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IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

Appellate Case No.: 2016-000076

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SC Court of Appeals

Concord and Cumberland Horizontal Property Regime, And Thomas R. Mather, And Betty Y. Segal, And Signature Charleston, LLC and Wade Robinson, And James C. Kirkpatrick, And Paul A. Brim, And Fred Rappaport and Joyce Rappaport, And Thomas R. Debnam, as Trustee of The Trust Agreement of Thomas R. Debnam, And Pamela L. Vaughan, And 304 Concord & Cumberland, LLC, And 402 Concord & Cumberland, LLC, And Avant & Associates, LLC and Oakland Holding, LLC, And Mattison J. MacGillivray and Teresa E. MacGillivray And Pamela Queen, And Stuart Reeves, Plaintiffs,

v.

Concord & Cumberland, LLC, Concord & Cumberland Manager, LLC, Estates, Inc., Estates Management Company, Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc., Defendants

Of whom Superior Construction Corporation APPELLANT,
And

The Muhler Company, Inc.....RESPONDENT.

RECORD ON APPEAL

Volume IV

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1 25 openings have been completed per
2 agreed-upon procedures, but developer/waterproofer
3 changed the bucking procedures and wants them
4 removed and reinstalled. Our cost to remove and
5 reinstall the windows is...

6 And it gives the cost.

7 Does that refresh your recollection
8 about who directed that the windows be reinstalled?

9 A. I surmised that the waterproofer is
10 Sutton-Kennerly, who was, at that point, the
11 waterproofing consultant.

12 Q. Okay. All right. Now, the flashing
13 detail that's on your exhibit -- not your exhibit,
14 but Exhibit 352 -- is that housing wrap that's
15 going to be used, or does that show how the house
16 wrap is going to be utilized?

17 A. Are you directing me towards 3550?

18 Q. I'm sorry, 352, and then the page
19 number is -- yeah, 3550.

20 A. And you're directing me to the top of
21 the illustration?

22 Q. Where it says, sill pan flashing...

23 A. Yes, that would be the building paper.

24 Q. So is it fair to say that it would not
25 be possible to install a window to this detail if

1 construction, I assume you're distinguishing that
2 from the homeowner opening and closing his windows.

3 You don't find a problem with that,
4 correct?

5 A. Correct.

6 Q. The problem with having windows open
7 during construction is all the things we talked
8 about before, the likelihood of somebody using it
9 as a means of ingress and egress, people passing
10 tools and equipment and materials through them,
11 that type of thing.

12 A. Damage from construction of the levels
13 above the window, primarily being the amount of
14 stucco and mortar that was falling down on to the
15 windows and into the operating mechanisms.

16 Q. So when somebody was talking about
17 being concerned about having the windows open
18 during construction, it's not because they're
19 concerned that having windows open is a bad thing
20 in general?

21 A. Correct. It's the likelihood of damage
22 to an open window.

23 Q. Thank you.

24 EXAMINATION

25 BY MR. EPPS:

Attachment J

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
)
)

- RE: Concord and Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-2271
- RE: Thomas R. Mather v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-2919
- RE: Betty Segal v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3206
- RE: Signature Charleston, LLC, *et al.* v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3207
- RE: James C. Kirkpatrick v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3208
- RE: Paul A. Brim v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3209
- RE: Fred Rappaport, *et al.* v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-3210
- RE: Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-9580
- RE: Pamela L. Vaughn v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2010-CP-10-9767
- RE: Stuart D. Reeves v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2011-CP-10-4603
- RE: Mattison J. MacGillivray, *et al.* v. Concord & Cumberland, LLC, *et al.*
Civil Action No. 2011-CP-10-4663

AFFIDAVIT OF TALI VEREEN

TALI VEREEN, first being duly sworn, deposes and says as follows:

1. My name is Tali Vereen and I am Credit Manager of the of The Muhler Company, Inc. ("Muhler").
2. I am above the age of 18 years and have personal knowledge of the statements made in this affidavit and certify it to be a true and correct statement.
3. I am familiar with the accounts receivable relating to the Concord & Cumberland project that is the subject matter of this lawsuit. I am also familiar with an agreement between Weather Shield Manufacturing, Inc., Superior Construction Corporation and Muhler dated June 11, 2007.
4. A review of the accounts receivable shows that Superior Construction Corporation has failed to abide by the terms of paragraph 10 on page 4 of the June 11, 2007 agreement in which Superior agreed to pay all amounts due to Muhler. As a result, Muhler has not paid Weather Shield in full for the Weather Shield materials that were installed at the project.

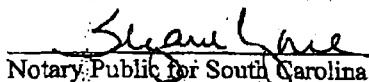
FURTHER, AFFIANT SAYETH NAUGHT.



Tali Vereen
Credit Manager of The Muhler Company, Inc.

SWORN TO AND SUBSCRIBED BEFORE ME

This 20th day of October, 2011.


Notary Public for South Carolina

My Commission Expires: My Commission Expires
April 26th 2014

Attachment K

**STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON**

**RECEIPT
AND
GENERAL RELEASE**

This Receipt and General Release (the "Agreement") is entered among and between the Concord and Cumberland Horizontal Property Regime (C/A No. 2010-CP-10-2771), Thomas R. Mather (C/A No. 2010-CP-10-2919), Betty Y. Segal (C/A No. 2010-CP-10-3206), Signature Charleston, LLC and Wade Robinson (C/A No. 2010-CP-10-3207), James C. Kirkpatrick (C/A No. 2010-CP-10-3208), Paul A. Brim (C/A No. 2010-CP-10-3209), Fred Rappaport and Joyce Rappaport (C/A No. 2010-CP-10-3210), Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam (C/A No. 2010-CP-10-9580), Stuart Reeves (C/A No. 2011-CP-10-4603), Mattison MacGillivray and Teresa E. MacGillivray (C/A No. 2011-CP-10-4663), Avant & Associates, LLC and Oakland Holding, LLC (C/A No. 2011-CP-10-8549), 304 Concord & Cumberland, LLC (C/A No. 2011-CP-10-8550), 402 Concord & Cumberland, LLC (C/A No. 2011-CP-10-8551), Pamela R. Queen (C/A No. 2011-CP-10-9585), and Pamela L. Vaughn (C/A No. 2010-CP-10-9767) (hereinafter "PLAINTIFF-RELEASORS"); AND Weather Shield Mfg., Inc. ("Weather Shield"), The Muhler Company, Inc. ("Muhler"), In the Wind, Inc. ("ITW"), and Watts Builders, LLC ("Watts") (hereinafter collectively the "RELEASEES"); AND Superior Construction Corporation, (hereinafter "SUPERIOR").

WHEREAS, the Concord and Cumberland Horizontal Property Regime is non-profit corporation and association of owners of condominium units in as building known as the Concord and Cumberland condominiums (the "Project"), which consists of a five-story building with twenty-seven (27) individual units in the top four floors and parking on the ground floor. The building is located at the corner of Concord Street and Cumberland Street in downtown

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Charleston, South Carolina. The Concord and Cumberland Horizontal Property Regime is established pursuant to the South Carolina Horizontal Property Regime Act codified at S.C. Code Ann. § 27-31-10 *et al.* (the "Act"). The control of the Concord and Cumberland Horizontal Property Regime was transferred from the developer to the unit owners on or around March 8, 2008. Pursuant to the Act and the Master Deed, as amended, governing the Regime, the Concord and Cumberland Horizontal Property Regime has an ownership interest in and/or duty to maintain certain portions of the building including the common areas located within the Regime; and

WHEREAS, Thomas R. Mather (Units 301/302), Betty Y. Segal (Unit 401), Signature Charleston, LLC and Wade Robinson (Unit 308), James C. Kirkpatrick (Unit 206), Paul A. Brim (Unit 205), Fred Rappaport and Joyce Rappaport (Unit 306), Thomas R. Debnam, as Trustee of the Trust Agreement of Thomas R. Debnam (Unit 101), Stuart Reeves (Unit 202), Mattison MacGillivray and Teresa E. MacGillivray (Units 107 and 208), Avant & Associates, LLC and Oakland Holding, LLC (Unit 305), 304 Concord & Cumberland, LLC (Unit 304), 402 Concord & Cumberland, LLC (Unit 402), Pamela R. Queen (Unit 307), and Pamela L. Vaughn (Unit 108) are the owners or former owners of certain condominium units in the Project. Pursuant to the Act and the Master Deed, as amended, governing the Regime, PLAINTIFF-RELEASORS as well as all other owners of units at the Project also have or had an ownership interest in certain portions of the Project, including the common areas located within the Regime; and

WHEREAS, among them, PLAINTIFF-RELEASORS have instituted fifteen (15) civil actions which assert claims for fifteen (15) individual units plus the common elements claimed by the Concord and Cumberland Horizontal Property Regime, which are on file in the Court of Common Pleas for Charleston County, South Carolina, with the civil action numbers referenced

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on the first page of this Agreement. The first lawsuit was filed by the Concord and Cumberland Horizontal Property Regime on March 19, 2010, on behalf of itself and all of the unit owners, including the PLAINTIFF-RELEASORS, alleging claims of construction defects with the common elements and limited common elements at the Project. It is clear, although the Concord and Cumberland Horizontal Property Regime and the individual unit owners at the Project had different times when they received actual and/or construction notice of the alleged construction defects, including those raised in later pleadings by the PLAINTIFF-RELEASORS, that all owners at the Project were on actual notice of the alleged construction defects on or by March 19, 2010, when the Concord and Cumberland Horizontal Property Regime initiated litigation alleging construction defects at the Project. For discovery and pre-trial matters, all fifteen lawsuits were combined under the earliest civil action number. This Agreement combines and includes the claims which are more fully set forth in the fifteen (15) original Complaints and subsequent Amended Complaints and Cross-Claims.

WHEREAS, RELEASEES and SUPERIOR deny the claims and allegations asserted against them in the lawsuits and have filed various answers and other pleadings disputing said claims and allegations and asserting affirmative defenses, counterclaims, cross-claims, and third-party claims; and

WHEREAS the parties to this Agreement desire to avoid the expense, uncertainties, and risks of further litigation between and among themselves and to fully, finally, and forever compromise and settle certain past, present, and future claims that were, could or should have been brought against RELEASEES by PLAINTIFF-RELEASORS and certain, but not all claims, cross-claims or counter-claims that were, could or should have been brought by and between RELEASEES and SUPERIOR regarding or stemming from alleged window and door

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product defects and construction defects at the Concord & Cumberland condominium project located in Charleston, South Carolina.¹ The claims being released and dismissed in this Agreement are: all claims of PLAINTIFF-RELEASORS against RELEASEES; all claims by SUPERIOR against ITW and/or Watts; all claims by Weather Shield against ITW and/or Watts; all claims by Muhler against ITW and/or Watts; and all claims by ITW and/or Watts against SUPERIOR, Weather Shield, Muhler or each other (all of which hereinafter are collectively "the RELEASED CLAIMS"). Specifically excluded from the RELEASED CLAIMS are: all indemnity and/or contract claims by SUPERIOR against J. Davis Architects, Weather Shield, and Muhler; all claims by Weather Shield against SUPERIOR or Concord & Cumberland, LLC; all claims by Muhler against SUPERIOR or Concord & Cumberland, LLC; and all claims by Weather Shield and Muhler against each other (all of which hereinafter are collectively "the EXCLUDED CLAIMS"). The EXCLUDED CLAIMS are not released, dismissed or excused by this Agreement and are preserved by the parties bringing them.

WHEREAS PLAINTIFF-RELEASORS represent and warrant that they are the sole owners of the claims they allege to hold and assert herein, that there are no other persons or entities that hold any interest in the claims asserted by each, and that each has the full and complete authority to fully and finally compromise and release the claims and demands compromised herein.

NOW THEREFORE, KNOW ALL BY THESE PRESENTS THAT:

1. **Incorporation.** The terms of the Whereas clauses set forth above are incorporated herein.

¹ In the Wind, Inc., reached its agreement to settle with PLAINTIFF-RELEASORS on April 23, 2013. Weather Shield Mfg., Inc., The Muhler Company, Inc. and Watts Builders, LLC, reached their agreement to settle with PLAINTIFF-RELEASORS on July 25, 2013. Because these settlements address claims originated by PLAINTIFF-RELEASORS and claims by and between some of the RELEASEES, this Receipt and General Release is combined to dismiss the RELEASED CLAIMS, as noted below.

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2. Release by PLAINTIFF-RELEASORS, PLAINTIFF-RELEASORS, FOR AND IN CONSIDERATION OF the total sums set forth below in the amounts of:

Weather Shield Mfg. Inc. = \$450,000.00
The Muhler Company Inc. = \$300,000.00
In the Wind, Inc. = \$350,000.00
Watts Builders, LLC = \$50,000.00

herewith, to us in hand paid by and on account of the RELEASEES, the receipt and sufficiency whereof is hereby acknowledged, do for ourselves and our heirs, assigns, executors and administrators, **HEREBY REMISE, RELEASE, ACQUIT, AND FOREVER DISCHARGE** RELEASEES, their heirs, agents, servants, employees, insurers (including to the extent payment is made on behalf of ITW, Certain Underwriters of Lloyd's London Subscribed to Policy No. TPATE001091, Blair & Co., and The Main Street America Group, and to the extent payment is made on behalf of Weather Shield, Liberty Mutual Ins. Co. and Sentry Claims Service; and including to the extent payment is made on behalf of Muhler, Companion Property and Casualty of America and Companion Casualty Group), sureties, re-insurers, successors, and assigns, and all other persons, firms, corporations, and associations or partnerships, whether herein named, who may be individually, jointly or severally liable to the undersigned;

OF AND FROM ANY AND ALL CLAIMS, demands, debts, rights, actions, and causes of action, including but not limited to direct claims, cross-claims, counterclaims, and third-party claims, costs, interest, emotional distress, fees, expenses, and compensation of any nature, now existing or which may hereinafter accrue, and all known and unknown, foreseen and unforeseen injuries or damages and the consequences thereof resulting which heretofore have been, or which hereinafter may be, sustained by PLAINTIFF-RELEASORS and their heirs, assigns, executors, and administrators as a result of any matter arising out of or caused by products designed, manufactured, marketed, distributed, sold, used or supplied or the work

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performed by or on behalf of RELEASEES during the construction and/or repair of the Concord & Cumberland condominiums located in Charleston, South Carolina.

PLAINTIFF-RELEASORS FURTHER AGREE, as a further consideration and inducement for this compromise settlement, that the settlement shall apply to all unknown and unanticipated injuries and damages that were raised or could have been raised in any and/or all of the claims brought by PLAINTIFF-RELEASORS against the RELEASEES and SUPERIOR as to any incidents now disclosed or undisclosed and/or presently known or unknown by PLAINTIFF-RELEASORS.

3. Release by SUPERIOR. IN CONSIDERATION OF THE ABOVE PAYMENT made to PLAINTIFF-RELEASORS, SUPERIOR HEREBY REMISES, RELEASES, ACQUITS AND FOREVER DISCHARGES its Cross-Claims against ITW and Watts and their heirs, agents, servants, employees, insurers (including to the extent payment is made on behalf of ITW, Certain Underwriters of Lloyd's London Subscribed to Policy No. TPATE001091, Blair & Co., and The Main Street America Group), sureties, re-insurers, successors, and assigns, such claims to include all demands, debts, rights, actions, and causes of action, including but not limited to direct claims, cross-claims, counterclaims, and third-party claims, costs, interest, emotional distress, fees, expenses, and compensation of any nature, now existing or which may hereinafter accrue, and all known and unknown, foreseen and unforeseen injuries or damages and the consequences thereof resulting from or caused by products designed, manufactured, marketed, distributed, sold, used or supplied or the work performed by or on behalf of RELEASEES during the construction and/or repair of the Concord & Cumberland condominiums located in Charleston, South Carolina. Nothing in this Paragraph shall be construed to abridge, negate, undermine, or otherwise diminish the EXCLUDED CLAIMS

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4. Limited Release by RELEASEES. IN CONSIDERATION OF THE ABOVE PAYMENT, RELEASEES HEREBY REMISE, RELEASE, ACQUIT AND FOREVER DISCHARGE EACH OTHER from all Cross-Claims asserted against each other and the RELEASEES' heirs, agents, servants, employees, insurers, sureties, re-insurers, successors and assigns, and all other persons, firms, corporations, and associations or partnerships, whether herein named, who may be jointly or severally liable to the undersigned, with the exception of the EXCLUDED CLAIMS by Weather Shield and Muhler against each other.
5. Termination of Existing Warranties. PLAINTIFF-RELEASORS also, without limiting the generality of the release contained herein, for themselves, their successors, heirs, purchasers and assigns, specifically release RELEASEES and SUPERIOR from any and all express warranties and from all implied warranties related to the units, the Project, the Regime or any of its components or products designed, manufactured, marketed, distributed, sold, used or supplied for the Project which may be imposed under federal or South Carolina law.
6. Dismissal with Prejudice. The parties to the Agreement also agree to execute, or cause their counsel to execute, such stipulations, orders or other documents required to dismiss with prejudice all lawsuits, claims, and causes of action asserted by PLAINTIFF-RELEASORS against SUPERIOR and RELEASEES and the RELEASED CLAIMS asserted by SUPERIOR and RELEASEES against each other in the lawsuits, provided that such dismissal shall not dismiss the EXCLUDED CLAIMS. The reservation of the EXCLUDED CLAIMS shall not in any way affect the full, total, and complete release of any other claim or any other party and does not create any new claim or right against any released party.
7. No Admission of Liability. The parties to the Agreement agree and acknowledge that this settlement is a compromise of doubtful and disputed claims, and that neither the recitals,

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terms, conditions or other statements in the Settlement Agreement nor the payment of sums herein mentioned shall be construed as an admission of liability on the part of the persons, firms, and corporations who are hereby released for any allegation or claim, by whom liability is expressly denied, and no judgment shall be entered. This Agreement shall not be admissible in the lawsuits or in any other action, suit or legal proceeding as evidence of any liability, culpability or fault of or on the part of any party to this Agreement.

8. **Hold Harmless.** As further consideration for the payments made by or on behalf of RELEASEES herein, PLAINTIFF-RELEASORS agree to indemnify and hold harmless RELEASEES and SUPERIOR against any loss, costs, damages, liens, and expenses (including attorneys' fees), by reason of any third person or entity claiming to have any lien and/or subrogation interest for any services or materials provided to PLAINTIFF-RELEASORS or any of them in conjunction with the lawsuits or claiming to be an assignee or subrogee of any of the claims or causes of action mentioned above and FURTHER REPRESENT that any subrogation or lienholder interest as to any claim herein released is to be resolved from the funds herein disbursed. As part of this Paragraph, PLAINTIFF-RELEASORS acknowledge and state that the settlement funds paid by RELEASEES are intended for the repairs to the Project as recommended by the experts retained on behalf of the PLAINTIFF-RELEASORS as part of the underlying litigation and include, but are not limited to, replacing all of the Weather Shield windows and doors at the Project, with the exception of those windows and doors in the unit owned by Guy Beatty who has already performed some repairs and whose windows and/or doors have already been replaced or repaired.

The Concord and Cumberland Horizontal Property Regime specifically represents that it, on behalf of all owners at the Project, was aware of the alleged construction defect claims before

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it filed its lawsuit regarding the common elements and limited common elements at the Project on March 19, 2010. Therefore, the Concord and Cumberland Horizontal Property Regime will not raise in the future nor assist any other parties with filing any new or duplicative claims in the future that were and/or could have been the subject of the Concord and Cumberland Horizontal Property Regime's construction defect lawsuit that it initiated on March 19, 2010.

9. **Succession.** This Agreement shall be binding upon and shall enure to the benefit of the parties and their respective heirs, representatives, administrators, successors, receivers, trustees, purchasers, and assigns.

10. **Authority to Sign this Agreement.** The persons signing this Agreement on behalf of a corporate or legal entity (including any LLC or partnership) represent and warrant that they have full authority to execute this Agreement and make it fully binding upon the party for whom they have signed.

11. **Understanding of Agreement.** The parties have read all of the terms of this Agreement. They had an adequate opportunity to review this Agreement with their attorneys and have their attorneys explain the terms of this Agreement to them. The parties understand and agree with everything stated in this Agreement. The parties have signed this Agreement freely and voluntarily, without any duress or coercion, and upon the advice of their attorneys.

12. **Entire Agreement (Merger and Integration Clause).** This Agreement constitutes and merges the entire understanding of the parties as to the RELEASED CLAIMS and supersedes any and all prior and contemporaneous oral and written negotiations between the parties as to the RELEASED CLAIMS. The parties acknowledge that they have read this Agreement and that it is a complete, written statement of the terms and conditions of the settlement. The parties agree that all of the terms of this Agreement are contractual and not a mere recital. This instrument

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shall not disturb, abrogate, supersede, or negate, in whole or part, any separate settlement entered into by SUPERIOR, nor shall it be construed to waive, satisfy, diminish, or extinguish the EXCLUDED CLAIMS.

13. No Reliance on Other Party (Non-Reliance). The parties have entered into this Agreement based solely upon their own independent investigation, knowledge, and judgment of their particular situation, the extent of their damages and injuries, and the facts and circumstances related to their dealings and involvement with the other parties. The parties agree that any information, facts, statements or representations they received from any other party (including any persons or entities representing, or claiming to represent, a party) that were relevant to their decision to enter into this Agreement could have been and should have been written into this Agreement, and in signing this Agreement the parties have not relied on, and have not been influenced by, any oral or written information, facts, statements, representations or anything else that has been said or supplied to them by or on behalf of a party that are not expressly stated in this Agreement.

14. Adequate Consideration. PLAINTIFF-RELEASORS, and RELEASEES ACKNOWLEDGE that the total amounts paid by or on behalf of RELEASEES are fair and sufficient settlements to resolve the RELEASED CLAIMS and/or any other claims asserted or that could have been asserted against RELEASEES, saving and excepting the EXCLUDED CLAIMS, which are hereby reserved, preserved and excluded from this Release. PLAINTIFF-RELEASORS acknowledge that the parties not being dismissed by this Agreement are entitled to a dollar-for-dollar set-off as prescribed by South Carolina Code §§15-38-10, et seq., and by signing this Agreement SUPERIOR, Weather Shield, and Muhler do not waive any arguments

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for allocation of the funds pursuant to South Carolina Code §15-38-15, or other applicable South Carolina Law.

15. Rule to Show Cause. In further exchange for the consideration provided herein, PLAINTIFFS-RELEASORS agree not to pursue the Rule to Show Cause filed by them against Weather Shield, its insurer, Liberty Mutual, Ins., Co., and/or William Strickland, and agree that all claims concerning the subject matter of the Rule to Show Cause and all claims concerning Weather Shield's or its insurers' participation in any mediation of the lawsuits are relinquished, waived, released, and dismissed part of the RELEASED CLAIMS herein.

16. Governing Law and Interpretation of this Agreement. This Agreement shall be deemed to have been prepared, signed, and delivered exclusively in the State of South Carolina, and this Agreement shall be governed by, interpreted, performed, and enforced in accordance with the laws of the State of South Carolina. No provision of this Agreement shall be interpreted for or against any party by virtue of the fact that the provision was drafted by that party or that party's attorney.

17. Execution in Counterparts. This Agreement can be executed in counterparts by all parties signing this Agreement and, when taken together, the signed counterparts shall constitute one complete and fully executed and binding document. Any party may rely on a copy of the signed original received from another party by facsimile or email and may consider the copy as a legal, binding, and enforceable document.

18. Effective Date of this Agreement. This Agreement shall be deemed effective as of the first signature, regardless of the dates of any other of the signatures below.

19. Proper Parties to Receive Settlement Funds. PLAINTIFF-RELEASORS further represent and warrant that they have not heretofore assigned to any other person or entity all or

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any portion of any claim whatsoever which they may have or may have had or may claim in the future to have against the persons and entities hereby released. PLAINTIFF-RELEASORS further represent and warrant that they are the sole proper parties to receive the Settlement Proceeds discussed herein and that they will undertake the affirmative duty and responsibility to allocate and distribute (or via their attorneys cause to be distributed) the Settlement Proceeds paid herein amongst the PLAINTIFF-RELEASORS and that they shall indemnify and hold harmless RELEASEES and SUPERIOR from any and all claims or disputes concerning the distribution of the Settlement Proceeds amongst themselves.

Plaintiff Concord and Cumberland Horizontal Property Regime FURTHER AGREES, represents and warrants that it has complete and unconditional authority to assess, compromise and extinguish all claims asserted in this litigation related to the repair of the common elements and limited common elements of the building, including the window and door openings and the window and door units themselves. Plaintiff Concord and Cumberland Horizontal Property Regime in this action has asserted damages based upon the repair of the common elements associated with all 27 units and the common elements that compromise the Regime. It represents and warrants that it has the authority to compromise and extinguish all of the claims asserted in this action that relate to the repair or replacement of all common elements, including all claims related all window and door openings and the window and door units themselves in the common elements, whether or not the terms of the Master Deed declare these window or door units to be part of the common elements or part of the individual units. Plaintiff Concord and Cumberland Horizontal Property Regime excludes from this representation all other claims or damages that are owned exclusively by the individual unit owners, but includes all unit owners that have assigned claims to Plaintiff Concord and Cumberland Horizontal Property Regime. Also

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excluded from this representation is the unit owned by Guy Beatty who has already performed some repairs and whose windows and/or doors have already been replaced or repaired.

Each individual Unit-Owner Plaintiff represents and warrants that it has complete and unconditional authority to assert, compromise, and extinguish all claims asserted by each in this litigation, including all claims related to all window and door openings and the window and door units themselves in their Unit(s) or that may be owned by each unit owner as part of the unit and not as part of the common elements. Each individual Unit-Owner Plaintiff that is a signatory to this Agreement represents that it is his, her or its intent to fully and finally absolve RELEASEES and SUPERIOR of the RELEASED CLAIMS without regard to any dispute or ambiguity as to the ownership of the window and door units themselves or to any other element of the building whether deemed to be a common element or portion of a unit.

20. Confidentiality Provision. The parties to this Agreement and their respective counsel hereby agree and stipulate that the settlement sum and any contributions by any party shall be deemed confidential and not published, released or disseminated to any other person or entity except to governmental agencies for tax purposes, unless by written agreement of the parties or by court order or as otherwise required by law or as required in defense or prosecution of the EXCLUDED CLAIMS. This provision in no way affects or limits the PLAINTIFF-RELEASORS' obligations pursuant to The Residential Property Condition Disclosure Act codified at S.C. Code Ann. §27-50-10 et seq.

21. Severability. Whenever possible, each provision of this Agreement shall be interpreted so as to be valid under existing law. A finding of invalidity as to any provision of this Agreement or any portion thereof shall void only that provision or portion and no other, and this Agreement shall be interpreted as if it did not contain the invalid provision or portion.

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22. Cooperation. As further consideration for the Settlement Proceeds paid by or on behalf of Weather Shield, PLAINTIFF-RELEASORS agree that they will cooperate with Weather Shield in relation to the EXCLUDED CLAIMS and will waive any conflict of interest and permit any of their expert witnesses to be retained by Weather Shield, with Weather Shield bearing all related costs and expenses of the expert witnesses from the date of this Agreement forward to the extent Weather Shield decides to use or rely on such expert witnesses in its defense or prosecution of the EXCLUDED CLAIMS.

23. Enforcement. If the parties signing this Receipt and General Release must file pleadings against any other party or parties to enforce the terms contained in this document, then the losing party or parties to such enforcement action shall pay the winning party's or parties' reasonable attorney's fees and expenses incurred to enforce and/or defend the enforcement action.

IN WITNESS WHEREOF, each party hereunto sets its hand and seal as follows:

[Signature Pages Follow]

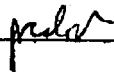
I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME
(C/A No. 2010-CP-10-2771)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: 

Its: 

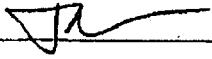
(Witness 2) Print: _____

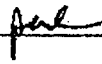
I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THOMAS R. MATHER
(C/A No. 2010-CP-10-2919)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: 

Its: 

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME
(C/A No. 2010-CP-10-2771)
[PLAINTIFF-RELEASOR]

M. Jensen
Candace R. Johnson
(Witness 1) Print: CANDACE R. JOHNSON
Moira Korman
M. G. Gurn
(Witness 2) Print: Moira Gurns

By: Thomas R. Mather
Its: BOARD MEMBER
Candace R. Johnson
BOARD MEMBER

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THOMAS R. MATHER
(C/A No. 2010-CP-10-2919)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

(Witness 2) Print: _____

By: _____
Its: _____

RECEIPT AND GENERAL RELEASE

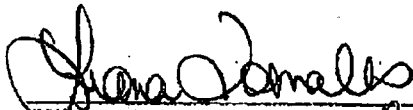
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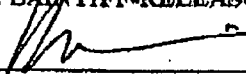
15

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

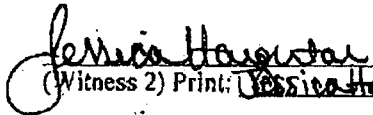
WITNESS:

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME
(C/A No. 2010-CP-10-2771)
[PLAINTIFF-RELEASOR]


(Witness 1) Print: Liana Pomes

By:  Wade Robinson

Its: Treasurer


(Witness 2) Print: Jessica Houghton

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THOMAS R. MATHER
(C/A No. 2010-CP-10-2919)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

BETTY Y. SEGAL
(C/A No. 2010-CP-10-3206)
[PLAINTIFF-RELEASOR]


(Witness 1) Print: M. J. Garvey

By: Betty Y. Segal
Its: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

SIGNATURE CHARLESTON and
WADE ROBINSON
(C/A No. 2010-CP-10-3207)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

BETTY Y. SEGAL
(C/A No. 2010-CP-10-3206)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

SIGNATURE CHARLESTON and
WADE ROBINSON
(C/A No. 2010-CP-10-3207)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: Sheryl Luttman

By: [Signature]

Its: Manager

(Witness 2) Print: America A Espinoza

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

16

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

JAMES C. KIRKPATRICK
(C/A No. 2010-CP-10-3208)
[PLAINTIFF-RELEASOR]

Allison M Gillespie
(Witness 1) Print: Allison m Gillespie

By: [Signature]

Its: _____

Mary B. Clegg
(Witness 2) Print: MARY B CLEGG

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAUL A. BRIM
(C/A No. 2010-CP-10-3209)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHIELD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

JAMES C. KIRKPATRICK
(C/A No. 2010-CP-10-3208)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHIELD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAUL A. BRIM
(C/A No. 2010-CP-10-3209)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: Paul A. Brim

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

FRED RAPPAPORT and JOYCE
RAPPAPORT
(C/A No. 2010-CP-10-3210)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THOMAS R. DEBNAM, AS TRUSTEE
OF THE TRUST AGREEMENT OF
THMOAS R. DEBNAM
(C/A No. 2010-CP-10-9580)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

FRED RAPPAPORT and JOYCE
RAPPAPORT
(C/A No. 2010-CP-10-3210)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THOMAS R. DEBNAM, AS TRUSTEE
OF THE TRUST AGREEMENT OF
THMOAS R. DEBNAM
(C/A No. 2010-CP-10-9580)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: Thomas R. Debnam

Its: TRUSTEE

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

18

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

STUART REEVES
(C/A No. 2011-CP-10-4683)
[PLAINTIFF-RELEASOR]

Gennifer Schwartz
(Witness 1) Print: Gennifer Schwartz
James M. Murray
(Witness 2) Print: James M. Murray

By: [Signature]

Its: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

MATTISON MACGILLIVRAY and
TERESA E. MACGILLIVRAY
(C/A No. 2011-CP-10-4663)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

19

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

STUART REEVES
(C/A No. 2011-CP-10-4603)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

MATTISON MACGILLIVRAY and
TERESA E. MACGILLIVRAY
(C/A No. 2011-CP-10-4663)
[PLAINTIFF-RELEASOR]

Barbara Lucare
(Witness 1) Print: Barbara Lucare

By: [Signature]

Eileen Cody
(Witness 2) Print: Eileen Cody

Its: [Signature]

UNIT 107

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

19

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

STUART REEVES
(C/A No. 2011-CP-10-4603)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

MATTISON MACGILLIVRAY and
TERESA E. MACGILLIVRAY
(C/A No. 2011-CP-10-4663)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: Barbara Luccara

By: M. Williams

Its: MacGillivray

(Witness 2) Print: Cileen Cody

UNIT 208

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

AVANT & ASSOCIATES, LLC and
OAKLAND HOLDINGS, LLC
(C/A No. 2011-CP-10-8549)
[PLAINTIFF-RELEASOR]

Sally W Walker
(Witness 1) Print: SALLY W WALKER

By: James E McMill

R. Brown
(Witness 2) Print: _____

Its: Owner Oakland Holding, LLC
Owner of Avant & Associates, LLC

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

304 CONCORD & CUMBERLAND,
LLC
(C/A No. 2011-CP-10-8550)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHIELD MFG., INC., THE MUEHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

AVANT & ASSOCIATES, LLC and
OAKLAND HOLDINGS, LLC
(C/A No. 2011-CP-10-8549)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHIELD MFG., INC., THE MUEHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

304 CONCORD & CUMBERLAND,
LLC
(C/A No. 2011-CP-10-8550)
[PLAINTIFF-RELEASOR]

Margaret J. Scholtz
(Witness 1) Print: *Margaret J. Scholtz*
Victoria McDonald

By: *Kathy Swoer*
Its: *managing mbr*

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

402 CONCORD & CUMBERLAND,
LLC
(C/A No. 2011-CP-10-8551)
[PLAINTIFF-RELEASOR]

Margaret J. Schultz
(Witness 1) Print: Margaret J. Schultz

By: Kathy Sweet

Its: Managing mbr

(Witness 2) Print: Victoria McDonald

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAMELA R. QUEEN
(C/A No. 2011-CP-10-9567)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

402 CONCORD & CUMBERLAND,
LLC
(C/A No. 2011-CP-10-8551)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAMELA R. QUEEN
(C/A No. 2011-CP-10-9567)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: Jessica Gibson

By: Pamela R. Queen

Its: owner

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAMELA L. VAUGHN
(C/A No. 2010-CP-10-9767)
[PLAINTIFF-RELEASOR]


(Witness 1) Print: I. KEITH MURPHY

By:

Its:

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

IN THE WIND, INC.
[RELEASEE]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
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I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

PAMELA L. VAUGHN
(C/A No. 2010-CP-10-9767)
[PLAINTIFF-RELEASOR]

(Witness 1) Print: _____

By: _____

Its: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

IN THE WIND, INC.
[RELEASEE]

Richelle Campbell
(Witness 1) Print: Richelle Campbell

By: [Signature] 10/24/13

Its: Attorney

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

22

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHIELD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

WEATHER SHIELD MFG., INC.
[RELEASEE]

Brandon W. Brummer
(Witness 1) Print: Brandon W. Brummer

By: [Signature]
Its: V.P.

Gail M. Herring
(Witness 2) Print: Gail Herring

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)

23

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THE MUHLER COMPANY, INC.
[RELEASEE]

Cynthia H. Sanden

(Witness 1) Print: Cynthia H. Sanden

Kathryn C. Conway

(Witness 2) Print: Kathryn C. Conway

By: P. J. [Signature]

Its: Attorney

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

WATTS BUILDERS, LLC
[RELEASEE]

(Witness 1) Print: _____

By: _____

Its: _____

(Witness 2) Print: _____

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

24

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

THE MUHLER COMPANY, INC.
[RELEASEE]

(Witness 1) Print: _____

By: _____

Its: _____

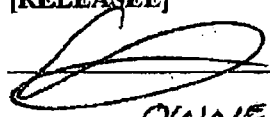
(Witness 2) Print: _____

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

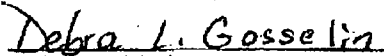
WITNESS:

WATTS BUILDERS, LLC
[RELEASEE]


(Witness 1) Print: _____

By: 

Its: OWNER


(Witness 2) Print: _____


DOUGLAS D. WATTS

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined into C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

24

I HAVE READ AND CONSENT TO THE FOREGOING AGREEMENT REGARDING THE SETTLEMENT REACHED WITH IN THE WIND, INC. ON APRIL 23, 2013, AND WITH WEATHER SHEILD MFG., INC., THE MUHLER COMPANY, INC., AND WATTS BUILDERS, LLC ON JULY 25, 2013.

WITNESS:

SUPERIOR CONSTRUCTION
CORPORATION
[RELEASEE OF CROSS-CLAIMS VS.
IN THE WIND, INC. AND WATTS
BUILDERS, LLC]

Angela J. Mitchell
(Witness 1) Print: Angela J. Mitchell

Ruth Hartsell
(Witness 2) Print: Ruth Hartsell

By:

Its:

President

RECEIPT AND GENERAL RELEASE

Concord and Cumberland HPR, et al. (Combined Info C/A No. 2010-CP-10-2271 for discovery and pre-trial proceedings.)
v. 10-21-13

25

Attachment L

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY
REGIME,

CASE NO. 2010-CP-10-2271

and

THOMAS R. MATHER,

CASE NO. 2010-CP-10-2919

and

BETTY Y. SEGAL,

CASE NO. 2010-CP-10-3206

and

SIGNATURE CHARLESTON,
LLC and WADE ROBINSON,

CASE NO. 2010-CP-10-3207

and

JAMES C. KIRKPATRICK,

CASE NO. 2010-CP-10-3208

and

PAUL A. BRIM,

CASE NO. 2010-CP-10-3209

and

FRED RAPPAPORT and
JOYCE RAPPAPORT,

CASE NO. 2010-CP-10-3210

and

THOMAS R. DEBNAM, AS
TRUSTEE OF THE TRUST
AGREEMENT OF THOMAS R.
DEBNAM,

CASE NO. 2010-CP-10-9580

and

PAMELA L. VAUGHN,

CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

Defendants.

DEPOSITION OF: KENNETH M. LIES, Volume I

DATE: September 23, 2013

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(843) 785-3263Myrtle Beach, SC
(843) 839-3376Columbia, SC
(803) 731-5224Greenville, SC
(864) 234-7030Charlotte, NC
(704) 573-3919

1 doesn't have to be utterly exhaustive. But kind of
2 walk me through a brief description of what your
3 involvement has been since 2008, let's say,
4 until -- well, I believe the first plaintiff's
5 lawsuit in this case was filed in April of 2010. I
6 stand to be corrected. But approximately
7 thereabouts. Tell me what you were doing during
8 that period of time.

9 A. Actually, most of my work was during
10 that time period, actually.

11 Q. Okay.

12 A. At least as far as on-site activities
13 go. I was originally retained in late 2008. I
14 don't -- I'd have to look at my records to give you
15 an exact date, I think, but it was late 2008.

16 Had a site visit to look at the
17 building with -- I was there with folks from The
18 Muhler Company. Walked the site, got a little bit
19 familiar with the window products and was -- the
20 issues, concerns that were described to me that the
21 windows -- related to the windows by the
22 contractor, developer and other parties.

23 Then I was back in December of 2008 to
24 witness some testing that was being performed by
25 Architectural Testing. I observed that testing.

1 I believe I may have gone to a meeting
2 that involved all parties or like most of the
3 parties that had any involvement in it.

4 For instance, I remember being at a
5 meeting with developer, contractor, subs, Muhler
6 Company as well as some experts that were helping
7 the various parties out. And that was either my
8 first trip down there or second trip after the ATI
9 testing.

10 Q. Was that on site or was that at a law
11 firm?

12 A. That was at a law firm, what I recall.

13 Q. Okay.

14 A. I took notes, observed the window
15 testing done by ATI, again in October -- or I'm
16 sorry -- December, I believe, of '08.

17 Started to develop an approach in my
18 mind of how to remedy the concerns that were being
19 expressed regarding the windows. We did some
20 research as well researching the window products.
21 And this would have been early 2009.

22 Developed an investigative and testing
23 program that I implemented back -- I believe it was
24 February of '09 to really understand and diagnose
25 why water penetration was occurring in some units

1 A. What is that? Well, after we came up
2 with a repair protocol and it was shared amongst
3 all the parties at the time and I received some
4 input/feedback from various people -- Skip Lewis in
5 particular looked at it -- we scheduled -- we
6 ordered materials, weather stripping, other
7 materials, hardware, and implemented the protocol
8 that we had developed on a couple of the specimens,
9 again, back in Unit 301, to see if we improved
10 performance or not. And so that activity occurred,
11 I believe, in March, if I'm not mistaken, of 2009.

12 Q. Okay. And ATI ran a number of these
13 tests. And would you generally say that the --
14 while the results improved, they still did not
15 produce passing results?

16 A. I would --

17 MR. NISTAD: Objection.

18 THE WITNESS: -- argue with that
19 characterization. I believe they were passing
20 results.

21 BY MR. MAJURE:

22 Q. Okay.

23 A. And one window -- I mean, anytime you
24 do this it's a process. And I recall one of the
25 windows. We ran the test. First of all, both of

1 them, the major water entry areas, which were water
2 that would come over the tops of the sashes, that
3 would infiltrate at operator roto mechanisms.

4 Let's see. What other one? Oh. May
5 run down the glass from a glazing leak. We
6 addressed all of those, and those were the symptoms
7 that were reported to us that I was getting
8 feedback from that the owners had identified and
9 noted.

10 It was also the major water penetration
11 that I observed not only in December but also
12 during our diagnostic testing in February of '09.
13 So those tests -- after we did the remediation on
14 it, those sources of water were taken care of.
15 They were eliminated.

16 The only thing that remained on one
17 window in the first series of tests, we got a
18 little bit of water that entered into the pan or
19 onto the test buck within the pan that was the
20 result of us adding the new hardware, and we missed
21 a seal.

22 I recall that there was also a seal
23 that was missed at the operator as well that had to
24 be put on. Did that and ran the tests again, and
25 we performed with no water penetration on that

1 window.

2 The other window that was in the east
3 elevation I recall getting leakage at a frame
4 corner intersection. And again, that -- or water
5 penetration. It wasn't really leakage because it
6 was collected and controlled within the pan every
7 time. And it was a very, very small amount. Tried
8 to redo that seal and was unsuccessful because we
9 ran out of time and the sealant was never able to
10 cure and set up.

11 But I'm confident that we would have
12 actually had no water penetration, not even into
13 the pan. But the water that we did get in that
14 second test or on that second one was very small,
15 and it was contained within the flashing system
16 underneath.

17 Q. Okay.

18 A. So I think I even wrote an email to
19 that effect, that I felt very strongly that the
20 windows could easily -- would be remediated
21 following the protocol, so...

22 Q. Okay. Since I don't have the other
23 itemized billing statements beyond February of
24 2009, I want to try to step back a little bit and
25 ask you some questions that are a little bit more

1 that was hard to open, that was skewed, if you
2 will, within -- from where it originally was
3 installed and was loose when you opened and closed
4 it. And the looseness broke a weather seal around
5 the roto operator mechanism between the sill piece
6 and the operating mechanism specifically.

7 Also saw sagging of sashes on some of
8 the units. And I'm not certain today whether or
9 not the hardware is responsible for that solely or
10 whether it's -- certainly a result of windows being
11 left open all the way for extended periods of time.
12 And I get that not from personal observation but
13 from reading transcripts of some of the people who
14 were at the jobsite during construction.

15 Q. Okay.

16 A. These are extremely, in my opinion,
17 heavy sash on the casements. And leaving them open
18 fully to pass materials through or for ventilation,
19 whatever, really does put a toll and weight on the
20 hardware that you wouldn't normally see in everyday
21 operating conditions.

22 Q. Let's talk a little bit more
23 specifically about the hardware. The hinges. Are
24 you saying that you calculate -- you determined, to
25 a reasonable degree of engineering certainty, that

1 THE WITNESS: I don't think I have any
2 other components -- of the components of the
3 window? None that I can think of.

4 BY MR. MAJURE:

5 Q. Okay. So, for example, you have no
6 real issue with the type of weather stripping that
7 was chosen for these windows.

8 A. No, no. But I do -- I know that the
9 weather stripping that was on the windows was not
10 able to provide a weather seal given the amount of
11 variation in the geometry between the sash and the
12 frame. Again, I talked about sagging sashes.

13 And this is, you know -- I don't want
14 to -- I don't want the record to reflect that all
15 the windows had extremely sagged sashes, because
16 that's not the case at all. But some of them were
17 extremely bad. And some of the sashes were bowed
18 or -- I'll call it bowed, warped beyond a plane.

19 And for the weather stripping to work
20 between the frame and the sash, that has to be --
21 that plane has to be consistent within the
22 tolerance of the weather stripping.

23 You had conditions on some of the
24 windows where that was exceeded. And so,
25 therefore, the weather stripping that was on the

1 Q. Okay.

2 A. No.

3 Q. And in addition to measuring the
4 windows themselves for being within tolerances for
5 plumb, level and square, did you measure -- did you
6 attempt to measure any of the window rough
7 openings, the bucks that the windows were affixed
8 into?

9 A. We -- I don't recall measuring width
10 and height of the bucks per se. What we did is we
11 measured the distance between the window frame and
12 the buck on the interior side. So that's the
13 dimensions I do have. From the inside of the
14 building, obviously.

15 Q. Okay.

16 A. But it's hard to -- I guess I'm -- it
17 would be hard to do what you -- to measure just the
18 bucks, I think.

19 Q. Okay.

20 A. And the reason I say that is because
21 the two-by-sixes, I believe they were, are not
22 always perfectly straight in themselves.

23 Meaning it might be -- you might have a
24 dimension that's tight back by your nail fin, but
25 by the time you get into the inside of the

1 building, it's now gapped a little farther or
2 tighter. They're just -- they're not straight.

3 And part of that is a function of using
4 pressure-treated lumber to do it in the first
5 place, because that's not a real stable --
6 dimensionally stable wood.

7 Q. Okay. As far as your method that you
8 used to determine whether a window was within
9 tolerances for square and plumb, did you use the
10 corner-to-corner measurement, or did you use like a
11 water level?

12 A. We used -- we did not use water levels.
13 We used a -- more of a carpenter's level. We
14 measured diagonals of the opening, generally. We
15 also -- can I get my notes so I don't misstate
16 something here?

17 Q. Sure.

18 A. I think it's in this one. Here we are.
19 Okay. I'm going to start my answer over again.

20 We measured the diagonals of the entire
21 opening, typically, and then we also -- we did
22 diagonals of the operable sashes on the casements.
23 We measured plumb, level and square on sides. Or
24 plumb and level whether vertical or horizontal. We
25 measured the distance between the buck and the

1 consider: One of them being abuse. What have you
2 personally documented as being abuse for these
3 windows?

4 A. By the owners I haven't. I don't have
5 any knowledge, because I didn't do that analysis.

6 But I can tell you, when I was out
7 there for my site visits, we see a lot of weather
8 stripping where -- the interior weather stripping
9 on these units are a vinyl leaf, L-E-A-F, type
10 weather strip. There was a lot of leaves weather
11 stripping that was damaged, that was broken off at
12 corners where the whole side of the leaf was broken
13 off and taken out. There was areas where it was
14 missing.

15 There was areas where -- or there were
16 windows -- and not just one or two -- that had all
17 kinds of debris in the sills, whether -- I remember
18 seeing mortar dust, I remember seeing drywall
19 compound on the weather stripping. I remember
20 seeing all kinds of abuse.

21 And then I see -- and then I measure
22 some of these units or tried to open them up and I
23 can see that the operators have been damaged, where
24 they're rotating inside as you crank them open and
25 the seal's been gone.

1 I saw sashes that are basically
2 scraping as you open and close them. So that's
3 what I saw when I was there.

4 As far as going into people's units and
5 looking, I didn't do a big survey to give you an
6 answer. I did go into some people's units. And,
7 quite frankly, I didn't see any signs of leaks in
8 the couple units I was in.

9 We did create a leak, I will say, in a
10 unit below one of our test windows, though. And
11 she had had -- I believe she had reported that she
12 had had a leak there before. So just the runoff
13 from our water spray created a leak on top of her
14 window well.

15 Q. But now with the windows that were
16 actually being tested, though, they were inspected
17 prior to being tested, and they were cleaned prior
18 to being tested; correct?

19 MS. VARNADO: Objection.

20 THE WITNESS: In some cases, correct.
21 For sure in some cases, correct.

22 BY MR. MAJURE:

23 Q. Okay. In what cases did you document
24 someone subjected a window to a water test in which
25 the window aperture or some portion of it had

1 clear sealant and Dow 799 does.

2 Q. Okay.

3 A. And that's -- this is exactly what we
4 used when we did the repairs to the prototype
5 windows. I don't believe 795 comes in clear.

6 Q. And under sash, glazing and cladding,
7 Items A through C are the same.

8 A. Yes.

9 Q. And then A and B under mullions and
10 stacks are changed in several respects; correct?

11 A. Yes. A, the original was to inspect
12 them and repair as necessary, I guess. And I
13 changed it to replace them, I believe.

14 Q. Okay. So your current repair protocol
15 has 24 steps to it.

16 A. Okay.

17 Q. Aren't you pretty much just about
18 taking the whole thing apart and putting it back
19 together again?

20 MS. VARNADO: Objection.

21 THE WITNESS: No.

22 BY MR. MAJURE:

23 Q. Okay. In what ways are you not?

24 A. The big thing is we're not removing the
25 windows from their openings, which is a major,

1 could do further testing and research and
2 investigation to see if it's okay or not. And
3 that's the part I haven't done yet to be able to
4 answer your previous question.

5 BY MR. MAJURE:

6 Q. So what testing activities did you
7 perform in your lab or your facility? You've
8 already mentioned a couple items. What else have
9 you done?

10 A. That I did in my lab?

11 Q. Well, did you take -- did you not take
12 some samples?

13 A. Oh, oh, oh, oh. I took a piece of the
14 weather stripping and put it on an exterior door of
15 our office lab -- lab office. That I did do.

16 Q. Did you ever obtain an exemplar of
17 these particular Weather Shield windows and take
18 them apart or do any testing on them yourself?

19 A. Have not, no.

20 Q. Okay. Let's talk about the design that
21 the architect used to implement these windows into
22 his building envelope.

23 Do you have any criticism of the design
24 that the architect used to incorporate these
25 windows into the building envelope?

1 A. I don't think it was totally -- it was
2 completely thought out. So I do have criticism of
3 the design in that respect in that -- and let me be
4 specific on that.

5 I don't think there was a good plan
6 prior to -- of what the final detailing was going
7 to be prior to The Muhler and their subs getting
8 out there to start installing windows. I think it
9 was kind of made up on the spot in the
10 preconstruction meeting. That's what it comes
11 across to me.

12 I think they had a general idea of
13 conceptually maybe what they were going to do. But
14 even today I'm not clear exactly how it's done. I
15 wasn't -- haven't been able to get permission to
16 tear the brick off or the stucco off to see exactly
17 what was done. I'm kind of intrigued to see the
18 pictures that were just provided this morning.

19 But some of the leaking, for instance,
20 that we got into the bucks during our testing has
21 to have -- there's something going on with the way
22 the membranes are installed to the nail fin for
23 that to happen, and I don't know what it is. But
24 something's mislapped or there's a hole or
25 something.

1 And then you bring it into a pan, and I
2 have -- I'm one that has -- I have nothing against
3 sill pans. I know some other people are. But you
4 have to understand sill pans.

5 First of all, they've got to be back
6 sealed or you're going to get percolate -- any
7 water that gets into them and you have differential
8 pressure, they're going to percolate water in.
9 These aren't done.

10 There's too big a gap between the back
11 of the pan and anything you could reliably seal
12 against. Because the thing that you really want to
13 seal against is the back of your window. And these
14 aren't tall enough to do that. There's no --

15 Q. So the rear end dam is not high enough,
16 in your opinion?

17 A. No, it's not at all. And then after
18 it's been bent and everything, that would make that
19 even harder. But there's no slope to it, positive
20 slope. So you have a water collection device that
21 you put into your design to collect incidental
22 water, but it has nowhere to go.

23 Q. Let me stop you right there. You're
24 saying the pan has no positive slope?

25 A. No.

1 raised their hand - and maybe they did verbally,
2 but normally you'd like to see that in writing -
3 and said how are we going to -- you know, tell us
4 exactly, step by step, how we're going to do it and
5 show us some 3-D or isometric drawings. That would
6 have been the best way to handle it.

7 Either that or walk through another
8 mock-up step by step, take pictures of every step.
9 But memorialize it. I agree with you. Because as
10 I said, sitting here today, I don't know how they
11 did it. Sounds like there's question if anybody
12 knows how they did it.

13 Q. Okay.

14 A. Because it wasn't memorialized.

15 Q. Okay. Let me make sure I've got all
16 your comments about your critique of the overall
17 window assembly installation designed by the
18 architect.

19 You are critical of the fact that
20 there's no back seal to the pan, the rear end dam
21 is not high enough, in your opinion, and the pan
22 has no positive slope or pitch.

23 A. Correct.

24 Q. And the drip edge of the pan has no
25 means to evacuate water to the outside of the

1 building envelope.

2 A. Yeah, regarding the stucco in
3 particular and the stone as well.

4 Q. Okay. Anything else? Did we get to
5 the bottom of the issue of wrapping the --

6 A. Well, here's another thing.

7 Q. Okay.

8 A. Maybe it exists and I just haven't seen
9 it. There should have been some instruction on how
10 to attach the buck, what size screws, what spacing,
11 how to attach that buck to the opening.

12 I understand there's some
13 correspondence, or maybe it's just in the
14 transcript, that it is to be anchored at the tops
15 and sides but not through the sill and that the
16 structural engineer reviewed this. But I haven't
17 seen anywhere where it's, again, memorialized as to
18 how to actually attach it.

19 Q. Okay. Have you personally looked into
20 the issue of whether or not the as-built
21 configuration of the fasteners for these windows is
22 structurally adequate? Or someone in your firm?

23 A. Nobody has done any kind of analysis of
24 that, no.

25 Q. Okay.

1 A. But back to the criticism again of the
2 test buck, I also think it's a bad idea to use
3 Wolmanized or pressure-treated lumber, because that
4 stuff is never straight. It curls and warps as it
5 dries out. And you want a really good substrate
6 for not only your windows. You want a good
7 substrate for your waterproofing as well.

8 So although I appreciate that they were
9 trying to get something that wouldn't degrade if it
10 got wet. But heck, the jambs aren't going to be
11 under water, the top piece isn't going to be under
12 water, and you could have easily picked something
13 more stable that had water resistance through your
14 sill suction if you wanted to do that.

15 Q. Do you believe that that was a poor
16 design choice that rises to the level of being a
17 breach of the standard of care?

18 A. I haven't come to that conclusion yet,
19 but I will say it was not a smart decision, in my
20 opinion.

21 Q. Okay. Anything else?

22 A. Not that I can think of, no. And I
23 interrupted you on your next question. I know I
24 did.

25 Q. And so you're not critical of wrapping

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

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THOMAS R. DEBNAM, AS
TRUSTEE OF THE TRUST
AGREEMENT OF THOMAS R.
DEBNAM,

CASE NO. 2010-CP-10-9580

and

PAMELA L. VAUGHN,

CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

Defendants.

DEPOSITION OF: KENNETH M. LIES, Volume II
DATE: September 24, 2013

A. WILLIAM ROBERTS, JR., & ASSOCIATES
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(864) 234-7030

Charlotte, NC
(704) 573-3919

1 A. That's correct.

2 Q. Okay. So would you say that your
3 repair protocol was a success?

4 A. Yes.

5 Q. Under what standard?

6 A. Under the -- well, a number of
7 standards. I believe it corrected the leakage that
8 the building was experiencing under normal climatic
9 conditions.

10 I believe it also demonstrated that the
11 windows, as installed, would not leak to the
12 interior under the criteria established by Estates,
13 which was 5.5 PSF.

14 The only moisture that we got was a
15 leak of an area that was -- essentially had to be
16 remediated and the sealant didn't quite cure. But
17 it only ended up being a small quantity of water
18 into the test buck area, which is an area that, as
19 you said previously, would be an area that you
20 would expect to have some incidental moisture
21 accumulate into anyway.

22 But I believe that had we had time to
23 let the sealants cure properly, it would have also
24 resulted in zero water into the pan. As it was, it
25 was a very small amount.

1 Q. Why would you test at all without the
2 sealants cured? I mean, why would you even try
3 that?

4 A. Well, because we learned -- you know,
5 we implemented the repair protocol. And then in
6 doing the test we learned of some things that we
7 should have done. The tests revealed a joint that
8 we didn't have in the protocol to be sealed, and
9 that's why it got modified.

10 So we implemented that and tried to
11 pull off a successful test without, you know, the
12 sealants actually being completely cured at that
13 point. In fact, they were wet. They weren't even
14 skimmed over. But we were on a time crunch. The
15 owner wanted us out of there. So we did the best
16 we could.

17 Q. Can I see your copy of the report?

18 A. The ATI report?

19 Q. Yeah. Okay. On Page 5 of 7 where it
20 lists the test results --

21 A. Yes.

22 Q. -- it mentions that Estates, quote,
23 testing was stopped at client's request. Who do
24 you understand that client to be?

25 A. That would have been my request.

1 Q. That would have been your request.

2 A. Yes.

3 Q. Why did you stop the test at 1:20?

4 A. Because what I was trying to achieve
5 was zero water into the test buck area. So since
6 it appeared -- I said, let's stop. Let's try and
7 figure this out before we go on so we can get a
8 successful test accomplished to meet that
9 objective. And these tests take time to run. And
10 again, the owner, Dr. Mather I think his name was,
11 was very anxious to have us done and out of there.

12 Q. Now --

13 A. So I said, let's not waste time. Let's
14 get this fixed.

15 Q. Was this the cyclic test being
16 performed?

17 A. Yes.

18 Q. And that's supposed to be run for five
19 minutes.

20 A. Five minutes pressure on, one minute
21 off, three cycles.

22 Q. Since it's only five minutes, why would
23 you not allow it to run the full five minutes so
24 you could see all of the places in which it could
25 possibly be leaking and not just stop it as soon as

1 Q. What are other causes of a glazing
2 leak?

3 A. I think you could get some -- more
4 likely than not it's because the seal was
5 incomplete at the factory, quite honestly.

6 Q. Sure. How about if you leave windows
7 open in the rain and the interior wood is not
8 finished or painted and so, therefore, that
9 interior wood gets wet?

10 A. If it gets wet and you would lose the
11 bond of the sealant, glazing sealant, that could
12 happen, I suppose. I'm not sure I saw that,
13 though. I'm sure I didn't see one like that.

14 Q. Could glazing leaks also be caused by
15 someone removing a cap bead?

16 A. I think you could reintroduce the
17 glazing leak by removing a cap bead. So in that
18 respect, yes.

19 Q. Digging down, I mean, to take out the
20 cap bead you're going to use some type of knife or
21 something; right?

22 A. Yes. But I guess maybe I'm not
23 following you, but --

24 Q. I'm not saying it's a good idea. I'm
25 just saying if somebody -- if these windows had

1 been cap beaded and then somebody came along and
2 dug out the cap beads, they could cause --

3 A. They would negate the effectiveness of
4 the cap bead itself, and I would agree with that.

5 Q. Okay. Would you also agree that in
6 their work they could also cause further damage
7 that would result in a glazing leak?

8 A. I guess it's possible, depending on
9 how -- which window and how that window was
10 originally glazed to begin with. It's possible.
11 And my answers are regarding the windows at
12 Concord & Cumberland.

13 Q. Yeah.

14 A. Okay. So I don't get this handed to me
15 in another matter saying, wait a minute.

16 Q. You read Mr. Andrews' deposition?

17 A. Yes, but -- yeah, quickly.

18 Q. Did you get to the part where he talked
19 about receiving a report some of the windows had
20 been left open during a high wind event and the
21 sash had torqued?

22 A. I recall reading -- that was in one of
23 the transcripts, but I -- it must have been his, I
24 suppose. I'm not certain it was his or not,
25 though.

1 Q. Okay.

2 A. I remember reading something to that
3 effect, though.

4 Q. Okay. Did you observe any conditions
5 in the field when you were there that would be
6 consistent with the type of damage you would expect
7 from the windows being exposed to a high wind
8 event, open?

9 A. Well, certainly there was sagging sash
10 members, which putting a lateral load on an open
11 casement like that would certainly cause movement
12 and distortion and sagging, potentially. So I
13 would say yes, I did see conditions that might
14 correlate.

15 Q. And in your repair protocol you were
16 accommodating that condition.

17 A. Well, interesting you asked that
18 question. Yes, with the exception I believe there
19 are some out there that are so bad I can't fix
20 them. That's a handful of them that I remember
21 that I don't think my protocol could fix, that they
22 would have -- the sashes at least would have to be
23 completely replaced.

24 Q. Okay.

25 A. They were just twisted so badly.

1 in a position to extrapolate from that, the test
2 failure, that the windows are defective?

3 A. Defective by design?

4 Q. Yes.

5 A. No.

6 Q. Are you in a position to say they were
7 defectively put together or manufactured because of
8 that test failure?

9 A. I think -- in some cases I think there
10 is, for instance, a glazing failure. More likely
11 than not that was something that happened at the
12 factory, in my opinion.

13 Q. Right.

14 A. But it's not a widespread. It's a
15 onetime thing. So in that regard, that particular
16 unit might have had a manufacturing deficiency, but
17 I don't find that as a manufacturing design or
18 actually something that you wouldn't -- you
19 don't -- I mean, you kind of expect seeing a
20 glazing failure every now and then anyway because
21 these are made by people, and people aren't always
22 perfect. So having an isolated glazing failure or
23 a few doesn't shock me, and it's something that can
24 be addressed.

25 Q. Okay. In some of these instances where

1 there was water penetration observed during the
2 testing process, water showed up between the window
3 and the frame; correct? Between the window and the
4 buck.

5 A. Correct. Quite often, quite honestly.

6 Q. Okay. Would you attribute that to a
7 failure of the waterproofing?

8 A. Possibly. Possibly due to the
9 waterproofing. Without taking -- and I didn't do
10 this. Without taking the cladding apart, taking it
11 off at the jambs or the surround of the window,
12 it's hard to tell. I mean, there's no way to tell
13 for sure if it was waterproofing-related or not.

14 Q. Okay. And when Stafford Consulting had
15 that condition occur did they take apart the
16 cladding to do that further investigation?

17 A. No. I mean, I can tell you that there
18 are -- there were sealant failures. And I'm not
19 suggesting where Stafford tested, because I can't
20 recall right now whether we documented that or not.

21 But there are areas around these --
22 around the windows when I was out there where the
23 caulking was not complete; where, we talked
24 yesterday about, was omitted underneath brick
25 lintels and underneath the flashing at the lintel

1 line that would allow water to get back to that
2 waterproofing line.

3 Q. And, therefore, cause failure of the
4 test.

5 A. If the waterproofing wasn't complete,
6 yes, that could contribute to water showing up now
7 on the test buck frame. Or not test buck. Or
8 the -- now I'm -- just the buck or -- I guess
9 that's what we've been calling it, but it's not a
10 test buck.

11 Q. Test buck is what you use in a lab.

12 A. Yes.

13 Q. This is just a buck system, I guess.

14 A. Yes.

15 Q. Okay. And do you agree with me that in
16 some instances where water came in over the sash,
17 for instance, that that could have been caused by
18 abuse or misuse of the window?

19 A. Could be, yes.

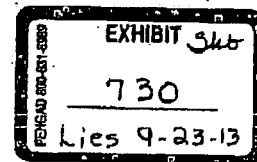
20 Q. Did you see any instances with Stafford
21 Consulting where they ran the test -- they tested
22 their spray rack before they started the test, but
23 they tested the spray rack on the window itself?

24 A. Well, I saw them seeing if they could
25 get pressure, I guess, and flow rates. I did see

Attachment M

Apr. 28, 2009

**CONCORD & CUMBERLAND CONDOMINIUMS
PROPOSED WINDOW REMEDIAL WORK SCOPE**



Following the implementation of remedial work at the two test windows in Unit 501, observing the testing conducted by Architectural Testing Inc. (ATI) and conducting additional diagnostics, Rath's, Rath's & Johnson, Inc. (RRJ) has revised the proposed window remedial work scope for the windows at the Concord & Cumberland Condominiums. It is recommended that the following scope of work be implemented on all of the windows:

Windows

- A. Remove the casement sash from the window frame. Remove operator cover, operator, and hinges. Remove leaf weatherstripping.
- B. Clean debris from window sill and frame. Remove excessive and prior remedial sealants exposed at the jamb and sill. Wipe surfaces clean with solvent using a two-cloth method.
- C. Fill fastener penetrations in the sill and sash frame with epoxy wood filler. Seal holes in vinyl cladding at sill with vinyl repair material.
- D. Seal jamb-to-sill intersection with Dow Corning 999 sealant, using a cove-type bead configuration. Also, seal the intersection between the vinyl and aluminum cladding at the sill and tool flush.
- E. Inspect bulb gaskets at the jamb and head of the frame. Seal gasket kerf groove between jamb and sill sections. Cut back gasket slightly if needed to access kerf.
- F. Install new Truth Hardware Maxim Series Sill Mount Dual Arm Roto-operator on 1/8 inch thick compressible pad. Assure seal between pad and sill frame well as between the pad and operator. Install new track and stud bracket on the sash.
- G. Install new Truth Hardware Maxim Series Washability Casement Hinges.
- H. Install new operator cover with bulb gasket. Cut access hole for new operator cover, apply penetrating sealer to cuts, and primer to piece prior to installation. Seal ends of operator

cover to jambs and set in continuous bed of sealant. Pre-drill holes and attach operator cover with trim screws. Apply paintable silicon-latex sealant between operators and covers and at interface with jambs.

- I. Inspect top of sash rail and recess sash frame screws that project above the rainwater gutter.
- J. Install new limit stop device on sash and frame. (Optional)
- K. Inspect leaf weatherstripping and replace if damaged.
- L. Install surface mount Q-lon sweep weatherstripping at the top rail and non-hinge stilés of operable sash. Apply epoxy adhesive over aluminum cladding screws on top rail prior to installation of weatherstripping. Install Q-lon sweep weatherstripping tight to exterior side of bulb gasket at hinge side jamb frame.
- M. Reinstall sash. Perform needed adjustments for proper seat and compression on bulb weatherstripping. Adjust keepers as needed to achieve positive latching and gaskets seals.
- N. Apply finish coat of latex paint to frames and sashes that have only factory prime coat.
- O. Inspect exterior aluminum cladding joints on the frame. Apply sealant (Dow Corning 999) bridge seals to open or gapped cladding joints.

Sash Glazing and Cladding

- A. Inspect fixed and casement sash exterior glazing cap bead applications. Correct gaps or other observed deficiencies.
- B. Inspect exterior aluminum cladding joints at sash. Apply sealant (Dow Corning 795) bridge seal to all gapped cladding joints.
- C. Inspect for evidence of glazing leakage on interior. At suspect locations, remove wood glazing stop and install a heel bead of sealant (Sikaflex) between glass edge and sash frame. Install new glazing stops.

Mullion and Stack Covers

- A. Remove all horizontal and vertical mull caps and covers. Inspect joint between window frames and seal any voids.
- B. Clean accessory grooves of debris and prior sealant. Install new mull covers in a complete bed of Dow 795 silicone sealant.

Window Perimeters

- A. Extend the perimeter joint sealant profile to fully cover the exposed window accessory grooves and bonding to the adjoining cladding substrate (masonry, stucco, or stone). Install new Dow Corning 790 silicone sealant. Achieve a minimum bond of $\frac{1}{4}$ inch onto the window frame (past accessory groove) and a minimum $\frac{1}{4}$ inch bond onto the wall cladding.
- B. Install Dow Corning 790 joint sealant between the bottom of the drip cap and head of the window frames.
- C. At the steel lintel/brick interface, apply sealant to the joint between the brick and lintel at the return leg of the interface. Marry this joint with the perimeter sealant at the window perimeter.
- D. Install sealant between bottom of metal brick flashing and steel lintel.

Attachment N

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY
REGIME,

CASE NO. 2010-CP-10-2271

and

THOMAS R. MATHER,

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THOMAS R. DEBNAM, AS
TRUSTEE OF THE TRUST
AGREEMENT OF THOMAS R.
DEBNAM,

CASE NO. 2010-CP-10-9580

and

PAMELA L. VAUGHN,

CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

Defendants.

DEPOSITION OF: MYLES A. GLICK, AIA, Vol. I

DATE: July 22, 2011

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 A. I was tasked with trying to find the
2 causes of the water intrusion into the exterior
3 skin of the building and ultimately into the units.
4 In order to do that, I had a roof survey done by
5 REI, Roger Parker, and the exterior skin of the
6 building, meaning the brick and the stucco, I
7 provided a forensic investigation for those
8 materials myself.

9 Q. So would it be fair, then, to say that
10 when you're looking at the exterior envelope of the
11 building, the roof system essentially has been
12 handled by REI and you're deferring to their work,
13 but the remainder of the exterior envelope of the
14 building has been within the scope of your
15 services? Would that be fair?

16 A. Correct.

17 Q. Okay. First of all, do you believe
18 that you have been provided with information that
19 identifies all of the known sources of water
20 intrusion into the interior of the building?

21 A. I don't think I could ever know all the
22 places of water intrusion. I've identified typical
23 locations, but there are going to be other areas
24 discovered when we strip the building and areas --
25 things that I can't see --

1 A. Correct. And my destructive tests
2 confirm what's on those drawings.

3 Q. That was my next question.

4 So in the destructive test cuts that
5 you performed at the window areas, did you observe
6 that the as-built condition for the installation of
7 the windows conformed -- well, substantially
8 conformed to the design requirements that are shown
9 in Exhibit 36?

10 A. I would say that they resembled them.
11 They did not conform to them because the architect,
12 as awkwardly as it is, does call out weeps and
13 other areas of concerns, such as flashing, but if
14 you look at the drawings very carefully, it doesn't
15 really show you what he's talking about. He's got
16 the word and an arrow and there's really no
17 explanation. I mean, there's really no detail on
18 it. What's out in the field appears to be similar
19 to it, except they leave out the weeps.

20 Q. Okay. Now, is the -- the weeps are
21 left out in the design or the weeps are left out in
22 the field, the as-built?

23 A. In the field the weeps are not there in
24 the stucco, for instance, but he calls out weeps on
25 that drawing. But he calls it out but doesn't show

1 you what to do. So they're -- they're -- they're
2 not the best drawings in the world. They indicate
3 something should weep and what normally would
4 happen, a contractor would say, hey, what are you
5 talking about here? Show me -- give me some
6 clarification. And the architect would give him
7 some clarification. If the contractor did not ask
8 for clarification and built it without any other
9 documentation, the builder would be responsible for
10 the design at the end of the day.

11 Q. Okay.

12 A. And I did not see anything and I don't
13 have access, quite frankly, to any of his files
14 that indicate that that took place. I've been
15 through the architect's files of what I have.

16 Q. All right. Now, then other than the
17 weeps, does the as-built condition of the
18 installation of the windows substantially conform
19 to the requirements that are shown in Exhibit 36?

20 A. Well, Exhibit 36 is large. I mean, I
21 can't answer that question as a general.

22 Q. Sure.

23 A. We're going to have to go through every
24 one of those drawings because they're all
25 different. They're -- they're taken at different

1 A. My notes -- my hands are on -- notes --
2 handwritten notes are on the left-hand side of the
3 bottom drawing where I write, percentage of slope
4 with a question mark. Under the word drainable
5 trim is a question mark. Again, here's a great
6 example, it says, drainable trim and an arrow. It
7 doesn't show you what the drainable trim is. I
8 don't know how the hell you'd know what to do. You
9 would have to ask for further direction if I was a
10 contractor and then I -- I wrote the word, blocking
11 treated with a question mark.

12 Q. Oh, that --

13 A. Is that -- is that blocking treated?
14 That was a -- it wasn't noted. I -- I had that
15 question.

16 Q. Okay.

17 A. The next page is Sheet Number 3.

18 Q. Okay.

19 A. And I question the fact that, is this
20 really shown right, because they've got the
21 secure -- I'm, sorry, they've got the screw that
22 secures the window literally shown between two
23 pieces of blocking. That has no holding power.
24 That would pull out in heartbeat in a storm. So I
25 was raising the question, did they really build it

1 another X. That's a secondary piece of blocking
2 and then you have your stainless steel pan. In the
3 field the secondary blocking was not there.

4 Q. Okay. It was just one large piece of
5 wood?

6 A. Yeah, and I -- to me that doesn't make
7 any difference. I mean, I'd rather have one piece
8 of wood. So that in and of itself is not a problem
9 to me. So it does reflect it in that regard --

10 Q. Okay.

11 A. -- but not exactly per this drawing.

12 Q. Okay. Are there any other
13 conditions -- are there any other design
14 requirements that are shown by the first page of
15 Exhibit 36 that you believe are contrary to Weather
16 Shield's installation instructions?

17 A. No. That's the only ones both on -- on
18 the head of the window and the sill of the window.

19 Q. Okay. Are there any conditions --
20 design requirements depicted on this first page of
21 Exhibit 36 that you contend violate any particular
22 building code or widely-recognized industry
23 standard?

24 A. Well, the architect has indicated
25 through-wall flashing at the head of the

1 building --

2 Q. Okay.

3 A. -- with weeps just by the nature of the
4 graphics and showing the flashing coming through at
5 the head. That is very -- there's very few
6 examples of any flashing at the head of the windows
7 doing what the architect has shown.

8 Q. Okay.

9 A. And that -- that --

10 Q. That's a question of the as-built
11 versus the design and that was going to be my next
12 question, but I'm asking you as far as --

13 A. Well --

14 Q. -- the design that's depicted here, is
15 there anything about the design that you contend
16 violates the building code or any widely-recognized
17 industry standard?

18 A. No.

19 Q. Okay. Now, then let's go to the next
20 observation.

21 For the rest of the conditions depicted
22 in the first page of Exhibit 36, what is it that
23 you've observed in your test cuts that in the
24 as-built in the field that deviates from this
25 apparent design requirement?

1 definable to me, it's vague as can be, but it does
2 show something, puts the contractor on notice.

3 Q. Yes. Now, whatever it would be
4 draining would be coming down and -- from above the
5 trim, coming down on the flashing and then
6 evacuating down to that -- I guess that slot; is
7 that right?

8 A. I would believe that's how he would
9 hope it would be.

10 Q. So where, then, is the evacuation path
11 for water coming down that flashing to get to that
12 slot?

13 A. That's exactly my question.

14 Q. Okay. So it's not depicted?

15 A. No, it's not depicted. That's why I
16 said it's vague as could be and that's where the
17 contractor should ask questions. I mean, it's --
18 there's a bunch of information that puts you on
19 notice, but it doesn't tell you how to get there.

20 Q. Do you know if the purpose of the
21 drainable trim is to drain water that's evacuated
22 from the water management system on the inside or
23 instead is to allow water that drips down the
24 exterior surface of the stucco and breaks the path
25 of the water to keep it from running back to the

1 situation, you drain stucco. The code says it, you
2 received a building permit that says I'm going to
3 follow the building code, and in this case, you
4 should know this.

5 Q. Okay.

6 A. Why would you pay your subcontractor if
7 he didn't do all the work? Aren't you checking the
8 subcontractor's work? How many windows are here?
9 It's not like it's one window. I mean, it
10 stretches for a block. You got 50 windows. I
11 really don't know how many. There's quite a few
12 windows. You can look up and see if there's
13 flashing. When I got out of my car, there was no
14 flashing. That's when I called Mr. Ogiba and said,
15 I think you got more problems than you do just
16 trying to keep water out of these windows. I think
17 you got some other problems. So I saw it when I
18 got out of my car. This guy's been on the job
19 24/7 -- well, sorry, eight hours a day, you know,
20 seven day -- five days a week, six days a week. I
21 think he should see it.

22 Q. Okay. But, again, because you have not
23 been able to fully examine the construction file,
24 you don't know at this point if the contractor's
25 raised an objection to this issue and whether or

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CASE NO. 2010-CP-10-9767

Plaintiffs,

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Defendants..

DEPOSITION OF: MYLES A. GLICK, AIA, Volume II

DATE: May 4, 2012

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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(704) 573-3919A. WILLIAM ROBERTS, JR. & ASSOCIATES 800-743-DEPO
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1 of the fourth-floor balcony units, the as-built
2 installation violates the Schluter manufacturer's
3 installation instructions?

4 A. Well, I've only seen one, 401. I've
5 not seen the others. I have no reason to believe
6 that they're built any different because they have
7 the same dimensions. So they can't achieve the
8 same slopes and curb requirements.

9 Q. So with your observations at the
10 balcony at 401, if you could list for me all the
11 aspects in which the installation deviated from the
12 manufacturer's instructions. You talked about
13 slope. Anything else?

14 A. Slope is the biggest thing.

15 Q. Okay. How about the interface of the
16 system to the deck drains? Did you find any
17 deficiencies with that?

18 A. We didn't take apart the system. The
19 water is already in the mortar bed of the system.
20 Because of its efflorescence, the calcium and the
21 lime is coming out. The pictures indicate that
22 there's massive water intrusion in the deck itself.
23 So it's obviously failed. It's coming back out.

24 And after time, all you're left with is
25 mortar, and the tile is just going to -- you'll be

1 able to pick the tile up with your hands because
2 you've lost the bonding capacity.

3 The other problem with the decks is the
4 lack of curb. And as I just demonstrated in 401
5 where I did my own water test, which was nothing
6 more than put a hose on the deck, the water came
7 right into Unit 401. So there's no vertical
8 flashing from the membrane to stop it from going
9 into the unit.

10 Q. Okay.

11 A. And that was in that -- all those
12 pictures in that interiors book. I don't know if
13 it was made an exhibit the last time or not.

14 Q. Okay. When did you do that water test,
15 Myles?

16 A. When?

17 Q. Yeah.

18 A. Let see if I can put a date on it.
19 7-11-2011.

20 Q. Okay.

21 A. And the pictures are Slide 69, 68
22 showing the rusted studs, and the rusted decking
23 underneath the wood flooring, 67.

24 Q. Okay.

25 A. And I'm looking at -- I don't think --

1 I mean, even if you had that strip there, I guess
2 the water would go here and then hit this other
3 piece of flashing down at the slab level.

4 I mean, the plans are -- they're vague.
5 They have information. I would request an RFI if I
6 was the contractor.

7 Q. Okay. So --

8 A. If there's no RFI, then the contractor
9 assumes design responsibility.

10 Q. If the condition in the field -- if the
11 condition in the field with the brick coming up
12 level with the edge of the deck is found, that
13 would actually conform to Detail No. 8, wouldn't
14 it?

15 A. Well, graphically it does.

16 Q. Okay. Now, you know, sometimes an
17 architect can modify a manufacturer's instructions
18 for a particular application.

19 You would agree then that there is a
20 way that an architect can choose to modify a
21 manufacturer's instructions and still carry out the
22 intent of drainage in the exterior cladding.

23 A. When I do that, I get the manufacturer
24 to sign off on the detail, yeah.

25 Q. Okay.

1 money with your experts to prove me wrong.

2 Q. Okay. Touché.

3 A. It's as simple as that. But it
4 wouldn't matter because the decks are not sloped
5 anyway. It's all got to be ripped up. So when you
6 put it all together, you've got so many
7 deficiencies, you've got to take it all off.
8 You've got to, Chris. You've got to.

9 When you look at the building from the
10 outside, just look at the soffits where the water's
11 staining. That means water is getting through
12 intersections, which it could be the front
13 intersection at the brick or stucco. Could be the
14 wall. Any number of sources.

15 Q. Okay. Do you have any other
16 observations or opinions about construction or
17 design defects related to the balconies that we
18 haven't discussed already?

19 A. No, sir.

20 Q. Okay.

21 A. You asked me to find you a detail in
22 the Schluter system of a deck over space that's not
23 occupied?

24 Q. Yeah, but you said you could get it off
25 the website. So I'm just going to try to find it.

1 (A recess transpired from 11:54 until
2 1:10.)

3 MR. MAJURE: Okay. Myles, we copied
4 your color photographs that are in your
5 supplemental production. So let's go through those
6 now. Here's your original. There's a couple of
7 copies, folks. We didn't make -- we've got like
8 four, so y'all can spread them around if you want.

9 Okay. We'll mark this as our next
10 exhibit.

11 (GLICK EXH. 158, Two Pages of Color
12 Photos, marked for identification.)

13 BY MR. MAJURE:

14 Q. Okay. Myles, tell me what we're seeing
15 here.

16 A. This is the interior picture of Unit
17 110. It was sent to me on 4-10-2011. And it's
18 showing water intrusion at crown moulding and water
19 coming down the plane of the wall itself.

20 It looks like a tremendous amount of
21 water, based on the water stains on the paint and
22 the chipping paint. This was sent to me. I did
23 not take these pictures.

24 Q. Okay. Who sent them to you?

25 A. It may have been Jesse. I'm not sure.

1 record.

2 BY MR. MAJURE:

3 Q. Myles, off the record we confirmed that
4 there is no Unit 110. So what I'd like for you to
5 do then is go back, see if you can determine which
6 unit this is, see if there was a transcription
7 error.

8 But let's go back to the substance of
9 it. What did you do to investigate this condition?

10 A. I didn't do anything. I just received
11 the photographs.

12 Q. Did you interview the owner?

13 A. No.

14 Q. Are you able to draw any conclusions
15 about the cause or origin of this -- of these
16 conditions?

17 A. Well, it's clearly coming in way above
18 the window. It's probably at a cornice line. And,
19 depending on the exact location of the window in
20 the building, I could determine the most likely
21 split -- place of water intrusion into the unit,
22 but it may be different from the water intrusion in
23 the wall plane, which then goes into the unit.

24 Q. Okay.

25 A. So it would take some research to do.

1 control joints, lack of proper slope on the sill
2 and water intrusion at the sill, creating a rusted
3 accessory bead for the stucco itself and then
4 causing staining on the building itself.

5 And actually, you can see cracking in
6 other corner locations in this photograph that I'm,
7 unfortunately, going to have to hold up because
8 there's no number. There's other cracks at other
9 windows in this photograph.

10 Q. Do you regard these conditions as a
11 result of a design defect or construction defect or
12 both?

13 A. I think this is construction.

14 Q. Okay. On the last page of this exhibit
15 there's some red arrows pointing to some control
16 joints.. Do you have any observations about this
17 photograph?

18 A. No, I don't know. There was no
19 definition of why those arrows are there.

20 Mr. Landon will have to --

21 Q. Will have to testify as to that.

22 A. Yes, sir.

23 Q. Okay. All right. The next one.

24 Here's your original, Myles.

25 (GLICK EXH. 163, Note from Mr. Oakley

1 Q. Are you able to draw any conclusions as
2 to what the cause may be of any alleged water
3 intrusion at this location?

4 A. Yeah. Based on the photograph of the
5 water test, he is doing a water test at the
6 intersection of a stucco wall plane and a cornice
7 running around the building.

8 That's probably not flashed properly,
9 and water is getting in at that location, traveling
10 down above the window below the water test in the
11 third photo.

12 And clearly, there's a relationship of
13 why he took the photograph above the window where
14 he's doing the water test above the window.

15 Q. Can you -- is there anything you can
16 look at in the plans to tell me if the plans call
17 for a flashing interface at this trim, this stucco
18 trim assembly?

19 A. I can try.

20 Q. If you would, that would be nice,
21 Myles.

22 A. Sure.

23 Q. If you find the page that you think
24 speaks to this issue, if you could just identify it
25 for the record, please. Does Detail 3 depict the

1 Q. Yeah.

2 A. Any air that gets behind the brick,
3 which could be for any number of reasons -- i.e.,
4 weep holes -- weep holes let's air in, it's going
5 to go right into the unit.

6 I'm sure all these people have paid
7 higher utility bills based on the installation of
8 these windows. I mean, it's just going right into
9 the units.

10 Q. Let's keep trucking, Myles. Keep
11 trucking. Let's go to slide 13.

12 A. 13 demonstrates that water, to the tune
13 of a moisture content of 30 to a hundred percent,
14 is in those bucks. Those bucks should be dry, and
15 they're soaked.

16 Q. And the reason they are soaked, in your
17 opinion, is what?

18 A. Windows leaking and the joints are
19 improper between the brick and the window itself at
20 the sill and most likely the jambs. And water is
21 just sitting in the pan.

22 Because you go to No. 14, I've
23 demonstrated with my level and a straightedge that
24 there's a negative slope on that flashing sitting
25 on the buck. I mean, the buck sitting on the

1 flashing. Or pan, whatever you want to call it.

2 Q. Did you take your ruler and push it all
3 the way back to the end dam?

4 A. I pushed it in all the way it would go.
5 I can't tell you if there's an end dam now, sitting
6 here. But it does show an end dam on the plan.
7 But it went in all the way. But it's negative
8 slope. So any water that got in there sits under
9 the buck, and the buck's going to absorb it.

10 Having said that, what's really
11 interesting in No. 14 is you see where I wrote DT
12 No. 11 on the buck itself?

13 Q. Um-hum.

14 A. You see the line next to it that's
15 ragged?

16 Q. Yeah.

17 A. That outlines the water stain. That
18 water stain's coming from the top, not the bottom.

19 Q. So --

20 A. So even though there's negative slope
21 holding water, the water's coming from the top,
22 which tells me --

23 Q. The window itself is leaking.

24 A. Either the window or the joint --
25 and/or the joint at the sill window.

1 observations?

2 A. Now I'm on the -- back to 13, I guess.
3 They're out of order.

4 Q. Oh, back to 13.

5 A. That's the order I was taking them in.
6 It just shows the lack of a nailing fin.

7 Q. Okay. Slide 38. What are your
8 observations?

9 A. 38 returns to 14, and it shows a
10 clogged cell.

11 Q. Oh, we've already looked at this,
12 haven't we?

13 A. No. That was 13. They look familiar
14 because all the cells are filled. You see, you're
15 having déjà vu all over again.

16 MR. DUKES: Mark that as the first
17 Yogi-ism of the day.

18 MR. MAJURE: The déjà vu all over
19 again?

20 MR. DUKES: When you come to a fork in
21 the road, take it.

22 THE WITNESS: I was very careful to
23 note in here that the conditions that I'm pointing
24 out as construction deficiencies exist everywhere
25 that I opened it up. It wasn't just a fluke. So

1 some of the pictures may look alike. But the
2 mortar clogs it up. That's what the picture's ,
3 showing. It shows no flashing to daylight.

4 BY MR. MAJURE:

5 Q. Okay.

6 A. 39 is 14, showing the weeps totally
7 closed with mortar. And that was to the left of
8 14. So again, this is some more weeps that are now
9 closed up. They don't even have any cells in them.
10 It's just a weep. It's an open head joint, in
11 other words, with mortar in it. Very sloppy, no
12 consistency. Bad masonry job. Terrible masonry
13 job.

14 40 is demonstrating that the weeps or
15 joints that show -- because they're not really
16 weeps, functioning weeps -- are 38 1/2 inches apart
17 or 39, rather. So again --

18 Q. We're at the head? Still at the
19 soldier drip edge in the head?

20 A. Yeah, we're at the head of a window in
21 a soldier drip edge, correct, at Unit 205, living
22 room.

23 Q. Okay. What are your observations for
24 Slide 41?

25 A. I was trying to point out that there

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY
REGIME,

CASE NO. 2010-CP-10-2271

and

THOMAS R. MATHER,

CASE NO. 2010-CP-10-2919

and

BETTY Y. SEGAL,

CASE NO. 2010-CP-10-3206

and

SIGNATURE CHARLESTON,
LLC and WADE ROBINSON,

CASE NO. 2010-CP-10-3207

and

JAMES C. KIRKPATRICK,

CASE NO. 2010-CP-10-3208

and

PAUL A. BRIM,

CASE NO. 2010-CP-10-3209

and

FRED RAPPAPORT and
JOYCE RAPPAPORT,

CASE NO. 2010-CP-10-3210

and

THOMAS R. DEBNAM, AS
TRUSTEE OF THE TRUST
AGREEMENT OF THOMAS R.
DEBNAM,

CASE NO. 2010-CP-10-9580

and

PAMELA L. VAUGHN,

CASE NO. 2010-CP-10-9767

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC; et al.,

Defendants.

DEPOSITION OF: MYLES A. GLICK, AIA - Volume III

DATE: June 22, 2012

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 responsibility to make sure it's done as well.

2 Q. Yeah. All right. I'll mark this as
3 another one to go back to look at the plans for.

4 Well, if the plans do in fact do not
5 call for a through-wall flashing assembly in the
6 precast stone at the -- at this location -- and I'm
7 not saying this to the exclusion of anyone, anyone
8 else's responsibility, but would you regard that as
9 a design defect?

10 A. No, because it's just not detailed.
11 Not everything has to be detailed. I think whoever
12 proceeded without the RFI question and/or answer
13 assumed the design responsibility, and that would
14 be the general contractor.

15 And I do believe that the plans are
16 silent to that issue. But like you said, we'll
17 confirm that and the other issues.

18 Q. Okay. We'll confirm that when we look
19 at the plans.

20 A. It's a good thing I brought the plans.

21 Q. Okay. Let me just write this down.
22 Okay. Slide No. 82. What are your observations as
23 to any design or construction deficiencies here?

24 A. Well, 82 and 83 are just additional
25 pictures of the tower. I'm kind of working my way

1 water tests failing. And I seem to think that he
2 told me there was a third test. Maybe that's the
3 one that passed. I don't know.

4 In the early days I said, you know, I
5 need to go look at this building, see what this is
6 all about. Because, you know, I'm doing this stuff
7 through e-mail and in my office.

8 And that's when I went down there and
9 that's when I called up and said, I think you've
10 got a bigger problem. You don't have any drainage
11 in any of your stucco. I'm not sure about the
12 brick. It's hard to see the brick. But the
13 stucco, it was pretty easy to see that there was no
14 drainage.

15 Q. And the same with the expansion joints.
16 Wouldn't it be fairly obvious that they weren't in
17 the right location or were missing, were not
18 installed in accordance with the plan?

19 A. I think you're referring to control
20 joints.

21 Q. I'm sorry. Control joints.

22 A. Well, I wouldn't know if they were in
23 accordance with the plans, because at that point I
24 didn't have the plans.

25 Q. I'm not speaking about you yourself.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND HPR, et al.,

Plaintiffs,

CASE NO. 2010-CP-10-2271 (et al.)

vs.

CONCORD & CUMBERLAND, LLC, et al.,

Defendants.

DEPOSITION OF: MYLES I. GLICK, AIA - VOLUME V

DATE: June 6, 2014

TIME: 1:00 PM

LOCATION: McAngus, Goudelock & Courie
735 Johnnie Dodds Boulevard,
Suite 200
Mount Pleasant, SC

TAKEN BY: Counsel for Defendant Weather
Shield Manufacturing, Inc.

REPORTED BY: TERRI L. BRUSSEAU, Registered
Professional Reporter, CRR

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 been back.

2 Q. Okay. And were you there to diagnose
3 the problem or were you --

4 A. No, I was there to look at -- at the
5 problem because they want -- the gentleman wanted
6 to do something because he was trying to rent out
7 308 and he couldn't do it and he was between
8 tenants and I was also trying to introduce my staff
9 at Glick/Boehm to the project because we were hired
10 to repair the building.

11 Q. You've been hired to repair the
12 building?

13 A. Yes.

14 Q. Okay. And what stage are you in in the
15 repair process?

16 A. They haven't started yet.

17 Q. Okay.

18 A. I think general contractor's doing some
19 budget pricing. I'm not exactly sure of the exact
20 status right now. Shawn Mellin in my office is
21 handling that but it's -- it may be -- I think we
22 already got BAR approval so I think -- I think
23 we're waiting on the building permit.

24 Q. Okay. And who's the contractor?

25 A. Trident Construction.

1 Q. Sure.

2 A. Some of them do but in a safe manner.

3 So it's really -- I haven't heard that Trident will
4 in fact require them to move out.

5 Q. Okay.

6 A. It's not come across my desk.

7 Q. All right. At the time of your last
8 deposition it was my understanding you had not yet
9 received the Stafford Consulting report concerning
10 the windows. Have you since received it?

11 A. I think I have, yes.

12 Q. Have you reviewed it?

13 A. I flipped through it the other day. I
14 mean, it just talks about the -- the tests --

15 Q. Right.

16 A. -- the water tests.

17 Q. Okay.

18 A. And I just, you know, noted that --
19 what I had been told, that they had failed, the
20 tests had failed so there was water intrusion
21 through the windows, around the windows. I did go
22 during the testing --

23 Q. All right.

24 A. -- but they -- they had the machines
25 down and they were waiting on something and I had

1 to go so I never saw any tests.

2 Q. Okay. So you never --

3 A. No.

4 Q. Okay.

5 A. No, I just showed up and I had to leave
6 20 minutes later because Estates said they had a
7 delay.

8 Q. All right. And have you seen any video
9 or anything like that of any of the tests?

10 A. No.

11 Q. All right. And since your last
12 deposition have you conducted any testing of your
13 own?

14 A. I think we had Trident open up a couple
15 places, the balconies specifically. We wanted to
16 see how much room was in the depression of the slab
17 as opposed to the interior slab of the unit so we
18 could try to get some measurements on actual
19 ability to slope in accordance with the Schluter
20 system which requires 2 percent slope.

21 Q. Um-hum.

22 A. Because if you remember Tom Carlson and
23 his people, they did a survey of about 10 or 12
24 units and none of them met the 2 percent slope
25 so...

1 Q. Okay.

2 A. But he took it from the top. You know,
3 we really don't know how -- how thick the mortar
4 bed is or anything so I believe Shawn had Trident
5 open up a couple balconies.

6 Q. Okay.

7 A. I'm pretty sure of that.

8 Q. Do you --

9 A. I haven't seen it.

10 Q. Okay. Do you know if that was
11 documented with photographs or --

12 A. I'm sure my guys took photographs.

13 Q. Okay.

14 A. I could get those for you if you need
15 them but I remember the answer when I asked Shawn
16 what they found and they said they -- they could
17 slope them the 2 percent.

18 Q. So it could be remediated to -- to make
19 the slope?

20 A. And -- and possibly use the tile again.
21 We have to change some details because the
22 architect has a detail that even if it was sloped 2
23 percent you couldn't get the water out.

24 Q. Why is that?

25 A. They blocked it up. They blocked up

1 where the Schluter system drains.

2 Q. Oh.

3 A. The Schluter system is a system of
4 drainage that's underneath the tile so when water
5 goes through the tile cracks or the mortar cracks
6 or any crack whatsoever and it hits the membrane,
7 it then flows through to a drainage mat and that
8 slopes on that 2 percent to the exterior face of
9 the balcony. Well, the exterior face of the
10 balcony, the architect detailed a brick roll lock
11 and you just can't get the water out and as a
12 matter of fact during my destructive testing on the
13 brick I actually removed some bricks with my hand
14 because the mortar had actually lost its strength.
15 When you get -- when mortar gets a lot of water
16 through it there's efflorescence and that's all the
17 lime and the calcium that's coming to the surface
18 where you're just left with sand so you -- I just
19 moved it with my hand and it was all soft and gooey
20 and you could see that the water was just built up.
21 It's in the photographs.

22 Q. All right. And that was as a result of
23 the improper design of that roll lock there?

24 A. Absolutely.

25 Q. Are you going to put in the curbing at

1 the -- at the doors on the -- on the balconies?

2 A. Yes.

3 Q. And are you going to do that on every
4 balcony or just the fourth floor?

5 A. We're going to try to do it on every
6 one now that we have some measurements.

7 Q. Okay.

8 A. That's the kind of the stuff that's not
9 really finished in the drawings.

10 Q. Sure.

11 A. We're just going to supplement the
12 drawings.

13 Q. Are you using a bucket and the pan
14 system in the drawings?

15 A. Well, you know, having a -- a sill pan
16 is very important but -- having a sill pan that
17 drains to the exterior and is not negative sloped
18 like the one that was there is very important.

19 Q. Sure. Since you've had the chance to
20 review the depositions of the architects and
21 Miss -- or of Mr. Davis, Miss Murphy, Mr. Burns and
22 had the opportunity to do some additional site
23 visits, have you changed or augmented any of your
24 opinions in this case?

25 A. No, I have not. I think the architect

1 has still violated the standard of care both in the
2 drawings, the vagueness of those drawings as well
3 as the CA responsibilities in signing off on
4 contract administration to the extent of the
5 substantial completion at the end of the job.

6 Q. Okay.

7 A. I mean, they -- you know, they have
8 field reports talking about weep holes missing and
9 flashing missing and things of that nature.
10 There's like three or four of them but they've set
11 up no mechanism as I said on my affidavit to follow
12 up and I think the field crew or field staff, one
13 or two people at different times from the
14 architect's office failed to really provide an
15 adequate protocol for reviewing things in the
16 field, understanding the deletions in the field,
17 and I'll get to that in a second, and following up
18 at the end of the job before you sign the
19 substantial completion that they in fact didn't --
20 didn't repair what he himself brought out in the
21 field reports in terms of reviewing situations that
22 are not there like the flashing above the windows.
23 I mean, Sutton-Kennerly brought it out in their --
24 in their observations in the -- at the mockup and
25 it's just not in the field and it's -- it's a basic

1 element of stucco detail.

2 You pick up any ASTM Number 926 or
3 1063, they tell you stucco leaks, it has to have a
4 way of getting water out of it. The ASTM is a
5 reference from the code so thereby they are code
6 issues. They're also industry standards. If you
7 pick up the plaster manual -- just hit plaster
8 manual on the computer, you'll find all the details
9 for stucco and they'll explain why you do have to
10 do what you do. So, you know, those complete
11 deletions and lack of observation on the part of
12 the architect form my opinion to create that
13 affidavit.

14 Q. Okay. So nothing that you read made
15 you change your opinion and say, they did a better
16 job than I thought they had or something to that
17 effect?

18 A. No, they didn't and -- and the only
19 thing I did read that I found interesting was their
20 expert, Mr. Burns, basically said, I wouldn't do it
21 that way but they didn't violate the standard of
22 care. Well, if he wouldn't do it that way and I
23 wouldn't do it that way, is he saying the standard
24 of care is to do it wrong? So I -- I question my
25 colleague's opinion. I think he had a cyclical

1 argument that -- that he really wanted to say that
2 but that's just my feelings but he -- he knows
3 whose flag he's protecting.

4 Q. Sure.

5 A. And I'm not saying that in a negative
6 way, I'm just saying that was his conclusion.
7 My -- my opinion's different and my opinion's based
8 on the facts that I just talked about.

9 Q. Right. And you said something about
10 deletions on the job?

11 A. That's stucco, the stucco. That's what
12 I was talking about, flashing of the stucco.

13 Q. Oh, not having the flashing there?

14 A. Right.

15 Q. So meaning they failed to have a
16 protocol for construction administration to deal
17 with if something was left off that should be
18 there, how -- how to address that situation?

19 A. Well, they should have noticed it.

20 Q. Right.

21 A. I noticed it the minute I got out of my
22 car. I mean, I -- I had never been to the project
23 during construction --

24 Q. Right.

25 A. -- but the minute I got out of the car

1 I could see that there's no drainage --

2 Q. Right.

3 A. -- considerations for the head of the
4 windows and that -- that's always an issue. I
5 mean, you're getting water trapped. As we opened
6 the building up we found rusted lath so it was --
7 it was resulting in damage.

8 Q. So the lack of head flashing, lack of
9 drainage in your opinion resulted in damage to the
10 building?

11 A. Absolutely.

12 Q. Did you have the opportunity to go
13 through the field reports, the architect's field
14 reports, kind of in a chronological manner?

15 A. I can't say they were chronological.
16 I -- I have a whole bunch of them and I went
17 through them.

18 Q. Okay.

19 A. Actually they're marked from two years
20 ago. I just can't remember if they were
21 chronological.

22 Q. Sure.

23 A. But I -- the items that are in it
24 are -- some of them are pretty good. I mean, they
25 point out some of the issues with the brick but

1 those brick issues have never been fixed. To this
2 day they've never been fixed.

3 Q. So they point out an issue but then
4 never -- there was never no protocol or any -- or
5 any action taken that you could see by the
6 architect to make sure that those problems were
7 fixed?

8 MS. HOLBROOK: Object to the form.

9 THE WITNESS: That's correct. And then
10 because of that they -- they signed a substantial
11 completion which said everything is built within
12 tolerances in accordance with the plans and specs
13 and that's not true.

14 BY MS. VARNADO:

15 Q. And I think in my going through those
16 reports what I found is that Mr. Murphy missed some
17 of the points about flashing that later in 2008
18 another individual from J. Davis came and did a
19 site inspection and he pointed out the lack of
20 weeps. Did you notice that pattern?

21 A. Well, I remember that instance of the
22 other person coming. I -- my -- my feeling was
23 that -- and even reading his deposition that --
24 that Mr. Murphy really may not have had the right
25 qualifications to be on that job.

1 construction, whether it be metal or wood. You've
2 got to get the water out. It's in there. There's
3 no way to drain it. It's going to go to the inside
4 if you don't drain it.

5 Q. Right. Let's touch on that or expand
6 that point a little bit about having no one in his
7 employ, in Mr. Davis' employ, who had experience or
8 expertise in waterproofing or doing waterproofing
9 details for stucco applications. Should the
10 individual in charge of the contract administration
11 have an understanding of the waterproofing
12 necessary for stucco applications assigned to
13 Concord and Cumberland?

14 A. Absolutely.

15 Q. Okay.

16 A. You're hired by the owner who's relying
17 on your services and one of your services is
18 contract administration to make sure that it is --
19 it's code compliant and also in accordance with the
20 plans and specs which the owner paid to have done.

21 Q. Right.

22 A. And there is numerous opportunities --
23 it's not like there's just one window or it's --
24 you can't see it. I mean, there's plenty of
25 opportunities to see the way it's being built, even

1 from the ground as I said earlier in the case of
2 some stucco. And obviously I can't see the fourth
3 floor but you can see the first floor and the
4 second floor pretty easily and we do frequently use
5 binoculars and telephoto lenses now so we can see
6 things, you know, even if you're not going to get
7 up on a scaffold but there's plenty of balconies
8 you can just walk out on and just turn around.

9 Q. Right.

10 A. I mean, it's not hard in this
11 particular job. Some jobs it is very difficult to
12 see things, you really do have to climb
13 scaffolding, but you have to make sure your people
14 know what the rules of engagement are. The rules
15 of engagement are code compliant, make sure you
16 build to the plans and specs. Those are
17 contractual obligations and the contractor didn't
18 do things right and that's well documented and the
19 architect didn't catch things that were wrong and
20 that's documented because we wouldn't be here
21 today. If no one violated the standard of care, we
22 wouldn't be here today.

23 Q. In terms of Sutton-Kennerly's role,
24 they were hired by the owner, correct?

25 A. That is correct, that's my

1 get a case that's not your expertise, you bring in
2 someone that knows the case. Architects do that
3 all the time but their not bringing in is really a
4 violation of -- of common sense and you're not
5 doing your -- your clients the proper job.

6 Q. Okay. And if -- if J. Davis didn't
7 have anyone on this job that understood the -- how
8 the design pressure ratings work with mulled units,
9 would you agree that that was a violation in the
10 standard of care?

11 A. That -- I would, yes. I mean, you
12 only -- but you only have to know enough to call
13 the engineer up, quite frankly. They didn't have
14 to worry about it, they could have just let the
15 engineer take care of it.

16 Q. All right. Well, did you see any
17 evidence that they did that in your --

18 A. Not in all -- not in all the
19 information I have.

20 Q. The installation of Weather Shield
21 windows in a barrier wall, I believe you testified
22 that that was a violation --

23 A. It's a violation --

24 Q. -- of the code.

25 A. -- of Weather Shield's -- it's not -- I

1 mean, Weather Shield's installation instructions
2 prohibits that.

3 Q. Right.

4 A. It's in their instructions do not do
5 that.

6 Q. Right. And it's also -- and in so
7 doing, that was a violation of the code, right?

8 A. Yes. If you do not install a product
9 in accordance with the manufacturer's instructions,
10 it's a violation of code.

11 Q. Okay. Would designing a barrier system
12 into which Weather Shield windows were going to be
13 installed also be a violation of the standard of
14 care?

15 A. Yes, because you don't know your
16 products and the products' limitations.

17 Q. So you have to -- the architect
18 designing a building using those Weather Shield
19 windows should know that none of the systems --
20 none of the cladding can be a barrier system, they
21 all have to be a drainable system?

22 A. He should have known that, yes.

23 Q. Okay. And to not know that is a
24 violation of the standard of care?

25 A. Yes, and the standard of care being do

1 you aware of anything in Weather Shield's materials
2 that would approve that type of installation?

3 A. No.

4 Q. Okay. Looking at Exhibit 41 and this
5 is my -- nope, it's the official one. Okay.
6 Exhibit 41, Slides 68 and 69, this is Unit 401.
7 You had performed a water test and you -- you said
8 water got straight into the building?

9 A. Water test is a very loose term.
10 Basically I turned the water on, put the hose on
11 the ground or on the balcony that came into the
12 unit, no pressure, no wind, it just rolled right
13 in.

14 Q. Okay. And am -- it wasn't clear just
15 from the way your prior testimony was gathered but
16 am I correct in understanding the concern that was
17 allowing the water in was not a door leak but it
18 was the design of the patio or the balcony?

19 A. Well, it's a combination of all -- both
20 of it. I mean, it's how the door relates -- there
21 is a pan -- there's a copper piece, a pan
22 underneath that door. How far it goes, I don't
23 know but it's where a lot of things come together.
24 The water seemed to be coming and -- and staying in
25 that pan because it's negative slope, in other

1 words, the tile is higher than the metal pan so it
2 stays there and eventually will blow in because of
3 the location of the condominium on the harbor.
4 There's also an opening underneath the stud wall
5 which sits on that slab which this Slide Number 68
6 demonstrates that it's been leaking for quite some
7 time because the bottom plate, the metal track
8 on -- on the slab is really rusted---

9 Q. Right.

10 A. -- big time and the floor warped
11 tremendously so it's been coming in for quite some
12 time.

13 Q. But that had --

14 A. But --

15 Q. -- nothing to do with the door?

16 A. Well, we don't know until we take apart
17 every one.

18 Q. Okay. But when you did your test and
19 got water you weren't putting water on the door,
20 you were putting water on the deck, right?

21 A. On the deck, that is correct.

22 Q. Right. So the water that you put in in
23 your test didn't come through the door, it came
24 under it?

25 A. It came under it.

1 you referring to when you say that?

2 A. How they're used in the details, in
3 other words, a pan -- there's nothing wrong with a
4 pan but how it's detailed, that's a problem and
5 then how it's built is even worse.

6 Q. Were they built -- were the pans built
7 as they were detailed?

8 A.. Well, the detail's not very clear,
9 quite frankly, and the pan, the one I measured, had
10 negative slope so when I opened it up, water
11 actually came out and I said that before in
12 testimony, it showed it in pictures that there was
13 water stuck between the pan and the buck.

14 Q. Do you recall if the pan as designed
15 was designed to have a negative slope?

16 A. No, they show it as just a straight
17 line.

18 Q. Okay. So that would be an
19 installation -- an example of an installation
20 departing from the plans and specs?

21 A. I would say so, yes, and common sense.

22 Q. Sure. The prior -- or the prior time
23 that you were under oath at deposition back in June
24 of 2012 you were asked if you believed whether?
25 J. Davis was responsible in any way for the leaking

1 of the windows and your response was, no, I think
2 the windows are leaking by themselves. Do you
3 stand by that testimony today?

4 A. Well, the -- the windows are leaking by
5 themselves, that's what that was referring to, in
6 other words, the window itself is a bad window.
7 They're leaking at the mullions but there's also
8 leaking around the windows and that's a result of
9 installation, detailing, things of that nature.

10 Q. And can you specifically identify for
11 me what detailing by the architect has resulted in
12 leaking through the windows as opposed to an
13 installation defect?

14 A. Well, the water that's stuck on the
15 pan, that's in between the -- the pan's not doing
16 any good where it is. I mean, I -- I don't know
17 why it's there.

18 Q. And one of the reasons that the pan is
19 not working is because it wasn't built according to
20 the slope that was provided?

21 A. No, it's just in the wrong place. A
22 pan is typically under the window on top of the
23 buck so if the window leaks it immediately hits the
24 pan and exits out.

25 Q. Um-hum.

1 A. You have a wood buck sitting under the
2 window and then a pan, then another wood buck. I
3 mean, it just doesn't make any sense where it is,
4 it just provides all kinds of opportunities so when
5 the windows leak and areas leak around the window,
6 the buck gets wet so the pan doesn't really do
7 anything but hold water.

8 Q. And do you recall any of the
9 circumstances -- are you aware of any circumstances
10 giving rise to the use of a wood buck?

11 A. The -- the units had leaks on the
12 inside, the trim.

13 Q. I'm not sure my question was clear. Do
14 you know why a wood buck system was used in these
15 windows?

16 A. Well, you need something to attach the
17 bottom sill to.

18 Q. Okay. And the attachment directives
19 was something you expected Weather Shield to
20 provide or comment on?

21 A. Well, I -- I would have thought and
22 still think to this day that conversations would
23 have taken place because the architect would talk
24 to the vendors, especially window manufacturers,
25 about their product, hey, look, I got this kind of

1 MS. HOLBROOK: That's all I have.

2 Thank you.

3 EXAMINATION

4 BY MR. NISTAD:

5 Q. Myles, I represent Muhler. I'm sure
6 you know that. This pan detail, it shows that the
7 pan empties behind the stucco and not to daylight,
8 right?

9 A. That is correct.

10 Q. And that's clear in the detail?

11 A. That is correct.

12 Q. And there's no need for an RFI to
13 figure out where it empties?

14 A. No, it's pretty obvious.

15 Q. And in your opinion that is a deviation
16 from the standard of care, correct?

17 A. Well, it -- when you consider it in
18 conjunction with no head flashing -- because
19 remember, the pan of one window is over the head of
20 another window.

21 Q. Okay.

22 A. So if the -- if it's collecting water,
23 it eventually gets out and doesn't just evaporate
24 and it's down and stuck on the window below it.

25 Q. Okay.

1 A. And then it goes and we've seen water
2 coming in at the heads of the windows.

3 Q. And so to repair that pan issue, you
4 have to take out all the windows?

5 A. Well, you'll have to disconnect the
6 window from the bucks. If that was the only
7 problem in the entire structure --

8 Q. Okay.

9 A. -- is that your question?

10 Q. Yeah. Basically, yeah.

11 A. Let's see. If the nailing flange --
12 nailing fins are still on the window, you may be
13 able to repair just leaving the window where it is,
14 maybe, but it's going to take a lot of
15 jerry-rigging to get it up in there because you're
16 sticking -- still have to have the bucks.

17 Q. Right.

18 A. I mean, that's what attaches the window
19 to the structure and then you have to take the
20 bucks and secure those to the main framing. It's
21 just a matter of where that pan is, it's just not
22 in the right place. I mean, obviously if you put
23 it on top of the -- on top of the bucks you're --
24 and you screw through the frame, that's not good
25 but if you have the nailing fin, you're at least

1 screwing through the side of -- of the pan as
2 opposed through the top where it's collecting the
3 water.

4 Q. If you're going to put in a pan -- if
5 you're going to -- if you're going to fix the pan
6 issue that's out there that's not -- it's not
7 flashed to daylight and it does -- and it has a
8 negative slope rather than a positive slope, you're
9 going to have to take -- you're probably going to
10 have to take those windows out?

11 A. Absolutely, yeah, you just -- you just
12 can't work it, which means you --

13 Q. When you --

14 A. -- you take the window out, you got to
15 take the brick out and the stucco out.

16 Q. Okay. And when you take that window
17 out, you're probably going to have to replace it
18 just because of the damage you've caused to the
19 window by taking it out?

20 A. That's what I believe will happen, yes,
21 sir.

22 Q. So even if the windows were perfect in
23 that situation, you're probably going to have to
24 replace the windows because of the pan issue --
25 because of the design of the pan issue?

1 A. Yes.

2 Q. And you'd agree that -- that the issues
3 with this building are not just window issues,
4 there's issues with almost every trade that touched
5 the building, correct?

6 A. Stucco, brick, masonry, windows, tile,
7 Schluter system --

8 Q. A to Z?

9 A. Yeah, a lot of trades. Not every trade
10 but quite a few.

11 Q. And you saw that as soon as you got out
12 of your car and looked at the building, correct?

13 A. Yes, sir.

14 Q. What is the budget that you're working
15 with on the repair, do you know?

16 A. Don't really know, we're -- we're just
17 fixing the building the way it needs to be fixed
18 and then just pricing it.

19 Q. Okay.

20 A. We've not been told -- I actually to
21 this day don't even know what the settlement was.
22 All I know is there's only one way to fix it,
23 you've got to fix it right and they're pricing
24 that.

25 Q. Did you have the opportunity to see

1 A. If the windows were perfect?

2 Q. Yes.

3 A. Yes, you would still have the --

4 MR. MAJURE: Objection.

5 THE WITNESS: -- brick cladding -- the
6 brick cladding problems and the stucco cladding
7 problems. They also don't meet code and they let
8 water in.

9 BY MR. NISTAD:

10 Q. Are you saying that the materials are
11 evident about project management by Superior?

12 A. I'm not sure what your question is
13 asking.

14 Q. There's been some depositions by a man
15 named Vince Hood or Richard Andrews talking about
16 how Superior managed the project from beginning to
17 end. Do you have -- have you seen those
18 depositions?

19 A. I don't believe I have, no. I -- I --
20 I say this not lightly but I don't mean to poke fun
21 or be mean but I don't think there was any
22 management or supervision because of what's out
23 there. So that may answer what's in those
24 depositions, I'm not sure but, I mean, the stucco
25 problems and the brick problems, that's

1 Construction 101. I don't care if you didn't have
2 a set of plans or you had a terrible set of plans,
3 you wouldn't do what's out there.

4 Q. Okay.

5 A. I mean, it's just basic construction,
6 been -- been done for a hundred years.

7 Q. Well, let's -- let's look at one of
8 those issues, the slope of the pan. Should the
9 details have shown a slope in that pan?

10 A. Well, the details really don't show a
11 slope.

12 Q. Yeah, but --

13 A. They just show it straight.

14 Q. But they should have?

15 A. They don't show a negative. They
16 should have shown it on an angle.

17 Q. Okay. Whoever installed those pans
18 even if there wasn't a detail, Construction 101
19 would tell them you got to have a little slope in
20 this pan so the water goes out rather than in,
21 right?

22 A. Yes, sir.

23 Q. Do you know who installed the pans?

24 A. No, not -- I do not know a trade.

25 Q. Okay. Do you know -- have you seen

1 square on the day they were installed?

2 A. No, sir.

3 Q. Okay. If the wood bucks are sitting in
4 the pans and water's sitting in the pans with them
5 are the wood -- is the wood going to warp at some
6 point?

7 A. Yes, because that wood is treated but
8 it's treat -- it's not treated to sit in water.
9 Two-by-fours are treated to get wet and dry out.

10 Q. Okay.

11 A. If they sit in the water that I saw
12 between the two bucks, it's -- it's not going to do
13 that wood very good. I -- I've seen treated wood
14 two-by-fours rot as plates because they've been in
15 moisture so long.

16 Q. Could that cause the windows that were
17 installed plumb and square to go out of plumb and
18 square because of movement of the wood buck below?

19 A. I would think it could. An extreme
20 case but I think it could.

21 Q. Okay. Are you aware that there's
22 testimony or any evidence that these casement
23 windows were open during construction or left open
24 for extended periods of time meaning hours at a
25 time --

1 would you expect that the normal usage would not be
2 having them open for an extended period of time,
3 day after day for hours at a time?

4 A. Well, it --

5 MR. MAJURE: Objection.

6 THE WITNESS: If you're working in a
7 building, you're supposed to have the building
8 under some degree of air conditioning for your
9 drywall, your trim, so there's no really reason to
10 open up windows if you're working on the -- on the
11 window -- on the trades on the inside because you
12 don't want to expose everything to the humidity.

13 BY MR. NISTAD:

14 Q. And would -- would it be the general
15 contractor's duty to maintain the security of the
16 building as it's going up?

17 A. Absolutely, it's his responsibility.

18 Q. It's their -- it's their duty to
19 protect the work of prior subcontractors who have
20 left the site?

21 A. Yes.

22 MR. MAJURE: Objection.

23 BY MR. NISTAD:

24 Q. Would you expect a general contractor
25 to have the windows stay closed throughout the

1 building process?

2 A. They typically are.

3 Q. And the failure to secure those windows
4 and make sure other trades don't damage those
5 windows, that would be the responsibility of the
6 general contractor?

7 MR. MAJURE: Objection.

8 THE WITNESS: Yes, it would be.

9 MR. NISTAD: That's all I have, thanks.

10 THE WITNESS: Thank you.

11 (WHEREUPON, the proceedings concluded
12 at 3:07 PM.)

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

**MUHLER'S AMENDED
NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY JUDGMENT**

FILED
2014 JUL 15 AM 11:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY

CONCORD & CUMBERLAND, LLC, *et al.*,

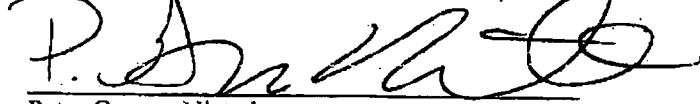
Defendants.

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TO: CHRIS MAJURE, ESQUIRE AND HENRY BROWN, ESQUIRE:

Please take notice that the Defendant The Muhler Company, Inc. will be move before The Honorable Clifton Newman at a time and date set by Judge Newman for an Order that grants Partial Summary Judgment to Defendant Muhler on all cross-claims alleged against Muhler by Defendant Superior Construction Corporation and Defendant Concord & Cumberland, LLC. This Motion is based upon Rule 56 of the South Carolina Rules of Civil Procedures. The grounds for this motion are that: 1) neither the Subcontract nor the 2007 Agreement indemnifies Superior or C&C for their own wrongdoing, and that the 2007 Agreement fails for lack of consideration and impossibility; 2) that neither Superior nor C&C is entitled to equitable indemnification because neither can prove it has "clean hands"; and 3) that C&C is not entitled to contribution because it failed to extinguish Muhler's exposure to Plaintiffs. Defendant Muhler reserves the right to submit a Memorandum of Law in support of the Motion for Partial Summary Judgment along with exhibits.

MCANGUS GOUDELOCK & COURIE, L.L.C.



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ATTORNEYS FOR DEFENDANT THE MUHLER
COMPANY, INC.

July 14, 2014

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

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And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

THE MUHLER COMPANY, INC'S
MEMORANDUM IN OPPOSITION TO
MOTION FOR PARTIAL SUMMARY
JUDGMENT FILED BY SUPERIOR
CONSTRUCTION CORPORATION

FILED

JUL 25 2014

JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

Defendant, The Muhler Company, Inc. ("Muhler" or "Defendant") respectfully submits this Memorandum of Law in opposition to Superior Construction Corporation's ("Superior") Motion for Partial Summary Judgment ("Motion"). Superior's Motion is based upon two agreements, an original subcontract between Superior and Muhler, dated May 17, 2006 ("Subcontract") (Att. A), and a later agreement, dated June 11, 2007, among Weather Shield Manufacturing, Inc. ("Weather Shield"), Muhler and Superior ("2007 Agreement") (Att. B).

Superior's Motion must be denied for several reasons. First, neither the Subcontract nor the 2007 Agreement provide indemnification for Superior's own negligence. Second, there is substantial evidence that Superior's negligent actions and/or inactions caused or significantly contributed to the problems associated with the windows and doors. Thus, the extent of Superior's liability for the damages attributable to the windows and doors, as opposed to Muhler's liability, if any, is clearly a question of fact that cannot be resolved on summary judgment. In addition, even if it were entitled to indemnification, Superior's claimed settlement amount is unreasonable under the circumstances, and it is not entitled to either the attorneys' fees/costs or to displacement/housing costs that it claims.

Background

This is a construction defect case relating to a condominium project located at the corner of Concord and Cumberland Streets in Charleston, South Carolina ("Subject Property"). Concord & Cumberland, LLC ("C&C") was the original owner and developer of the property. Superior was the general contractor for construction of the building shell. (Subcontract, Art. 1, Att. A). Among others, C&C hired J. Davis

Architects, PLLC ("JDavis") as the architect for the project, and Sutton-Kennerly Associates ("SKA") as waterproofing experts. (Andrews Dep. p. 24, lines 4-14, Att. C) (Hodge Dep. p. 37, lines 10-12, Att. D).

Superior entered into a Subcontract with Muhler to supply and install windows and doors manufactured by Weather Shield. While the Subcontract called for the installation of windows, the scope of that installation was limited to setting windows in rough openings which were prepared by Superior and/or its subcontractors. (Att. A) (See the Affidavit of Ron Sykora, Att. E) (Andrews Dep. p. 372, line 18 – 373, line 1, Att. C) (Clardy Dep. p. 436, lines 17-22, Att. F). Muhler employed two different subcontractors, In the Wind and Watts Builders, Inc., to install the windows. In the Wind also worked as a direct subcontractor for Superior by preparing rough openings that included the installation of sill pans and bucks within the pans. (Lawson Dep. p. 25, lines 1-6, Att. G) (Id., Dep. p. 28, lines 4-8) (Clardy Dep. p. 441, lines 8-18, Att. F) (Id., p. 482, lines 8-13 (Mr. Clardy clarifying that In the Wind was serving as Superior's direct subcontractor when it was installing rough openings for the windows)).

Muhler did not take on any design responsibility for the project but, instead, looked to the architect for design and to the window manufacturer, Weather Shield, to provide installation instructions. Ron Sykora, Muhler's vice president of sales, stated that, "[a]s the supplier of the windows and the installer of the windows, we look to the design professional to create an installation procedure and detail and then we perform that detail procedure. That's what was done here at this project." (Sykora Sept 24, 2012 Dep. p. 53, lines 16-21, Att. I-1) (Id., p. 61, lines 18-22) (Sykora May 24, 2013 Dep. p. 24, line 18 – 26, line 22, Att. I-2). Richard Andrews, project manager with Estates

Management,¹ testified that Muhler "adhered to those instructions." (Andrews Dep. p. 375, line 18 – 376, line 3, Att. C).

As the window installation approached, it became apparent that the proposed method for installing the windows did not conform to Weather Shield's installation instructions. The main problems involved Window Shield's requirement that the window be installed against the buck, and an issue with the pans. (Lawson Dep. p. 18, line 22–19, line 25, Att. G). In meetings where these problems were discussed, Brad Lawson, Muhler's production manager, confirmed that Muhler served as "the referee between Superior, JDavis and Sutton & Kennerly," to "make sure that Weather Shield's installation documents were complied with So we were there to get these parties to agree to how they wanted to put it in, as long as it complied with Weather Shield's documents." (*Id.*, p. 66, line 15 – 67, line 5).

Mr. Lawson testified that, "the design that Sutton-Kennerly and Estates and Superior came up with, I didn't have confidence in it that it was going to be waterproof." Although Muhler voiced its objection, it used the installation design provided to it because, "at that point, they're the experts, that's their building, this is how they wanted it put in." (Lawson Dep. p. 184, lines 4-13, Att. G) (Trial Exh. 356, Att. H). Mr. Sykora explained that Muhler "just, [was] being instructed how to put windows and doors in. Certainly ... this particular installation with the bucks sitting in a pan and attached as they were in a pan was something we hadn't seen before, but we're not design professionals. We're not waterproofing professionals. So we wouldn't be interjecting what we felt to be a proper waterproofing method." (Sykora Sept 24, 2012 Dep. p. 135, lines 10-18, Att. A-1). Carlton S. "Chip" Clardy confirmed that Superior simply was

¹ Estates Management provided project management for C&C on the Subject Property.

"told how to" install the windows in the bucks that were sitting in the pans. (Clardy Dep. p. 672, line 8 – 674, line 7, Att. F (agreeing that "Superior was told by the architect we're going to use a pan and we're going to put two bucks in the pan and then we're going to put the window – attach the window to those bucks that are in the pan"))).

After twenty-five windows were installed, objections were raised by the owner and/or the architect, and Muhler was asked to remove those windows and reinstall them following a different protocol. Mr. Clardy testified that the procedure for installing windows from that point forward came from either the architect or owner, and also agreed that any problems with the design of how the windows were to be installed was the responsibility of the owner and/or architect. (Clardy Dep. p. 677, line 3 – 678, line 15, Att. F) (Sykora Sept 24, 2012 Dep. p. 53, line 16 – 54, line 18, Att. I-1).

Mr. Lawson testified that, other than one issue that was brought to his attention and later determined to have been caused by a warped sash on a window, (Lawson Dep. p. 44, line 18 – 45, line 4, Att. G), no one advised Muhler that "the installation didn't comply with Weather Shield's installation recommendations ..." (*Id.*, p. 47, line 24 – 48, line 11). Mr. Sykora confirmed. (Sykora May 24, 2013 Dep. p. 51, line 13 – 52, line 14, Att. I-2 (testifying that a Weather Shield representative told Muhler one window was out of square, although it was, in fact, within the tolerance allowed by Weather Shield)).

Sometime in 2007, the Subject Property began to experience water intrusion issues, including but not limited to leaking at the windows and doors. Weather Shield, Superior and Muhler entered into the 2007 Agreement, under which C&C is identified as a third party beneficiary, to address the issues of leaking windows. The 2007 Agreement required, among other things, that Superior satisfy any outstanding balances due to

Muhler related to the subcontract. (2007 Agreement, Section 10, Att. B). Superior has not complied with that provision of the contract. (See Affidavit of Tali Vereen, Att. J).

The individual units in the Subject Property were completely sold out before construction was finished. (Hodge Dep. p. 60, lines 8-10, Att. D). Control over the Subject Property was transferred from C&C to the unit owners in March 2008. (Receipt & General Release, p. 2, Att. K).

Ken Lies was brought on site in late 2008 to develop a "remedy [for] concerns that were being expressed regarding the windows." (Lies Dep. p. 9, line 12 – 10, line 19, Att. L). He developed what later became known as the Ken Lies repair protocol, (Att. M), which was circulated to all the parties and then applied to three windows in 2009. (Lies Dep. p. 47, lines 1-11, Att. L). With some adjustments, the windows produced generally passing results. (Id., p. 47, line 12 – 49, line 21). The Ken Lies repair protocol did not require removing the windows from their openings. (Id., p. 132, lines 24-25).

Superior hired its own window expert, L.G. "Skip" Lewis, in the fall of 2008, (Lewis Dep. p. 10, lines 15-18, Att. V), to help resolve the water infiltration issues. (Id., p. 14, lines 14-20). Mr. Lewis later testified that his "overall opinion then was that the problems with the windows were correctable, they were correctable without total de-clad of the building, they were correctable without total replacement of the windows." (Id., 241, lines 14-19) (Id., p. 74, line 1 – 75, line 10) (Id., p. 342, line 25- 343, line 1 ("I have always been of the opinion that it would be possible to fix the windows in lace")) (Trial Exh. 440, Att. Z). Mr. Lewis opined that, "[a]ny windows at the subject property that continue to experience water intrusion could be remedied by the implementation of the 'Ken Lies Repair Protocol' with the possible

exception of the wholesale removal and replacement of the windows on the fourth floor level." (*Id.*, p. 6).

In February 2009, Myles Glick was engaged by Plaintiffs "to find the causes of the water intrusion into the exterior skin of the building and ultimately into the units." (Glick Dep. p. 25, lines 1-3, Att. N). Significantly, Mr. Glick testified that he had been engaged to examine the Subject Property and provide an opinion as to the problems with leaking windows. However, on his first trip to the Subject Property, he immediately noticed that there was no flashing and called Plaintiffs' counsel and told him, "I think you got more problems than you do just trying to keep water out of these windows. I think you got some other problems. So I saw it when I got out of my car." (*Id.*, p. 112, lines 6-17) (*Id.*, p. 552, lines 4-14) (*Id.*, p. 665, lines 1-25). Ultimately, Mr. Glick testified that there were problems associated with almost every "trade that touched the building." (*Id.*, p. 734, lines 2-13).

In 2010, the Plaintiffs began filing lawsuits against Superior, Muhler and Weather Shield, along with numerous other defendants. The Plaintiffs complained about specific issues with various components of the Subject Property, including: 1) the Stucco system, 2) Windows, 3) Wall Sheathing, 4) Brick, 5) Balconies, 6) Roof, and 7) Miscellaneous. (Amended Complaint of Plaintiff Concord and Cumberland Horizontal Property Regime, filed June 1, 2012 ("Amended Complaint") ¶ 49, Att. O). As explained in more detail below, the Amended Complaint alleged numerous causes of action against Superior that had nothing to do with the windows and/or Muhler's work under the Subcontract. More importantly, a number of the Plaintiffs' complaints that were related

to windows or leaking are directly attributable to failures or negligence on the part of JDavis, Superior and/or other subcontractors.

Mr. Glick reviewed Paragraph 49 of the Amended Complaint, which tracks closely with the issues raised in his expert reports, and opined that each one was the result of design deficiencies, contract administration² and/or construction. (Glick Dep. p. 671, line 2 – 680, line 9, Att. N). In his most recent deposition, Mr. Glick opined that the architect and general contractor missed numerous opportunities to see and correct issues with the Subject Property, including the windows. “Those are contractual obligations and the contractor didn’t do things right and that’s well documented and the architect didn’t catch things that were wrong and that’s documented because we wouldn’t be here today. If no one violated the standard of care, we wouldn’t be here today.” (*Id.*, p. 682, line 22 – 683, line 22). For example, installation of the Weather Shield windows into a barrier system, as opposed to a drainable system, was not only a violation of the Weather Shield installation instructions, but also a violation of code. (*Id.*, p. 688, line 20 – 689, line 16). Mr. Lewis is in agreement, opining that “the biggest criticism” he had of the building design drawings was that they “basically combine elements of drainage systems in barrier systems,” which was not done in “a competent manner,” which ran “the risk of encapturing unintended drainage or water within ... the cladding system.” (Lewis Dep. p. 289, line 6 – 290, line 14, Att. V) (*Id.*, p. 327, lines 2-25) (*Id.*, p. 329, lines 2-18).

Mr. Glick also was highly critical of Superior’s management of the construction of the Subject Property: “I say this not lightly but ... I don’t think there was any

² For his part, Mr. Clardy blamed the architect for failures in contract administration “when the windows were at issue ... quite frankly, they just disappeared from the job ... I don’t recall ... there being any architect appearance on the jobsite to assist in working out the problems, making sure that we were, in fact, meeting their intent of the plans and specifications.” (Clardy Dep. p. 589, line 10 – p. 590, line 4, Att. F).

management or supervision because of what's out there ... I'm not sure but, I mean, the stucco problems and the brick problems, that's Construction 101." (Glick Dep. p. 738, line 14 – 739, Att. N). This criticism extended to the installation of the pans with a negative slope. (*Id.*, p. 739, lines 7-22). Mr. Sykora agreed that Superior did not provide adequate supervision on the project: "the superintendents not keeping the various other subcontractors well supervised ... extension cords coming through windows and doors, and windows and doors being left open. On other projects that I've been on, typically at the end of the day, there's somebody at the contractor level that would go through the building, close everything up for the night, if anything had been left open. Most projects today – or over the last few years – that I've been involved in typically don't allow windows and doors to be open." (Sykora May 24, 2013 Dep. p. 77, lines 5-14, Att. I-2).

In each of his reports, Mr. Glick recommended either replacing or repairing the windows. (See Glick Preliminary Report, dated Dec 15, 2009, p. 14, Att. W) (Glick Supplemental Report #1, dated March 11, 2010, p. 10, Att. X). In contrast, he consistently recommended that the stucco system and the brick be completely removed and replaced, in addition to other major repairs to the Subject Property. (Glick Preliminary Report, p. 15, Att. W) (Supplemental Report #1, p. 11, Att. X) (Glick Dep. p. 148, line 23 – 149, line 12, Att. N) (*Id.*, p. 590, line 6 – 594, line 21). Although Mr. Glick later recommended that the windows be replaced, he stated that he believed Weather Shield "is a good manufacturer," but "something went wrong somewhere," on this project so that he just did not "feel comfortable telling these clients to do anything but change these windows out." (*Id.*, p. 496, lines 10-18). Mr. Glick also agreed that, in order to repair the defective pans, all of the windows would have to be removed;

regardless of whether the windows leaked or not. It would be difficult if not impossible to remove the windows for this purpose without damaging them, which would require new windows irrespective of how the windows were performing. (Id., p. 733, lines 4-21).

STANDARD FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c), SCRCP, summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gauld v. O'Shaughnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Gauld, 380 S.C. at 558, 671 S.E.2d at 85.

Only after the party moving for summary judgment meets the initial burden of showing it is entitled to summary judgment as a matter of law, must the opponent then present specific facts showing genuine issues for trial. Gauld, 380 S.C. at 558-559, 671 S.E.2d at 85. In cases applying the preponderance of the evidence standard, the "non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); Plantation A.D., LLC v. Gerald Bldrs of Conway, Inc., 386 S.C. 198, 204, 687 S.E.2d 714, 718 (Ct. App. 2009). "Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the

application of law.” Keith v. River Consult., Inc., 365 S.C. 500, 505, 618 S.E.2d 302, 304 (Ct. App. 2005).

ARGUMENTS

I. Neither the Subcontract nor the 2007 Agreement provide indemnity to Superior for its own wrong-doing.

Although Superior correctly states that, under South Carolina law, parties can agree to indemnify each other for various types of damages or losses, it is incorrect that either of the agreements at issue here indemnify it for its own negligence.³ South Carolina recognizes that, unless public policy dictates otherwise, a party can agree to indemnify another party for that party’s own negligence. However, “a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting from its own negligent acts unless such intention is expressed in **clear and unequivocal terms.**” Laurens Emerg. Med. Spec. v. M.S. Bailey & Sons Bankers, 355 S.C. 104, 111, 584 S.E.2d 375, 379 (2003) (emphasis added);⁴ *see also* Murray v. The Texas Co., 172 S.C. 399, 402, 174 S.E. 231, 232 (1934 (finding “broad and comprehensive” language was insufficient to prove the contract relieved a party from its own negligence). Indemnification for one’s own negligence is “not favored in the law,” and because “[l]iability on such indemnity is so hazardous, and the character of the indemnity so

³ Although Superior purports to reserve the right to demand payment from Muhler for amounts paid under any settlement Superior might enter into with C&C, (Motion, p. 9 n.1), the legal arguments below regarding the limits of the indemnity provisions contained in the Subcontract and the 2007 Agreement, as well as the factual disputes over liability for the windows, doors and water intrusion issues at the Subject Property, apply equally to any claim based on Superior’s obligation to C&C as they do to Superior’s direct indemnification claim.

⁴ Although Superior pays lip service to this standard, (Motion p. 12), it clearly does not apply it. Nor does Superior claim to be fault-free in relation to damages allegedly associated with the windows and doors at the Subject Property. Instead, Superior’s insistence that it need not prove that it is an “innocent party” or that it has “clean hands,” essentially concedes that Superior’s own negligence contributed to the Plaintiffs’ window/door damages.

unusual and extraordinary ... there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation, and no inference from words of general import can establish it.” 41 Am. Jur. 2d Indemnity 16.

Other states are in accord. “Indemnification agreements seeking to indemnify a party for losses resulting from that party’s own negligent acts are not favored in the law.” Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646 (Minn. Ct. App. 1985). As a consequence, an intent to indemnify a party from the consequences of its own negligence must be explicit and be “specifically stated in the four corners of the document.” Cabo Constr., Inc. v. R. S. Clark Constr., Inc., 227 S.W.3d 314, 317 (Tex. App. 2007). In fact, “if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee’s own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.” Greer v. City of Philadelphia, 795 A.2d 376 (Pa. 2002), *quoting* Perry v. Payne, 66 A. 553 (Pa. 1907) (“there can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation”); *see also* Nusbaum v. Kansas City, 100 S.W.3d 101, 106 (Mo. 2003) (“an indemnification contract ‘will not be construed so as to indemnify one against loss or damage resulting from his own negligent acts unless such intention is expressed in clear and unequivocal terms’”); East-Harding, Inc. v. Horace A. Piazza & Assoc., 91 S.W.3d 547, 551 (Ark. Ct. App. 2002) (a “subcontractor’s intention to obligate itself to indemnify a prime contractor for the prime contractor’s own negligence must be expressed in clear and unequivocal terms and to the extent that no other meaning can be ascribed”);

Hagerman Constr. Corp. v. Long Elec. Co., 741 N.E.2d 390, 392 (Ind. Ct. App. 2000) (because indemnification clauses indemnifying a party for its own negligence are disfavored as "a harsh burden that [an indemnifying] party would not lightly accept," any such provision must "stated in clear and unequivocal terms"); Dillard v. Shaughnessy, Fickel & Scott Architects, Inc., 884 S.W.2d 722, 724 (Mo. Ct. App. 1994) (applying Kansas law) (under general contract construction, indemnification clauses do not indemnify for "damages caused by the indemnitee's own negligence unless the agreement specifically states").

Because courts require clear and unequivocal language in order to find an agreement to indemnify a party for its own negligence, "indemnification contracts claimed to contain these provisions are construed more strictly than other contracts." Maxim Tech., Inc. v. City of Dubuque, 690 N.W.2d 896, 901 (Iowa 2005); *see also* Laurens Emerg. Med. Spec., 355 S.C. at 111, 584 S.E.2d at 378-379 (applying "the rule requiring strict construction of a contract containing an indemnity provision purporting to relieve an indemnitee from the consequences of its own negligence"); *see also* McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (contract provisions "that seek to exculpate a party from liability for the party's own negligence are not favored by the law," and are strictly construed because "such provisions tend to induce a want of care").

A. The Subcontract does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

There are two indemnity provisions between Muhler and Superior at issue in this case. The first is contained in the initial Subcontract between the two parties. (Att. A). The indemnity clause in this contract is the form clause for AGC Document No. 600,

Subcontract for Building Construction, August 1984 by the Associated General Contractors of America. Article 12.1 of the Subcontract provides:

12.1 SUBCONTRACTOR'S PERFORMANCE. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect, and Contractor (including its affiliates, parents and subsidiaries) and other contractors and subcontractors and all of their agents and employees from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Subcontractor's Work provided that

(a) any such claim, damage, loss, or expenses is attributable to ... injury to or destruction of tangible property (other than the Subcontractor's Work itself) including the loss of use resulting there from, **to the extent caused or alleged to be caused in whole or in any part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by the Subcontractor or anyone for whose acts the Subcontractor may be liable, regardless of whether it is caused in part by a party indemnified hereunder.**

(b) such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Article 12.

(Subcontract, ¶ 12.1, Att. A) (emphasis added). Courts uniformly interpret this language as not providing indemnification for the indemnitee's own negligence. *See, e.g., Braegelmann*, 371 N.W.2d at 646-647 (interpreting same operative language as not providing indemnification to the general contractor for its own negligence); *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997) (finding virtually identical language did not indemnify indemnitee for its own negligence but instead provided indemnification "only to the extent the [indemnitor's] negligence contributed to the loss"); *Cabo Constr.*, 227 S.W.3d at 317-318 (finding same language did not expressly state that the subcontractor would indemnify the contractor for the contractor's own negligence); *Brown v. Boyer-Washington Blvd Assoc.*, 856 P.2d 352, 355 (Utah 1993) (limiting similar indemnification language to damages caused in whole or in part

by acts of the subcontractor); MT Builders, LLC v. Fisher Roofing Inc., 197 P.3d 758, 765 (Ariz. Ct. App. 2008) (explaining that identical indemnification language created “a comparative fault or negligence arrangement whereby the indemnitor’s liability is limited ‘to the extent’ it and its supervisees were at fault”); Frank v. MSI Constr. Mgrs., Inc., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (construing practically identical language to mean the subcontractor is liable to the general contractor only “to the extent of its own negligence but is not required to indemnify” the general contractor for the general contractor’s own negligence); Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc., 902 S.W.2d 536, 539 (Tex. Ct. App. 1995) (holding that nearly identical language does not indemnify the indemnitee for its own negligence); Hagerman, 741 N.E.2d at 393-394 (similar language in AIA standard construction form contract does not “clearly and unequivocally” provide coverage for indemnitee’s own negligence).

As the Missouri Supreme Court explained in a case containing similar language to Article 12.1 of the Subcontract, the “phrase ‘to the extent caused’ expresses an intention to limit the indemnitor’s liability to the portion of fault attributed to the indemnitor The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor’s] negligence even if [the indemnitee] participates in part in [the indemnitor’s] negligent conduct. To hold otherwise would make the intended expression to limit liability to the acts of indemnitor meaningless.” Nusbaum, 100 S.W.3d at 106-107. Courts have routinely held that the language “to the extent” in this indemnification clause means that the indemnifying party is liable to the indemnitee “to the extent of its own negligence but is not required to

indemnify [the indemnitee] for [the indemnitee's] negligence." Frank, 527 N.W.2d at 81.⁵ This Court should reach the same conclusion here.

B. The 2007 Agreement does not obligate Muhler to indemnify Superior for Superior's own wrong-doing.

Even though the 2007 Agreement contains somewhat broader indemnification language than the Subcontract, it does not state clearly and explicitly that Muhler agrees to indemnify Superior for Superior's own negligence and/or wrong-doing. Instead, Section 11 of that Agreement provides:

11. In the event either Superior or Concord and Cumberland, LLC, are sued hereafter by or on behalf of any subsequent owner, alleging that one or more of the windows and/or doors do not comply with the original and amended Contract Documents, or are defectively installed, **Muhler agrees to unconditionally indemnify both Superior and Concord and Cumberland, LLC against these allegations and will pay all damages (including reasonable attorneys' fees) incurred by either or both, as determined by a court of competent jurisdiction or award of arbitration, liability incurred by either or both as consequence including, but not limited to, costs and attorneys' fees, any remedial costs of expert witnesses, cost of arbitration and all other damages incurred.**

(2007 Agreement, Section 11, Att. B) (emphasis added).

First, to the extent this provision purports to indemnify Superior or C&C "unconditionally," it is unconscionably broad. See Fisher v. Stevens, 355 S.C. 290, 296, 584 S.E.2d 149, 152 (Ct. App. 2003) (holding that an overly broad indemnification provision would "offend notions of public policy"). Although Fisher involved a so-called exculpatory contract, or waiver, the reasoning applies equally here, where the phrase "unconditionally" is as objectionably broad, if not broader, as the phrase at issue there, which released "any person in any restricted area" from liability." Id.

⁵ In Hagerman, the Indiana court explained that the "phrase 'to the fullest extent permitted by law' is a preservation clause that preserves [the indemnitee's] rights under the law to the extent that [the indemnitor] and/or its sub-subcontractors, etc. are negligent." 741 N.E.2d at 394.

Second, Section 11 of the 2007 Agreement does not clearly, explicitly or unequivocally state that Muhler is agreeing to indemnify Superior for Superior's own negligence. Although "formulaic language expressly stating that 'X indemnifies Y for Y's own negligence' is not mandatory," the "agreement must speak to the negligence of the indemnitee." Snohomish County Pub. Transp. Benefit Area Corp. v FirstGroup America, Inc., 271 P.3d 850, 854 (Wash. 2012) (emphasis added). Here, as was the case in Snohomish County, the indemnity provision "does not tell a court 'clearly and unequivocally' that the parties considered the effect of the negligence of the indemnitee and intended to indemnify for the indemnitee's own negligence." 271 P.3d at 862. Indemnity provisions promising to indemnify "from and against any and all claims," or where the indemnitor assumed "all responsibility for claims asserted by any person whatever," are "general terms" that are "insufficiently clear and unequivocal," to provide indemnification for the indemnitee's own negligence. Cox Cable Corp. v. Gulf Power Co., 501 So.2d 627, 629 (Fla. 1992). The use of the term "unconditionally" similarly does not express any intent to indemnify Superior for its own negligence.

Two Texas cases serve as examples of indemnification agreements that evidenced an express intent to indemnify the indemnitee for its own negligence. See Enserch Corp. v. Parker, 794 S.W.2d 2 (Tex. 1990) and Atlantic Richfield Co. v. Petroleum Personnel, Inc., 768 S.W.2d 724 (Tex. 1989). In Enserch, the indemnification clause provided that J.W. "Bill" Christie, Inc., assumed "entire responsibility and liability for any claim or actions based on or arising out of injuries ... sustained or alleged to have been sustained in connection with" Christie's performance of the contract "*regardless of whether such claims or actions are founded in whole or in part upon alleged negligence of [Enserch],*

[Enserch's] representative, or the employees, agents, invitees, or licensees thereof. [Christie] further agrees to indemnify and hold harmless [Enserch] ... in respect of any such matters ..." 794 S.W.2d at 6-7 (emphasis added). In Atlantic Richfield, the Contractor agreed "to hold harmless and unconditionally indemnify the Company against and for all liability, cost, expenses, claims and damages which [the Company] may at any time suffer or sustain or become liable for by reason of any accidents, damages or injuries ... in any matter arising from the work performed hereunder, *including but not limited to any negligent act or omission of [the Company], its officers, agents or employees ...*" 768 S.W.2d at 724 (emphasis in original). The Court held that the italicized language was sufficient to give the indemnitor notice that he was agreeing to indemnify the Company for its own negligence. Id., at 726. The Texas Court did **not** find significant or rely in any way on the inclusion of the word "unconditionally" in its analysis of whether the indemnity provision covered the indemnitee for its own negligence.

The use of the term "unconditionally" could mean many things⁶ but does not, on its face, indicate Muhler ever intended to indemnify Superior for Superior's own negligence. Although Superior is correct that the 2007 Agreement provides that both parties participated in drafting the Agreement, (*see* 2007 Agreement, Section 23, Att. B), that does not ameliorate the fact that indemnity agreements are strictly construed against the party seeking to be indemnified. *See Federal Pac. Elec. v. Carolina Prod. Enterprise*, 298 S.C. 23, 28-29, 378 S.E.2d 56, 58-59 (Ct. App. 1989); *see also East-Harding*, 91

⁶ For instance, the parties' intent may have been that Muhler would indemnify Superior or C&C for the acts of Weather Shield and/or In the Wind and/or Watts Builders, regardless of whether Muhler was also negligent. Or, the parties may have intended that Muhler would indemnify Superior or C&C regardless of whether Muhler was made a party to the suit. It simply is not clear from the face of the document that the parties ever intended that Muhler would indemnify Superior for its own negligence.

S.W.3d at 551 (same); Frank, 527 N.W.2d at 81 (construing “the contract most strictly against the party who is the indemnitee”). Applying this construction principle to the 2007 Agreement inevitably results in the conclusion that Section 11 does not cover Superior for its own negligence.

Superior points to Paragraphs 45 through 54 of the Amended Complaint as the basis for its indemnification claim under Section 11 of the 2007 Agreement. However, Section 11 indemnifies only against claims that the windows and/or doors: 1) do not comply with the original and amended Contract Documents, or 2) are defectively installed. The term “Contract Documents” is not defined anywhere in the 2007 Agreement and, therefore, this provision is inherently vague and unclear. Furthermore, none of the allegations in Paragraphs 45-54 mentions any failure of the windows or doors to comply with any contract documents. Although Paragraph 49(b), which addresses windows, references industry standards, building codes and manufacturer’s installation instructions, there is no reference to Contract Documents. Under the rule that indemnification provisions are strictly construed against the party seeking indemnification, those references should not be construed to mean Contract Documents.⁷

In addition, although Paragraph 49 asserts various damages as a result of water intrusion resulting from “defects and deficiencies in the design and construction” of the Subject Property, it is unclear to what extent, if any, the items listed under subsection (b) (windows) are the result of defective installation as opposed to, say, deficient design. For

⁷ Furthermore, from a factual standpoint, Mr. Andrews testified that, when the project was turned over to the owners, the windows met the project requirements. (Andrews Dep. p. 299, lines 2-19, Att. C). Mr. Hood testified that he observed the windows being installed correctly. (Hood Dep. p. 21, lines 18-23, Att. T) (*Id.*, p. 31, lines 10-22). Superior’s expert, Mr. Lewis, testified that the windows were installed consistent with accepted practices. (Lewis Dep. p. 350, lines 6-11, Att. V). When asked if the physical installation of the windows met the plan drawings, Mr. Glick replied, “Yes, they do, oddly enough.” (Glick Dep. p. 468, lines 4-7, Att. N).

example, Mr. Lewis clarified that, when he attributed water intrusion "coming from the outside around the windows," to installation, "a deficient installation could ... be due to either incomplete or deficient installation details, weatherproofing details," and concluded "it's probably a combination" of a "trade problem" and a "design problem." (Lewis Dep. p. 318, line 20 – 319, line 5, Att. V) (*Id.*, p. 362, lines 8-14) (*Id.*, p. 392, lines 1-13).

Third, Section 32-2-10 provides, in pertinent part, that "a promisee or agreement in connection with the design, planning, construction, alteration, repair or maintenance of a building ... purporting to indemnify the promisee, its independent contractors, agents, employees, or indemnitees against liability for damages arising out of ... property damage proximately caused by or resulting from the sole negligence of the promisee, its independent contractors, agents, employees, or indemnitees is against public policy and unenforceable." S.C. Code Ann. § 32-2-10 (2013). Where, as is the case here, the window and door units themselves and/or the installation of any window or door unit has been affected by negligent work performed by Superior and its direct subcontractors, other than Muhler, that resulting damage is solely caused by Superior's own negligence. The fact that Superior hired experts to throw all of the blame for the water intrusion issues onto Muhler and Weather Shield does not prove that Superior is not solely responsible for the water intrusion problems at the Subject Property. There has been no adjudication of this issue, which means that this fact is in dispute and not ripe for summary judgment. Furthermore, the term "unconditionally" in Section 11 of the 2007 Agreement can be interpreted to require Muhler to indemnify Superior for Superior's own negligence. Such an interpretation would require the conclusion that Section 11 also

violates the prohibition against indemnity for sole negligence in construction contracts found in S.C. Code Ann. § 32-2-10 (2013).

Fourth, and completely fatal to Superior's Motion, the plain language of the 2007 Agreement provides that Muhler will indemnify Superior for "all damages (including reasonable attorneys' fees) incurred by [Superior] ... as determined by a court of competent jurisdiction or award of arbitration." (2007 Agreement, Section 11, Att. B). Under Section 11, the term "damages" specifically is modified by the phrase "as determined by a court of competent jurisdiction or award of arbitration." This language clearly and unambiguously limits damages payable under that provision, including attorneys' fees, to those determined by a court or arbitrator. See MT Builders, 197 P.3d at 763 (recognizing that some indemnification clauses limit or restrict losses to those incurred by an award or judgment). Here, there has been no court determination of the Plaintiffs' damages, which Mr. Clardy conceded. (Clardy Dep. p. 739, lines 9-16, Att. F). Therefore, no obligation to indemnify Superior has arisen in this case under the 2007 Agreement.

In the end, as Superior points out, courts will not re-write contracts for the parties, McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 33 S.E.2d 501 (1945), which is what Superior implicitly is asking this Court to do. Superior's entire argument requires this Court to write into both the Subcontract and the 2007 Agreement language expressing an intent to indemnify Superior for its own negligence, because neither of those contracts contains such language. Superior simply assumes this Court will read into the Subcontract a provision allowing "indemnity notwithstanding any concurrent negligence of a party to be indemnified." (Motion p. 13). Superior assumes, but fails to point to any

language in either the Subcontract or the 2007 Agreement that indicates Muhler agreed to indemnify Superior for Superior's own negligence.

This Court should hold that neither the Subcontract nor the 2007 Agreement provides indemnification to Superior for its own negligence.

C. The 2007 Agreement fails for lack of consideration and impossibility.

Even if the 2007 Agreement were deemed to provide indemnification for Superior's own negligence, which Muhler denies, that Agreement fails for lack of consideration and impossibility. As to lack of consideration, Section 10 of the 2007 Agreement provides that:

In exchange for the payment by Superior of all amounts due Muhler in accordance with the Subcontract Agreement and in accordance with the terms of the Memorandum of Understanding executed by Superior and Muhler on June 7, 2007, Muhler agrees that it will complete the installation of all uninstalled products and accessories promptly upon execution of this Agreement ..."

(2007 Agreement, Section 10, Att. B). The referenced Memorandum of Understanding, dated June 7, 2007, specifically states that "Superior will deliver a check to Muhler for \$120,745.00 immediately upon receipt of" referenced performance bonds. (Att. R).⁸ The performance bond was delivered by Muhler but Superior has never made the promised payment. (See Affidavit of Tali Vereen, Att. J). As Muhler was never paid pursuant to this promise, Superior has not complied with that provision of the 2007 Agreement.

It is important to note in this respect that Mr. Sykora explained that Superior failed to timely pay Muhler even before "any problems with the windows and doors and

⁸ In fact, Mr. Andrews characterized the 2007 Agreement among Superior, Weather Shield and Muhler as a "payment agreement." (Andrews Dep. p. 297, lines 4-8, Att. C) (see also Affidavit of Todd R. Meyer, Esq., dated May 7, 2014, ¶¶ 8, 15, Att. S (explaining that one of the purposes of the 2007 Agreement was to address "Superior's failure to pay Muhler for amounts due pursuant to its construction subcontract," and that Superior's promise to pay amounts due "was a crucial component of the deal"))).

we were induced to get into this agreement so that we would get paid for the work that we had already done.” (Sykora Sept 24, 2012 Dep. p. 164, lines 15-19, Att. I-1). Superior “was withholding payment prior to any window tests. They weren’t paying us. They weren’t performing their portion of their contract. They then – once the water tests came up, they used that as an excuse not to pay us any more money, but they were in default ... way before the tests.” (*Id.*, p. 167, lines 7-15). Mr. Clardy confirmed. (Clardy Dep. p. 478, line 3 – 479, line 17, Att. F (explaining that in January of 2007, Muhler had not been paid and Mr. Clardy did not know of a reason why Muhler was not paid at that time)) (*Id.*, p. 480, lines 19-24).⁹ Robert “Robbie” Robinson, a Superior Manager, testified that it was Superior’s policy to not pay subcontractors until they received payment from C&C. (Robinson Dep. p.137, lines 18-23).¹⁰

In fact, Mr. Robinson testified that Superior was \$15 million “in the hole” on other projects at the time it was working on the Subject Property. Beginning in January 2008, this shortfall began to affect Superior’s ability to pay subcontractors on various projects. (Robinson Dep. p. 167, lines 2-21). Although he could not confirm that Mr. Clardy had admitted that Superior was using money from the Subject Property to pay for other jobs, he did explain that, “the way Superior did business, they put all the revenue in one bucket and paid out of that bucket; right, wrong or indifferent.” He also acknowledged a number of agreements signed by Mr. Clardy in which he agreed to “no longer use Concord funds to pay other debts.” (*Id.*, p. 174, line 22 – 175, line 15).

⁹ Muhler also was never paid for the 25 windows it was instructed to remove and reinstall so that the bucking configuration could be altered. (Sykora Sept 24, 2012 Dep. p. 122, lines 2-13, Att. I-1).

¹⁰ Superior’s practice of withholding payment to subcontractors until after payment was received for C&C violates S.C. Code Ann. §29-6-230 (2007).

Furthermore, actions and positions taken by the Plaintiffs, C&C and/or Superior made Muhler's performance under the 2007 Agreement impossible. Muhler agreed "to remedy any defects in the installation of the windows." (June 2007 Agreement, Section 5; *see also* Section 9, Att. B (Muhler agreeing "that in the event of any future window or door failure or defect in installation, that Weather Shield will repair or replace any defective window or door, and Muhler will repair any other component of the building damaged in the process of repairing or replacing such window or door installation"))). Even though Mr. Lies developed a protocol for repairing the windows that proved to be successful, (Att. M (Protocol)) (Lies Dep. p. 262, lines 22-25, Att. L),¹¹ Muhler was not allowed to execute that repair protocol. (Robinson Dep. p. 78, line 16 – 79, line 12). Thus, Muhler was placed in a position that it could not resolve this issue. *See Payne v. Melton*, 67 S.C. 233, 45 S.E. 154 (1903).

II. Alternatively, the indemnity provisions in the contracts are ambiguous and not appropriate for summary judgment.

Alternatively, to the extent Superior urges an interpretation of the indemnification provisions in either the Subcontract or the 2007 Agreement that is in conflict with the plain language or those contracts or the case law cited above, it essentially concedes that those provisions are ambiguous and not ripe for summary judgment. For instance, any argument that the clause, "regardless of whether it is caused in part by a party indemnified hereunder," in the Subcontract entitles Superior to indemnification from Muhler for its own negligence, renders that clause "equivocal at best," *Braegelmann*, 371

¹¹ The only leak was the result of an area where "the sealant didn't quite cure." Mr. Lies explained that they had to go ahead and test it without the sealant cured because they "were on a time crunch. The owner wanted us out of there ... the owner, Dr. Mather I think his name was, was very anxious to have us done and out of there." (Lies Dep. p. 262, line 14 – 264, line 11, Att. L).

N.W.2d at 646, making interpretation of this provision inappropriate for summary judgment.

The same is true for Section 11 of the 2007 Agreement. Because there is no language in that section indicating a clear intent to indemnify Superior for its own wrongdoing, it is, at best, ambiguous and not ripe for summary judgment. See Murray, 172 S.C. at 402, 174 S.E. at 232 (finding "broad and comprehensive" indemnification language "provocative of some doubt"); Sherlock Holmes Pub. Inc. v. City of Columbia, 389 S.C. 77, 83, 697 S.E.2d 619, 622 (Ct. App. 2010) (ambiguity in a contract requires a court to "look beyond the four corners to discern the parties' intentions"); Skull Creek Club Ltd. v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993) (the "construction of a contract which is ambiguous, or capable [of] more than one construction, is a question of fact").

Thus, to the extent this Court finds the indemnification provisions in the Subcontract and/or the 2007 Agreement ambiguous as to whether they provide indemnification for Superior's own negligence, it should deny Superior's Motion.

III. Superior completely misapplies Griffin v. Van Norman.

Superior's heavy reliance on Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990) is misplaced. First, Superior cites Griffin for the proposition that a contractual indemnity cause of action "is a narrow exception to the scintilla rule of evidence that precludes summary judgment, at least as to liability," referencing the "three-pronged test of reasonableness that is required for recovery." However, as Griffin involved a motion to dismiss, not a motion for summary judgment, it did not elucidate the evidentiary standard for withstanding a motion for summary judgment.

Second, without addressing the key issue of whether it is entitled to indemnity from Muhler under either the Subcontract or the 2007 Agreement, Superior simply and erroneously concludes that, because it has settled the claims against it "related to the windows and doors, it is unnecessary to conduct a trial of the underlying claims related to Muhler's scope of work." (Motion pp. 11-12). Citing Griffin, Superior claims it has satisfied its right to indemnity from Muhler and the Court only need address the proper amount of damages. (Id. p. 12). Superior's attempt to gloss over the key legal issue in its case, *i.e.*, whether it is entitled to any indemnity from Muhler under either the Subcontract or the 2007 Agreement for its own negligent acts, reveals core the weakness in Superior's Motion.

As Griffin involved equitable indemnity, not contractual indemnity, as well as an indemnitee who was an "innocent party," it simply does not apply in this case. 302 S.C. at 522, 397 S.E.2d at 379.¹² Otis Elevator, Inc. v. Hardin Constr. Co., 316 S.C. 292, 295, 450 S.E.2d 41, 43 (1994), also relied on by Superior, involved an "innocent indemnitee" as well. In fact, in Otis Elevator, a jury specifically found that "no act or omission" of the indemnitee caused the plaintiff's injuries. 316 S.C. at 295, 450 S.E.2d at 43. Therefore, the only question before the court was whether the indemnitee's settlement with the plaintiff was reasonable. Even if it were applicable to this case, which it is not, Superior could not take advantage of the rule discussed in Griffin because it cannot prove it is an "innocent defendant." 302 S.C. at 523, 397 S.E.2d at 380. Because Griffin is not

¹² Although some or all of the elements set forth in Griffin to determine whether a settlement amount should be allowed under an indemnification claim may be useful inquiries in a contractual context, *i.e.*, whether a settlement is reasonable, the party seeking indemnification first must establish its right to recover. That hurdle Superior has not and cannot overcome.

directly applicable to this case, the arguments on pages 11-28 of Superior's Motion are irrelevant and should be rejected.

Rather than attempting any analysis of the contractual provisions that govern the outcome of its motion, Superior simply and erroneously concludes that it is entitled to indemnification under the Subcontract and/or the 2007 Agreement, regardless of how much Superior's own negligence contributed to the Plaintiffs' alleged damages. As explained above, this Court should find that, as a matter of law, neither the Subcontract nor the 2007 Agreement entitles Superior to indemnification for its own negligence.

IV. The proportion of liability attributable to Superior for alleged window and door problems is a fact question not appropriate for summary judgment.

Where, as is the case here, the inquiry into whether the Plaintiffs' damages were caused in whole or in part by any negligent actions of the party seeking indemnification is a disputed question of fact, the case is not appropriate for summary judgment. *See East-Harding*, 91 S.W.3d at 551; *Brown*, 884 S.W.2d at 724 ("the actual fault of the relative parties" is a "critical element[] when determining whether indemnification applies"). The indemnification language at issue here has been labeled "a 'narrow form' of indemnification" in that it "only covers the indemnitee to the extent its losses were caused by the indemnitor." *MT Builders*, 197 P.3d at 765. In short, the indemnitor's liability "is limited 'to the extent' it and its supervisees were at fault." *Id.* This language requires Superior to prove the extent of Muhler's fault in order to recover under Article 12.1 of the Subcontract. *See Id.* at 764; *see also Nusbaum*, 100 S.W.3d at 107 (unless parties concede liability, a court must determine how much of a settlement is for the indemnitor's negligence and how much is attributable to the indemnitee's own negligence). In short, the determination of whether a plaintiff's injuries were caused in

whole or in part by the indemnitee, the indemnitor and/or some third party is a factual inquiry inappropriate for summary judgment. East-Harding, 91 S.W.3d at 551.

There are numerous disputed factual issues that must be resolved before the issue of whether, and if so, to what extent, Superior is entitled to indemnification from Muhler. Some of the major issues and evidence are set out below.

A. Superior's failures as a General Contractor contributed to the Plaintiffs' alleged damages, both in general and specifically with respect to the windows and doors.

There is overwhelming evidence and testimony that Superior failed miserably in its role as General Contractor for the Subject Property. Mr. Andrews testified that there were concerns about Superior being able to adequately staff the Project. "There was issues that came up during the construction that [Superior] just didn't have the right manpower to bring in the resources as they fell behind, or didn't seem to. I'm not sure why they made the decisions to do what they did." (Andrews Dep. p. 31, line 23 – 32, line 8, Att. C). Mr. Robinson agreed that Superior's Myrtle Beach office made "a big mistake" on the C&C project, both in terms of price and the schedule. (Robinson Dep. p. 98, lines 18-25). The minimal number of change orders in the Project was "atypical. It's a picture into the lack of resources to get things organized." (Andrews Dep. p. 73, lines 2-7). Mr. Andrews testified that, other than Superior's supervisor, Johnny Barfield, "[e]verybody else was either a subcontractor's employee or a temporary labor force that they hired to buy carpentry work from, labor to clean up the project, various tasks that they tried to tackle completely with temporary labor." (Id., p. 331, lines 3-11). In the Wind's president, Mark McFarland's criticisms of Superior included, "very poor framing, very poor construction, very poor scheduling. The supervision was very poor. They had temporary help in place of skilled carpenters doing work. It just was a very mismanaged

project from the beginning.” (McFarland Dep. p. 75, lines 3-14, Att. FF). Mr. Robinson admitted that Superior “did utilize ... a lot of temporary labor from labor sources. Our kind of assistant superintendent, Robert something-or-another, did come through a temp agency. In hindsight, we probably could have done a better job ...” (Robinson Dep. p. 95, lines 13-19). It was Mr. Robinsons’ opinion that managing the Subject Property and the work Superior was doing at 21 George Street was too complex for Wally Baughn to be project manager on both with no assistance. (Id., p. 168, lines 9-25). Vince Hood, a consultant hired by the developer (Estates Management) to investigate construction problems at the Subject Property, echoed these criticisms, indicating that the project was understaffed: “There were no craftsmen or carpenters that were employed by Superior,” and “no foremen to assist [Superior’s] superintended on site...” (Hood Dep. p. 26, line 22 – 28, line 11, Att. T) (Id. p. 37, line 23 – 38, line 14 (citing a lack of skilled labor/carpenters, on the project)).

Mr. Hood explained that the problems with Superior’s management of the project went deeper than Superior’s staffing problems

Q: Tell me how they go deeper.

A: Well, when you have work that needs to be done and subcontracts have not been written. When you have material – important material that needs to be delivered, you don’t know what the delivery dates are and you don’t even have copies of the submittals that would have been approved by the architects or engineers. You don’t have copies of those on site, you don’t know when the material’s coming or whether it’s even been ordered. Subcontracts for certain installations that were not written or, if they were, the superintendent on site did not – was not aware of who it was. Just numerous problems and flow of information problems.

Q: If you had to grade Superior’s performance for Concord & Cumberland, what grade would you give them?

A: It would be, at best, a very poor grade. If you want to call it a D, D minus. Very little support from the home office, which you would expect. Apparently a cash flow problem since ... a lot of subcontractors are not being paid on time and walking off the jobsite. A lack of planning. And the project manager was overwhelmed with the other projects and really didn't pay much attention to this project.

(Hood Dep. p. 39, line 9 – 40, line 13, Att. T). Mr. Robinson confirmed that Superior failed to have materials ordered and subcontractors hired and lined up properly. (Robinson Dep. p. 130, line 7 – 131, line 4). Another problem Mr. Hood identified was “that not all of the subcontractors had current plans on site.” (Hood Dep. p. 69, lines 5-10).

Superior's failures as General Contractor directly contributed to water intrusion problems. For example, Mr. Andrews testified that, when they examined a balcony that had been installed improperly, they “found that the waterproofing system that Superior had put in, that they had poked a hole in the waterproofing membrane as it was being required to bridge over a void ... that one hole, which was a persistent leak.” (Andrews Dep. p. 143, line 17 – 144, line 2, Att. C). When asked about Superior's response afterwards, Mr. Andrews indicated that Superior admitted “the quality of the workmanship was extremely poor and negligent.” (*Id.*, p. 283, line 16 – 284, line 13).

B. Actions taken by the architect, owner, Superior and/or other subcontractors affected both the installation and performance of the windows.

Mr. Lies was critical of the design the architect used to incorporate the windows into the building envelope, saying he did not believe “it was completely thought out. So I do have criticism of the design in that respect ... and let me be specific on that. I don't think there was a good plan ... of what the final detailing was going to be prior to ... Muhler and their subs getting out there to start installing windows. I think it was kind of

made up on the spot in the preconstruction meeting.” (Lies Dep. p. 147, line 23 – 148, line 10, Att. L). Mr. Lies noted that the pans under the bucks were not back sealed, which allowed water to percolate in, and there was “too big a gap between the back of the pan and anything you could reliably seal against.” In addition there was no positive slope to the pans, “[s]o you have a water collection device that you put into your design to collect incidental water, but it has nowhere to go.” (*Id.*, p. 149, lines 1-22). Mr. Lies also opined that “[t]here should have been some instruction on how to attach the buck, what size screws, what spacing, how to attach that buck to the opening.” (*Id.*, p. 161, line 15 – 162, line 11). Even Superior’s Chip Clardy asserted that “there were significant design defects in the plans that were given to it for Concord & Cumberland,” that related to “the design of the window installation,” as well as the exterior cladding. (Clardy Dep. p. 671, line 18 – 672, line 5, Att. F).¹³ Mr. Robinson agreed that the architect provided inadequate design details. (Robinson Dep. p. 88, lines 7-17). “There was no agreement amongst JDavis and Sutton-Kennerly on the proper method of installation of the windows until after the contract time had expired.” (*Id.*, p. 211, lines 21-24). In fact, when he started working on the project in the spring of 2007, it was “disorganized.” He testified that “certain things had not been hired out. Certain directives had not been issued to us. I mean, it was ... three months past the completion time. So in that respect, it was a mess We were still having conversations about mythology on window installation, things like that.” (*Id.*, p. 129, lines 7-19).

¹³ Theresa Hodge, the 30(b)(6) designee for C&C, confirmed that the architect came up with the sealant detail to resolve the problem that arose when they realized that Weather Shield’s installation instructions said that pans were not to be used with the doors. (Hodge Dep. p. 66, line 8 – 67, line 11, Att. D).

In fact, in defense of his own company, Mr. Clardy testified that the problems lay not so much with Superior's failure to coordinate the work properly but, instead, pointed the finger at the architect and developer:

Majority I think on this project was in a failure of the project to be designed correctly and the contract documents to be complete and clearly show how the project was to be properly constructed That's the design issue I think that performance wound up being significantly integrated to the design problem to the point that it did have a significant ripple-down effect I pretty much agree that it is a step-down process. If the owner and architect don't provide adequate documentation to the contractor, the contractor doesn't provide adequate documentation to the subcontractor, then it's going to be exactly what we got here.

(Clardy Dep. p. 722, line 12 – 723, line 14, Att. F).

Mr. Andrews recalled that the window installation was delayed because Superior did not have the rough openings, the bucks, ready in time. (Andrews Dep. p. 274, lines 20-25, Att. C). Sequencing the subcontractors was the general contractor's responsibility and Mr. Andrews testified that "Superior did a very, very, very poor job of getting the subcontractors sequenced in, the right materials and the right equipment, the right products in at the right time." (*Id.*, p. 281, line 11 – 282, line 3). As a result, some windows were installed in the brick without their fins. (*Id.*, p. 282, lines 5-22). Mr. Robinson agreed that water intrusion problems in some of the units was the result of Superior's errors in sequencing the trades, or subcontractors. (Robinson Dep. p. 198, lines 3-21).

Mr. Lawson testified that Superior used temp labor, which he described as "very incompetent," (Lawson Dep. p. 174, line 20 – 175, line 21, Att. G), to install the bucks. "We wouldn't install the window until the buck was corrected, so we were seeing poor workmanship, and we would have to make them correct it sometimes two or three times

before we would install the window.” (*Id.*, p. 183, lines 2-6). Mr. Sykora explained that Muhler advised Superior when they encountered bucks that were not square. (Sykora May 24, 2013 Dep. p. 50, line 14 – 51, line 12, Att. I-2).

Mr. Lawson testified that Muhler installed the windows square and plumb and indicated that events that occurred after installation may have caused windows to become unsquared, unplumbed and/or unlevelled. (Lawson Dep. p. 103, line 15 – 104, line 10, Att. G). Mr. Sykora testified similarly. (Sykora May 24, 2013 Dep. p. 51, line 13 – 52, line 25, Att. I-2 (testifying that only one window was slightly out of square but it was adjusted to within the accepted tolerance)). Mr. Glick agreed that it was possible that the windows were installed plumb but having wood bucks sitting in pans that were constantly wet would warp the wood and cause the window to “go out of plumb and square.” (Glick Dep. p. 754, lines 3-19, Att. N). Mr. Lies added that the use of pressure-treated lumber for the bucks may have contributed to the problem “because that’s not a real stable – dimensionally stable wood,” (Lies Dep. p. 70, line 20 – 71, line 6, Att. L), concluding that it was “a bad idea to use Womanized or pressured-treated lumber, because that stuff is never straight. It curls and warps as it dries out.” (*Id.*, p. 163, lines 1-5). Even Christine Quigley, a senior associate with Stafford Consulting Engineers, admitted that, although she criticized the windows for being out of plumb, (Quigley Dep. p. 182, lines 14-16, Att. U), she could not state that the windows were not plumb and square when they were installed. (*Id.*, p. 413, lines 6-9). Neither could Mr. Lewis state whether they windows were plumb and square when installed. (Lewis Dep. 348, lines 13-22, Att. V).

When asked about the architectural detail for the pans underneath the windows, Mr. Glick stated, “[h]ow they’re used in the details, in other words, a pan – there’s

nothing wrong with a pan but how it's detailed, that's a problem and then how it's built is even worse." (Glick Dep. p. 727, lines 2-5, Att. N). Mr. Glick clarified that the leaking around the windows is the result, in part, of the design and location of the pans. (Id., p. 728, line 7 – 729, line 7) (Id., p. 731, lines 6-24). Superior was responsible for installing the pans under the windows. (Hodge Dep. p. 148, line 23 – 149, line 7, Att. D). Mr. Andrews testified to problems with getting Superior to install the pans properly. (Andrews Dep. p. 168, lines 1-25, Att. C) (*see also* Trial Exh. 356, Att. H (although the pans were at the site and each was labeled "for the opening that it fits ... Superior is using any pan that comes close and hammering it into the opening. Many pans are being damaged ...")). Significantly, in order to correct the pan issue, the windows would have to be removed and replaced even if there was absolutely nothing wrong with the windows. (Glick Dep. p. 732, line 3 – 734, line 1, Att. N) (Clardy Dep. p. 670, lines 12-18, Att. F) (concurring).

Mr. Lies testified that, during the testing process, they observed water penetration between the window and the buck, "[q]uite often," and attributed that "[p]ossibly due to the waterproofing." (Lies Dep. p. 315, line 25 – 316, line 9, Att. L). Muhler was not responsible for waterproofing. (Sykora May 24, 2013 Dep. p. 25, line 24 – 26, line 22, Att. I-2) (Id., p. 97, lines 5-17) (Id., p. 119, lines 9-11).

Mr. Andrews also explained that the subcontractor for the stucco exterior was provided the window details because that subcontractor would have "installation responsibility towards any subsequent flashings that are integral with the stucco system to help remove water ... from inside the wall cavity to the outside face of the stucco." (Andrews Dep. p. 59, line 12 – 60, line 8, Att. C). Mr. Andrews testified as to the

importance of the windows being flashed properly so that they could drain. (Id., p. 43, lines 1-7). It was Mr. Andrews' understanding that Superior and/or its stucco subcontractor "would be installing window head and sill flashing ... [p]er the JDavis details and/or the manufacturer's stucco typical details." (Id., p. 79, lines 6-10). It is widely agreed that the lack of proper flashing and/or weep holes contributed to the water intrusion problems at the Subject Property. (Id., p. 43, lines 1-7) (Glick Preliminary Report, pp. 11-12, Att. W) (Supplemental Report #1, p. 7, Att. X) (Glick Dep. p. 92, line 19 – 93, line 7, Att. N) (Quigley Dep. p. 388, line 15 – 389, line 10, Att. U) (Lewis Dep., p. 37, line 16 – 38, line 16, Att. V (noting the significance of the rough opening flashing "particularly given the design of the wall systems, especially the stucco wall systems by the prime design professional ... the exterior cladding and its seal with the perimeter of the window frame is, in my mind, a very important barrier to water intrusion from the exterior of the building to the space between your cladding and your sheathing"))) (Id., p. 147, lines 22-25 (through-wall flashing "is a critical element"))).

Mr. Clardy agreed that the lack of weep holes in the exterior cladding could cause problems with the windows, as could negative pressure created by the HVAC subcontractor. (Clardy Dep. p. 648, lines 2-16, Att. F). Mr. Lewis testified that "at one point in time there was a fairly significant issue with building negative pressure ... that would likely be a cause or certainly would exacerbate the moisture infiltration complaints that we were hearing with respect to the windows." (Lewis Dep. p. 16, lines 15-21, Att. V). This problem resulted in moisture patterns, or drywall staining, around the windows. (Id., p. 19, lines 10-17). The HVAC subcontractor installed "a higher powered fan unit

on the rooftop than was originally specified," which caused condensation issues in the building. (Clardy Dep. p. 651, line 13 – 652, line 1, Att. F).

C. Other contractors damaged the windows and doors after they were installed and Muhler had left the Subject Project.

Both Mr. Glick and Mr. Lewis testified that it was Superior's responsibility to ensure that other subcontractors did not damage the windows once Muhler left the Subject Property. (Glick Dep. p. 756, line 14 – 757, line 8, Att. N) (Lewis Dep. 278, lines 3-18, Att. V). Superior's Mr. Clardy agreed. (Clardy Dep. p. 338, lines 6-13, Att. F). However, Mr. Sykora testified that "there were a number of ... different trades that came onto the project after [Muhler] completed [its] work, and there was quite a bit of damage done by various trades to the windows and doors." (Sykora May 24, 2013 Dep. p. 15, line 21 – 16, line 7, Att. I-2) (*Id.*, p. 182, lines 6-15). Mr. Andrews recalled "seeing some scaffolding/walk boards being placed inside of a window that was already installed so that people could come and go some. That was not really a good thing." (Andrews Dep. p. 184, lines 4-8, Att. C). "There were extension cords left ... run through windows, around doors, the windows being open so long, and when they were doing the stucco work, there was quite a bit of stucco that fell on to the hardware, fell on to the lock mechanism that's on the sash ... And when you went to close the windows, they would grind closed because of all of that masonry material that fell into the hinges, into the hardware. ... [Muhler] had to replace weather stripping, as well, because the weather stripping got torn up during construction by other trades." (Sykora May 24, 2013 Dep. p. 17, line 14 – 18, line 2, Att. I-2) (*Id.*, p. 71, line 6 – 73, line 11).¹⁴

¹⁴ Muhler was never paid for that repair work, which totaled around \$25,000 - \$30,000. (Sykora May 24, 2013 Dep. p. 18, lines 13-14, Att. I-2) (*Id.*, p. 24, lines 2-5).

Mr. Clardy admitted that the windows were left open during construction and that materials were "delivered through opened windows." (Clardy Dep. p. 571, lines 7-12, Att. F). He explained the windows were left open, in part, because of cost concerns. (*Id.*, p. 684, line 25 – 685, line 3). Ms. Quigley acknowledged that people using the windows "as a means of ingress and egress during the construction phase," could have caused the windows to sag. (Quigley Dep. p. 328, line 8 – 329, line 4, Att. U). In addition, Ms. Quigley admitted that it was possible that the leaking she observed on the one door that she tested could have been the result of damage caused by construction workers at the site after the door had been installed. (*Id.*, p. 194, line 11 – 195, line 11). Curtis Watts, part owner of Watts Builders, testified that after doors were installed, his workers "closed them, locked them, did our best to protect them, but Superior beat the hell out of them." (Watts Dep. p. 50, lines 18-23, Att. GG). Mr. Lies explained that, "leaving [the casement windows] open fully to pass materials through or for ventilation ... really does put a toll and weight on the hardware that you wouldn't normally see in everyday operating conditions." (Lies Dep. p. 57, lines 16-21, Att. L).

Mr. Andrews also testified that Superior "didn't do a good job" of protecting the windows from other subcontractors. Windows were left open to allow the interior workers to have ventilation and, in addition, windows were open during a "strong storm." (Andrews Dep. p. 214, line 20 – 218, line 18, Att. C) (*Id.*, p. 287, line 25 – 288, line 4). In fact, Superior employees reported that windows had been damaged when they were left open during a wind event. (*Id.*, p. 287, lines 8-15). Mr. Lawson recalled that "a lot of the sash had been left open during construction and sagged and had been damaged during construction, which wouldn't allow it to contact the weather stripping properly ...

I have pictures of every window, just about, in the building, standing open in rainstorms ...” (Lawson Dep. p. 49, lines 13-21, Att. G) (Id., p. 80, lines 17-23). Mr. Lies testified that if the windows were left open during a rain and the interior wood had not been finished or painted, and that wood “gets wet ... you would lose the bond of the sealant, glazing sealant ...” (Lies Dep. p. 296, lines 6-11, Att. L).

When he examined the windows, Mr. Lies observed:

a lot of leaves [of] weather stripping that was damaged, that was broken off at corners where the whole side of the leaf was broken off and taken out. There was areas where it was missing. There was areas where – or there were windows – and not just one or two – that had all kinds of debris in the sills ... I remember seeing mortar dust, I remember seeing drywall compound on the weather stripping. I remember seeing all kinds of abuse ... and then I measure some of these units or tried to open them up and I can see that the operators have been damaged, where they’re rotating inside as you crank them open and the seal’s been gone. I saw sashes that are basically scraping as you open and close them.

(Lies Dep. p. 119, line 6 – 120, line 3, Att. L). Mr. Lewis agreed that these issues could have caused the windows to fail the tests. (Lewis Dep. p. 105, line 9 – 106, line 7, Att. V).

Mr. Lies testified that water that came in over the window sash could have been caused by abuse or misuse of the windows. (Lies Dep. p. 317, lines 15-19, Att. L) (Id., p. 64, lines 8-18). Mr. Lewis acknowledged that some of the water intrusion between the glass and the sash frame could have been caused by “leaving those sashes open during a high wind event.” (Lewis Dep. p. 264, line 13 – 265, line 6, Att. V), and Mr. Lies concurred that he saw conditions that might correlate to damage caused by windows being left open in high winds. (Lies Dep. p. 297, line 16 – 298, line 14, Att. L).

In addition, Mr. Lies testified that the “upfit” or “buildout” contractors, who upfitted the interior of units, also damaged the windows. “The windows were not

covered or protected while they did their work. ... there was some weather stripping that had paint on it ... [t]he windows were commonly just covered in sawdust. There was drywall mud on some of the units. All that ... dust and debris, you know, because they weren't protected, was getting into the operators." (Lies Dep. p. 178, lines 9-22, Att. L).

- D. Despite numerous sources of leaks and water intrusion into the Subject Property unrelated to the windows and doors, Superior and the Plaintiffs focused almost exclusively on the windows and doors.

Mr. Glick pointed to numerous causes of water intrusion at the Subject Property that either had nothing to do with the windows, or were not caused by Muhler's window installation. (See Glick Preliminary Report, Att. W) (Glick Supplemental Report #1, Att. X) (Glick Supplemental Report #3, dated Feb. 4, 2012, Att. Y). Although Mr. Hood testified that "the windows themselves were leaking," he clarified that the leaking he observed was "[n]ot around the edges, which would indicate an installation problem." (Hood Dep. p. 84, lines 1-5, Att. T). Mr. Robinson conceded that at least one unit had water intrusion problems unassociated with the windows: water "appeared to be coming in from higher than the windows in between the third and fourth floor." (Robinson Dep. p. 185, lines 14-19).

In his reports, Mr. Glick identified numerous construction defects, including but not limited to the following:

Stucco System

1. Lack of Weep holes at window heads
2. Lack of through wall Flashing (TWF) at window heads resulting in water intrusion to the studs and deterioration of sheathing
3. Lack of a Functional Water Management System
4. Lack of proper slope at EIFS horizontal trim
5. System thickness varies
6. Lack of proper sealant joints at stucco and window intersections
7. Installation methods do not follow building code and ASTM requirements C 926 & C 1063. Therefore, Stucco System is in violation of the building code.

Windows

1. Water test failures
2. Lack of proper spacing for effective sealant joints with adjacent dissimilar materials
3. Negative slope of pan flashing
4. Negative slope of exterior sill at tower (precast) window
5. Lack of a window mullion cap at unit #304. All windows should be checked.
6. Lack of nailing fins.
7. Lack of fasteners. Weathershield shall confirm that this installation is an approved method.

Wall Sheathing

1. Lack of proper installation around window openings.
2. High moisture content resulting from water intrusion and therefore, deteriorating densglass gold sheathing.
3. Lack of proper fasteners and fasteners not secured properly.

Brick

1. Lack of functioning weep holes with TWF at brick sills and heads
2. Lack of proper gap for sealant joints at window intersections with brick
3. Lack of proper slope at brick sills.

Miscellaneous

1. Flashing on top of window sill nailing fin (hole #9)
2. Lack of end dams in TWF at brick sill flashing
3. Lack of proper weep holes at brick sills
4. Lack of a drip detail allowing water to roll under the balcony onto the soffit
5. Lack of proper sealant at rail post penetrations into the tile balconies
6. Lack of weeps at brick and stucco walls at the first floor cornice (stone) intersection.
7. Lack of proper flashing at floor/wall intersections and lack of drip lip at all balconies

(Glick Preliminary Report, pp. 11-12, Att. W) (Supplemental Report #1, p. 7, Att. X).

The vast majority of these issues are unrelated to the performance of the windows or their installation.

With respect to "weeps and other areas of concerns, such as flashing," Mr. Glick concluded that the architectural drawings did not provide sufficient detail for the builder to know how to install these features. "If the contractor did not ask for clarification and

built it without any other documentation, the builder would be responsible for the design at the end of the day.” (Glick Dep. p. 76, line 4 – 77, line 10, Att. N) (Id. p. 79, lines 4-11) (Id., p. 104, lines 3-19) (Id., p. 228, lines 4-9) (Id., p. 435, lines 10-14). Mr. Glick pointed to the lack of through-wall flashing and weeps at the windows as violations of both the applicable building codes and the architect’s design. (Id., p. 92, line 19 – 93, line 7). Mr. Lewis concurred that the lack of weeps was “the key element.” (Lewis Dep. 290, lines 11-14, Att. V). Mr. Glick said, “just look at the soffits where the water’s staining. That means water is getting through intersections, which it could be the front intersection at the brick of stucco. Could be the wall. Any number of sources.” (Glick Dep. p. 244, lines 9-14, Att. N). He observed “water intrusion at crown moulding and water coming down the plane of the wall itself,” (id., p. 249, lines 17-19), water “coming in way above the window ... probably at a cornice line ...” (Id., p. 251, lines 17-18). Mr. Glick observed “massive water intrusion” from the balcony decks. (Id., p. 197, line 21 – 198, line 9).

When asked whether the various defects he observed were the “result of a design defect or construction defect or both,” Mr. Glick responded that he thought it was construction. (Glick Dep. p. 276, lines 10-13, Att. N). He confirmed that the construction deficiencies he observed, including the lack of through-wall flashing, “exist[ed] everywhere,” (Id., p. 332, line 22 – 333, line 3), and the subcontractor doing the window installation “would have absolutely nothing to do with any flashing.” (Id., p. 509, lines 5-6). Mr. Clardy agreed that Muhler was not responsible for the pan flashing or for correcting any deficiencies in the pans or the bucking. (Clardy Dep. p. 698, line 19 – 700, line 16, Att. F).

Mr. Glick identified instances where water was coming in at the windows because they were "not flashed properly." (Glick Dep. p. 281, lines 1-11, Att. N). Mr. Glick observed bucks that were soaked because, once water got in, water just sat in the pans because "there's a negative slope on that flashing sitting on the buck." Mr. Glick opined that water was present because either the window was leaking "or the joint – and/or the joint at the sill window" allowed water to enter. (Id., p. 303, line 12 – 304, line 25). Water was coming into the units under the doors on the patios or balconies because of negative slope of the balconies, not necessarily because of any defect in the doors. (Id., p. 714, line 4 – 715, line 25).

Mr. Andrews confirmed that pipes leaked, water could get behind the stucco system, and some balconies were angled to allow water to flow into a unit. (Andrews Dep. p. 343, line 13 – 346, line 14, Att. C). Theresa Hodge with Estates Management made a site visit on October 26, 2007 where she documented leaks in various units, a number of which were not window leaks. (Hodge Dep. p. 152, line 12 – 156, line 14, Att. D) (*see also* Id. p. 172, lines 16-21 ("We had one issue where the gas line going through the wall was installed – it wasn't balanced, so the water was coming into the unit instead of going out. I mean, there were various different reasons that were given for water intrusion"))).

Nonetheless, as Mr. Sykora testified, "all of the testing has been specifically targeted to the window and nothing else. And as I said before, after having been at the building site and looking into walls and things during construction, we would see water in areas above windows and adjacent to windows in the wall cavity that – you know, I'm not a trained expert, but when I see water that's nowhere near a window, I want to know

how that water got there and why that water's there. And a lot of other people that were there were asking that same question. But for some reason, it always reverted back to the window. ... But there's clearly other problems with this building that are unrelated to the window, and, as I said, in hindsight, it would be nice to test the building, not the window, and see if there's water coming through in other areas." (Sykora May 24, 2013 Dep. p. 156, line 24 – 157, line 22, Att. I-2).

Mr. Andrews summarized that "everything during the construction and the testing was trying to paint the windows and the window installation as the source of the problem ... Rather than concentrating on windows, it should have been a – call it a wholistic [sic] approach, and let's find out why there's water in the walls. And that was not done." (Sykora May 24, 2013 Dep. p. 166, lines 7-18, Att. I-2). Ms. Quigley acknowledged that "it's very reasonable that a lot of window leaks are probably called window leaks because the leaks show up at the windows, where it very well could be the perimeter, or something happened above that happens to come out at a window head, so everybody says it's a window leak." Ms. Quigley readily admitted that, despite the fact that she had not investigated the other construction conditions that would impact the performance of the windows,¹⁵ she still would testify to a correlation between deficiencies in the windows and leaks. (Quigley Dep. p. 414, line 12 – 415, line 2, Att. U).

Aside from test pressures, Mr. Lies criticized "some of [Stafford's] procedures – the masking wasn't always complete or wide enough where they were trying to isolate windows from surrounding construction." (Lies Dep. p. 105, line 21 – 106, line 7, Att.

¹⁵ In fact, Stafford's Ms. Quigley admitted that she did not intend to look at the integration of the building wrap or any flashing issues. (Quigley Dep. p. 151, line 17 – 152, line 2, Att. U). She also admitted that she did not investigate the installation method or design of the pans underneath the windows, the installation of the doors with pans, or the construction of the rough openings themselves. (*Id.*, p. 183, line 18 – 184, line 16).

L). In addition, a basic flaw in Stafford's testing was that Stafford did not investigate the cause of water intrusion:

The problem is we know the windows can meet 5.5 [DP] because there's windows out there that passed and they were certified to do that. So the investigator needs to figure out if they don't, why don't they. What's different now than it was back then. Is it because there's contamination or there's weather stripping that's been damaged or there's sashes that are bowed or sashes that are sagged. What's causing them not to perform the way that we hoped they would when they were newly installed. That part of the investigation I don't think happened. I don't think there's an answer either by Stafford. They just simply tested and did a thumb's up, thumb's down, much like I believe ATI did during their initial tests. They were just asked does it meet 5.5 or not, and that's what they did. They weren't asked to answer the next question of[,] if they didn't, why not.

(Id., p. 114, line 9 – 115, line 3). Mr. Lies explained that, Stafford's use of the term "water penetration" just meant that "they saw water present from their test," regardless of whether it breached the innermost plane of the window or not. (Id., p. 221, line 20 – 222, line 12). In addition, Mr. Lies pointed out that the focus on whether the windows met a specific performance level years after they had been installed was misplaced. Instead, it was Mr. Lies opinion that making "the window performance of the as-installed units be able to perform satisfactorily for the future homeowners and for future tenants," was "what we need to solve here." (Id., p. 245, line 8 – 246, line 7).

With respect to the door that Stafford tested, Ms. Quigley could not identify what caused the leaking.

Q: But it's safe to say, you cannot render an opinion to a reasonable degree of certainty, most probably, in your field of expertise, that the glazing leak at the door that you tested was caused by any specific handling, installation or manufacturing or design defect?

A: I don't know. I can tell you, I don't know what caused the leak, but that it leaks, and it's not acceptable.

(Quigley Dep. p. 195, lines 12-20, Att. U).

In fact, the October 3, 2013 (Revised) Stafford report states as its only objective “to verify whether or not windows are leaking as previously reported by others [sic] experts.” (Stafford Report, Att. AA). It does not purport to determine the cause of any leaking at or around the windows, even though it recognizes that Mr. Glick identified “numerous locations of water infiltration related to the construction of cladding, underlayment, flashing and sealant conditions at the perimeter of the windows.” (*Id.*, p. 3). Stafford applied a 5.5 psf test pressure in all of its tests, in 2007, 2008 and 2009, although Mr. Lies disputed whether this was an appropriate methodology for windows once the units had been upfitted and occupied for some years. (Lies Dep. p. 107, line 13 – 110, line 18, Att. L) (*Id.*, p. 289, line 23 – 291, line 13). Finally, the Stafford report only opines that the leaks through the window assembly were “indicative that failure is attributable to the window manufacturer,” and that leaks occurring “between the interface of the window unit to the rough opening framing [were] indicative that failure is attributable to window and **flashing** installation.” (Stafford Report, pp. 7-8, Att. AA) (emphasis added). Stafford does not account for the fact that Superior and/or its direct subcontractors other than Muhler were responsible for installing the flashing, as well as the pans and bucks. (Clardy Dep. p. 698, line 19 – 699, line 12, Att. F). The Stafford report fails to causally link the one alleged variance with the manufacturer’s installation instructions (discrepancies on observed tolerances or spacings required by the installation instructions) to any window or unit failure. (Stafford Report, p. 8, Att. AA).

In the end, although Ms. Quigley advocated removing and replacing all of the windows and doors,¹⁶ as noted above, Mr. Lies testified that the problems with the

¹⁶ Ms. Quigley admitted that her opinion that all of the doors needed to be replaced was based on tests performed on a single door. (Quigley Dep. p. 187, line 5 – 190, line 5, Att. U). There is no

windows “could be remediated per [his] protocol, and they will perform satisfactorily as expected.” (Lies Dep. p. 183, line 14 – 184, line 3, Att. N) (Id., p. 267, line 11 – 268, line 17 (explaining specifically that the issue with windows leaking could be repaired and that he did not “think you have to do major surgery on this building of pulling every window out of it to have a situation that meets owner expectations”)). Mr. Lewis was in agreement. (Lewis Dep., p. 241, lines 14-19, Att. V) (Id., p. 74, line 1 – 75, line 10) (Id., p. 342, line 25- 343, line 1 (“I have always been of the opinion that it would be possible to fix the windows in lace”)) (Trial Exh. 440, Att. Z). Mr. Lies pointed out that nothing in Ms. Quigley’s Stafford report indicated that they talked about or considered “anything short of throwing the windows or pulling the windows out.” (Lies Dep. p. 269, line 19 – 270, line 17, Att. L). Mr. Lies testified that, once they got to the point they were doing his repair protocol “on a production basis,” they could repair each window in two to four hours. Furthermore, the homeowner would not have to move out of the unit in order for the repairs to be effected. (Id., p. 279, line 1 – 280, line 17).

V. Superior’s settlement amount was unreasonable and accounted solely for its own negligence.

Plaintiffs’ total damages estimate was \$5,057,452. (Concord & Cumberland Preliminary Remediation & Restoration Cost Estimate, June 29, 2012, Att. BB). Notwithstanding that this estimate is likely inflated, (Lewis Dep. p. 281, lines 11-16, Att. V (opining that the Plaintiffs’ expert’s proposed “scope [of work was] much greater than ... necessary”)), solely for the sake of argument, Muhler addresses that estimate for purposes of responding to Superior’s Motion. Of the total repair estimate, \$1,276,866 was attributed to window and door repair. (Att. BB). Superior settled its alleged liability justification for extrapolating her conclusions regarding one door to all of the doors at the Subject Property.

for Plaintiffs' claims arising out of the windows and exterior doors for \$775,000.00. (Motion, pp. 8, 25). The Plaintiffs settled with Muhler and Weather Shield (as well as with In the Wind, Watts Builders and Superior) for their portion of the liability for window and door issues. (Receipt & General Release, Att. K).¹⁷ Under that settlement, Muhler paid the Plaintiffs \$300,000.00, Weather Shield paid \$450,000.00, In the Wind paid \$350,000.00 and Watts Builders paid \$50,000.00, for a total of \$1,150,000.00 to settle all claims "from alleged window and door product defects and construction defects at" the Subject Property. (Receipt & General Release, pp. 3-5, Att. K).¹⁸

This amount accounts for all but \$126,866 of the Plaintiffs' unadjusted repair estimate for doors and windows. Thus, the Plaintiffs have recovered from Muhler, Weather Shield, In the Wind and Watts Builders for their share of the liability for the alleged window and door problems. The amounts paid by Superior to the Plaintiffs are, therefore, attributable to its own negligence at the Subject Property.

In addition, Superior attempts to include a full third of what it characterizes as "non-specific" line items" from the Plaintiffs' repair estimate (Motion, p. 25), as part of its potential damages related to window and door problems. However, Superior's overly-simplistic and erroneous approach totally ignores several factors that render its estimate inappropriate. First, Superior includes items that have nothing or very little to do with the replacement of the window and door units. For example, Superior includes General Conditions totaling \$169,958; however, only three of the specific line items under that category potentially has any relation at all to replacement of windows (i.e.,

¹⁷ Plaintiffs reached settlement with In the Wind on April 23, 2013, and with Weather Shield, Muhler and Watts Builders on July 25, 2013. (Receipt & General Release, p. 4, Att. K).

¹⁸ As part of that settlement, Superior released any claim it may have had against In the Wind and Watts Builders for their work at the Subject Property but did not release any potential claims it had against J Davis, Weather Shield or Muhler. (Receipt & General Release, pp. 4, 6, Att. K).

Temporary Protection over sidewalks (\$6,000), Scaffolding Equipment Rental (\$33,194), and Scaffolding Erection/Dismantle (\$26,206)) totaling \$65,400. The remaining items in this category relate specifically to the exterior cladding and walls.¹⁹ Furthermore, the Exterior Repairs Allowance totaling \$277,493 have absolutely nothing to do with the windows and doors but, instead, involve the balconies, stairs, common entries, crown molding, etc.

Second, in order to repair the defective pans, all of the windows have to be removed, regardless of whether they leak or not. As Mr. Glick testified, it would be difficult if not impossible to remove the windows for this purpose without damaging them, which would require new windows in any event. (Glick Dep. p. 733, line 4 – 734, line 1, Att. N). Although Superior relies on the fact that, in the Plaintiffs' estimate the line item for window and door replacement is more than twice the amount for exterior wall cladding, Mr. Glick opined that removal and replacement of the exterior cladding would be more expensive than removing and replacing the windows and doors. (*Id.*, p. 735, line 19 – 736, line 8). Furthermore, it was Mr. Glick's opinion that, even if the windows had been perfect, there still would have been litigation over the Subject Property because "the brick cladding problems and the stucco cladding problems. They also don't meet code and they let water in." (*Id.*, p. 737, line 22 – 738, line 8).

Under the Modified Comparative Negligence jury form, had this matter gone to trial, the jury would have been asked to apportion liability among the defendants. Any defendant found to be less than 50% liable for the plaintiffs' injuries, such as Muhler who paid around 24% of the total window/door repair estimate, and only about 6% of the total

¹⁹ The exterior cladding has to be removed and replaced because there are fundamental problems with both the stucco and the brick. (Glick Preliminary Report, p. 15, Att. W) (Supplemental Report #1, p. 11, Att. X) (Glick Dep. p. 737, line 22 – 738, line 8, Att. N).

repair estimate would be responsible for only their share of the total liability. See S.C. Code Ann. § 15-38-15(A). However, the Plaintiffs could recover all of their damages from any defendant, such as Superior, who was required to pay 50% or more of the total liability.

VI. Superior is not entitled to the attorney's fees it claims.

"Absent a duty to indemnify there is no obligation to pay attorney fees." Glendale Constr. Servs., 902 S.W.2d at 539. Because any duty Muhler may have to indemnify Superior is limited to Muhler's own percentage of liability, if any, its obligation to pay litigation costs and/or attorney's fees is also limited to Muhler's percentage of fault, if any. See Dillard, 884 S.W.2d at 725; Greer, 795 A.2d at 381 n.5 (explaining that the "to the extent" language in an indemnification clause "limited the indemnitor's liability to that portion of the attorney's fees and costs that corresponded to the percentage of fault attributed to it for the plaintiff's injuries"); MT Builders, 197 P.3d at 768 (indemnitor obligated to reimburse defense costs only to the extent of the indemnitor's fault); Nusbaum, 100 S.W.3d at 198 (duty to pay defense costs is "[b]ased on the percentage of fault ascribed to" the indemnitor).

Furthermore, even if Superior is entitled to some amount of attorney's fees and costs, which Muhler disputes, those fees and costs must be reasonable. Superior's attorney's fees and costs are unreasonable for several reasons. First, Superior basically prosecuted the windows and their installation rather than defending its own work. Superior's main defense became, in essence, a prosecution of the window and door issue to the detriment of the other numerous alleged defects with the design and construction of the Subject Property. (Lewis Dep. p. 42, line 17 – 43, line 7, Att. V (Mr. Lewis admitting

that the window tests were purposefully directed at and limited to "the window product and the installation of the window product, basically frame-to-frame by Muhler," as distinct "from the integration of the product with the building envelope"); (*id.* p. 45, lines 14-19 (confirming that test approach was selected in order to determine whether the window "units individually between the sash and the frame and from frame-to-frame through the mullions that had been either factory installed or field installed were watertight. That was the purpose of those tests")). Mr. Clardy essentially admitted that Superior did not put up any defense regarding the windows and/or their installation other than that none of it was Superior's fault. (Clardy Dep. p. 736, line 10 – 737, line 15, Att. F). Although Ms. Quigley agreed that there were problems with the pan flashing, (Quigley Dep. p. 388, line 15 – 389, line 10, Att. U), and the weep and flashing system, (*id.*, p. 392, line 9 – 393, line 17), she did not examine any of these features because the lawyers for the Plaintiffs and for Superior "asked [her] to focus on windows and windows alone." (*Id.*, p. 395, lines 1-12). Tellingly, Mr. Hood took a picture of Superior's construction planning calendar for February 2007, which he characterized as "more of a optimistic wish list ... [b]ecause **nothing that they ever planned happened on time ... Other than the window test.**" (Hood Dep. p. 57, line 23 – 58, line 11, Att. T) (emphasis added).

Thus, it is hardly surprising that Superior's own repair estimate throws the weight of the repair costs on the windows, given its constant attempts to prosecute the "window issues" instead of defending its own performance at the Subject Property. Superior's estimate for Window & Door Repair is a full 96% of the Plaintiffs' estimate, whereas most of the other repair categories ranged from only 23% (Interior Repair Allowances) to

52-53% (Exterior Wall, Corrosion Damage Repair (Allowance); Electrical, Plumbing & Elevator Allowance; Design Contingency Allowance (10%)) to 77% (Water Management System) of the Plaintiffs' estimate. This is consistent with Superior's attempts to defend itself by throwing blame on the windows and doors.

Second, the number and length of depositions noticed by Superior far exceeded what was reasonably necessary in order to defend itself. Numerous and multiple depositions were taken of the various unit owners of the Subject Property, several lasting eight hours or more, and most lasting between five and seven hours. Numerous questions were asked of the homeowners about property they owned **other** than the Subject Property.

Third, Superior engaged counsel, Murphy & Grantland, P.A., located in Columbia, South Carolina to defend it in actions pending in Charleston, South Carolina. This decision resulted in excessive travel fees for Columbia counsel to travel repeatedly to and from Charleston and Mount Pleasant. Two experienced attorneys with local law firms filed affidavits indicating that they would have been prepared and able to provide a comparable defense for Superior at rates comparable to those of Murphy & Grantland. Neither of the local Charleston firms would have charged for travel time for the numerous depositions and other litigation-related events scheduled in Charleston or Mount Pleasant, South Carolina. (Affidavit of J. Blanton O'Neil, IV, Esq., dated May 15, 2014, Att. CC) (Affidavit of Thomas B. Pritchard, Esq., dated May 15, 2014, Att. DD).

This Court should deny summary judgment on Superior's claim for attorney's fees and litigation costs.

VII. Superior is not entitled to displacement, or housing costs.

Although Superior's Motion includes costs for housing the residents of the Subject Property while repairs are being effected, Mr. Glick, whose company Glick/Boehm, was hired to manage the repairs, testified that it was unclear whether any residents would have to move out during the repair process. (Glick Dep. p. 665, lines 8-13, Att. N) (*Id.* p. 670, line 19 – 671, line 4). Furthermore, as discussed above, Mr. Lies proposed a methodology to repair the windows that would not have caused any resident to have to move out for any period of time. (Lies Dep. p. 279, line 1 – 280, line 17, Att. L). Finally, even if the residents were forced to move out during the window and door replacement, necessary repair/replacement of the pans requires removal and replacement of the windows, (Glick Dep. p. 732, line 3 – 734, line 1, Att. N) (Clardy Dep. p. 670, lines 12-18, Att. F) (concurring), so that any need for the residents to move out while the windows are being replaced is not solely Muhler's responsibility, if at all.

This Court should deny summary judgment on Superior's claim for displacement, housing or moving costs.

VIII. Muhler takes issue with some of the facts that Superior alleges are not in dispute.

Superior sets forth numerous facts that it claims are not in dispute; however, many of the so-called "facts" presented in its Motion are disputed, misleading and/or inaccurate. For example, Superior suggests Muhler "concede[d] That the initial battery of six tests by SKA was performed incorrectly." (Motion, p. 5). From the beginning, Muhler consistently alleged that the initial SKA tests were improper. (Sykora Sept 24, 2012 Dep. p. 138, line 16 – p. 142, line 3, Att. I-1) (Lawson Dep. p. 100, lines 9-19, Att. G). In addition, Superior asserts that "[l]ater tests performed by SKA in the latter

half of March 2007 were within accepted industry parameters ..." (Motion, p. 5). Again, Muhler witnesses consistently denied that the SKA testing ever was within acceptable parameters. (Sykora Sept 24, 2012 Dep. p. 142, line 10 – p. 143, line 10, Att. I-1) (Trial Exh. 361, Att. EE).

Superior asserts that Architectural Testing, Inc. ("ATI") was "specifically selected by Muhler ..." (Motion p. 5). In fact, after the parties objected to the second round of SKA testing as not within acceptable industry parameters, Muhler suggested two companies, one of which was ATI, and apparently Estates chose ATI. (Lawson Dep. p. 95, line 14 – 96, line 20, Att. G) (Sykora Sept 24, 2012 Dep. p. 148, line 21 – 149, line 13, Att. I-1).

In addition, Superior implies that it was directly responsible for preparing the window rough openings only "initially," noting that it later subcontracted this work to Watts Builders, Inc. ("Watts") (Motion p. 3),²⁰ who also served as a subcontractor for Muhler for some of the window installation work. Muhler would clarify two points for this Court: 1) Superior was responsible for preparing the rough openings, including "wrapping the window rough opening with a vapor barrier, installing metal pan at the sill of the rough opening, and then installing wood 'bucks' around the perimeter of the rough opening," (Motion p. 3), as well as installing the flashing. (Andrews Dep. p. 79, lines 6-10, Att. C), throughout the project. The fact that it chose to subcontract this work out to subcontractors other than Muhler through direct subcontracts between Superior and those subcontractors, (Lawson Dep. p. 25, lines 1-6, Att. G) (*Id.*, Dep. p. 28, lines 4-8) (Clardy

²⁰ Both In the Wind and Watts Builders performed work as direct subcontractors for Superior. See (McFarland Dep. p. 54, lines 2-7, Att. FF (In the Wind started installing wood bucks because Superior was so slow)) (Clardy Dep. p. 483, lines 8-13, Att. F (In the Wind worked as a direct subcontractor for Superior for buck installation)) (Watts Dep. p. 34, line 19 – 35, line 3, Att. GG (Watts Builders installed some pans on the fourth floor for Superior)).

Dep. p. 441; lines 8-18, Att. F), did not relieve Superior of the ultimate responsibility for this work. (Id., p. 698, line 19 – 699, line 12).

Included in its recitation of facts that it claims are undisputed, Superior alleges that it incurred over \$500,000.00 in legal fees and expenses affiliated with its defense of the window and door claims, over \$100,000.00 in witness fees and over \$30,000.00 in court reporter fees. (Motion p. 8). These amounts are not supported anywhere in Superior's Motion and, as is discussed above, Muhler contests both the accuracy and applicability of these amounts.

In addition, Superior omits from its Statement of Undisputed Facts the fact that, although Paragraphs 45 through 50, and 52 through 54 of the Amended Complaint contain allegations regarding the windows and doors, they also contain numerous allegations of other failures of the Subject Property.²¹ For example, Paragraph No. 49 is broken out into seven different categories, of which windows is only one. The other damages Plaintiffs allege were the result of defects and deficiencies in the design and construction of the Subject Property include: 1) the Stucco system, 2) Wall Sheathing, 3) Brick, 4) Balconies, 5) roof, and 6) Miscellaneous. (Amended Complaint ¶ 49, Att. O).²² Thus, the Plaintiffs' allegations of negligence against Superior went far beyond the issue of whether the windows and doors were installed properly and/or leaked.

²¹ Paragraph No. 51 involves the "exposed sprinkler piping in the parking area," and does not address the windows and doors in any way. (Amended Complaint ¶ 51, Att. O).

²² Mr. Clardy agreed that other construction and structural defects with the Subject Property did not have anything to do with the windows. (Clardy Dep. p. 646, lines 18-20, Att. F (defects in the stucco unrelated to the windows); Id., p. 652, lines 15-21 (installation of railing related to waterproofing issues but not windows); Id., p. 653, lines 15-17 (roofing issues not related to windows); Id., p. 654, line 23 – 655, line 6 (waterproofing issues on the top floor did not implicate windows)).

Superior misconstrues testimony from Mr. Andrews in its attempt to prove its case against the windows. (Motion, pp. 21-24). However, Superior omits key clarifications that followed immediately after the testimony quoted by it. In response to questioning by defense counsel, Mr. Andrews testified:

Q: Can a failure of, say, the exterior cladding manifest itself at the windows as far as water intrusion?

A: It could. I mean if there was a –
* * *

If there's a failure to install the Tyvek properly on every opening – I'm not aware of any of that, but if there is, then you could foreseeably have an opportunity for water to get into the wrong places.

Q: If you had a design requirement for head flashing and weeps at the head of a window, to get water out of the building before it gets to a window and that's done improperly, could that manifest itself at the window, the problem?

A: Head flashings are important. I could see that showing itself at the top of a window somehow, I don't know how –

Q: Anywhere from the length of the window to the bottom of the window – correct? – because water is not getting out.

A: Well, if the water – given the system that they had with the – and a droplet of moisture, droplet of water, should have been ostensibly held up by the ceiling around the fin. If that sealant work was not done properly, then any water that got behind a head flashing or other subsequent flashing material and that combination together, it could introduce water into the inside of the structure.

(Andrews Dep. p. 430, line 17 – 431, line 21, Att. C).²³ In addition, other witnesses contradict any conclusion that may be drawn from Mr. Andrews' testimony regarding the effect of Superior's negligence, as well as that of other subcontractors on the project, contributing to alleged problems with the windows and doors. (See Sections IV, 1, 2, and 3, above). As noted above, such conflicts in disputed material facts make this matter inappropriate for summary judgment.

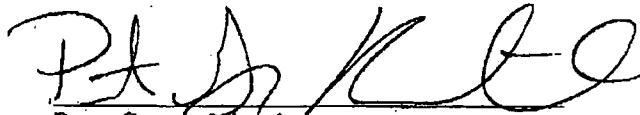
²³ As Ms. Hodge testified, problems with the Tyvek not lapping over the vertical leg of the window pan were Superior's responsibility. (Hodge Dep. p. 147, line 7 – 148, line 8, Att. D).

CONCLUSION

For the reasons stated herein, this Court should deny Superior's Motion for Summary Judgment.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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(843) 576-2900

ATTORNEYS FOR DEFENDANT,
THE MUHLER COMPANY, INC.

July 25, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

And

Thomas R. Mather,

And

Betty Y. Segal

And

Signature Charleston, LLC and Wade
Robinson,

And

James C. Kirkpatrick,

And

Paul A. Brim,

And

Fred Rappaport and Joyce Rappaport,

And

Thomas R. Debnam, as Trustee of the Trust
Agreement of Thomas R. Debnam,

And

Pamela L. Vaughn,

And

304 Concord & Cumberland, LLC,

And

402 Concord & Cumberland, LLC,

And

Avant & Associates, LLC and Oakland
Holding, LLC,

And

Mattison J. MacGillivray and
Teresa E. MacGillivray,

And

Pamela Queen,

And

Stuart Reeves,

Plaintiffs,

v.

Concord & Cumberland, LLC, Concord &
Cumberland Manager, LLC, Estates, Inc.,
Estates Management Company,

CIVIL ACTION NO: 2010-CP-10-2271

**SUPERIOR CONSTRUCTION CORPORATION'S
MOTION TO RECONSIDER**

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2014 OCT 16 PM 2:09

FILED

Superior Construction Corporation, Weather Shield Mfg., Inc., The Muhler Company, Inc., In The Wind, Inc., J. Davis Architects, PLLC, Wall Craft Construction, Inc., Weatherholtz Masonry, LLC, Philip Gasque d/b/a Philip Gasque Construction, Architectural Stone Company, Southern Mechanical, Inc., Greg Gasque Metal Works, Keating Roofing and Sheet Metal, Inc., Lowcountry Tile Contractors, Inc., Safeco Insurance Company of America, Companion Property and Casualty of America, Companion Property and Casualty Group, Watts Builders, LLC, Elias Duffy d/b/a Masonry Pros, Renaissance Steel, LLC, American Drywall Construction, Inc., Turner Electrical of SC, Inc., and Metro Waterproofing, Inc.,

Defendants.

Cross Claim Plaintiff Superior Construction Corporation (Superior), pursuant to Rule 59, respectfully requests the Court to reconsider its grant of partial Summary Judgment to The Muhler Company, Inc. (Muhler) as set forth in its Order filed October 6, 2014, finding that the language of Muhler's subcontract, combined with the language of the 2007 Agreement, fails to permit Superior to be indemnified by Muhler for its concurrent (but not sole) negligence pertaining to Superior's settlement of the Plaintiff's claims arising from the windows provided and installed by Muhler.

Superior reiterates the fact that it is stipulated that it cannot recover from Muhler for claims arising from its *sole* negligence; the issue argued before the Court is whether or not the subcontract, as modified by the 2007 Agreement, allowed Superior to be indemnified notwithstanding its possible *concurrent* negligence. Additionally, Muhler has never argued that Superior's settlement of the Plaintiffs window claims was for its sole negligence. So the issue before the Court was whether or not the indemnity clause in the subcontract, *as modified by the*

2007 Agreement, allowed Superior to be indemnified for both Muhler's negligence as well as Superior's concurrent negligence, if any.

The essence of this Motion for Reconsideration is twofold. The first general issue is to the Court's interpretation and adoption of case law, most specifically that the Court's assertion in the Order that extrajurisdictional courts uniformly interpret the subcontract indemnity language in the manner argued by Muhler, i.e. to prohibit indemnity for concurrent negligence is, respectfully, simply not true. The second and probably more important issue is that the Court's approach in analyzing the issue of indemnification was incorrect, because the Court's analysis looked at the Subcontract and the 2007 Agreement separately from each other, and concluded that neither instrument by itself allowed for indemnification for a indemnitee's concurrent negligence. The reason this is improper is because the 2007 Agreement, by its terms, states that the subcontract remains in place, "except to the extent specifically stated in [the] Agreement." See Paragraph 1 of the Agreement. Thus, the subcontract and the Agreement cannot be viewed in isolation from each other; they must be assessed in conjunction, with any changes made by the Agreement in contrast to the Subcontract controlling.

The Court, while correctly noting in the Order that it is a high standard to achieve the "clear and unequivocal" level of clarity in a contractual clause to permit a party to be indemnified for its concurrent negligence, goes on to claim that the indemnity clause cited by Superior in *Camp, Dresser & McKee, Inc. v. Paul n. Howard Co.*, 853 So.2d 1071 is "substantially dissimilar" to Article 12.1 of the subcontract, which is an AGC Document No. 600 form subcontract. The clause examined in *Camp*, is noted by the opinion to be "almost verbatim" the indemnification clause contained in the American Institute of Architects (AIA) standard document A201 form clause. *Camp*, at 1077. However, at the same time, the Court,

appearing to adopt wholesale all of the cases cited by Muhler in support of its position, declared that essentially all of the cases cited by Muhler as set forth in the order were "virtually identical", "similar" or having the "same operative language" as the AGC indemnification clause. The fact of the matter is that most of the cases cited by Muhler and adopted by the Court involved exactly or almost verbatim the same AIA clause in *Camp*. See *Mautz v. J.P. Patti Co.*, 688 A.2d 1088, *Cabo Constr., Inc., v. R.S. Clark Constr., Inc.*, 227 S.w.3d 314, *MT Builder v. LLC v. Fisher Roofing, Inc.* 197 P.3d 758, *Hagerman Const. Group v. Long Electric Co.*, 741 N.E. 390, *Braegelman v. Horizon Dev. Co.*, 371 N.W. 644. For the Order to conclude that "courts uniformly interpret this language as not providing indemnification for an indemnitee's own negligence" in accordance with Muhler's interpretation is simply not accurate. As discussed at oral argument and below, a slight majority of outside jurisdictions, which: (a) do not have a controlling statute regarding contractual indemnity, and (b) are specifically ruling upon the issue of indemnification upon concurrent negligence, ruled in favor of indemnification when faced with indemnity clauses substantially identical to the AIA or AGC form indemnity clauses. Furthermore, one of the cases cited by Muhler and advanced by the Court's order was a ruling upon which the underlying indemnification claim was for a party's sole negligence, which has no application to the instant case. See *Brown v. Boyer-Washington Blvd. Assoc.*, 856 P.2d 352. (Utah 1993)

The key language stressed by Superior in the AGC clause (as modified by the 2007 Agreement) at oral argument and in brief that supports its position is not addressed anywhere in the Order. This is the section of Article 12.1 that states "*regardless of whether it is caused in part by a party indemnified hereunder.*" (Emphasis added.) This clause makes it unequivocally clear that, while the underlying claim must arise or relate to Muhler's scope of work, Superior's

concurrent negligence, if any, is not a bar to full recovery (so long as Superior's claim is not one for its sole negligence, which is not at issue in this case). One of the cases argued by Superior, *Gunka v. Consolidated Papers, Inc.* 179 Wis.2d 525 (1993) focuses in on this exact language and explains: "[t]he critical difference in the language is that the indemnification agreement before us requires Winter [the indemnitor] to indemnify [the indemnitee] 'regardless of whether or not it is caused in part by a party indemnified hereunder.'" Focusing on that language, the *Gunka* court held that the party seeking indemnification was entitled to be indemnified for its concurrent negligence. The clause in *Camp* contained this exact same critical language. The majority (albeit a slight majority) of other jurisdictions, all adhering to the "clear and unequivocal" standard of interpretation required by this State, when examining this particular phrase contained within an indemnity agreement concluded that it was expressly clear that the party to be indemnified was covered as to their concurrent negligence. Almost all of these cases examine indemnity clauses that are substantially identical to either the AIA or the AGC indemnity clauses. See *Berry v. Orleans Parish School District School Board*, 830 So.2d 283 (2002), *Oster v. Medtronic, Inc.* 428 N.W.2d 116, 118 (1988), *Thorton v. Guthrie County Rural Elec. Co-op Ass'n*, 467 N.W.2d 574, 576-578 (1991), *McBro, Inc. v. M&M Glass Company*, 611 So.2d 283 (1992), *Payne Plumbing & Heating Co., Inc. v Bob McKiness Excavating and Grading, Inc.*, 382 N.W.2d 156 (8th Cir. (Iowa) 1986), *Simon Property Group, L.P. v. Brandt Const. Inc.*, 830 N.E.2d 981, 998-995 (Ct. App. Ind. 2005), *Robinson v. A.Z. Shmina & Sons Co.*, 96 Mich. App. 644, 293 N.W.2d 661 (Mich. Ct. App. 1980), *Wallace v. Slidell Memorial Hosp.*, 509 So.2d 69 (La. App. 1987), *Cumberbatch v. Board of Trustees, Delaware tech. & Comm. College*, 382 A.2d 1383, *Binswanger Glass Co., Inc. v. Beers Const. Co.* 141 Ga.App 715, 234 S.E.363 (Ga. App. 1977), *Washington Elementary School Dist, No. 6 v. Baglino Corp.*, 169 Ariz. 58, 817 P.2d

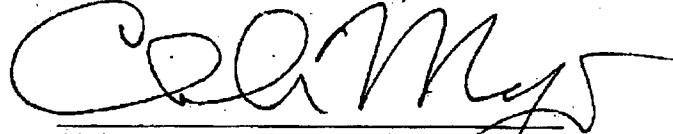
3, 9 (Ariz. Sup. Ct. 1991): The cases cited by Muhler that include that same language in the indemnity clause at issue simply ignore that language in order to reach their conclusions, except for *Braegelmann*, which found that when compared to language in the indemnity clause "to the extent caused by" the subcontractor resulted in an ambiguous condition that required it to reject indemnification because it did not meet the court's "clear and unequivocal" standard (the *Snomish County* case cited by Muhler simply adopts *Braegelmann*). [Additionally, as discussed below, the "to the extent" clause relied upon by *Braegelmann* was eliminated by the language of the 2007 Agreement.] However, *Braegelmann* fails to give any consideration to a construct that effectuates the totality of the clause's provision: that out of possibly several liable parties, the indemnitor is only to pay that part of the total liability arising out of or resulting from its scope of work, plus that of the indemnitee. For example, if there are five parties found liable to a plaintiff, two of which included parties situated as Muhler and Superior, then Muhler would only be responsible for the portions paid by Muhler and Superior, but excluding all others. This interpretation gives effect to Article 12.1 in its entirety, while still meeting the clear and unequivocal standard. *Camp* recognizes in its analysis the "only to the extent caused by" language found in the AIA clause that mirrors the clause in *Braegelmann*, yet still concludes that the indemnitor was liable to the indemnitee for its concurrent negligence, noting that "[t]he document makes no sense if [the indemnity clause] has the meaning that [respondents] ascribe to it." *Camp*, at 1078. However, additionally, Article 12.1 of Muhler's AGC subcontract does not use the language "only to the extent caused" (emphasis added) as found in the AIA A201 contract examined by *Braegelmann*, but instead states "to the extent caused in whole or in part" by the subcontractor's negligence.

The second issue raised by this motion is that the Court improperly looked at the Subcontract and the 2007 Agreement in isolation from each other to assess the issue of indemnification for Superior's possible concurrent negligence. The 2007 Agreement makes it expressly clear that the Subcontract terms remain in place, "except to the extent specifically stated in [the] Agreement", which shall control in the event of any conflict. See Paragraph 1 of the 2007 Agreement. So Paragraph 11 of the Agreement does not wholesale replace Article 12.1 of the Subcontract, it amends it. The reason this issue is so crucial is because the apparent primary basis for the Court's conclusion on the concurrent negligence issue in the Order focuses on the "to the extent" clause in the subcontract, concluding that at best it renders the clause ambiguous, as the *Bragelmann* court did, and thus failing to satisfy the "clear and unequivocal" standard of *Laurens Emerg. Med. Spec. v. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003). Paragraph 11 of the 2007 Agreement eliminates or overrides the "to the extent caused" clause by stating that Muhler will pay "all damages" incurred by Superior and Concord & Cumberland, LLC. Because these terms are directly incompatible, the 2007 Agreement controls. So in summary, while in isolation, paragraph 11 of the Agreement may not state clearly and unequivocally that Superior can be indemnified for their possible concurrent negligence, the "regardless" clause of Article 12.1 of the Subcontract, as discussed above, satisfies that requirement, and the "to the extent caused or alleged to be caused in whole or in part" language in the subcontract is eliminated by the language of Paragraph 11 of the 2007 Agreement. There is nothing in Paragraph 11 which alters the original subcontract clause stating "regardless of whether it is caused in part by a party indemnified hereunder." Finally, Paragraph 11 of the Agreement does not use the term "negligence" or "omission" as the basis for triggering the indemnity to indemnify, but instead only uses the term "allegations"- a demonstrably lower

criteria than an act of negligence, although the Subcontract still refers to claims "alleged to be caused."

Lastly, the Order draws a distinction between the "performance of the work" in the indemnity provision in Camp, and the "performance of the subcontractor's work." (Bold in original.) Respectfully, this is a distinction without a difference. The contract in *Camp* was a general contractor's contract; it would naturally refer to "the work" (as defined by the contract) more broadly than "the subcontractor's work" in Muhler's subcontract. Here is no reason for Muhler's subcontract, or any other subcontractor's contract for that matter, to define the work therein other than the "subcontractor's work." The real concern in this regard is that the underlying claim is one that "arises out of or resulting from the performance of the Suncontractor's work", which is clearly the case here.

MURPHY & GRANTLAND, P.A.



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Attorney for Defendant Superior Construction Corporation

Columbia, South Carolina
Oct. 14, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, et al.,
Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

THE MUHLER COMPANY, INC'S
OPPOSITION TO SUPERIOR
CONSTRUCTION CORPORATION'S
MOTION TO RECONSIDER

FILED
2015 OCT 22 PM 2:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Muhler Company, Inc. ("Muhler") respectfully submits this Opposition to Superior Construction Corporation's ("Superior") Motion to Reconsider this Court's Order dated September 25, 2014 ("Order").

1. **The cases relied on by Superior construe language that is substantively different from the language in the Subcontract and are, therefore, inapplicable.**

None of the cases relied on by Superior contain language that is substantively similar to that found in Paragraph 12.1 of the Subcontract. Therefore, those cases, and the results reached in them, are inapplicable to the case at hand. Under the indemnification clause in Payne Plumbing & Hearing Co., Inc. v. Bob McKiness Excavating & Grading, Inc., 382 N.W.2d 156 (Iowa 1986), "[t]he Subcontractor agree[d] to indemnify and save harmless the Contractor from any and all loss or damage ... occasioned wholly or in part by any negligent act or omission of the Subcontractor or that of anyone directly or indirectly employed by them or performing the work of this Subcontract under the direction of the Subcontractor or anyone for whose acts any of them may be liable in carrying out the provisions of the general contract and of this Subcontract regardless of whether or not it is caused in part by a party indemnified hereunder." 382 N.W.2d at 160 (emphasis added). Thus, the clause covered acts by anyone employed by either the Contractor or the Subcontractor and reached work performed under the general contract as well as under the Subcontract. The indemnity provision at issue here is distinctly different and is limited to damages "arising out of or resulting from the performance of the Subcontractor's Work" and extends only to damages caused "in whole or in any part by any negligent act or omission of the Subcontractor" or its employees.

Likewise, the indemnification provision under consideration in Washington Elem. Sch. Distr. No. 6 v. Baglino Corp., 817 P.2d 3 (Ariz. 1991) contains language that appears in many other cases relied on by Superior. The indemnification provision there covered damages "arising out of or resulting from the **performance of the Work ...**" This is the same language that appears in Camp, Dresser & McKee, Inc. v. Paul N. Howard Co., 853 S.2d 1072 (Fla. Ct. App. 2003) and Gunka v. Consolidated Papers, Inc., 508 N.W.2d 426 (Wis. Ct. App. 1993) (the operative phrase promised indemnification for damages "arising out of or resulting from the **performance of the work or services...**") (emphasis added).¹ In contrast, the Subcontract at issue here only promised to indemnify Superior "from and against all claims, damages, loss and expenses, including but not limited to attorney's fees, arising out of or resulting from the **performance of the Subcontractor's Work.**" (Subcontract, ¶ 12.1) (emphasis added).

Binswanger Glass Co. v. Beers Constr. Co., 234 S.E.2d 363 (Ga. Ct. App. 1977) contained an indemnity clause that promised indemnification for damages "arising out of or resulting from the **performance of the Work,**" and that was "caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor ... or anyone for whose acts **any of them may be liable ...**". 234 S.E.2d at 365 (emphasis added). Thus, Binswanger is readily distinguishable from the instant case. Cumberbatch v. Board of Trustees, 382 A.2d 1383 (Sup. Ct. Del. 1978) relied on Binswanger to reach a similar result based on similar indemnification language. In Cumberbatch, the provision at issue

¹ Superior erroneously asserts that the cases relied on by Muhler contain the "same operative language" as that under consideration in Camp. As noted above and in Muhler's motion for summary judgment and in its opposition to Superior's motion for summary judgment, Camp contains language substantively dissimilar to the language in Paragraph 12.1 of the Subcontract. Furthermore, Superior incorrectly states that Brown v. Boyer-Washington Blvd. Assoc., 856 P.2d 352 (Utah 1993) involved a claim for a party's sole negligence. The plaintiff in Brown brought claims against multiple parties, alleging each was partly at fault.

provided indemnification for damages "arising out of or resulting from the performance of the Work ..." that was "caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor ... or anyone for whose acts any of them may be liable ..." 382 A.2d at 1385 (emphasis added). The language in Robinson v. AZ Shrima & Sons Co., 293 N.W.2d 661 (Mich. Ct. App. 1980),² Simon Prop. Group, L.P. v. Brandt Constr., Inc., 830 N.E.2d 981 (Ind. Ct. App. 2005),³ and Wallace v. Slidell Mem'l Hosp., 509 So.2d 69 (La. Ct. App. 1987)⁴ is identical to that in both Binswanger and Cumberbatch, and similarly distinguishable. None of these courts were asked to consider the effect of an indemnification clause like the one at issue here, that limits the indemnification to damages arising out of or resulting from the performance of the Subcontractor's Work and to the extent that the damages are caused, in whole or in part, by any negligent act or omission of the Subcontractor or its employees only. Therefore, the cases relied on by Superior are meaningfully distinguishable and not pertinent to the provision at issue here.

2. Superior's contract interpretation is faulty and should be rejected.

Although Superior dismisses the significance of the references to the Subcontractor's work in the Subcontract, in fact reading that phrase entirely out of the

² The clause at issue in Robinson provided indemnification for damages "arising out of or resulting from the performance of the Work," and that was "caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor ... or anyone for whose acts any of them may be liable ..." 293 N.W.2d at 663 (emphasis added).

³ The clause at issue in Simon Prop. provided indemnification for damages "arising out of or resulting from the performance of the Work," and that was "caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor ... or anyone for whose acts any of them may be liable ..." 830 N.E.2d at 986(emphasis added).

⁴ The clause at issue in Wallace provided indemnification for damages "arising out of or resulting from the performance of the Work," and that was "caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor ... or anyone for whose acts any of them may be liable ..." 509 So.2d at 74 (emphasis added).

contract, general principles of contract interpretation require this court to construe the contract "as a whole and different provisions dealing with the same subject matter are to be read together." Skull Creek Club Ltd. v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). Thus, Superior's attempt to isolate one phrase and declare that phrase grants it indemnification for its own negligence, despite the fact that other language in the indemnity provision in the Subcontract makes such result unclear and equivocal, is patently wrong and should be rejected.

For the same reason, this Court's failure to address the "regardless of whether it is caused in part by a party indemnified hereunder," phrase is of no import – that phrase does not stand alone but must be interpreted in light of the other language in the indemnification clause. As Muhler pointed out previously, cases that consider language identical to that found in Paragraph 12.1 of the Subcontract have held that the language does not indemnify the indemnitee for the indemnitee's own negligence. See, The Muhler Company, Inc.'s Memorandum in Opposition to Motion for Partial Summary Judgment Filed by Superior Construction Corporation, dated July 25, 2014, pp. 14-15.

Superior's assertion that the "to the extent" language relied on in Braegle v. Horizon Dev. Co., 371 N.W.2d 644 (Minn. Ct. App. 1985) was "eliminated by the language of the 2007 Agreement," was neither raised to this court in opposition to summary judgment nor is it persuasive. First, this argument should be dismissed because it was not raised to the Court in opposition to summary judgment. See, e.g., Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 344-45 (Ct. App. 2008) (a party cannot raise an issue for the first time on a Rule 59(e) motion); Eaddy v. Oliver, 345 S.C. 39, 44,

545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot raise an issue for the first time on a Rule 59 motion that could have been raised at trial).

Second, the 2007 Agreement specifies that neither the testing performed to date, "nor this Agreement has amended or affected any party's contractual rights and responsibilities except to the extent specifically stated in this Agreement." (2007 Agreement, p. 1, Att. B). Although Section 11 of the 2007 Agreement provides certain, limited indemnity promises,⁵ it stands on its own. Section 11 simply does not reference or even purport to modify Paragraph 12.1 of the Subcontract. (2007 Agreement, p. 4, Att. B). There simply is no specific modification of the Subcontract's indemnification provision. Furthermore, because the 2007 Agreement does not provide indemnification for Superior's own negligence, it cannot expand the Subcontract so that it provides such indemnification. Thus, either read together or separately, neither the Subcontract nor the 2007 Agreement indemnify Superior for its own negligence, and Superior's 11th-hour attempt to make this argument should be rejected as both untimely and baseless.

Third, as Muhler has explained previously, in a case containing similar language to Article 12.1 of the Subcontract, the Missouri Supreme Court explained that the "phrase 'to the extent caused' expresses an intention to limit the indemnitor's liability to the portion of fault attributed to the indemnitor The preferred construction of the indemnification provision at issue, one that provides a reasonable meaning to each phrase of the provision, requires nothing more than that [the indemnitor] indemnify [the indemnitee] for [the indemnitor's] negligence even if [the indemnitee] participates in part in [the indemnitor's] negligent conduct. To hold otherwise would make the intended

⁵ For example, it only applies to allegations that the windows and/or doors do not comply with Contract Documents or are defectively installed, but to no other allegations or damages.

expression to limit liability to the acts of indemnitor meaningless.” Nusbaum v. Kansas City, 100 S.W.3d 101, 106-107 (Mo. 2003); see also Frank v. MSI Constr. Mgrs., Inc., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995) (the “to the extent” language in the indemnification clause means that the indemnifying party is liable to the indemnitee “to the extent of its own negligence but is not required to indemnify [the indemnitee] for [the indemnitee’s] negligence”). This Court should reach the same conclusion here.

CONCLUSION

For all the reasons stated herein and presented to this Court previously, summary judgment on Superior’s indemnity claim was proper and should be upheld. Superior’s Motion to Reconsider should be denied.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC



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(843) 576-2900

ATTORNEYS FOR DEFENDANT,
THE MUHLER COMPANY, INC.

October 8, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, *et al.*,

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

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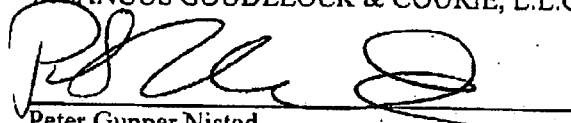
NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

TO: CHRIS A. MAJURE, ESQUIRE, ATTORNEY FOR SUPERIOR CONSTRUCTION:

Please take notice that the Defendant The Muhler Company, Inc. will be move before
The Honorable Clifton Newman at a time and date set by Judge Newman for an Order that grants

Summary Judgment to Defendant Muhler on all cross-claims alleged against Muhler by Defendant Superior Construction Corporation. This Motion is based upon Rule 56 of the South Carolina Rules of Civil Procedures. The grounds for this motion are that the settlement reached by Superior Construction Corporation with the Plaintiffs in the underlying construction case in the context of the global settlement by all the Defendants, in which Superior Construction Corporation paid less than fifty per cent (50%) of the total settlement monies paid to the Plaintiffs, and read in the context of S.C. Code Ann. § 15-38-10, indicate that Superior Construction Corporation paid to the Plaintiffs an amount that is attributable solely to its own negligence. Superior Construction Corporation's settlement with the Plaintiffs resolved its own negligence and not that of any other subcontractor, in particular, The Muhler Company. Defendant Muhler reserves the right to submit a Memorandum of Law in support of the Motion for Summary Judgment along with exhibits.

MCANGUS GOUDELOCK & COURIE, L.L.C.



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ATTORNEYS FOR DEFENDANT THE MUHLER
COMPANY, INC.

January 5, 2016

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

And

Thomas R. Mather,

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Signature Charleston, LLC and Wade
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Pamela L. Vaughn,

And

304 Concord & Cumberland, LLC,

And

402 Concord & Cumberland, LLC,

And

Avant & Associates, LLC and Oakland
Holding, LLC,

And

Mattison J. MacGillivray and

Teresa E. MacGillivray,

And

Pamela Queen,

And

Stuart Reeves,

Plaintiffs,

v.

Concord & Cumberland, LLC, Concord &
Cumberland Manager, LLC, Estates, Inc.,
Estates Management Company,
Superior Construction Corporation, Weather

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2010-CP-10-2271

CIVIL ACTION NO: 2010-CP-10-2919

CIVIL ACTION NO: 2010-CP-10-3206

CIVIL ACTION NO: 2010-CP-10-3207

CIVIL ACTION NO: 2010-CP-10-3208

CIVIL ACTION NO: 2010-CP-10-3209

CIVIL ACTION NO: 2010-CP-10-3210

CIVIL ACTION NO: 2010-CP-10-9580

CIVIL ACTION NO: 2010-CP-10-9767

CIVIL ACTION NO: 2011-CP-10-8550

CIVIL ACTION NO: 2011-CP-10-8551

CIVIL ACTION NO: 2011-CP-10-8549

CIVIL ACTION NO: 2011-CP-10-4663

CIVIL ACTION NO: 2011-CP-10-9585

CIVIL ACTION NO: 2011-CP-10-4603

**Superior Construction Corporation's
Motion For Summary Judgment
Against**

THE MUHLER COMPANY, INC.

Clocked in date Canceled

Shield Mfg., Inc., The Muhler Company, Inc.,
In The Wind, Inc., J. Davis Architects, PLLC,
Wall Craft Construction, Inc., Weatherholtz
Masonry, LLC, Philip Gasque d/b/a Philip
Gasque Construction, Architectural Stone
Company, Southern Mechanical, Inc., Greg
Gasque Metal Works, Keating Roofing and
Sheet Metal, Inc., Lowcountry Tile
Contractors, Inc., Safeco Insurance Company
of America, Companion Property and Casualty
of America, Companion Property and Casualty
Group, Watts Builders, LLC, Elias Duffy d/b/a
Masonry Pros, Renaissance Steel, LLC,
American Drywall Construction, Inc., Turner
Electrical of SC, Inc., and Metro
Waterproofing, Inc.,

Defendants.

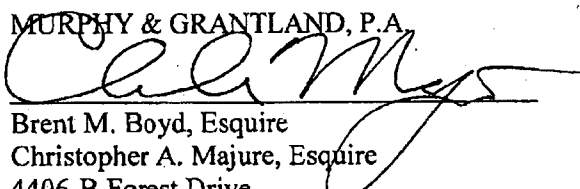
**TO: GUNNER NISTAD, ESQUIRE ATTORNEY FOR THIRD PARTY DEFENDANT
THE MUHLER COMPANY INC.:**

Superior Construction Corporation (herein, "Superior") hereby petitions the Court for hearing upon this Motion for Summary Judgment against The Muhler Company ("Muhler"), to be heard within ten (10) days of service of this Motion or such time as appointed by the Court. The grounds for this motion are as follows. Superior seeks to enforce its right of contractual indemnity against The Muhler Company arising from its subcontract with Superior in connection with the provision and installation of the windows and doors for the construction of the Subject Property, and the "June 2007 Agreement" with Superior, which contains additional indemnity provisions. Under the terms of the subcontract and the Agreement, Superior is entitled to indemnity from Muhler for the attorneys' fees, costs, expenses, and damages incurred by Superior as a result of the claims asserted by the various Plaintiffs of the consolidated cases related to Muhler's scope of work. Whereas Superior has settled the claims of the Plaintiffs related to the windows and doors, it is unnecessary to conduct a trial of the underlying claims

related to Muhler's scope of work; whereas in accordance with Griffen v. Van Norman 302 S.C. 520, 523, 397 S.E.2d 378 (Ct. App. 1990), Superior has satisfied the elements at law to enforce its right of indemnity, and the Court need only to address the final determination of the proper amount of damages. The elements cited by Griffen to allow recovery in a valid claim of indemnity (1) if the settlement is bona fide, with no fraud or collusion by the parties; (2) if, in the circumstances, the decision to settle is a reasonable means of protecting the innocent party's interest; and (3) if the amount of the settlement is reasonable in light of the third party's estimated damages and the risk and extent of defendant's exposure if the case is tried. Griffen, at 523. Superior, as an indemnitee under the present circumstances, "is not required to prove the Plaintiff's actual ability to recover the amount paid in settlement so long as the indemnitee proves that he was potentially liable to the plaintiff." Otis Elevator, Inc. v. Hardin Construction Co. Group, Inc. 316 S.C.292, 297, 450 S.E.2d 41, 44.

Superior will timely supplement this Motion with a memorandum of law and such other exhibits, affidavits and other evidence in support of this Motion.

MURPHY & GRANTLAND, P.A.



Brent M. Boyd, Esquire
Christopher A. Majure, Esquire
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(803) 782-4100, ext. 1210/1240
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Email: bboyd@murphygrantland.com
cmajure@murphygrantland.com

*Attorneys for Defendant Superior Construction
Corporation*

Columbia, South Carolina
July 30, 2013

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
CONCORD AND CUMBERLAND
HORIZONTAL PROPERTY REGIME,

And

THOMAS R. MATHER,

And

BETTY Y. SEGAL,

And

SIGNATURE CHARLESTON, LLC and
WADE ROBINSON,

And

JAMES C. KIRKPATRICK,

And

PAUL A. BRIM,

And

FRED RAPPAPORT and JOYCE
RAPPAPORT,

And

THOMAS R. DEBNAM, as TRUSTEE OF
THE TRUST AGREEMENT OF THOMAS R.
DEBNAM,

And

PAMELA L. VAUGHAN,

Plaintiffs,

vs.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2010-CP-10-2271

Civil Action No. 2010-CP-10-2919

Civil Action No. 2010-CP-10-3206

Civil Action No. 2010-CP-10-3207

Civil Action No. 2010-CP-10-3208

Civil Action No. 2010-CP-10-3209

Civil Action No. 2010-CP-10-3210

Civil Action No. 2010-CP-10-9580

Civil Action No. 2010-CP-10-9767

NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENT

FILED
2013 OCT 17 PM 12:36
JULIE J. ARSTRONG
CLERK OF COURT
BY

CONCORD & CUMBERLAND, LLC, *et al.*,

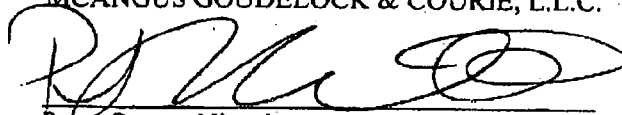
Defendants.

)
)
)
)
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TO: CHRIS MAJURE, ESQUIRE AND HENRY BROWN, ESQUIRE:

Please take notice that the Defendant The Muhler Company, Inc. will be move before The Honorable Clifton Newman at a time and date set by Judge Newman for an Order that grants Summary Judgment to Defendant Muhler on all cross-claims alleged against Muhler by Defendant Superior Construction Corporation and Defendant Concord & Cumberland, LLC. This Motion is based upon Rule 56 of the South Carolina Rules of Civil Procedures. The grounds for this motion are that the contractual indemnity provisions that Defendant Superior and Defendant Concord & Cumberland seek to enforce are rendered unenforceable because of a breach in contract by Superior Construction Corporation. Defendant Muhler reserves the right to submit a Memorandum of Law in support of the Motion for Summary Judgment along with exhibits.

MCANGUS GOUDELOCK & COURIE, L.L.C.



Peter Gunnar Nistad

Post Office Box 650007

735 Johnnie Dodds Blvd, Suite 200 (29464)

Mt. Pleasant, South Carolina 29465

(843) 576-2900

ATTORNEYS FOR DEFENDANT THE MUHLER
COMPANY, INC.

October 10, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

Concord and Cumberland Horizontal Property
Regime,

And

Thomas R. Mather,

And

Betty Y. Segal

And

Signature Charleston, LLC and Wade
Robinson,

And

James C. Kirkpatrick,

And

Paul A. Brim,

And

Fred Rappaport and Joyce Rappaport,

And

Thomas R. Debnam, as Trustee of the Trust
Agreement of Thomas R. Debnam,

And

Pamela L. Vaughn,

And

304 Concord & Cumberland, LLC,

And

402 Concord & Cumberland, LLC,

And

Avant & Associates, LLC and Oakland
Holding, LLC,

And

Mattison J. MacGillivray and

Teresa E. MacGillivray,

And

Pamela Queen,

And

Stuart Reeves,

Plaintiffs,

v.

Concord & Cumberland, LLC, Concord &
Cumberland Manager, LLC, Estates, Inc.,
Estates Management Company,

CIVIL ACTION NO: 2010-CP-10-2271

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2014 JUL 14 PM 3: 22

FILED

SUPERIOR CONSTRUCTION CORP.?
SUPPLEMENT TO ITS MEMORANDUM OF LAW
IN SUPPORT OF PARTIAL SUMMARY JUDGMENT
AGAINST THE WEATHER SHIELD MFG, INC.

Superior Construction Corporation, Weather
Shield Mfg., Inc., The Muhler Company, Inc.,
In The Wind, Inc., J. Davis Architects, PLLC,
Safeco Insurance Company of America,
Companion Property and Casualty of America,
Companion Property and Casualty Group,
Watts Builders, LLC, Elias Duffy d/b/a
Masonry Pros, Renaissance Steel, LLC,
American Drywall Construction, Inc., Turner
Electrical of SC, Inc., and Metro
Waterproofing, Inc.,

Defendants.

**TO: CHRISTINE VARNADO, ESQUIRE, ATTORNEY FOR DEFENDANT
WEATHER SHIELD MFG, INC.:**

Superior Construction Corporation ("Superior") provides this Supplement to its previously issued Memorandum of Law in support of its motion for Partial Summary Judgment Against Weather Shield, Mfg., Inc.

In section II(c)(ii) of Superior's previously issued Memorandum, subtitled as the "Second Griffen Element" (beginning at page 12 of the Memorandum) Superior sets forth certain key items of documentary and testimonial evidence in discovery in support of this element of Griffen v. Van Norman, 302 S.C. 520, 523, 397 S.E.2d 378 (Ct. App. 1990), which is directed towards ascertaining if, under the circumstances, the decision by Superior to settle the window and door claims against it by Plaintiffs was a reasonable means of protecting its interests. Superior offers the following additional items in further support of this Griffen element.

Kenneth Lies, AIA is one of the named expert witnesses on behalf of The Muhler Company. He has been a practicing architect for over twenty-five years, and is a member of the American Society of Testing and Materials (ASTM), sitting on the task group for several testing standards for window water penetration testing of window products. Deposition of Kenneth

Lies, AIA, Vol. I, p.7. Mr. Lies made numerous admissions of a fairly wide range of problems with the windows themselves as well as the manner in which they were installed. While he consistently objected to certain water testing that was performed at pressures that he felt should not have been used beyond six months from installation, he consistently had to admit that a significant number of the windows were still experiencing water intrusion under normal weather conditions and at lesser testing pressures that coincided with performance ratings that were required by the Architect, which did not have any stated temporal constraints. (See detailed discussion below.) While Superior points out the more salient details of his testimony below, it invites the Court's attention to his entire deposition transcript.

The major conclusion that Mr. Lies makes in regards to the windows is that the hardware that Weather Shield incorporated into the operative casement windows was not robust enough to handle the extremely heavy weight of the sashes. From his own personal investigation by contacting a Weather Shield representative, Jason Heir, and the manufacturer of the operator mechanism, he found that Weather Shield simply used the same standard window sash and hardware assembly for their lower grade, non-impact rated windows for the instant product, which is a much heavier window with impact rated glass. See Deposition of Kenneth Lies, AIA, Vol. I, p. 56- 59. This was confirmed by Mr. Hier in deposition. See Deposition of Jason Heier, p. 13- 16. The manufacturer of the operator mechanisms, Truth Hardware, informed him that the as-built hardware that was incorporated into the windows was not recommended for the size and weight of the sashes, and instead they would have recommended a dual-armed roto operator. See Deposition of Kenneth Lies, AIA, Vol. I, p.56-59. The manufacturer's literature for the particular as- built device limited its use to 50 pounds. From his calculations, Lies estimated weight of the as-built windows to range between 80 to 85 pounds. *Id.* p. 61. He witnessed direct conditions in the field indicating that the as-built hardware was failing to perform as it would be

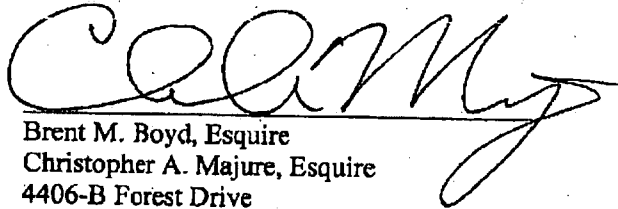
expected, for instance sashes sagging to such a degree that it exceeded the ability to be corrected via adjustment screws in the hinges. The sagging caused the weather stripping that was supposed to provide the window's weather seal to not function as it should. His repair protocol was specifically directed at correcting this issue by upgrading the operator and the hinges. *See Id.*, p. 62, l. 17 through p. 65, l. 2.

Mr. Lies also admitted the existence of a substantial number of installation defects, such as improperly installed mull caps, which he admitted contribute to water penetration. *Id.*, p. 67. When confronted with Christine Quigley's aforementioned report (Exhibit 5) listing numerous items of installation deficiencies, he repeatedly had to stipulate that these conditions were improper. *Id.* Vol. II, pp. 201- 213. Lies admits that under the applicable building code, the windows at the subject property should remain watertight- without leaks or water penetration- under normal climatic conditions, and that the failure of the windows to perform as such would be an unacceptable condition under the code. Deposition of Kenneth Lies, AIA, Vol. II, p.223. Line 21 through p. 226, line 8. He agreed that a test protocol can be used to attempt to replicate normal climatic conditions, and that an ASTM E1105 test method would be the method that he would use. *Id.* Vol. II, p. 226, l.25 through p.227, l. 17. (As described earlier in the Stafford Consulting report authored by Christine Quigley's report, the E1105 method was used by almost every prior testing entity.) He admitted that the highest wind pressure applied during Stafford's testing (5.29 to 5.55 pounds per square foot- psf) was only approximately forty-five miles per hour, and that this is a condition that would occur, "without question" in Charleston in severe thunderstorm conditions. *Id.*, Vol. II, p. 231, l.25 through p. 232, l. 12. He admitted that the combination of this wind and water pressure would fall within normal climate conditions in Charleston. *Id.*, Vol. II, p. 232, l.19 through p 233, l. 7. As to fixed unit windows, Lies admitted that a window that experiences window glazing leaks under normal weather conditions (or

testing that replicates those conditions) even three or four years out from original construction has "something wrong with that particular window", and is not weather tight under the building code. *Id.*, Vol. II, p. 238, l. 9 to p. 239, l. 14. He further admitted if an operable window is leaking three to four years out after installation under normal weather conditions, it still needs to be addressed. *Id.*, p. p. 240, l. 4-7. Lies admitted that the results of window water testing conducted by Architectural Testing Inc. in December of 2009, which were performed at a lower test pressure (4psf) resulted in water intrusion for every window tested under that protocol; he further admitted that this test pressure corresponded to a DP 40 performance grade for the windows, which was specified by the Architect for the project. *Id.*, Vol. II, p. 246. l. 11 to p. 247, l. 23. While he attempted to nonetheless call the windows a "high quality product", he simultaneously admits that his repair protocol calls for essentially all of the window hardware in the operative casement windows to be removed and replaced because, in his opinion, the predominate cause of documented water intrusion is the hardware and its lack of ability to achieve compression of the weather stripping around the sash. *Id.*, Vol. II, p. 246. l. 11 to p. 247, l. 23.

This above testimony, in conjunction with all of the previously cited testimony and evidence, bears heavily upon Superior's decision to settle the window claims on the basis that a fact-finder could potentially conclude that there existed a such a level of systematic deficiencies in the windows themselves and their manner of installation, that likely constituted building code violations as well as a potential material breach of the requirements of the plans and specifications, that Plaintiffs could likely prevail upon at trial. Superior reserves the right to supplement the facts and law of its Memorandum and the Supplement at oral argument.

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*Attorneys for Defendant Superior Construction
Corporation*

Columbia, South Carolina

July 11, 2014

1

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2010-CP-10-2271

CONCORD AND CUMBERLAND HORIZONTAL PROPERTY)
REGIME, THOMAS R. MATHER, BETTY Y. SEGAL,)
SIGNATURE CHARLESTON, LLC, WADE ROBINSON,)
JAMES C. KIRKPATRICK, PAUL A. BRIM, FRED)
RAPPAPORT, JOYCE RAPPAPORT, THOMAS R.)
DEBNAM, as Trustee of the Trust Agreement)
of THOMAS R. DEBNAM, STUART REEVES,)
MATTISON MACGILLIVRAY, TERESA W.)
MACGILLIVRAY, AVANT & ASSOCIATES, OAKLAND)
HOLDING, LLC, 304 CONCORD & CUMBERLAND,)
LLC, 402 CONCORD & CUMBERLAND, LLC,)
PAMELA R. QUEEN, and PAMELA L. VAUGHN,)

Plaintiffs,

vs.

CONCORD & CUMBERLAND, LLC, CONCORD &)
CUMBERLAND MANAGER, LLC, ESTATES, INC.,)
ESTATES MANAGEMENT COMPANY, SUPERIOR)
CONSTRUCTION CORPORATION, WEATHER SHIELD)
MFG, INC., THE MUHLER COMPANY, INC., IN)
THE WIND, INC., J. DAVIS ARCHITECTS, PLLC,)
WALL CRAFT CONSTRUCTION, INC.,)
WEATHERHOLTZ MASONRY, LLC, PHILLIP GASQUE)
d/b/a PHILLIP GASQUE CONSTRUCTION,)
ARCHITECTURAL STONE COMPANY, SOUTHERN)
MECHANICAL, INC., GREG GASQUE METAL WORKS,)
KEATING ROOFING AND SHEET METAL, INC.,)
LOWCOUNTRY TILE CONTRACTORS, INC., SAFECO)
INSURANCE COMPANY OF AMERICA, COMPANION)
PROPERTY AND CASUALTY GROUP, WATTS)
BUILDERS, LLC, ELIAS DUFFY d/b/a MASONRY)
PROS, RENAISSANCE STEEL, INC., AMERICAN)
DRYWALL CONSTRUCTION, INC. and TURNER)
ELECTRICAL OF SC, INC.,)

Defendants.

TRANSCRIPT OF RECORD
DECEMBER 4, 2015
CHARLESTON, SC

Before: The Honorable Clifford Newman, Judge.

1 A P P E A R A N C E S:

2 Alan Ross Jr. Belcher, Esquire
3 Attorney for Safeco Insurance Company of America

4 Henry W. Brown, Esquire
5 Attorney for Concord & Cumberland Manager, LLC

6 Christopher Alton Majure, Esquire
7 Attorney for Superior Construction Corporation

8 Peter Gunnar Nistad, Esquire
9 Attorney for Muhler Company, Inc.

10 Christine Companion Varnado, Esquire
11 Attorney for Weather Shield Manufacturing

12 Amanda K. Haffenden, RPR, CRR
13 Circuit Court Reporter
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1 (December 4, 2015.)

2 THE COURT: Okay. All cameras are gone now.

3 MR. MAJURE: I don't believe we can provide
4 the amount of intrigue. We came to realize that our area
5 of practice is far more mundane than even we realize.

6 Chris Majure on behalf of Superior
7 Construction Corporation.

8 MR. BROWN: Henry Brown, Nexon Pruett on
9 behalf of Concord & Cumberland LLC.

10 MS. VARNADO: Christie Varnado for Weather
11 Shield.

12 MR. NISTAD: Gunner Nistad for Muhler.

13 THE COURT: And Mr. Belcher is coming in too.
14 For the record, Mr. Belcher?

15 MR. BELCHER: Alan Belcher here for Safeco
16 and Superior.

17 THE COURT: Mr. Majure, first regarding the
18 e-mail you sent yesterday involving Mr. Saab and Carl
19 Pierce's billing records, I was trying to read it over
20 while listening to closing arguments in a trial I was
21 doing, so I don't know if I got the full impact of it
22 because my concentration was divided. Tell me what's
23 going on there.

24 MR. MAJURE: Well, Your Honor, I did see
25 after I filed that e-mail that there was a response from

1 the Court and the motion would be -- the motion to quash
2 would be continued, so my comments, I guess, would be
3 moot, but I just raise the concern that with the January
4 25th trial date, if that motion to quash is not timely
5 resolved, if there will be activities that will have to
6 occur after that motion.

7 THE COURT: Well, we have court going on in
8 Kingstree in a couple of weeks. The 14th, Monday through
9 Thursday, we're supposed to be there. How many people
10 need to come, would need to come, to have the motion
11 addressed, everyone or --

12 MR. MAJURE: Well, the motion to quash is in
13 response to Superior's subpoena. Now, the motion does
14 relate to Weather Shield's witness, so I gather Ms.
15 Varnado would want to be present, but, technically, the
16 motion to quash is going to be filed by counsel on behalf
17 of Mr. Pierce's --

18 THE COURT: I'm happy to schedule it, and
19 that's probably a good week to schedule it, if -- and I'm
20 not scheduled to be back here until the week that the
21 case is set for trial. So --

22 MR. MAJURE: I would make it a priority to
23 assure that I could be here some time during that period,
24 and Mr. Saab could likewise appear.

25 THE COURT: Ms. Varnado, are you in --

1 MS. VARNADO: I mean -- what date? Is there
2 a particular date you were --

3 THE COURT: Well, I'm there Monday through
4 Thursday that week, and whenever it's convenient for the
5 parties, I'm sure we could work it out.

6 MS. VARNADO: Yeah, I'm happy to go up there.
7 That would be fine.

8 THE COURT: Okay. Well --

9 MR. MAJURE: I could contact opposing
10 counsel.

11 THE COURT: Within that Monday, Tuesday --
12 probably Monday, Tuesday, Wednesday or maybe even
13 Thursday. We might be wrapping up everyone's criminal
14 court, which means we might have a deluge of people
15 trying to get out of jail before Christmas on that last
16 day, so we might want to make it earlier in the week
17 rather than later.

18 MR. MAJURE: Understood, Your Honor.

19 MS. VARNADO: And that's the week of the
20 14th?

21 THE COURT: Yes. All right? So as far as
22 these matters and motions, who wants to be heard first?

23 MS. VARNADO: I'm happy to go, Your Honor.

24 THE COURT: All right.

25 MS. VARNADO: Christy Varnado for Weather

1 Shield. We have the motion to exclude the new report,
2 the --

3 THE COURT: I'm sorry, Ms. Varnado. Let me
4 just address the motion -- let's see. The summary
5 judgment motion that Mr. Brown wanted reconsidered --

6 MR. BROWN: Yes, sir.

7 THE COURT: I think I would like to address
8 that first.

9 MR. BROWN: All right. Yes, sir.

10 THE COURT: Considering I have recently been
11 reversed on a summary judgment matter, it's something hot
12 and heavy on my mind, so --

13 MR. BROWN: I had no intention of bringing
14 that up, Your Honor.

15 THE COURT: I'm not sure I agree with the
16 Court of Appeals, but, nevertheless. Yes, sir. If you
17 could kind of, you know, kind of reset the facts and then
18 tell me -- let's go from there.

19 MR. BROWN: Let me start -- start at the
20 beginning because Your Honor wants me to move along.

21 THE COURT: Yes, sir.

22 MR. BROWN: Again, this is a claim by Concord
23 & Cumberland, LLC who is the developer and seller of the
24 condominiums. We, along with Weather Shield, along with
25 Superior, the contractor, along with J. Davis, the

1 architect, were all sued by the homeowners' association.
2 One of the allegations in that case was that the windows
3 themselves as manufactured by Weather Shield were
4 defectively manufactured and also defectively installed
5 by the subcontractor, defendant Muhler.

6 If Your Honor recalls, this case has an
7 anomaly in it outside of a typical defects case in that
8 during construction, questions arose about the quality of
9 the windows, and there were investigations and
10 discussions between Superior as the contractor, Concord &
11 Cumberland as the developer, and Muhler and Weather
12 Shield about whether the windows would be rejected and
13 totally new windows purchased and put in or whether we
14 would continue with the windows manufactured by Weather
15 Shield and as remedied and repaired by them.

16 The decision was made after assurances from
17 Weather Shield and Muhler to go forward with construction
18 with the windows originally spec and purchased with
19 assurances by Weather Shield that repairs and remedies
20 would be performed and the windows would function.

21 Those discussions and understanding
22 culminated in an agreement that is the foundation for
23 this claim by Concord against Weather Shield, and that
24 agreement contains representations as to the remedies
25 performed as to the corrective measures to the windows,

1 promises that the windows were merchantable, and in an
2 indemnity against allegations against Concord and
3 Superior by the homeowners' association that the windows
4 were defective.

5 Based upon that agreement, construction
6 continued. The developer and Superior went forward with
7 Weather Shield's windows. The units were sold to the
8 homeowners and litigation followed, alleging that the
9 windows were defective. That case proceeded to
10 settlement -- excuse me.

11 As part of the allegations and cross-claims,
12 Concord & Cumberland asserted the cross-claim against
13 Weather Shield and Muhler, arising not only out of the
14 general performance of the work, but arising out of their
15 specific agreement, saying we put the windows into the
16 unit because of your assurances. Your assurances turned
17 out to be incorrect. We have been sued. We want
18 damages.

19 In addition to the suit on that specific
20 indemnity we filed a claim for equitable indemnity, which
21 is the subject matter of your award of summary judgment.
22 Now, the piece that I've left out for how we get here is
23 that everyone eventually settled with the homeowners'
24 association. Concord & Cumberland paid \$800,000 in
25 settlement and allocated \$400,000 to the window claims.

1 The indemnity agreement also provided for reimbursement
2 of attorneys' fees as well as any damages as the result
3 of the allegations.

4 Now, what was left over out of that case was
5 the claims between Superior, Weather Shield, between
6 Concord and Weather Shield, Superior and Weather Shield.
7 The cross-claims were left to be tried, based on the
8 settlement reached.

9 Ms. Varnado moved for summary judgment on the
10 equitable indemnity claim that Your Honor granted and in
11 that order made reference to Concord's having provided --
12 the architect having hired the contractor, having had
13 people participating in the flow of information.

14 Your Honor recognized in that order that the
15 active passive negligence distinction that I think is
16 recognized in the electric and gas industrial case, the
17 Fourth Circuit case, and I think the premise of those
18 cases, and I think it is good law in South Carolina, is
19 that for purposes of equitable indemnity, passive
20 negligence does not bar the right. It has to be active
21 negligence, and the comment and the discussion is that
22 the mere failure to discover the default by another party
23 is passive negligence, which does not bar equitable
24 indemnity.

25 Your order went on to find, though, that the

1 conduct and the acts attributable to Concord & Cumberland
2 went beyond passive into active, and that is the essence
3 and the position that we respectfully ask Your Honor to
4 reconsider, is, one, for purposes of summary judgment,
5 that this case should not proceed to trial to hear the
6 full testimony on whether there is, in fact, active
7 negligence.

8 And what I would like to focus to -- is what
9 I've said so far, is this helpful to the Court?

10 THE COURT: Yes, sir.

11 MR. BROWN: Where I think the question
12 becomes too broad to grant on summary judgment is a
13 finding of fault in regard to the specific proposition
14 that the windows were defective.

15 The case law, and what is quoted by
16 Ms. Varnado in her brief, I think, is correct, and I
17 think there is a word that needs to be focused on, and
18 that is the word negligence as opposed to fault. I find
19 equitable indemnity cases to be very difficult in that
20 the Court uses sometimes that the parties seeking
21 indemnity is without fault. Now, does that mean simply
22 that we are looking for conduct for which they performed
23 better, or are we looking for a legal duty that has been
24 breached?

25 Now, the case that Ms. Varnado cites is

1 Vermeer, and it refers to negligence, not fault. The
2 case is saying that there has been no fault of the
3 parties seeking indemnity that joins in the fault of the
4 party that we're seeking indemnity from. I do not
5 believe that under the case law that if our architect
6 mis-designed the stucco or designed a bad roof or failed
7 to observe the installation of the roof by Muhler that
8 that fault affects our right of indemnity with regard to
9 whether or not the windows themselves are manufactured
10 properly, and that is the question at issue.

11 There is no question but that the allegations
12 that we were sued under and that we settled under said
13 that the windows themselves were defective in
14 manufacture. There would have been, and there was during
15 discovery -- would have been in trial and there was
16 during discovery copious testimony that there were
17 problems with the windows and there were leaks with the
18 windows, and now, Ms. Varnado thinks I'm wrong, and I
19 understand that.

20 I'm not trying to represent that she agrees
21 today, but the Court's inquiry is not whether Concord &
22 Cumberland as the developer who hired architects they
23 trusted and contractors they trusted could have done a
24 better job. I think the inquiry for the Court is whether
25 there's negligence on the part of Concord & Cumberland

1 that joins into the delivery of defective windows such
2 that Concord & Cumberland should be barred from any
3 recovery, and I think that's where, at least on this
4 record, there really is no evidence, and I think there's
5 certainly no evidence sufficient to sustain and justify
6 not hearing the evidence at trial, granting it on summary
7 judgment.

8 I think that's where the Court -- the
9 reconsideration is the recognition, first of all, that
10 general failures by the architect we hired, unassociated
11 with the manufacture of the windows, does not constitute
12 a contributory or a combining fault, and I think fault
13 has to be read in the context of not could we have done a
14 better job, but is there some legal negligence?

15 If you look back to the South Carolina
16 case -- my cases have run away for me, the South
17 Carolina -- the electric and gas case of '64 involving
18 the contractor's failure to remedy -- to properly repair
19 a sidewalk which led the city to be liable vicariously to
20 the person who tripped talked about the right of
21 indemnity in terms of where was the legal duty on the
22 part of the city to search out and find the defective
23 work by the contractor.

24 In this case, there is the no legal duty on
25 the part of Concord, particularly where we have

1 affirmative representations that we will deliver adequate
2 windows in the future. We have no legal duty to inspect,
3 evaluate their manufacture, and to determine along with
4 them whether they're submitting adequate windows.

5 The fact that we had an architect on the job,
6 we had someone on the job that we were hoping will make
7 this job a better job, without showing how that conduct
8 relates to or ties into or some how we joined in the
9 manufacture of defective windows leaves it at least a
10 question for trial for Your Honor to hear all of the
11 testimony and determine whether anything Mr. Andrews did,
12 Mr. Parker did, the architect did, joined in the windows,
13 not just joined into the stucco being bad, not just
14 joined into the flashing being wrong, not joined into the
15 roof, but is there a specific relationship between the
16 conduct of Concord & Cumberland and the delivery of
17 defective windows?

18 And we think, at worst, that question should
19 be decided in the context of all of the testimony and not
20 on summary judgment, that the connection is, well, the
21 developer had an architect, had a contractor, had people
22 on the job. There must have been something he had done
23 wrong. There must be some fault on his part, so we'll
24 not allow indemnity from the company that manufactured
25 the windows and installed them, and they turned out to be

1 bad.

2 So, in essence, Your Honor, I think there is
3 a very precise legal standard of some legal duty we
4 breached. I'm not sure there's been any proposition in
5 the law that a party loses money or forfeits rights short
6 of the breach of legal duty, and then the evidence in
7 this record is devoid of any connection between the
8 conduct of Concord and the presence of defective windows,
9 and we simply are asking that that question be decided at
10 trial as opposed to summary judgment.

11 Thank you.

12 THE COURT: All right.

13 MS. VARNADO: May it please the Court, Your
14 Honor: First of all, you got it right the first time in
15 the original order because the basis was not just because
16 the architect was hired by Concord & Cumberland, although
17 that is true and that was part of it, but also Concord &
18 Cumberland's own folks, employees of Concord &
19 Cumberland, participated in the design of the window
20 installation that resulted in problems with the windows'
21 performance, and that was documented by evidence, and
22 there was no contrary evidence submitted by Concord &
23 Cumberland.

24 In addition, Concord & Cumberland hired a
25 company called Metro Waterproofing. Metro Waterproofing

1 took out all the caulking and glazing around the windows
2 and put in their own caulking, and then, later on, there
3 were leaks through that portion of the windows that Metro
4 Waterproofing, the agent of Concord & Cumberland, had
5 touched, had affected, so therefore there was evidence,
6 there is evidence, that Concord & Cumberland joined in
7 the fault that was allowing windows to leak.

8 That was in the record. There was no
9 evidence to the contrary submitted by Concord &
10 Cumberland. They had relied on pleadings, but, Your
11 Honor, as you know, reliance on pleadings is not accurate
12 for summary judgment, and then -- so when he's -- when
13 Mr. Brown is talking about the passive active negligence,
14 although that issue has been put somewhat to the side as
15 the cases have developed, nonetheless, there is evidence
16 of the active joining in by Concord & Cumberland, and
17 once you have actively joined in with the fault, once
18 your hands are no longer clean, you are not entitled to
19 equitable indemnity. Concord & Cumberland would still be
20 able to pursue their contractual indemnity claim.

21 The other basis, although you did not address
22 this in your summary judgment order, is the other reason
23 why you got this right and that is there is no special
24 relationship between Weather Shield, the window
25 manufacturer, and Concord & Cumberland, the developer,

1 because under the case law, there needs to be a direct
2 special relationship between the two parties for
3 equitable indemnity to ever attach in the first place.

4 And Shield sold windows to Muhler, who then
5 installed them in the building, who sold them to
6 Superior, and they installed them in a building owned by
7 Concord & Cumberland, but the chain of how that went
8 is -- there's at least two entities in between Weather
9 Shield and Concord & Cumberland, and there's the utility
10 case, which talks about how the sub of the sub, that the
11 party, that the named party, could not get equitable
12 indemnity from the subcontractor of the subcontractor
13 because it was not a special relationship. It was too
14 attenuated, is the term the Court used.

15 So due to this lack of special relationship,
16 and also due to the only evidence in the record, which is
17 that Concord & Cumberland, through its own employees,
18 participated in the design and through its own agents
19 altered the windows, which later were demonstrated in
20 those same locations to have leaks through the locations
21 that Metro altered.

22 THE COURT: Mr. Brown, do you argue there is
23 evidence in the record some dispute with experts or
24 something?

25 MR. BROWN: Yes, sir. There clearly is

1 evidence in the record --

2 THE COURT: That's where the Court of Appeals
3 disagreed with me in my mold case that I granted summary
4 judgment, saying that where there is evidence in the
5 record, you can't grant summary judgment. Of course, I
6 didn't agree there was evidence in the record.

7 MR. BROWN: Yes, without question. Let's go
8 back. We keep -- this is the problem with deciding
9 summary judgment. Ms. Varnado grabs a whole bunch of
10 stuff and wraps it up in a whole big bundle and says,
11 Here it is, without pointing out the differences in the
12 evidence.

13 There was plenty of evidence during discovery
14 that the windows themselves as delivered and installed
15 were defective. Ms. Varnado disagrees with it. It is a
16 question for decision on the merits. There is testimony
17 from the plaintiff's expert that what Concord &
18 Cumberland's experts suggested is how to install windows,
19 not design the windows themselves. That's a Muhler issue
20 on how to install them, was the right evidence.

21 The plaintiff's testimony is the information
22 that Concord & Cumberland provided on how to install the
23 windows was correct and was ignored, and Ms. Varnado's
24 statement is that there is testimony that what Concord &
25 Cumberland did contribute to the bad installation does

1 not exist. The evidence is, is what they provided was
2 correct.

3 Now, here is where we keep going. Metro
4 appeared two years after the windows were installed.
5 They had been leaking for two years. Concord is trying
6 to do the right thing and fix them. They bring in Metro
7 to try to come up with some way to remedy and correct
8 these defective windows.

9 THE COURT: How is that building now? It's
10 over on East Bay Street or --

11 MR. BROWN: It is a continuing disaster, Your
12 Honor.

13 THE COURT: I was trying to find a park over
14 there, a few blocks over, and --

15 MR. BROWN: After the case was settled -- if
16 you'll indulge me for two minutes of trivia in this
17 continuing disaster, the case was settled for somewhere
18 close to \$5 million. Now, Mr. Clay came in and designed
19 a repair that included taking these windows out and
20 buying new windows, and the homeowners are taking these
21 windows out and putting in brand new windows, and there
22 was a contract for some \$4 million to remedy all the work
23 for trial.

24 So somewhere along the way, various counsel
25 will tell you money was wasted by the homeowners'

1 association board, extra work was ordered, but suddenly,
2 in the middle of a job, they said, Look, guys, we're
3 going \$2.5 million over our contract. Do you have the
4 money? And the association said no.

5 Now, about five months ago, Pirtano quit
6 halfway through the repair of those buildings, and I
7 don't know that they have resolved or have determined
8 where the additional \$2.5 million is coming from to
9 finish fixing these buildings, but without question, one
10 of -- this will come up in her motion to exclude
11 Mr. Parker.

12 One of the things the homeowners' association
13 was doing was buying all new windows, but it is, to my
14 knowledge, still in internal fighting among those
15 homeowners on why the cost got away from them on the
16 repair of the building.

17 But going back, Your Honor, if we stand here
18 and we break up all the nuances, we'll be here all day.
19 Metro was not hired during construction. The windows as
20 installed were --

21 THE COURT: Does that eliminate the need for
22 a special relationship or not?

23 MR. BROWN: No, it does not, but there's a
24 special relationship is that relates from our direct
25 negotiations and promises. The case law has said a

1 contractor, subcontractor, there is a special
2 relationship. In the Ashley case that was decided a year
3 ago, they held that the contract relating to the property
4 was a special relationship.

5 Now, she may want to contest that
6 negotiations with Weather Shield and their face-to-face
7 assurances that the windows were proper --

8 THE COURT: Is that Ashley I and Ashley II or
9 what?

10 MR. BROWN: Ashley II, I think it is, in
11 which the Court recognized that the contract between the
12 parties created that special relationship. There are any
13 number of cases that recognize that the contract, direct
14 dealing, face-to-face negotiations, face-to-face
15 agreement, create that special relationship.

16 Now, Ms. Varnado would be right had there
17 never been this episode of windows failing during
18 construction. The promises and face-to-face discussions,
19 commitments, assurances, Please go ahead and buy our
20 windows; we promise you they're good, that is the type of
21 communication and result of contract that has
22 repetitively held as being special relationship.

23 Now, whether or not in the end you find it
24 shouldn't be decided now, but we should have the
25 opportunity to put up testimony that may differ from

1 Ms. Varnado's position and have Your Honor decide, on the
2 evidence, did the face-to-face communications between
3 Concord & Cumberland, Superior, and Weather Shield give
4 rise to that special relationship?

5 THE COURT: So why didn't you convince me
6 about all this the first time?

7 MR. BROWN: I did a pretty good job, I think
8 Your Honor, but I had hoped and felt that we covered all
9 that and it was there, but to go back over, there's a lot
10 of evidence there, but it should be heard on the merits.
11 It's a nonjury case anyway.

12 THE COURT: All right.

13 MS. VARNADO: Your Honor, if I may, there was
14 no evidence put in by Concord & Cumberland on the issue
15 of special relationship during the summary judgment
16 motion. They have a burden to do that, and if there was
17 evidence, they should have brought it to you at the first
18 hearing. They should have brought it to you on the
19 motion to reconsider. They didn't, but here is the other
20 thing --

21 THE COURT: Let me ask you this: Just on
22 that point, whether they brought it or not, if it's in
23 the record -- and I don't know that I reviewed the entire
24 record because it's so voluminous. If it's in the
25 record, whether they brought it to me or not, can he now

1 raise it on reconsideration?

2 MS. VARNADO: In terms of in the record, I
3 think what Mr. Brown is referring to is just all the
4 various facts that have been gathered in the case via
5 depositions and things like that, but it's not in the
6 record on the motion for summary judgment, and that's
7 what Your Honor is dealing with when you get a motion for
8 summary judgment, and the case law is clear.

9 One side has the burden, the moving party has
10 the burden, and once the moving party makes the burden,
11 the other party has the burden of putting forward a
12 scintilla of evidence into the record on the motion for
13 summary judgment, and that's where Concord & Cumberland
14 did not put this evidence that they say exists into the
15 record. But, also, going back to special relationship,
16 the contract is not a direct contract between Weather
17 Shield and Concord & Cumberland. Concord & Cumberland is
18 merely a third party beneficiary, again, attenuated in
19 this situation.

20 There is no special relationship under the
21 law, but there's also no evidence that contradicts the
22 evidence that Weather Shield put in. The fact that Metro
23 came back two years later and altered the windows is not
24 a problem. The whole point is that the lawsuit came
25 about because the water was coming through the windows in

1 the very same places that Metro altered in addition to
2 other places and that there is evidence in the record
3 that not only did Concord & Cumberland's people
4 participate in the design of the windows themselves, they
5 participated in the design of the buck system that the
6 evidence in the record, the experts in the record said,
7 was the cause of leaks in the windows.

8 That is plain and simple and clearcut.
9 Mr. Brown wants to say that there's evidence to the
10 contrary. It's not in that record that was before you
11 when you decided that motion.

12 THE COURT: Mr. Brown, you get the final word
13 on this motion.

14 MR. BROWN: Your Honor, the record submitted
15 to you for summary judgment, and I agree the whole record
16 counts, were about two or three three-ring binders this
17 thick. There is a voluminous amount of material. If
18 these issues were there, and we don't need to argue on
19 appeal whether they were there, we try the case.

20 THE COURT: The Court of Appeals seemingly
21 looked at more than the trial judge. They can consider
22 whatever they want to.

23 MR. BROWN: You had before you -- and in the
24 volumes of testimony and documents, you had these issues
25 there. The agreement says this on paragraph 12 that

1 Weather Shield signed: In the event either Superior or
2 Concord & Cumberland, LLC, their name is in the agreement
3 repetitively, are pursued hereafter by or on behalf of
4 any subsequent owner alleging that one or more of the
5 windows and/or doors are defective and/or do not comply
6 with the warranties and representations made herein,
7 Weather Shield agrees to unconditionally indemnify both
8 Superior and Concord & Cumberland against these
9 allegations and will pay all damages, including
10 attorneys' fees, incurred by either or both as determined
11 by a Court of competence jurisdiction or an award of
12 arbitration.

13 That is exactly the type of arrangement or
14 agreement held over and over to create the special
15 relationship. The time to decide if Ms. Varnado
16 disagrees with it is on the record made with all the
17 testimony before it. If what she is saying is an
18 argument, it is not factually accurate. There's plenty
19 of evidence that the windows are defective as installed,
20 but the point is, we should only try this case once on a
21 full record.

22 It is nonjury. Your Honor is perfectly
23 capable of hearing it all and separating the wheat from
24 the chaff, we just want the opportunity to do that.

25 THE COURT: Having been recently reversed in

1 granting a summary judgment, but I think that the points
2 in that case is something that is sort of a reminder to
3 the trial Courts not to attempt to weigh credibility or
4 believability on the evidence when deciding summary
5 judgment issue.

6 I believe that I took into consideration what
7 seemingly was the strong view of the evidence without
8 considering the other evidence that may also have existed
9 in the record that creates an issue of fact, and so I'm
10 going to grant the motion for reconsideration on the
11 summary judgment motion.

12 MR. BROWN: Thank you, Your Honor. Do you
13 need anything more than a simple order saying upon
14 consideration?

15 THE COURT: I think a simple order -- well, I
16 don't know. You can file whatever you want. Denying the
17 summary judgment typically doesn't call for much, but I
18 don't know about reconsidering it and denying it, so
19 maybe I need more than typical.

20 MR. BROWN: I will prepare an order that I
21 think addresses that certainly in enough detail. If Your
22 Honor thinks it's inadequate --

23 THE COURT: Give Ms. Varnado a shot at.

24 MR. NISTAD: Just so we're clear, Muhler was
25 mentioned several times. Muhler and Concord & Cumberland

1 have reached a settlement, and so there is --

2 MR. BROWN: That's correct. Our claim is
3 only against Weather Shield.

4 MR. NISTAD: Just so you know context.

5 THE COURT: All right. Mr. Nistad, how are
6 you doing?

7 MR. NISTAD: Doing better, except for being
8 hungry.

9 THE COURT: All right. Well, let's try to do
10 another one, another motion, or --

11 MR. BROWN: That's our only motion. I think
12 Ms. Varnado has a motion in regard to -- and a
13 supplemental report sent to her in July from an already
14 existing witness.

15 THE COURT: All right. Ms. Varnado?

16 MS. VARNADO: Yes. Just for continuity,
17 Superior also had a motion to reconsider the summary
18 judgment.

19 MR. MAJURE: Yes, Your Honor, and it might
20 make more sense to get to the motion to reconsider.

21 THE COURT: Okay. Yes, sir?

22 MR. MAJURE: Is that all right, Your Honor?

23 THE COURT: Sure.

24 MR. MAJURE: Superior has filed a motion to
25 reconsider the Court's order as it relates to the

1 granting of partial summary judgment to the Muhler
2 Company, and we have previously submitted this motion to
3 reconsider. The date of submission as October 14th,
4 2014, and I would just note for the record that part of
5 the reason for the delay in this being heard was, of
6 course, due to the pending trial of the case in the
7 spring. Mr. Nistad, of course, especially had some
8 health issues. We are certainly glad to hear he is in
9 better shape, but that has been the major reason for why
10 we're holding now this hearing for a motion.

11 Superior -- probably a little bit of
12 refreshment of the facts is in order. Mr. Brown did do a
13 pretty good job of summarizing those facts. The real
14 issue at hand that the Court ruled upon was that the
15 subcontract between the Muhler Company and Superior and
16 the June 2007 agreement did not meet the clear and
17 unequivocal standard under Laurens Medical here in South
18 Carolina to allow it to be indemnified for any concurrent
19 negligence of security.

20 Naturally, it's recognized that under statute
21 that no party can be indemnified for their sole
22 negligence, and that's not an issue in this case. The
23 issue is whether or not those agreements, taken together,
24 would have allowed Superior to be indemnified for any
25 possible concurrent negligence that it would have had.

1 And I'm actually going to go somewhat out of
2 order in my oral argument, out of order of what I have
3 briefed, because I believe the second motion that's
4 raised in the motion to reconsider at page seven is
5 really the better place to start.

6 The first issue is that the Court's analysis
7 in reaching his conclusion that the clear and unequivocal
8 standard had not been met was derived from a separate
9 analysis of the subcontract in isolation, and then
10 looking at the June 2007 agreement in isolation, deciding
11 that neither of those met that standard and therefore
12 Superior was not entitled to indemnification.

13 In looking at the subcontract, the Court
14 heard varying extensive arguments from both sides about
15 relying on extra jurisdictional authority as to the
16 interpretation of that clause.

17 Now, just to refresh the Court, the
18 subcontract at issue was AGC form 600 subcontract. Both
19 sides, both Muhler and Superior, presented extensive case
20 law that looked at AGC 600 form language and AIA form
21 4001, I believe, language that was, at first glance,
22 remarkably similar. The Court, after hearing the
23 extensive arguments of both sides on the extra
24 jurisdictional cases, sided with the Muhler Company, and
25 the order states that the overwhelming majority, or the

1 Courts uniformly interpret this language to not allow a
2 party to be admitted by, of course, concurrent
3 negligence, and then the Court looked at the 2007
4 agreement.

5 We argue that that approach, that the
6 approach in assessing the issue of indemnification for
7 any possible concurrent negligence, would be improper,
8 and the 2007 agreement makes it expressly clear that the
9 subcontract terms remain in place, quote, except to the
10 extent specifically stated in the agreement, end quote.
11 And that would control -- and that the agreement would
12 control in the event of any conflict, and that's in
13 paragraph one of the 2007 agreement.

14 So paragraph 11 of the June 2007 agreement,
15 which has the indemnity provision for the June 2007
16 agreement, it does not wholesale replace article 12.1 of
17 the subcontract, it amends it, so the analysis that must
18 be performed is that the two must be reconciled into one.

19 Now, someone might make the conjectural
20 argument, Well, if it's not one, Your Honor, it's not the
21 other, how can you put the two together and somehow get
22 it?

23 Well, actually, that is a possibility. There
24 can be a circumstance in which some aspect or defect in
25 the first agreement is modified by the second agreement

1 and therefore the whole -- the two, put together, can
2 actually produce an end result that would satisfy the
3 clear and unequivocal requirements for concurrent
4 negligence indemnification.

5 So that's the first and most crucial aspect
6 of our motion to reconsider, is that the Court go back
7 and look at the two and reconcile the two, with the
8 understanding that the agreement, by its express terms,
9 controls.

10 So if there's anything that is clearly
11 unreconcilable between the two, then the June 2007
12 agreement is going to prevail over any portion of the
13 subcontract indemnity clause that conflicts with it.

14 Now, we argued exhaustively about different
15 phrases within the subcontract and then how it was
16 changed. Muhler's approach was to look at the two
17 separately and attack them separately, which as any good
18 lawyer would do, if that's your best argument, that's the
19 way you approach it, but it's simply not the way that the
20 two were supposed to be agreed.

21 The 2007 agreement specifically states that
22 the subcontract controls except to the extent the 2007
23 agreement changes it. So that is the first and most
24 crucial step, and when you look at the two of them, there
25 are aspects, there are some key aspects, about the two

1 indemnity clauses that directly conflict, and therefore
2 the 2007 agreement must control.

3 And, Your Honor, I can see we have probably
4 read these clauses more than just about anything I can
5 think of in our career, but just because it's been a
6 year, I am going to read paragraph 12.1 of article 12 of
7 the subcontract which was Exhibit 4 to Superior's
8 memorandum of law in support of its motion for partial
9 summary judgment against the Muhler Company, just so we
10 can have an updated and complete record of it.

11 So article 12, which underneath it is
12 entitled indemnification, states: 12.1: Subcontractors'
13 performance: To the extent permitted by law, the
14 subcontractor shall indemnify and hold harmless the
15 owner, the architect, the contractor, open parentheses,
16 including its affiliates, parents, and subsidiaries,
17 close parentheses, and other contractors and
18 subcontractors and all of their agents and employees from
19 and against all claims, damages, loss, and expenses,
20 including but not limited to attorneys' fees, arising out
21 of or resulting from the performance of the
22 subcontractor's work provided that, subparagraph A; any
23 such claim, damage, loss, or expense is attributable to
24 bodily injury, sickness, disease, or death or to injury
25 or destruction of tangible property, open parentheses,