

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151

Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc..... Respondents,

v.

Eagle Windows & Doors, Inc., Appellant.

APPENDIX to the RECORD ON APPEAL

G. Dana Sinkler
S.C. Bar No. 5138
Gibbs & Holmes, PC
171 Church St., Suite 110
Charleston, SC 29401
(843) 224-1758
Attorney for Appellant

Jason M. Imhoff
S.C. Bar No. 69355
The Ward Law Firm P.A.
233 South Pine Street
P.O. Box 5663
Spartanburg, SC 29304
(864) 582-3075
Attorney for Respondents

RECEIVED

DEC 16 2014

SC Court of Appeals

Index

Transcript

Transcript of the Testimony of Mr. Philip Gilliam, dated 12/10/2013.....1

Exhibits

Photographs of Able [sic] Residence.....37

Photographs from April 2005 Window Water Testing.....41

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG 2007-CP-42-00296

Nationwide Mutual Insurance
Company, and Gilliam Construction
Company, Inc.,

Plaintiffs,

-vs-

Eagle Windows & Doors, Inc., et al,

Defendant.

TRANSCRIPT OF RECORD

December 10, 2013
Spartanburg, South Carolina

Ordered: March 12, 2014

Delivered: March 14, 2014

BEFORE:

The Honorable J. Mark Hayes, II, Presiding Judge.

APPEARANCES:

Mr. Jason M. Imhoff,, Esquire
Attorney Appearing for the Plaintiffs

Mr. G. Davis Sinkler, Esquire
Mr. Guy Gibbs, Esquire
Attorneys Appearing for the Defendant

Transcript of the testimony of **Mr. Phillip Gilliam** on **December 10, 2013.**

Pamela Faucette, CVR-M
Circuit Court Reporter

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

WITNESSES

Mr. Phillip Gilliam:	Page:
Direct by Mr. Imhoff.....	4
Voir Dire by Mr. Sinkler.....	5
Continued Direct by Mr. Imhoff.....	6
Cross by Mr. Sinkler.....	22
Redirect by Mr. Imhoff.....	30

EXHIBITS

Joint Exhibits:	Marked:	Received:
1 - (Responses to Plaintiffs' Request for Admissions)	4	4
2 - (Affidavit of Steven Perry)	4	4
3 - (Affidavit of Andrew Wickham)	4	4
4 - (Answers to Plaintiffs' Interrogatories)	4	4
5 - (Website for Eagle)	4	4
6 - (Application for Amended Certificate of Authority)	4	4
Plaintiffs' Exhibits:	Marked:	Received:
1 - (Contract Agreement)	7	19 (Over Obj)
2 - (Invoice)	18	19 (Over Obj.)
3 - (Letter Dated 5/17/03)	19	22
4 - (Settlement & Release)	20	22
5 - (Four Photos of Home)	(Marked/admitted in prior transcript.)	
6 - (Pages 19 & 20 - Photos)	(Marked/admitted in prior transcript)	

Plaintiffs' Exhibits:

Marked:

Received:

7 - (Letter Dated 8/9/05)

(Marked/admitted in prior transcript.)

8 - (Report of Findings Pages 5 - 9)

(Marked in prior transcript.)

9 - (Pages 22 - 28 of
Mr. Still's Report)

(Marked/admitted in prior transcript.)

Defendant's Exhibits:

Marked:

Received:

(None)

Reporter's Certification..... 36

REPORTER'S NOTE: All Joint Exhibits were previously noted as marked and stipulated to in the previous transcript.

REPORTER'S NOTE: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

REPORTER'S NOTE: Some of the names in this transcript are spelled phonetically.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

December 10, 2013

10:02 A.M.

(Joint Exhibits 1 through 6 were previously marked for identification and admitted into evidence by stipulation of the parties.)

(Off-the-Record Comments)

THE COURT: So, you want to -- you're going to call your witnesses first?

MR. IMHOFF: Yes, Your Honor -- yes, Your Honor.

THE COURT: Okay.

MR. IMHOFF: Are you ready, Your Honor?

THE COURT: Yes, sir.

MR. IMHOFF: Your Honor, we call Phil Gilliam.

THE COURT: Sir, just come up here and let the clerk swear you in.

(Whereupon,

PHILLIP GILLIAM

having been first duly sworn, testified as follows:)

(Off-the-Record Comments)

THE COURT: And give us your name again.

THE WITNESS: Phillip Gilliam.

THE COURT: Phillip Gilliam.

Direct Examination by Mr. Imhoff:

Q. Now, Mr. Gilliam, what do you do for a living?

A. I'm a residential contractor.

Q. And what company do you work for?

A. Gilliam Construction Company, which I own.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Okay. And how long have you worked for Gilliam Construction
2 Company?

3 A. Since 1994.

4 Q. All right. And do you have any licenses?

5 A. I do.

6 Q. What type of licenses?

7 A. I hold a residential builders' license with the State of South Carolina.

8 Q. And how long have you been building homes?

9 A. Since 1994.

10 Q. And — and how many homes have you built?

11 A. Approximately fifty (50) homes.

12 Q. Is your — is your license limited in any way?

13 A. It is not. It's unlimited residential.

14 MR. IMHOFF: Your Honor, at this time, I'd like to offer Mr. Gilliam
15 as an expert in residential construction, building envelope, and building
16 products.

17 THE COURT: Residential construction, building what was that?

18 MR. IMHOFF: Building envelope.

19 THE COURT: And, then, the third one?

20 MR. IMHOFF: Building products.

21 MR. SINKLER: Well, I'm not sure what you mean by an expert in
22 building products. I — I'd like to ask him a couple of questions ----

23 THE COURT: Certainly.

24 MR. SINKLER: — about that.

25 Voir Dire by Mr. Sinkler:

1 Q. Have you ever designed a window?

2 A. No, sir.

3 Q. Do you know anything about the design of a window?

4 A. I -- I do know things about the design of a window, yes.

5 Q. But you've never designed one yourself?

6 A. No, sir, I have not.

7 Q. Okay. Have you ever manu -- manufactured a window?

8 A. No, sir.

9 Q. Have you got any -- any experience in man -- manufacturing defects
10 or design defects? Is that something -- something you have an understanding of
11 articles on that (phonetic)?

12 A. No, sir.

13 Q. All right. Do you have any -- any expertise in that?

14 A. Only the experience of dealing with multiple windows, windows
15 companies over a 20-year period.

16 (Brief Pause)

17 MR. SINKLER: All right. I don't -- with -- with that, I'm okay with
18 him being whatever you ever said about his -- you were offering him for.
19 You're offering him for -- to talk about construction and -- and things of that
20 nature.

21 THE COURT: All right. I'll find him qualified as -- as you
22 requested. You may go ahead.

23 MR. IMHOFF: Thank you, Your Honor.

24 (Brief Pause)

25 Continued Direct Examination by Mr. Imhoff:

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

1 Q. Mr. Gilliam, did you have the opportunity to meet and work for Renaul
2 and Karen Able?

3 A. Yes, sir.

4 Q. All right. And what did Renaul and Karen Able hire you to do?

5 A. They hired me to construct a residence at The Cliffs of Glassy.

6 MR. IMHOFF: May I approach, Your Honor?

7 THE COURT: All right.

8 **(Off-The-Record Comments)**

9 **(Whereupon, Plaintiff's Exhibit 1 was marked for identification.)**

10 Q. (By Mr. Imhoff) Mr. Gilliam, is this the contract agreement you had
11 with Renaul and Karen Able?

12 **(Exhibit handed to the witness.)**

13 A. Yes, it is.

14 Q. Okay. And is that contract for the construction of a -- of a home at
15 The Cliffs of Glassy?

16 A. That's correct.

17 Q. And did that contract agreement require you to build and deliver them
18 a home which was free of defects?

19 A. Yes, it does.

20 Q. Okay. Did it also require that, if you and the Ables had a disagreement
21 that, that disagreement would be resolved in arbitration?

22 A. Yes, it does.

23 Q. Okay. Did the agreement, the contract agreement, require any
24 particular windows in the Ables' home?

25 A. The contract specified a Peachtree brand window.

1 Q. Okay. Did you install Peachtree windows in Mr. Able's home?

2 A. We did not.

3 Q. Why not?

4 A. At the request of Mr. Able, he preferred the use of a product called
5 Eagle Windows.

6 Q. And did you ultimately go and purchase those windows for Mr. Able?

7 A. Yes.

8 Q. And have them installed in Mr. Able's home?

9 A. Yes.

10 Q. All right. Did you -- at some point, did Mr. Able complain about
11 defects in his home?

12 A. He did.

13 Q. And what defects did he complain about?

14 A. There was water leaking to the interior of the home.

15 Q. Okay. And did you do -- and were you able to resolve that issue with
16 Mr. and Mrs. Able short of arbitration?

17 A. I was not.

18 Q. And did they ultimately sue your construction company?

19 A. Yes.

20 Q. All right. And it was in an arbitration forum?

21 A. Correct.

22 Q. Okay. Did you, in an arbitration forum, invite both the subcontractors
23 in the construction and also Eagle Manu -- and Eagle Window, the manufacturer of
24 the windows?

25 A. Yes.

1 Q. Okay. And did they join the arbitration?

2 A. No, they did not.

3 Q. Did you do any investigation about the cause of the leaking into Mr.
4 Able's home?

5 A. We did.

6 Q. What did you do?

7 A. We flood (phonetic) tested the windows. We examined the joints
8 around the windows. We attempted to make the window leak by using water hoses.

9 Q. And did the windows leak?

10 A. The windows did leak.

11 Q. Where did they leak?

12 A. The windows leaked at the miter joint of the frame of the window.

13 Q. If you would, explain — explain that area, the miter joint, to the Court.

14 A. This window is an extruding aluminum frame. Where the side of that
15 aluminum frame meets the bottom, that joint — the two sides are mitered together.

16 Q. So there's a piece of metal that is vertical and a piece of metal that's
17 horizontal?

18 A. Correct.

19 Q. And in between those is the glass?

20 A. That's correct.

21 Q. All right. And are those two pieces of metal two separate pieces of
22 metal?

23 A. Two separate pieces of metal at all four corners.

24 Q. At all four corners? All right. And so there's a joint or a — a gap
25 where those two pieces of metal meet?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A. That's correct.

Q. All right. And is that where the window was leaking?

A. That is correct.

Q. And is that what your investigation revealed when you put a water hose to the window?

A. Yes, it is.

Q. Okay. Was Eagle Window invited to participate in that testing?

A. Yes.

Q. Did they participate in that testing?

A. Not in the first test, but in the second test.

Q. Okay. How many tests were done on the windows?

A. Multiple tests.

Q. Are the windows supposed to leak when you put the hose on them?

A. No.

Q. Okay. Are the windows supposed to leak as a matter of course in the building envelope of that house?

A. No.

Q. Okay. Are -- were the windows defective?

A. Yes.

MR. SINKLER: I object to the conclusion, Your Honor. I don't think that would be -- he doesn't know anything about design or manufacture, so I don't know whether he would know they were defective when he says defective (phonetic).

THE COURT: All right. I'll let you cross examine him on that point.

1 MR. SINKLER: Thank you.

2 (Brief Pause)

3 Q. (By Mr. Imhoff) When you purchased the windows for Mr. Able's
4 home, did you expect them to leak in the manner that you found they were leaking
5 when you did your investigation?

6 A. No, I did not.

7 Q. Thank you. Did you find any investigation, publication, news article,
8 any document or anything that would have put you on notice that these windows
9 would leak in the manner that you found they did?

10 A. I did not.

11 Q. When Eagle Window was on site for the water testing, did they make
12 any suggestions to change the manner in which you were testing these windows?

13 A. No, they did not.

14 Q. Okay. Did they have any criticisms of the way that you were testing
15 the windows?

16 A. They did not.

17 Q. Did they participate in testing the window?

18 A. Yes.

19 Q. Okay. And how did they participate?

20 A. Observance of the tests that were performed.

21 Q. Okay. Was their participation limited to just observing the tests?

22 A. At that time, yes.

23 Q. Did they do any tests of their own on the windows?

24 A. Not to my knowledge.

25 Q. Okay. Do you know if they've ever done any tests on the windows at

1 issue in Mr. Able's home?

2 A. Not while I was present.

3 Q. Did they ever tell you that they were not willing to honor a warranty for
4 those windows?

5 A. Yes.

6 Q. Okay. I'm sorry, did they ever tell you they were not willing to -- strike
7 that.

8 (Brief Pause)

9 Q. Did damages occur to Mr. Able's home because of those leaking
10 windows?

11 A. That's correct.

12 Q. All right. How?

13 A. The water -- the water that intruded, through the corners of the
14 windows, was pulled behind the nailing pin of the window where it, then, entered the
15 building envelope, the wood portion of the walls, causing damage.

16 Q. Okay. Was the removal of stucco around those windows necessary to
17 fix the issue with them leaking?

18 A. Yes.

19 Q. Was repair of the damages caused from the leaking windows
20 necessary due to those windows leaking?

21 A. Yes.

22 Q. Okay. Was -- was a repair to the rough opening, where the windows
23 were put into the building, necessary due to those leaking windows?

24 A. Yes.

25 Q. Have you seen the scope of repair which was proposed by Mr. Able

1 and his expert, Randy Still?

2 A. Yes.

3 Q. Did you understand that scope of repair?

4 A. I did.

5 Q. Did you understand that scope of repairs to include removing stucco
6 all the way around the windows ----

7 A. I did.

8 Q. ---- fixing any damage that was found caused by the leaking windows?

9 A. Yes.

10 Q. Okay. And also installing what's called pan flashing underneath the
11 windows?

12 A. Yes.

13 Q. Okay. Was pan flashing necessary pursuant to code at the time the
14 windows were installed?

15 A. No.

16 Q. Okay. Do you recall why pan flashing was necessary during the
17 repair?

18 A. Because the windows leaked.

19 Q. Okay. Was there an alternative to installing pan flashing?

20 A. Using a window that didn't leak.

21 Q. Okay. So the alternative to that was to remove the window, purchase
22 new windows, and reinstall them?

23 A. Yes.

24 Q. But the scope of repair that Mr. Able chose instead just put a pan
25 underneath the window; is that right?

1 A. That's correct.

2 Q. All right. And what did that pan do to allow those windows to stay in
3 the building?

4 A. The — the purpose of the pan was to catch the water that came
5 through the window, through the window leaks, and direct that water down the wall
6 to the outside.

7 Q. Is that a cheaper alternative than removing all of the windows,
8 purchasing new windows, and installing them?

9 A. Yes.

10 Q. Okay. Did you believe that Mr. Able's and Mr. Still's scope of repair
11 was reasonable?

12 A. Yes.

13 Q. Okay. Did you — at the time the arbitration was proceeding, did you
14 understand that, that work was actually being done?

15 A. Yes.

16 Q. Do you remember the name of the company that was doing it?

17 A. Blue Ridge Construction.

18 Q. And do you recall that Mr. Still was conducting contract administration
19 services for that work?

20 A. Yes.

21 Q. And approving the payments?

22 A. Yes.

23 **(Brief Pause)**

24 Q. Was that amount necessary due to these leaking windows?

25 A. Yes.

1 Q. Okay. Were the repairs to the stucco and the window installation
2 required because of the leaking windows?

3 A. Yes.

4 (Brief Pause)

5 Q. Do you have employees at Gilliam Construction that install windows
6 and install stucco?

7 A. I use subcontractors to do the work.

8 Q. All right. So all of the work that's done on a project that you're working
9 on is by independent subcontractors?

10 A. Correct.

11 Q. Okay. And what do you do on the project?

12 A. I am the liaison with the cust -- customer. I am the supervisor of daily
13 work; planner, scheduler, controller.

14 Q. Do you have to oversee the subcontractors?

15 A. I do.

16 Q. And supervise them?

17 A. I do.

18 Q. Is part of your obligation to make sure that they are following the
19 applicable code at the time?

20 A. Yes, sir.

21 Q. Okay. Did the stucco applicator violate the code at the time?

22 A. He did not.

23 Q. Did the window installer violate the code at the time?

24 A. He did not.

25 (Brief Pause)

1 Q. And did you know, or have reason to know, that the windows that were
2 requested by Mr. Able and installed in this house would leak?

3 A. No, I had no idea.

4 Q. All right. Do you believe that you have any fault for the failure of these
5 windows in Mr. Able's house?

6 A. No.

7 Q. Who do you believe was ultimately responsible for the failure and the
8 necessity to make this repair?

9 A. The manufacturer of the window.

10 MR. SINKLER: If Your Honor, please, the — he's getting into the
11 question of contribution among joint tortfeasors. And the statute that was in
12 effect at this time said relative degrees of fault could — could not be
13 considered. And he's trying to apportion fault by the answers and that
14 violates the statute that is applicable to this case.

15 MR. IMHOFF: I'll move on.

16 THE COURT: Okay. He'll move on. Thank you, sir.

17 Q. (By Mr. Imhoff) Was the case — was the arbitration with the Ables
18 ultimately settled?

19 A. Yes.

20 Q. Okay. Do you recall how much the Ables were demanding in that
21 arbitration?

22 (Brief Pause)

23 A. (No Response)

24 Q. In general?

25 A. Two hundred thousand dollars (\$200,000).

1 Q. Was it in excess of \$250,000?

2 MR. SINKLER: Object to the form of the question. He's leading
3 the witness.

4 THE COURT: All right. You need to watch the form of the
5 question, please, sir. Did he answer? I didn't hear him answer -- to your
6 previous question?

7 MR. IMHOFF: What previous was that -- which question, Your
8 Honor?

9 THE COURT: As to the amount.

10 Q. (By Mr. Imhoff) Okay. Do you -- do you recall how much the amount
11 the Ables were asking for?

12 A. In your -- in the initial demand, I don't recall that number. It was two
13 hundred thousand (\$200,000) or more.

14 Q. Okay. All right. Do you recall how much the case was ultimately
15 settled for?

16 A. I do.

17 Q. Okay. How much?

18 A. Two hundred and forty-five thousand (\$245,000).

19 Q. Okay. And of that \$245,000, how much did Gilliam Construction add
20 -- contribute?

21 A. Gilliam Construction contributed \$35,000.

22 Q. Okay. And how was that \$35,000 broken down?

23 A. Twenty-five thousand (\$25,000) of that amount was the last invoice for
24 construction work on the initial contract, which was never paid. The balance of
25 \$10,000 was a cash addition that Gilliam Construction made to settle the case.

1 Q. Okay. So you actually wrote a check for \$10,000?

2 A. Correct.

3 (Brief Pause)

4 MR. IMHOFF: May I approach, Your Honor?

5 THE COURT: (Nods affirmatively.)

6 (Off-The-Record Comments)

7 (Whereupon, Plaintiff's Exhibit 2 was marked for identification.)

8 Q. (By Mr. Imhoff) I'm going to hand you Defense [sic] Number Exhibit 2
9 now. Is that the invoice for the amount of money that Mr. Able did not pay you
10 because of this window issue?

11 A. Yes, it is.

12 Q. And what is the total amount of that invoice?

13 A. Twenty-five thousand, five eighty-four, fifty (\$25,584.50) --- excuse me,
14 fifty-three (\$25,584.53).

15 MR. IMHOFF: Your Honor, we would ask that these Defense
16 Exhibits -- I mean, Plaintiff's Exhibits 1 and 2 be moved into evidence at this
17 time.

18 (Brief Pause)

19 THE COURT: Any objection to Plaintiff's 1 and 2?

20 MR. SINKLER: If it's been produced before, I -- I have no
21 objection to it, but I -- I've -- I've not seen either one (phonetic).

22 MR. IMHOFF: I think I -- I think I offered my entire file to Mr.
23 Sinkler. And, so, I don't know -- I mean, I can't put my finger on it ----

24 MR. SINKLER: My -- my file that you gave me was -- had Bates
25 stamps on it all. And I don't see any Bates stamps on either one of these.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. IMHOFF: What I mean is, I offered for him to come and look. And I think he actually did through my entire file. Is that -- isn't that true?

MR. SINKLER: I have no idea.

MR. IMHOFF: No, I think I forwarded that to you to come look at my file and I thought that you or Ashley (phonetic) actually came and looked at it.

MR. SINKLER: That's a possibility, but it was in 2007 that Ashley could have. But I don't -- I don't think you did because you had made an motion to dismiss. By -- by the time a lot of this happened, several of the parties (phonetic) had their case dismissed. (Phonetic)

THE COURT: All right. I will -- I will allow the documents in if -- because the documents are going to back up -- it's my understanding, what you're presenting these documents to do, they're simply backing up what he's verbally testifying to.

MR. IMHOFF: That's correct, Your Honor. They're just additional proof.

THE COURT: Okay. And if -- if you run across anything that's brand-new, that's -- that's not coming from the witness, then, let me know about that.

MR. IMHOFF: I will.

(Off-the-Record Discussion)

(Whereupon, Plaintiff's Exhibits 1 and 2 were admitted over objection.)

(Whereupon, Plaintiff's Exhibit 3 was marked for identification.)

1 Q. (By Mr. Imhoff) Okay. I'm going to hand you Plaintiff's Exhibit
2 Number 3.

3 (Exhibit handed to the witness.)

4 Q. Do you recognize that as a letter from Mr. Able to you concerning the
5 payment of that \$25,000 and change?

6 A. Yes.

7 Q. Okay. And did you take that as an admission that he owed that money
8 but would not pay you because of the window issue?

9 MR. SINKLER: I object to that, Your Honor.

10 THE COURT: All right.

11 Q. (By Mr. Imhoff) What does that letter say?

12 THE COURT: All right. Thank you. You can answer that
13 question.

14 A. This letter was an acknowledgment of the amount of money that Mr.
15 Able still owed for the construction of his home.

16 Q. When -- when the money was paid and also the labor was made, of
17 the amount of money Mr. Able paid you, did you obtain a release from Mr. Able?

18 A. Yes.

19 Q. At the same time, did you obtain a release of any liability of Eagle
20 Window?

21 A. Yes.

22 (Whereupon, Plaintiff's Exhibit 4 was marked for identification.)

23 (Off-the-Record Discussion)

24 Q. (By Mr. Imhoff) And I'm going to hand you Plaintiff's Exhibit Number 4.

25 (Exhibit handed to the witness.)

1 Q. Can you identify that release?

2 (Brief pause while the witness examines document.)

3 A. This is the settlement agreement and release between Renaul and
4 Karen Able and Gilliam Construction.

5 Q. Okay. Did does that release also release any liability of Eagle Window
6 for this — for this product defect?

7 A. No. They — no, they are not named in the settlement release.

8 MR. IMHOFF: May I approach, Your Honor?

9 THE COURT: (Nods affirmatively.)

10 MR. SINKLER: Are you offering that as an exhibit?

11 MR. IMHOFF: I'm sorry?

12 MR. SINKLER: Are you offering that as an exhibit?

13 MR. IMHOFF: I will, yes.

14 MR. SINKLER: Okay.

15 (Brief Pause)

16 Q. (By Mr. Imhoff) Do you see in Paragraph 1 that Eagle Window is
17 identified?

18 A. Yes, I do.

19 MR. IMHOFF: Your Honor, I would move to admit Exhibits 3 and
20 4 into evidence at this time.

21 MR. SINKLER: And what — what is 3? Is that 4 or what?

22 MR. IMHOFF: Yeah, it's 4.

23 MR. SINKLER: What is 3?

24 MR. IMHOFF: Three (3) is the letter from Renaul and 2 is the
25 letter — or invoice.

1 (Brief Pause)

2 MR. SINKLER: I have no objection.

3 THE COURT: All right. Without objection, it'll be 3 and 4.

4 (Whereupon, Plaintiff's Exhibits 3 and 4 were admitted into
5 evidence without objection.)

6 MR. IMHOFF: Your Honor, no — no further questions for Mr.
7 Gilliam at this time.

8 THE COURT: Okay.

9 Cross Examination by Mr. Sinkler:

10 Q. Mr. Gilliam, show you me in the settlement agreement or the eventual
11 release where there was any consideration other than the \$210,000 paid by Gilliam
12 and Gilliam Construction Company and Nationwide Insurance Company.

13 (Brief Pause)

14 A. I may need just a moment, sir.

15 (Pause while the witness examines document.)

16 A. In my — my quick scan of the document, I don't — I don't see it listed
17 here. I'm trying to tax an eight-year old memory of how this all went down.

18 Q. All right. But let me just represent to you, I've read this a number of
19 times myself and I don't see anything in the way of consideration other than under
20 Item Number 1 on Page 2. And, if you can find anything to the contrary, please, let
21 me know.

22 A. Okay.

23 Q. All right. Do you know where these windows came from originally?

24 A. Eagle manufacturers.

25 Q. And do you know where — where they work?

- 1 A. Pardon?
- 2 Q. Do you know where Eagle manufacturing was?
- 3 A. Their manufacturing plant was in Dubuque, Iowa.
- 4 Q. So they were shipped all the way from there to Greenville, South
5 Carolina?
- 6 A. Right, to a distributor in Greenville.
- 7 Q. And that was over to Simpsonville at ----
- 8 A. Window and Door Concepts.
- 9 Q. Window and Door Concepts. That was Mr. Gold (phonetic)?
- 10 A. Charles Gold (phonetic).
- 11 Q. All right. Do you have any idea if those windows suffered any sort of
12 damage on — on the trip from Iowa to Greenville?
- 13 A. There was no damage noted when they were delivered to the home.
- 14 Q. Would there have been any damage noted at the time that you made
15 the window tests? Did you find damage noted?
- 16 A. No. It would be routine to inspect the delivery for damage; the
17 packaging, the windows themselves.
- 18 Q. Do you know whether they did that?
- 19 A. That was done, but no damage was noted at the time.
- 20 Q. How do you know that?
- 21 A. I was present. I'm present for all window deliveries.
- 22 Q. That survive (phonetic)?
- 23 A. Yes, sir.
- 24 Q. All right. Do you remember Mr. Still telling you about how tight the
25 space was for the installation of the windows?

1 A. Define space, sir. I'm -- I'm not sure what space you're talking about,
2 sir.

3 Q. The space of the opening to -- to install the windows in the -- in the
4 rough opening for the windows? (Phonetic)

5 A. I don't specifically recall that remark in any of his notes.

6 Q. All right.

7 **(Brief Pause)**

8 Q. If, in fact, the window opening was tight and made it difficult for the
9 window to be installed, would that be a problem?

10 A. The window would have to be re-framed to accept the -- the window
11 that was sent for that opening.

12 Q. So you wouldn't want to force it in -- into the opening?

13 A. We don't allow our crew to force the jams.

14 Q. All right.

15 **(Brief Pause)**

16 Q. Could the windows have been damaged in the installation?

17 A. Not to my knowledge.

18 Q. Could they have? Could they have? Is that a possibility?

19 A. I have -- I guess it's possible, but I'm not aware of any damages.

20 Q. But the windows leaked?

21 A. Correct.

22 Q. So there's something --- something happened to the window to make it
23 leak, right?

24 A. Yes, sir. And it's my opinion that a metal-to-metal joint with no sealant
25 is going to leak.

1 Q. Well.... There was no sealant put on it at all?

2 A. No, sir.

3 Q. And who installed the windows?

4 A. My -- my crew that I hired that I subcontracted with installed the
5 windows.

6 Q. Is that Mr. Churchill (phonetic)?

7 A. Correct.

8 Q. Did he -- did he put any sort of ----

9 A. Not at that particular joint we're talking about, no, sir.

10 Q. He didn't put anything else ----

11 A. No. It would not be ordinary to seal the window at that location.

12 (Brief Pause)

13 Q. Wasn't -- wasn't the -- did the stucco go all the way to the ground?

14 A. Yes, sir.

15 Q. Wasn't that one of the problems?

16 A. Not for the windows. The stucco did go all the way to the ground.

17 Q. So, if -- if the water got into the window, or in through the window, it
18 had no way of getting -- getting to the ground, right, because -- because the stucco
19 was installed improperly?

20 A. I -- I can't agree with that statement. The damages that were revealed
21 were isolated to the window area. The path of water damage was limited to the area
22 around the windows.

23 Any water that leaked in never would have had the opportunity to get
24 to the ground in that it was absorbed by the wood.

25 Q. All right. That's your opinion?

1 A. Pardon?

2 Q. That's your opinion?

3 A. Yes, sir.

4 Q. Now, you — you gave a deposition, did you not?

5 A. I did.

6 Q. And you did that on the 21st day of December, 2005.

7 A. Yes, sir.

8 Q. And at Page —

9 **MR. SINKLER:** Do you have an extra copy of that?

10 **MR. IMHOFF:** (Shakes head negatively.)

11 **MR. SINKLER:** No? I'll — I'll just show him mine.

12 **(Document handed to the witness.)**

13 **(Brief Pause)**

14 Q. (By Mr. Sinkler) And referring to Page 122 of your deposition — can
15 you identify this as your deposition?

16 A. Yes, yes, sir.

17 Q. All right. At Page 122, Mr. Gibbs, who was deposing you, showed you
18 an Exhibit 36. And I have a copy of Plaintiff's Exhibit 36, which is a — (inaudible)
19 Imhoff's 0485. And you listed a number of payments that you — or a number of
20 expenses. Let me show you that.

21 **(Document shown to the witness.)**

22 Q. (By Mr. Sinkler) Do you recognize that?

23 A. Yes, sir, I'm familiar.

24 Q. All right.

25 **MR. IMHOFF:** Do you have a copy, Mr. Sinkler?

1 **MR. SINKLER:** Excuse me?

2 **MR. IMHOFF:** Do you have a copy of that?

3 **MR. SINKLER:** Of this Exhibit 36?

4 **MR. IMHOFF:** To his deposition?

5 **MR. SINKLER:** Yeah. I don't.

6 **MR. IMHOFF:** Do you have the exhibits? I'm sorry. Are there
7 exhibits attached to his deposition that's with that?

8 **A.** No, not -- not that I have. I have no exhibits.

9 **Q.** (By Mr. Sinkler) It probably did. At any rate, Mr. Gibbs said, "Let me
10 show you Exhibit 36." And, then, "I expect you know the answer to this without my
11 showing you the file, so, let me ask you what it is."

12 And your answer was, "It is a listing of monies that I've provided
13 Gilliam Construction Company..." -- that I've provided Gilliam Construction
14 Company..." --- meaning it provided -- "...to pay for items I felt exceeded what would
15 be considered punch list items but were done in an effort to satisfy and make happy
16 things that we did in the house."

17 And, then, he asked you, "So it is money that Gilliam Construction has
18 spent on the house that you did not charge the Ables for?" And you said, "That's
19 correct."

20 **MR. IMHOFF:** Your Honor, can I object? I didn't hear a question
21 in -- in any of that.

22 **THE COURT:** Okay.

23 **MR. SINKLER:** I'm asking -- I'm asking him if he said, "That's
24 correct."

25 **A.** Yes.

1 Q. (By Mr. Sinkler) So tell me what -- what these are as -- compared to
2 the \$25,000 that the -- you mentioned in the settlement.

3 A. Certainly. Mr. Able had a long list of issues that he found with the
4 house. Some justified; some I did not feel justified. But, in my practice as a builder,
5 I try to go out of my way to make sure my customer is happy.

6 At this time, I was building -- 100% of my business was building in this
7 one community. And I strive try hard to maintain the reputation of doing whatever it
8 would take to make the customer happy.

9 The items that you see here are items that I completed in order to
10 make Mr. Able happy with his home. These were not items that were in the contract
11 of the home.

12 These were not items that are defective items as part of the
13 construction of the home. But these are items that he felt he needed to have in
14 order to be satisfied with the home.

15 Q. Okay. So did these items have anything to do with the \$25,000?

16 A. These do not.

17 Q. All right. That's all I have. All right.

18 **(Off-the-Record Discussion)**

19 Q. Do you have a copy of the \$10,000 check that -- that you gave to
20 settle the case?

21 A. I do not have a copy with me here today, no.

22 Q. Do you have a -- any sort of copy of the check that -- that was given
23 by your insurance company to settle the case?

24 A. I do not possess a copy today.

25 **(Brief Pause)**

1 Q. It would be your testimony that the insurance company paid \$20,000
2 and you paid ten (\$10,000)?

3 MR. IMHOFF: Objection, Your Honor. It misstates the facts. I'm
4 not sure where he got that.

5 THE COURT: Well, he can respond. He's on cross examination.

6 A. No, sir. I — I don't understand your numbers.

7 Q. Okay. When you settled, your total settlement was the twenty-one
8 thousand (\$21,000) — I mean was \$210,000?

9 A. Two hundred and ten thousand (\$210,000) plus there were other
10 expenses; professional engineering fees, attorney fees, just — that raised the
11 settlement amount to I believe it was two, forty-five (\$245,000).

12 Q. Well, in consideration for the release, it says it's \$210,000. And you
13 couldn't find anything else in the release that indicated there was any other
14 consideration paid.

15 A. That is what the release states, yes.

16 Q. All right. So how do we know additional monies were paid by the
17 insurance company if they're not in the release?

18 A. The additional monies — there were monies paid by Gilliam
19 Construction. One was a concession of the \$25,000. The other was the \$10,000
20 check.

21 Q. Why is that not mentioned in the release?

22 A. I don't know that.

23 Q. Okay.

24 MR. SINKLER: I don't have anything further, Your Honor.

25 THE COURT: Any redirect limited to what he went into?

1 **MR. IMHOFF:** Yes, Your Honor, just briefly.

2 **Redirect Examination by Mr. Imhoff:**

3 **Q.** If you would, please look at Exhibit Number 4, Mr. Gilliam.

4 **(The witness complied with the request.)**

5 **A.** Okay.

6 **Q.** And, if you turn to the second page, do you see paragraph Number 1?

7 **A.** Yes.

8 **Q.** And does that reads "We, Renaul Able and Karen Able, individually..."

9 and so on?

10 **A.** Yes.

11 **Q.** So that is the Ables' section of the release?

12 **A.** Correct.

13 **Q.** Turn to Page 2 and Paragraph 2, if you would, Mr. Gilliam.

14 **(The witness complied with the request.)**

15 **Q.** That starts, "We, Phillip Gilliam and Gilliam Construction Company,
16 Inc..." Do you recognize that?

17 **A.** Yes.

18 **Q.** Do you understand that to be your part of the release?

19 **A.** I do.

20 **Q.** Turn to Page 30 if — I'm sorry, Page 4, if you will.

21 **(The witness complied with the request.)**

22 **Q.** And, so, the first page, it is language where you are releasing the
23 Ables. Will you, please, read that paragraph at the top of Page 4?

24 **A.** Paragraph 3 or the paragraph above?

25 **Q.** It's — no, no, no, the paragraph above; just start reading.

1 A. "...Are in any way connected with any and all damages to persons or
2 property resulting or to result or which might result in the future from any amounts
3 owed or allegedly owed by Plaintiffs to Defendants, relating to the property..."

4 Q. Okay. You can stop right here. What do you understand that you to
5 be releasing the Ables for there, Mr. Gilliam?

6 A. From any damages to persons or property which could result in any
7 money owed in the future by the Plaintiff to the Defendant.

8 Q. Okay. So it's "...any amounts owed or allegedly owed by Plaintiffs"?
9 Do you see that part?

10 A. Yes, sir.

11 Q. Do you know who the Plaintiffs were in that case?

12 A. Yes.

13 Q. Do you know who alleged that the Plaintiffs owed money?

14 A. Yes.

15 Q. Who?

16 A. I have alleged that the Plaintiffs owed money.

17 Q. Okay. Did you sign this document releasing the Ables from the money
18 that you allege they owe you?

19 A. Yes. I think I understand the question --- yes.

20 Q. Okay. Is that money the \$25,000 that the Ables owe to you?

21 A. Yes.

22 Q. Okay. Was that part of your concession to settle the case?

23 A. Correct.

24 Q. And you believe that they owe you that money?

25 A. Yes.

1 Q. Does Exhibit 3 -- I'm sorry, 2 and 3 support your allegation that they
2 owe that money?

3 A. It does.

4 Q. Okay. And did Mr. Able's letter to you admit that he owed that money?

5 A. Correct.

6 MR. IMHOFF: No further questions, Your Honor.

7 MR. SINKLER: This is an exhibit, is it not, the settlement and the
8 release?

9 MR. IMHOFF: It's Number 4.

10 THE COURT: Thank you, sir. You may step down.

11 MR. SINKLER: May it please the Court?

12 (The witness complied with the Court's request.)

13 THE COURT: Yeah, just leave -- you can take your deposition,
14 but leave all those things right there.

15 THE WITNESS: Okay.

16 (The witness complied with the request.)

17 (Brief Pause)

18 MR. IMHOFF: Your Honor, we would dismiss any allegations and
19 Defendants not already dismissed. If American Architectural Products,
20 Window -- Window Door -- Window and Doors Concepts, Inc., Charles Gold,
21 Harbor Plastering (phonetic), Phillip Bender (phonetic), Upstate
22 Waterproofing, Dale Coleman (phonetic) , and Gary Churchill, have not
23 previously been dismissed, we would do that at this time, leaving only Eagle
24 Window.

25 MR. SINKLER: Well, Mister -- what they're trying to do is to -- to

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

try to see who is in contribution, the only ones that are active are those that I'm dismissing? No, you can't do that.

And under -- under the contribution provisions of the statute at the time, you consider the various parties that have already been sued and -- and their contribution to the overall liability. And, then, you divide by that figure and -- and apply pro rata liability.

There's a case that the Supreme Court decided that Justice Toal wrote, and I think I can provide you with a copy of it, that -- that establishes that based on the language of the statute in 2000, which is applicable to this particular case, you can't consider relative degrees of fault. And you -- you got to apply pro rata liability.

And in the case of *Southeastern Freight Lines against The City of Hartsville and South Carolina Department of Highways and Public Transportation* (phonetic), the -- the jury had to apportion liability for an automobile accident that injured somebody in a way that applied 70% to Hartsville and 20% to -- no, 70% responsibility to somebody called Southeastern, 20% to the city and 10% to the state.

And on appeal the Supreme Court ruled that you had apportion that pro -- pro rata so each one paid an apportionate share rather than that. And I can -- do you have another copy of that, that's not marked up.

(Off-the-Record Discussion)

MR. SINKLER: Your Honor, may I approach?

THE COURT: (Nods affirmatively.)

(Documents handed up to the Court.)

THE COURT: Thank you.

1 **MR. SINKLER:** These are all parties to the suit. And two of them
2 are parties that have already settled and — and they're all — including Mr.
3 Gilliam, are all parties to the any contribution irrespective of whether he now
4 releases them or not.

5 **THE COURT:** I'm sorry? I missed that last part.

6 **MR. SINKLER:** Irrespective of whether he now chooses to release
7 them since — since he's trying to pin all the liability on Eagle Windows, the
8 old Eagle Windows.

9 **(Brief Pause)**

10 **MR. IMHOFF:** If I may, Your Honor. I guess my first question is,
11 is he objecting to me dismissing Defendants? I'm ----

12 **MR. SINKLER:** I'm — I'm objecting — I object to the purpose for
13 which you're doing it. That's what I object ----

14 **MR. IMHOFF:** Well, I'm not sure that it's the proper time to argue
15 this. I'm certainly welcome to. And what I would say is — is this; That it is —
16 Eagle Windows did not participate in the arbitration.

17 They have not really participated in this case. We may bring the case
18 against whomever we choose. If Eagle Window decides to put evidence up
19 that there should be other defendants; liable, responsible who contributed to
20 this damage, then, they're certainly welcome to do that.

21 What we are not going to do is continue a cause of action against
22 them or put any evidence up that any of the other defendants are responsible
23 or should be added to the group of defendants as Mr. Sinkler pointed —
24 pointed out as the denominator for the pro rata share.

25 He's welcome to put that up in his case.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SINKLER: And I think the statute requires it.

THE COURT: All right. Well, everybody is protected on the record.

MR. IMHOFF: Thank you. And — and I would say, I think there's — and I don't know where it is in here, but — but the Court — and the statute does envision that, even folks that are not part of the case, can be used to determine the denominator, the fraction so to speak.

But we're not going to put that evidence up. Eagle Window may.

THE COURT: Okay. All right. Thank you.

MR. IMHOFF: Your Honor, we would next call Randy Still.

(Whereupon, the requested portion of the proceeding concluded.)

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 35, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

March 13, 2014

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

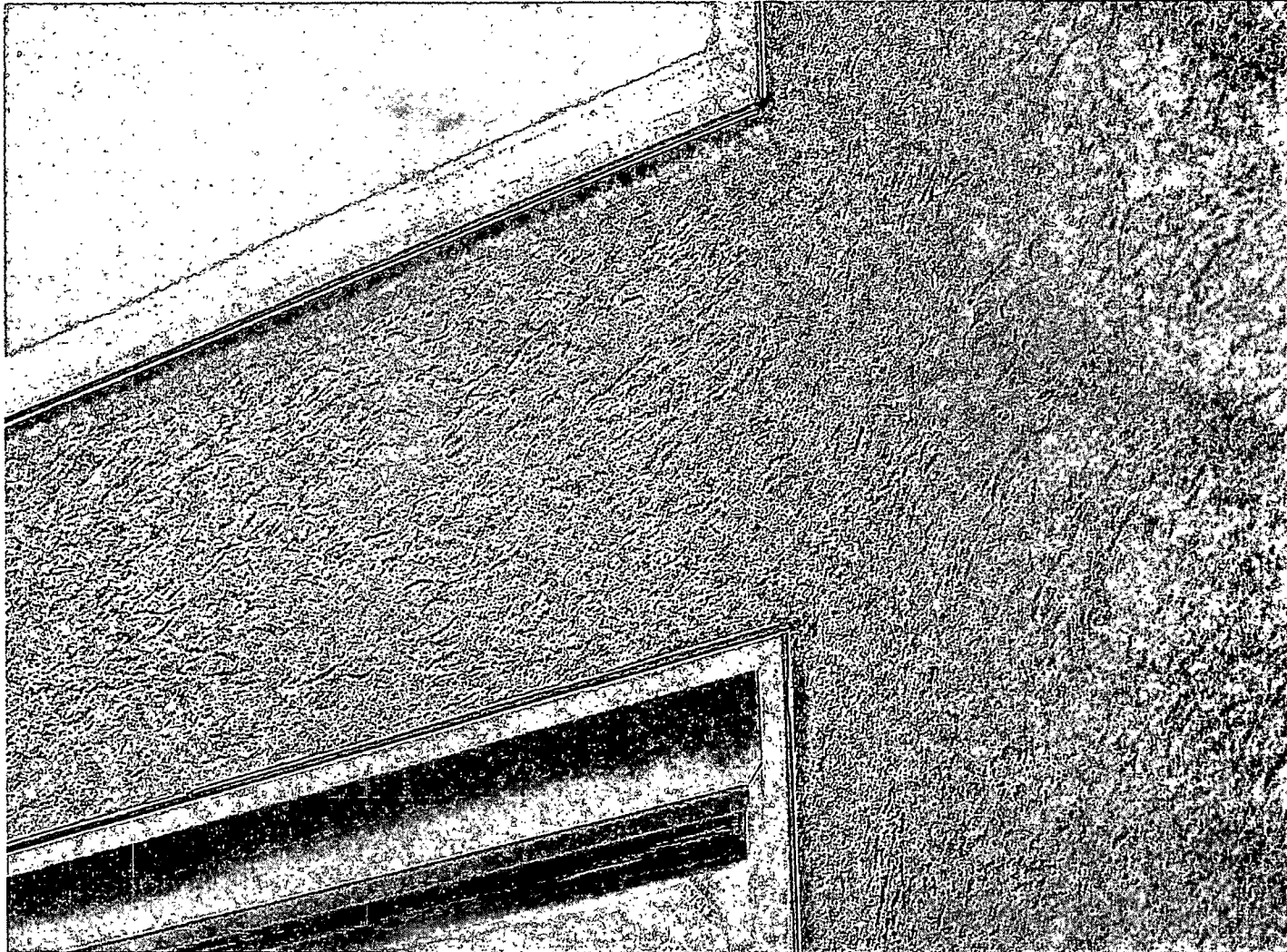


Able Residence, 4 Lobelia Way, Landrum, SC

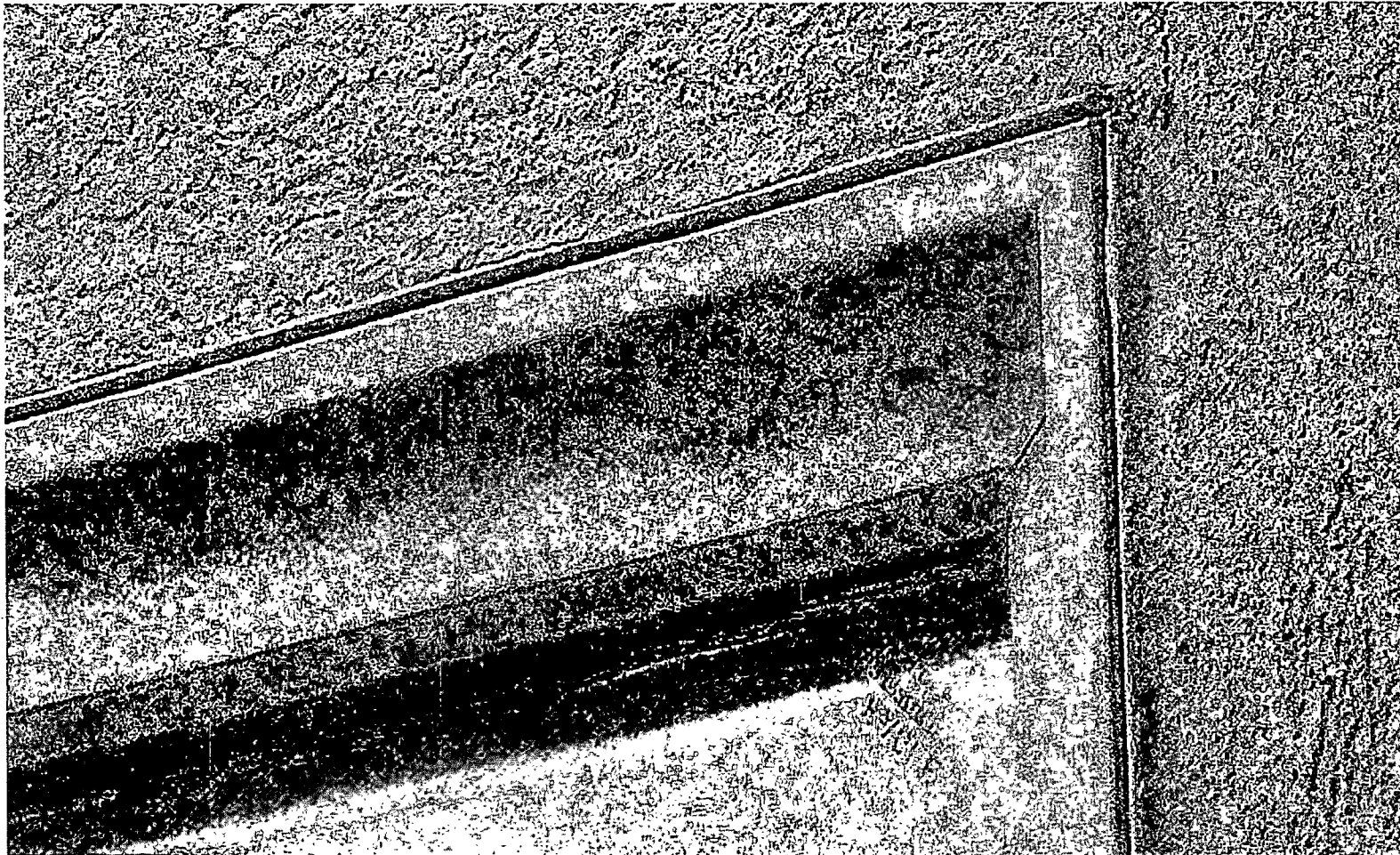
38



39



40





41

April 2005 Window Water Testing

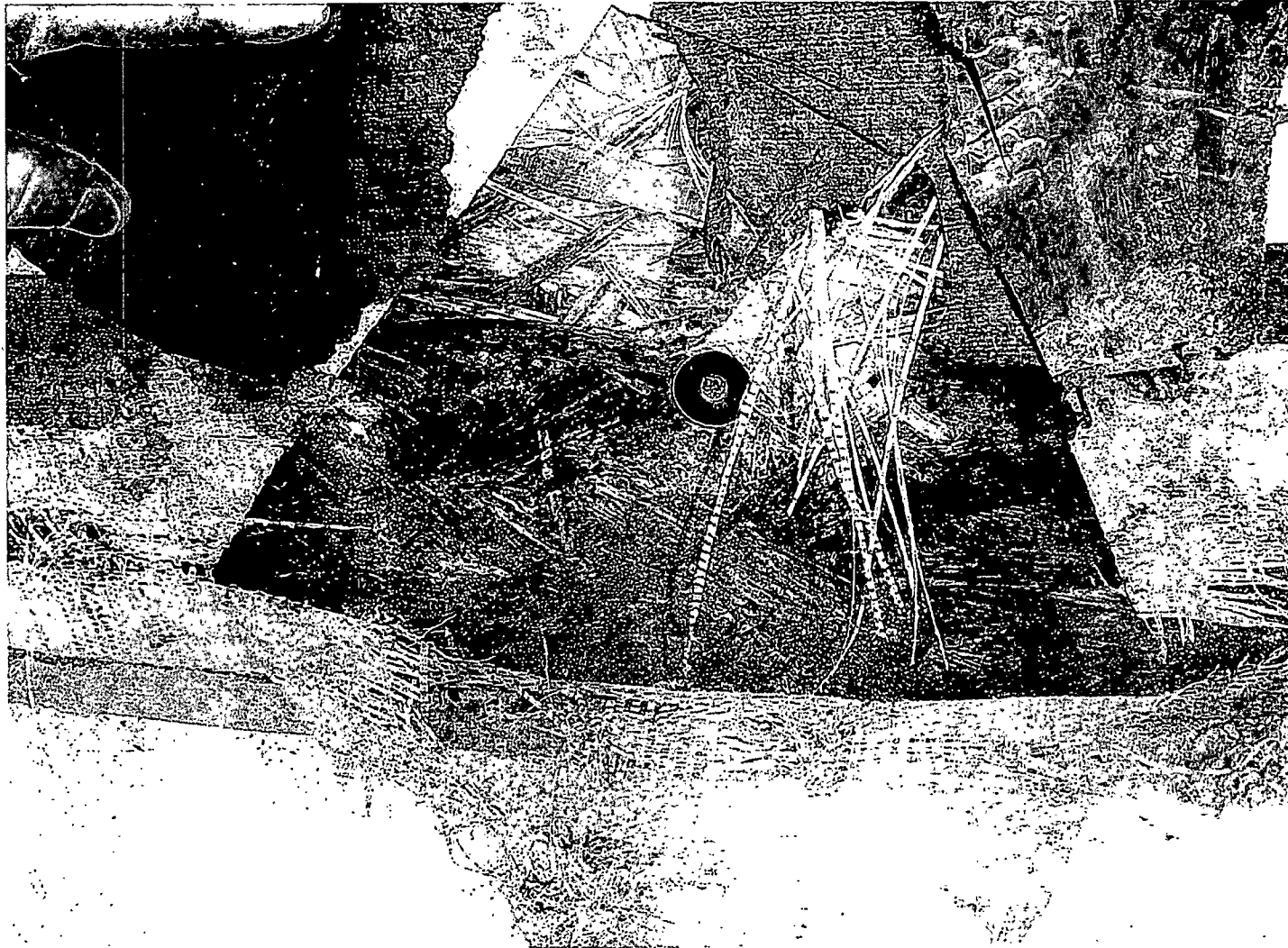


42

April 2005 Window Water Testing

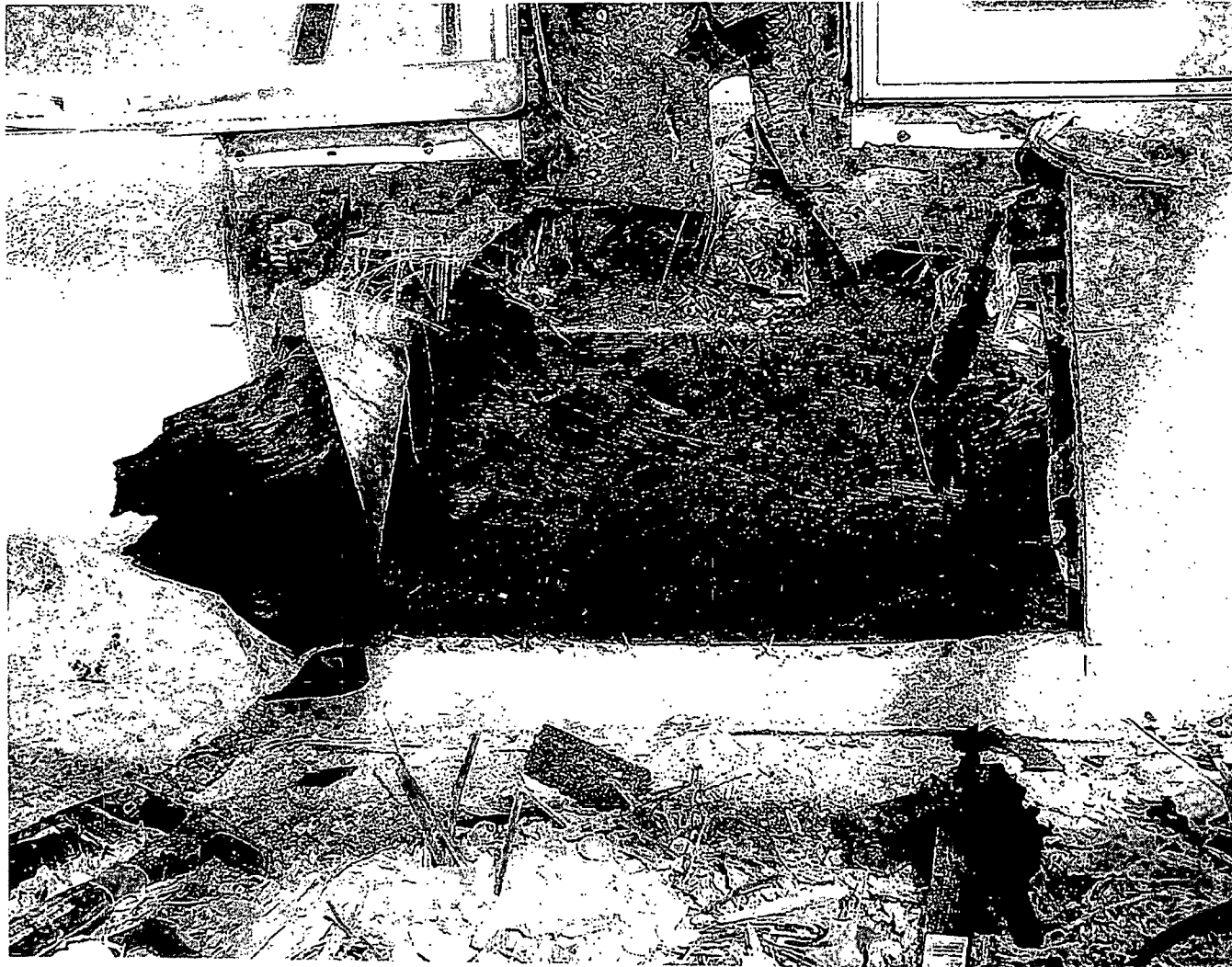


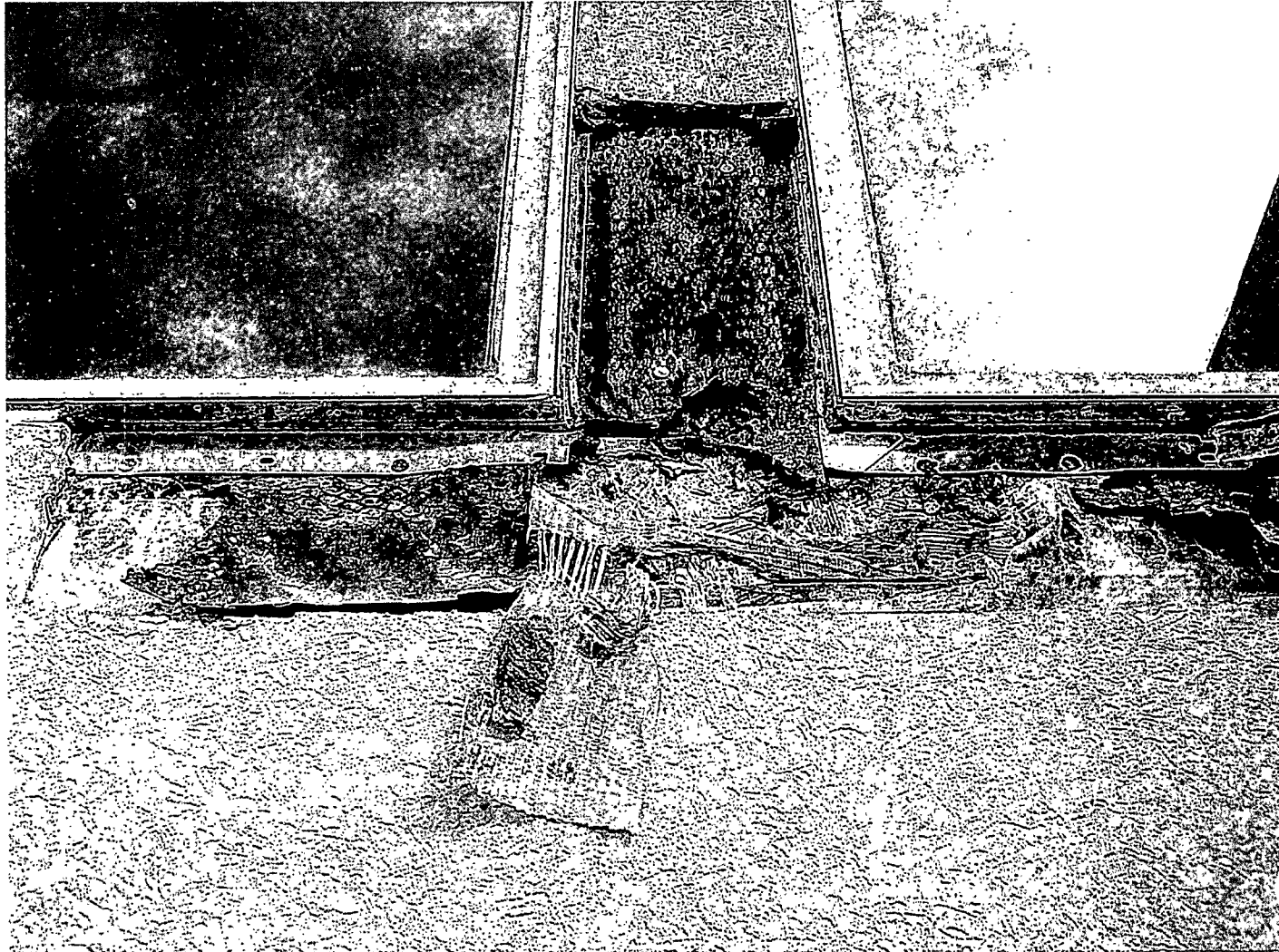
43



44

45





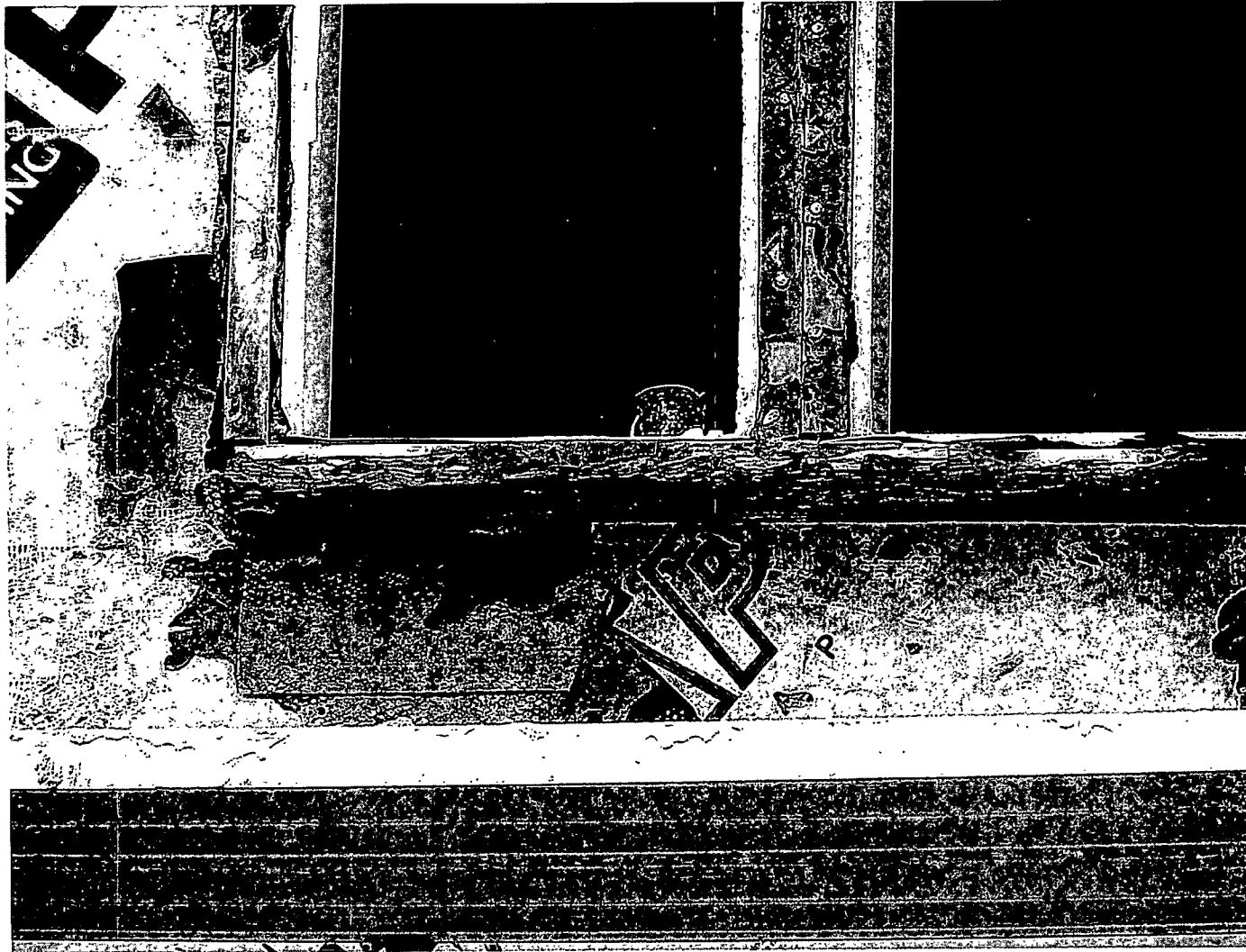
46



47



48

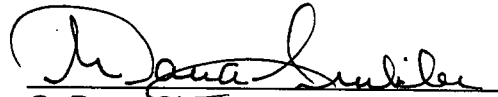


49

Certificate of Counsel

The undersigned hereby certifies that the Appendix to the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

12-8, 2014



G. Dana Sinkler
Gibbs & Holmes
171 Church Street, Suite 110
Charleston, SC 29401
(843) 224-1758
Attorney for Appellant

RECEIVED

DEC 16 2014

SC Court of Appeals