A: As I recall the final number of villas developed
3 by Heritage were in the 1500 range.

4 Q: Do you know what the cash flow or money that came
5 out of those?

6 A: It was probably close to this 55 million number
7 that was mentioned.

8 Q: Do you know where all of that money went?

9 A: No.

10 Q: Now, what was, what was your title when you first
11 came to Heritage Communities?

12 A: Vice president of sales and marketing.

13 Q: And how long did you stay in that position?

14 A: Probably a year.

15 Q: Okay. Before I get into your next position with,
16 with Heritage, I want to show you a document that
17 I believe has been marked as Exhibit -- what is
18 the ---

19 A: This one's marked as 1.

20 Q: The ---

21 A: I'm sorry, 1A.

22 Q: 1A?

23 A: Yes, sir.

24 Q: Do you recognize this document?

25 A: I do.

1 Q: And what is this document?

2 A: This is a tracking document that's used in, in
3 many market arenas whereby you determine the
4 basis or the origin or genesis of a particular
5 sale and the demographic that's associated with
6 that particular sale.

7 Q: Okay. And what, what would be the purpose of
8 getting a document such as this?

9 A: It, it gives you historical retrospect as to who
10 your market audience is and, particularly as it
11 relates to the type of customer versus the closes
12 associated with your demographic.

13 Q: In this particular form marked as Exhibit 1A --

14 MR. HENRY: FIRST OF ALL, I WOULD MOVE
15 TO INTRODUCE EXHIBIT 1A.

16 MR. WISEMAN: LET ME LOOK AT IT REAL

17 QUICK. (PAUSES TO LOOK AT

18 DOCUMENT.) NO OBJECTION.

19 MR. HENRY: WITHOUT OBJECTION.

20 PLAINTIFF'S EXHIBIT NUMBER 1A

21 OFFERED INTO EVIDENCE.

22 Q: What was, what was done with this particular
23 information gathered on a sheet such as this?

24 A: This is a -- Again, this is a, a typical survey
25 form that allows any company, whether it's a real

1 estate company or otherwise, again, to identify
2 its demographic and its close rate based on the
3 potential customers who are interested in
4 condominiums. This particular document would
5 then have been entered into a database. That
6 database would have been massaged to the point
7 that we would be able to target our upcoming
8 advertising and the type of customer that
9 Heritage most appealed to.

10 Q: Okay. And I noticed on this particular form that
11 you, you asked "What is the primary reason for
12 purchase at Heritage Communities, Inc. instead of
13 other locations," and the answer was what?

14 A: "Quality."

15 Q: How old is the person that is filling out this
16 form?

17 A: 60 -- greater than 65.

18 Q: Okay. So would I be correct that you would take
19 a form like this put it into a database, and then
20 when you look at it you say "We need to market to
21 people in, in the 65-year-old range that are
22 looking for quality"?

23 A: That would be one of the demographics, yes.

24 Q: Okay. All right. After you had been at, with
25 Heritage Communities for a period of time in the

1 marketing area, were you promoted to another
2 position?

3 A: Yes, sir. I was promoted after approximately a
4 year to chief operating officer, senior vice
5 president; and my additional duties were the
6 oversight of the, the closing department, which
7 would take into account the form that we just
8 discussed, looking at a demographic and then
9 making sure that from the date of the sale to the
10 point of closing that there was a seamless
11 process so that both the customer and Heritage
12 Communities were served in, in the best light in
13 order to make sure everyone was informed about
14 the closing, the building process, the
15 expectation of when the close could occur, et
16 cetera.

17 Q: At the time you were promoted to senior vice
18 president and chief operating officer, were you
19 aware that these projects were experiencing
20 construction deficiencies?

21 A: Yes, sir.

22 Q: Was there anything done in a proactive manner by
23 Heritage Communities to inform prospective
24 customers that these problems were being
25 experienced?

1 A: At, at some point in time, and I don't recall
2 exactly when, we, I circulated a letter that was
3 written and authorized by Roger VanWie
4 identifying the problems and recognizing the fact
5 that we did have issues and that we were
6 attempting to correct them.

7 Q: Was this given to all of the prospective
8 purchasers?

9 A: No, sir.

10 Q: Okay. Who was it given to?

11 A: The homeowners and the salespersons who were on-
12 site.

13 Q: Okay, the people, the homeowners on-site and the
14 salespeople that were selling them?

15 A: Homeowners who, people who already had purchased
16 and closed and salespeople who were speaking with
17 prospective new buyers.

18 Q: And the people that were already closed, those
19 were the people that were making these
20 complaints, if you would, concerning leakage in
21 windows, decks and so forth?

22 A: Yes, sir.

23 Q: When you were made senior vice president and
24 chief operating officer, who were the officers of
25 Heritage Communities at that time?

1 A: Roger VanWie, Dr. Jack Green, and I'm not sure at
2 what point in time but Dr. Patty VanWie was also
3 on the board. I believe Lynn Anderson pre-dated
4 Dr. VanWie on the board, but I'm not sure at what
5 point she became an officer.

6 Q: When you say "Dr. VanWie," what, what profession
7 is she in?

8 A: She's a dentist, and she's, she's Roger VanWie's
9 wife.

10 Q: And is she -- Does she practice here in Horry
11 County?

12 A: Yes, sir. She has an office in Little River.

13 Q: And that's up till today?

14 A: Yes, sir, to my knowledge.

15 Q: Do you know where Mr. VanWie is located?

16 A: No, I don't.

17 Q: Okay. When is the last time you've seen Mr.
18 VanWie?

19 A: It's probably been -- well, actually I saw him a
20 couple of months ago as a ride by, a drive by,
21 but I haven't spoken with him in probably a year
22 or more.

23 Q: When is -- When you say "a drive by," what do you
24 mean by that?

25 A: His wife lives in my neighborhood.

1 Q: And he came by your house?

2 A: Yes, sir.

3 Q: But you did not talk with them?

4 A: Yes, sir.

5 Q: You don't know where he is living today?

6 A: I have no idea.

7 Q: Now, are you familiar with a company by the name
8 of BuildStar?

9 A: Yes, sir.

10 Q: What was BuildStar?

11 A: BuildStar was the, excuse me, BuildStar was the
12 construction company that was one of Heritage's,
13 one of Heritage's subsidiaries.

14 Q: Do you know who the officers of BuildStar was?

15 A: Roger VanWie and Jack Green.

16 Q: Was Lynn Anderson eventually made the president
17 of BuildStar?

18 A: Yes, sir.

19 Q: And if I understand it correctly, BuildStar was
20 the general contractor?

21 A: That's correct.

22 Q: And they would actually construct all of these
23 buildings?

24 A: BuildStar was a, was a unique entity in that it,
25 it employed people on-site who were responsible

1 for the oversight of building, but those on-site
2 superintendents and employees supervised the
3 construction by subcontractors. Heritage didn't
4 do any physical building or BuildStar didn't do
5 any physical building.

6 Q: Okay. So in other words, BuildStar would sub
7 everything out?

8 A: Yes, sir.

9 Q: Okay. Were you involved in the construction
10 process at all?

11 A: No, sir.

12 Q: Who would, who was the person that would, would
13 oversee BuildStar?

14 A: Roger VanWie.

15 Q: Do you know what credentials Mr. VanWie has in
16 the construction business?

17 A: I don't.

18 Q: Do you know if he had a general contractor's
19 license?

20 A: I don't.

21 Q: Do you know if he had a residential homebuilder's
22 license?

23 A: I don't.

24 Q: But he was the one overseeing these projects
25 including Magnolia North?

1 A: Yes, sir.

2 Q: If you would, explain to the jury, Mr. Hardister,
3 when they were going to do a new project such as,
4 well let's just take Magnolia North, what were
5 the entities under the Heritage Communities, Inc.
6 umbrella that would be formed?

7 A: One more time please?

8 Q: When Heritage Communities, Inc. would develop a
9 project such as, and we'll take Magnolia North,
10 are you familiar with the, with the structure of
11 that development as far as the corporations they
12 would form?

13 A: Oh sure. Yes, I understand what you mean.

14 Q: How was, how was that done?

15 A: Each individual property was its own corporation.
16 It was set up -- for example, Magnolia North
17 Condominium Horizontal Property Regime, LLC or
18 Magnolia North, LLC was set up as a separate
19 corporation.

20 Q: Okay. And then that corporation would form the
21 homeowners association?

22 A: The homeowners association and a board of
23 directors specifically for that particular
24 entity, that particular project.

25 Q: And to your knowledge, was that the structure

1 that was done in all of the Magnolia North or --

2 I'm sorry, Heritage Communities projects?

3 A: Yes, sir, it was.

4 Q: Okay. And what -- who would be the officers in
5 these corporations?

6 A: Originally it was Dr., Dr. Green, Mr. VanWie and
7 Lynn Anderson. Eventually it was Mr. VanWie,
8 Lynn Anderson and myself.

9 Q: Okay. And the, the structure of the corporations
10 would be such that all of them had the same
11 officers and directors?

12 A: Yes, sir.

13 Q: Okay. Now the structure would be set up to
14 develop; and then would the, would Heritage hire
15 an architect to design the project?

16 A: Yes, sir.

17 Q: In reference to Magnolia North, do you know who
18 they hired?

19 A: There were two architects who were involved in
20 that project. One was, I believe, historically
21 was, was Tom Pegram and the second was Robin
22 Roberts.

23 Q: Okay. And who, what company did Robin Roberts
24 work for?

25 A: It was another one of Heritage's subsidiaries, a

1 company by the name of Tuscan Architecture.

2 Q: All right. Were you aware that Tom Pegram was
3 the architect that drew the plans for Magnolia
4 North?

5 A: I think so, yes.

6 Q: Let me show you what has been marked as Exhibit
7 2.

8 MR. WISEMAN: I DON'T HAVE AN OBJECTION
9 TO THIS AS LONG AS A PROPER
10 FOUNDATION IS LAID AT SOME
11 POINT.

12 MR. HENRY: OKAY.
13 PLAINTIFF'S EXHIBIT NUMBER 2
14 OFFERED INTO EVIDENCE.

15 Q: Do you recognize this document?

16 A: Yes. This is a document that -- oh, this is a
17 note that, as I recall, was on, stamped on the
18 plans of Magnolia North.

19 Q: Okay. Do you under -- Do you have an
20 understanding of what construction administration
21 duties are in reference to an architect?

22 A: I do.

23 Q: Explain to the jury what that is.

24 A: Primarily construction duties as it applies to an
25 architect is the architect is required, in some

1 instances, obviously not in this one, but in some
2 instances, to oversee the daily or the day-to-day
3 construction of a project as it applies to the
4 plans that they have drawn particular to that
5 project.

6 Q: In other words, the architect goes on-site to
7 make sure they are following his plans and
8 specifications?

9 A: That's correct.

10 Q: Why -- strike that. Do you know why in this case
11 that Heritage Communities elected not to have
12 construction administration for Magnolia North?

13 A: I don't know so much as they elected not to
14 versus Mr. Pegram not wanting to do it. I don't
15 know whether it was Heritage's choice or Mr.
16 Pegram's choice. I wasn't involved in that
17 negotiation. That would have been Mr. VanWie.

18 Q: Okay. And who would be the person to ask about
19 why that occurred?

20 A: Mr. Pegram or Mr. VanWie.

21 Q: Okay. Do you believe it is important in the
22 construction process to have construction
23 administration?

24 A: I do.

25 Q: And why is that?

1 A: Again in retrospect. There's a, there's a,
2 there's a modicum of, of, of responsibility as it
3 applies to an architect who, who puts their stamp
4 on a particular project; and the ongoing
5 oversight of quality and construction, I think,
6 is important, and it's something that did not
7 occur at Magnolia North to my knowledge.

8 Q: Okay. And the brochure that we have marked as
9 Exhibit 1, we've already discussed, talks about
10 the quality of the construction specifications.
11 And would you agree that the construction
12 administration is to assure that quality and
13 meeting the architect's specifications?

14 A: Yes.

15 MR. WISEMAN: I'M GOING TO OBJECT JUST
16 BECAUSE HE'S NOT AN EXPERT
17 AND HE'S ALREADY SAID HE
18 DIDN'T REALLY HAVE ANYTHING
19 TO DO WITH THE CONSTRUCTION
20 ASPECT OF THESE BUILDINGS.

21 MR. HENRY: OKAY.

22 Q: When the -- You've, you've testified that at some
23 point after you came to work, shortly after I
24 believe you said, you came to work for Heritage,
25 that you learned that there were construction

1 deficiencies being complained of, water
2 intrusion, decks, balconies, that sort of thing;
3 is that correct?

4 A: That's correct.

5 Q: What representations did Heritage make to the
6 homeowners concerning correcting those
7 deficiencies?

8 A: Heritage recognized and, and was able to diagnose
9 the, the genesis of the problem, and then
10 Heritage then notified the homeowners that it
11 would repair the deficiencies that it recognized.

12 Q: Okay. And were these representations to the
13 homeowners being made all the way up to the time
14 Heritage went out of business?

15 A: Yes, sir.

16 Q: Okay. And would you expect that the homeowners
17 relied on those representations?

18 A: Yes, sir.

19 Q: In reference to all of these projects, when I say
20 "all of these projects," the ones that we've
21 discussed that are listed on Exhibit 1, the
22 brochure, and the other two, Magnolia North and
23 Avian Forest, were the homeowners being told in
24 all of those projects that Heritage would take
25 care of the construction deficiencies?

1 A: Yes, sir.

2 Q: And in all of those projects were the
3 corporations that were developing, the
4 subsidiaries of Heritage that were developing
5 those corporations, were they in the same office
6 that Heritage Communities was in?

7 A: Yes, sir.

8 Q: Okay. And I noticed there's, there's a procedure
9 in the, and we're going to talk about this in a
10 minute, in the warranty manual to report a
11 deficiency, and they are all to the same place,
12 the same number and everything. Do you agree
13 with that?

14 A: Yes, sir.

15 Q: Okay. And except for the legal structure of the
16 corporations, would it be fair to say that all of
17 these corporations were in a sense one but they
18 were set up for bookkeeping purposes?

19 MR. WISEMAN: PAT, I'M GOING TO OBJECT
20 BECAUSE YOU ARE ASKING FOR
21 A LEGAL CONCLUSION AND TO
22 DRAW CONCLUSIONS AS TO WHY
23 A CERTAIN ENTITY WAS SET UP
24 WITHOUT HIM REALLY HAVING
25 ANY INVOLVEMENT.

1 MR. HENRY: OKAY.

2 Q: You can answer to the best of your knowledge.

3 A: No. The, the, the individual corporations were
4 set up, at least with my recollection, is each,
5 each property according to the South Carolina
6 Horizontal Property Regime requirements are, are
7 set up as an entity so that each business could
8 contain its own expenses and oversight as it
9 applied to property management, construction cost
10 allocation, et cetera, et cetera. So they were
11 more set up as cost centers under that corporate
12 umbrella is, is how I recall.

13 Q: So they were cost centers, but they were
14 essentially owned and operated by the same
15 officers and directors?

16 A: Yes, sir, that's correct.

17 Q: Okay.

18 A: That is correct.

19 Q: Let me show you Exhibit 3 and ask you if you can
20 identify Exhibit 3?

21 MR. WISEMAN: NO OBJECTION.

22 A: I can.

23 MR. HENRY: WE'VE INTRODUCED THIS
24 WITHOUT OBJECTION.

25 PLAINTIFF'S EXHIBIT NUMBER 3

1 OFFERED INTO EVIDENCE.

2 Q: What is this?

3 A: This is the Heritage Communities Warranty Manual
4 for all of its properties.

5 Q: Okay. And who was this given to?

6 A: It was given to the homeowner at the point of
7 their closing.

8 Q: Okay. And tell me exactly what a homeowner would
9 do, and I believe if you look, that it applied to
10 all of the Heritage projects, ---

11 A: That's correct.

12 Q: --- did it not?

13 A: That's right.

14 Q: Okay. And what -- in all of the Heritage
15 projects, including Magnolia North, what would a
16 homeowner do if, say, they had a window that
17 leaked or a deck that leaked?

18 A: They would contact Heritage directly.

19 Q: Okay. And would -- What would Heritage do?

20 A: The -- any post-closing issues, whether they were
21 punch issues or more critical issues, were all
22 logged in by the, by the closing specialist and
23 the person whose oversight and responsibility was
24 to see that those problems were corrected.

25 Q: Okay. And was -- up until the time that Heritage

1 closed its doors, were they still fixing problems
2 out there?

3 A: Yes, sir.

4 Q: And were they -- what were they representing to
5 the homeowners up until the time they went out of
6 business that they would do in reference to the
7 construction deficiencies?

8 A: That they would be repaired.

9 Q: And were they?

10 A: No, sir.

11 Q: Pick up Exhibit 4, if you would, and tell me if
12 you can identify that.

13 A: Master Deed for Magnolia North Horizontal
14 Property Regime.

15 MR. HENRY: OKAY. WE WOULD MOVE TO
16 INTRODUCE THAT.

17 MR. WISEMAN: NO OBJECTION.

18 PLAINTIFF'S EXHIBIT NUMBER 4
19 OFFERED INTO EVIDENCE.

20 Q: Explain to the jury what a master deed is, Mr.
21 Hardister.

22 A: The, the master deed is a document that defines
23 all of the, the regulations and, and requirements
24 of the developer as it applies to the, the
25 construction of a particular property.

1 Q: Okay. If you would, look over on page, on page
2 36.

3 A: Yes, sir.

4 Q: That's the signature page for the master deed?

5 A: Yes, sir.

6 Q: And what corporation is filing this master deed?

7 A: Heritage Magnolia North, Inc.

8 Q: And who, who are the officers of Heritage

9 Magnolia North, Inc.?

10 A: Jack Green, Jr. President; Lynn M. Anderson,
11 Secretary.

12 Q: And were they also officers in Heritage

13 Communities, Inc.?

14 A: Yes, sir.

15 Q: Then look over, if you would, to this stamped
16 number at the bottom. It would be page 1477.

17 A: Uh-huh (affirmative response).

18 Q: This stamped number, do you see that?

19 A: Yes.

20 Q: Okay. What is this document that is attached to
21 the master deed?

22 A: Articles of -- Nonprofit Corporation Articles of
23 Incorporation.

24 Q: And for what corporation?

25 A: Magnolia North Property Owners Association.

1 Q: Okay. This is incorporating the property owners
2 association that is the plaintiff in one of these
3 cases, correct?

4 A: I would assume so. I'm, I'm not sure of the
5 exact reason for this document.

6 Q: Okay. Who signed this document?

7 A: This document was signed by Miles E. Watson.

8 Q: And how was he related, if at all, to the
9 Magnolia -- I'm sorry, to the Heritage
10 Communities corporations?

11 A: At that time he was a vice president.

12 Q: Okay. Now turn over to the next page.

13 A: (Complies with request.)

14 Q: What is that document? I'm sorry, the next page.
15 What is this document?

16 A: The bylaws.

17 Q: And that was also attached to the, to the master
18 deed?

19 A: Yes, sir.

20 Q: Okay. And if you would, turn over to the stamped
21 number 14 -- that's not a very good -- it looks
22 like 91.

23 A: Okay. Is that it?

24 Q: No, the next page I believe.

25 A: 92?

1 Q: Yes.

2 A: "Board of Directors, Number, Powers, Meetings"?

3 Q: Correct. Under the "Election, Term of Office,
4 and Vacancies," who are listed as the officers of
5 the homeowners association?

6 A: Lynn M. Anderson, Roger H. VanWie and myself,
7 Gwyn Hardister.

8 Q: Okay. And the three of you were also officers in
9 Heritage Communities, correct?

10 A: That's correct.

11 Q: Okay. And so when the master deed was filed it
12 was set up so that the developer, Heritage
13 Communities, Inc./Magnolia North, Inc., were also
14 the officers of the association?

15 A: That's right.

16 Q: And the developer, Heritage, controlled the
17 association, correct?

18 A: That's right.

19 Q: And then who signed the Magnolia North Property
20 Owners Association Minutes -- I'm sorry, the, the
21 bylaws?

22 A: I know I did, but I don't know who these other --
23 these were other witness, but I signed it.

24 Q: Those are witnesses ---

25 A: Yes, sir, I signed it.

1 Q: But you signed as president of the Magnolia North
2 Property Owners Association, Inc.?

3 A: I did.

4 Q: Okay. And so from the time the master deed was
5 filed until Heritage went out of business, the
6 homeowners association was controlled by the
7 developer, correct?

8 A: That's correct.

9 Q: Now, look if you would at, it's not the stamped
10 number, but page 16 of the master deed?

11 A: Okay.

12 Q: If you would, look at the last, the last
13 paragraph and publish to the jury, if you would,
14 the first sentence of the last paragraph on page
15 16?

16 A: "The Board of Directors of Association shall
17 cause the common elements to be inspected and
18 evaluated annually by a professional engineer,
19 architect, qualified property inspector, or other
20 qualified professional, who then shall render a
21 maintenance recommendation report to the Board of
22 Directors of the Association and to the Grantor
23 as to the condition of the common elements, as
24 well as any recommendations for repairs
25 maintenance of the common elements."

1 Q: Okay. How about taking a look at the next
2 exhibit and ask, tell me if you can identify
3 Exhibit Number 5?

4 A: Yes, sir, I can.

5 Q: And what is that?

6 A: That is a Building Condition Assessment for
7 Magnolia North prepared for The Noble Company.

8 Q: All right. And are you familiar with this
9 document?

10 A: Yes, sir.

11 MR. HENRY: WE WOULD MOVE TO INTRODUCE
12 THIS DOCUMENT.

13 MR. WISEMAN: I'M GOING TO OBJECT TO IT
14 AS HEARSAY.

15 MR. HENRY: WHAT'S THAT?

16 MR. WISEMAN: I'M GOING TO OBJECT TO IT
17 AS HEARSAY.

18 MR. HENRY: OKAY.

19 PLAINTIFF'S EXHIBIT NUMBER 5
20 OFFERED INTO EVIDENCE.

21 Q: Who had this document prepared?

22 A: The Noble Company.

23 Q: Okay. And tell the jury who The Noble Company
24 is.

25 A: They were the property, the property management

1 company for all of the Heritage properties in
2 Horry and Georgetown County.

3 **Q: And as the property manager, what were their**
4 **duties and responsibilities?**

5 A: Their responsibility was to maintain the -- First
6 of all, they collected the, the homeowners
7 association dues; and then from those dues they
8 were, they were the company who would care for
9 the property under the terms and conditions of
10 the former document we just reviewed.

11 **Q: The master deed?**

12 A: The master deed, as to what needed to be done on
13 a regular basis, maintenance, oversight, building
14 care, everything except for repairs. They also
15 were responsible on an annual basis for
16 conducting a building condition assessment in
17 order to determine if there were issues that
18 needed to be addressed budgetarily for the
19 upcoming budget year.

20 **Q: This was done in compliance with the master deed?**

21 A: That's correct.

22 **Q: The sentence you just read out of the master deed**
23 **on page 16?**

24 A: That's correct.

25 **Q: Okay. Were you given a copy of this?**

1 A: Yes.

2 Q: Okay. Do you know if anyone else was given a
3 copy of this?

4 A: The, there were copies distributed to all of the
5 officers of the company and, and as I recall the,
6 the building project managers, ---

7 Q: Okay.

8 A: --- the employees of BuildStar.

9 Q: The employees of BuildStar, which was also the
10 employees of Heritage?

11 A: You could assume that.

12 Q: Look over on page 1 of this report.

13 A: Yes.

14 Q: First of all, do you know who George R. Barbour,
15 Jr., P.E. is that is on the front page of this
16 document?

17 A: Never met the person.

18 Q: Okay. Do you know that he is the person that was
19 with Kimley-Horn that prepared this document?

20 A: It states so on the document here.

21 Q: Okay. And if you would turn over to page 1, the
22 heading is "Executives Summary." Do you see
23 that?

24 A: Yes.

25 Q: Okay. Publish to the jury, if you would, the

1 last sentence that begins -- the next to the last
2 sentence that begins with "Elements."

3 A: "Elements that are in poor condition or critical
4 condition include the asphalt pavements, which do
5 not have a finish course installed in some areas,
6 and PVC handrails, which are loose and present a
7 safety hazard. There is also evidence of
8 moisture intrusion in exterior porch ceilings."

9 Q: Now was this a surprise to you when you got this
10 document that those conditions existed?

11 A: No, sir.

12 Q: Why not?

13 A: They were ongoing problems reported by the
14 homeowners.

15 Q: Okay. And in reference to these problems, what
16 was Heritage Communities representing to the
17 homeowners?

18 A: They would be repaired.

19 Q: And were they repaired?

20 A: They were in the process of being repaired.

21 Q: And why weren't they completely repaired?

22 A: Because of the demise of the company.

23 Q: Okay. What, what was wrong with the asphalt
24 pavement?

25 A: You know, I don't recall that specifically. I'm,

1 I'm not going to opine what it, what it might be
2 because I'm not an expert in that area.

3 Q: Right.

4 A: I don't remember.

5 Q: That's okay. If you don't recall, that, that's
6 fine. Turn over to page 3 if you would.

7 A: Okay.

8 Q: The first, second, third -- the fourth paragraph
9 under "Summary of Observations and Findings," the
10 engineer that drafted this report talks about
11 site drainage. Do you see that?

12 A: I do.

13 Q: Okay. Do you recall any issues regarding site
14 drainage?

15 A: Let me read it, and I'll let you know.

16 Q: Okay.

17 A: (Pauses to review document.) Vaguely, I
18 remember it vaguely.

19 Q: And what, what do you remember?

20 A: I remember there was some pooling of, of
21 accumulated water around some of the buildings.
22 That's the extent of my memory, but I do remember
23 they, they needed to change the slope of some of
24 the landscaping so that the moisture would, that
25 the accumulated rain would drain away from the

1 building versus pooling or towards the building.

2 Q: Do you know whether or not Heritage remedied
3 those problems before they went out of business?

4 A: I don't.

5 Q: The next is "2.2 Pavements." Do you see that?

6 A: Yes, sir.

7 Q: Read the first sentence, if you would, of the
8 second paragraph.

9 A: "This section describes the evaluation of
10 pavement, cracks, overall pavement condition and
11 pavement drainage for each building evaluated at
12 Magnolia North. Pavement consists of bituminous
13 cement concrete drive isles and parking bays with
14 concrete curb and gutter. Dumpster pads are
15 Portland cement concrete."

16 Q: And then the second paragraph.

17 A: "The pavement" -- "The pavement generally are
18 inadequate and in poor to critical condition (P-
19 8, 10, 11, 12). For the paved areas in the
20 vicinity of Buildings 6 through 13 and 19, the
21 asphalt finish (surface) course has not been
22 installed and the base course is inadequate to
23 handle traffic wear. In many locations where the
24 finish course is absent, the pavement is
25 cracking, stripping, or has failed. In addition,

1 the lack of finish course has left the drop inlet
2 rim elevation above that of the pavement surface,
3 preventing proper drainage; ponding water was
4 observed at these locations."

5 Q: Okay. Do you recall any issues regarding the
6 pavement?

7 A: No, sir.

8 Q: Okay. Turn over to page 5 of this assessment
9 report. The fifth, the fifth paragraph down,
10 would you publish that to the jury, please, sir?

11 A: "In most buildings there is evidence of moisture
12 intrusion (staining and/or mildew) on the
13 ceilings of the rear porches, the front
14 breezeways, and the staircase landings (P-16-17).
15 In some cases there was accompanied by -- in some
16 cases this was accompanied by cracks in the
17 gypsum board ceiling and peeling paint (P-18).
18 Since the buildings were reportedly pressure
19 washed this year and some ceilings painted,
20 possible moisture intrusion at other ceiling
21 locations was not observed."

22 Q: Okay. Do you recall issues regarding the porches
23 and ceilings of the porches and decks?

24 A: Yes, sir.

25 Q: What do you recall about that?

1 A: I remember the genesis, the problem and what was
2 being done to repair it.

3 Q: Okay. Were these problems repaired before
4 Heritage -- at Magnolia North before Heritage
5 went out of business?

6 A: No, sir.

7 Q: What -- Read or publish the next paragraph.

8 A: "Unsealed gaps into the interior of the brick
9 facade were observed in the vicinity of utility
10 penetrations, such as HVAC condensate discharges
11 (P-19) and electric meter bases located at the
12 base of each building (P-20). Unsealed gaps are
13 also present at the corners of wood band trim and
14 the intersection of front columns and brick
15 wall."

16 Q: Do you remember any issues regarding this?

17 A: I don't.

18 Q: Okay. The ---

19 MR. WISEMAN: PAT, REAL QUICK -- I'M

20 SORRY. I JUST WANT TO MAKE

21 SURE IT'S UNDERSTOOD THAT

22 I'M OBJECTING TO THIS

23 REPORT, AND THAT OBJECTION

24 INCLUDES OBJECTING TO THE

25 READING OR PUBLISHING OF

1 PARTS OF THE REPORT ---

2 MR. HENRY: SURE.

3 MR. WISEMAN: --- AS PART OF THE

4 TESTIMONY; BUT YEAH, I JUST

5 WANT TO MAKE SURE THAT ---

6 MR. HENRY: SURE, NO PROBLEM. I

7 UNDERSTAND THAT.

8 MR. HENRY CONTINUES:

9 Q: The next portion of it is, that I want you to

10 look at, is the second paragraph up from the

11 bottom that begins "All buildings."

12 A: Yes.

13 Q: Read that paragraph, if you would, to the jury.

14 A: "All buildings use PVC handrails along the second

15 and third floor breezeways, staircase landings

16 behind the aluminum handrails, and rear porches

17 (P-22). The rear porch handrails were not

18 assessed for this report. The PVC breezeway

19 handrails are very flexible especially at the

20 center post. The building code requires that

21 handrails resist a 200-pound point load or a 50-

22 pound/foot distributed load; the PVC handrails

23 may not be able to resist the code loads and

24 therefore present a potential safety hazard."

25 Q: Do you recall any issues regarding the handrails?

1 A: No, not as it applies to this.

2 Q: All right. And the last paragraph on page 5.

3 A: "In many locations the PVC handrail brackets,
4 which secure the handrail to the breezeway or
5 staircase landing columns, were observed to be
6 pulling away from the column (P-23). Where this
7 condition was observed the handrails were loose
8 and could be easily shaken, and therefore present
9 a potential safety hazard."

10 Q: Do you remember any issues regarding that?

11 A: No, sir.

12 Q: Turn to page 7 if you would. Do you see "3.3
13 Exterior Façade"?

14 A: On page 6?

15 Q: Page 7?

16 A: Oh, yes, I do.

17 Q: Okay. Just the second little square, I guess you
18 would say, up from the bottom, it says
19 "Porch/breezeway - repair leaks in porch and
20 breezeway waterproofing." Do you recall issues
21 regarding that?

22 A: I do.

23 Q: And what issues do you recall regarding that?

24 A: As it states there were leaks in the porch and
25 breezeways due to an interruption in the

1 waterproofing process at those areas.

2 Q: And did -- What did Heritage represent to the
3 homeowners in reference to the repair of those
4 units?

5 A: They would be repaired.

6 Q: Turn to page 8 if you would. And the top
7 sentence, would you publish that to the jury.

8 A: "The water intrusion evident on the rear porch
9 ceilings on the first and second floors of some
10 villa buildings should be analyzed further to
11 determine the specific cause and course of
12 action. Any staining noted on third-story roofs
13 may be indicative of roof leaks, which should
14 also be investigated and corrected."

15 Q: And this report that has been marked as Exhibit
16 5, this was given to you as an officer of
17 Heritage Communities?

18 A: Yes.

19 Q: And at the time this was given to you, you were
20 the president and chief operating officer?

21 A: Yes, yes.

22 Q: Okay.

23 A: I was.

24 Q: All right. And you distributed this to the
25 appropriate people?

1 A: Actually, The Noble Company distributed it to us
2 as officers. I didn't distribute the report.

3 Q: Okay. And in reference to Magnolia North, at the
4 time that this report was received, was Heritage
5 still selling units at Magnolia North?

6 A: Yes, sir.

7 Q: Was any effort made to inform the prospective or
8 the purchasers at that time of this report?

9 A: Not to my knowledge.

10 Q: Were you made aware that, as an officer of
11 Heritage, that some of the homeowners at Magnolia
12 North were experiencing window leaks?

13 A: Yes.

14 Q: Okay. Did you ever determine or do you recall if
15 it was ever determined why the windows were
16 leaking?

17 A: I don't.

18 Q: Okay. Look at Exhibit Number 6 and tell me if
19 you can identify that document.

20 A: I can.

21 Q: And what is this?

22 A: This is a complaint from a homeowner, Barbara
23 Dean.

24 Q: And it went directly to you?

25 A: It went to Connie Lee who was the predecessor to

1 Myra Smith as the punch or post-closing punch
2 coordinator.
3 Q: Okay. And this regards the punch list for 203,
4 Building 4?
5 A: Right.
6 MR. WISEMAN: CAN I LOOK AT IT?
7 MR. HARDISTER: SURE.
8 MR. HENRY: WE WOULD MOVE TO INTRODUCE
9 EXHIBIT 6.
10 MR. WISEMAN: WE OBJECT TO IT AS HEARSAY
11 AND ALSO AS TO RELEVANCE
12 BECAUSE IT SEEMS TO BE A
13 PUNCH LIST ITEM AND I DON'T
14 BELIEVE WE'RE BEING SUED
15 FOR PUNCH LIST ---
16 MR. HENRY: RIGHT.
17 MR. WISEMAN: --- ITEMS.
18 PLAINTIFF'S EXHIBIT NUMBER 6
19 OFFERED INTO EVIDENCE.
20 Q: In reference to Exhibit Number 6, would you look
21 at the third paragraph up from the bottom?
22 A: Yes.
23 Q: You can just read that if you would.
24 A: "Second in terms of importance, Bill and I are
25 concerned with the serious condensation on the

1 windows. It was heavy enough to land in puddles
2 along the window ledges in the living area and
3 bedroom. Can you advise if this is something we
4 will need to deal with, or is this a temporary
5 problem? It is clear that the moisture is
6 settling onto the window sill which in time will
7 cause a much more serious problem."

8 **Q: Does that not say "into the window sill," not**
9 **onto?**

10 A: "Bill and I are concerned . . . on the windows.
11 It was heavy enough to land in puddles along the
12 window ledges in the living area and bedroom.
13 Can you advise if this is something we will need
14 to deal with or is a temporary problem? It is
15 clear that the moisture is settling into the
16 window sill which in time will cause a much more
17 serious problem."

18 **Q: Do you recall this issue?**

19 A: Uh-huh (affirmative response), I do.

20 **Q: Tell the jury what this issue was.**

21 A: Interestingly enough this was always a matter of
22 debate among the homeowners as well as Heritage
23 because we live in a warm environment and because
24 the construction of the buildings were relatively
25 tight. Many people didn't realize that if they

1 cooked a lot in their kitchens and they boiled
2 with the pots open, it will cause condensation on
3 the inside. And so there was always a debate,
4 obviously after the fact, many of those weren't,
5 may or may not have necessarily been valid, but
6 there was always a debate as to whether the
7 moisture was coming from inside the unit that was
8 caused by homeowner or from exterior as caused by
9 some of the issues of water leaks from the
10 windows as we've identified historically.

11 **Q: Okay. And in retrospect did you determine what**
12 **the real problems were?**

13 **A:** On this one, no, I don't recall; but the majority
14 of the problems were from the issues with the
15 leaking windows.

16 **Q: And the improper installation of the windows?**

17 **A:** Yes, sir.

18 **Q: Look at Exhibit Number 7. Can you identify that?**

19 **A:** This is the minutes from the First Annual
20 Homeowners Meeting, Magnolia North Property
21 Owners Association, Wednesday, March 8, 2000.

22 **Q: Okay. And were you present at this meeting?**

23 **A:** I was present, and I was also president and CEO.

24 **MR. HENRY: WE WOULD MOVE TO INTRODUCE**
25 **EXHIBIT 7.**

1 MR. WISEMAN: I WOULD OBJECT TO IT AS
2 HEARSAY, RELEVANCE AND RULE
3 403.
4 PLAINTIFF'S EXHIBIT NUMBER 7
5 OFFERED INTO EVIDENCE.
6 MR. HENRY: LET'S TAKE A SHORT BREAK..
7 ***** OFF THE RECORD *****
8 (ON THE RECORD.)
9 VIDEOGRAPHER: IT IS 1:34, AND WE'RE BACK
10 ON THE RECORD.
11 MR. HENRY CONTINUES:
12 Q: Mr. Hardister, I have shown you a document marked
13 as Exhibit 7.
14 MR. HENRY: I BELIEVE IT HAS BEEN
15 INTRODUCED OVER OBJECTION;
16 IS THAT CORRECT?
17 MR. WISEMAN: WHICH ONE ARE WE ON; THE
18 PUNCH LIST?
19 MR. HENRY: NO, THE HOMEOWNERS MINUTES.
20 MR. WISEMAN: OH, YES, THERE'S AN
21 OBJECTION.
22 MR. HENRY: OKAY.
23 Q: You were present at this homeowners meeting?
24 A: Yes, sir.
25 Q: Do you recall this meeting?

1 A: I do.

2 Q: What was the purpose -- this was the first annual
3 homeowners meeting, and it was held on Wednesday,
4 March the 8th; is that correct?

5 A: That's right.

6 Q: The homeowners association had been formed in
7 December of '98; is that correct?

8 A: I don't remember when it was formed.

9 Q: Well, the master deed was filed -- let me show
10 you Exhibit 4. The master deed was filed on what
11 date?

12 A: December 9th.

13 Q: Of what year?

14 A: Of '98. I see, '98, December 11.

15 Q: December 11 of 1998?

16 A: Of '98, that's correct.

17 Q: And you're having the first homeowners meeting on
18 March the 8th of 2000; is that correct?

19 A: That's right.

20 Q: So there had been no homeowners meetings in
21 between December of '98 and March of 2000?

22 A: That's right.

23 Q: Was there a reason that there were no homeowners
24 meetings then?

25 A: I think, as I recall the homeowners meetings were

1 required once per year; and if you look back, you
2 may find that probably coincidental with this
3 March 8th was probably around the time of the
4 first closing in 2000 so it was probably pushed
5 forward a year past the first closing in Magnolia
6 North. I don't -- There was no reason, as I
7 recall, to delay the meeting.

8 Q: Okay. The minutes, Exhibit 7, state "In
9 attendance at the meeting from the Board of
10 Directors were Gwyn Hardister, Roger VanWie and
11 Lynn Anderson." Is that correct?

12 A: That's correct.

13 Q: And all three of you were also officers in
14 Heritage Communities, Inc., correct?

15 A: That's correct.

16 Q: And Magnolia North, Inc.?

17 A: Correct.

18 Q: And so at this point the developer was still in
19 control of the homeowners association?

20 A: That's right.

21 Q: And it says "Mr. Hardister then welcomed everyone
22 and thanked them for attending the meeting." So
23 you were present, correct?

24 A: That's right.

25 Q: Now turn to the second page if you would. The

1 first paragraph says -- well, you read the first
2 two sentences there if you would.

3 A: "A homeowner then asked," that one?

4 Q: Yes.

5 A: "A homeowner then asked if monies set aside for
6 reserve funding is being spent on the damages to
7 the roads and curbs from construction. Mr.
8 Specht explained that no reserve monies had been
9 spent and these monies are strictly for future
10 use."

11 Q: Okay. Do you know what he's talking about there?

12 A: I do.

13 Q: And what is that?

14 A: Every horizontal property regime is required to
15 take the, to take the homeowners fees that are,
16 that are paid monthly and to put those in a
17 reserve account, and reserves are made up of a
18 number of oversight issues particular to that
19 specific property that entailed future, future
20 repairs, future planning for pools and things of
21 that nature. And what he was speaking of is that
22 there had been reserve set aside from those
23 homeowners dues that would allegedly be used for
24 repairing the roads.

25 Q: Okay. But Mr. Specht says that they were, that

1 was only for, the reserves for, only for future
2 use, correct?

3 A: That's right.

4 Q: The reserves are not for the use of repairing
5 construction deficiencies, correct?

6 A: No, sir.

7 Q: They're so that if in 10 years a roof needs to be
8 replaced, for example, they'll have money to
9 replace the roof?

10 A: That's correct.

11 Q: It was Heritage Communities' responsibility to
12 repair any construction deficiencies, right?

13 A: That's correct.

14 Q: And they didn't do that because they went out of
15 business?

16 A: That's right.

17 Q: Now the second one says, starting with "Mr.
18 VanWie," would you read that to the jury please?

19 A: "Mr. VanWie told the membership that the roads
20 and curbing will be repaired and there will be
21 another layer of asphalt added to the roads when
22 construction is completed in the area and another
23 excess to the property is constructed."

24 Q: Okay. Do you know what he was talking about
25 there?

1 A: Yes. Typically the, the final layer of asphalt
2 is not added to a, the, the parking lot and
3 driving areas until such time as the construction
4 is completed because of the damage to, potential
5 damage to those roads because of construction
6 traffic, heavy vehicles, et cetera. And so once
7 an area of the project is completed, then the top
8 surface of the road will be applied.

9 Q: Do you know if that was done?

10 A: I don't know because -- I don't think so.

11 Q: Okay. Then under "New Business/Public Input,"
12 the second paragraph?

13 A: Yes. "A homeowner then asked about the
14 construction of the indoor pool. Mr. Hardister
15 told the membership that the pool would be
16 constructed when they get to that point in the
17 building plan."

18 Q: And is that one of the pools that we discussed in
19 the Exhibit 1, the brochure?

20 A: Yes, sir.

21 Q: Was that constructed?

22 A: No, sir.

23 Q: Should it have been constructed?

24 A: Yes, sir.

25 Q: Then it says "Another homeowner," I think that's

1 supposed to be "then questioned whether or not
2 renters will be allowed to use the fitness center
3 facility."

4 A: Yes.

5 Q: What is the fitness center facility?

6 A: Each of the properties were planned, had a
7 planned fitness center that would serve
8 particular areas of the development.

9 Q: Was that constructed at Magnolia North?

10 A: Not to my knowledge.

11 Q: Should it have been constructed?

12 A: Yes, sir.

13 Q: Turn over to the next page, the third full
14 paragraph down that begins "Ms. Joyce Johnson."

15 A: Yes.

16 Q: Would you read the first two sentences.

17 A: "Ms. Joyce Johnson then discussed the structural
18 and leaking problems in the building at Magnolia
19 North. The balconies are leaking into the units
20 below them and many windows are leaking."

21 Q: And the next?

22 A: "Mr. Hardister told the membership that Heritage
23 Communities has found the problem with the
24 leaking balconies and they will be fixing the
25 problem."

1 Q: So at this time Heritage was representing to the
2 homeowners that they would be fixing the leaking
3 windows and leaking decks and any other
4 construction problems such as the paving?

5 A: Yes, sir.

6 Q: And they didn't do that?

7 A: They did not.

8 Q: Should they have?

9 A: Yes, sir.

10 Q: Let me get you to pick up Exhibit 8. Can you
11 identify that letter?

12 A: Yes.

13 Q: Was that a letter written to you?

14 A: It was.

15 Q: And did you receive that letter?

16 A: I did. Well, I'm not sure if I did, but more
17 than likely I did if it was addressed to me.

18 Q: All right.

19 MR. HENRY: WE WOULD MOVE TO INTRODUCE
20 EXHIBIT 8.

21 MR. WISEMAN: OBJECT AS HEARSAY.

22 MR. HENRY: OKAY.

23 PLAINTIFF'S EXHIBIT NUMBER 8
24 OFFERED INTO EVIDENCE.

25 Q: Do you recall what prompted this letter? I see

1 that he had written you a letter on July the 5th,
2 which I do not have, but do you recall the
3 circumstances of his writing this letter to you?

4 A: Yeah, I do actually. If you, if you look back at
5 the document we just discussed, the Plaintiffs
6 Exhibit 7, at that time we were strong, Heritage
7 was strongly considering including a homeowners
8 advisory board to be an adjunct to the board of
9 directors for all of our properties, and this was
10 for two purposes. One was to, to bring the
11 homeowners closer to the board of directors so we
12 could discuss intimately what the ongoing
13 problems were, and the second was so that there
14 was more transparency to what we were doing.
15 Given the number of problems that we were having,
16 it was starting to have a, have a negative effect
17 on our selling process, and so at the prior board
18 meeting, the prior homeowners meeting, I had
19 offered the opportunity that we may be asking
20 some homeowners to volunteer to be an adjunct
21 homeowners advisory board.

22 Q: Okay. And isn't Mr. Hairfield asking that the
23 bylaws be amended and allow two additional
24 directors to the board?

25 A: What he was asking for, and I remember we

1 actually consulted counsel on this, what he was
2 asking for was to be included as a board member
3 and was not satisfied with being a, just an
4 adjunct advisor.
5 Q: Okay.
6 A: He wanted to be on the board.
7 Q: In other words he wanted a vote?
8 A: Yes, sir, he wanted a vote.
9 Q: And an advisory board member would not have a
10 vote?
11 A: No, sir.
12 Q: Did he tell you why he wanted that; do you recall
13 that?
14 A: I don't recall that, but I remember answering his
15 letter.
16 Q: Let me show you Exhibit 9.
17 MR. HENRY: AND WE WOULD MOVE TO
18 INTRODUCE EXHIBIT 9.
19 MR. WISEMAN: NO OBJECTION, NO OBJECTION.
20 PLAINTIFF'S EXHIBIT NUMBER 9
21 OFFERED INTO EVIDENCE.
22 Q: All right. Would you read the first paragraph to
23 the jury, please, sir? Before you do that, what
24 is Exhibit 9?
25 A: It is a response to Mr. Hairfield's letter to me

1 on July 31st, 2000, which I replied the same day,
2 July the 31st, which leads me to believe that I
3 didn't receive his July the 5th letter because as
4 evidence by these two I typically responded
5 immediately. It wasn't always fun, but I
6 responded immediately.

7 **Q: Right.**

8 A: So I responded to him the same day saying "Dear
9 Mr. Hairfield: Thank you for your letter to me
10 of July 5, 2000." I guess I must've read it
11 because I referenced it. "At the present time
12 the board of directors must decline your request
13 to expand the board of directors of Magnolia
14 North to include two resident homeowners. At
15 that time -- at the time that Class II control
16 ends, all positions on the board of directors at
17 Magnolia North will be open for any homeowner who
18 may wish to serve, either resident or non-
19 resident."

20 **Q: Do you recall why you declined to allow**
21 **homeowners on the board as voting members?**

22 A: You know, I don't recall specifically; but I
23 think it was an issue that was an issue of
24 legality as it applied to the master deed and the
25 rules under the horizontal property regime. I

1 don't remember the specific reasons. I do recall
2 that there was quite a debate and that we, we
3 wanted to do it, but I think it would have caused
4 some issues with the, the corporate, the legal
5 structure of the horizontal property regime.
6 Q: Okay. Then I would ask you to look at Exhibit 10
7 and ask you if you, if you recognize that letter.
8 A: Yes.
9 Q: Okay.
10 A: I remember.
11 Q: And what is this letter?
12 A: It is a letter that speaks directly to the
13 leaking issues, ---
14 MR. HENRY: WE WOULD MOVE ---
15 A: --- the porch issues.
16 MR. HENRY: WE WOULD MOVE TO INTRODUCE
17 EXHIBIT 10.
18 MR. WISEMAN: OBJECT AS HEARSAY.
19 PLAINTIFF'S EXHIBIT NUMBER 10
20 OFFERED INTO EVIDENCE.
21 Q: I'm going to ask you ---
22 A: Okay.
23 Q: --- a few questions, if you would look at Exhibit
24 10. Who Was Robert N. Gross?
25 A: Robert was a, an individual whom I hired. As I

1 began taking on more responsibility with
2 Heritage, Robert was a person who I hired as the
3 vice president of homeowner relations to step
4 into the breach to try to handle some of the less
5 complicated issues of punch and post-closure
6 issues with Myra. So he worked for me.

7 Q: Was he handling any complaints from homeowners
8 about construction deficiencies?

9 A: He was.

10 Q: And so Mr. Gross was a, an employee of Heritage
11 Communities?

12 A: Yes, sir.

13 Q: And do you know who Mr. Hairfield is?

14 A: I do.

15 Q: Who is Mr. Hairfield?

16 A: He was a homeowner in Building 3.

17 Q: Okay. And what is the tenor of this letter?

18 A: The tenor of his letter is that he's concerned
19 that the repairs to his porch have not been
20 completed based on the, the oncoming hurricane
21 season; and he's concerned that if it's not
22 repaired, that there will be further damage to
23 his unit.

24 Q: Okay. And what, what was the problem he was
25 complaining about?

1 A: As I recall it's the leaking porches again.

2 Q: Okay.

3 A: He wanted to enclose his porch.

4 Q: And this is -- and that's the balconies, the
5 private balconies, correct?

6 A: That's correct.

7 Q: Okay. And were you having, in addition to the
8 breezeways, were you getting complaints about
9 leaking into the balconies?

10 A: Same issues.

11 Q: Same issues?

12 A: Yes, sir, same issues.

13 Q: Okay. Do you recall whether or not prior to
14 Heritage going out of business if Heritage
15 determined what the problems were with the
16 private balconies?

17 A: The same as the breezeways.

18 Q: Okay. They were leaking?

19 A: Yes, sir.

20 Q: Now, the, the architectural plans, and I'll
21 represent this to you, that the architectural
22 specifications require a, require use of
23 pressure-treated plywood on the decks and
24 balconies. Do you recall any issues regarding
25 the use of OSB instead of treated plywood?

1 A: No, sir.

2 Q: Do you know why Heritage would have changed from
3 using what was specified by the architect and
4 using a much cheaper product?

5 A: That wouldn't have been in my area of
6 responsibility. I have no idea.

7 Q: If that was not a proper product, that would not
8 be something as represented in the sales brochure
9 that would be buildings of top quality?

10 A: I can't give you an opinion because I don't know
11 what the difference in OSB and another type of
12 plywood quality would be.

13 Q: Okay. Give me just one moment.

14 MR. HENRY: CAN WE GO OFF THE RECORD
15 FOR JUST A MINUTE, AND LET
16 ME SEE IF I CAN CONCLUDE
17 HERE?

18 ***** OFF THE RECORD *****

19 (ON THE RECORD.)

20 VIDEOGRAPHER: IT IS 1:52, AND WE'RE BACK
21 ON THE RECORD.

22 MR. HENRY CONTINUES:

23 Q: Was Heritage, in reference to the construction
24 deficiencies that were being complained about by
25 the homeowners, was Heritage calling back its

1 subcontractors or was BuildStar calling back its
2 subcontractors to come repair those deficiencies?

3 A: Yes, sir.

4 Q: Were they responding to that?

5 A: In some cases, yes; in some, no.

6 Q: Do you recall why they were not responding?

7 A: Some weren't being paid.

8 Q: And that's why they were not coming back?

9 A: Yes, sir.

10 Q: And was that true at the time that Heritage
11 closed its doors?

12 A: That's correct.

13 Q: Do you know how many subcontractors they left
14 unpaid?

15 A: No, I have no idea.

16 Q: It was many, wasn't it?

17 A: Many.

18 Q: What?

19 A: Many.

20 Q: The, the sale of the condos after the reports of
21 all of the construction deficiencies were made,
22 these homeowners bought, bought condominiums that
23 were defective. Would you agree with that?

24 MR. WISEMAN: I'M GOING TO OBJECT. HE'S

25 ALREADY STATED HE DOESN'T

1 ---

2 A: I don't know that that's the case.

3 MR. WISEMAN: LET ME MAKE MY OBJECTION

4 FOR THE RECORD JUST REAL

5 QUICK. HE'S ALREADY STATED

6 THAT HE DOESN'T HAVE ANY

7 EXPERTISE IN THE

8 CONSTRUCTION INDUSTRY, AND

9 HE'S NOT REALLY

10 KNOWLEDGEABLE ON THAT ISSUE

11 SO YOU WERE ASKING HIM TO

12 RENDER WHAT WOULD REALLY BE

13 AN EXPERT OPINION.

14 Q: In retrospect, did Heritage put hundreds of
15 condominiums in the stream of commerce that had
16 construction deficiencies?

17 MR. WISEMAN: SAME OBJECTION.

18 A: In retrospect, yes.

19 Q: Did you buy any units in the Heritage projects?

20 A: My wife and I did.

21 Q: Okay. And what did -- When did you by those; do
22 you recall?

23 A: I don't remember the specific date. It was
24 during the course of the, the two years or so
25 that I was at Heritage as investments.

1 Q: Okay. And how did those investments turn out?

2 A: Not too well.

3 Q: That's all I have, thank you.

4 EXAMINATION

5 BY MR. WISEMAN:

6 Q: Mr. Hardister, you were originally hired as the
7 vice president of sales and marketing?

8 A: Correct.

9 Q: And is it fair to say that a large thrust of the
10 marketing of these condominiums would be to point
11 out that they were affordable living at the
12 Beach?

13 A: That's right.

14 MR. HENRY: DO YOU WANT TO COME OVER
15 HERE SO HE CAN FACE THE
16 CAMERA?

17 MR. WISEMAN: I CAN DO THAT, SURE.

18 ***** OFF THE RECORD *****

19 (ON THE RECORD.)

20 MR. WISEMAN CONTINUES:

21 Q: Do you recall discussing how -- strike that. Let
22 me ask it this way. Is part of the marketing of
23 these condominiums golf condominiums?

24 A: Yes.

25 Q: And is there basically -- is there a golf season

1 in Myrtle Beach?

2 A: There is.

3 Q: Okay. And was there any weather event that you
4 can recall that impacted the sales of these
5 condominiums at Magnolia North?

6 A: Most definitely, and again, I've never really
7 validated the dates, but in, in either 2000 or
8 1999, I don't remember which, which year, there
9 were two subsequent, I don't know if they were
10 classified hurricanes, but they were certainly
11 classified as tropical storms; and in a matter of
12 just a couple of months we experienced about 18
13 inches of rain in, in Myrtle Beach, and that was
14 right in the middle of our peak selling season.

15 Q: What was the impact of this weather event on the
16 ability to sell these condominiums at Magnolia
17 North during those two seasons, that season?

18 A: It's significantly impacted it because the
19 majority of our sales were during the golf
20 season, and two storms were during golf season so
21 essentially we had no customers. Most of our
22 customers were from outside of the Myrtle Beach
23 area.

24 Q: And how did that impact sales?

25 A: Significantly lower sales than, than in prior

1 years. I don't remember how significantly lower
2 but significantly lower.

3 Q: We've had discussions about this March 8, 2000
4 meeting, and you were present as president of the
5 homeowners association.

6 A: Right.

7 Q: Correct?

8 A: Correct.

9 Q: Do you recall the discussion regarding the issues
10 of balconies?

11 A: Yes.

12 Q: Okay. And do you recall there was a discussion
13 at the meeting that y'all identified the
14 subcontractors that were responsible for this
15 issue?

16 A: Yes.

17 Q: And were these subcontractors contacted about
18 rectifying this problem?

19 A: They were.

20 Q: Okay. What was their response?

21 A: There was some effort on the part of the
22 subcontractors who were found to be responsible,
23 and they were attempting to repair the problems.

24 Q: There's been a lot of talk today about claimed
25 construction deficiencies at Magnolia North. Is

1 it fair to say that your level of knowledge
2 regarding these deficiencies comes from the
3 complaints that you received while working at
4 Heritage?

5 A: That's correct.

6 Q: Have you ever reviewed any of the expert reports
7 that have been submitted by the Plaintiffs in
8 this case?

9 A: Only the one that we referenced earlier in the,
10 in the discussion with Mr. Henry.

11 Q: This was the Kimley-Horn report?

12 A: That's right.

13 Q: Okay.

14 A: That's the only one.

15 Q: All right. Do you recall when you were deposed
16 this past December; do you recall that?

17 A: Yes.

18 Q: Okay. You were questioned earlier today about
19 windows, and there was some discussion about
20 window issues. Do you recall that when you were
21 asked about that in December your basic response
22 was "The only one I'm," -- that you really
23 weren't familiar with the window issues at
24 Magnolia North?

25 A: Yes.

1 Q: Okay. And that you were really more familiar
2 with window issues at another project?

3 A: Right, Magnolia Place.

4 Q: All right. And the window issues at the other
5 project were related to a half round window?

6 A: That's right.

7 Q: Okay. But that half round window wasn't used at
8 Magnolia North, was it?

9 A: It was not.

10 Q: Okay. So it's fair to say that you really didn't
11 have, you don't really have an intimate level of
12 knowledge regarding any claimed window issues at
13 Magnolia North?

14 A: Most of the issues at Magnolia North were decks
15 and breezeways. The window issues were pretty
16 limited.

17 Q: Okay. And the issues regarding the decks and
18 breezeways, Heritage was making every effort that
19 it could to repair those issues?

20 A: They were.

21 Q: And Heritage was making these efforts right up
22 until the day that it went out of business?

23 A: They were.

24 Q: Okay. Is it fair to say that Heritage was making
25 every effort to please the homeowners and to

1 rectify these issues right up until the day they
2 went out of business?

3 A: They were.

4 Q: And why would it do that?

5 A: Heritage recognized, again, in retrospect, that
6 it had some sub standard building by its
7 subcontractors, and it was trying to rectify
8 those issues because if they didn't, it obviously
9 would have a bearing on its future sales and its
10 further success.

11 Q: They were seeking to satisfy the homeowners to
12 have happy customers?

13 A: Yes.

14 Q: Because that's, that's what would be good for
15 business?

16 A: Yes.

17 Q: There was some discussion earlier about BuildStar
18 and its relation to the various subcontractors
19 that were actually building these buildings.
20 That was no Heritage or BuildStar employees out
21 there actually doing the framing?

22 A: No.

23 Q: That was done by subcontractors?

24 A: That's right.

25 Q: The same with the Hydra-Stop or the ---

1 A: That's right.

2 Q: --- waterproofing on the deck; that was done by
3 subcontractors?

4 A: That's right.

5 Q: Basically subcontractors did the construction of
6 these buildings?

7 A: 100 percent of it.

8 Q: And each subcontractor had its own supervisor?

9 A: Yes.

10 Q: Okay. And BuildStar was tasked with coordinating
11 these various subcontractors; is that correct?

12 A: Yes.

13 Q: Okay. Hiring a subcontractor was traditionally a
14 bidding process?

15 A: Yes.

16 Q: Okay. And the process of which a sub would
17 request to do the work that was -- that would be
18 the, the subcontractor would tell who he is, what
19 his expertise is, and how much the job is going
20 to cost?

21 A: Correct.

22 Q: And also part of that bid process, the sub would
23 represent that it had the skill-set, the
24 specialty in that work to, to be able to do the
25 work that it was bidding to do?

1 A: Yes.

2 Q: Okay. And Heritage BuildStar, or excuse me,
3 BuildStar would rely on these representations
4 when they eventually hired these subcontractors.
5 Is that fair to say?

6 A: I would assume. I wasn't involved in that
7 process, but I would assume, yes.

8 Q: Okay. There's been a lot of discussion, a lot of
9 questions about Heritage's level of knowledge
10 regarding construction issues and why and whether
11 it should have passed it on to homeowners and
12 prospective buyers. Did Heritage set out to
13 defraud prospective purchasers or homeowners?

14 A: Of course not.

15 Q: Heritage was seeking to rectify these issues and
16 was in the process of doing so when it went out
17 of business; is that correct?

18 A: Absolutely.

19 Q: All right. And is it fair to say that, that
20 Heritage -- strike that. Is it fair to say that
21 Heritage would, would not have knowingly hired a
22 subcontractor to do bad work?

23 A: Yes.

24 Q: Okay. And it's fair to say that Heritage would
25 have not knowingly installed a bad or defective

1 product on a building?

2 A: No.

3 Q: And if we later learned, you know, years later,
4 that a particular product used on a building such
5 as a trim product had, has learned to become
6 inappropriate for this type of environment and is
7 no longer acceptable, that's something that we
8 didn't know at the time and we learned later, but
9 it wasn't that we knowingly put up a bad product;
10 is that correct?

11 A: That's correct.

12 Q: There's also discussion regarding pools and some
13 other amenities. When Heritage was representing
14 to the prospective buyers about the various
15 amenities that were going to be present at
16 Magnolia North, they, they intended to put those
17 products out?

18 A: They did.

19 Q: There was no intention to defraud homeowners or
20 anything like that; is that correct?

21 A: No, that's correct.

22 Q: Is that correct?

23 A: That is correct.

24 Q: You said "No."

25 A: I'm sorry, that is correct.

1 Q: All right. And the trouble, when Heritage began
2 experiencing financial difficulties and we
3 discussed this, this problem with the hurricanes
4 and the impact on sales, was the -- the plan was
5 to build its way out of the financial trouble
6 that it was in; is that correct?

7 A: Yes. "Build," you mean ---

8 Q: To, you know, continue to operate, to continue to
9 function, and to finance the company ---

10 A: Yes.

11 Q: --- so that it could actually make these repairs
12 and rectify these issues that the homeowners had?

13 A: Yes, it did.

14 Q: As you sit here today you really don't have any
15 knowledge as to the scope of these deficiencies
16 that have been discussed today?

17 A: I have no idea.

18 Q: We've also had some discussion regarding you
19 sitting on the board of directors for the
20 homeowners association, which is essentially the
21 Plaintiff in this case, while at the same time
22 also being a, the president of Heritage.

23 A: (Indicates affirmatively.)

24 Q: And I think it's been phrased as "Heritage still
25 controlled the board," things like that?

1 A: Yes.

2 Q: "Heritage still controlled the homeowners
3 association."

4 A: Yes.

5 Q: Were you ever asked to do anything as a board
6 member by anyone at Heritage that you thought
7 went against the best interest of the homeowners?

8 A: No.

9 Q: I believe -- strike that. Do you recall when we
10 discussed this issue back in December?

11 A: Yes.

12 Q: Okay. And you recall stating something like that
13 you actually almost always lean towards the side
14 of the homeowners rather than Heritage?

15 A: Yes.

16 Q: Is that true today?

17 A: Yes, it is.

18 Q: That's all the questions I have.

19 RE-EXAMINATION

20 BY MR. HENRY:

21 Q: I have just a few follow-up. Mr. Hardister, you
22 and I discussed, when we were looking at the
23 minutes of the meeting, which has been marked as
24 Exhibit 7, regarding the use of reserves ---

25 A: Yes.

1 Q: --- for the homeowners?

2 A: Yes, sir.

3 Q: Prior to turning the homeowners associations over
4 to the homeowners, did Heritage put any money in
5 the reserves to pay for any of the construction
6 deficiencies that we've been talking about?

7 MR. WISEMAN: LET ME PUT AN OBJECTION ON
8 THE RECORD REAL QUICK. I'M
9 JUST GOING TO OBJECT TO
10 THIS LINE OF QUESTIONING AS
11 IT'S OUTSIDE THE SCOPE OF
12 THE CROSS. GO AHEAD.

13 A: I have no idea.

14 Q: Okay. You've indicated that BuildStar -- strike
15 that. You've indicated that all of this work was
16 done by subcontractors; is that correct?

17 A: All of the construction?

18 Q: Construction ---

19 A: Correct.

20 Q: --- at Magnolia North was done by subcontractors?

21 A: That's correct.

22 Q: BuildStar was the general contractor?

23 A: That's right.

24 Q: And as the general contractor BuildStar was
25 responsible to oversee the construction, correct?

1 A: That's right.

2 Q: And BuildStar was responsible to make sure that
3 the subcontractors' work complied with the code
4 and the architect's specifications?

5 A: That's right.

6 Q: Between the homeowners who bought these
7 condominiums with construction deficiencies and
8 Heritage, whose responsibility should it be to
9 pay for these construction deficiencies that were
10 left to them?

11 MR. WISEMAN: I'M GOING TO OBJECT AS
12 YOU'RE ASKING FOR A LEGAL
13 CONCLUSION.

14 Q: Whose ---

15 A: One, one more time?

16 Q: Okay. Between Heritage and the homeowners who
17 purchased these condominiums at Magnolia North
18 from Heritage with construction deficiencies
19 left, who should be responsible for the payment
20 of whatever it cost to repair the construction
21 deficiencies?

22 MR. WISEMAN: SAME OBJECTION.

23 A: It should've been Heritage Communities.

24 Q: And you still believe that today?

25 A: I do.

1 Q: And you believed it when you were the officer of
2 the, of Heritage?

3 A: I did.

4 Q: That's all I have.

5 (The video deposition concluded at 12:12 p.m.)

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1 CERTIFICATE

2

3 This is to certify that the foregoing deposition
4 of W. Gwyn Hardister, consisting of Ninety-four (94)
5 pages is a true and correct transcript of the
6 testimony given by said deponent after first being
7 duly sworn; said deposition was reported by method of
8 stenomask with backup. This transcript may contain
9 quoted material; said material is transcribed as read
10 or quoted by the speaker.

11

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

16

17 IN WITNESS WHEREOF, I have hereunto set my hand
18 and seal this 27th day of April, 2009.

19

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

25

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Magnolia North Property Owners'
Association, Inc.,

Plaintiff,

vs.

Heritage Communities, Inc., Heritage
Magnolia North, Inc. and BuildStar
Corporation,

Defendants,

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO. 2003-CP-26-3203

EIGHTH AMENDED COMPLAINT

(Jury Trial Demanded)

FILED
HORRY COUNTY
FEB 24 PM 4:09
MELANIE HUGGINS
CLERK OF COURT

Plaintiff, complaining of the Defendants, would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The Plaintiff, Magnolia North Property Owners' Association, Inc., (hereinafter "Association"), is an eleemosynary corporation organized and existing under the laws of the State of South Carolina. The Association is responsible for the maintenance and upkeep of the common elements in the Magnolia North Horizontal Property Regime, all as set forth in the Magnolia North Horizontal Property Regime Master Deed and Amendments thereto, reference to said Master Deed being craved as forming a part and parcel hereof.

2. The Defendant Heritage Communities, Inc. (hereinafter "Heritage"), is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina, and transacts business in the State of South Carolina. Heritage Communities, Inc. expressly warranted the condominium at the Magnolia North Horizontal Property Regime.

3. The Defendant Heritage Magnolia North, Inc. (hereinafter "Heritage Magnolia"), is a South Carolina corporation and developed the Magnolia North Horizontal Property Regime. Magnolia North is composed of a number of tracts of real estate submitted to the Horizontal Property Regime and is composed of 21 three-story buildings containing 12, 13, or 15 units per building. Heritage Magnolia sold the units to the homeowners.

4. The Defendant BuildStar Corporation (hereinafter "BuildStar") is, upon information and belief, a corporation organized under the laws of the State of South Carolina. BuildStar is engaged in the business of general contracting, and on information and belief, constructed the buildings, the subject of this action. Upon information and belief, BuildStar acted as the General Contractor in the construction of the Magnolia North Condominium buildings. BuildStar had the duty to oversee and supervise the subcontractors and the construction of the condominiums.

5. The Defendants, Heritage, Heritage Magnolia and BuildStar have been formed and operated so their legal distinction is blurred and they are amalgamated.

6. Subsequent to the buildings of Magnolia North being opened for occupancy, some of the buildings began to exhibit evidence of moisture intrusion, and other construction deficiencies which Heritage assured the homeowners would be repaired.

7. Upon further investigation and inspection, the Plaintiff learned that there was inappropriate sequencing, means, methods, and supervision of construction, and, in addition, inappropriate use of materials and negligent application of materials in the construction of the buildings of the Magnolia North Horizontal Property Regime.

FOR A FIRST CAUSE OF ACTION

8. The Defendants were negligent, grossly negligent, willful, and wanton in the construction of the Magnolia North buildings, the subject of this action, in numerous particulars including, but not limited to, the following:

- a. In failing to properly supervise and oversee the construction which allowed improper construction resulting in water intrusion and resulting damages to the buildings;
- b. In failing to properly grade the site such that water is directed towards the buildings;
- c. In failing to properly install or failing to install control joints, balcony membranes, handrails, masonry, masonry cavity wall weep system, flashing, building paper, paving, and firewall, in violation of the applicable building codes, industry standards, and manufacturers requirements;
- d. In failing to construct the buildings using water tight means and methods in violation of the applicable building codes, industry standards, and manufacturers requirements;
- e. In failing to properly or adequately slope the masonry and seal penetrations through masonry;
- f. In using inappropriate materials which have resulted in water intrusion and rotting of the buildings;
- g. In failing to properly inspect and supervise the construction of the project so as to assure compliance with the applicable plans, specifications, industry standards, manufacturers' requirements, applicable code, including, but not limited to, the standard building code and good construction practices;
- h. In the particulars as set forth in the Report of R. V. Buric, which Report, including any amendments, is incorporated herein and made a part and parcel hereof; and
- i. In placing defective condominiums in the stream of commerce when the Defendants knew or in the exercise of reasonable care should have known were defective and were being sold to innocent home buyers.

9. The above set forth negligent, willful, wanton and grossly negligent construction, violates the applicable building codes, industry standards, manufacturers' requirements and good construction practices.

10. As a direct and proximate result of the combined and concurring negligence, carelessness, recklessness, willfulness and wantonness of the Defendants as set forth herein, numerous parts of the building have been continuously and repeatedly exposed to leaks causing moisture infiltration resulting in mold, rot, rust and degradation of the building. Also, other direct and consequential damages have resulted including, but not limited to, those set forth in the expert reports as amended produced by the Plaintiff, reference to which is craved as forming a part and parcel hereof. In addition, Defendants incorporated defective products into the buildings and failed to properly install components of the buildings which has caused the buildings to be continuously and repeatedly exposed to moisture and unconditioned air entering the buildings, walls and units resulting in mold, mildew, rot, rust and degradation to the building. The incorporation of defective products and defective construction will necessitate substantial demolition of the building in order to get to and correct or remove the defective products and defective construction. The deficiencies and the selection and incorporation of defective products have caused damage to parts of the building and the building as a whole.

11. Plaintiff is informed and believes that it is entitled to judgment against the Defendants in an amount sufficient to completely repair, restore, and remediate the buildings together with all consequential damages and punitive damages as this Court might deem appropriate.

FOR A SECOND CAUSE OF ACTION

12. The allegations of the Statement of Facts and the First Cause of Action are incorporated herein and made a part and parcel hereof.

13. Heritage expressly warranted the workmanship and construction of the buildings comprising Magnolia North and made representations through its advertising, and through its written warranty in order to entice the members of the Association to purchase the units.

14. This expressed warranty has been breached as set forth in hereinabove.

15. That as a direct and proximate result of the breach of their expressed warranties of quality construction, the Plaintiff has been damaged as set forth in hereinabove.

16. The Plaintiff is entitled to judgment against the Defendants as set forth hereinabove.

FOR A THIRD CAUSE OF ACTION

17. The allegations of the Statement of Facts and the First and Second Causes of Action are incorporated herein and made a part and parcel hereof.

18. BuildStar, on information and belief, constructed all of the buildings comprising the Magnolia North Horizontal Property Regime. In constructing said buildings, BuildStar extended to the Plaintiff implied warranties of workmanlike service.

19. BuildStar has breached its warranties of workmanlike service as set forth hereinabove.

20. As a direct and proximate result of the breach of BuildStar of its warranties of workmanlike service, Plaintiff has been damaged as set forth hereinabove.

21. The Plaintiff is entitled to judgment against BuildStar as set forth hereinabove.

FOR A FOURTH CAUSE OF ACTION

22. The allegations of the Statement of Facts and the First, Second and Third Causes of Action are incorporated herein and made a part and parcel hereof.

23. Heritage and Heritage Magnolia were the developers of the Magnolia North Condominium buildings and subjected the property to a Horizontal Property Regime under a Master Deed and Bylaws prepared by the developer, reference to which are craved as if set forth herein verbatim. All unit purchasers were required to be a member of the Association.

24. The Defendants maintained control of the Plaintiff Association and therefore had a fiduciary duty to the Association and its members which included the duty to bring the Common Elements up to a reasonable standard or to deposit sufficient funds in the account of the Association to bring the common elements up to a reasonable standard before turning them over to the Association.

25. Heritage and Heritage Magnolia were negligent, reckless, willful, and wanton, and breached their fiduciary duties in turning the Common Elements over to the Association in one or more of the following particulars:

- a. In allowing the construction of the Condominium Project with substandard materials, and in allowing the use of inappropriate methods and means of construction and turning over the buildings to the Association in substandard and deteriorated condition;
- b. In failing to assure that the Condominiums were properly constructed as set forth hereinabove;
- c. In failing to investigate the condition of the Project before turning over the Condominium Project to the Association; and

- d. In turning over the Common Elements to the Association in a substandard and deteriorated condition without depositing sufficient funds to the account of the Association to bring the condominiums up to a reasonable standard.

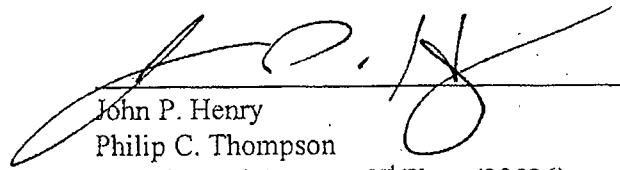
26. As a direct and proximate result of the negligent, willful, and wanton conduct of Heritage and Heritage Magnolia as hereinabove set forth, the Plaintiff has been damaged as set forth hereinabove.

27. The Plaintiff is entitled to judgment against the Defendants Heritage and Heritage Magnolia as set forth hereinabove.

28. The Plaintiff is informed and believes that it is entitled to judgment against the Defendants in an amount sufficient to completely repair, restore, and remediate the buildings together with all consequential damages and punitive damages as this Court might deem appropriate.

WHEREFORE, Plaintiff prays for judgment against the Defendants as hereinabove set forth.

THOMPSON & HENRY, P.A.



John P. Henry
Philip C. Thompson
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Fax: (843) 248-6396
Attorneys for Plaintiff

Conway, South Carolina
Feb 27, 2009

Page 1	Page 3
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT Harleysville Group Insurance Group, A Pennsylvania Corporation,) Plaintiff,) -versus-) 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.) Harleysville Group Insurance Group, A Pennsylvania Corporation,) Plaintiff,) -versus-) 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.) THE DEPOSITION OF JAMES WRIGHT Tuesday, August 31, 2010 a.m. — 1:15 p.m.	1 INDEX 2 EXAMINATION OF WITNESS: PAGE 3 JAMES WRIGHT 4 Examination by Mr. Henry 9 5 Signature Page 91 6 Errata Sheet 92 7 Certificate of Court Reporter 93 8 9 10 EXHIBITS 11 12 DESCRIPTION OF EXHIBITS: PAGE 13 14 Exhibit Number 1 15 Fourth Amended 30(b)(6) Notice of Deposition 16 of Harleysville Insurance Group 10 17 18 Exhibit Number 2 19 Eighth Amended Complaint 31 20 21 Exhibit Number 3 22 Fourth Amended Complaint 32 23 24 Exhibit Number 4 25 Third Amended Complaint 32
Page 2	Page 4
1 APPEARANCES: 2 FOR THE PLAINTIFFS: 3 John P. Henry, Esquire 4 THOMPSON & HENRY, P.A. 5 1300 Second Avenue, Third Floor 6 Conway, South Carolina 29526 7 FOR THE DEFENDANT: 8 (Harleysville Insurance Group) 9 Robert C. Calamari, Esquire 10 McAngus Goudelock & Courie, LLC 11 2411 North Oak Street, Suite 401 12 Post Office Box 1349 13 Myrtle Beach, South Carolina 29578 14 FOR THE DEFENDANT: 15 (National Surety Corp.) 16 Laura Johnson Evans, Esquire 17 Wilkes Bowers, P.A. 18 171 Church Street, Suite 210 19 Charleston, South Carolina 29401 20 21 Karin McCarthy, Esquire 22 Rivkin Radler 23 Long Island 24 926 RXR Plaza 25 Uniondale, New York 11556-0926 21 COURT REPORTER: 22 Donna H. Martin, CVR 23 Certified Verbatim Reporter 24 25	1 DESCRIPTION OF EXHIBITS: PAGE 2 Exhibit Number 5 3 Fourth Amended Complaint 34 4 5 Exhibit Number 6 6 Verdict Form for Riverwalk Condominiums 34 7 Exhibit Number 7 8 Verdict Form for Riverwalk Condominiums 9 Class Action 34 10 Exhibit Number 8 11 Verdict Form for Magnolia North Prop Owners' 12 Association, Inc. 35 13 Exhibit Number 9 14 Horry County Permit Application for Magnolia 15 North and C.O. 35 16 17 Exhibit Number 10 18 Horry County Permit Application for Riverwalk 19 And C.O. 35 20 21 Exhibit Number 11 22 Questions about Reservation of Rights 36 23 24 Exhibit Number 12 25 Reservation of Rights dated December 11, 2003 40 21 Exhibit Number 13 22 Reservation of Rights dated December 12, 2003 41 23 24 25

1 (Pages 1 to 4)

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Page 5		Page 7	
1	DESCRIPTION OF EXHIBITS: PAGE	1	STIPULATIONS
2	Exhibit Number 14	2	
	Reservation of Rights dated January 23, 2004 46	3	
3		4	The deposition of JAMES WRIGHT, taken on behalf of
	Exhibit Number 15	5	the Plaintiffs, at the law offices of Thompson &
4	Reservation of Rights dated January 27, 2004 47	6	Henry, P.A., located at 1300 Third Avenue, Third
5	Exhibit Number 16	7	Floor, Conway, South Carolina, on Tuesday, August 31,
	Reservation of Rights dated February 9, 2004 47	8	2010.
6		9	
	Exhibit Number 17 (For bundling purposes: 17A, 17B and 17C)	10	The deposition will be taken before Donna H.
7	Notebook of Policies 48	11	Martin, CVR, a Notary Public and Certified Verbatim
8	Exhibit Number 18	12	Reporter in and for the State of South Carolina.
	Heritage Magnolia North Policy MPA-0E4290 48	13	
9		14	It is stipulated and agreed that this deposition
	Exhibit Number 19	15	is being taken for the purpose of discovery, for use
10	Fireman's Fund Insurance Company Umbrella and	16	during the trial, and for all other purposes permitted
11	Excess Liability Insurance Policy 49	17	under the applicable rules of procedure.
12		18	
13	Exhibit Number 20	19	It is stipulated and agreed between counsel and
14	Heritage Communities Policy OP-3D9529 50	20	the above witness that the reading and signing of the
15		21	above deposition be, and the same, are hereby
16	Exhibit Number 21	22	reserved.
17	Heritage Communities Policy MPA-3D9529 55	23	
18		24	
19	Exhibit Number 22	25	
20	Heritage Communities Policy BEC-3D9529 57		
21			
22	Exhibit Number 23		
23	BuildStar Corp. Policy CB-1D6198 62		
24			
25			

Page 6		Page 8	
1	DESCRIPTION OF EXHIBITS: PAGE	1	MR. CALAMARI: THIS DEPOSITION IS TAKEN
2	Exhibit Number 24	2	PURSUANT TO THE SOUTH
	BuildStar Corp. Policy BEC-1D6198 66	3	CAROLINA RULES OF CIVIL
3		4	PROCEDURE, AND IT'S OUR
	Exhibit Number 25	5	UNDERSTANDING AND OUR
4	Heritage Riverwalk Policy MPA-4D4650 69	6	POSITION THAT ALL
5	Exhibit Number 26	7	OBJECTIONS ARE PRESERVED
	Heritage Riverwalk Policy BEC-4D4650 70	8	EXCEPT AS TO THE FORM OF
6		9	THE QUESTION. SO,
	Exhibit Number 27	10	TYPICALLY THERE AREN'T A
7	Contractor's Business Owners Policy 74	11	LOT OF OBJECTIONS MADE IN
8	Exhibit Number 28.	12	THESE BECAUSE THEY CAN BE
	Commercial General Liability Coverage Form 74	13	RAISED AT A LATER TIME; IS
9		14	THAT CORRECT?
	Exhibit Number 29	15	MR. HENRY: CORRECT.
10	Commercial Umbrella Liability Policy 74	16	COURT REPORTER: LAURA?
11		17	MS. EVANS: YES, MA'AM.
12	Exhibit Number 30	18	COURT REPORTER: I WASN'T ON THE RECORD YET
13	Commercial Blanket Excess Liability Policy 75	19	WHEN YOU MADE YOUR
14		20	STATEMENT A MINUTE AGO. IF
15	Exhibit Number 31	21	YOU WANT TO PUT THAT ON THE
16	Unimpaired Aggregate Limits Endorsement 79	22	RECORD NOW, THAT'S FINE.
17		23	MS. EVANS: SURE. I'D BE HAPPY TO.
18		24	THIS IS LAURA EVANS ON
19		25	BEHALF OF NATIONAL SURETY.
20			
21			
22			
23			
24			
25			

2 (Pages 5 to 8)

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1 JUST FOR EASE IN THE
2 DEPOSITION, ANY OBJECTIONS
3 TO THE FORM OR OTHER
4 OBJECTION THAT MR. CALAMARI
5 MAKES WE WILL JOIN IN THAT
6 OBJECTION.
7 JAMES WRIGHT, HAVING BEEN DULY SWORN, WAS DEPOSED
8 AS FOLLOWS:
9 EXAMINATION
10 BY MR. HENRY:
11 Q: Would you please, sir, state your full name and
12 your current mailing address?
13 A: James Lee Wright. My business address or a
14 personal address?
15 Q: Business address, please.
16 A: 414 Union Avenue, 14th Floor, Nashville,
17 Tennessee, 37129.
18 Q: Where are you presently employed?
19 A: Harleysville Insurance.
20 Q: Mr. Wright, I assume that you have given your
21 deposition in the past?
22 A: I have.
23 Q: About how many times do you think you've given
24 your deposition?
25 A: I'd say it's a couple. It's not, it's not ten,

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1 but it's more than one.
2 Q: Okay. All right. And you basically understand
3 the procedures?
4 A: Yes.
5 Q: Okay. Let me just review a couple things with
6 you. Of course this is a court reporter; she'll
7 be taking down everything that's said in this
8 room or on the phone. And so, you know, when you
9 answer a question it's important that you answer
10 verbally and not a shake of the head, that's
11 sometimes hard for the reporter to decipher.
12 Also, if you would, let me finish my question
13 before you start answering; it's hard to do that
14 sometimes. This is not a marathon or a contest
15 to see who lasts the longest and so if you need
16 to take a break, please let me know and we will
17 do that. I would assume that you've been advised
18 that this is a 30(b)(6) deposition. Do you know
19 what, do you understand what I'm talking about?
20 A: Yes, I do.
21 Q: Okay. And let me mark the Notice of 30(b)(6)
22 Deposition.
23 EXHIBIT NUMBER 1
24 MARKED FOR IDENTIFICATION.
25 Q: And this is marked as Exhibit 1. Have you

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1 reviewed this deposition notice prior to the
2 deposition?
3 A: Yes, I have.
4 Q: Are you prepared to answer the questions that are
5 set out or the areas set out for questioning?
6 A: Yes.
7 Q: Okay. Now what is your present position with
8 Harleysville?
9 A: Construction defect litigation manager.
10 Q: How long have you been in that position with
11 Harleysville?
12 A: About six and a half years.
13 Q: How long have you been with Harleysville?
14 A: About seven and a half.
15 Q: Prior to your being there, what did you say
16 construction ---
17 A: --- defect litigation manager.
18 Q: Prior to your position with Harleysville as the
19 construction defect litigation manager, what
20 position did you hold with Harleysville?
21 A: I was a litigation specialist.
22 Q: And I assume that was for about six months?
23 A: Yes. That wasn't, it wasn't very long.
24 Q: And where were you prior to seven years ago?
25 A: Travelers before that, St. Paul before that.

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1 Q: How long were you with Travelers?
2 A: About five years.
3 Q: And what was your position with Travelers?
4 A: I think they called it a technical specialist.
5 It's all the same job.
6 Q: Okay. And prior to Travelers?
7 A: St. Paul before that.
8 Q: And what was your position with St. Paul?
9 A: St. Paul was primarily, most of the time at St.
10 Paul I was a transportation claims specialist,
11 major case unit, whatever it was.
12 Q: And prior to that?
13 A: You're asking the difficult questions first.
14 Q: How long were you with St. Paul?
15 A: About five years as well.
16 Q: And with Travelers?
17 A: About five years.
18 Q: Okay. And prior to St. Paul?
19 A: Prior to St. Paul I was with -- what are they
20 now? At the time they were Gay & Taylor, and
21 then they were purchased by somebody else.
22 Q: And how long were you with Gay & Taylor?
23 A: About a year and a half.
24 Q: And prior to Gay & Taylor?
25 A: A company that is, was at the time, has gone

3 (Pages 9 to 12)

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1 through mergers as well, but at the time was
 2 called Toplis & Harding, T-O-P-L-I-S, & Harding.
 3 Q: What kind of company is that?
 4 A: It's a, it's a third-party administrator. We did
 5 a lot of work for, at T&H did a lot of work for
 6 foreign insurers.
 7 Q: Okay. How long have you been in the insurance
 8 industry?
 9 A: Since '86.
 10 Q: And where were you prior to '86, college?
 11 A: College, yes.
 12 Q: Where did you finish college?
 13 A: I actually finished at MTSU, Middle Tennessee
 14 State.
 15 Q: That was prior to '86?
 16 A: No. Actually I finally got my degree, I got
 17 married and didn't finish a degree until just
 18 recently.
 19 Q: Okay. Have you been involved with the claims and
 20 litigation with Magnolia North and Riverwalk
 21 Condominiums?
 22 A: Yes.
 23 Q: What has been your involvement in these cases?
 24 A: Magnolia and Riverwalk just as managing the unit.
 25 Q: What do you mean by that?

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1 A: Two people that work for me handle the funds or
 2 handled the files, actually probably more than
 3 that at one time or another.
 4 Q: And who were they?
 5 A: Brian Tormey I think handled Magnolia North all
 6 the way through, and Derek Harris had -- no,
 7 Derek, I'm sorry. Derek Harris had Magnolia
 8 North to start with; Brian had Riverwalk.
 9 Q: Okay. And when you say they handled these cases,
 10 what do you mean by that?
 11 A: It's part of their caseload. It's their, it's
 12 their responsibility to investigate, coordinate
 13 with the defense counsel, do whatever it is to
 14 just make the decisions whether we settle or try
 15 a case.
 16 Q: Okay.
 17 A: Up to their, obviously up to their authority
 18 limits but.
 19 Q: Right. And then how do you fit into that
 20 picture; they just report to you?
 21 A: They would report to me, yes.
 22 Q: They give you the status of the cases and that
 23 sort?
 24 A: Yes.
 25 Q: And how is this communicated to you?

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1 A: Well obviously through, they, they sit right
 2 outside my door so some of it's oral, some of
 3 it's reports, some of it's ---
 4 Q: Right. Are there e-mails to you?
 5 A: I'm sure there are e-mails regarding the case.
 6 Q: Okay. Are there written reports to you from
 7 Brian Tormey and Derek Harris regarding the case?
 8 A: Yes. It would typically be a single report. We
 9 do a, what's intended to be a living document
 10 that's updated as you go along but it's just a
 11 case summary report, yes.
 12 Q: Okay. And where are these documents kept?
 13 A: Those documents are either kept, in case of e-
 14 mail they're on the computer system, and we'd
 15 have a claim system that has, we've recently gone
 16 paperless so we have a claim system that has
 17 documents on it as well.
 18 Q: And if I wanted to see these reports, where would
 19 I go to get them?
 20 A: Well you can ask, we generate them, we can print
 21 them off.
 22 Q: Okay. But they're on a paperless system of some
 23 kind?
 24 A: Right.
 25 Q: Okay. Now would Brian Tormey and Derek Harris

Page 16

1 have the responsibility of employing defense
 2 counsel for the insureds?
 3 A: Yes.
 4 Q: And tell me how that is done. In other words,
 5 does Harleysville have an approved list of
 6 attorneys?
 7 A: Yes. We basically have a, like most other
 8 carriers, have a panel of attorneys with whom
 9 we've negotiated rates and service guidelines.
 10 But there are times when, due to conflicts or due
 11 to geographic location or whatever, you have to
 12 go off the list so it's not a, it's not a hard
 13 and fast thing.
 14 Q: Do the insureds have any say-so in who the
 15 lawyer's going to be?
 16 A: Well the policy doesn't give them the say-so.
 17 The policy says if we're going to defend the
 18 case, then we have the right to do that as we sit
 19 fit. However, in most cases we have, you know,
 20 we have conversations with the insureds and
 21 certainly in these cases nobody at Heritage ever
 22 said that we weren't doing a fine job defending
 23 them so.
 24 Q: Right. I'm just trying ---
 25 A: Right.

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1 Q: --- to find out how these lawyers are chosen.
 2 A: All right. How they're chosen. In some cases
 3 you'll have cases that are ongoing, by the time
 4 they get reported to us; and if it makes sense to
 5 not reinvent the wheel, say, you can leave their
 6 appointed counsel on. There are cases where,
 7 especially in the construction defect context,
 8 where multiple insurers insure the same entity,
 9 in Heritage that's not the case, but if three
 10 insurance companies all insure the same company
 11 and we all owe a defense for that company and one
 12 of them has already appointed somebody, even
 13 though they are not on our counsel, we join in
 14 with them and share that cost.
 15 Q: Okay. And are there written guidelines for these
 16 lawyers to abide by?
 17 A: Sure.
 18 Q: Okay. And what would those guidelines provide?
 19 A: They're just basically about when to report, when
 20 to bill, those kinds of things.
 21 Q: All right.
 22 A: Agreed rates, whether we'll pay for travel or
 23 not, those types of things.
 24 Q: Right. How about the employment of expert
 25 witnesses, do you have the authority to approve

Page 18

1 or disapprove the employment of expert witnesses?
 2 A: That, that is typically a decision that's left to
 3 the attorneys. We'll have, occasionally we'll
 4 have discussions about that and, and say, "Well
 5 what type of expert do you think we need in this
 6 case," or "What do you think of this person,
 7 rather than that person?" I don't believe in
 8 these cases that we had any objection to anybody
 9 that was hired by the defense counsel.
 10 Q: Okay. What could you object to if the lawyer
 11 came to you and said, "We want to hire John Doe
 12 expert from New York and his hourly rate's \$500
 13 an hour?"
 14 A: Like anybody, we want to get bang for our buck.
 15 Q: Sure.
 16 A: And if we can get just as good an expert or an
 17 expert that we think is just as qualified, may
 18 work better in a specific area -- you know, down
 19 here, bringing an expert that has, you know, a
 20 Boston accent may not play well here. He may be,
 21 he may be just as qualified but he may not be, be
 22 as accepted by a jury and he may not, he just may
 23 not go over as well.
 24 Q: And those are discussions you would, when I say
 25 "you," Harleysville, would have with the defense

Page 19

1 attorney that they've selected?
 2 A: Uh-huh (affirmative response), Harleysville or
 3 any other carrier, yes.
 4 Q: Okay. In reference to the Magnolia and Riverwalk
 5 cases ---
 6 MR. HENRY: AND BOB, I ASSUME THAT
 7 WE'RE USING THIS DEPOSITION
 8 IN BOTH CASES?
 9 MR. CALAMARI: YES, YES.
 10 MR. HENRY: OKAY. WE DOUBLE-CAPTIONED
 11 THEM SO.
 12 Q: In reference to the Riverwalk and Magnolia cases,
 13 would Mr. Tormey and Mr. Harris, and I have the
 14 reservation of rights letters, and I believe they
 15 drafted those letters?
 16 A: They may have.
 17 Q: I'm not sure. We'll look at those in a few
 18 minutes.
 19 A: Like, like any other large organization, people
 20 come and people go.
 21 Q: Right.
 22 A: These files at some point were probably handled
 23 by other specialists who may have drafted
 24 reservation of rights. I'm not, I'm not sure who
 25 wrote them in this.

Page 20

1 Q: Okay. In the process, after the litigation is
 2 filed and Mr. Tormey and Mr. Harris are assigned
 3 these cases, do they generally discuss trial
 4 procedure with a lawyer?
 5 A: Clarify that. They're not, neither one of them
 6 are attorneys.
 7 Q: Right.
 8 A: So they're not going to, they're not going to
 9 talk about practice areas that they're not,
 10 obviously not qualified to talk about.
 11 Q: Right.
 12 A: But as far as -- I'm not sure exactly what you
 13 mean by trial procedure.
 14 Q: Well, whether or not that Harleysville thinks
 15 they ought to bring three experts or five
 16 experts, or whether or not they ought to put this
 17 witness up or that witness up on the witness
 18 stand, those sorts of things.
 19 A: As far as witness, really that is why we, that's
 20 why we hire attorneys because that's, that's what
 21 they're supposed to know. We're insurance claims
 22 people; we know that side of it.
 23 Q: Right.
 24 A: But you hire people to do the job that they know
 25 how to do. And as far as what witness goes up

5 (Pages 17 to 20)

Page 21

1 first or which attorney from the firm is going to
 2 examine that particular witness, no, we leave
 3 that to them.
 4 Q: Okay. Does Harleysville ever direct the defense
 5 counsel to ask the jury, for example, or to ask
 6 the court to submit special interrogatories to
 7 the jury?
 8 A: Do we ever do that or do we do that in these ---
 9 Q: Have you ever done that?
 10 A: Have we ever done that? I'm trying to think
 11 whether we have or not. I honestly can't, I
 12 honestly can't remember a case where we have,
 13 although I cannot tell you that I, that I never
 14 would in the right situation. I can tell that in
 15 these cases, in Gardens we had, in the other, in
 16 another case, Gardens at Cypress Bay, we had
 17 talked about it, we actually, the suggestion was
 18 that we had to do it, we made the motion to do it
 19 and both defense counsel and plaintiff counsel
 20 freaked out. The court didn't want to do it.
 21 We've had several conversations with the defense
 22 counsel in these cases and others afterwards
 23 who've said that they flat out wouldn't allow it
 24 and couldn't allow it, they felt it would be
 25 prejudicial to their clients.

Page 22

1 Q: Okay. Why did you discuss it in Gardens?
 2 A: I can't remember who brought it up first. But
 3 somebody made the, the, the concern came up that
 4 if we didn't, there would be no way to break down
 5 the damages. And we, and we discussed and felt
 6 that, no, it wasn't the proper place. That in
 7 order if we, that if we intervened, we would be
 8 put in the position where we would be standing at
 9 trial, having to agree with much of what the
 10 plaintiff said, and be then in direct conflict
 11 with our insured. That in -- just like in these
 12 cases the understanding with Heritage all the way
 13 through was "In order for us not to be in direct
 14 conflict with you, that the best way to serve us
 15 both is to be in absolute lock-step with the
 16 insured going through the trial, of the liability
 17 issues and the damages. Make that number as low
 18 as it could possibly be and then discuss what of
 19 that is covered and what is not. That way,
 20 whatever the number is, whatever number falls to
 21 either one of us is the lowest that we can make
 22 it." And it benefits us both and it keeps us
 23 from injecting ourselves into a trial that, in a
 24 manner where we're clearly not supposed to be,
 25 since insurance isn't supposed to be brought into

Page 23

1 the trial in the first place.
 2 Q: Right.
 3 A: That there was really no other workable fashion
 4 that we could think of other than to try the case
 5 and then discuss whether it's covered or not.
 6 Q: Was there any consideration given to submitting
 7 special interrogatories to the jury after they
 8 reached a verdict?
 9 A: Yes, there was. We thought about that. It
 10 basically ---
 11 Q: We're talking about Gardens now?
 12 A: No, no. But it, at, the concept in general, yes.
 13 Q: Did you, you're saying you considered that in
 14 Magnolia and Riverwalk?
 15 A: We've considered, we've -- I don't know that we
 16 talked about it in a specific case. We talked
 17 about it in terms of, well, what is the mechanism
 18 that we go about, how do we do this that it's
 19 fared to the insured and we still get a chance
 20 to discuss the matters fully? If all we get to
 21 do is submit special interrogatories, then the
 22 jury isn't in a position to answer those
 23 questions because they haven't been provided with
 24 any evidence to answer those questions.
 25 Plaintiffs don't want the damages broken down.

Page 24

1 Defense attorneys have already told us they
 2 wouldn't do it, so now you're, you would, we
 3 would be asking a jury to do something that they
 4 haven't been given any evidence on and if we do
 5 that, then we, the argument is that we've, we've
 6 had our one shot, we don't, we don't get to re,
 7 revisit that question. It seems prejudicial to
 8 have to answer questions that nobody's had any
 9 evidence put on for and then be stuck by the
 10 answer.
 11 Q: You're losing me on that, the jury wouldn't have
 12 the evidence to determine that. What would they
 13 have to determine? I'm not sure on that.
 14 A: Supreme Court -- well, and first off we would
 15 have had to have a crystal ball, all of us would
 16 have had to have a crystal ball. During the
 17 pendency or during these trials the Supreme Court
 18 of the state was still deciding on their coverage
 19 decision in the second Newman case. So we would
 20 have all had to have been able to look into our
 21 crystal balls, tell what the Supreme Court was
 22 going to say, what was covered and what was not
 23 and ask questions based on information that we
 24 didn't even have. It would have been absolutely
 25 impossible to do.

6 (Pages 21 to 24)

Page 25

1 Q: Was Harleysville taking the position during the
2 Riverwalk and Magnolia North cases that nothing
3 was covered under their policy for these, the
4 claims in these two cases?
5 A: Well the policy covers certain things. The
6 policy covers property damage.
7 Q: I'm trying to find out what it covers, so far I
8 don't know.
9 A: Well it covers property damage ---
10 Q: Right.
11 A: --- during the policy period that arises from an
12 occurrence.
13 Q: Right.
14 A: And an occurrence is an accident. Well the
15 evidence in these two cases and in several of the
16 other Heritage cases is they knew what they were
17 doing, they didn't care and they, we've heard it
18 from several people, they dumped these buildings
19 on these poor, unsuspecting people. That doesn't
20 sound like an accident. So damages that don't
21 arise from an accident aren't covered. They,
22 insured, people buy insurances policies to
23 transfer very specific risks. When you enter
24 into a business venture you take on unlimited
25 risks. Insurance policies only transfer some

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1 risk, they don't transfer all risk, that's why
2 they have the insuring agreement, et cetera. You
3 can buy various different types of policies to
4 transfer various types of risk. In these cases
5 we've always argued that there's just no accident
6 here. They built 125 or so buildings, they built
7 them all the same way, and in fact I think
8 there's testimony in, in one of these cases that
9 the representative from Better Built said that
10 they not only had constructive notice but actual
11 notice that they had problems with the windows,
12 that the windows were leaking and if they
13 continued to do that, they would continue to
14 leak. Again it just doesn't sound like an
15 accident; and if it's not an accident, none of
16 it's covered.
17 Q: Did you change your mind at all about what was
18 covered after the Newman decision?
19 A: Which, which one? I think, I think we all ---
20 Q: The last one.
21 A: The last one? I think the last one set out a, a
22 unique set of, or unique way to analyze it. I
23 don't think there's another case in the country
24 that, that puts it quite that way, although I
25 think everybody understands that bad work, in and

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1 of itself, is just bad work, it's a business
2 risk, it's not covered. My impression is that
3 pretty much everybody knew that the Supreme Court
4 had gone too far with the first Newman decision
5 and that at some point they would have to scale
6 that back. Where they were going to go, nobody
7 knew, but I think everybody thought that it would
8 change and obviously it did change.
9 Q: Okay. Did Harleysville have any role in the
10 Newman case?
11 A: Yes, in the second one.
12 Q: Okay. And what role did Harleysville have in the
13 second one?
14 A: We actually took over for Auto Owners.
15 Q: Okay.
16 A: And we paid for the appeal and taking it back.
17 Q: Okay. And I think you petitioned, did you not,
18 the Supreme Court on the issue of the general
19 verdict not segregating damages and therefore
20 everything was covered?
21 A: I think that, I, I think that that's a misread of
22 that. I think what the court, the Supreme Court
23 ultimately said was it wasn't brought up in the
24 deck action.
25 Q: Uh-huh (affirmative response).

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1 A: That ---
2 Q: Just like it wasn't brought up in Magnolia and
3 Riverwalk?
4 A: No, it's brought up in this deck action. I think
5 that's what the Supreme Court said, is that at
6 the beginning stages of the deck action in Newman
7 they didn't, they didn't ask for it, they didn't
8 attempt to do it. And so that it wasn't before
9 the Supreme Court so the Supreme Court couldn't
10 make a decision on it.
11 Q: I'm not going to get into an argument about it,
12 it says what it says.
13 A: Absolutely.
14 Q: But the way I read it, it says in the, the
15 arbitrator in the underlying action did not break
16 the damages down so he gave a general verdict, a
17 general amount and they weren't going to re-
18 litigate damages. Is that not what you, how you
19 read it?
20 A: No. I, I, no, I didn't.
21 Q: Okay.
22 A: That's not my understanding of that.
23 Q: All right. You agree that Harleysville paid for
24 a petition of the Supreme Court to revisit that
25 issue?

7 (Pages 25 to 28)

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1 A: Yes.
2 Q: Okay.
3 A: Well that and the other issues obviously.
4 Q: And they refused to do that?
5 A: Who refused to do that?
6 Q: The Supreme Court.
7 A: I don't know that they refused to revisit it.
8 The Supreme Court answered a question, the
9 question that was put before them. They, they
10 can only rule based on the evidence that was
11 brought before them, and in that particular case
12 they made a decision that they thought was
13 proper. I'm not sure that given a different set
14 of circumstances they would have the same answer.
15 Q: Did you attend any of the trial?
16 A: Yes.
17 Q: Okay. Both in Magnolia and Riverwalk?
18 A: Yes.
19 Q: Okay. And how much of the trial did you attend?
20 A: Several days in each one of them.
21 Q: Okay.
22 A: I couldn't tell you exactly how many days. I'd
23 have to go back and look at my calendar.
24 Q: Did you have discussions with insured's counsel?
25 A: Yes.

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1 Q: Okay. And what were those discussions?
2 A: "How do you think it's going, did you believe
3 this witness," those types of things.
4 Q: And did you discuss trial strategy with them?
5 A: Only if they asked, "Well what do you think," you
6 know, "Where do you think they're going to go,"
7 those types of things. But again, trial strategy
8 is, that's why we hire the lawyers. It's what
9 they're trained to do.
10 MR. CALAMARI: AND AGAIN, WE DON'T WANT TO
11 WAIVE ANY ATTORNEY-CLIENT
12 PRIVILEGE ISSUES BASED ON
13 THESE QUESTIONS. I JUST
14 WANT TO MAKE SURE WE'RE NOT
15 ---
16 MR. HENRY: RIGHT. WELL ---
17 MR. CALAMARI: I UNDERSTAND.
18 MR. HENRY: ERIC FOSMIRE AND STEVE
19 BROWN WERE NOT HIS LAWYERS.
20 THEY, FROM WHAT HE SAID
21 THEY WERE THE INSURED'S
22 LAWYERS, NOT
23 HARLEYSVILLE'S.
24 MR. CALAMARI: I THINK IT'S -- YOU KNOW
25 WHAT I MEAN. WE'RE NOT

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1 TRYING TO WAIVE ANY.
2 Q: I would assume that Harleysville had a copy of
3 the complaint in the Magnolia North case?
4 A: I'm sure we have, yes.
5 Q: And I've had the complaint marked as Exhibit 2.
6 EXHIBIT NUMBER 2
7 MARKED FOR IDENTIFICATION.
8 A: Uh-huh (affirmative response).
9 Q: Okay. How about turning to page ten?
10 A: I only have seven pages.
11 Q: Let's see. I'm sorry. Page four, I apologize,
12 paragraph ten.
13 A: (Complies with request.)
14 Q: The first part reads, "As a direct and proximate
15 result of the combined and concurring negligence,
16 carelessness, recklessness, willfulness and
17 wantonness of the Defendants as set forth herein,
18 numerous parts of the building have been
19 continuously and repeatedly exposed to leaks
20 causing moisture infiltration resulting in mold,
21 rot, rust and degradation of the building." Does
22 that track the policy language in the CGL policy?
23 A: Does it track the policy language?
24 Q: Yes.
25 A: No.

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1 Q: Okay. But you had this complaint, correct, or
2 Harleysville did?
3 A: Yes, yes.
4 Q: Okay.
5 A: The policy doesn't use that language at all.
6 Q: Okay. And did you have the complaint also in the
7 Riverwalk case? When I say "you," I mean
8 Harleysville ---
9 A: Yes. I'm sure Harleysville had the complaints,
10 yes.
11 Q: All right. And does that appear to be a copy of
12 the complaint?
13 A: It does.
14 Q: All right.
15 A: I have this as the fourth amended so, yes. I
16 assume that's the last one?
17 Q: Yes, it is.
18 EXHIBIT NUMBER 3
19 MARKED FOR IDENTIFICATION.
20 Q: And did you also have a copy of the complaint in
21 the Tony L. Pope class action?
22 A: I'm sure we did, yes.
23 Q: Okay.
24 EXHIBIT NUMBER 4
25 MARKED FOR IDENTIFICATION.

8 (Pages 29 to 32)

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1 Q: Is loss of use covered under your policy?
 2 A: Can be.
 3 Q: Okay. Do you have a reservation of rights letter
 4 written in this case?
 5 A: I'm sure there's one and probably several.
 6 Q: Okay. Where would I find those, because Mr.
 7 Calamari says he's produced the file, your files
 8 to me, and I didn't see one?
 9 A: Well they're there.
 10 Q: Okay.
 11 MR. HENRY: CAN I GET A COPY OF THOSE?
 12 MR. CALAMARI: I GAVE YOU THE FIVE THAT WE
 13 HAVE. THE ONLY ONE THAT WE
 14 COULDN'T FIND WAS THE
 15 BUILDSTAR ONE, BUT WE'RE
 16 TRYING TO TRACK THAT ONE.
 17 MR. HENRY: I HAVEN'T SEEN ONE FOR THE
 18 TWO CLASS ACTIONS.
 19 MR. CALAMARI: YOU KNOW WHAT, I DON'T
 20 THINK I LOOKED FOR THE
 21 CLASS ACTIONS BUT I DON'T
 22 KNOW WHY THEY WOULDN'T BE
 23 IN THERE.
 24 A: Yes, I don't know.
 25 Q: And did you have a copy of the James G. McCartney

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1 class action?
 2 A: Yes, I'm sure we had.
 3 EXHIBIT NUMBER 5
 4 MARKED FOR IDENTIFICATION.
 5 Q: Okay. The class representative has been
 6 substituted and Mr. Hejna, Chester Hejna is now,
 7 but that's the last. Okay. And let me show you
 8 the verdict form in the Riverwalk case.
 9 EXHIBIT NUMBER 6
 10 MARKED FOR IDENTIFICATION.
 11 A: Uh-huh (affirmative response).
 12 Q: Have you seen that before?
 13 A: I have.
 14 Q: And does that appear to you to be the verdict
 15 form by the jury ---
 16 A: Appears to be.
 17 Q: --- in the Riverwalk case?
 18 A: It, it would appear so, yes.
 19 Q: Okay. Can you identify Exhibit Number 7?
 20 EXHIBIT NUMBER 7
 21 MARKED FOR IDENTIFICATION.
 22 A: This looks like the verdict form in the Tony Pope
 23 class.
 24 Q: And can you identify Exhibit 8?
 25 EXHIBIT NUMBER 8

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1 MARKED FOR IDENTIFICATION.
 2 A: This would be the Magnolia North HOA Verdict
 3 Form.
 4 Q: Okay. So the record will reflect the times of
 5 construction and the times, and the last
 6 occupancy, I have here the first building permit
 7 application in Magnolia North, which has been
 8 marked as Exhibit 9, and the last certificate of
 9 Occupancy.
 10 EXHIBIT NUMBER 9
 11 MARKED FOR IDENTIFICATION.
 12 A: This is the last certificate of occupancy or the
 13 first?
 14 Q: The last I believe.
 15 A: 7/6/2000, that's probably the last, yes.
 16 Q: And then I marked as Exhibit 10 the first
 17 building permit and the last certificate of
 18 occupancy for Riverwalk.
 19 EXHIBIT NUMBER 10
 20 MARKED FOR IDENTIFICATION.
 21 A: Okay.
 22 Q: I'm sorry. Is that Heritage, not Riverwalk?
 23 Yes.
 24 A: Yes, this is Riverwalk.
 25 Q: Okay. Now I noticed one of your agents, I didn't

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1 feel too bad after I read this, but one of your
 2 agents said it's going to take me a long time to
 3 figure out all these policies and I've been
 4 spending the last week trying to figure out what
 5 policies were enforced, what they meant and that
 6 sort of thing. I think, I sent this to Bob, I
 7 don't know if he gave that to you.
 8 A: Yes, I saw this last week.
 9 Q: Can you tell me, let's go ahead and mark this.
 10 EXHIBIT NUMBER 11
 11 MARKED FOR IDENTIFICATION.
 12 Q: I would assume that these prefixes on the policy
 13 numbers have some type of designation or
 14 designate something; is that correct?
 15 A: Yes, they do.
 16 Q: Okay. And the first one is CB, what does that
 17 mean?
 18 A: It's, I'm going to screw these up. This is
 19 probably a question for an underwriter more
 20 appropriately, but it's like contractor's
 21 business policy basically.
 22 Q: Okay. If I wanted to ask an underwriter about
 23 these subjects, who would I ask?
 24 A: I'm not sure that the underwriter on Heritage is
 25 still around but we, we could certainly find you

9 (Pages 33 to 36)

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1 somebody. Who today, I don't know.
 2 Q: But somebody at Harleysville would know ---
 3 A: Yes, right.
 4 Q: Okay.
 5 A: It would give you more. Basically these are,
 6 these are, for the most part, our package
 7 policies that are put together in, in certain
 8 ways to appeal to certain segments of the
 9 business. The CB is a policy that was put
 10 together primarily for small contractors.
 11 Q: Okay. And what is BEC?
 12 A: The BEC and the BE, both, are blanket excess.
 13 Why the C is in the one, I don't know. It's not
 14 their blanket excess policies, their umbrella
 15 policies.
 16 Q: Okay. And what is MPA?
 17 A: It's a multi-peril policy.
 18 Q: And how does that differ from, say, the contract
 19 business?
 20 A: Most of it is just the forms and endorsements
 21 that are packaged together, kind of a pre-
 22 packaged form.
 23 Q: Okay.
 24 A: Multi-peril policy, I think the, the biggest
 25 difference is the, in the CB policy as opposed to

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1 the MPA policy they use a different, a different
 2 GL form.
 3 Q: Right.
 4 A: So it's a different, it's a different form that
 5 provides the general liability coverage. And
 6 some of them may have, the difference between,
 7 say, the MPA and the OP is the, from what I
 8 understand, is the property aspect of it. It,
 9 different coverage's and endorsements, it varies.
 10 Q: Okay. I know the, is BE, but I also found, and
 11 this is a policy that I could not find and I got
 12 this out of the reservation of rights letter, but
 13 there's a BEOE, in one of the reservation of
 14 rights letters?
 15 A: Oh it's probably our -- these would be the
 16 prefix. The OE is probably a zero, E, and that's
 17 probably part of the rest of the policy number.
 18 Most of our policy numbers are the prefix, a
 19 dash, a letter, or a number, a letter and then
 20 four more numbers, so that could just be the end
 21 of that particular policy number.
 22 Q: Okay.
 23 A: I don't think I've ever seen a BEOE.
 24 Q: The GL is the general liability?
 25 A: It's general liability.

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1 Q: And would the GL be in the CB policy and the BEC
 2 policy?
 3 A: It could be actually.
 4 Q: It could be?
 5 A: The GL policy would be a mono-line policy, which
 6 would, the other like, the MPA and the CB
 7 policies both cover both liability and property.
 8 Q: Right.
 9 A: But the GL policy is just for liability so it
 10 wouldn't, it wouldn't have the property component
 11 to it.
 12 Q: All right. And what is the OP?
 13 A: It's an output policy. Output policies were
 14 originally designed more for, you'll hear them
 15 referred to as block policies, like jeweler's
 16 block policy or I think there's an OP policy that
 17 was designed specifically for camera dealers.
 18 They are designed to, they, they cover the
 19 property in a different fashion than what the MPA
 20 does. Other than that, they, they're virtually
 21 identical.
 22 Q: Okay, and the CG policy?
 23 A: CG is, is like CGL, it's the, it's a mono-line
 24 liability policy as well.
 25 Q: And a BA policy?

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1 A: That is a business auto policy.
 2 Q: Okay. And I have a note down here to ask you
 3 about the BuildStar. There's a BuildStar policy
 4 and that's the one that says, "BEOE," in the
 5 reservation of rights letter that I could not
 6 find.
 7 A: Yes. That, that, I'm not sure what you're
 8 talking, I don't think I've ever seen a BEOE.
 9 Q: We'll look at the reservation of rights letter in
 10 just a minute, but I'm sure that's where that
 11 came from. And I've got all the policies except
 12 two. I found a copy of one and then I could not
 13 find the copy of the BEOE, whatever, whatever
 14 that is.
 15 A: Right.
 16 Q: And I want to show you the reservation of rights
 17 letters.
 18 MR. HENRY: WHAT'S THE NEXT, 12? I'LL
 19 JUST MARK THESE IF YOU WANT
 20 ME TO.
 21 EXHIBIT NUMBER 12
 22 MARKED FOR IDENTIFICATION.
 23 Q: Can you identify Exhibit 12?
 24 A: It looks like a reservation of rights letter
 25 written in December 2003 by Frank Chmielewski.

10 (Pages 37 to 40)

Page 41 1 Q: Is Mr. Chmielewski still around? 2 A: No. Frank is now the education director at the 3 Society for CPCU, I believe that's right. 4 Q: Let me show you what's been marked as Exhibit 13 5 and see if you can, ask you if you can identify 6 that document? 7 EXHIBIT NUMBER 13 8 MARKED FOR IDENTIFICATION. 9 A: It looks like another, written a day apart. This 10 one's written December 12, 2003, Frank 11 Chmielewski, it looks like a reservation of 12 rights letter on the Magnolia North. 13 Q: Okay. Turn over to page two. 14 A: (Complies with request.) 15 Q: The BEOE4 --- 16 A: Oh. 17 Q: --- 4290. 18 A: Right. 19 Q: Looks like he said it's an excess coverage 20 policy? 21 A: Yes, it is. It's the, it's the blanket excess, 22 it's the umbrella policy over the MPA, and those 23 policies were issued to Heritage Magnolia North, 24 Inc. 25 Q: Okay. This may be not answerable in this kind of	Page 43 1 determine what provisions of the policies does 2 Harleysville, forget the reservation of rights 3 letters, anything, does Harleysville now contend 4 that takes these claims outside of coverage? 5 That's what I have to nail down so that everybody 6 knows that we're dealing with the same thing. 7 A: Uh-huh (affirmative response), sure. Well as I 8 said every, the policy in general covers property 9 damage or bodily injury arising during the policy 10 period as a result of an accident. 11 Q: Right. 12 A: If it's not an accident, it's not covered. If 13 it's not property damage, it's not covered. If 14 it's not inside the policy period, it's not 15 covered. That's the basic, and so we don't think 16 that there's an accident that's occurred here. 17 Q: I understand that. You've made that very clear 18 to me, and I think I knew that before you got 19 here. But what you must understand, you've 20 brought this declaratory judgment action and 21 you're saying in your declaratory judgment, when 22 I say "you," Harleysville, that these claims are 23 outside of coverage. 24 A: Yes. 25 Q: And I have to know every policy provision that
Page 42 1 general term, but it may help shorten things. In 2 each of the reservation of rights letters there 3 is a reservation of rights and then it sets out 4 the policy provisions that Harleysville contends 5 may take the claims outside of the coverage; is 6 that correct? 7 A: Yes, at least, at least partially. 8 Q: What do you mean by "partially"? 9 A: Well at the end it says, "This letter's not 10 intended to waive any of HMIC's right under any 11 HMIC insurance policy or relating to this claim 12 or any other claim." It's, these letters are not 13 intended to be exhaustive, they can't be 14 exhaustive, there are issues and facts that arise 15 during the pendency of any litigation that may or 16 may not affect coverage under the policy. The 17 purpose of, the purpose of putting the insuring 18 language in there is simply to bring their 19 attention to certain things that we think may be 20 of importance at that particular point in time. 21 It's not to say these are the only things we're 22 ever going to talk about. 23 Q: Right. And therein lies my problem because we're 24 here in this DJ action, this deck declaratory 25 judgment action, and what I'm trying to do is	Page 44 1 Harleysville says in any way takes these claims 2 or affects these claims to bring them outside of 3 coverage or to lessen them in any way. And 4 that's what I need from you. That's what the 5 30(b)(6) deposition exhibit says. 6 A: Well I'm not sure that I can say anymore than 7 what the complaint and the policies say. We have 8 a right, obviously, to have the court determine 9 how the policy applies to this given set of facts 10 and we, that's between Harleysville and the 11 Heritage entities, determine what portion of this 12 risk they have transferred. 13 Q: Well there are about ten policies, ten or 15 14 policies, and we can just simply go through each 15 policy, and I'm prepared to do that, and say, 16 "Okay, point out to me each and every policy 17 provision that Harleysville takes the position 18 takes the claim outside of the coverage." 19 A: Well first off, the exclusions don't even need to 20 be discussed if we can't get past the insuring 21 agreement. If it's not an accident, it doesn't 22 matter what's excluded or what's not excluded. 23 Q: Right. 24 A: If it's not property damage, the same thing. If 25 it's outside the policy period, same thing. So

11 (Pages 41 to 44)

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1 it's all, all of that would be an alternative
 2 argument anyway. If they, if somebody
 3 ultimately, with the court says, "Ultimately we
 4 believe it's an accident," well then there are
 5 still exclusions that, yes, we think would, would
 6 apply. Some of those, in fact most of those, are
 7 probably in, in some of these reservation of
 8 rights letters.
 9 Q: But you understand, Mr. Wright, I can't say, I
 10 can't take your testimony that most of them are
 11 probably in there. I've got to know if they're
 12 in there or not.
 13 A: Well first off, the letter is between us and
 14 Heritage so it was never written to anybody else.
 15 I mean, the policy was not written for the
 16 benefit of your clients. The policy was written
 17 for and between Heritage entities and
 18 Harleysville, but obviously there are exclusions.
 19 If they expect or intend the injury, not covered.
 20 If it's something that they've gotten into just
 21 by, by terms of entering into a contract, if
 22 they've incurred the liability just ---
 23 Q: Well let's do this. Just to, we're going to be
 24 here a while.
 25 A: We may be. There's a lot a, there's a lot to

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1 coverage issues.
 2 Q: We're going to be here a long time, ---
 3 A: There's a lot of coverage issues.
 4 Q: --- but I'm ready to do that. I'm going to go
 5 through each policy and ask you to tell me which
 6 of the, what language in each one of the policies
 7 may, in Harleysville's position, brings the
 8 claims outside of coverage.
 9 A: Okay.
 10 Q: All right. Let me get the rest of these
 11 reservation of rights letters in, and we'll go
 12 through that. Can you identify Exhibit Number 13
 13 [sic]?
 14 DEPOSITION EXHIBIT NUMBER 14
 15 MARKED FOR IDENTIFICATION.
 16 A: Looks like a letter written by Frank Chmielewski
 17 in January 2004, regarding the Riverwalk.
 18 Q: Wait a minute, I'm sorry. Let's see that. That
 19 would be 14, I'm sorry. Let's start over. What
 20 is Exhibit 14?
 21 A: 14 looks like a letter written by Frank
 22 Chmielewski to people at Heritage regarding
 23 Riverwalk.
 24 Q: Okay. And who is the insured that they're
 25 writing the reservation of rights to?

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1 A: Heritage Communities in this case, although I'm
 2 not sure that given the amalgamation ruling that
 3 it matters.
 4 Q: Okay. What is Exhibit 15?
 5 EXHIBIT NUMBER 15
 6 MARKED FOR IDENTIFICATION.
 7 A: Letter written by Wayne Moore, January 2004,
 8 regarding, to BuildStar regarding Riverwalk.
 9 Q: Okay. And is that a reservation of rights
 10 letter?
 11 A: Yes, it is.
 12 Q: And who's the insured?
 13 A: In that case BuildStar.
 14 Q: And can you identify Exhibit 16.
 15 EXHIBIT NUMBER 16
 16 MARKED FOR IDENTIFICATION.
 17 A: Letter written by Ken Mayer, February 2004,
 18 insured in this particular case is the Heritage
 19 Riverwalk Inc., regarding Riverwalk.
 20 Q: You believe there's a reservation of rights
 21 letter in the Pope class action?
 22 A: I believe so.
 23 Q: And do you believe there's a reservation of
 24 rights letter in the McCartney class action?
 25 A: I would believe so, yes.

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1 Q: Okay. And do you believe there's a reservation
 2 of rights letter in Magnolia North for BuildStar?
 3 A: I believe there to be.
 4 Q: Okay. Would you mind getting a copy of those and
 5 giving ---
 6 A: No.
 7 Q: --- them to Mr. Calamari? Sir?
 8 A: Yes. We'll do that.
 9 Q: Let me show you a notebook, which is a duplicate
 10 of the notebook given to me by Mr. Calamari,
 11 representing that those contain the policies that
 12 are an issue in this declaratory judgment action.
 13 EXHIBIT NUMBER 17 (For bundling purposes: 17A, 17B and 17C)
 14 MARKED FOR IDENTIFICATION.
 15 A: It looks to be, yes.
 16 Q: Okay. And there were two other policies in the
 17 reservation of rights letter. One is policy
 18 number MPA-4290, which I found a copy of in
 19 documents I have, and I've marked that as Exhibit
 20 18.
 21 EXHIBIT NUMBER 18
 22 MARKED FOR IDENTIFICATION.
 23 Q: Do you recognize that? I'm sorry, this goes with
 24 that. This is attached to that. And I've marked
 25 that as 18, and what is Exhibit 18?

12 (Pages 45 to 48)

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1 A: It looks to be the MPA policy issued to Heritage
 2 Magnolia North for the period of 9/1/99 to
 3 9/1/2000.
 4 Q: Okay.
 5 A: There's also information in here on the 9/1/98 to
 6 the 9/1/99 period.
 7 Q: Let me show you what's been marked as Exhibit 19
 8 and ask you if you can identify that?
 9 EXHIBIT NUMBER 19
 10 MARKED FOR IDENTIFICATION.
 11 A: It looks to be the Fireman's Fund Umbrella Policy
 12 for Heritage Communities, although I've never
 13 seen it before.
 14 Q: Okay. All right. Look at Policy Number OP-
 15 3D9529.
 16 A: (Complies with request.)
 17 COURT REPORTER: CAN WE STOP FOR A SECOND SO
 18 I CAN CHANGE MY FILE?
 19 MR. HENRY: SURE.
 20 *****OFF THE RECORD*****
 21 (ON THE RECORD.)
 22 MR. HENRY CONTINUES:
 23 Q: Have you had an opportunity to review Policy
 24 Number OP-3D9529?
 25 A: I've scanned it, I haven't read.

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1 Q: Right. I want to mark that as Exhibit 20.
 2 MR. HENRY: YOU CAN JUST MARK IT ON THE
 3 OUTSIDE OF THE TAB, WHERE
 4 THAT PARTICULAR POLICY'S
 5 TABBED.
 6 EXHIBIT NUMBER 20
 7 MARKED FOR IDENTIFICATION.
 8 Q: And what is the term of that policy?
 9 A: The policy goes from 8/3/99 to 8/3/2000.
 10 Q: Okay. And what are the limits?
 11 A: The limits are a million per occurrence, two-
 12 million dollars general aggregate.
 13 Q: Okay. And are there completed ops in that
 14 policy?
 15 A: That general aggregate applies to the products in
 16 completed operation.
 17 Q: And do you have any reason to believe that that's
 18 not a complete copy of the policy?
 19 A: No. I don't have any reason to believe that.
 20 Q: Okay. And does that policy have a general
 21 liability policy; I think the form is CG00010196?
 22 A: Yes, it does.
 23 Q: And that's the ISO1994 version?
 24 A: '96 version.
 25 Q: '96?

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1 A: That's what the last four, the last four numbers
 2 on any of the policy numbers or policy form
 3 numbers, ---
 4 Q: Okay.
 5 A: --- indicate the month and the year.
 6 Q: All right. Has Harleysville paid out any money
 7 under this policy?
 8 A: Yes.
 9 Q: And how much?
 10 A: I couldn't tell you exactly that. That number, I
 11 can certainly give you that number, I don't have
 12 it with me today.
 13 Q: Okay. You didn't see that in the 30(b)(6)?
 14 A: No. I didn't see that in the 30(b)(6).
 15 Q: It might not be. Can you get that for me?
 16 A: Yes.
 17 Q: Okay. Are there any coverage defenses to that
 18 policy that are not contained within the terms of
 19 that policy? For example, failure to cooperate?
 20 A: Well that would be ---
 21 Q: That would be part of the ---
 22 A: --- contained, that's, that's part of the policy.
 23 Q: Okay. What part of the policy do you, does
 24 Harleysville contend take the claim outside of
 25 the policy?

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1 A: There are, first off, there are damages outside
 2 of the period between 8/3/99 and 8/3/2000.
 3 Q: What do you mean by that?
 4 A: I think that everyone has the, the evidence says
 5 that the damages were claimed to be ongoing and
 6 progressive. You've said the time period for
 7 Magnolia North, you've given me the first permit
 8 but actually the, we have a different set of
 9 arguments whether the property is done or not so
 10 I think that rather, more appropriately it should
 11 be the first CO date. But you have 7/6/2000 is
 12 the last CO date.
 13 Q: Uh-huh (affirmative response).
 14 A: So if you're telling me that all of the damages
 15 for this building occurred between this date and
 16 8/3/2000, then that's not an issue. But I think
 17 some of the damages occurred after 8/3/2000.
 18 Q: Okay. This policy that we're talking about,
 19 9529, was in effect at 8/3/2000?
 20 A: Well actually it was in effect for all of one
 21 second on 8/3/2000, yes.
 22 Q: Okay. Are there any terms that Harleysville
 23 contends takes the Plaintiffs' claims outside of
 24 coverage that are not contained in policy OP-
 25 3D9529?

13 (Pages 49 to 52)

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1 A: I, I think you need to restate that one again.
 2 I, outside of coverage for, I'm sitting here
 3 looking at a, at a notebook with 15 or 16, 20
 4 policies.
 5 Q: Right.
 6 A: Outside of coverage for this particular policy or
 7 outside of coverage for any of these policies?
 8 Q: No. We're going to go through each policy.
 9 A: Okay.
 10 Q: And what I'm asking you is, is there anything
 11 outside of the policy terms in OP-3D9529 that
 12 Harleysville contends takes the Plaintiffs'
 13 claims outside coverage?
 14 A: Well, arguably there may be.
 15 Q: Well, I need to know what those are.
 16 A: Well that, it's the, the Newman decision's not
 17 contained in here. But the Newman decision says
 18 that, is an interpretation of what this is.
 19 It's, what's in the Newman, the second Newman
 20 decision isn't here word for word, but the
 21 Supreme Court of the state has said this doesn't
 22 apply. So whatever it, in any situation we
 23 could, you know, we could have entered a contract
 24 and the state could say, "No, we don't think that
 25 that's a valid contract," and no matter what we

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1 said between ourselves; if the state says it's no
 2 good, it's no good.
 3 Q: Right.
 4 A: So there, there are things that can be outside of
 5 the policy that would affect it, yes. And it's,
 6 it's kind of a broad question. I don't know
 7 whether there will be something that, that's
 8 outside of what's in this particular policy.
 9 Q: Okay. Well you understand if there is, I'm
 10 entitled to know; don't you understand that?
 11 A: If I know, I would say.
 12 Q: All right.
 13 A: Do I know other than, other than watching the
 14 Newman ---
 15 Q: And if you determine, ---
 16 A: --- decision.
 17 Q: --- and if you determine there's something
 18 outside the policy, would you advise Mr. Calamari
 19 so that he can alert me to that fact?
 20 A: Sure.
 21 Q: Okay.
 22 A: If there, if something came to light that, you
 23 know, we would certainly make that, make that
 24 known.
 25 Q: Okay. And I'm not sure I asked you this. Who is

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1 the insured under OP-3D9529?
 2 A: Heritage Communities.
 3 Q: Okay. The next policy I want you to look at is
 4 MPA-3D9529.
 5 A: (Complies with request.)
 6 MR. HENRY: AND HOW ABOUT MARKING THAT
 7 AS EXHIBIT 21.
 8 EXHIBIT NUMBER 21
 9 MARKED FOR IDENTIFICATION.
 10 Q: Who is the insured under Exhibit 21?
 11 A: Heritage Communities, Inc.
 12 Q: Okay. And is there an additional insured?
 13 A: There may be.
 14 Q: Okay. We don't need to spend a lot of time on
 15 that. I think Dr. Jack Green is an additional
 16 insured, but the policy speaks for itself. What
 17 is the term of MPA-3D9529?
 18 A: 8/3/98 to 8/3/99.
 19 Q: What are the limits of the policy?
 20 A: A million dollars per occurrence and with a two-
 21 million dollar general aggregate for products and
 22 completed operations.
 23 Q: There is completed operations?
 24 A: Yes.
 25 Q: And does this policy contain the CGL language?

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1 A: It's probably on the same form. Looks like the
 2 copy you may have gotten was a copy that had all
 3 the forms for a period from '96 to '99, and it
 4 doesn't look like the CG001 form is in this
 5 section.
 6 Q: Would that ---
 7 A: Let me see if there's a form, there should be a
 8 forms list here. Yes, you have a CG00010196.
 9 Q: Give me that again.
 10 A: CG00010196.
 11 Q: Okay.
 12 A: The same basic GL coverage forms that's the, in
 13 the following policy period.
 14 Q: Okay. Have any amounts been paid out under this
 15 policy?
 16 A: Yes. Again we'll get you those.
 17 Q: Okay. And would this be the same, have the same
 18 general liability language that the policy OP-
 19 3D9529 had; it'd be the same form?
 20 A: It's an identical form, yes.
 21 Q: All right. Then, if you would, look at policy
 22 BEC-3D9529.
 23 A: For which policy period? I've got a couple of
 24 those.
 25 Q: 8/3/97 to 8/3/99.

14 (Pages 53 to 56)

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1 A: That's actually two policy periods, they're
 2 written on a one-year basis. But the first one
 3 from '97 to '98 is right here.
 4 Q: And would it have the same CG policy provisions?
 5 A: No, it's probably got a different form. This is,
 6 this is the umbrella policy so it would be
 7 written on a different form.
 8 Q: Okay.
 9 A: It's probably in there.
 10 Q: Can you find that for me?
 11 A: That's just what I was looking for. That would
 12 be a PT04100997.
 13 Q: Okay. And does it differ from the CG?
 14 A: Slightly, yes. In, in terms of scope and
 15 purpose, this doesn't cover losses under a
 16 million dollars basically.
 17 Q: Right. Does it have the same language regarding
 18 the insuring agreement and accident and
 19 occurrence and that sort of thing?
 20 A: It's similar; but no, it's not exact.
 21 Q: Okay.
 22 MR. HENRY: LET'S MARK THAT POLICY AS
 23 EXHIBIT 22.
 24 EXHIBIT NUMBER 22
 25 MARKED FOR IDENTIFICATION.

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1 Q: Have any amounts been paid out under this policy?
 2 A: I'm trying to think if they have or not. I don't
 3 know, but we'll get you that information as well.
 4 We'll let that kind of be a standing answer. I
 5 can't ---
 6 Q: Okay.
 7 A: --- tell you today whether any particular amount
 8 has been paid under any of these policies; I just
 9 don't have it in front of me.
 10 Q: And this BEC policy, Exhibit 22, would be an
 11 excess policy, correct?
 12 A: It's, technically it's a commercial umbrella
 13 policy. Just a different term of art but an
 14 excess policy would cover basically, exactly what
 15 the underlying policy covers, only at a higher
 16 limit. An umbrella policy could cover that, plus
 17 other things, at least potentially.
 18 Q: So the PT0410 would be an umbrella policy?
 19 A: It is indeed.
 20 Q: And let's suppose for the sake of our discussion
 21 -- first of all, who's the insured under that
 22 policy?
 23 A: Heritage Communities.
 24 Q: Let's suppose the underlying policy had been
 25 exhausted.

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1 A: Uh-huh (affirmative response).
 2 Q: Would it be a particular policy that would have
 3 to be exhausted, would it be the MPA-3D9529; is
 4 that the reason it has the same number?
 5 A: The reason it has the same number is it's, the
 6 last six there pretty much indicate, it would
 7 indicate that it's, that's more of an account
 8 number for Heritage Communities. Whether it's
 9 the OP, the MPA or the BE's, BEC's, that says
 10 what kind of policy we've issued to that
 11 particular entity.
 12 Q: Okay. But explain to me how the insured would
 13 get to the umbrella policy?
 14 A: Well because it's a, because it's a commercial
 15 umbrella policy you'll notice, say, say in this
 16 case it doesn't have a, an auto exclusion, it has
 17 an aircraft or watercraft exclusion. So let's
 18 say it's an auto accident.
 19 Q: Right.
 20 A: And you have an auto accident, in this case, June
 21 of '99, within the policy period, and they cause,
 22 you know, they, they, God forbid, made someone a
 23 quadriplegic and they've got a, you know, three-
 24 million dollar loss, well you've got a one-
 25 million dollar per occurrence on the bodily, for

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1 bodily injury under their auto policy and then
 2 the rest of it would go here, subject to a
 3 retained limit and I think these have, all have a
 4 \$10,000 retained limit.
 5 Q: What is a retained limit?
 6 A: Retained limit is the same as saying a self-
 7 insured retention. Any time an amount is
 8 retained, it's separate, it's different and
 9 distinctive from, say, a deductible. A
 10 deductible, we would pay and then I would come
 11 back to you and say, "Pay me back." A retained
 12 limit in essence is a, is an amount for which you
 13 have no insurance and for which you have to pay
 14 before I have to do anything at all.
 15 Q: Okay. The next policy I want to look at is, I
 16 believe this is another one that is not in the
 17 notebook but is in the reservation of rights.
 18 It's a MPA-704407. It looks like to me it's
 19 different.
 20 A: 704407.
 21 Q: I don't think there's a ---
 22 A: It's not a number I recognize. Oh, that's a GL.
 23 I think, I think, if I remember right, that's a
 24 GL policy. That was the first GL policy issued
 25 to Heritage Communities, but it was issued in

15 (Pages 57 to 60)

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1 1994 I believe.
 2 Q: Okay. I had term of, and I got this out of the
 3 reservation of rights letter I think, 8/3/95 to
 4 8/3/96.
 5 A: I think that is a, I think by 95-96 it was a MPA
 6 policy. I think the GL policy was 94-95. In
 7 either case, they wouldn't apply to these losses
 8 at all.
 9 Q: All right. The next policy is policy CB-1D6198.
 10 A: Which period do you want to talk about that one?
 11 Q: Well let me ask you this. It looks like to me,
 12 just from looking at this, except for some
 13 endorsements or property added or something like
 14 that, the one policy is the same for four years?
 15 A: The CG, it, it, the general, the basic form ---
 16 Q: Right.
 17 A: --- would be the same. There may, the
 18 endorsements may have changed over time.
 19 Q: Right, right.
 20 A: For any of the MPA policies it will be a CG0001
 21 form. Those forms have various addition dates.
 22 The last four numbers on those forms are addition
 23 dates. There was a CG form in '94, '96, '98,
 24 2000, and 2004, so they may have changed. You
 25 may have early on a '94 form. I don't think it

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1 affects these policies that that can be possibly
 2 triggered by these claims.
 3 Q: I don't remember seeing a form beyond --
 4 Harleysville didn't change the form after like
 5 '96.
 6 A: Right. I think these are all '96 forms. I don't
 7 think we ever went to the '98 on Heritage; and if
 8 we looked at the 2000, we did look at the 99-2000
 9 for Heritage Communities.
 10 Q: Yes.
 11 A: And we were still using the '96.
 12 Q: Right. Do you have the CB-1D6198?
 13 A: I do. I have for the 4/1/99 to 4/1/2000 period.
 14 Q: Okay.
 15 MR. HENRY: WE CAN MARK THAT AS EXHIBIT
 16 23; WOULD THAT BE THE NEXT
 17 ONE?
 18 EXHIBIT NUMBER 23
 19 MARKED FOR IDENTIFICATION.
 20 Q: I've got a term of 4/1/97 to 4/1/01; is that not
 21 right?
 22 A: That is, again the, the, the initial term would
 23 have probably been, we wrote the first one for
 24 BuildStar 4/1/97, it expired 4/1/98, we renewed
 25 it annually through 4/1/2000. The 4/1/2000 did

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1 not go to 2001. That policy was cancelled short
 2 as of August 1.
 3 Q: Okay. Exhibit 23, is this a primary policy or is
 4 it an excess policy?
 5 A: The CB is a primary policy.
 6 Q: Okay. Then does it have the CG form?
 7 A: No. It is actually written on a PT06170190.
 8 Q: And I was thinking that was the commercial
 9 umbrella liability policy?
 10 A: No. That's the, that would be the, the CB would
 11 be the contractors business policy. Basically
 12 it's the, it would be the policy written for a
 13 small contractor.
 14 Q: And would that have the CG language in it?
 15 A: It would have general liability or, or general
 16 liability language in it, coverage to it, yes.
 17 The, the actual policy language would differ from
 18 the CG form slightly.
 19 Q: Can you find a PT form?
 20 A: I hope so.
 21 Q: Because I've got one PT form, but it's the
 22 commercial umbrella liability policy.
 23 A: There it is. You have to go back to the 97-98
 24 section.
 25 Q: Let's stick this on it so we can go back to it.

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1 A: All right.
 2 Q: Okay. And what is the form number there?
 3 A: PT0617, edition 190 or 0190.
 4 Q: Okay. And what is the term again?
 5 A: Well they, the original term for BuildStar was
 6 written 4/1/97-98. It was renewed annually
 7 through 4/1/2000; however the policy, the last
 8 policy period did not expire in 4/1/2001, it
 9 actually cancelled short for non-payment, right?
 10 Either non-payment or I think they actually asked
 11 for it to be cancelled August 1, 2000.
 12 Q: It was cancelled August 1, 2000?
 13 A: Yes.
 14 Q: And what are the limits of that policy?
 15 A: One-million dollars.
 16 Q: Two-million aggregate?
 17 A: Products completed operations aggregate two-
 18 million dollars.
 19 Q: Okay. And have any amounts been paid out under
 20 that policy?
 21 A: Again we'll have to get you the, ---
 22 Q: Okay.
 23 A: --- the amounts by policy period.
 24 Q: All right. And BuildStar is the, and there's an
 25 additional insured, Patty Van Wie?

16 (Pages 61 to 64)

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1 A: I think I saw that, yes.
 2 Q: The next one I would like for you to look at is
 3 BEC-1D6198, and it has a term of what I gathered
 4 was 4/1/97 to 4/1/01.
 5 A: That would be true except for the last policy
 6 also cancelled 8/1/2000. It is, is renewed
 7 annually just as the primary policy ones.
 8 Q: Okay.
 9 A: So you actually have, instead of one policy you
 10 have three policies or four policies, 97-98, 98-
 11 99, 99-2000, and then the one that's just in
 12 2000.
 13 Q: Okay. And what would be the form number for the
 14 liability section of that policy?
 15 A: PT04010887.
 16 Q: And who is the insured?
 17 A: BuildStar Corporation.
 18 Q: And what are the limits?
 19 A: One-million dollar per occurrence with a one-
 20 million dollar products completed operations
 21 aggregate.
 22 Q: One-million completed operations aggregate?
 23 A: Uh-huh (affirmative response). And a retained
 24 limit of \$10,000.
 25 MR. HENRY: AND LET'S MARK THAT AS

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1 Q: All right.
 2 MR. HENRY: LET'S MARK THAT POLICY AS
 3 EXHIBIT 25.
 4 A: It's already 18.
 5 Q: I'm sorry. And you'll get me whether or not any
 6 amounts have been paid out?
 7 A: Under the MPA on this one, since this applies --
 8 this policy would not apply to Magnolia Place or
 9 Gardens at Cypress Bay or Azalea or any of the
 10 other properties. This policy was, was only for
 11 what we call the sub-developer or the project
 12 specific developer.
 13 Q: Right.
 14 A: So the only thing that they would have is for
 15 Magnolia North. There's been nothing paid under
 16 the liability on this one. As far as I can
 17 remember I think there may be, I think there's a
 18 property loss paid under it.
 19 Q: Okay.
 20 A: But if there, we'll firm that up, but if there's
 21 anything paid under it, it's not much.
 22 Q: And the BE-0E4290 we can't find. Would the BE
 23 tell you that it used the CG form or ---
 24 A: No. The BE, the BE would be the, probably the
 25 same form as what is on Heritage Communities BE

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1 EXHIBIT 24.
 2 EXHIBIT NUMBER 24
 3 MARKED FOR IDENTIFICATION.
 4 Q: And you'll get me the answers about the, ---
 5 A: If there's, yes.
 6 Q: --- any payouts?
 7 A: Yes.
 8 Q: And less go to Policy Number MPA-0E4290.
 9 A: That would be this one.
 10 Q: First of all, who is the insured?
 11 A: The insured for this would be Heritage Magnolia
 12 North, Inc.
 13 Q: Okay. And what is the general liability policy
 14 form that was used?
 15 A: CG00010196.
 16 Q: Okay. And what is the term of that policy?
 17 A: Looks like 9/1/99 to 9/1/2000, and I think there
 18 is another one. Yes. We have two policies for
 19 Heritage Magnolia North. The first one starting
 20 9/1/98 to 9/1/99, and the second one 9/1/99 to
 21 9/1/2000.
 22 Q: And what are the limits of coverage?
 23 A: A million dollars per occurrence with a two-
 24 million dollar products completed operations
 25 general aggregate.

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1 form, probably, in all likelihood anyway. It is
 2 most likely the PT0401 form. And from that
 3 number I can tell you that that was written to,
 4 or written for Heritage Magnolia North, Inc.
 5 Q: Yes, that's what the reservation of rights letter
 6 says. And the terms would be 9/1/98 to
 7 11/30/2000 from what the ---
 8 A: I think it's 11/29.
 9 Q: Okay. I won't fuss about one day.
 10 A: Yes, one day here or there.
 11 Q: I think I've got, the only place I could have
 12 gotten those was the reservation of rights
 13 letter.
 14 A: Right.
 15 Q: All right. The next policy is -- well, since
 16 this was written Heritage Magnolia North, would
 17 it be safe to assume that no money has been paid
 18 out under that policy?
 19 A: Subject to looking at it, ---
 20 Q: Sure.
 21 A: --- that is certainly my belief.
 22 Q: Okay.
 23 A: I don't think anything's been paid under that
 24 excess policy, that umbrella policy.
 25 Q: All right. The next one would be MPA-4D4650.

17 (Pages 65 to 68)

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1 A: That would be the Heritage Riverwalk, Inc.
 2 policy.
 3 Q: Right.
 4 MR. HENRY: LET'S MARK THAT AS EXHIBIT
 5 25.
 6 EXHIBIT NUMBER 25
 7 MARKED FOR IDENTIFICATION.
 8 Q: Can you tell me what form of general liability
 9 coverage was provided under that policy?
 10 A: It's the CG00010196.
 11 Q: Okay. And what is the term of that policy?
 12 A: Looks like the first Riverwalk policy we wrote
 13 was 6/18/97 to '98, and that went again 98-99 and
 14 99-2000 was one.
 15 Q: I have that it was either cancelled or terminated
 16 on 6/18/2000?
 17 A: I, it just wasn't renewed as of 6/18/2000.
 18 Q: Okay. And what are the limits of coverage?
 19 A: It's a million dollars per occurrence.
 20 Q: Two-million aggregate?
 21 A: Two-million products completed operations general
 22 aggregate.
 23 Q: Okay. And again we would think, but subject to
 24 your checking, that no money has been paid out
 25 under that policy?

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1 A: I don't believe that any has been, no; but I will
 2 confirm that.
 3 Q: The next policy would be 4D46, BEC-4D4650.
 4 A: Right.
 5 MR. HENRY: AND WE WILL MARK THAT AS
 6 EXHIBIT 26.
 7 EXHIBIT NUMBER 26
 8 MARKED FOR IDENTIFICATION.
 9 Q: Who is the insured under that policy?
 10 A: Heritage Riverwalk, Inc.
 11 Q: Okay. And what is the form used to provide
 12 general liability?
 13 A: PT04010887.
 14 Q: And what is the term?
 15 A: It's renewed annually from 6/18/97 through
 16 6/18/2000.
 17 Q: And what are the limits of liability?
 18 A: Four-million dollars.
 19 Q: Okay. And are there completed ops?
 20 A: Yes.
 21 Q: And again, we don't think anything has been paid
 22 out on this but you'll check that?
 23 A: Yes, will do.
 24 Q: Now we've got, it appears to me in these
 25 policies, the general liability is provided by

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1 four different forms. Three of them have the
 2 prefix PT.
 3 A: Uh-huh (affirmative response).
 4 Q: Does that stand for something that you know of?
 5 A: Not that I know of. I mean, I'm sure it, I'm
 6 sure that somebody at ISO could tell you what
 7 that is.
 8 Q: Right.
 9 A: It's probably some type of a package, something
 10 or other.
 11 Q: If you know, do the PT forms, they have different
 12 numbers, there are three different numbers from
 13 what I have here, or maybe two, and do they
 14 differ in any way in their language or do you
 15 know?
 16 A: If there's a different edition number, they've
 17 changed something.
 18 Q: Okay.
 19 A: And it may, it could be anything. I mean, it
 20 could be, it could be the insuring agreement. It
 21 could be an exclusion or condition to the policy.
 22 I mean, literally, it could be anything.
 23 Q: I apologize, but would you look at BEC-3D9529 and
 24 give me that form number again?
 25 A: PT04010887.

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1 Q: Okay. It would appear to me that we have four
 2 general liability forms, two, I'm sorry, three, a
 3 CG00010196, a PT04010887, a PT06170190.
 4 A: Uh-huh (affirmative response).
 5 Q: What I would like to do, if we can take a break
 6 for a minute I would like to -- Before we do
 7 that, I think I've got a sticker here somewhere.
 8 Would you, I should have put it on the other
 9 side, but would you stick that on one of those
 10 forms, the CG form?
 11 A: (Complies with request.)
 12 Q: And then stick one on the PT0404, I'm sorry,
 13 04010887?
 14 A: (Complies with request.) Okay. Now I'm
 15 confused. Are my eyes just that bad? This one
 16 looks like 0997, edition date, I don't know if
 17 there's a different one. I can't imagine that
 18 they came out with two versions of that within a
 19 month. There's a typo some place. That's not a
 20 typo.
 21 Q: Okay. We've got another one?
 22 A: We have another one. We have a, there is a
 23 PT04010987.
 24 Q: PT04 what?
 25 A: 01.

18 (Pages 69 to 72)

Page 73 1 Q: Uh-huh (affirmative response). 2 A: 0987. There's the 887 right there. 3 Q: Okay. 4 A: PT0401 edition 887. 5 Q: And which one is the 87 on? 6 A: The, the 0887 is on the BEC-4D, 4D4650, and then 7 the Heritage Communities has a 0997, PT0410 8 edition 997. 997, that's why. Not 87, it's 97. 9 Q: Do we have a 190? 10 A: No. We have a, we have an 887 and a 997. 11 Q: All right. Let's start over here so we don't. 12 How many forms do we have? 13 A: We have the CG001. 14 Q: CG001. 15 A: That's actually three zero's, I'm sorry. 16 00010196. 17 Q: And then we have --- 18 A: A PT --- 19 Q: PT. 20 A: --- 04010887, and we have the PT04010997, and 21 then we have the PT, looks like the primary 22 policy, it's the 0610, whatever that is, 06, 23 06170190. 24 Q: So we've actually got four different forms? 25 A: Yes.	Page 75 1 liability policy form PT0410 edition 997. 2 Q: And can you identify Exhibit 30? 3 EXHIBIT NUMBER 30 4 MARKED FOR IDENTIFICATION. 5 A: It's a copy of commercial blanket excess 6 liability policy form PT0401 edition 887. 7 Q: Okay. Now to your knowledge, are there any other 8 forms providing general liability insurance to 9 the plaintiffs in these cases? 10 A: There are no policies providing coverage to the 11 plaintiffs in these cases. 12 Q: Okay. Touch,. The policies that, are there any 13 forms providing general liability to the 14 insured's that were issued to Heritage entities, 15 the plaintiffs, that we haven't marked as 16 exhibits, to your knowledge? 17 A: No. 18 Q: Okay. Are you aware of any endorsements that 19 Harleysville is relying on to these policies that 20 would affect coverage of the Plaintiffs' claims 21 in the underlying actions? 22 A: Wow, I think we'll have to go back through each 23 one of these individually. 24 Q: Okay. 25 A: Let's see which the, because the endorsements
Page 74 1 Q: Did you mark all of those? 2 A: The only one I have not is the PT061, PT0617. 3 Q: Are you putting those stickers actually on the 4 form or just on the policy? 5 A: Yes, most of them are on the form. 6 Q: Can you just stick them on the forms because I'm 7 going to have them copied. You got it? 8 A: Yes. 9 Q: Let's take a break. 10 *****OFF THE RECORD***** 11 (ON THE RECORD.) 12 MR. HENRY CONTINUES: 13 Q: Let me show you what the reporter has marked as 14 Exhibit 27 and ask you if you can identify that? 15 EXHIBIT NUMBER 27 16 MARKED FOR IDENTIFICATION. 17 A: Looks to be a copy of form PT0617 edition 190. 18 Q: Okay. And can you identify Exhibit 28? 19 EXHIBIT NUMBER 28 20 MARKED FOR IDENTIFICATION. 21 A: Looks to be a copy of the ISO form CG00010196. 22 Q: And can you identify Exhibit 29? 23 EXHIBIT NUMBER 29 24 MARKED FOR IDENTIFICATION. 25 A: Looks to be a copy of commercial umbrella	Page 76 1 will change over time. Well, assuming there's no 2 asbestos or lead in the buildings, then there's 3 no endorsements separate from the liability forms 4 that would change or alter coverage for these 5 cases under the first BuildStar policy, which 6 would be CB-1D6198, 4/1/97 to 4/1/98. 7 Q: Okay. 8 A: Is there any EIFS on these buildings? I don't 9 think there is, is there? 10 Q: What? 11 A: Is there any EIFS, are these EIFS buildings; do 12 they have any EIFS on them? 13 Q: No, no. 14 A: I didn't think so. 15 Q: At least we didn't find any. 16 A: No, I don't see any separate endorsements that 17 limit coverage for the, at least for the 18 BuildStar primary policies, any of the CB- 19 1D6198's. There is a contractor's limitation 20 endorsement. 21 Q: What policy is that in? 22 A: On the BuildStar umbrella policies, the BEC- 23 1D6198. 24 Q: Uh-huh (affirmative response). 25 A: It's form BC7107 edition 591; that does further

19 (Pages 73 to 76)

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1 limit coverage. It has rendering or failure to
 2 render any professional services by you or for
 3 you, including the preparing, approving or
 4 failing to prepare or approve maps, drawings,
 5 opinions, reports, surveys, change orders,
 6 designs or specifications and any supervisory
 7 inspections or engineering services. For the
 8 Heritage Communities, primary policies at least,
 9 no endorsements other than the CG form that would
 10 affect, that we've talked about. We have a lead
 11 and asbestos and an EIFS exclusion, none of which
 12 apply to this particular loss.
 13 There is an endorsement, CG0055039, I'm
 14 sorry, BC7134 edition 787 on the Heritage
 15 Communities' umbrella policies that deems the
 16 underlying insurance aggregate limits to be
 17 unimpaired. Whether or not that comes into play
 18 on these cases will depend ultimately on how
 19 much. But what this means is if, say the
 20 underlying, say the primary policy that underlies
 21 this is impaired and there is ---
 22 Q: What do you mean "impaired"?
 23 A: Impairment means that it's been eroded. Erosion
 24 or impairment is the same thing. We've paid some
 25 money on them.

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1 Q: Right.
 2 A: If it is impaired and there is only, say, \$20.00
 3 left on that policy, this says for purposes of
 4 whether the, whether or not the umbrella will
 5 pay, you still have to hit a million dollars,
 6 regardless of how much is left on that policy.
 7 Whether that comes into play on these cases is a
 8 matter of allocation.
 9 Q: Would you put a sticky on that?
 10 A: (Complies with request.)
 11 Q: I need to get a copy if it. I'll tell you what,
 12 just pull it out and we'll mark that.
 13 MR. CALAMARI: JUST THIS ONE PAGE?
 14 MR. HENRY: YES. JUST PUT THAT STICKY
 15 IN THERE SO WE'LL KNOW
 16 WHERE TO PUT IT BACK SO HE
 17 CAN CONTINUE.
 18 A: It'd be much easier if these were mono-line
 19 policies. For the primary policies issued to
 20 Heritage Riverwalk the MPA-4D4650 policies, there
 21 aren't any endorsements that would alter the
 22 liability coverage. And the umbrella is the same
 23 as long as there's no lead in the buildings and I
 24 don't think there is. No endorsements that would
 25 change the general liability coverage on Magnolia

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1 North MPA-00 ---
 2 REPORTER'S NOTE: DEPOSITION RECESSED TO
 3 RECONNECT TO CONFERENCE
 4 CALL.
 5 *****OFF THE RECORD*****
 6 (ON THE RECORD.)
 7 MR. HENRY CONTINUES:
 8 Q: Mr. Wright, let me show you what's been marked as
 9 Exhibit 31, which is the form you described as an
 10 endorsement to the policy.
 11 EXHIBIT NUMBER 31
 12 MARKED FOR IDENTIFICATION.
 13 A: Yes.
 14 Q: And what is the form number?
 15 A: BC7134 edition 787.
 16 Q: And you've already explained what that means?
 17 A: Yes.
 18 Q: Okay. And from what I understand, after your
 19 review of the policy that is the only exception
 20 or only endorsement to the policy that may in
 21 some way affect coverage?
 22 A: It looks to be, yes.
 23 Q: Okay. Do you have any evidence or does
 24 Harleysville take the position that the work out
 25 there was done by other than sub-contractors, in

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1 other words that BuildStar performed any of the
 2 work itself?
 3 A: That's not my understanding. My understanding is
 4 that they didn't perform any work ---
 5 Q: Right.
 6 A: --- out there. I think that it was, my
 7 understanding it was all sub-contracted.
 8 Q: Okay. And do you have any evidence that
 9 BuildStar or any of your insured's hired sub-
 10 contractors and intended that they negligently
 11 performed the work?
 12 A: I don't have any evidence that they hired sub-
 13 contractors other than the fact that their, that
 14 somebody else did the work. There's no, no
 15 contracts or anything. I don't have any evidence
 16 to show what their intent was.
 17 Q: Okay. In the complaint in this declaratory
 18 judgment action it indicates that you're asking
 19 the court to perform a time on risk analysis;
 20 what does that mean?
 21 A: Time on risk is like we discussed earlier, that a
 22 policy is issued for a certain period of time and
 23 the insuring agreement of the policy says that we
 24 will pay for damages arising from bodily injury
 25 or property damage during the policy.

20 (Pages 77 to 80)

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1 Q: Right.
 2 A: The policy issued 7/1, or January 1, '97 to
 3 January 1, '98, covers damages in 1997. It
 4 doesn't cover damages in '96, and it doesn't
 5 cover damages in '98.
 6 Q: All right.
 7 A: Very clearly, if that's the case, then damages
 8 that occur over time have to be slotted into that
 9 period of time.
 10 Q: And you think in South Carolina that's the way
 11 it's determined?
 12 A: I don't think it's been decided.
 13 Q: Okay.
 14 A: There, there is however a, what, the Fourth
 15 Circuit case, I think it's called, it's
 16 Stonehenge I think, where they did exactly that
 17 on South Carolina policies.
 18 Q: Do you have any disagreement that the jury in the
 19 underlying cases had before them the issue of rot
 20 of the sheathing, water intrusion and repeated
 21 water intrusion?
 22 A: They were told that water was intruding; they
 23 were told that rot had occurred.
 24 Q: Okay.
 25 A: The question becomes, based on the second Newman

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1 Q: Did you ask defense counsel to ask for an
 2 allocation?
 3 A: We discussed it several times with them ---
 4 Q: That's not what I asked you.
 5 A: --- on this and other cases and they sought,
 6 they, why, -- Wait a minute. Why would I ask
 7 somebody to do something that they had already
 8 told me they would not do?
 9 Q: Okay. Eric Fosmire told you he wouldn't do it?
 10 A: He would not do it.
 11 Q: He told you that?
 12 A: Yes.
 13 Q: And Steve Brown told you he would not do that?
 14 A: He would not do it.
 15 Q: And when was that determined?
 16 A: Those were several, several conversations in and
 17 around after the time when Gardens was tried
 18 because we were discussing how best to do this.
 19 And in discussing it with not only the attorneys
 20 involved in Gardens but other defense counsel
 21 that we knew in South Carolina, they all said,
 22 "No. If you ask me to do it, if you tell me to
 23 do it, I won't do it."
 24 Q: I'm not worried about Gardens and all that. All
 25 I'm worried about is Riverwalk and Magnolia

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1 decision, how much of that is just bad work and
 2 how much of that is damage as a result of that
 3 bad work.
 4 Q: Okay. Now that was a pretty good segway into my
 5 next question. Let's suppose that the court, and
 6 I know you don't agree with this, finds that
 7 there was an occurrence and there was water
 8 damage that is covered under the policy, that
 9 that was an occurrence, okay, just for the sake
 10 of our discussion. I know you don't agree with
 11 that, but tell me how much of that rot the jury
 12 allocated money to?
 13 A: They weren't given the evidence.
 14 Q: What?
 15 A: They weren't given a chance.
 16 Q: What do you mean they weren't given a chance?
 17 A: That's what this deck action is about.
 18 Q: Okay. Well ---
 19 A: You didn't, you didn't want them to do that.
 20 Defense counsel wouldn't, wouldn't, didn't want
 21 us to that.
 22 Q: But ---
 23 A: It would have put us in a position where we,
 24 again, where we were directly opposed to our
 25 insured.

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1 North. I want you to tell me when you asked Eric
 2 Fosmire to allow you to intervene and submit
 3 special interrogatories or have the jury allocate
 4 damages?
 5 A: Again, I didn't because we had had the discussion
 6 in general terms.
 7 Q: Okay.
 8 A: And if he says "I won't do it," then why would I
 9 ask that question in the next case that came
 10 around.
 11 Q: Okay. So the answer is, you never asked in these
 12 two cases?
 13 A: We discussed it in terms of, both in Gardens and
 14 in cases future and they said they would not do
 15 it.
 16 Q: Okay.
 17 A: So the question was -- if he said "I wouldn't do
 18 it," then again, why would I, why would I follow
 19 that up with "Will you do it?"
 20 Q: You need to stop evading my question and listen
 21 to it. It's a very simple question. Did Eric
 22 Fosmire or Steve Brown, after you asked them to
 23 intervene or to get an allocation by the jury of
 24 the damages, refuse to do it?
 25 A: We've, ---

21 (Pages 81 to 84)

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1 Q: Yes or no?
 2 A: --- we've established that I did not ask them
 3 directly to do that.
 4 Q: All right. That's all the question I asked. You
 5 would agree with me there's no way at this point
 6 to determine an allocation of damages, how the
 7 jury allocated damages because they didn't do it,
 8 did they?
 9 A: How that jury did?
 10 Q: Yes.
 11 A: I would agree that we can't figure out how that
 12 jury did it.
 13 Q: Okay.
 14 A: Because they were never asked to do it.
 15 Q: Right.
 16 A: I, I think it can be done.
 17 Q: Who was the agreement with, I'm looking at the
 18 Interrogatories that Mr. Calamari filed, the
 19 Answers to Interrogatories, and it says
 20 "Harleysville and the Heritage entities had an
 21 understanding and agreement that all coverage
 22 issues would be resolved in a coverage action
 23 after the verdict was rendered by the jury." My
 24 first question to you is when was this agreement
 25 reached? Was it before the trial started, after

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1 the trial ---
 2 A: Clearly before the trial started.
 3 Q: Before the trial ever started?
 4 A: Yes.
 5 Q: Okay. And who was the agreement with?
 6 A: We've discussed the issue with Roger Van Wie and
 7 Jack Green, both.
 8 Q: Okay. And they agreed to that?
 9 A: Yes. We had a basic understanding that that was,
 10 that was best for them and it was best for us.
 11 Q: Is it Harleysville's position that punitive
 12 damages are not covered?
 13 A: Yes, it is.
 14 Q: Has Harleysville paid punitive damages under the
 15 same policies we have here?
 16 A: We may have, we may have settled cases in which
 17 punitives were assessed. That we paid punitive
 18 damages is a different question. I can't tell
 19 you that we've ever paid punitive damages under
 20 these.
 21 Q: Under what provisions of the policy do you
 22 contend exclude punitive damages?
 23 A: Sitting there, listening to the standard for
 24 punitives and to the evidence that you've put on
 25 in order to get punitives, you had to reach a

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1 standard where it was a conscious and callous
 2 disregard. A conscious disregard is no longer an
 3 accident.
 4 Q: How about grossly negligent, do you pay for gross
 5 negligence?
 6 A: In an auto case if you're grossly negligent, yes.
 7 In a case, the punitive damages still have to get
 8 to the point, you still have to get to the point
 9 where it's, it meets the insuring agreement in
 10 the first place. If you get through the insuring
 11 agreement, is there something that says we won't
 12 pay punitive damages, no.
 13 Q: Okay.
 14 A: If punitive damages are insurable in that state
 15 and they're, and it meets all the other
 16 qualifications for insurance, yes, they can be
 17 paid.
 18 Q: Okay. But you agree there's nothing in the
 19 policy that says "We will not pay punitive
 20 damages?"
 21 A: There is not a punitive damages exclusion in the
 22 policy.
 23 Q: Okay. If Harleysville's position, and it may not
 24 be, you tell me, but if Harleysville's position
 25 is that we can't even get past occurrence,

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1 accident, what would be a reason to categorize
 2 damages; would there be any reason to do that?
 3 A: Well we have to, if we get past accident, then,
 4 yes, we have to categorize damages. If we can't
 5 get past accident, then, no, there's no reason to
 6 talk about it.
 7 Q: Do you think we can get past accident?
 8 MR. CALAMARI: OBJECTION.
 9 A: The Newman case involved a single house. This
 10 involves 125 buildings all built exactly the same
 11 way. It involves a case where we have testimony
 12 from an individual who says "You're doing this
 13 incorrectly. You're having water infiltration
 14 problems now. If you continue to do it, you're
 15 going to continue to have problems." They were
 16 on actual notice, not just constructive notice,
 17 actual notice of a problem that they knew would
 18 result in water penetration. I don't know if you
 19 can get past accident.
 20 Q: Okay. Let me talk to Phil a minute.
 21 *****OFF THE RECORD*****
 22 (ON THE RECORD.)
 23 MR. HENRY CONTINUES:
 24 Q: I don't think I have anything further.
 25 A: All right.

22 (Pages 85 to 88)

Page 89 1 MR. HENRY: DOES ANYBODY ON THE PHONE 2 HAVE QUESTIONS? 3 MS. EVANS: NO, SIR. 4 MS. MCCARTHY: NO, WE DO NOT. 5 (This deposition concluded at 1:15 p.m.) 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 91 1 SIGNATURE PAGE 2 3 I do hereby certify that I have read the 4 foregoing deposition given by me before Miranda J. 5 Burton, a Notary Public for South Carolina, Horry 6 County, South Carolina. 7 8 PLEASE CIRCLE EITHER "A" OR "B". 9 10 (A) Said deposition is correct as is and 11 requires no changes. 12 13 (B) I desire that the changes attached hereto, 14 described on the "Errata Sheet" be 15 incorporated into said deposition. 16 17 18 19 JAMES WRIGHT 20 21 22 Date 23 24 25
Page 90 1 September 20, 2010 2 3 John P. Henry, Esquire 4 Thompson & Henry, P.A. 5 1300 Second Avenue, Third Floor 6 Conway, South Carolina 29526 7 RE: Harleysville Group Insurance Group, a Pennsylvania Corporation vs. 8 Heritage Communities, et al. 9 Case No.: 2009-CP-26-11862 and 2009-CP-26-10053 10 Dear Mr. Henry: 11 Enclosed you will find both the original and copy of the deposition of James 12 Wright taken Tuesday, August 31, 2010 in the above referenced actions. 13 14 As you may recall, Mr. Wright requested to read and sign his deposition. 15 Therefore, by copy of this letter, I am forwarding a copy of the transcript to Mr. 16 Wright, along with the original signature page, errata sheet and instructions for 17 reading and signing. 18 Upon completion of the signature page and errata sheet, the original of these 19 pages will be sealed under separate cover and forwarded to you with a copy to all 20 parties involved. If the said pages are not completed within the thirty day period 21 when required in court, the original deposition shall be considered complete with 22 this letter in lieu of the signature page. 23 It was a pleasure working with you. If we can be of assistance to you in the 24 future, please give us a call. 25 26 Very truly yours, 27 28 PRESTIGE COURT REPORTING 29 30 Donna H. Martin, CVR 31 Enclosures 32 cc: Mr. James Wright Robert C. Calamari, Esquire 33 Laura Evans, Esquire Karin McCarthy, Esquire 34 Original Deposition Copies of Deposition 35	Page 92 1 ERRATA SHEET 2 FOR THE DEPOSITION 3 OF JAMES WRIGHT 4 (TAKEN TUESDAY, AUGUST 31, 2010) 5 6 PAGE LINE CHANGE AND REASON FOR CHANGE: 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25

23 (Pages 89 to 92)

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1 CERTIFICATE

2

3 This is to certify that the foregoing deposition
4 of JAMES WRIGHT, consisting of NINETY-THREE (93)
5 pages, is a true and correct transcript of the
6 testimony given by said deponent after first being
7 duly sworn; said deposition was reported by method of
8 stenomask with backup. This transcript may contain
9 quoted material; said material is transcribed as read
10 or quoted by the speaker.

11

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

16

17 IN WITNESS WHEREOF I have hereunto set my hand
18 and seal this 20TH day of SEPTEMBER, 2010.

19

20 Donna H. Martin, CVR
21 Nationally Certified Verbatim
22 Reporter and Notary in and for
23 the State of South Carolina
24 My Commission Expires: 12/28/14
25

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT

Harleysville Group Insurance Group, A Pennsylvania Corporation, Plaintiff, -versus- 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.	CASE NO: 2009-CP-26-11862

Harleysville Group Insurance Group, A Pennsylvania Corporation, Plaintiff, -versus- 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.	CASE NO: 2009-CP-26-10053

**THE TELEPHONE DEPOSITION OF
BRIAN TORMEY**

Tuesday, October 19, 2010
10:06 a.m. — 10:54 a.m.

Prestige Court Reporting, Inc.
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THE TELEPHONE DEPOSITION OF BRIAN TORMEY
CASE NO: 2009-CP-26-11862 & 2009-CP-26-10053

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EXHIBITS

(No exhibits were marked during the telephone
deposition.)

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THE TELEPHONE DEPOSITION OF BRIAN TORMEY
CASE NO: 2009-CP-26-11862 & 2009-CP-26-10053

Page No: 2

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THE TELEPHONE DEPOSITION OF BRIAN TORMEY
CASE NO: 2009-CP-26-11862 & 2009-CP-26-10053

Page No: 4

STIPULATIONS

The telephone deposition of BRIAN TORMEY, taken on behalf of the Plaintiffs, at the law offices of Thompson & Henry, P.A., located at 1300 Third Avenue, Third Floor, Conway, South Carolina, on Tuesday, October 19, 2010.

The telephone deposition will be taken before Alice S. Nelson, a Notary Public and Verbatim Court Reporter in and for the State of South Carolina.

It is stipulated and agreed that this telephone deposition is being taken for the purpose of discovery, for use during the trial, and for all other purposes permitted under the applicable rules of procedure.

It is stipulated and agreed between counsel and the above witness that the reading and signing of the above telephone deposition be, and the same, are hereby waived.

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BRIAN TORMEY, HAVING BEEN DULY SWORN, WAS DEPOSED
AS FOLLOWS:

EXAMINATION

BY MR. HENRY:

Q: Mr. Tormey, my name is Pat Henry. I'm sure that you know that I represent the plaintiffs in the Magnolia North, Riverwalk, and Pope class action, and I will be taking your deposition this morning. I don't anticipate it lasting very long at all, but if you need to take a break for any reason, just let us know and we will accommodate you on that. I would assume you've had your deposition taken in the past?

A: Yes, I have.

Q: Okay. And have you had it taken in connection with issues about coverage of claims?

A: In coverage claims?

Q: Yes.

A: I have, yes.

Q: Okay. I will be asking you this morning a number of questions about these under -- and I'll refer to these cases as underlying cases because they are the underlying cases involved in these declaratory judgment actions brought by Harleysville.

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Harleysville?

A: About six years.

Q: When you first went to work with Harleysville, were you at that time employed by some other insurance company?

A: I'm sorry. Say that again.

Q: When you went to work with Harleysville six years ago, were you at that time employed by some other insurance ---

A: To rephrase your question, was I employed previously with another insurance company?

Q: Yes.

A: Yes, I was.

Q: Okay. And what insurance carrier was that?

A: CNA Insurance Company.

Q: And how long were you with CNA?

A: Almost ten years.

Q: What was your title and duties at CNA?

A: My title changed, of course, in the, in the course of ten years.

Q: Sure.

A: But I was a claim adjuster there. I specialized, at the time when I changed positions to the Harleysville. I specialized in handling large losses, large claim losses involving property

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First of all, if I ask you a question and you don't understand the question, please ask me to rephrase it and don't answer it until I rephrase it so that you understand. If you give me an answer, I will assume that you understood my question and you're giving me a full and truthful answer. Can we agree to that?

A: Yes, sir.

Q: Okay. First of all, let me ask you to state your full name and where you presently reside.

A: My full name is Brian Thomas Tormey, T-O-R-M-E-Y. I reside at 1285 Buckingham Circle, Franklin, Tennessee, 37064.

Q: And how long have you resided in -- Where did you say?

A: It's in Franklin, which is a little bit south of Nashville.

Q: Franklin, Tennessee?

A: Uh-huh (affirmative response), yes, sir.

Q: And how long have you resided in Franklin?

A: I've resided there for six years.

Q: Okay. Where are you presently employed?

A: I'm employed at Harleysville Mutual Insurance Company.

Q: How long have you been employed with

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damages, third party property claims.

Q: Would those include insurance defect cases?

A: Insurance defect cases?

Q: Yes.

A: Yes. They, possibly, yes, they did. Sometimes they did. Sometimes they were just strictly third party claims.

Q: And that was when you were with CNA and you were an adjuster then?

A: Yes.

Q: Okay. And what other titles and responsibilities did you hold at CNA?

A: I was a claims specialist. I handled various claims throughout the course of ten years, from first party claims, property damage claims, to auto accidents, just a host of claims.

Q: Would that have included construction defect claims?

A: No, no.

Q: Why did you leave CNA and go to Harleysville?

A: It was a opportunity to, to go into construction defects. Of course, there was monetary incentives to do that.

Q: What year was it that you went with Harleysville?

A: It was in 2004.

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1 Q: These underlying cases had already been filed by
2 then, is that correct, except for the Pope ---
3 A: Let me, let me -- Hang on a second. Let me just
4 make sure. Hang on just a second.
5 Q: Sure.
6 A: I'm sorry. It was 2006 when I came over here.
7 It was April 19, 2006.
8 Q: Okay. In what position were you first employed
9 at Harleysville?
10 A: It was in construction defect unit.
11 Q: Who was your supervisor?
12 A: James Lee Wright.
13 Q: And what was your responsibility in reference to
14 the construction defect cases?
15 A: Construction defect cases, in the time I was
16 hired to today, is essentially the same. I
17 handle construction defect cases primarily on the
18 liability, liability investigation side of the
19 cases.
20 Q: Do you have a title at Harleysville?
21 A: Construction defect litigation specialist.
22 Q: And is Mr. Wright still your supervisor?
23 A: He is.
24 Q: And what are your duties and responsibilities --
25 Well, let me make that more specific. In

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1 and Pope?
2 A: That's correct.
3 Q: Do you know if a reservation of rights letter was
4 sent in the Pope class action?
5 A: On the -- I do not know. On the liability side
6 of that, you know, it does, it's not really in
7 the scope to handle the reservation of rights, or
8 does not involve those issues. So I do not know
9 if that was, was -- I was not involved in that.
10 Q: Okay. Were you involved in any of the other
11 Heritage cases?
12 A: Yes.
13 Q: And tell me which one of the Heritage cases you
14 were involved with.
15 A: Also involved in the Gardens case and the Sea
16 Dunes case, and, and I think that was it.
17 Q: Okay. Now, in all of those cases, were there
18 claims for water intrusion and rot, that sort of
19 thing?
20 A: Generally speaking -- You know, it's been some
21 time ago. I mean, there was a host of
22 allegations involved in that. What those
23 specific allegations were, it's very hard for me
24 to recall at the moment, but generally speaking,
25 I think those types of claims were involved in

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1 reference to the Magnolia North, Riverwalk, and
2 Pope class action cases, what were your duties
3 and responsibilities?
4 A: As far as the Riverwalk cases, the Heritage cases
5 on that, I was handling the liability
6 investigation side of that only. In other words,
7 when a file is, is received here in the office,
8 if there are significant coverage issues involved
9 in that, the coverage is split so there will be
10 no conflict between the adjustor handling the
11 liability side of the, the issues versus another
12 adjustor handling a coverage issue.
13 Q: Right. And I'm going to ask you about some of
14 that in just a moment, but first of all, you were
15 involved in the Riverwalk Property Owners
16 Association lawsuit with Heritage?
17 A: Yes.
18 Q: Okay. And were you involved in the Magnolia
19 North Property Owners Association litigation with
20 Heritage?
21 A: No, I was not.
22 Q: Okay. Were you involved in the Pope class action
23 litigation with Heritage?
24 A: Yes.
25 Q: Okay. So you were involved in just the Riverwalk

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1 that, along with other claims as well, including
2 breach of fiduciary duties and breach of contract
3 claims, just a host of, of other claims as well.
4 Q: All right. Let's talk about the Gardens case
5 first of all. Who was the attorney that you
6 dealt with in the Gardens case?
7 A: Eric Fosmire.
8 Q: And tell me a little bit about how your
9 responsibilities as the person from Harleysville
10 handling the liability side would differ if you
11 were handling the coverage side.
12 A: On the liability side of it, primarily, I
13 reviewed reports.
14 Q: And what kind of reports?
15 A: Reports from attorneys, reports from defense
16 experts, plaintiff experts, I reviewed all those
17 to, to try to evaluate the claim. I also paid
18 attorneys' bills, expert bills.
19 Q: You approved those bills?
20 A: Yes.
21 Q: Okay. Prior to the Gardens case, had you dealt
22 with Eric Fosmire in any other cases, or his
23 firm?
24 A: I don't believe so.
25 Q: Do you know whether or not his firm had ever

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represented Harleysville?

A: Not to my knowledge.

Q: Okay. When the lawyer, for example, wants to take a deposition of an expert, would you be the person that he would consult about doing that?

A: I'm sorry. Say the question again.

Q: Okay.

A: Make sure I understood it.

Q: If a lawyer, for example, Mr. Fosmire in the Gardens case, wanted to take an expert's deposition, would you be the person on the liability side that would approve his taking that deposition?

A: I don't know if approve is the right word for it. Generally speaking, the defense attorney is hired, of course, in the best interest of the insured, and they have a large leeway there to defend the claim as they deem fit. If, if he says, "I need to take this deposition of a plaintiff expert," I would, of course, yes, I would not refute that. I would not object to that, and so he would pay that, or he would take that deposition, send me the bill, and I would, I would pay that accordingly.

Q: What, if anything, do you do as far as approval

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track of it that way.

Q: When you look at liability, do you look at the claims that may be covered by the Harleysville policy?

A: No. When I'm assigned to be the liability adjuster on it, I almost view myself as being in the same shoes as, as the defense attorney in the fact that I review all the claims being made and try to evaluate it from that perspective. The coverage side of the house would then analyze those reports or would have, you know, consult with their own coverage attorney to look at the issues, whether it be covered.

Q: And when it comes down to mediation, settlement of the case, let's take the Gardens case, who would make the decision as to whether or not to settle the case?

A: I think that's a joint effort. As far as the liability side of it, the liability would be most informative, most knowledgeable about the facts of the case liability and to summarize and to analyze those aspects of the claim, and then the coverage adjuster would then evaluate that with the coverage issues in mind.

Q: And was there insurance coverage in the Gardens

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of the defense lawyer's actions. I mean, do you approve his hiring expert witnesses, for example, ---

A: Throughout the history, throughout the history of the claim, even from the very onset, it is critical and part of my job to obtain and work with the defense attorney on a litigation strategy, how we're going to defend the insured, what that's going to take in general terms, and so, yes, I would work with him to try to understand what needs to be done and to make sure that goes through, you know, smoothly.

Q: And your participation when the claim is first made generally goes through to the end, is that correct, until the case is tried or until the case is settled, that sort of thing?

A: Generally speaking, yes.

Q: When you review these reports from the experts, from the lawyers, and that sort of thing, do you file a report yourself to Harleysville?

A: I don't file a report, per se. What I do is to, as far as the claim history, is to, is to keep notes and a running, I guess you want to call it, synopsis of the facts of the case, the liability of it, the claim damages, and, and try to keep

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case?

MR. CALAMARI: OBJECTION TO FORM.

A: I don't think that was ever resolved. That was a open question. I know that there was a coverage file on it, but the matter was settled.

Q: And would you settle a case where there was, you know, where Harleysville was saying there was no coverage at all?

A: Each case is totally different from any other case.

Q: Well, let's talk about ---

A: I know that, I know that -- Let me answer -- finish?

Q: All right.

A: And that there are situations, there are certain claims in which that a business decision is made in, even in light of coverage issues, valid coverage issues, in which a decision is made to settle the matter rather than to pursue coverage issues, even in situations where there may be absolutely zero coverage involved.

Q: In the Gardens case, did you ever talk with Jack Green or Roger Van Wie?

A: No. I never made any contact with them. At that point, my understanding was that that, that, I

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1 think Roger Van Wie had moved on, and I had no
2 communication with him. I dealt strictly with
3 the defense attorney in this matter.
4 Q: Did you have any contact with Jack Green, who's a
5 dentist in Myrtle Beach?
6 A: No. I never spoke to him.
7 Q: Prior to the case being settled, did you have any
8 contact with Jack Green or Roger Van Wie?
9 A: I never did; no.
10 Q: You never consulted them about whether the case
11 should be settled or not settled?
12 A: No. I never did. I believe that there were some
13 discussions on the coverage side of that, even
14 through the coverage counsel, but as, as far as,
15 I never had any personal contact with them.
16 Q: Okay. And how about in Riverwalk and the Pope
17 class action, did you ever have any discussions
18 with the insureds in that case, in those cases?
19 A: Personally, no, I did not. But, again, I believe
20 that communications were made on the other side
21 of the house through the coverage files on that.
22 Q: Right. But you never consulted with the insured
23 in either the Riverwalk or the Pope class action?
24 A: No. And, again, I think it's very important to
25 state that there was no real contact with the

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1 on rare occasions, like I said at the very
2 beginning, I typically handle the liability
3 investigation aspects of it. On rare occasions,
4 I have handled claims from the coverage side of
5 it, mostly in other states, very rarely in, in
6 South Carolina.
7 Q: Have you ever handled a coverage claim, on the
8 coverage side, for a construction defect case in
9 South Carolina?
10 A: Not that I can recall, not that I know of off the
11 top of my head.
12 Q: When you've handled a coverage claim in other
13 states in a construction defect case, did you
14 take the position that water intrusion through
15 the exterior wall would be a covered issue?
16 A: Each state is very different in, in dealing with
17 these matters.
18 Q: What state ---
19 A: Wait, wait, let me finish. I'm sorry. Let me
20 finish. Each state is different on these
21 matters, and so it is, when there's significant
22 coverage issues, I consult with a coverage
23 attorney within that state, and we evaluate the
24 claim or he evaluates the claim, we discuss about
25 the coverage issues, and I follow what he advises

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1 insured. As far as Jack Green, my understanding
2 was that he was primarily a financial investor in
3 that and that, again, Roger Van Wie had moved out
4 of state, and I never had any contact with him.
5 Q: Did you take into consideration in the Gardens
6 case before you settled it that there was water
7 intrusion and damage through the exterior walls?
8 A: I think that was a matter of debate, whether that
9 was -- I think it was disputed at the time,
10 whether that was even, even proven. There was,
11 there was some pictures involved in that, very
12 limited pictures of very limited water damage.
13 So, overall, all those claims, all those alleged
14 damages were part of the evaluation process.
15 Q: Well, what I'm trying to figure out is if
16 Harleysville's taking the position in these
17 construction defect cases that there's nothing
18 covered, why they have paid out millions of
19 dollars to claimants.
20 A: Again, part of that question is based upon a
21 decision that coverage is involved, and I just
22 have no personal knowledge of that.
23 Q: So you've never been involved on the coverage
24 side of a construction defect case?
25 A: Not in the Heritage matters. Other cases, now.

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1 to do.
2 Q: Let's take the Riverwalk case. When you are
3 representing the, or you are on the liability
4 side, do you feel like you have an obligation to
5 protect the interests of the insured?
6 A: Yes. As a liability adjuster, we, we try very
7 hard to ascertain the facts, liabilities,
8 damages, and try to evaluate that and try to, to
9 resolve the claim within the policy limit and the
10 best interest of the insured.
11 Q: And did you do that in Riverwalk?
12 A: I believe I did.
13 Q: And did you do that in the Pope class action?
14 A: Yes. We tried to settle both matters in the best
15 interest of the insured, but in light, there's
16 also coverage issues on, on that, so, on both
17 those matters. So, you know, we, I did the best
18 I could involving the valuation of it, working
19 with the defense attorney involved with that; but
20 again, both matters had coverage issues involved
21 in that, and that has to, of course, have a
22 factor in it as well.
23 Q: And what did you understand in Riverwalk the
24 coverage issues to be?
25 A: Generally speaking, all I really know is that

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there's just a reservation of rights issued on that, and there is just coverage issues on, on the whole matter. I don't know any specific issue.

Q: I'm trying to ask you, you're familiar, I'm sure, with the CGL policy and the exclusions, and what I'm trying to find out is, looking at the terms of the CGL policy, what were the coverage issues in Riverwalk and the Pope class action?

A: Again, Pat, I'm sorry, but you're going to have to go back to either the coverage adjustor or the coverage attorney involved in that and ascertain that.

Q: But you would not have taken that into consideration in any settlement discussions?

A: No. I would not. I would not, from the liability perspective, I could not take that into consideration. After I evaluate the file, it is, it is the coverage attorney's or coverage adjustor's scope of work to evaluate the claims that are being made and to apply them to the policy to see if anything, if anything is covered at all.

Q: Were you ever advised by anyone, by Mr. Wright or anyone at Harleysville, that there was absolutely

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verdict. He had conflicts with that.

Q: Right. And that was ---

A: That's as far as I really got with it.

Q: But that was never discussed with him in Riverwalk?

A: In Riverwalk, I think that, that we had already discussed that matter with him, and he, there was no beating that horse, there was no sense in beating that horse. I think it was already discussed and addressed and resolved.

Q: I know it's a hard question to ask, but let me try again. In Riverwalk and the Pope class action, you did not discuss with Mr. Fosmire or the insured anything about an allocated verdict or other than a general verdict?

A: No. I did not discuss that with them.

Q: Okay. And you did not discuss it with the insured?

A: No. I already told you before that I had no contact with the insureds. There was no real contact to, to have to make with the insureds. All my discussions was with the defense attorney, and I know that the coverage side of it discussed it with others.

Q: Did you ever wonder how, if the jury issued a

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no coverage in the Riverwalk case or the Pope class action?

A: No. Coverage issues are not discussed with me. So I can't address that issue.

Q: Okay. Did you ever discuss the form of the verdict in Riverwalk?

A: I'm trying to think. Hold on for just a moment.

Q: Sure.

A: Form of the verdict in Riverwalk at trial. I know in the -- Well, to answer your question, no, I never discussed, had discussions of the verdict form in the Riverwalk matter.

Q: Or in the Pope class action matter?

A: Or, or in the Pope class, right.

Q: And you never discussed it with either Mr. Fosmire or the insureds. Is that what I understand?

A: Well, I know that, not with the insured, of course, but generally speaking, with, with Fosmire, I know that in another case we discussed it, in particular, you asked about the Gardens matter before, I know we discussed it before with, with Eric, and I know that he would not participate in a detailed verdict form that would break out the verdict form other than a general

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general verdict, how you were going to tell whether or not the jury allocated any money to covered claims?

A: Covered claims, again, Pat, that issue solely rests with the coverage, coverage file.

Q: But, I mean, ---

A: --- for this claim.

Q: --- you weren't in a vacuum. You knew that there were issues about whether certain items in these construction defect cases were covered, didn't you?

A: In a sense, I was in a vacuum. My sole responsibility was really to evaluate the damages that were being made and the liability and causation and try to work with the defense attorney to get the best possible outcome for the insured in these matters.

Q: Okay. But you're not telling me, are you, that you were not aware that there were coverage issues in Riverwalk and the Pope class action?

A: Pat, I think I already answered that question. I said that, yes, I was aware that those, there was coverage issues on that, but what those coverage issues were, how a verdict would, or how a type of verdict against the insured and whether that

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1 verdict would be covered would be in the
2 wheelhouse of the coverage file, not the
3 liability file. In a sense, I only participate,
4 you know, for the insured all the way up through
5 and in the course of trial until a verdict is
6 rendered.
7 Q: Did you attend the Riverwalk and Pope class
8 action trials?
9 A: I attended some days, yes.
10 Q: And during the time you were in trial, did you
11 have conversations with Mr. Fosmire or, I can't
12 remember, the fellow that was working with him?
13 A: Andrew Cole?
14 Q: Yes. Did you have conversations with them?
15 A: I had conversations with, with them, sure, how
16 trial was going, the, the merits of the trial,
17 defense experts, things of that nature. I most
18 certainly did.
19 Q: Okay. And before I move on, I want to understand
20 that you had no responsibility in the Magnolia
21 North case?
22 A: Magnolia North, no responsibility for the
23 Heritage matters, that's correct.
24 Q: Was there a difference in the Heritage matters
25 and the Magnolia North, I mean, all I'm -- Go

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1 regular basis by Harleysville?
2 A: Yes.
3 Q: I know you said that you hired a lawyer to
4 determine if you needed an expert or not, but did
5 you approve the fees for the experts?
6 MR. CALAMARI: OBJECTION TO FORM.
7 A: By, by fees, you mean did I approve and pay the
8 invoices that the experts submitted?
9 Q: Yes.
10 A: Yes, I did.
11 Q: Okay. During the time, the Pope class action and
12 the Riverwalk cases were going on, did you have
13 regular communications with your supervisor, Mr.
14 Wright?
15 A: I discuss all my cases with, with Lee, generally
16 speaking.
17 Q: And does he discuss coverage issues with you?
18 A: On files where I am the liability adjuster, no,
19 he would not have those discussions with me.
20 Q: Not at all?
21 A: Not at all.
22 Q: And do you give him your notes in these cases? I
23 know you said you didn't do a report.
24 A: I would say that, that I make electronic notes,
25 and he would have access to those, those

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1 ahead.
2 A: Just to clarify, to answer your question, I
3 think, just to clarify, I did participate as a
4 defense adjuster, I think, on the co-carrier, as
5 the co-carrier for Weaver Construction in the
6 Magnolia North matter. Before that I had no
7 participation whatsoever in Magnolia North
8 pertaining to the Heritage entity, but there's
9 just, I had one minor player in the Magnolia
10 North issue, and I just offer that just, you
11 know, full disclosure, let you know.
12 Q: Okay. Have you had any dealings with Steve Brown
13 since you've been at Harleysville?
14 A: I know Steve Brown, most certainly, yes.
15 Q: And his firm is used by Harleysville on a regular
16 basis?
17 A: We, we -- Yes. That's correct.
18 Q: And Eric Fosmire was also used on a regular basis
19 at Harleysville; is that correct, or his firm?
20 A: Eric Fosmire's firm, yes. I can't think of it,
21 now. Yes.
22 Q: Young Clement?
23 A: Young Clement is Steve Brown's firm, and Collins
24 Lacy was, was Eric Fosmire's firm.
25 Q: Correct. And those two firms have been used on a

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1 electronic notes.
2 Q: When the jury rendered its verdict in the Pope
3 class action and the Riverwalk class action, were
4 you in the courtroom?
5 A: No.
6 Q: Do you have any way of knowing how the jury
7 allocated its verdict, that is, how much they
8 paid for defective siding, how much they paid for
9 windows, how much they paid for water intrusion?
10 Do you have any way to know that?
11 A: My understanding is that there'd be no way to
12 know that, and, and that's why the coverage
13 action is involved in that, trying to distinguish
14 that, those type of damages.
15 Q: But what I'm asking is, if you say that it's
16 going to take a thousand dollars to fix water
17 intrusion, how do you know how much the jury paid
18 for that?
19 A: Yeah. That's something that, that I never even
20 thought of. My involvement at that point was
21 out. I'd have to discuss that with, even,
22 defense counsel to try to interpret the verdict
23 form.
24 Q: Have you ever discussed a verdict form with an
25 attorney in a case?

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1 A: No.

2 Q: In any of these cases, if Harleysville felt like
3 there was no coverage or there was a dispute as
4 to covered claims or not covered claims, would
5 they have sent a reservation of rights letter?

6 A: Again, Pat, that's something that would be the
7 determination of the coverage adjustor and
8 coverage attorney, and I wouldn't know that.

9 Q: Well, if they didn't send a reservation of rights
10 letter to their insured, how would the insured
11 know that there may be uncovered claims?

12 A: The reservation of rights letter is, is one
13 method that we communicate with the insured to
14 advise them that there are coverage issues, too,
15 on a file; but also, you know, there may be
16 verbal communications that the coverage adjustor
17 may have with the insured and/or their coverage
18 counsel, and, and, you know, again, I just
19 wouldn't have privy to that. I wouldn't have any
20 knowledge of that, what was sent or what not, was
21 not sent.

22 Q: Well, you would agree with me, would you not,
23 that the insured should be kept advised along the
24 proceedings of the case as to the status of the
25 case, what the issues are, what coverage issues

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1 A: I informed him that it was going to take place,
2 and that was really the extent of the
3 conversation.

4 Q: You didn't discuss what your testimony was going
5 to be or the coverage issues or anything of that
6 nature?

7 A: I did not.

8 Q: And my understanding is you've never participated
9 in a case where the carrier asked the court or
10 asked the attorney or asked anyone for an
11 allocated verdict so you would know what the jury
12 allocated to the different issues in the case?

13 A: In situations, and I'm drawing from my experience
14 over the course of 20 years of claims, you know,
15 in cases where that we asked for any type of
16 allocation, defense attorneys refused to do it.
17 They refuse to do it because their interest is
18 protecting the insured, and to the extent that a
19 allocated verdict would produce some verdict that
20 would be not in the interest of the insured, in
21 other words, would produce something that would
22 say that, you know, something that would not be
23 covered, that would not be in the best interest
24 of, of their client, their primary client, the
25 insured, that they refuse to do it because they

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1 there are, and that sort of thing, would you not?

2 MR. CALAMARI: OBJECTION.

3 A: In this case, the insured was closed, out of
4 business and out of state. My, you know, my
5 understanding is that there was really no contact
6 with the insured. Any communications like that
7 would be, you know, through the coverage side of
8 the file and, you know, through the coverage
9 counsel, I hope that answers your question.

10 Q: What have you done, if anything, to prepare for
11 this deposition? Have you talked with anyone.
12 I'm sure you've talked with Mr. Calamari, have
13 you talked with Mr. Wright?

14 A: You know, this deposition was kind of strange and
15 came out of left field for me. I did not know I
16 was even going to be deposed until last week,
17 late last week.

18 Q: I understand.

19 A: And so Mr. Calamari did tell me that, that this
20 was going to take place, and he asked me, I
21 think, ---

22 Q: I don't care, I'm not allowed for you to tell me
23 what Mr. Calamari told you. That's a privileged
24 conversation. What I really want to ask you is,
25 did you discuss your deposition with Lee Wright?

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1 have a conflict of interest.

2 Q: Have you or anyone at Harleysville, to your
3 knowledge, ever advised an insured that there was
4 going to be any problems if there was not an
5 allocated verdict?

6 A: I'm sorry. You're going to have to restate that
7 question.

8 Q: Sure. Have you, since you've been at
9 Harleysville or anytime during your career in the
10 insurance business, have you ever gone to the
11 insured or your company's gone to the insured and
12 said, you know, "There's going to be a problem
13 here if you don't ask for an allocated verdict.
14 If you get a general verdict, we're not going to
15 be able to determine what claims, you know, the
16 jury allocated money to and, therefore, we're not
17 going to know what's covered?"

18 A: That's kind of a coverage function to do that,
19 because it, there's a diversification there
20 between Harleysville's interest and the insured's
21 best interest.

22 Q: Right.

23 A: I can best answer your question this way. In
24 those limited cases in which I am a coverage
25 adjustor on it and settlement discussions are

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1 going on. all I can do is to advise the insured.
2 where the insured is actively participating.
3 actively involved. and, and is there with their
4 counsel. perhaps, we can just say, "Listen, we
5 raised the reservation of rights letter. We're
6 standing by that. and just keep that-in-mind-----
7 while we, you know, go through this process."
8 and, and that's about the best way I can answer
9 your question.
10 Q: So you've done that before?
11 A: I have during settlement discussions. Yes, I
12 have.
13 Q: Okay. Have you been in on any meetings with
14 anyone at Harleysville where it was discussed,
15 where the Newman decision was discussed or the
16 results of the Newman decision were discussed,
17 that water intrusion as a result of defective
18 construction was a covered claim under the CGL
19 policy?
20 MR. CALAMARI: OBJECTION TO FORM.
21 A: I've heard of the Newman decision. To tell you
22 what it is at this moment, I have no idea. I
23 couldn't be specific with that. I know that it
24 is still being reviewed before the Supreme Court,
25 and so, you know, the final outcome of that is.

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CERTIFICATE

This is to certify that the foregoing telephone deposition of BRIAN TORMEY, consisting of THIRTY-FIVE (35) pages, is a true and correct transcript of the testimony given by said deponent after first being duly sworn; said deposition was reported by method of stenomask with backup. This transcript may contain quoted material; said material is transcribed as read or quoted by the speaker.

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 26th day of OCTOBER, 2010.

Alice S. Nelson
Verbatim Court Reporter
Notary in and for the State of
South Carolina
My Commission Expires: 7-26-16

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1 is still in flux. That's my knowledge or my
2 extent of knowledge on that.
3 Q: Have you ever paid a claim for water intrusion in
4 construction defect cases such as Riverwalk?
5 A: That's a very hard question to answer just to the
6 extent that most construction defect claims have
7 disputed coverage issues on them and that there's
8 also causation issues involved in it, and so, you
9 know, 99 percent of our claims that we get in, we
10 resolve through settlement and often before it
11 goes to trial, I should say, not often, but most
12 cases. It's only the very rare case that goes to
13 trial. We, we try to work with the, the insured
14 and defense attorneys and, when necessary, the
15 coverage attorneys, and we try to resolve, often
16 from a business perspective, to make a business
17 decision while those issues are still under
18 investigation, and so oftentimes you're able
19 reach a resolution without addressing that issue
20 with finality.
21 Q: Thank you very much. That's all I have.
22 (The deposition concluded at 10:54 a.m.)
23
24
25

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