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IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC 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

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 CorporationAPPELLANT,

And

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

RECORD ON APPEAL

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1 other than the subcontractor's work itself, close
2 parentheses, including the loss of use resulting
3 therefrom to the extent caused or alleged to be caused in
4 whole or in any part by any negligent act or omission of
5 a subcontractor or anyone directly or indirectly employed
6 by the subcontractor or anyone for whose acts the
7 subcontractor may be liable, regardless of whether it is
8 caused in part by a party indemnified hereunder.

9 Subparagraph B: Such obligation should not
10 be construed to negate or abridge or otherwise reduce any
11 other right or obligation or indemnity that would
12 otherwise exist as to any party or person described in
13 this article 12, period, end quote, and this is the only
14 indemnification provision in the entire subcontract.

15 Now, turning to the indemnity agreement --
16 excuse me, the June 2007 agreement, at paragraph 11,
17 states the following, quote: In the event either
18 Superior or Concord & Cumberland, LLC are sued
19 hereinafter by or on behalf of any subsequent owner
20 alleging that one or more of the windows and/or doors do
21 not comply with the original and amended contract or are
22 effectively installed, Muhler agrees to unconditionally
23 indemnify both Superior and Concord & Cumberland,
24 LLC against these allegations and will pay all damages,
25 including reasonable attorneys' fees incurred by either

1 or both as determined by a Court of competent
2 jurisdiction or award of arbitration.

3 Liability incurred by either or both is in
4 consequence including but not limited to cost and
5 proceeds, any remedial costs of expert witnesses, costs
6 of arbitration, and all other damages incurred, end
7 quote.

8 Muhler had focussed on the language in the
9 original subcontract to the extent caused by, which it
10 also says to the extent caused by in whole or in part,
11 and then turned to a number of cases -- there were a
12 number of cases that Muhler cited that do actually
13 support their argument, but the thing that we mostly take
14 issue with is that the Court states in its order that the
15 Courts in the United States uniformly -- and I'm
16 paraphrasing -- uniformly interpret this language to
17 exclude indemnification for one's own negligence.

18 Well, actually, it's not uniform at all. If
19 anything, it's very closely divided, and if you look at
20 the cases that are cited by -- that are cited by Superior
21 and cited by Muhler, it's almost a 50/50 split, but my
22 argument, we would argue as we outlined in our motion to
23 reconsider, it's a slight majority actually in favor of
24 Superior's argument that the clause stating that, quote,
25 regardless of whether or not caused in part by any party

1 indemnified hereunder, end quote, is a clear indication
2 that the concurrent negligence of the party to be
3 indemnified is included within the scope of the
4 indemnification.

5 Now, I was -- we presented this argument
6 before the Court at oral argument. The language stating
7 "to the extent caused by" clearly conflicts with the
8 language of the indemnity agreement that says all
9 damages -- that you can't have all damages in the 2007
10 agreement being stated as the scope of recovery and that
11 be reconciled with only to the extent caused by in whole
12 or in part. Those two are not reconcilable. Because the
13 June 2007 agreement by its terms states that it prevails,
14 that overcomes that argument.

15 Now, even aside from that, the cases that we
16 have pointed out, a number of those cases have pointed
17 out, even aside from the June 2007 agreement, that still
18 has been interpreted by a number of Courts. It's still
19 good law today, hasn't been checked, still satisfies that
20 agreement, but what it boils down to is that the Court is
21 faced with a custom situation.

22 This is a decision that will never be able to
23 be compared to other decisions that are only ruling upon
24 one discrete form language in the AIA or the AGC. This
25 is a context where you start with one of these paragraphs

1 but you have to reconcile it with the June 2007
2 agreement, and after that reconciliation, then that end
3 product has to be decided as to whether it meets the
4 clear and unequivocal standard, which Superior has argued
5 that it does.

6 Muhler, in its opposition to the motion to
7 reconsider, has repeatedly stressed also the clause the
8 performance of the work or services, trying to --
9 claiming that it's a difference but then never explaining
10 what, in fact, that difference is, and I'm sure that Mr.
11 Nistad will explain to the Court why it is that they
12 point that out, but the performance of the work includes
13 the end product of said work.

14 So I don't understand -- I don't understand
15 why Muhler is stressing, quote, the performance of the
16 work and -- for example, on page three of Muhler's
17 opposition, they're looking at the indemnification
18 provision under Washington Elementary School District No.
19 6 and noting that the indemnification may recover damages
20 arising out of or resulting from the performance of the
21 work, end quote, and that same language appears in the
22 Camp, Dresser & McKee case and the Gunka case.

23 And they state, In contrast, a subcontractor
24 at issue here only promised to indemnify Superior from
25 and against all claims, damages, losses, and expenses,

1 including but not limited to attorneys' fees arising out
2 of or resulting from the performance of the
3 subcontractor's work.

4 It appears to me that Muhler is trying to
5 make a distinction between the performance of the
6 subcontractor's work and the performance of the work, but
7 with the facts being presented before the Court here
8 today and the claim being presented by Superior, there is
9 no distinction that matters here whether it's the
10 performance of the work or the performance of the
11 subcontractor's work.

12 Superior is not seeking any damages from
13 Muhler that relates to any of the other settlements or
14 other portions of the work that Superior separately
15 settled. Superior has a separate and discrete settlement
16 with the plaintiffs that is specifically for claims
17 arising out of or resulting from windows and the doors.
18 That's a specific amount.

19 So the only work at issue here is the
20 subcontractor's work, so if we were -- now, the
21 distinction of the subcontractor's work would be
22 important, Your Honor, if Superior had made a large
23 global settlement with the plaintiffs, a lump sum
24 settlement of all claims, and it was not delineated as to
25 what portions related to any particular scope.

1 If that was the claim that Superior was
2 bringing forth here, the distinction of the performance
3 of the work and the performance of the subcontractor's
4 work would have traction here, but because we have a
5 distinct window and door settlement for which Superior
6 had to pay for the windows and doors of the Muhler
7 Company manufactured by Weather Shield, that is the basis
8 of the claim. There's no other -- there's no other
9 portion of the work for which Superior is seek
10 indemnification.

11 Also too in comparison of the two -- in
12 reconciling the two agreements, the subcontractor and the
13 June 2007 settlement agreement, the 2007 settlement
14 agreement lowers the bar as to what gets Superior through
15 the threshold of being able to be indemnified. It merely
16 says that allegations, being sued for allegations of
17 nonconformance, are not what's triggered a failure to
18 indemnify because the parties, at the time that they're
19 negotiating that agreement, had a present knowledge of
20 problems and issues raised.

21 It is fully within the contemplation of the
22 parties that there is a problem. This is not a case
23 where the parties are conducting routine business,
24 executing formal contracts without any amendments in
25 advance of a contract without any knowledge of any

1 problems. That's an entirely different scenario.

2 This is a scenario where Muhler is on notice,
3 as well as Superior and everyone else involved, that
4 there is a present problem in the beginning of 2007
5 involving windows failing installation tests, and when
6 the June 2007 agreement comes forward, it's clear that
7 the intent is, We don't want to get sued at all.

8 The June 2007 settlement agreement doesn't
9 even use the term negligence at all. It uses the term
10 allegations. It's the very act of being sued that then
11 triggers that obligation.

12 THE COURT: I'm going to get you to wrap up
13 so I can hear from Mr. Nistad.

14 MR. MAJURE: And another aspect of the
15 reconciling of the two agreements is the key clause,
16 regardless of whether or not caused in part by party
17 indemnified hereunder.

18 Yes, Superior is -- Muhler argues that we're
19 focussing on that clause. Yes, we do. The reason why we
20 do is because there are Courts all across the country
21 that focus on that language, and focussing on that
22 language state that that allows a party to be indemnified
23 for its own concurrent negligence.

24 In addition, that key portion of the language
25 is not altered by any other aspect of that 2007

1 agreement. That portion still remains unchanged. Muhler
2 argues that we did not raise that issue at oral argument
3 or before the Court, but we adamantly contest that.

4 That was one of the key issues that we were
5 raising in addition to the fact that the two agreements
6 had to be reconciled into one, and if the Court requires
7 us to order a transcript to substantiate that, we will do
8 so.

9 Thank you, Your Honor.

10 THE COURT: All right. Mr. Nistad?

11 MR. NISTAD: Thank you, Your Honor.

12 I think I need to start out with just putting
13 this all in context about what standard we're looking at,
14 examining the contracts. The standard is clear. I think
15 I read to you a definition way back last year that
16 unequivocal means without a doubt, so if you were giving
17 the jury instructions about a standard, judges always
18 stand there and mention, ever so slightly, and then in
19 criminal court it's a little bit harder, but here, what
20 Superior has to prove is that the damages of Superior are
21 clear and unequivocal and without a doubt.

22 So if you were standing in front of a jury
23 you would have to say, Superior has to do this. It's got
24 to go all the way to the bottom. There's no doubt, and
25 the whole scales flip over. It's obvious. We don't have

1 that here.

2 What we do is we have contracts that we
3 argued, took two days to argue all this, and we gave you
4 documents that are stacked up probably in your office
5 against the wall halfway. We've argued about this a lot,
6 those contracts that by themselves and together don't
7 clearly say, without a doubt, that Muhler has to
8 indemnify Superior for Superior's own negligence, and
9 that's what they're asking us to do.

10 Now, they say they have this separate
11 document where they have a settlement that is just about
12 windows, but we contest that that's an inaccurate
13 reflection of what's really being settled, and we also
14 contest that they have responsibility for the window
15 problems, and they do. Muhler installed -- because the
16 window problem is not just the window and then sticking
17 the window into the rough opening. The window problems
18 leap across into areas of the wall that that go beyond
19 what Muhler's scope of work was, and Muhler -- I mean,
20 Concord & Cumberland and Superior were actively involved
21 in the design and we followed their instructions. So
22 they're involved, active negligence, in the window
23 installation.

24 Then -- let me try to get back on track. So
25 as far as what their settlement of the plaintiff is, they

1 paid X. We contest that they're entitled to
2 indemnification for all that because we should only be
3 responsible for Muhler's contribution to that part of the
4 negligence. We're not indemnifying them for our own
5 negligence. We're not indemnifying them for the
6 negligence of the subcontractors they hired directly to
7 install those windows. We're not indemnifying them for
8 the subcontractors hired by Concord & Cumberland who
9 later modified the windows and contributed to the
10 problems with the windows. We're only responsible for
11 Muhler's contribution to the problem, and that's it.

12 And then the scope of their indemnification,
13 they want all attorneys' fees, and they've eliminated
14 some entry of bills here and there that they said
15 obviously don't involve windows at all. It might be
16 something related to a roof, but there's lots of entries
17 in their bills that they're seeking to be reimbursed for.

18 They're reviewing the pleadings from a stucco
19 manufacturer. We didn't install stucco. We didn't
20 design how the stucco goes on. We didn't manufacture the
21 stucco, but just because the stucco might be involved in
22 the overall cladding of the building, which the windows
23 are a part of, we should pay them their attorneys' fees
24 for defending the whole case, and so what we're asking
25 is, it's not a trigger for a jury to defend. That's a

1 question of fact.

2 What we're saying is if indemnification is
3 owed, the scope of that indemnification itself, that
4 Muhler indemnified Concord & Cumberland for its -- for
5 Muhler's negligence and not anyone else's. The scope
6 that they're asking for is Muhler indemnified them for
7 Muhler's negligence, for Concord & Cumberland's
8 negligence, for Superior's negligence, for the stucco
9 manufacturer's negligence, for the HVAC's negligence, and
10 there's no -- it's basically Muhler's eating the whole
11 tab for things that we had nothing to do with.

12 THE COURT: How does all that impact the
13 motion to reconsider?

14 Well, it just goes to fairness of what the
15 scope of indemnity is. Mr. Majure said before that the
16 2007 agreement lowers the bar, and our duty of indemnity
17 triggers when there's allegations, and there's a couple
18 things about that. That's just a duty to indemnify.
19 That's not what this discussion is about. We're talking
20 about what the scope of that indemnity is.

21 The duty to indemnify is there's an issue
22 about whether there's even a duty to indemnify because of
23 breach of contract and other issues that might eliminate
24 the whole duty to indemnify.

25 For this argument, we're assuming there is a

1 duty to indemnify as to what is the scope, and so he
2 might be right that the 2007 agreement lowers the bar,
3 but for our argument of what is the scope of that
4 indemnity, it has to eliminate the bar. There has to be
5 no question at all. The contracts have to say Muhler
6 must indemnify Concord & Cumberland or Concord &
7 Cumberland's own negligence, and the contracts just don't
8 say that.

9 In the language that we focus on in all these
10 cases is this to show that -- the cases that Superior
11 relies are language that is different than the language
12 that is in our contract. What we have to focus on is
13 those cases that use the same language that is in our
14 contracts, and in all those cases, the language and the
15 interpretation by the Court is consistent with your
16 ruling that there is -- Muhler's entitled to partial
17 summary judgment and does not have to indemnify Concord &
18 Cumberland for its own negligence, Superior. We have to
19 settle it.

20 So to focus on the language in my memo is to
21 show that the cases that are relied on by Superior are
22 not appropriate for our case because that contractual
23 language is different. If you look at cases that have
24 the same contractual language, those rulings are
25 consistent with your ruling.

1 THE COURT: All right.

2 MR. NISTAD: The approach you took, you know,
3 after two days of looking at it, I think we took every
4 approach possible, but I think we should point out if the
5 2007 agreement is controlling and you found the 2007
6 agreement is not clear and equivocal, there's nothing you
7 can do to resurrect the whole argument.

8 Looking at the 2007 agreement, there's
9 nothing in that language that is remotely close to saying
10 that Muhler has to indemnify Concord & Cumberland --
11 Superior, sorry. I confused the case name, as I refer to
12 it all the time with the party I'm focussing on right
13 now. If you look at that 2007 agreement, it says if
14 there are allegations about the window or window
15 installation, we owe indemnity.

16 Well, that's fine as long as the complaint
17 that was filed only focussed on the windows and the
18 window installation. What we have was a lawsuit that
19 attacked almost every element of the construction. It
20 wasn't just a case about windows. It was a case about
21 stucco. It was a case about brick. It was a case about
22 stone. It was a case about HVAC. It was a case about
23 the roof. It was a case about the design. It was a case
24 about the administration of construction, and you
25 cannot -- Concord and Superior are just lumping all this

1 into one thing and trying to have Muhler pay for it all
2 and trying to have Muhler completely absolve Superior for
3 all its wrongdoing, and one of the reasons why Trident
4 has left the job, from what I've heard, is that once they
5 opened up the walls and really saw all that was there,
6 there are massive problems with construction.

7 Superior got this thing wrong from day one,
8 and there's ample testimony from one of the
9 administrators who came to watch the building go up, and
10 I think he was hired directly by Concord & Cumberland.

11 He was asked, Did Superior get anything
12 right? And he said, I don't think so.

13 But now they want -- Superior wants 99
14 percent of their attorneys' fees paid by Muhler, and they
15 want \$800,000, I think is the number that Superior paid
16 the plaintiffs allegedly for the windows, and they also
17 contributed to major problems with the windows as
18 alleged.

19 And so all we're saying is at this point --
20 it's not that you're not ruling there is no duty to
21 indemnify. That's for trial, and you're not ruling --
22 what you're doing is ruling on the scope of what can be
23 awarded, if there is indemnity required, and that scope
24 is just Muhler indemnifies Superior for Muhler's own
25 negligence, and there is ample case law that says that is

1 the credible way, is that -- and this is, you know,
2 contract interpretation.

3 It's a question of law for the Court, and the
4 standard of care, the standard of review that must be
5 clear and unequivocal language, reverses the situation a
6 little bit on how the appellate Courts would look at it.

7 It's not that there's a question that I
8 consider just a question of fact or he construes it as a
9 question of fact, he has to show there is absolutely no
10 question of fact that it is clear and unequivocal. It's
11 Superior's burden of proof, and they haven't done that.

12 THE COURT: All right.

13 MR. MAJURE: Your Honor, to start with, I'll
14 start from the back and go forward. I don't have to show
15 a question of fact as to how a contract is supposed to be
16 interpreted. That's a question of law, and two-thirds of
17 what I heard was a plea for the subcontractor to be
18 rescued from its contract.

19 Superior has also stated from the very
20 beginning that the relief that it was seeking in its
21 motion for partial summary judgment was to have the award
22 as to the portion paid and settle indemnity because we
23 believe that is clearly recoverable under the end product
24 of the two agreements.

25 As to the attorneys' fees, the representation

1 that 99 percent of Superior's legal bills are being
2 presented here is just patently false. I went line
3 through line for hours and hours carving things out of
4 the bills, but the issue is, is that Your Honor -- the
5 issue of the legal bills is what we've requested from the
6 very beginning, that that be heard in a damages hearing,
7 so we're not asking the Court as to the portion of legal
8 fees for the Court to gavel it down and give us the whole
9 amount. We're submitting those for the Court's
10 consideration, and those will still have to be subject to
11 a damages hearing after the Court grants Superior its
12 summary judgment.

13 THE COURT: Let me ask you this --

14 MR. MAJURE: Muhler still gets to fight that
15 another day.

16 THE COURT: Let me ask you this: Is it
17 Superior's contention that reading the two agreements
18 together, Superior is entitled to be indemnified for its
19 own --

20 MR. MAJURE: For its concurrent negligence,
21 yes, and we say that it does meet the clear and
22 unequivocal test. And also the law says that you have to
23 look at these agreements in the context of how the
24 parties entered it, and the context of the June 2007
25 agreement is very critical.

1 Parties with knowledge of active issues,
2 coming to the table and reaching its agreement, that
3 context is important. But still, the analysis is that
4 the two agreements must be reconciled and the end product
5 then examined to see if that meets the clear and
6 unequivocal test.

7 THE COURT: And you're saying I didn't do
8 that.

9 MR. MAJURE: Yes.

10 THE COURT: I did not reconcile it.

11 MR. MAJURE: The order examines each
12 separately and then says this doesn't meet it, this
13 doesn't meet it, and therefore you got nothing, and, Your
14 Honor, we submit that that's not -- that's respectfully,
15 Your Honor, not the right approach because the agreement
16 says the subcontract controls except to the extent the
17 agreement changes, so you have to start with items 1
18 through 10 in the subcontract, compare it to items 1
19 through 10 in the agreement, see which ones negate or
20 alter the others, and then look at the end product, and
21 only after looking at the end product do you make a clear
22 and unequivocal analysis.

23 And it is our argument, as we set forth in
24 our motion to reconsider and today, that once those two
25 agreements are reconciled and then examined under the

1 clear and unequivocal standard, it meets that standard.
2 And it's concededly a very complicated approach, and if
3 Your Honor would like me to draft a proposed order
4 outlining that, I would be happy to do it, but as to
5 attorneys' fees, that's still going to have to be --
6 that's still going to have to be heard.

7 Attorneys' fees will be heard and argued upon
8 after summary judgment, and, again, this is a custom
9 situation. If this case went to the Supreme Court, the
10 Supreme Court would not be able to simply look at all the
11 other cases that we said and look at the subcontract
12 agreement, ignore the 2007 agreement and how it changed
13 it and say we agree with this line of cases versus this
14 line of cases. This decision will stand uniquely apart
15 from any others because it has --

16 THE COURT: How are y'all ever going to
17 explain all these facts to them?

18 MR. MAJURE: I'm sorry, Your Honor?

19 THE COURT: How are y'all going to be able to
20 explain these facts to them in a way that they understand
21 them?

22 MR. MAJURE: I just hope that the lights on
23 the table are somehow not working very good that day,
24 Your Honor, is all I need to say.

25 THE COURT: Well, we're going to get some

1 lunch, so any final words?

2 MR. NISTAD: Mr. Majure said we have to look
3 it at it in the context of the way contracts were
4 entered. That's parol evidence, and I think if you're
5 doing that, you're certainly not meeting the standard of
6 clear and unequivocal language in the contract.

7 THE COURT: Well, I guess that is a means of
8 determining the intent of the parties.

9 MR. NISTAD: But if you have to determine the
10 intent of the parties, that standard requires clear and
11 unequivocal language in the contract, so I don't see
12 how --

13 THE COURT: What problems the parties are
14 attempting to address when they enter into the agreement.

15 MR. MAJURE: But, Your Honor, you don't have
16 to resort to parol evidence if the agreements do not
17 adequately address --

18 MR. NISTAD: We're talking about an ambiguous
19 subcontract at that time. It's ambiguous. It's not
20 unequivocal.

21 MR. MAJURE: If parol evidence is then
22 required, then summary judgment is not appropriate at
23 all, for either side.

24 THE COURT: But y'all agree that parol
25 evidence is not required and the Court does not have to

1 figure out intent of the parties.

2 MR. MAJURE: And the June 2007 agreement has
3 a integration clause.

4 THE COURT: All right. I just raised the
5 question. I'm not saying that's what I'm considering.
6 Just clarification.

7 MR. NISTAD: I can't remember if I had
8 another point to make or not.

9 THE COURT: What's your thought about his
10 proposal to draft an agreement? Where would y'all
11 disagree?

12 MR. NISTAD: A lot of places. Everywhere. I
13 think if you didn't examine the contracts as a whole last
14 year, I just don't see how that's possible, and I think
15 we need a chance to argue that approach additionally.

16 THE COURT: I recall spending quite a bit of
17 time examining those contracts, as I'll have to do again,
18 apparently.

19 MR. NISTAD: I think the exhaustive two days
20 of hearings we had that day and all the briefs we
21 submitted attacked the problem from every angle, and so,
22 you know, it might be that the order needs to be
23 rephrased a little bit, but I think ultimately the
24 conclusion was always that there is not clear and
25 unequivocal language, no matter how you read these

1 contracts, to show that Muhler indemnifies Concord &
2 Cumberland.

3 THE COURT: The Courts universally agree that
4 I'm restricted to my own evaluation. I'm not saying
5 universally.

6 MR. NISTAD: Right. The term "universals"
7 might have been wrong. Maybe there is some language that
8 contradicts -- when you have two Courts contradicting
9 each other about how to interpret a clause, there's doubt
10 there.

11 THE COURT: Are any of those Courts in South
12 Carolina?

13 MR. NISTAD: No, Your Honor.

14 THE COURT: That's the problem.

15 MR. NISTAD: Yeah. So if it's, you know, all
16 along, you were using those cases as some guidance on how
17 you interpreted the contract, ultimately that's what the
18 order was. You're looking at the language in these
19 contracts in making a determination. Is it clear and
20 unequivocal language? And just using those other Courts'
21 analysis as some guidance on your own interpretation, but
22 I don't think you were bound -- you didn't think you were
23 bound by any --

24 THE COURT: Well, on this particular one --
25 and I need to ponder it some more, and if y'all want to

1 write a letter or whatever and give it your best shot,
2 I'll be happy to receive it and then just make a
3 decision.

4 But, frankly, on the reconsideration, my
5 mental framework is more on Mr. Brown's, so I have to get
6 there on this one, so --

7 MR. NISTAD: If you want to hear from us more
8 in a couple weeks that would be --

9 THE COURT: It would be in letter form.

10 MR. NISTAD: Yeah, but, I mean --

11 THE COURT: Well, I would still rather read
12 what you have to say rather than try to sort it all over
13 again because I can focus a little better, but right now
14 I think we've got to get some lunch.

15 MR. MAJURE: No arguments from that, Your
16 Honor.

17 THE COURT: What else do you have before we
18 break?

19 MR. BROWN: We have a motion by Ms. Varnado
20 to exclude testimony, and that ends my involvement. I
21 hesitate to interfere with Your Honor's lunch. I have a
22 granddaughter dancing in the Nutcracker in Alexandria,
23 Virginia at 1:00 tomorrow, and I was going to leave here
24 and try to go.

25 THE COURT: Does that force you to agree with

1 her?

2 MR. BROWN: I would have to stay, Your Honor,
3 but if you want, I can certainly do it -- I don't think
4 this one is going to take long. Maybe it is, but if it's
5 going to take a while, we'll wait, if you can address it.

6 THE COURT: I don't know. Ms. Varnado?

7 MS. VARNADO: I mean, I don't know exactly
8 how long it will take. I mean, it's probably at least 20
9 minutes, I would guess.

10 THE COURT: We're only going to take a quick
11 half hour or so.

12 MR. BROWN: That's fine..

13 THE COURT: Otherwise, I won't be listening
14 too well.

15 MR. BROWN: Let's take a break.

16 (Recess taken.)

17 THE COURT: Is it your turn yet?

18 MS. VARNADO: Yes. This is Weather Shield's
19 motion to exclude the new report opinions and testimony
20 of a newly named witness, Mike Parker and of Ms. Quigley.

21 THE COURT: Is that a relative term or --

22 MS. VARNADO: Let me give you the background,
23 and you can put it into context.

24 The deadline to name liability expert and
25 provide final opinions was October 12th, 2012.

1 THE COURT: Okay.

2 MS. VARNADO: And that was for the August
3 20th, 2012 scheduling order. The discovery deadline in
4 this case was July 8, 2014.

5 THE COURT: Discovery deadline July 2014?

6 MS. VARNADO: July 8, 2014. No subsequent
7 order has been issued changing those deadlines. There
8 has been no motion by counsel for Concord & Cumberland
9 Superior to alter the scheduling orders, alter those
10 deadlines.

11 There was a witness who was first listed,
12 Mr. Parker, Mike Parker, as a fact witness, and he was
13 hired because -- he was hired by Concord & Cumberland.
14 He and his company, SKA, were hired by Concord &
15 Cumberland during the process to advise them about the
16 project, various aspects of the project. He's listed as
17 a fact witness. He was not named as an expert witness
18 until August 27th, 2014, so that was after the deadline
19 to name liability experts.

20 Weather Shield didn't object at the time
21 because Mr. Parker had been deposed on July 28, 2013, and
22 in that he testified that he had no opinions about the
23 cause of leaks or defects in the wood windows.

24 He said he hasn't been retained as an expert
25 to testify about any possible window water leaks contract

1 or to render any opinions about Weather Shield products.
2 He said while his company performed water tests on the
3 Weather Shield slabs at the Concord & Cumberland project.
4 He had not done the work necessary to formulate any
5 opinions about the windows.

6 He hadn't been asked to formulate any party's
7 duties or breaches of duties, and he confirmed that --
8 and Mr. Brown, during the deposition, walked through the
9 test that Mr. Parker's company had performed and asked
10 him some questions about the tests, mainly factual
11 questions: Did you follow the standard? What tests did
12 you use?

13 And then he asked Mr. Parker general
14 questions about what can cause a window to leak. So when
15 I was sitting down with Mr. Parker, he confirmed that
16 while he responded to a general question about general
17 characteristics of windows, but legally he was not in a
18 position to testify to a reasonable degree of certainty
19 most probably as an engineer as to the causes of leaks at
20 a window or door project and whether the window was
21 constructed with a proper amount of sealant.

22 So he at that time clearly was not being
23 offered as an expert on liability for windows. Now, in
24 July of 2014, he's served with the report by Mr. Parker
25 saying that he's now come up with opinions on windows,

1 he's done some additional work, and he's listed by both
2 Concord & Cumberland and Superior in July and August of
3 2015 as a new expert.

4 They listed him as expert, but not on the
5 windows, because the only thing that he was to be
6 testifying about was what he testified to in his
7 deposition, and in his deposition, nothing was about the
8 windows. Even so, first of all, naming Mr. Parker as an
9 expert in August of 2013 was beyond the scheduling order
10 of August 20th, which put the deadline to name experts in
11 October of 2012, and Mr. Brown will argue that that
12 somehow went away, that that scheduling order somehow
13 didn't mean anything, but when Weather Shield filed an
14 amended expert designation in 2014, Superior filed a
15 motion to exclude Weather Shield's expert because it was
16 not timely made, and we worked out that issue, but
17 Weather Shield withdrew the damages expert because it was
18 in violation of the existing scheduling order.

19 So that scheduling order has never -- even in
20 the subsequent amended scheduling orders, none of them
21 have gone back and extended the deadline to name
22 liability or damages experts, for that matter, so naming
23 Mr. Parker is in violation of the scheduling order by
24 years. Second, it's in violation at this point, and the
25 way the parties went about it, it is in violation of the

1 rules to promptly amend the interrogatory responses.
2 They knew Mr. Parker was doing this work before the close
3 of discovery, yet failed to notify Weather Shield or
4 Muhler that that was going on by amending their
5 interrogatory responses.

6 They waited months and months and then
7 surprised Weather Shield with this report, long after
8 discovery was over. That meant Weather Shield had no
9 opportunity to name any opposing witnesses, had no
10 opportunity to engage in any discovery that would be
11 necessitated by this new report.

12 This case has been going on for a very long
13 time, and there have been years years and years of
14 discovery. And Mr. Parker was known to everybody at the
15 beginning because he was involved in the construction.
16 There is no reason if they intended to use that man as an
17 expert they didn't name him timely.

18 Mr. Brown is also going to say the reason
19 they did this is because the building was now under
20 construction and so they could go back in there and get
21 new evidence, the alleged defects in the building, but
22 there was ample time throughout discovery to ask for the
23 parties to allow a window to be removed so that
24 Mr. Parker could do the very same tests that he does, or
25 very same examination that he does that he did in his

1 report. Nobody asked. Nobody inquired about that, but I
2 have been in cases, other cases, with Mr. Parker where he
3 has requested that a window come out. A window has come
4 out, and he has done the same kind of thing, so it was an
5 option that was available during the discovery period,
6 and they didn't take us up on it.

7 So at this point, years later, after the
8 close of discovery, after the close and times to
9 appropriately name expert witnesses, now we were
10 surprised with Mr. Parker's report, and it was very
11 bizarre, Your Honor, because normally in these
12 construction cases, when an expert is going to do an
13 inspection, all parties are notified. When an expert is
14 going to do -- once litigation is going on, when an
15 expert is going to do testing at the site or do a
16 destructive test or take something apart, everybody is
17 invited to bring their experts.

18 There was no notice to Weather Shield or
19 Muhler that this was going to take place, and no notice
20 that any of the work had been done; again, even though
21 the parties knew, even though Mr. Brown's client, Concord
22 & Cumberland knew, prior to the close of discovery that
23 they were intending to name a new witness, they didn't do
24 it until after the close of discovery when the report
25 came out.

1 And, Your Honor, based on the violation of
2 both the scheduling order and the Rule 33(b) requirements
3 about timely supplementing your discovery responses,
4 Weather Shield is asking for the sanction of, and what is
5 just fair, to have Mr. Parker's testimony of this new
6 evidence, this new report, excluded from the trial.

7 And when the Court does that, it looks at
8 several factors that come from a case named Jumper v.
9 Hawkins. One is the type of witness involved, and here
10 it's an expert witness. They're using the man as an
11 expert witness, and as far as a fact witness or what he
12 testified to in his deposition, Weather Shield would have
13 had no objection to that being used.

14 And, once more, they had other witnesses that
15 they have listed that would testify to alleged defects in
16 the windows, so they would not be prevented from putting
17 forth their case by virtue of not having Mr. Parker. The
18 content of the evidence emanating from the proper witness
19 is the second prong of the Jumper test, and the evidence
20 coming from Mr. Parker that should be excluded, what he
21 did, Your Honor, is take windows that were removed from
22 the building, take them apart; doors, take them apart,
23 all of this is stuff that hadn't been done before but
24 could have been done before.

25 The explanations for the failure or refusal

1 to comply with the order, well, Mr. Brown says that the
2 first scheduling order doesn't mean anything. It doesn't
3 exist anymore, and the second thing he says is that it
4 was a new opportunity, but just because it's a new
5 opportunity, Your Honor, does not mean that that is a
6 valid explanation for waiting. They had the opportunity
7 to perform. They just didn't take advantage of it for
8 whatever reason.

9 What's more, if you remember, Your Honor, we
10 were going to try there case way back, last year,
11 practically. Well, it was last year when Mr. Pierce had
12 his issue and then Mr. Nistad had his issue. All of this
13 new investigation by Mr. Parker took place long after
14 that time, so the parties are not in the discovery phase,
15 the parties are in the trial phase, and adding on to
16 this, to the preparation, is prejudicial to Weather
17 Shield in terms of the surprise that was provided, the
18 additional funding that -- the additional money spent now
19 to engage in discovery.

20 If it is true that Mr. Parker is timely named
21 or that there is no scheduling order or that a scheduling
22 order that says discovery is over doesn't say what it
23 means -- doesn't mean what it says, then Weather Shield
24 needs to be doing a lot of discovery. We're going to
25 have to get records from Mr. Parker. We'll have to go

1 down and get records from this new construction, and for
2 that reason, you know, why don't we just fill in any gap
3 we want with this case? The thing is wide open then, and
4 it's not what was supposed to happen in this case, and
5 it's not the posture the parties were in.

6 And so importance of the witness's testimony,
7 again, Mr. Parker is not the only witness that these
8 people could use to put forth their testimony about the
9 alleged defects in the windows, and, again, what is
10 significant is all the deadlines have passed and there
11 was no notice of any testing or any additional work to be
12 performed. The prejudice is the additional money that
13 Weather Shield will have to spend to either -- to
14 discover this case, or, if discovery is over, then
15 Weather Shield is definitely hampered, but there will
16 need to be additional discovery in order to allow Weather
17 Shield not to be disadvantaged by this new evidence.

18 In addition, Weather Shield objects to the
19 information generated by this new testing, by Mr.
20 Parker's testing, to be used or relied upon by any other
21 witness, including Christine Quigley, who is an expert
22 that was designated by Superior who now works for Sutton
23 Kennerly Associates and was involved in the testing and
24 was made aware of it, and so, in addition, that simply
25 would be putting it in through the back door, and that

1 evidence just -- it should be excluded. These folks can
2 testify to what they want to testify to about that, and
3 Mr. Brown may argue that Weather Shield wants to say to
4 Mr. Parker, well, you didn't do the work you need to do
5 so your opinions aren't valid. Well, he testified in his
6 deposition he was not going to render opinions about
7 windows.

8 So as long as Mr. Parker is not rendering
9 opinions about windows, then we don't have to get into
10 the point of whether he did any work or not to render the
11 opinions. On the other hand, Your Honor, if you believe
12 that this should go forward, that this evidence should be
13 allowed to come in, then Weather Shield requests that the
14 scheduling order be altered so that discovery can be
15 open, that Weather Shield be allowed to name additional
16 liability and damages witnesses, and proceed with the
17 discovery necessary to address the new matters brought
18 forward by this additional evidence.

19 THE COURT: The new matters being what again?

20 MS. VARNADO: Opinions by Mr. Parker
21 concerning alleged defects with the Weather Shield
22 windows. Mr. Parker made destructive tests. He looked
23 at the documents. He looked at the wrong documents, he
24 looked at the wrong picture, and has drawn wrong
25 conclusions.

1 THE COURT: It seemed like he didn't want it,
2 if they did all that.

3 MS. VARNADO: It's a waste of time, Your
4 Honor, but what's more, it's not proper, and it causes
5 everybody to engage in the need to engage in additional
6 discovery and the time has passed. It is late. It is
7 beyond late. There is no need -- there was no need to do
8 this, other than they decided they wanted to fill in a
9 gap, I guess.

10 But the point is, Your Honor, this is in
11 violation of the scheduling orders and the rules, and I
12 think under this situation and under the case law, the
13 Andrews case, that this is an appropriate sanction and it
14 is appropriate to exclude this testimony from this
15 witness and to exclude any other witness from bringing
16 this testimony in through the back door.

17 THE COURT: All right.

18 MR. BROWN: Thank you. It's going to take a
19 few minutes to work through all this. It reminds me of
20 the lawyer joke, and I don't know if it's on TV, but the
21 lawyer objects to the evidence and the Court asks for
22 grounds and the answer is, It hurts my case.

23 Let's go back to Mr. Parker. Mr. Parker's
24 well-known to Ms. Varnado. She's faced him in a number
25 of window cases. He is clearly a qualified expert and

1 consultant in regard to water and windows. I believe he
2 assisted Pella in preparing the installation instructions
3 for their windows.

4 Interestingly, in the small world side of
5 things, if you recall the discussion this morning,
6 Concord & Cumberland hired these people who helped design
7 the windows. That's Mr. Parker's company.

8 They have been a participant in the case, and
9 they are no different than the owner of the company or
10 the contractor who has a superintendent who has expertise
11 along with the factual information, and those parties'
12 witnesses have always been able to testify to their
13 expertise and use their expertise to provide opinions.

14 A retained expert is what the rules
15 contemplate as to being notified.

16 Let's go back to Mr. Parker's history, aside
17 from the fact that everybody knew he was involved with
18 the project from its conception. On 11/17/2010, he was
19 identified by Superior Construction Corporation's answers
20 as having issued several sets of revised plans and specs
21 without any waterproofing systems. He conducted several
22 site inspections of exterior envelope waterproofing
23 systems, conducted a number of exterior envelope site
24 inspections during original construction.

25 THE COURT: What date are you reading now?

1 MR. BROWN: That's interrogatory answers on
2 November 17, 2010. On 9/5/12, and this is the sister
3 company to Concord, identified Mr. Parker is expected to
4 testify regarding his investigation of the window
5 installation on behalf of Concord & Cumberland and the
6 results of any testing it performed and remedial
7 recommendations.

8 Now, he was identified in the context of
9 testifying regarding investigations as to the windows,
10 which involves expertise. Now, what is interesting is
11 that Ms. Varnado swears to the validity of the expert, on
12 the date for identifying experts, but on July 2, 2014,
13 she added Carl Pierce as her expert with regard to the
14 attorneys' fees, well after the date in the order.

15 Now, what is apparent from this, was the
16 order extended? No. I don't say she waived anything.
17 We all knew that the case had been continued. We all
18 knew the case is going forward at another time. We've
19 all got a year to wait. Ms. Varnado knew we were still
20 supplementing. She identified Carl Pierce. Carl Pierce
21 is the person who's subject to the motion to quash that
22 she wants to call to testify.

23 Did the parties and the Court all recognize
24 that we are starting over, we got a new trial date?
25 Sure. I didn't object to her notification of Carl Pierce

1 a year or two later.

2 THE COURT: At the time that the original
3 scheduling order was issued, was Jesse Kirchner and all
4 in the case at that time, or was that after they left the
5 case?

6 MR. BROWN: They were in the case at that
7 time. The case then changed to a different case, which
8 is the collection, and the cross-claims on the
9 settlement.

10 THE COURT: Subsequent to the scheduling
11 order?

12 MR. BROWN: Yes, sir. Now, let's go over
13 Mr. Parker's testimony in 2013. Let me read what he said
14 in regard to Ms. Varnado's questions.

15 THE COURT: When we contacted you about this
16 hearing, I was told there was no courtrooms available, we
17 wouldn't have any place to go but a small room in a
18 corner someplace. Weeks always start out that way, but
19 Friday everybody is available, but go ahead.

20 MR. BROWN: Are you in a position to testify
21 to a reasonable degree of certainty most probably as an
22 engineer as to the cause of leaks at Concord &
23 Cumberland?

24 I don't know any more than I've just
25 testified about.

1 He did not say, I don't have an opinion.

2 THE COURT: Say that again?

3 MR. BROWN: I don't know any more than I have
4 just testified about. I'm sorry. I can't hear you. I
5 don't know any more about the windows and doors other
6 than what I just testified about.

7 Now, the question then was asked, Are you in
8 a position to render testimony that there's not a proper
9 amount of sealant?

10 I don't know for a fact there is or is not.

11 Now, the testimony he gave me predicate to
12 that had to do with window testing he had done in '08 and
13 '09, and you're an expert, that you're recognized as an
14 expert when you're giving opinions about window testing
15 and its results. Nobody had any problem with the fact
16 that he was an expert at that time.

17 He testified to a number of situations, a
18 number of tests. Based on those observations, can you
19 tell me whether any water was observed leaking through
20 the window itself during this test at 5.5 PSS?

21 There was water coming from the top of the
22 aqua portion of the window, and then also he's got five
23 or six -- there was a horizontal transom leak, so a lot
24 of these leaks, three of these leaks, were within the
25 window unit themselves. Unless we're going back 100

1 years in regard to products law, that is a failure of the
2 window, and that indicates that the windows are
3 defective, and he was giving opinions without objection,
4 without surprise, as an expert talking about his testing
5 seven, eight, or nine times, all showing leaks.

6 THE COURT: I missed that 100 year opinion.

7 MR. BROWN: If we're going back 100 years in
8 products law, and I can't claim that the product was
9 defective without saying what was done on the assembly
10 line within the plant, then maybe Ms. Varnado has a
11 point, but the windows in the agreement were stated to be
12 merchantable, and that is a position of the condition of
13 the window as it performs in the field.

14 And Mr. Parker testified, along with other
15 witnesses -- Ms. Varnado is right, there are witnesses
16 lined up to testify these windows leaked and were
17 defective and did not perform, but he's testifying as an
18 expert. He's been identified as an expert, and
19 Ms. Varnado knows he's an expert and she participated in
20 this deposition.

21 He did not said, I don't have an opinion. He
22 said I've told you all I know about the windows.

23 THE COURT: And he has since found out more
24 or --

25 MR. BROWN: Yes.

1 THE COURT: All right.

2 MR. BROWN: Now, Ms. Varnado asked him the
3 question, Look, have you checked -- let me back up. He
4 gave in his opinion an absence of sealant applied in the
5 factory is something that could have lead to these leaks.

6 Her question was, Have you verified that?

7 And his answer was, No, I haven't.

8 THE COURT: Let me ask you, is the
9 predominant issue in the case, whether the windows are
10 defective, still at issue?

11 MR. BROWN: Yes. Here is what happened after
12 that testimony: We settled the case. The homeowners
13 have their money, and they go about fixing the building,
14 and we learned they were removing windows and carrying
15 them downstairs to the Dumpster.

16 Now, before this, these buildings are owned
17 and the unit owners own them, and we don't have the
18 prerogative to simply walk in and rip out a window owned
19 by a unit owner. I guess we could have gone to court and
20 gotten an order and then ripped it out, but we did not
21 have an option of simply saying, Ma'am, we're going to
22 tear out your three windows this afternoon and test them.

23 But once the case is settled and Trident is
24 ripping the windows out, we had the opportunity, and it
25 became apparent now is a very good opportunity to answer

1 Ms. Varnado's question: Is there or is there not
2 sufficient sealant?

3 We made arrangements with Trident and the
4 owners, as could Ms. Varnado or anyone else, to say,
5 Let's go look at the windows in more detail.

6 Mr. Parker did that. It took a while because
7 of the difficulty of meeting, trying to schedule. He
8 evaluated windows, and he will answer the question
9 Ms. Varnado asked, Have you verified whether there is
10 enough sealant in the windows?

11 He can now answer that question, and
12 Ms. Varnado would like to try the case and says,
13 Mr. Parker, you don't know anything about those windows
14 and how they're manufactured, do you?

15 And his answer is going to be, Oh, yes, I do.
16 I had the opportunity to take them apart.

17 She would like to exclude that opinion
18 somehow, and she has had since July 15, 6 months ago, the
19 chance to take his deposition. We've offered him for
20 deposition. We consented immediately to her taking his
21 deposition. We have given her dates for his deposition.
22 We have asked her to go ahead and take it.

23 She has declined to take it and didn't want
24 to take it and refused to take it until Your Honor heard
25 the motions, and there are reasons for that, but it's

1 crying wolf to come in here and say, We've been
2 prejudiced because we have to take all these depositions.

3 She's intentionally delayed it so she can
4 come in here and argue prejudice. This is -- that report
5 is provided --

6 THE COURT: Does that make new a relative
7 term, as him being a new witness?

8 MR. BROWN: It was new on July 15th. It is
9 seven months old, eight months old, on the day we're
10 going to try this case, and it's not a new witness. The
11 subject matter is the central issue in the case.

12 THE COURT: More thorough impression of an
13 existing --

14 MR. BROWN: More thorough impression of a
15 prior opinion, answering a question she asked in the
16 deposition, and then he can say not only are they
17 defective and not only did I document over and over and
18 over, that the windows themselves were leaking, I could
19 not tell you exactly what the manufacturing defects were.

20 She's right. There is copious evidence of
21 bad windows, but this answers the question that she
22 asked. We gave it to her six months ago. It will be
23 seven months before the trial. There is plenty of case
24 law allowing that type of recent testimony. It's not
25 recent now, but it is simply answering a question she

1 already had and is further developing the central issue
2 in the case and is simply following up on testing done
3 not only by Mr. Parker, by architectural testing, by
4 people's visual observations. I think the plaintiffs
5 show that there were 23 window tests, and 21 of them
6 showed leaking through the windows.

7 THE COURT: How many window experts do y'all
8 plan on me listening to in January?

9 MR. BROWN: I think we have one by
10 deposition. We probably have four or five available. Do
11 we want you to hear them all? I don't think we need to,
12 but what we're trying to do with this is to take
13 advantage of an opportunity.

14 There are windows sitting in the Dumpster.
15 You can go up today to try to pull those windows out,
16 look at it, take it apart, evaluate it. Ms. Varnado had
17 the same opportunity to do that. This was a special
18 arrangement we made. This is trying to take buildings
19 apart, available to anybody.

20 Now, there is evidence available to the Court
21 to consider to answer the question. There's been plenty
22 of time to prepare for it, evaluate it. She could go
23 today because that building, I don't think, is finished
24 and do the same thing.

25 THE COURT: Are people still living there?

1 MR. MAJURE: In phases, Your Honor.

2 THE COURT: I was telling a story earlier. I
3 was parking down on that street, and the workers were
4 kind of waving me around, telling me where to park. I
5 was tempted to tell them I was in charge of this
6 building. I didn't say that, but I could tell they were
7 going through a major situation.

8 MR. BROWN: In summary, I won't belabor it.
9 Mr. Parker's been around. He's been identified well
10 within the discovery period. She's taken his deposition.
11 This is simply the same issues in the case but a little
12 more investigation because the windows are lying in the
13 Dumpster, and he's got the opportunity to answer the
14 questions:

15 There is no prejudice whatsoever, and we have
16 all treated that discovery, that witness deadline, as
17 basically in the past because we got a new case that's
18 being continued. Ms. Varnado took advantage of naming a
19 new witness. Nobody's complained. The case ought to be
20 tried on the merits.

21 Thank you.

22 THE COURT: Ms. Varnado?

23 MS. VARNADO: Your Honor, I named new
24 witnesses. I named Carl Pierce and I named Rich Moore,
25 and Superior filed a motion to exclude those witnesses,

1 and we discussed it --

2 THE COURT: Mr. Majure?

3 MS. VARNADO: Mr. Majure did, saying that it
4 was beyond the deadline, and I withdrew Mr. Moore because
5 the scheduling order said that we were required to name
6 our experts on liability and damages by that date in
7 2012.

8 Mr. Moore was going to testify to damages.
9 Mr. Pierce is not testifying to liability or damages, he
10 is testifying to reasonableness of attorneys' fees, a
11 different issue, and there was no deadline for that
12 within that 2012 scheduling order, and Mr. Majure,
13 Superior, withdrew the motion, and we resolved it that
14 way.

15 So Weather Shield did not pursue anything in
16 violation of the 2012 order, and when it was pointed out
17 to us that naming him would be in violation of the
18 scheduling order, we withdrew the witness. If, however,
19 that scheduling order date means nothing, we would like
20 to bring that witness back.

21 THE COURT: I think the reality of it is the
22 scheduling order was put in place when the whole case was
23 in place and not that these issues were ancillary, but --
24 the primary issue was just the buildings themselves and
25 the claim of the homeowners at that time, and then, of

1 course, I was aware that these were other issues.

2 I think that for the Court to lock anyone
3 into a scheduling order that's almost three-and-a-half,
4 four years old, it -- I mean, circumstances change, and I
5 don't know of any case where I would favor locking
6 someone in to something that evidently existed three or
7 four years ago versus having the parties continuing to
8 work on the case to bring whatever updated information
9 they might have, and I think that seems to be the type of
10 situation we're dealing with.

11 That's not to say you should or should not
12 have agreed with Superior who caused you to withdraw a
13 witness, and, of course, at some point all of this will
14 become pretty cumulative anyway. If I listen to y'all
15 argue, it sounds like y'all are experts on -- and then I
16 hear the experts on top of you all and then you tell me
17 in addition there is four experts.

18 You know, I don't know how much the -- I know
19 it all matters, because I have to evaluate credibility of
20 all the evidence, but I don't see why this witness should
21 be excluded, based on what I've heard at this point.

22 MS. VARNADO: If that is the case, what is
23 good for the goose is good for the gander, and Weather
24 Shield should be able to bring in new experts if it wants
25 to.

1 THE COURT: You know, at this point, we have
2 finally, hopefully, a fixed trial date for this case to
3 go ahead, and, you know, I certainly understand what you
4 mean, but I hope you're not suggesting you'll need it to
5 continue to find more people.

6 MS. VARNADO: That's not what I'm suggesting,
7 Your Honor, but, I mean, Weather Shield files this motion
8 to exclude this witness promptly after --

9 THE COURT: Well, you indicated you've been
10 trying to get to hear you and things that happened, and
11 this case has been -- this is just amazing, as long as
12 we've been dealing with it, and I'm ready to put it to
13 rest and strike it from my list at some point.

14 MS. VARNADO: If you are not going to exclude
15 the witness and the new testimony from this witness, the
16 new evidence from this witness, we respectfully ask that
17 you allow Weather Shield to name any expert that it needs
18 to name as long as it won't delay the case.

19 THE COURT: The judge hearing the case -- I
20 mean, y'all were doing preparation and have to act and
21 counteract at a certain point. I certainly agree with
22 you that if someone names a witness and you delayed
23 discovery, I certainly respect that, but now seven months
24 have passed, and we're two months -- I guess two months
25 or so before trial, you know, you find someone else you

1 want to bring, then they'll be behind the eight ball and
2 responding to your witness, but if someone else names a
3 new witness or had them and offers a new opinion, you
4 certainly have a right to respond and have an opportunity
5 to respond, so does that signal the way I would rule on
6 that if that becomes an issue?

7 MS. VARNADO: I think so.

8 THE COURT: I think you have a right to, if
9 you find someone who disagrees with him. I don't know if
10 he's the leading expert or what. If he finds someone
11 more persuasive than he and the case hasn't been heard
12 yet, I'll be here to hear what every one has to say.

13 MS. VARNADO: As a result, we need to get
14 documents. We need to have additional discovery as long
15 as it won't be hampered --

16 THE COURT: Well, Mr. Brown says he's been
17 trying to get the information to you, trying to make his
18 witness available, trying to do this, trying to do that,
19 and so I'm with you, so you required him to do all that.

20 MS. VARNADO: Not just limited to Mr. Parker,
21 because that hampers my client, and so I want to say that
22 discovery is not ended and that we are able to engage in
23 the discovery needed to address the new evidence.

24 THE COURT: All right. Who wants to comment
25 on that?

1 MR. BROWN: I said in our response that
2 Concord & Cumberland consents to Weather Shield
3 conducting reasonable discovery by way of deposition or
4 in writing into the information included and opinions
5 expressed by Mr. Parker.

6 Now, I did that in August when I replied to
7 her motion. If she wants to go find another witness,
8 that's fine. My client and I would like to get rid of
9 this case too. If she wants to find ten witnesses, fine.
10 Just get it to me some time prior to trial. There's no
11 new facts in this case.

12 THE COURT: All right. So your motion is
13 granted to reopen discovery.

14 MS. VARNADO: Thank you, Your Honor.

15 THE COURT: Whatever y'all --

16 MR. NISTAD: Does that apply to everyone?
17 These issues touch my client too. I have a window expert
18 who has always had opinions about the windows, what was
19 done to them. Those give him new information, and he
20 will perhaps have additional opinions.

21 THE COURT: That applies to you perhaps more
22 than anyone else because you were out of commission for a
23 while, so you --

24 MR. BROWN: Your Honor, we will cooperate in
25 any way we can in order to get this case prepared.

1 THE COURT: Okay. Who's going to draw an
2 order on that?

3 MR. BROWN: I will.

4 THE COURT: Get Ms. Varnado's approval of it.

5 MR. BROWN: I will.

6 THE COURT: That clears you out to go to
7 Virginia.

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: What else do we have?

10 MS. VARNADO: Your Honor, I have a motion to
11 compel against Safeco.

12 MR. MAJURE: One point of clarification, Your
13 Honor? We are in agreement that this disposition
14 resolves both the motion to exclude opinions and
15 testimony of Michael Parker as well as Christine Quigley,
16 or is that also --

17 MS. VARNADO: It's kind of moot if Parker
18 testifies to it.

19 MR. MAJURE: All right. So you regard the
20 motion as resolved.

21 THE COURT: All right.

22 MR. MAJURE: Okay.

23 MR. BROWN: Just to state my position, I
24 think what's coming up, the motion to quash has been
25 continued.

1 MR. MAJURE: Yes.

2 MR. BROWN: Anything else?

3 MS. VARNADO: Motion to compel.

4 MR. NISTAD: There's a motion for a
5 protective order that Mr. Majure filed about his
6 deposition. We talked about that a second ago.

7 He refused to answer some questions,
8 Mr. Majure did, when I took his deposition. I have no
9 problem with his refusal at this point, so those specific
10 objections -- I'm not asking him to answer them later on,
11 and then there are objections in that deposition. That
12 was part of the relief he requested, but we'll deal with
13 those at the trial when we designate specific lines.

14 If there's an objection to those lines, we
15 can deal with them at that time, so that would take way
16 too long.

17 MR. MAJURE: Your Honor, I agree with Mr.
18 Nistad's representation that if there are any residual
19 issues that need to be addressed on that motion, since
20 we're going to resume, we're going to reconvene in
21 Kingstree the week of the 14th with the motion to quash,
22 I would recommend, Your Honor, that we just end like
23 that.

24 THE COURT: Handle the --

25 MR. MAJURE: Any residual issues that might

1 be -- perhaps Ms. Varnado might have as to the motion to
2 exclude. Is that acceptable?

3 MS. VARNADO: Sure.

4 THE COURT: Because the remaining motion is a
5 motion to do what?

6 MS. VARNADO: A motion to compel.

7 THE COURT: To compel what?

8 MS. VARNADO: This is for Safeco. They have
9 not answered our supplemental request to --

10 THE COURT: Who is Safeco, Mr. Belcher?

11 MS. VARNADO: Yes, sir.

12 THE COURT: All right.

13 MS. VARNADO: We were seeking records. First
14 of all, they owe us their final time records, and I know
15 Mr. Belcher said he would agree to enter into an
16 agreement to get those to us within 15 days?

17 MR. BELCHER: That's correct.

18 MS. VARNADO: But the other portion of the
19 motion to compel is that we sought records that depict
20 the amount of time billed for the entire workday by the
21 lawyers or paralegals in his firm on any day in which
22 more than seven hours was billed in the case to include
23 time billed in other matters.

24 THE COURT: And the reason you want these
25 records is so that you can scrutinize them, pay some

1 money, or what?

2 MS. VARNADO: What we want these time records
3 for is to evaluate that based on Mr. Belcher's bills
4 submitted in the case to -- because of the amount of time
5 billed --

6 THE COURT: And he doesn't want to give them
7 to you?

8 MS. VARNADO: No, he does not, and it's not
9 the bill we want for this, Your Honor, it's the number of
10 hours billed. So we don't need the line entry, we just
11 need to know --

12 THE COURT: Why won't he give that to you?

13 MS. VARNADO: He says it's not relevant.

14 THE COURT: The facts at the mediation
15 issue -- do you know Biff Sowell in Columbia?

16 MR. MAJURE: Yes.

17 THE COURT: He's a well-respected lawyer that
18 shares my birthday, November 7th, so we're good friends.
19 I don't know his availability, but I was just thinking of
20 him and having y'all mediate it, order y'all to mediate
21 it before a certain date, still allow sufficient time to
22 finish up trial preparation if you don't resolve it.

23 MR. BROWN: I'm agreeable to that, and I'm
24 agreeable to Mr. Sowell.

25 MR. MAJURE: Your Honor, I would recommend

1 that favorably to my client and I don't see why my client
2 would --

3 MR. NISTAD: I don't -- I like mediations,
4 and I love to go to them to hopefully get things
5 resolved. I know we have a mediator who has ample
6 experience with this case. I don't know what we think
7 about Sowell, if he has the knowledge, but he mediated
8 three of the four, I think.

9 THE COURT: What are your thoughts?

10 MS. VARNADO: My only thought is my clients
11 are in Wisconsin, and they could appear via telephone and
12 would not have to come from Wisconsin because that.

13 THE COURT: I could just sit on the phone,
14 I'm doing other things, and occasionally chiming in and
15 all that.

16 Mr. Belcher?

17 MR. BELCHER: I respect Mr. Wilson, he's a
18 great mediator and I trust him, but, frankly, I think the
19 last mediation that we had was about a four-hour half-day
20 mediation, and I think we spun wheels because I think
21 that Mr. Wilson is so intimately aware of what's going on
22 between the parties here that it just doesn't have
23 traction.

24 THE COURT: That was my thought, that someone
25 who doesn't know about it and is not in the construction

1 scene could just come for the purpose of what mediation
2 is for, to get y'all to talk and hopefully resolve the
3 case.

4 MR. NISTAD: That's fine with me. I want
5 everyone to be walking in there with confidence, and if
6 there is any doubts about what both can do, at all, he's
7 still great, but I'm fine with whatever.

8 MR. BELCHER: I would like to have --
9 Mr. Wilson's process has been a facilitative process.

10 THE COURT: We're going to give it to
11 Mr. Sowell since Mr. Brown is talking about going up to
12 Washington, DC, and I just saw Mr. Sowell at a conference
13 in Washington, DC, and we were checking on a mediation.
14 He just came to mind. I haven't spoken with him.

15 MR. BROWN: He's a very good choice, Your
16 Honor.

17 THE COURT: Let's do that. When can you
18 mediate it, by what date?

19 MR. MAJURE: January 15?

20 MR. BROWN: Sometimes having a trial date
21 helps focus.

22 THE COURT: So we still need to address your
23 unwillingness to give up records, Mr. Belcher?

24 MR. BELCHER: Yes, Your Honor.

25 THE COURT: All right. What's your position

1 on all of that?

2 MR. BELCHER: Well, you know, I try to be as
3 agreeable as possible. In fact, I don't think I've had
4 to deal with a motion to compel in court in ten years.

5 What they're asking for is just outside of
6 the scope of discovery. They're asking for documents in
7 their possession. I'm not a party. My law firm is not a
8 party. If they want information about bills, they're
9 going to get it. They've already got them. They can
10 scrutinize them as much as they want, but if they want to
11 ask how much time me or my partners or associates or
12 partners bill in a day, I don't know if that's a matter
13 suitable for discovery here.

14 THE COURT: They're just digging too deep
15 into the inner workings of your business?

16 MR. BELCHER: Yes, and I'm happy to provide
17 them with the bills. I'm happy to provide them -- just
18 the way everybody keeps their bills nowadays, they can
19 scrutinize them, which they have continued to do that,
20 but what we're doing for other clients --

21 THE COURT: If the shoe were on the other
22 foot, do you think Ms. Varnado would give hers or object?

23 MR. BELCHER: Frankly, Your Honor, I wouldn't
24 ask.

25 THE COURT: You wouldn't ask.

1 MS. VARNADO: Your Honor, there are days
2 where folks in Mr. Belcher's firm want considerably more
3 than seven hours in a day on a telephone deposition, and,
4 in essence, we want to know if he was working on Concord
5 & Cumberland the whole time or if he was working on
6 something else, and if he only billed seven hours that
7 day on Concord & Cumberland, then that's one thing, but
8 if he billed 14 hours that day, then that's a question,
9 and that's what we're looking for, and it's not pleasant.

10 No one likes to look into that, but we are
11 being put in a position where Mr. Belcher's bills, the
12 firm's bills, are being submitted to Weather Shield and
13 Muhler and asked for us to pay those bills, and we are
14 needing the information to know whether or not it is true
15 that all the time spent allegedly on the Concord &
16 Cumberland case, was all that time spend on Concord &
17 Cumberland --

18 THE COURT: The question is, are you able to
19 do that through discovery of a non-party?

20 MS. VARNADO: It's the bills that his client
21 is submitting for payment but -- it's not Mr. Belcher,
22 necessarily, submitting the bills to me for payment, it's
23 Mr. Belcher submitting the bills -- it's Mr. Belcher's
24 client submitting the bills that they say their lawyer
25 charged for payment under the indemnity agreement.

1 THE COURT: Well, I haven't looked at that
2 motion. I guess that is a written motion?

3 MS. VARNADO: Yes, sir.

4 THE COURT: That you haven't reviewed, and
5 it's late on a Friday, and I'm not going to make any snap
6 decision about any of that. I suppose it includes some
7 authority expressing his specific concern, not being a
8 party to the litigation or objecting to your delving too
9 much in his private business, is exactly what he said, I
10 don't know.

11 I'm sure it's not the first time this has
12 been attempted throughout your litigation, throughout the
13 country and all, so I would like to explore that issue a
14 lot more, and if anyone that wants to chime in to address
15 it --

16 MR. MAJURE: Your Honor, if it's going to be
17 deemed that Mr. Belcher has to produce records related to
18 activities of his firm or associates that is not related
19 to this case at all, if that is to be the case then, I
20 think I already have my answer as to my subpoena and
21 motion to quash. I should definitely be entitled to get
22 Mr. Pierce's records from his firm on this very case if
23 they're going to be allowed to get the records from Mr.
24 Allen's firm on cases that are not even the present case.

25 THE COURT: So maybe that's a good reason why

1 we should talk about this when we deal with Mr. Pierce.

2 MR. BELCHER: Do you want legal briefs?

3 THE COURT: Yes, sir. I would love to have
4 them. Everything is important and critical, and I would
5 like to have some written thoughts so I can see.

6 MS. VARNADO: Thank you, Your Honor.

7 THE COURT: All right. Very good. Thank you
8 all.

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10 (Whereupon, the proceedings were concluded.)

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I, the undersigned Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Charleston County, South Carolina, on the 4th of December 2015.

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

May 8, 2016

Amanda K. Haffenden

Circuit Court Reporter

1 STATE OF SOUTH CAROLINA)
)
 2 COUNTY OF CHARLESTON) Court of Common Pleas
) Case No. 2010-CP-10-2271
)
 3 CONCORD AND CUMBERLAND)
 HORIZONTAL PROPERTY REGIME,)
 4 et al.,)
 Plaintiffs,)
 5)
 vs.) Transcript of Record
 6)
 CONCORD AND CUMBERLAND, LLC,)
 7 et al,)
)
 8 Defendants.)
)
 9 DATE: July 28 - 29, 2014

10 B E F O R E:

11 The Honorable Clifton B. Newman

12

A P P E A R A N C E:

13

Henry W. Brown
Attorney for Concord & Cumberland Manager, LLC

14

Christopher Alton Majure
Attorney for Superior Construction Corporation

15

Christine Companion Varnado
Attorney for Weather Shield Manufacturing, Inc.

16

Peter Gunnar Nistad and Helen F. Hiser
Attorneys for Muhler Company, Inc.

17

Amy Ruth Holbrook
Attorney for J. Davis Architects, PLLC

18

Alan Ross Belcher, Jr. and Elizabeth Freeman Wieters
Attorneys for Safeco Insurance Company of America

19

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

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1 THE COURT: Go ahead, Ms. Varnado. Tell me about
2 it.

3 MS. VARNADO: Your Honor, we have a consent motion
4 to seal. There are several releases that are germane to the
5 parties' arguments. And so the parties had agreed that we
6 would file those under seal. The most pressing concern for
7 my client was that ours has a confidentiality clause in it.

8 So, anyway, the parties have consented to filing
9 the exhibits relating to their settlement agreements under
10 seal. And we wanted to keep certain information under seal.
11 And that would be the amounts that Muhler, Weather Shield,
12 In The Wind, and Watts paid in their settlement to
13 plaintiffs.

14 THE COURT: All right.

15 MS. VARNADO: That motion was filed as a consent
16 motion. The brief of Muhler included one of those documents
17 that we intended to file under seal, mistakenly included
18 that when they filed. And so we would like to withdraw
19 that.

20 MR. NISTAD: Your Honor, however, I would like to
21 at least withdraw that -- garnished on behalf of Muhler,
22 withdraw that exhibit from the filing and possibly redact
23 part of the argument so that we can comply with this consent
24 order to seal that. In the rush to file these briefs and
25 get everything organized, the consent order to seal slipped

1 my mind.

2 THE COURT: All right. Any objection to any of
3 that from anyone?

4 All right. So both things will be the order of the
5 Court.

6 MS. VARNADO: And in that vein, I will hand up the
7 sealed exhibits so that you will have them, Your Honor.

8 MR. MAJURE: Chris Majure for Superior. Also in
9 connection with the motion to seal, Superior had provided
10 its settlement documents under the same pretext. And those
11 motions were submitted to the Court, and they were sealed at
12 the time of submittal.

13 THE COURT: Okay.

14 THE COURT: Next thing listed is motion to
15 compel.

16 MS. VARNADO: That is Weather Shield's motion. And
17 after further consultation with counsel for Safeco, we will
18 withdraw that motion. At this time we think we've got it
19 worked out.

20 THE COURT: All right. Motion to exclude.

21 MR. MAJURE: Motion to exclude filed by Superior,
22 we believe we also have resolved that. Counsel for Weather
23 Shield is going to produce the witness at issue, which is
24 Carl Pierce, for deposition prior to the end of September.

25 THE COURT: Carl Pierce?

1 MR. MAJURE: Yes.

2 THE COURT: The lawyer Carl Pierce?

3 MR. MAJURE: Yes, Your Honor.

4 MR. NISTAD: I can't wait to put Carl Pierce under
5 oath.

6 MR. MAJURE: Also, we are clearing up these smaller
7 items. Superior is withdrawing its motion for summary
8 judgment against JDavis, but not withdrawing the claim. We
9 were withdrawing it on the basis of issues of facts that
10 preclude summary judgment.

11 And in addition to that, Superior is going to be
12 dismissing its claim for equitable indemnity against The
13 Muhler Company and Weather Shield. But that does not affect
14 its claims for contractual indemnity.

15 THE COURT: With regard to all of these various
16 agreements in the sense that y'all are announcing, who's
17 drafting orders reflecting those things? How do you want to
18 handle it?

19 MS. VARNADO: Your Honor, I will gladly draft the
20 motion on the motion to seal -- excuse me, an order on the
21 motion to seal. Since we are withdrawing the motion to
22 compel, I don't see a need for an order at this time unless
23 you do, Your Honor.

24 THE COURT: There's a motion in the file, isn't
25 there? So we can do a Form 4 saying it's resolved.

1 MS. VARNADO: Okay.

2 THE COURT: Do you have that, Caroline?

3 THE CLERK: Your Honor, I'm sorry?

4 THE COURT: There's a motion to -- is that a motion
5 to compel --

6 MS. VARNADO: Motion against Safeco.

7 THE COURT: -- that's being withdrawn, and we want
8 to do a Form 4 saying it's withdrawn, and also a motion to
9 exclude that it's been resolved.

10 MS. VARNADO: Do you want an order or do you want a
11 Form 4?

12 MR. MAJURE: I will draft a simple order, Your
13 Honor.

14 THE COURT: Okay. So on the motion to compel, who
15 filed the motion again?

16 MS. VARNADO: I did, Your Honor, Weather Shield.

17 THE COURT: Rather than having the clerk, in her
18 busyness, worry about it, if you can do that.

19 MS. VARNADO: Certainly.

20 And then there's, I guess, the motion, Superior
21 withdrawing its motion against JDavis. Mr. Majure can do an
22 order to that effect.

23 MR. MAJURE: Sure, yes.

24 MS. VARNADO: In terms of Superior dismissing its
25 claim for equitable indemnity, that could either be

1 addressed in the summary judgment orders, or it could be
2 something separate. Either works for my purposes.

3 THE COURT: We are hearing the contractual
4 indemnity complaint today?

5 MR. MAJURE: Yes, Your Honor.

6 THE COURT: Whatever -- the final order could
7 include what was withdrawn, what remains, and what the Court
8 rules based on what was remaining?

9 MR. MAJURE: That would be fine, Your Honor.

10 THE COURT: So Superior's motion for partial
11 summary judgment against Weather Shield, is that remaining?

12 MR. MAJURE: There's motions for partial summary
13 judgment against Weather Shield and The Muhler Company.
14 They are very similar, but not identical. But, yes, Your
15 Honor, contractual indemnity.

16 MR. BROWN: May I ask Ms. Varnado one question?

17 THE COURT: Yes, sir.

18 MR. BROWN: It had to do with the documents under
19 seal. We have an understanding on how we are going to get
20 them.

21 THE COURT: These documents that are under seal, do
22 I need to see them, or they should stay under seal?

23 MR. MAJURE: For Superior's motions, Your Honor,
24 you will need to see them.

25 MR. BROWN: They will be relevant to the rest of

1 the case, Your Honor.

2 THE COURT: Okay.

3 MR. BROWN: Just for the Court's information, we
4 have the same claims against Weather Shield and Muhler. We
5 simply aren't at this time asking for judgment. But we will
6 have arguments along the lines or in response to their
7 motion for summary judgment on those claims. But we
8 understand we are going to hear this case on the 27th, and
9 we simply have not at this time asked the Court for any
10 judgment. We are prepared to try, if not settled.

11 THE COURT: 27th of?

12 MR. BROWN: October.

13 THE COURT: Okay. October 27th. All right.

14 What's next?

15 MR. MAJURE: I believe we are ready to commence
16 with Superior's motions for partial summary judgment against
17 The Muhler Company and Weather Shield, if it pleases the
18 Court.

19 THE COURT: Yes, sir.

20 MR. MAJURE: And also, Your Honor, if it's
21 permissible, I would like to be able to address the Court
22 from the table instead of the podium because of the amount
23 of materials we have.

24 THE COURT: All right. Let me find that.

25 MR. MAJURE: Your Honor, I will start with a little

1 background information of the facts and procedure in the
2 case that leads us here today. Superior Construction was
3 the general contractor for the construction of the building
4 shell for Concord and Cumberland, which Your Honor has
5 probably seen. It's situated across the street from the
6 Fleet Landing Restaurant at the corner of Concord and
7 Cumberland Streets.

8 When referencing it as a building shell, the
9 developer was going to build the shell, which is to say its
10 structural exterior elements, leaving unfinished the
11 individual condominium units. And those condominium units
12 were then going to be sold to individual buyers who would
13 then upfit their condo units.

14 Superior Construction hired The Muhler Company as
15 its subcontractor for the provision and the installation of
16 the windows and doors at the subject property. Weather
17 Shield was the supplier of those windows and doors under The
18 Muhler Company's contract.

19 At the beginning of the construction project, there
20 was not any contractual relationship between Superior
21 Construction and Weather Shield. The Muhler Company had
22 subcontractors who performed all of the installation work on
23 behalf of The Muhler Company. Those subcontractors were
24 called In The Wind, Inc. and Watts Builders.

25 Now, In The Wind, Inc. had a dual role in the

1 project in that they were also, in addition to being a
2 subcontractor of Muhler Company, they were a subcontractor
3 of Superior for the installation of the buck system for the
4 windows.

5 And what that means is that there's a window rough
6 opening, and that rough opening has to be prepared to
7 receive the windows. The particular configuration of
8 installation that was required by the architect was a
9 recessed configuration, so that necessitated the use of
10 wooden bucks, which are essentially 2 x 6s that are
11 installed around the rough opening. And then a pan is
12 installed. And then that installation then receives the
13 window that was installed by Muhler Company.

14 The Muhler Company did not perform the work for the
15 installation of the bucks and the pans. That was initially
16 being self-performed by Superior. And then thereafter, they
17 subcontracted the remainder of that work to In The Wind,
18 Inc., thus giving In The Wind the dual capacity.

19 In any event, in the course of construction, the
20 windows experienced a number of problems. And I will
21 elaborate on that a little bit more. But, eventually, after
22 several years, the HOA, and I believe it's 13 individual
23 unit owners, filed suit starting in April of 2010, and then
24 running on several months thereafter. So there was a series
25 of lawsuits filed. Those lawsuits were consolidated for the

1 purposes of discovery. And, of course, Your Honor, by
2 consent of the parties, became the judge chosen to try this
3 case in a bench trial.

4 We had four years of discovery. And just going
5 into the beginning of the fourth year of the case, on the
6 fourth mediation of the case, Superior settled the window
7 and door claims against the plaintiffs. Superior also
8 separately entered into settlements with the plaintiffs for
9 all the other separate components of the building that were
10 in issue in the case. So, for example, there was a separate
11 settlement for stucco claims. There was a separate
12 settlement for brick matters. We had a separate settlement
13 for HVAC, et cetera.

14 After several months after Superior settled with
15 the plaintiffs, The Muhler Company and Weather Shield, along
16 with those subcontractors, negotiated their own separate
17 settlement. Superior's settlement has been submitted to the
18 Court under seal and is one of the exhibits to our
19 memorandum.

20 The Muhler Company was bound via an AGC Form 600
21 subcontract to Superior. That contract -- that subcontract
22 had a standard indemnity clause that was recited in our
23 memorandum. And, Your Honor, the memorandum is fairly
24 extensive, as well as the memorandums in response. So I'm
25 going to try my very best not to just simply go through my

1 memorandum with you and allow it to speak for itself, but
2 just go over some major terms, and then let the Court look
3 at the memorandum in detail.

4 But, in essence, Superior is here today seeking
5 partial summary judgment against Muhler. And that is
6 actually a two-step process that we are seeking. The first
7 step is the declaration of the finding of liability against
8 Muhler on the subcontract, and a June 2007 agreement that
9 was entered into by the parties. That agreement was entered
10 into after the commencement of construction. And by way of
11 explanation, there was -- the window installation started
12 approximately February of 2007. The windows were then
13 tested. The initial battery of tests -- I think everyone
14 here concedes that the initial battery of tests was not
15 performed with the proper water pressure.

16 So then there were subsequent batteries of tests,
17 one by qualified licensed engineering companies; one of
18 which was a company that was specifically picked out by The
19 Muhler Company.

20 Those initial batteries of tests in March and April
21 and May of 2007 generated repeated failing results. The
22 windows could not perform under the established criteria.
23 What happened then was that counsel, personal counsel for
24 Superior, as well as Weather Shield and The Muhler Company,
25 began negotiating an agreement, this June 2007 agreement,

1 which we are all going to refer to today. We call it the
2 June 2007 agreement because that's when it was initially
3 dated and it's the reference that's in the first page of the
4 agreement.

5 Technically, Muhler did not sign and deliver their
6 copy of the agreement until on or about August 31st of 2007.
7 So that's when it became actually binding as to The Muhler
8 Company. That's not a major detail.

9 But going back to what Superior is seeking, we are
10 seeking an initial finding of liability against The Muhler
11 Company on the subcontract and the 2007 agreement. The 2007
12 agreement by its terms expands upon the obligations of the
13 subcontract. It expands upon items related to what type of
14 cures or fixes will be provided, touches upon payment
15 issues. It touches upon identification. It expands the
16 potential recovery under indemnification that initially
17 existed under the subcontract. So the two instruments go
18 together as to The Muhler Company.

19 Now I'm going to argue as to The Muhler Company
20 initially, but I will mention that the contractual indemnity
21 that Superior is seeking against Weather Shield is solely
22 based upon the 2007 agreement. There's no other instrument,
23 but, whereas, Muhler Company has two instruments, the
24 subcontract and the 2007 agreement. So that's the first
25 step, is the finding of liability.

1 The second step that we are seeking here today --
2 of course, the second step is predicated upon the Court
3 finding liability. But after that finding of liability,
4 Superior seeks to have the amount paid in settlement by
5 Superior to the plaintiffs to resolve the window and door
6 claims. We believe that that amount can be declared today
7 as being recoverable under the tenets of Griffin vs. Van
8 Norman and the Otis Elevator case, which is cited in our
9 memorandum.

10 We are not seeking a declaration as to a specific
11 amount of damages for attorneys' fees or costs or anything
12 of that matter. We recognize that that will have to be
13 addressed in a damages hearing. So, in essence, we are
14 seeking initial finding of liability.

15 And then, secondly, we are seeking declaration of
16 the amount payment of settlement is recoverable without the
17 necessity of a trial.

18 The Court could -- although we believe that our
19 arguments prevail, it is possible that the Court could
20 decide upon a finding of liability, but declining to rule in
21 our favor as to the amount paid in settlement. Again, we
22 believe that Griffin vs. Van Norman provides us an avenue of
23 recovery. But I'm trying to explain to the Court the
24 different scenarios as to how this could play out. There's
25 a number of moving parts.

1 The Muhler Company -- and I will get into this in
2 greater detail. Right now I'm trying to provide an
3 overview. The Muhler Company is attacking the 2007
4 agreement under a number of different arguments, one of
5 which is to just rescind the agreement for lack of
6 consideration or failure of performance on the part of
7 Superior due to nonpayment. And then they are also claiming
8 that Superior cannot be indemnified for its concurrent
9 negligence.

10 Now, just to further clarify things, it is not our
11 argument here today that Superior is entitled to be
12 indemnified for its sole negligence against The Muhler
13 Company or Weather Shield. Our law is very clear. You
14 cannot be indemnified for your sole negligence, even if your
15 contract states as such. However, you can be indemnified
16 for your concurrent negligence. And that's going to be one
17 of the real issues that's going to be in contention here.

18 While Superior believes that the 2007 agreement and
19 the subcontract in conjunction provided the relief it seeks,
20 we would also tell you, Your Honor, even -- if for some
21 reason you were to decide that The Muhler Company was
22 correct as to their arguments on the 2007 agreement and that
23 that agreement was not enforceable, we still argue that the
24 subcontract still provides us what we are seeking. It's
25 just that the 2007 agreement lowers the bar as to what has

1 to happen to allow indemnity, and also expands the overall
2 scope of recovery. But indemnity can still be had under the
3 subcontract line. But, again, we believe the 2007 agreement
4 is valid, that it is unambiguous as to the terms that we are
5 seeking, and that it provides the relief that we are seeking
6 here today.

7 So going to the subcontract, the subcontract, the
8 clause that's at issue here is listed on Page 4 of
9 Superior's memorandum in support of partial summary judgment
10 against The Muhler Company. And, Your Honor, as many
11 construction cases as you have tried, I'm sure that you
12 could probably recite this clause in your sleep if you
13 wanted to. But the language that Muhler is attacking comes
14 down to the clause that's in the Subsection A where it says
15 that -- and I will just start at midway through the
16 paragraph because it's so long: To the extent caused or
17 allegedly caused in whole or in part by any negligent act or
18 omission of the subcontractor, of anyone directly or
19 indirectly employed by the subcontractor, or anyone whose
20 acts the subcontractor may be liable, regardless of whether
21 it is caused by a party indemnified hereunder. That is one
22 of the key issues that you are going to hear us tussle about
23 here today, Your Honor.

24 We believe that that language clearly explains that
25 Superior is entitled to its indemnification within that

1 clause notwithstanding its concurrent negligence. It does
2 not allow us to recover for a claim that arises from our
3 sole negligence, but does allow us to recover from The
4 Muhler Company for claims for which Superior may be
5 concurrently negligent.

6 Now, The Muhler Company has -- in its memorandum
7 has argued that that language does not grant what we seek,
8 and it's simply a matter of disagreement as to what that
9 language means. And they turn to several cases that are
10 out-of-state, from I think six or seven different states
11 where they look at that particular language. Now, that
12 particular clause, this Article 12.1 of the AGC Form 600
13 subcontract, it is closely mirrored by an AIA subcontract
14 between a contractor and a subcontractor. And it's almost
15 identical.

16 So Muhler then is looking to other jurisdictions in
17 how they interpret that. And they are able to find a few
18 that interpret it counter to what we contend. Although
19 there is one case, one of the cases that they cite, which is
20 J.P. Patti Company vs. Remy Associates, which came from
21 Superior Court of New Jersey. That decision appears to be
22 overruled by the decision of Greer vs. The City of
23 Philadelphia, 658 P.A. 244, 2002 decision, as to the
24 interpretation of the indemnity language. That case looks
25 at that same language and decides that no concurrent

1 negligence can be identified for it.

2 And then there's another one of the cases that's
3 cited by Muhler, which is the Brown vs. Boyer-Washington
4 Boulevard Associates case from the Supreme Court of Utah.
5 And that case is barring indemnification for one's sole
6 negligence. It does not touch upon the issue of concurrent
7 negligence.

8 So in response to these cases cited by Muhler, we
9 looked -- he went and did 50 state searches of our own to
10 see what's out there. It appears that there's just as many
11 decisions that interpret the clause the way that we contend,
12 as there are as contended by The Muhler Company. And I just
13 want to hand up to the Court, if I may approach --

14 THE COURT: Yes, sir.

15 MR. MAJURE: These are the out-of-state cases that
16 have been previously provided to opposing counsel, that look
17 at the exact same issue. And we specifically performed the
18 search using that clause, regardless of whether it is caused
19 in part by a party indemnified hereunder. We specifically
20 searched under those criteria to see how other jurisdictions
21 looked at that case.

22 And what it comes down to, Your Honor, is it's
23 split. And there's no case that we are aware of in South
24 Carolina, no reported case, that specifically looks at the
25 language of the AGC contract or its close cousin the AIA

1 B201 contract, and says this allows for indemnification in
2 the situation of concurrent negligence or not.

3 So it's going to be up to the Court to look at the
4 plain language of this instrument and decide if it allows
5 Superior to be indemnified for its concurrent negligence.
6 We contend that it does. We contend that it's clear. And
7 in those cases that we provided, I would call the Court's
8 attention to one particular case. And that is the Florida
9 case from District Court of Appeals of Florida, Fifth
10 District. And they are looking at that exact language. And
11 that was the language from the AIA standard contract --

12 THE COURT: Which case are you looking at?

13 MR. MAJURE: That is the Camp, Dresser & McKee,
14 Inc. vs. Paul N. Howard Company. So in the Camp decision,
15 the Court, looking at that exact language, states the
16 following, and this is on Page 7 of the printout, Page 1078
17 of the decision, and it says the following: We conclude
18 that this provision clearly expresses the party's intent
19 that CEO may be indemnified by Howard even if CEO is sued
20 for its own unlawful conduct. The Court even further goes
21 on to state that the language is a paradigm of clarity that
22 even the Supreme Court has recognized.

23 So we believe that it makes it pretty clear that
24 Superior is entitled to be indemnified by The Muhler Company
25 notwithstanding any potential incurred negligence it may

1 have.

2 And, again, particularly the 2007 agreement was an
3 agreement that was exhaustively negotiated and drafted by the
4 parties for each participant. All these parties are
5 sophisticated. There's no indication there's drastically
6 unequal power between the two. This is an arm's length
7 agreement reached by counsel.

8 The 2007 agreement, which is included as an exhibit
9 to the memorandum, has a clause in it that further expands
10 the indemnity obligation by The Muhler Company. And it's
11 listed on Page 6 of our memorandum in support of partial
12 summary judgment against The Muhler Company. And it
13 provides -- I will just read it into the record. Paragraph
14 11 states: In the event either Superior or Concord and
15 Cumberland, LLC are sued hereinafter by or on behalf of any
16 subsequent owner alleging that one or more of the windows
17 and/or doors do not comply with the original and amended
18 contract documents, or are ineffectively installed, Muhler
19 agrees to unconditionally indemnify both Superior and
20 Concord and Cumberland, LLC against these allegations, and
21 will pay all damages (including reasonable attorneys' fees
22 incurred by either/or both as determined by a Court of
23 competent jurisdiction or award of arbitration, liability
24 incurred by either/or both as a consequence including but
25 not limited to costs and attorneys' fees, any remedial costs

1 of expert witnesses, costs of arbitration, and all other
2 damages incurred.

3 So what Muhler then is looking at in rebuttal -- we
4 think that this speaks for itself. It makes it very clear
5 that if we are sued under any lawsuit that makes these
6 allegations against us, it triggers this obligation that
7 ultimately has to be consummated, whether by trial or by
8 settlement. Now, again, we are just asking the Court to
9 look at this language as it exists and rule.

10 Muhler attacks the language of the clause under
11 several aspects. They are claiming that, in essence -- and
12 they are looking to another clause. There's another clause
13 in the agreement that says in return for this agreement,
14 Superior agrees that it will not pursue litigation against
15 The Muhler Company and against Weather Shield. And so in
16 looking at the agreement, Muhler argues that, first of all,
17 the fact that we asserted a cross-claim against them in the
18 instant litigation -- which we did not file, we did not
19 pursue this litigation, we were only sued and had to assert
20 our cross-claims -- that disqualifies us from recovery under
21 the 2007 agreement.

22 Our response to that is that we did not initiate
23 the litigation. We did not pursue it. And if you look at
24 the argument in totality, because in addition to that, The
25 Muhler Company also argues that the fact that we settled the

1 claims against us means that we can't recover. The sum of
2 The Muhler Company's arguments, and I believe Weather
3 Shield's is essentially the same, is that Superior could
4 never sue Muhler ever. Can't assert a cross-claim if it's
5 been sued. It has to just simply put its hands behind its
6 back and go through the entire process of litigation, and
7 then go through either a trial, an arbitration, have that
8 trial or arbitration be reduced to a verdict, and only then
9 can Superior recover. Superior can't settle. Superior
10 can't assert cross-claims. And even though they can settle,
11 and they did settle, both Muhler and Weather Shield settled,
12 so if you were to accept their interpretation as a whole, it
13 would mean that we could never defend ourselves, we could
14 never assert a cross-claim, we've got to go all the way to
15 trial, we have to subject ourselves to the uncertainty and
16 the outcome of a trial, and only then can we turn to that
17 for indemnification.

18 We believe that the language of Paragraph 11 of the
19 June 2007 agreement does not state that. It states in the
20 operative language: As determined by a Court of competent
21 jurisdiction or award of arbitration. Your Honor, that's
22 here. That's now. That's today. The language does not
23 explicitly say that we have to go to trial and be subjected
24 to a jury ruling. It doesn't say anything about that. It
25 just says that you have to be the one to determine it. And

1 what we argue is that that could be -- the language is
2 expansive enough that it could include going to settle it --
3 excuse me, going to trial or arbitration, but does not
4 conclude an outcome in which we settle the claims and then
5 seek the Court to enforce indemnification.

6 So we are here for the Court to decide. And in
7 that sense, what the Court would need to decide after making
8 a finding of liability, is whether or not the damages that
9 we are seeking in attorneys' fees, whether they are or are
10 not related to claims against Muhler. I mean, we have
11 submitted our attorneys' fees to the opposing side and our
12 detailed bills. They are entitled at trial to go through
13 them, if they need to, and attack whether or not a
14 particular expense or something incurred was or was not
15 incurred in connection with defending the lawsuit. They can
16 do that. But for us to have to be bound by a judgment, we
17 don't believe that the language is that specific. We
18 believe that the context that we are seeking indemnification
19 is covered by this clause. And it's not so constrained as
20 Muhler would have the Court believe.

21 Also, there's the issue of payment. The
22 subcontract has within it a clause that allows Superior to
23 withhold payment. And those are Article 5.3.3A, as well as
24 Article 10.1.1, Subsection (c) of the subcontract,
25 explicitly allows Superior to permit withholding from The

1 Muhler Company for pending claims and noncompliant work.
2 And that's just standard language in an AGC contract. It
3 also exists in the AIA contract.

4 So, first of all, we still have that right. But
5 secondly, the language in Paragraph 11 states that Muhler
6 agrees to unconditionally indemnify both Superior and
7 Concord; unconditionally, meaning without condition. We
8 believe that the Paragraph 11 stands apart, stands on its
9 own. It's not defeated by a failure of payment or
10 withholding of payment by Superior. And it isn't
11 undisputed, Your Honor. The payment was withheld. There
12 was withholding of payment. Funds were placed in personal
13 counsel for Superior -- Superior has corporate counsel in
14 Charlotte, and those funds were deposited in escrow.

15 I think Mr. Belcher might correct me if I'm
16 mistaken this, but they were ultimately addressed during a
17 settlement in principle reached. But in any event, those
18 funds weren't just put in Superior's pocket and walked away.
19 They were put in escrow and remained there for years. In
20 any event, we don't think that would matter.

21 And aside from that, even if for some reason the
22 Court were to adopt any of The Muhler Company's arguments
23 that this agreement could not be enforced, the subcontract
24 still remains. The subcontract still provides us with the
25 relief we seek. It is just a matter of scope as to how much

1 we can attain when you add the 2007 agreement to it.

2 And, Your Honor, a partial payment of the funds
3 that I referenced that were escrowed was made to Muhler, but
4 the remainder of the funds still sit there today.

5 MR. NISTAD: We'll take a check.

6 MR. MAJURE: That takes us to Griffin vs. Van
7 Norman, Griffin vs. Van Norman actually involved the case of
8 equitable indemnity. And in that case, the Court provided
9 an outline of how one can recover an amount paid in
10 settlement under an equitable indemnity theory. And that
11 decision, which we discussed exhaustively in our memorandum,
12 Your Honor, I'm not going to go through all its contents in
13 order to expedite this process. But the Griffin case was
14 then later relied upon by the Court in the Otis Elevator vs.
15 Hardin Construction Company Group, Inc. case in which they
16 looked at the Griffin elements in a contractual indemnity
17 scenario to decide how they would also allow recovery of
18 amount paid in settlement.

19 Now, the Otis Elevator case is a little bit more
20 convoluted. Otis Elevator involved Otis being a
21 subcontractor to install elevators at a particular property,
22 installed a service elevator that was not supposed to be
23 placed into operation until the project was complete. The
24 general contractor wanted to be able to use this elevator in
25 the course of its construction for its convenience. And so

1 what they did was they negotiated an agreement. And that
2 agreement required the general contractor to indemnify Otis
3 Elevator for any third-party claims that arose from the
4 operation of the elevator, but it also still made a
5 provision that Otis Elevator could not be indemnified for
6 its own negligence.

7 So that was a specifically crafted agreement that
8 did make an exception for concurrent and/or sole negligence.
9 So in that case -- so the case goes to trial. Just before
10 the jury returns its verdict, Otis Elevator decides to
11 settle the claim and then seek indemnification from the
12 party. In the subsequent indemnification case, the Court
13 did make a special interrogatory to determine if there was
14 any contributory negligence by Otis in the case. And the
15 Court concluded they had not -- the jury recorded they did
16 not make any finding of concurrent or sole negligence. And,
17 thus, awarded them their recovery.

18 Both Weather Shield and Muhler looked to that as
19 saying that Griffin only applies for equitable indemnity,
20 that it cannot apply to contractual indemnity. But if you
21 look at the Otis case, Otis was applying -- the Court in
22 Otis was applying the specific terms of the agreement that
23 was at hand. That clause -- that indemnification clause in
24 the Otis case did not have anything equivalent to the
25 language that we are referring to, regardless of the party

1 being identified hereunder.

2 So we believe that Otis Elevator still is going
3 to -- well, it does apply to contractual indemnity, but it
4 applies to contractual indemnity as the contract was
5 written. Otis just happened to apply it the way that
6 contract was/written. We have a contract that's equally
7 applicable and allows us to recover under Griffin. It's
8 just that our indemnity clause is a little different than
9 Otis Elevator's clause.

10 So we don't believe that we are restricted from
11 using Griffin as our vehicle of recovery of the amount paid
12 in settlement because our claim is not an equitable
13 indemnity claim or we have potentially concurrent
14 negligence.

15 But notwithstanding that, the Court still would
16 have to decide how it's going to decide whether or not that
17 we are eligible to receive a settlement. And I would
18 respectfully offer to the Court that our law really doesn't
19 provide anything better than Griffin. I suppose the
20 Court -- if the Court did not want to entertain that Griffin
21 and Otis Elevator allow us to recover our amount paid in
22 settlement, then it would seem to me the alternative would
23 actually be worse, which is just simply looking at the
24 settlement agreement and seeing if what we settled falls
25 within the ambit of the terms of the indemnity clause, and

1 then just ruling, and not looking to the factors of
2 reasonableness and the absence of collusion. I supposed
3 that if Griffin doesn't apply, then a party like Superior
4 could collude if they wanted to, and they might not have to
5 be reasonable. They can be almost downright arbitrary if
6 they wanted to, if we don't have to follow Griffin.

7 So in some ways, Your Honor, it might actually be
8 better for me if you decide that Griffin vs. Van Norman and
9 Otis Elevator don't provide me with the recovery that I
10 seek, because the only other alternative would be just a
11 strict enactment of the language.

12 In any event, we believe that when you look at the
13 totality of the evidence being brought before us, it
14 certainly falls within the parameters of reasonableness.
15 You don't have to vet and ferret every single detail of the
16 case to decide whether it's reasonable or not. There
17 certainly comes a point at which there's enough evidence
18 that tilts the needle far enough in the range of
19 reasonableness that you don't need to hear every single
20 argument against the reasonableness of the agreement.

21 Your Honor, I believe that summarizes what Superior
22 is seeking as to The Muhler Company. I will allow opposing
23 counsel to provide their argument. And we will in return
24 give a rebuttal. And then we can move on more specifically
25 to Weather Shield.

1 THE COURT: All right. We will take a few minutes
2 before hearing Muhler's response.

3 MR. NISTAD: I appreciate that. Thank you.

4 THE COURT: We will take about ten minutes.

5 (Whereupon, recess transpired.)

6 THE COURT: All right. Yes, sir, Mr. Nistad.

7 MR. NISTAD: Gunner Nistad on behalf of The Muhler
8 Company. Like Mr. Majure, I'm going to try to go over the
9 highlights of the arguments. We have extensive briefs we
10 have given you. I have hard copies for you if you want
11 them.

12 THE COURT: I think that would be helpful, because
13 I have a lot of hard copies. I have yours on my laptop, but
14 I think a hard copy would help.

15 MR. NISTAD: If you don't mind, I will approach the
16 bench. This all happened -- we will have to take that one
17 exhibit out.

18 THE COURT: Okay. It's about the same size. I
19 don't know, I think you might have beat him by a couple of
20 pages.

21 MR. NISTAD: I also have one in support of my
22 motion for summary judgment I will give you later. I will
23 put them on a scale and see who wins.

24 I would like to go into a little bit more detailed
25 background. I will try to keep it brief. I think it's very

1 important to know that this project started off behind the
2 eight ball almost immediately. We had testimony from a
3 Robbie Robinson, who was an employee of Superior. And he
4 acknowledged just from the very day Superior signed the
5 contract with Concord and Cumberland, they would have had a
6 very difficult time completing that contract according to
7 the terms therein. The time allowed for completion of the
8 construction was far too short.

9 We also have testimony from Mr. Robinson that
10 Superior was in some pretty grave financial -- grave
11 financial situation because of several other projects. And
12 all of these bad projects originated out of the Myrtle Beach
13 division, just like Concord and Cumberland. There were bad
14 projects in Myrtle Beach, I think one in North Carolina, and
15 one other one in Charleston called 21 George. I'm not sure
16 if you are familiar with that case.

17 THE COURT: 21 George. What was there before -- on
18 that corner?

19 MR. NISTAD: It was a surface parking lot for many,
20 many years. I don't know what was before that. But from
21 the time I was in high school here in Charleston, it was the
22 surface parking lot that I used to park in at night. I
23 would get a hamburger at the place across the street. That
24 might have been -- I think the statute of limitations has
25 run on that.

1 So we got a situation where Superior is playing
2 catch-up. And there's ample testimony that Superior is
3 trying to cut corners in their costs so that they can
4 complete this project and still have enough cash to make all
5 the other projects work. And they fall behind a lot of
6 their payments. There are numerous liens filed against
7 Superior from almost every trade that touched the building.
8 There's extraordinary amount of evidence from the owner of
9 Concord and Cumberland, from Mr. Robinson, an employee of
10 Superior, from Muhler's employees, that the project was
11 understaffed, undersupervised, and completely disorganized.

12 And so we've got a situation here where Superior
13 has walked itself into a losing proposition. And now it's
14 trying to blame all of its problems for every trade that
15 touched the building on Muhler and on Weather Shield and
16 every other party here today.

17 So if you look at the complaint, you will see
18 there's allegations against Superior for the brick cladding
19 and for the stucco cladding and the roof and the HVAC and
20 other things that have nothing to do with windows. But
21 Superior's camp is here and they want identification for a
22 massive amount of attorneys' fees that represent almost all
23 of its attorneys' fees. They cut out less than \$100,000
24 that they say had nothing to do at all with windows. But if
25 it had something to do with windows, just the tiniest little

1 bit, they include that.

2 And then they ask for payment of their settlement
3 payment to the plaintiffs that was divided up into two
4 settlement payments. There's one that was for miscellaneous
5 things. And one they say is just for windows. But I think
6 that strips you of your role as the finder of fact. You
7 determine whether or not that amount is reasonable the way
8 they apportion it. And so we have a situation here where
9 that settlement is not necessarily reasonable and there's
10 further inquiry necessary.

11 And the other major issue in the facts here is that
12 this is not a real simple construction case where you have a
13 general contractor, a subcontractor, one area of
14 construction deficiency, and no interaction between multiple
15 parties. And we've seen this in a lot of cases. We had 20
16 or so defendants with all different trades involved, and all
17 kinds of different indemnification agreements that Superior
18 may or may not be the beneficiary of with all those parties.

19 And then there's -- the prime indemnification
20 agreement in the subcontract excludes Muhler's
21 responsibility to indemnify Superior for the architect's
22 negligence. And there's ample evidence of the architect not
23 properly performing construction administration services on
24 site, and then providing details that are insufficient to
25 waterproof the building.

1 So we have this situation here where it is very
2 complicated. And the risk is that Muhler ends up
3 indemnifying Superior for Superior's negligence, Superior
4 for the architect's negligence, Superior for Weatherholtz
5 Masonry's negligence, and countless other subcontractors.

6 So what we are seeking here is something that's
7 fair. And I think as we look at the language of these
8 agreements, what is fair becomes crystal clear.

9 And so moving on to that language, I think it's
10 great to start out with what are the basic standards for
11 interpreting indemnity agreements? And what Muhler's basic
12 argument is, and maybe one of the only real areas you can
13 grant summary judgment, I will get to that, is that we don't
14 provide indemnity for Superior's own wrongdoing. That's
15 what they are asking us for today, is we indemnify them for
16 their own negligence. And I think the case law is pretty
17 consistent in South Carolina, as well as all the cases I
18 think we've handed you today, is that when there's indemnity
19 language that purports to have one party indemnify that
20 other party for the other's own negligence, the language
21 must be clear and unequivocal. And my counterpart for
22 Superior here, in most of his arguments, he just used the
23 word clear. And I think that the standard is more than
24 that; it's clear and unequivocal.

25 And I've looked up what unequivocal means in

1 Black's Law Dictionary and a couple of other online
2 dictionaries. I think the definitions are all pretty
3 standard. But in Black's, and this is from the 6th Edition.
4 I think there's a 10th now, but I got my Black's back in law
5 school and it is the 6th. But unequivocal is defined as:
6 Clear claim capable of being understood in only one way or
7 as clearly demonstrated.

8 It goes on to say: Free from uncertainty or
9 without doubt. And when used with reference to the burden
10 of proof, it implies proof of the highest possible character
11 and imports proof of the nature of mathematical certainty.

12 And so when we look at whether or not this language
13 is clear and unequivocal, I think we have to be able to look
14 at the language and say, there is no way anyone else in this
15 world can disagree.

16 And what's interesting about the case law that's
17 presented to you, I presented a case law that says that the
18 language is not clear and unequivocal. But Mr. Majure has
19 presented case law that says it is clear and unequivocal. I
20 think by the very existence of contradictory case law shows
21 that if the courts of different states can differ, it is
22 equivocal; it is not clear. And I would argue that Superior
23 at this time has to bat one thousand on case law. There
24 can't be any disagreement in any jurisdiction looking at
25 this language, not have one case at all that says that is

1 not clear and that is not unequivocal.

2 So the other thing I point out about the case law
3 is that the language that's in the case that Mr. Majure
4 cited, it is a little different than the language that's in
5 our cases. And what you have there is, in the cases he
6 cites, there's language that specifically references the
7 negligence of the contractor or -- which in this case would
8 be the negligence of Superior. And there's a Florida case
9 that Mr. Majure cited, Camp, Dresser & McKee, Inc. vs. Paul
10 Howard, 853 So. 2nd 1072, and it's from the year 2003. And
11 in that indemnification clause, it says -- I'm trying to
12 paraphrase this the right way. There's a clause that says:
13 Is caused in whole or in part by any negligent act or
14 omission of contractor, being the general contractor, and
15 any subcontractor, any one directly or indirectly employed
16 by any of them or anyone whose acts, any of them may be
17 liable. And goes on to have the regardless of whether or
18 not it is caused in part by a party indemnified hereunder.

19 In this Florida case, there's a specific reference
20 to the general contractor's negligence. In ours, there is
21 not. There is a reference to the -- I will read you the
22 language. In our contract it says: To the extent caused or
23 alleged to be caused in whole or in part by any negligent
24 act or omission of the subcontractor. So there's a
25 difference in the language. In the Florida case it's

1 contractor and subcontractor. In our contract, it's just
2 the subcontractor.

3 And there's also a clause that says in the first
4 paragraph of 12.1 before the subparagraphs A and B, it says
5 it has to be arising out of or resulting from the
6 performance of the subcontractor's work.

7 And so there's language here that limits it to just
8 the subcontractor. So there's differences in language.
9 There's differences in how the Courts address this kind of
10 boilerplate language. And so when you have a standard that
11 is clear and unequivocal, I don't see how the Court can
12 reach that conclusion. As the Black's dictionary says,
13 mathematical certainty, that's a pretty high standard.

14 And so I think that we've got a situation here
15 where the standard for Superior -- and it is Superior's
16 standard to prove, they have the burden of proving that it's
17 clear and unequivocal, because they are the ones seeking
18 indemnity -- is very, very difficult to meet. And the case
19 law shows and the difference in the language shows they
20 cannot meet it. And what's interesting in that regard is
21 that I think it reverses the whole analysis of summary
22 judgment for us here today. You know, they can't get
23 summary judgment right now that it's clear and unequivocal,
24 then you can rule as a matter of law that it is not, and
25 that the only proper level of indemnity that could possibly

1 be awarded to Superior is Muhler indemnifying Superior for
2 only Muhler's negligence.

3 And there's some case law that illustrates how that
4 works. It's MT Builders, is in our brief. And MT Builders
5 is a pretty extensive discussion of how this type of
6 indemnity clause basically sets up a comparative negligence
7 type situation, very similar to our new comparative
8 negligence structure here in South Carolina. MT Builders it
9 says if the subcontractor is required to indemnify the
10 general contractor for only the subcontractor's negligence,
11 how do we figure that out? What MT Builders did is look at
12 what the subcontractor paid for a verdict, and analyzed the
13 percentage of the payment. And it made the conclusion that,
14 well, that's the portion of -- the portion of the
15 subcontractor's negligence from the whole verdict covered by
16 the plaintiff. And if the general contractor is responsible
17 for some of that subcontractor's negligence, we will apply
18 that percentage to the recovery, to the claim made by the
19 general contractor.

20 So in this case, Muhler paid a small portion of the
21 overall settlement to the plaintiffs. It's about 5 or 6
22 percent. Here, Superior is trying to get 100 percent or
23 some apportionment between Muhler and Weather Shield that's
24 certainly higher than 5 or 6 percent. And in seeking that,
25 what they really ended up getting is Muhler indemnifying

1 Superior for the negligence of architect, Muhler
2 indemnifying Superior for the negligence of the stucco
3 contractor, Muhler indemnifying Superior for the negligence
4 of In The Wind.

5 I think there's an important point with the window
6 installation we all have to recognize. The window
7 installation is more than just putting a window in a hole,
8 tapping in some nails or screws, putting on some flashing.
9 Integral part of this window installation was the
10 installation of the bucks and the pans. And Superior has
11 acknowledged that they self-performed that or they
12 subcontracted that work out directly to In The Wind. And
13 the elements of that part of the window installation, the
14 bucks and the pans that are Superior's responsibility, is
15 subject to extraordinary amount of testimony that says it's
16 improper.

17 Part of it's improper because of design. And I'm
18 sure that's going to be part of Superior's argument at some
19 point, is that, we are not responsible for the design, it's
20 the architect's problem.

21 It's not Muhler's problem either. Muhler is given
22 the buck system that is designed by the architect, that's
23 installed by another contractor, and we go put in the
24 windows the best we can. And there's testimony from Myles
25 Glick, the plaintiff's expert, and Skip Lewis, Superior's

1 expert, that says the windows are installed in accordance
2 with the contract documents. And yet, there's testimony
3 that the installation has defects.

4 If the windows are installed in accordance with the
5 contract documents but there's installation defects, those
6 defects have to result from the design. We are following
7 instruction we are given from the architect. How do we
8 become responsible for defects in the installation? All
9 those defects point to an architectural problem.

10 Moving on to the 2007 agreement. First, there's
11 case law out there that says a broad, broad term,
12 unconditionally, is unconscionable. It's far too broad and
13 opens up a myriad of problems. One of the problems for
14 Superior will be that that word unconditionally can lead to
15 conclusion that Muhler has to indemnify Superior for its
16 sole negligence. And until we figure out all the
17 responsibility here, that possibility still exists.

18 So if you grant summary judgment right now for
19 Superior on the 2007 agreement and then later on as we try
20 this case find that Superior and the architect are the only
21 ones responsible for the installation problems with the
22 windows -- and that's all that Muhler could be responsible
23 for under the 2007 agreement, installation, not the windows
24 themselves, because Weather Shield came and put that on --
25 but if you find it's only the architect and Superior

1 responsible for the installation problems, and then Muhler
2 has to indemnify Superior unconditionally for window issues,
3 you set up a situation where we are indemnifying Superior
4 for its sole negligence. And that's prohibited by the
5 statute.

6 There's case law when we are talking about this
7 clear unequivocal standard that there has to be some
8 expression of the -- in this case, of Muhler agreeing to
9 indemnify Superior for Superior's negligence. And that's
10 never done. There is just a very -- it's just the one
11 blanket unconditionally word that's in there that doesn't
12 contemplate a very specific expression of Muhler agreeing to
13 indemnify Superior for Superior's negligence. And you will
14 see the case law.

15 And that case goes on and other case too: General
16 terms are not sufficient. How else can you clear an
17 unequivocal unless you use specific terms.

18 Unconditional can mean many things. It could mean
19 that Muhler's indemnifying Superior for its sole negligence.
20 It could mean that Muhler's indemnifying the architect for
21 his negligence. It's just not defined by the contract. And
22 it's far too broad to leave it undefined. So I think it's
23 ambiguous and it's overly broad.

24 THE COURT: The word unconditionally?

25 MR. NISTAD: The word unconditionally. And another

1 point about unconditionally, there was a reference by
2 Mr. Majure that that provision stands on its own, Paragraph
3 11. Well, if the contract is not valid, the section by
4 itself goes away too.

5 And while I'm on that topic, the contract says that
6 as soon as Muhler provides -- which it did, that Superior
7 will deliver immediately a check for \$120,000. That was
8 never done. Immediately, never done. It didn't necessarily
9 have to be immediate. We probably would have waited a
10 couple of days. But they are supposed to pay us. It never
11 happened. And yet they want to enforce the contract for
12 indemnity but excuse their own breach of that contract.

13 In terms of Superior's motion for summary judgment,
14 I think they've taken a few steps in making their argument,
15 but they haven't gone all the way. And they made their
16 arguments that here's the contract; based on our reading of
17 the contract, we are entitled to indemnity. But Muhler has
18 filed cross-claims back against Superior that relate to the
19 impossibility of performing the contract and the
20 unconscionability of the contract. And I think for Superior
21 to be granted summary judgment, they would also have to show
22 that Muhler's claims back against them that relate to that
23 contract have to be -- have to have summary judgment too in
24 their favor. They've only argued half the equation. We've
25 made claims back against them that are still pending.

1 There's no motion for summary judgment pending against them.
2 They can't get summary judgment on those claims here today.
3 And so if those motions, if those claims survive, and in
4 essence defeat the operation of the contract, you've got
5 loose ends that prevent summary judgment.

6 And I mentioned impossibility. Let me give you
7 some background there. There were problems with the windows
8 discovered prior to any lawsuits. Muhler got involved and
9 we hired a man named Ken Lie to come and look at these
10 windows. And we did extensive tests. And we went above and
11 beyond the call of duty to determine how we can make this
12 building work. And Ken Lie developed a protocol on how to
13 fix the windows. And we tested that protocol. And one of
14 the tests failed. But if you read the testimony of
15 Mr. Lee's, it's in our brief, it says the one window that
16 failed under my protocol was a result of a sealant that
17 hadn't had time to cure. He comes in from out of town. He
18 races to put this protocol into place where they are
19 changing out parts and they're adding sealants. And those
20 sealants have to cure. And he did it on two different
21 windows.

22 On one window it passed. So we have evidence that
23 the window repair protocol would have worked. On another
24 window it failed, but it failed in a very technical way.
25 Instead of water streaming through the window, one little

1 small, less-than-a-teaspoon drop of water ends up in the
2 pan. The pan is there as a water management system. So
3 while it technically failed, it still contained within the
4 water management system. And, theoretically, would have
5 been channeled outside the building without consequence. I
6 only say theoretically because there's ample evidence from
7 architectural experts that say the design of the pan by the
8 architect and the failure to have that pan flashed out to
9 daylight would have taken that water and put it back into
10 the wall system. So that's problematic. But Mr. Lee's
11 point is that if I had time to let these things cure and
12 then test, I think it would have passed.

13 And so Muhler has developed a repair. And there's
14 a presuit mediation for how can we make this repair happen.
15 And, ultimately, there was an offer made to the HOA, we will
16 go in and we will apply this protocol to a whole unit and we
17 will test it, and we will test it, we will do it to a whole
18 building. So the HOA pulled the plug and says, we are not
19 going to let you touch the building anymore. And still
20 Muhler is there ready and willing. They developed the
21 repair. They want to see it work, and were never given that
22 opportunity.

23 So we are still trying to prevent the litigation
24 that would necessarily trigger 2007 agreement, and we are
25 not allowed to do that.

1 As far as Griffin goes, it is just for equitable
2 indemnity, not for contractual indemnity. They can't get
3 summary judgment on Griffin because of my claims that are
4 pending.

5 One of the other issues about the reasonableness of
6 their settlement is that throughout the litigation,
7 basically, we had a situation where Superior was prosecuting
8 the window case rather than defending the construction as a
9 whole. Muhler and Weather Shield and In The Wind and Watts
10 defended the window case. Superior prosecuted it. And
11 there's a reason why. They think this 2007 agreement gives
12 them indemnification that's much, much broader than they
13 could ever hope. And if they push all the liability to the
14 windows, they can recover, insulate themselves from
15 liability.

16 I think that pretty much sums up Muhler's position.
17 I would like to relate quickly that that standard of clear
18 and unequivocal I think is the linchpin to everything here
19 today. And just the mere presence of competing case law
20 mandates a conclusion that the language is not clear and
21 unequivocal.

22 And when you take that final step, if
23 indemnification is owed, which is not -- which we think is
24 not determined yet, but if it is owed, partial summary
25 judgment would be appropriate here today is for Muhler. And

1 that partial summary judgment would say Muhler only
2 indemnifies Superior, assuming Superior proves entitlement
3 to indemnification later on, only provides indemnification
4 for Superior for that portion of Muhler's negligence that
5 attributed to Superior.

6 I hope that was clear. If you have any questions,
7 I'm glad to answer them.

8 THE COURT: All right.

9 Yes, sir, Mr. Majure.

10 MR. MAJURE: Your Honor, I tried to write down most
11 of the things that my colleague was bringing up in rebuttal.
12 I will try to address them in turn.

13 All of these descriptions about delay issues and
14 Superior's alleged financial problems, "playing catch up"
15 cutting corners, references to the liens, that's utterly and
16 completely irrelevant to the motion at bar. This is -- it
17 has no bearing. It's just -- I don't even know how to go
18 any further into that.

19 The statement that Superior was trying to blame all
20 of its problems on Weather Shield and Muhler, well, the fact
21 of the matter is that Superior has carved out settlements
22 for each section of the building for which it was addressing
23 potential liability. We are not seeking any recovery from
24 The Muhler Company on account of JDavis's design. We are
25 not seeking any recovery on account of the stucco work or

1 the brickwork. And there is -- there's nothing in our
2 settlement that we have obtained that even addresses those
3 scopes. The settlement explicitly states that it is only
4 focused on the window and door issues.

5 And when he referred to the residual issues, those
6 are residual issues that aren't addressed by all the other
7 carved out settlements that we make. So there's nothing
8 within the amounts that we have paid in settlement that
9 bring anything from an outside third-party against them.
10 They are the only people who provided and installed the
11 windows.

12 And the only other option is the bucks that they
13 were put into, which Superior installed via subcontractor,
14 but that at best would be concurrent negligence. And
15 they -- Muhler keeps trying to use the term own negligence,
16 own negligence. Well, own negligence has two components:
17 Sole and concurrent. Sole negligence plus concurrent
18 negligence equals own negligence. And they want to gloss
19 the two together. Okay? The language of the indemnity
20 agreement and the contract -- well, the contract makes it
21 clear that our concurrent negligence does not bar us from
22 recovery. It's as simple as that.

23 And the statement that Superior has to bat a
24 thousand on 50 state case law is just flatly incorrect. You
25 are not bound by any of it. It is simply the parties are

1 offering these cases to you to show you the different
2 jurisdictions having interpreted it different ways. But at
3 the end of the day, whether it's here or whether it's at
4 trial, you are going to interpret this document as a matter
5 of law. And nothing contained in any of those other
6 jurisdictions binds you. Doesn't bind you at all.

7 So your finding of law as to what the
8 interpretation of the subcontract and the indemnity
9 agreement is the same here as it will be at trial. You are
10 going to have to -- you are going to have to find as a
11 matter of law what those instruments mean and how they are
12 affected. That's the same.

13 And, you know, going back to -- we seem to be drawn
14 to the Camp case, but I again say, the decision in the Camp
15 case says the indemnity provision at issue in Paragraph
16 6.30, which is the AIA, that is the AIA subcontract, is only
17 verbatim identification provision contained in the AIA
18 Institute of Standard Document 201 for general conditions of
19 the contract for construction. Here's what I want to draw
20 attention to: The United States Supreme Court has cited
21 this language as being a paradigm of clarity in shifting the
22 risk of a negligent indemnity's loss to the indemnitor."

23 But, again, that's for you to find. That's for you
24 to find. It's a matter of law. And the fact that other
25 jurisdictions might not agree with your decision as a matter

1 of law does not prevent you from finding partial summary
2 judgment.

3 There's a mention that Muhler paid a small portion
4 of the overall amount settled. Again, it's irrelevant to
5 whether or not they owe us -- they owe us indemnification or
6 not, but I would mention that all these things that Muhler
7 is trying to bring up, I guess to call pity or something,
8 but the only -- Muhler paid a small portion after Superior
9 on a fourth mediation had paid on the windows. Because --
10 and since they've opened the door settlement discussions in
11 the presuit mediation, the reason why we couldn't reach a
12 resolution in the presuit mediation is because Muhler wanted
13 to contribute almost zero to the repair protocol that they
14 offered while Superior was offering \$100,000. So if they
15 want to open the door there, that's not going to produce a
16 good result for Muhler on that argument.

17 But the Ken Lie's test protocol, again, that's
18 just, I guess, trying to cold pick. Ken Lie's test protocol
19 has absolutely nothing to do with whether or not The Muhler
20 Company is liable to Superior underneath its subcontract and
21 indemnity agreement.

22 And they want to make it seem as if Superior was
23 "prosecuting the window case". The documents that Superior
24 produced in discovery in the first year or two years of this
25 case, in responding to their own discovery requests, shows

1 that Superior had the initial position that this was not a
2 pervasive issue, that these windows could be fixed. But
3 then subsequent tests keep producing these results.
4 Additional testimony keeps piling up. More discovery keeps
5 coming in. So in the course of a four-year case, after the
6 first two years of doing your very best to defend them, and
7 then more and more and more evidence keeps piling up against
8 them, you eventually have to read the handwriting on the
9 wall that there's a substantial potential liability.

10 And that's what Griffin is about. Griffin is not
11 about actual mathematical liability. It's about potential
12 liability, and whether we are reasonable in looking at the
13 the evidence that exists to see if there's a real potential
14 for liability. I think it is without question there is a
15 real potential of liability.

16 Muhler wants to bring up what's fair. Well, Your
17 Honor, quite frankly, except for extreme boundaries that
18 shock the Court, in the context of this case, what might
19 seem fair to Muhler, again, is irrelevant. These are
20 sophisticated commercial entities who are negotiating
21 million dollar contracts on equal bargaining terms. What
22 they want to, you know, claim or cry about might be fair is,
23 again, irrelevant. It goes back to the contract that they
24 signed and the agreement they negotiated.

25 Now, the language about being unconditional being

1 ambiguous, I don't know what's unambiguous about
2 unconditional. It's without condition. Here's the one
3 detail I want to bring up, and it runs into it with Weather
4 Shield. Muhler's liability is predicated on both the
5 subcontract and the 2007 agreement. Whereas, Weather
6 Shield's is only predicated on the 2007 agreement. The
7 subcontract, the original subcontract language makes it
8 absolutely clear that concurrent negligence is not a bar to
9 full recovery.

10 So what we are saying, Your Honor, is that the only
11 thing that Muhler should be able to argue at trial is
12 whether or not what we settled was on account of outside
13 third parties, which I think you can decide that here by
14 looking at the exhibits in the settlement agreement. You
15 can see it doesn't cover that. Doesn't extend to that.
16 It's only for the windows and doors.

17 But on the outside, on the outside occasion, that's
18 probably as good as it gets, or their being able to argue
19 that the expenses that we incurred -- which again, Your
20 Honor, we are not moving for summary judgment. We are
21 moving for partial summary judgment. We are only asking the
22 Court to give us the declaration of liability. They still
23 get to go to court and wade through our legal bills and
24 argue that certain things might not be applicable or certain
25 things in our legal bills might be unreasonable. I'm not

1 saying they can't do that at trial.

2 What we are saying, Your Honor, is that they are
3 liable. And they are going to go into trial from a posture
4 of liability. And everything that they are going to be able
5 to do from that point forward at trial is only going to be
6 directed towards the reasonableness of our attorneys' fees
7 and what their fair share of it is, and the reasonableness
8 of our settlement if the Court decides -- if the Court can't
9 decide that Griffin gives it to us today.

10 The repair protocol does nothing for Muhler at
11 trial that they are referring to. And the reason it does
12 nothing for Muhler at trial is because none of us here, Your
13 Honor, have any ability to compel the plaintiffs to accept
14 the repair protocol. We can't -- they make it sound as if,
15 if we only had a chance, if we only had a chance to go and
16 fix these windows, well, we would be arrested for
17 trespassing, just like they would, if we just went on to
18 these plaintiff's properties and start repairing their
19 windows. We can't control whether or not the plaintiffs
20 decide that the repair protocol is acceptable or not.

21 And so then going to trial, to a full-blown trial
22 with the plaintiffs, hoping that the repair protocol is
23 going to be what's going to save us, again, that's just rank
24 speculation. And it doesn't have anything to do -- the
25 repair protocol has nothing to do with whether or not Muhler

1 is liable to us under the subcontract in the agreement.

2 MR. NISTAD: I will be very brief Your HONOR THE

3 COURT: Yes, sir.

4 MR. NISTAD: Mr. Majure did just acknowledged that
5 Superior is not seeking indemnity for the negligence of
6 JDavis. And there's testimony that the design was wrong and
7 that the contract administration, that typically was
8 performed by JDavis in process of architect coming to the
9 site during construction and inspecting the site to make
10 sure the work conforms with the contract documents, there's
11 testimony that that was insufficient. That -- their
12 negligence, JDavis's negligence applies to the windows.

13 Superior at this point is looking for complete
14 reimbursement of everything it claims it paid toward the
15 windows from Muhler and Weather Shield without regard to
16 JDavis's contribution to that situation. That is the
17 situation. We are being required to indemnify JDavis And
18 that's just not how these contracts can be read. There's no
19 mention of JDavis or the architect in these documents at
20 all, in fact, unless you look at the subcontract that says
21 Muhler is not responsible for indemnifying Superior for the
22 negligence of the architect.

23 In terms of concurrent negligence, and this kind of
24 focuses on the last part of the boilerplate language that we
25 talked about so much. In our subcontract, it's Section 2.1,

1 it's Subpart A, and it's the language that says: Regardless
2 of whether it is caused in part by a party indemnified
3 hereunder.

4 What that does is it eliminates the defense of
5 indemnity that if Superior is negligent whatsoever, then no
6 indemnification is allowed. It takes this out of the
7 equitable indemnity kind of situation, where any little bit
8 of negligence by Superior would eliminate all indemnity.

9 It also is relevant to those states that had in the
10 past and may still have contributory negligence as a
11 complete bar. Any little bit of negligence would prevent a
12 recovery. So it preserves the possibility of negligence
13 despite their negligence. It does not go so far as to say
14 any little bit of negligence by Superior has to be
15 indemnified by Muhler.

16 I think that's sufficient for right now. Thank
17 you very much..

18 THE COURT: All right.

19 MR. MAJURE: Your Honor, I'm very pained to tell
20 you that you are going to experience substantially the same
21 argument that you just went through when we go through
22 Weather Shield. Being that it is 12:40, I would
23 respectfully recommend that we perhaps break for lunch
24 before we commence that into the next motion.

25 THE COURT: Suits me. What time do you want to

1 start back?

2 MS. VARNADO: Take an hour?

3 THE COURT: All right. Two o'clock. All right.
4 We will start back at 2 then.

5 (Luncheon recess was taken)

6 THE COURT: Who's next?

7 MR. MAJURE: Your Honor, The Muhler Company has a
8 motion for partial summary judgment that is, I guess you
9 could say, the direct contrapositive of Superior's motion
10 for partial summary against it. And Mr. Nistad can
11 elaborate further on this, but I believe however you decide
12 Superior's motion for partial summary judgment against The
13 Muhler Company will be completely dispositive of The Muhler
14 Company's motion for partial summary judgment against
15 Superior.

16 MR. NISTAD: I'm not sure that's exactly right. I
17 think we've addressed all the issues in the motions when we
18 argued the first time, and so I'm not sure you need to hear
19 anything extra from us. I have some issues with Henry
20 Brown's Concord and Cumberland too that might have to be
21 addressed, but at this point, it's probably best to move on
22 to the Weather Shield/Superior motions, and then come back
23 to mine later on.

24 THE COURT: Okay.

25 MR. NISTAD: If that suits you; just trying to be

1 as efficient as possible. Because I'm sure you want to hear
2 me say over again a second time; it's so riveting.

3 THE COURT: We can move on to Weather Shield,
4 that's fine.

5 MR. MAJURE: Give me a brief moment, Your Honor, to
6 pull out that section of the file. It's rather large.

7 MR. BROWN: Your Honor, Weather Shield both have
8 basically the same motion subject to some differences
9 against Concord. I think it would be more efficient to let
10 both of them argue, and I can respond to both of their
11 motions. They are really the same set of circumstances.

12 THE COURT: All right.

13 MR. MAJURE: Your Honor, Superior's motion for
14 partial summary judgment is almost identical to -- I mean,
15 Superior's motion for partial summary judgment against
16 Weather Shield is almost identical to its argument for
17 partial summary judgment against The Muhler Company. The
18 main difference being is that the 2007 agreement that we
19 referred to, the June 2007 agreement, which is signed by
20 both Weather Shield and Muhler, is the sole mechanism by
21 which Superior is seeking contractual indemnity against
22 Weather Shield. There is no subcontract that stands apart
23 as we have with Muhler.

24 So with Muhler, you are looking at two instruments;
25 the subcontract and the agreement. Whereas, with the

1 Weather Shield, you only have to deal with the agreement.

2 And the agreement has a separate clause that
3 applies to Weather Shield. And I do need to correct myself
4 as to Superior's memorandum of law in support of partial
5 summary judgment against Weather Shield. Weather Shield
6 correctly pointed out that in my memorandum, I mixed up the
7 language of the indemnity paragraph that pertains to Weather
8 Shield with the paragraph that pertains to Muhler. So I
9 would ask the Court to only crave reference directly to the
10 agreement itself as to its operative language.

11 Weather Shield also pointed out correctly that the
12 potential scope of recovery for Superior as opposed to --
13 for Superior against Weather Shield is not the same as the
14 potential scope of recovery against The Muhler Company. So
15 I wanted to clarify those issues at the outset.

16 Weather Shield has adopted, I will just say, the
17 large majority of The Muhler Company's arguments as to
18 conditional, broad and generalized language of indemnity
19 being inadequate to allow one to recover an indemnity
20 notwithstanding one's own concurrent negligence. So I won't
21 have to address as many of the same arguments in duplicate.
22 In essence, Superior's position is that the agreement, which
23 speaks for itself, we contend its unambiguous. Weather
24 Shield has introduced affidavits of the attorney that
25 negotiated the agreement on behalf of Weather Shield in

1 support of its arguments that the agreement is ambiguous.
2 And, therefore, we need to look to parole evidence. And
3 thus, the affidavits which the attorney who negotiated the
4 agreement provides what his view of what the agreement
5 should be. Your Honor, we would contend --

6 THE COURT: It wasn't his view that he participated
7 in drafting an ambiguous agreement, was it?

8 MR. MAJURE: Yes. The very same attorney who
9 claims that the agreement is ambiguous is the same attorney
10 who --

11 THE COURT: Drafted the agreement?

12 MR. MAJURE: -- participated in drafting it. Yes,
13 Your Honor. We contend that the agreement is not ambiguous,
14 and that the affidavit of Mr. Meyer, I believe it is, who
15 assisted in drafting the agreement on behalf Weather Shield,
16 should be disregarded as parole evidence. The agreement
17 itself clearly states that it is the entire agreement that
18 encompasses the complete agreement between the parties.
19 With the fact that it's being exhaustively negotiated by
20 counsel for one of the lawyers who came in to draft it, to
21 now come back and explain this is an ambiguous instrument
22 and how it really should be interpreted we think should be
23 disregarded.

24 Again, the overall essence of Weather Shield's
25 counter argument to our motion for partial summary judgment

1 comes out of their interpretation of how the agreement as a
2 whole should be interpreted. They, like The Muhler Company,
3 they agree that Superior can't settle the claim. It is
4 their contention, like The Muhler Company, that the way
5 Superior would have to follow the various mechanisms of the
6 2007 agreement to ultimately gain recovery is by never
7 asserting a claim against Weather Shield or Muhler Company,
8 even if it is a third-party lawsuit and where there are
9 certain cross-claims. We can't do that. We have to go all
10 the way through the course of litigation. We can't settle.
11 We cannot settle these claims. Even if everybody else
12 settles, even if they settle, we have to go -- we have to go
13 forward and have a trial or an arbitration and have that
14 being reduced to judgment.

15 THE COURT: Do you think that's one of their weaker
16 arguments?

17 MR. MAJURE: That's a difficult question, Your
18 Honor, because I think several of them are pretty weak.
19 When you look at the language of what the clause says as far
20 as being determined by a Court or arbitration, it simply
21 does not say by virtue or by means of a jury verdict or a
22 bench trial or even having a verdict at all. It's just
23 showing that there has to be a mechanism going through the
24 Court or arbitrator to ultimately gain the recovery. So --
25 nowhere in the agreement does it say that the right to

1 settle, which is a vital, fundamental right of a party in
2 any type of complex litigation, is compromised. And it's
3 just -- I think one -- the Court can almost take judicial
4 notice of how fundamental the right of settlement is. And
5 to just waive that right by implication when there's nothing
6 that says that you are waiving your right to settle a
7 third-party claim, it just does not make any sense.

8 THE COURT: Well, if there is yet to be a Court
9 determination, would that make a summary judgment motion on
10 that basis premature?

11 MR. MAJURE: I'm sorry, Your Honor?

12 THE COURT: Would that make a summary judgment
13 motion on that basis premature?

14 MR. MAJURE: I believe so, Your Honor. I believe
15 so.

16 THE COURT: Well, I mean, I'm saying would it make
17 your summary judgment motion on the basis of seeking to
18 enforce the agreement, would it make it premature because it
19 has yet to be determined? It hasn't been determined by any
20 court at this point.

21 MR. MAJURE: Well, the amount is to be determined,
22 Your Honor. It doesn't say -- it doesn't specifically say
23 that liability has to be -- of Superior has to be
24 determined; the amounts have to be determined.

25 THE COURT: That's why you are seeking partial

1 summary judgment?

2 MR. MAJURE: That's why we are seeking partial
3 summary judgment. I stress again and again and again, we
4 are asking the Court to find -- to make a finding of
5 liability against The Muhler Company and Weather Shield. We
6 completely recognize that there's going to have to be a
7 damages hearing that's going to address how much of our
8 attorneys' fees should or should not be allocated to these
9 defendants. And when they are not there, those particular
10 aspects are reasonable. We can't address that here today.

11 THE COURT: Would that damages hearing take the
12 form of litigating the entire construction defects case?

13 MR. MAJURE: Not if the Court decides that the
14 amount paid by Superior in settlement is, as a matter of
15 law, recoverable under its contractual indemnity rights. If
16 that is determined, then all the Court need decide is of
17 what remains in terms of costs and attorneys' fees should be
18 allocated towards these defendants. That's what the Court
19 will have to remain to decide.

20 THE COURT: What if the Court buy's Mr. Nistad's
21 argument that it's not an all-or-nothing proposition, that
22 you have to prove that it's solely related to something they
23 did wrong?

24 MR. MAJURE: Well --

25 THE COURT: Or much more limited than certainly

1 they wouldn't be responsible for what third-party might have
2 done?

3 MR. MAJURE: Well, Your Honor, if we are going to
4 go back to Muhler, what I will say is that we agree that we
5 cannot hold Muhler responsible for the negligence of the
6 architect, but we are not asking that. We are not seeking
7 the Court to hold them responsible for the negligence of the
8 architect, because we did not pay for the negligence of the
9 architect. We did not settle the claims against the
10 architect. We did not settle the claims of the plaintiffs
11 against the architect. The architect simply is not part of
12 the equation. In fact, no other subcontractor is part of
13 this equation, because we only -- we are only bringing a
14 specific settlement that only apply to the windows. And the
15 only people who could be responsible for the windows is
16 either Muhler and subcontractors or Superior, or if they
17 want to argue a third-party that sits outside.

18 But what you keep coming back to, Your Honor, is
19 that we did not settle -- we did not settle the liability of
20 any third-party outside third-parties, whether it be tenants
21 or passersby or cleaning people or whatever. We didn't
22 settle any of their liability. We are only settling what
23 comes to Superior and downward to their own subcontractors,
24 although they do have their own settlements.

25 THE COURT: Did you all settle with the architects?

1 MR. MAJURE: No, Your Honor, Superior has not
2 settled with the architects.

3 Does that answer your question, Your Honor?

4 THE COURT: Yes, sir.

5 MR. MAJURE: So going back then to Weather Shield,
6 we believe that the agreement is adequate to show a finding
7 of liability. It's a threshold finding. Weather Shield is
8 going to be entitled to make its argument about the
9 proximity of causation as to our attorney's fees for what we
10 are seeking as to whether or not a portion of our attorney's
11 fees are reasonable. There's a number of things they might
12 want to raise. And I can't get rid of those here at partial
13 summary judgment or summary judgment. That's still going to
14 have to be addressed.

15 But we believe that the language of the 2007
16 agreement is sufficient for the Court to make a threshold
17 finding of liability against Weather Shield. And then the
18 only thing that would be remaining is any mitigating
19 arguments that Weather Shield might would have as to the
20 reasonableness of the attorneys' fees that we paid or
21 whether it was proximately caused by those fees.

22 We still likely argue with The Muhler Company, we
23 still argue that the Court can find in a bench trial as a
24 matter of law that the settlement we made is reasonable. It
25 doesn't require an exacting analysis. There's a range of

1 reasonableness. And if what we have done in settlement
2 falls within that range, if the Court views that what we
3 have provided is more than adequate to show that it's
4 reasonable, then I don't think the Court need go any
5 further..

6 Now, Weather Shield is going to take a different
7 stance. They are going to say, we reserve our right to draw
8 upon anything and everything that might be out there to show
9 you that it's unreasonable. But we think that the law shows
10 that if we fall within the parameters of reasonableness,
11 that you could -- Your Honor, you could very well decide
12 that it's too close to call, we don't push the needle far
13 enough over-the-range of reasonableness for you to just
14 decide that's the case.

15 THE COURT: That goes back to the earlier question
16 of finding to make -- if we reach that point, and I make
17 such a determination of reasonableness, how much would I
18 have to hear to make that determination?

19 MR. MAJURE: How much would you have to hear?

20 THE COURT: Yes, sir. Because, typically, on any
21 issue that involve what is reasonable, that's a question of
22 fact for the jury, and then the matter is fully litigated
23 and the jury determines what's reasonable. So in this
24 context, you are saying it's some type of a short-circuit
25 way of determining what's reasonable?

1 MR. MAJURE: Yes, Your Honor. Although I will
2 admit that it's not an extremely strong argument on our
3 behalf. There isn't specifically a case that says -- that
4 defines my argument to you in the explicit terms that I'm
5 placing it to you in. But I do believe that you can --
6 reasonableness is a range of determination. And if you find
7 that it falls within that range, I think at a bench trial,
8 you are cable or allowed to do that. I think if we were in
9 a jury trial, it might be a different situation. But
10 because you can examine the facts that are being presented
11 to you and evaluate them at summary judgment, I think that
12 you could potentially go there.

13 But we are differentiating, though, the amount paid
14 in settlement and the attorneys' fees and other costs. So,
15 again, we are seeking a threshold finding of liability. In
16 addition to the threshold finding of liability, we would
17 like the Court to decide that the amount paid in settlement
18 is recoverable as a matter of law. And then everything that
19 relates to attorneys' fees and costs, et cetera, that's
20 going to have to be addressed at trial. The Court could
21 disagree with me and decide that the settlement -- the
22 amount paid in settlement can't be addressed today, it
23 cannot be addressed at summary judgment. But at a minimum,
24 the Court could find the threshold level of liability and
25 find Weather Shield violated.

1 I think that that covers most of what I wanted to
2 say about Weather Shield. Again, a lot of the arguments
3 made by Weather Shield and The Muhler Company are very
4 similar. The only significant difference that I can see is
5 being Muhler's arguments related to the subcontract, which,
6 of course, we have no culpability to Weather Shield.

7 MR. BROWN: Your Honor, not to butt in. Since I am
8 also party -- not a party, but have rights in the
9 agreement -- your questions I think are dead on point, and I
10 have some comments on them. I will hold them, but I don't
11 want to get wound up. I would like to address your
12 questions.

13 THE COURT: All right.

14 MR. BROWN: I think there are some pretty clear
15 answers in the case law.

16 THE COURT: Okay. Yes, ma'am.

17 MS. VARNADO: May it please the Court, Your Honor.
18 Christie Varnado for Weather Shield. Do you have a copy of
19 my motion in opposition? Would you like a hard copy?

20 THE COURT: Yes, please.

21 MS. VARNADO: In addition, we had sent you
22 previously a notebook with exhibits. This notebook has
23 additional exhibits that were addressed after we sent those
24 to you.

25 THE COURT: All right. Thank you.

1 MS. VARNADO: Weather Shield's memo in opposition
2 to Superior's summary judgment motion, we addressed, which
3 Mr. Majure cleared up, that he had improperly stated the
4 language in Paragraph 12 of the June 2007 agreement, which
5 applies to Weather Shield. If you are looking in Weather
6 Shield's exhibits, that June 2007 agreement is found at 15A.
7 And, then the operative language that specifically addresses
8 Weather Shield is in Paragraph 12. But to make things
9 easier, I have taken that language out, Your Honor, and just
10 put it in a larger, easier-to-read form, because that
11 language is controlling.

12 THE COURT: 15A, you mean of the original?

13 MS. VARNADO: Of Weather Shield's exhibits that
14 it's using for all of its memoranda.

15 THE COURT: I'm right here.

16 MS. VARNADO: 15A, Paragraph 12, is the indemnity
17 paragraph that Superior is seeking to use to recover
18 contractual indemnity against Weather Shield. The first
19 step in applying Paragraph 12 to Weather Shield is
20 demonstrating that the entire agreement is enforceable. And
21 counsel has admitted that they've never paid Muhler the
22 consideration due under the terms of the contract. Without
23 consideration, the contract itself fails. The other
24 consideration --

25 THE COURT: When you say -- was that in connection

1 with him saying they deposited money in escrow?

2 MS. VARNADO: Yes. There's an affidavit. You will
3 find that Exhibit 13 as Steele B. Windle, who was the
4 attorney for Superior's -- I guess he was Superior's
5 personal counsel at one point. And he testifies that he has
6 over \$50,000 in his escrow account, and it has remained
7 there to this day. So Superior paid its own attorney the
8 money. So its own attorney has the money, but they never
9 paid it to Muhler, to this day.

10 And so that's an essential component. You want to
11 enforce the contract, the contract has to be supported by
12 consideration. The contract hasn't been supported by
13 consideration, it is not a contract, you can't enforce it.

14 The other issue is in 15A, in the June 2000
15 agreement, is Paragraph 13, where it talks about sufficient
16 consideration for the agreement accepted by Muhler and
17 Weather Shield is Superior's decision to forego litigation
18 against Muhler and Weather Shield regarding window and door
19 defects. It doesn't say Superior couldn't sue us for
20 indemnification, or if we breached this contract, but it
21 certainly says you can't sue Muhler and Superior -- or
22 Muhler and Weather Shield, in my case Weather Shield, for
23 window and door defects. Yet, in their cross-claims, in
24 this lawsuit, every single one of them contains a breach of
25 warranty claim alleging windows and doors are defective. So

1 again, they violated the contract. They breached it and
2 aggregated the consideration, which is to forebear from
3 lawsuit.

4 It would be different if the lawsuit had only been
5 for indemnity for breaching this contract or something to
6 that effect. But they violated the exact terms that they
7 said they wouldn't violate in Paragraph 13 by suing us for
8 defective windows and doors.

9 THE COURT: They are not alleging that you've --
10 that y'all first breached something that then caused them
11 to --

12 MS. VARNADO: I have not ever seen that.

13 THE COURT: Or they are saying, well, since someone
14 else sued them, then this becomes a compulsory cross-claim
15 or something that necessitates them suing you, so,
16 therefore, despite the language, they could just do it
17 anyway?

18 MS. VARNADO: Well, they did say that -- I think
19 that's what he said, is because Superior was sued in the
20 same lawsuit that Weather Shield was sued in, that they were
21 entitled somehow to bring this cross-claim for breach of
22 warranty. But that's not -- that doesn't excuse them. Just
23 because they are sued in the same lawsuit doesn't excuse
24 them from their agreement to forebear from suing Muhler and
25 Weather Shield for defective windows and doors.

1 THE COURT: Doesn't justify their breach of the
2 agreement?

3 MS. VARNADO: Correct.

4 THE COURT: Which you say is without consideration?

5 MS. VARNADO: That's right. Exactly. So that's
6 the first prong, is Weather Shield's, in defense and in
7 prosecution of Weather Shield's summary judgment motion,
8 that this June 2000 agreement is not enforceable because of
9 lack of conversation.

10 But then if the Court should find there is
11 sufficient consideration or there wasn't a breach, and finds
12 that the document itself is enforceable, the next thing to
13 do is it's got to look at the language in Paragraph 12,
14 which itself determines the duties and obligations of
15 contractual indemnity.

16 And so you've got -- what Superior is doing is
17 ignoring most of the language in Paragraph 12 by saying,
18 because we settled, there's a contractual indemnity case out
19 there that allows settling parties to recover under an
20 indemnity clause; therefore, Superior gets to recover under
21 an indemnity clause. But they are ignoring the language of
22 the indemnity clause they are seeking to enforce. And you
23 can't do that.

24 What kind of indemnity are they entitled to is only
25 the indemnity in the language. And the language here has

1 significant components that will trigger the indemnity. The
2 first component is a suit by a subsequent owner alleging
3 that the windows are defective or don't comply with the
4 warranties. The other component is that they must incur
5 damages as determined by a court of competent jurisdiction
6 or award of arbitration. You can't leave that second part
7 out until later on. That's all a condition precedent to
8 them pursuing an indemnity claim against Weather Shield.

9 THE COURT: Can you repeat that for me again
10 please?

11 MS. VARNADO: Certainly. The language, in the
12 event either Superior or Concord are sued on behalf of the
13 subsequent owner alleging the windows or doors are
14 defective, and incurring damages determined by a court of
15 competent jurisdiction or award of arbitration, both are
16 conditions precedent to triggering liability -- excuse me,
17 triggering indemnity recovery from Weather Shield.

18 What Superior argues is the only triggering event
19 is the fact that they were sued. So they take the initial
20 clause "in the event of", but they ignore the end of the
21 sentence, which also includes "damages incurred as
22 determined by a court or an arbitrator." And that's just
23 like what my children do if I tell them, as long as it's not
24 raining, we will go to the pool tomorrow if you get your
25 chores done tonight. The next day, they hadn't done their

1 chores, but they come to me, mom, it is not raining, we are
2 going to the pool. And I say, no, we are not going to the
3 pool, because you didn't do your chores last night. And
4 that's what they are doing, is trying to collect indemnity
5 without doing their chores.

6 They can't just say, just because we are sued, we
7 get indemnity. They have to be sued and they have to have
8 incurred damages determined by a court or an award. Now,
9 they may not like that, but that's what they signed. That's
10 what they agreed to.

11 THE COURT: Can they still -- can they wait until
12 after -- since this is scheduled for a bench trial, can they
13 wait. And if they win at a bench trial, then pursue this
14 indemnity per this paragraph, or are they waiving it by
15 seeking to collect it at this time, or what's your view of
16 all that?

17 MS. VARNADO: Certainly. There's precedent in
18 South Carolina for this type of clause. It's called a
19 no-action clause. And no-action clauses set forth that if
20 you don't have an award, then there's no right, no action
21 accrues. That's what this language is, it creates a
22 no-action clause. No action for indemnity accrues unless
23 there was a judgment, unless there was an award.

24 That's what was set up here by the parties.
25 Otherwise, let's just take it out of the fact that we have a

1 bench trial scheduled, when the parties drafted this, you
2 have to believe that they intended this lawsuit to happen
3 before Superior could recover. So there would have to be
4 some big lawsuit that Superior settles, yet, they also have
5 Weather Shield in here and they have to have a damages
6 hearing. And that's not what's happened here. If this
7 pattern follows those no-action clauses, where -- if a party
8 actually has a judgment against it, that's when the right of
9 indemnity has accrued.

10 If you are engaged in settlement, if you -- like
11 here, the parties have paid for their own issues, is what is
12 contemplated under this type of agreement. If the parties
13 voluntarily pay for their own -- the claims against them,
14 there's -- then the indemnity isn't triggered.

15 The other thing, by interpreting it as Superior
16 wishes this clause to be interpreted, what that does is also
17 confuse indemnity with a duty to defend. Because indemnity
18 is triggered only after liability is determined; whereas, a
19 duty to defend is triggered by virtue of the fact a lawsuit
20 is filed. And here the word defend is not in this document.
21 It's not in this paragraph. Defend is not there.

22 THE COURT: So what do you make of counsel's
23 argument that he wants a partial summary judgment. He wants
24 me to determine the rights of the parties, and then later
25 on, determine damages?

1 MS. VARNADO: Right. What I make of it is he's
2 only reading -- he's basing his whole argument that he's
3 entitled to indemnity from Weather Shield on the first
4 clause in the sentence, is that Superior's been sued because
5 of defective windows, and ignoring the remainder of the
6 conditions in the paragraph. And so then he's also ignoring
7 that there's no language at all in here saying that Weather
8 Shield should be indemnifying Superior for Superior's
9 negligence, nothing that comes close to the clear and
10 unequivocal standard, that language that you see in other
11 contracts, regardless of whether the indemnity is partially
12 liable. There's nothing like that. It simply is completely
13 silent on that issue. My argument is because that's not
14 what was intended by the parties. And being silent on that
15 issue does not meet the clear and unequivocal standard.

16 So Superior who has this settlement thinks that
17 they can just have this Court determine that the settlement
18 is reasonable, but ignoring the language in the paragraph
19 they are trying to enforce.

20 THE COURT: Does the word unconditionally, does
21 that clear it all up, you agree to pay whatever,
22 unconditionally?

23 MS. VARNADO: Well, unconditionally to me means --
24 again, would deal with that which was determined by a court
25 of competent jurisdiction in the award. It's a troublesome

1 word in that there's conditions within the paragraph itself.
2 There's conditions about in the event, and there's
3 conditions concerning when damages are payable. So it's an
4 odd word to be in there.

5 Nonetheless, it certainly does not in any way --
6 and there are cases out there that say that unconditionally
7 indemnifying doesn't address the clear and unequivocal
8 language that is needed for Superior's own negligence to be
9 indemnified.

10 It is arguable also that the way -- having
11 unconditionally in there with these conditions could make
12 this paragraph ambiguous. Now, Mr. Meyer, whose affidavit
13 is Exhibit 15, does not say that the paragraph is ambiguous
14 or the contract is ambiguous. It is true he participated in
15 the drafting of the agreement, and he does not say that it
16 is ambiguous. I say, as counsel for Weather Shield, that
17 it's ambiguous. Mr. Meyer, as a former employee of Weather
18 Shield, merely goes through the documents that support the
19 parole evidence as to what the parties' determination was
20 when they drafted the agreement.

21 And what Mr. Meyer tells us is, first of all,
22 initially there was a paragraph in there that contains all
23 of the items that Superior wants to read into Paragraph 12.
24 It contains the duty to defend. It contains an
25 unconditional indemnification for Superior for its own

1 negligence, for anything under any reason. It contains an
2 award of costs and damages and expert witness fees and all
3 kinds of things. All those goodies, there are many of
4 those, were stricken from the language that became Paragraph
5 12.

6 And that's what Mr. Meyer, his affidavit, shows the
7 previous drafts and e-mail communications between the
8 counsel where the word defend, as in duty to defend, was
9 stricken. And he sets up how the word liability was
10 stricken and replaced with damages. He further says Weather
11 Shield had no intention to pay for anybody's negligence and
12 had no -- but their own, and no intention to pay for
13 anybody's negligence, pay just because someone decided to
14 settle.

15 The language is clear as to what -- let's see. It
16 is in -- Weather Shield will indemnify them for the cost
17 which they become responsible as determined by a court of
18 competent jurisdiction after exhaustion and waiver of all
19 appeals directly attributable to Weather Shield. And that's
20 what Mr. Meyer says is the language they were drafting to
21 put into Number 12.

22 so Mr. Meyer isn't saying or testifying that the
23 contract he drafted was ambiguous. He simply is setting
24 forth what the parole evidence is that supports Weather
25 Shield's interpretation of this contract.

1 Now, the next step, and some of the questions that
2 you've asked, Your Honor, is, well, if I decide that there's
3 indemnity under this agreement, how much of a trial would we
4 need to have? What do we need to hear? And that's when you
5 need to look at Paragraph 11 and contrast it with Paragraph
6 12. Because in Paragraph 12, Weather Shield is responsible
7 only for allegations that the windows are defective or don't
8 comply with the warranties or representations in the June
9 2007 agreement, which has statements about warranties.

10 On the other hand, Paragraph 11 discusses Muhler
11 and Muhler's responsibilities, which are allegations that
12 one or more of the windows and doors don't comply with the
13 original and amended contract documents, or are defectively
14 installed.

15 So in order to decide what Muhler has to pay for
16 and what Weather Shield has to pay for, there's a great deal
17 of evidence that's going to need to come in.

18 And, thirdly, because this agreement does not cover
19 Superior's negligence, we are going to have to take out
20 whatever Superior's negligence caused. And so this is not a
21 shortcut -- just finding that there is a duty to indemnify
22 by Weather Shield under this agreement is not a shortcut to
23 then the next step being we are going to award Superior
24 their settlement costs and then just have damages hearing or
25 attorneys' fees. It just simply doesn't work that way,

1 because their settlement encompasses, self-servingly, just
2 the money they decided to allocate towards windows and doors
3 and not -- without any finding as to what portion of window
4 and door liability that settlement encompasses.

5 What's more, again, that's the whole reason why you
6 have a court determine that stuff, because the parties can
7 come up with whatever suits them best. The plaintiffs and
8 Superior can come up with whatever suits them best in terms
9 of what we allocate towards windows and what we allocate
10 towards stucco and what we allocate towards residual
11 liability. And plaintiff doesn't necessarily care, but
12 there's case law out there that says if Weather Shield is
13 not involved in the -- in that determination of the
14 settlement, we are not bound by those allocations by the
15 parties.

16 And that's when -- although I don't think -- I
17 really don't think that Superior has reached the threshold
18 for the Griffin factors. And the Griffin factors, Griffin
19 comes about -- Griffin is an equitable indemnity claim. It
20 is then applied by the Supreme Court in a contractual
21 indemnity case. But that case started with a finding that
22 there was no negligence on behalf of a party seeking the
23 indemnity. So the Griffin factors are contemplated to be
24 used when one party is innocent to fault and the other party
25 is not. In fact, the second prong talks about the innocence

1 of the party.

2 But if you were to find that it was to be
3 applicable, in looking at the Griffin prongs, then the first
4 prong under Griffin is the settlement is bona fide and free
5 from collusion. And that's where we talk about the fact
6 that this settlement was entered into by plaintiffs and
7 Superior with an allocation of over 75 percent of the amount
8 of damages or the settlement amount that Superior pays to
9 plaintiffs all to be windows and doors, regardless of the
10 fact that the entire skin of the building that plaintiff's
11 experts are saying all the stucco has got to come off, all
12 the brick, all the stone, the windows have to come out not
13 only because they are defective, but also because the pans
14 put in by Superior are wrong and those have to come out.
15 So -- and the steel, the claims about steel, the claims
16 about the HVAC and the electrical and the roof and a whole
17 range of things, yet, they have allocated 75 percent to the
18 windows because that benefits them because they want to
19 recover under the agreement.

20 Plaintiffs don't care. Plaintiffs collude with
21 them and go along with it because it doesn't affect
22 plaintiffs because plaintiffs are going to get what they get
23 from the window defendants, and it won't effect what happens
24 with Superior.

25 The other issue is whether the decision to settle

1 was reasonable under the circumstances. And that's the
2 prong, the second prong which mentions the fact because the
3 party's innocent. But here the party is not innocent. The
4 party clearly has liability of its own. And the decision to
5 settle here, if you are going to settle window claims, why
6 would you settle before the window defendants have settled?
7 Stands to reason you are going to pay a whole lot more if
8 you settle window claims before the window defendants have
9 settled. Logically, you wait until plaintiff, and hopefully
10 plaintiff will get all the money they want out of the window
11 defendants and doesn't want anything from you for windows.
12 But they settled months before the window defendants
13 settled.

14 And then finally, talking about whether the amount
15 is reasonable in their settlement allocation, they have not
16 submitted any admissible evidence to prove their claim,
17 either that the decision to settle was reasonable or that
18 the amount was reasonable. Other courts have looked to
19 expert witness testimony on those issues. Superior believes
20 that the Court can make that determination on its own,
21 apparently without any evidence. And then in so doing, in
22 their damages that they allege in their brief, they include
23 payment to plaintiffs for all the windows and doors of the
24 project, ignoring the fact the plaintiffs represented only
25 14 units out of the 27 units of the project, per the master

1 deed, the HOA, nor the plaintiffs' own windows in the units
2 of the nonparties, therefore, they would not be entitled to
3 recover for the windows and doors in units that aren't
4 parties to the action.

5 But that's not what -- the repair estimates they
6 provided and they are claiming they base their settlement
7 numbers on, are all of the windows and doors in the project.
8 But it would be considerably fewer, only the 14 units that
9 are involved, and the few that are in the common areas owned
10 and maintained by the HOA.

11 And, likewise, the damages that they are relying on
12 for the loss of use costs, they are calculating 100 percent
13 of those to allegedly defective windows, not discounting
14 that for the fact that the brick has to be removed,
15 balconies removed, redone, all of that. And they are
16 calculating it on 27 units, not the 14 units in the common
17 areas. And so what -- the number that they have is greatly
18 inflated.

19 The window claims could be evaluated less than half
20 a million. And the window defendants paid more than that in
21 their settlement with plaintiffs. So, arguably, there was
22 no reason for Superior to pay any money to the plaintiffs
23 for window and door claims.

24 I think that covers Weather Shield's argument in
25 opposition to the motion.

1 THE COURT: This whole motion indemnity, the right
2 to be indemnified by a joint tortfeasor or a person jointly
3 responsible under the construction defects, I don't know if
4 you call them a tortfeasor or not --

5 MS. VARNADO: Yes.

6 THE COURT: Is this something relatively new in the
7 law or has it come about as a result of the legislative
8 enactments or is this a body the law that has no history in
9 South Carolina law jurisprudence?

10 MS. VARNADO: Your Honor, my understanding is this.
11 Obviously, under standard, either contractual or equitable
12 indemnity, both of those concepts deal with someone who is
13 not a joint tortfeasor. The equitable indemnity
14 requirements are that one who is not -- the one who has
15 clean hands can recover indemnity from one who has caused
16 him to incur liability.

17 THE COURT: Well, the elevator company, innocent
18 party causes a third-party to have to pay money so they get
19 indemnified.

20 MS. VARNADO: Right. And under Otis, in the
21 elevator, the elevator company was adjudged to have clean
22 hands, to have been innocent, had owed no duties to the
23 party who was injured. And so their sole liability -- their
24 hands were clean. They were not a joint tortfeasor.

25 There are instances though where under contractual

1 arrangement, a joint tortfeasor can get indemnity from the
2 other joint tortfeasor, but it has to be clear and
3 unequivocally expressed in the contract. And in the June
4 2007 agreement, it is not clearly and unequivocally
5 expressed in that agreement.

6 So it's not a new concept. It's just simply -- in
7 the end, if you are coming with unclean hands and are trying
8 to get indemnity, then the contract under which you are
9 seeking indemnity better say that it doesn't matter if you
10 are partly responsible for the liability, you can recover
11 anyway.

12 And there's a new case that just came out, which is
13 the Ashley II case. But that case is not applicable to what
14 we are talking about today. That is strict liability under
15 CERCLA and the Court specifically limited that decision to
16 those circumstances, and also in a footnote, though, noted
17 they weren't talking about the joint liability situation
18 because in the end, all the liability that was being sought
19 for was during the time period when the other party didn't
20 know. So they really -- they had clean hands in relation to
21 the time period they were seeking to recover.

22 THE COURT: All right.

23 MR. NISTAD: Your Honor, can I add a couple of
24 points because you guys started talking about Muhler a lot
25 when this started. I thought I was off the hook for a

1 little bit.

2 I would just like to point out that Superior also
3 has claims pending against the architect, JDavis for
4 violation of the Spearin doctrine or breach of warranty of
5 the plans. And a lot of that argument has to go to the
6 windows. One of my defenses is that, well, it's the
7 negligence of a third-party that is not in my control that
8 caused a lot of the window problems. And that would be
9 JDavis for failing to provide the details for the
10 installation of the windows that would be waterproof.

11 So you have a situation here where if you granted
12 summary judgment for Superior on the amount of their
13 settlement, they could potentially recover twice even though
14 I have a defense that it is JDavis's problem, not mine. So
15 I don't get to litigate that.

16 So I think, again, this goes to the complexity of
17 this indemnity situation in that we have multiple different
18 lines of indemnity. And all the parties are pointing up and
19 down those lines and across to other lines. And it's just
20 hard for you to grant summary judgment that there is
21 liability for indemnity. What you can grant is that
22 indemnity agreements themselves do not provide for indemnity
23 for your own negligence.

24 One point on the word unconditionally.
25 Unconditionally could mean that the conditions of Griffin do

1 not apply. I don't think you can contract away the law.

2 And then for the money owed to Muhler, there's
3 testimony from Ron Sykora, who is Muhler's VP of operations,
4 I think. He's an officer of the company. But when we are
5 negotiating the 2007 agreement, Muhler already was owed
6 money from Superior long before there are any window
7 problems discovered. And Muhler -- I mean, Superior just
8 uses these window issues to continue to stall those payments
9 because they have such a cash flow issue with all their
10 other projects. But Superior's failure to pay breaches both
11 the 2007 agreement and the original subcontract agreement.

12 I think that's it. Thank you.

13 THE COURT: All right.

14 MR. MAJURE: Many, many things to address here.
15 Let's start with Otis Elevator. Otis Elevator involved
16 having to entail a finding of no fault on behalf -- on the
17 part of Otis, because that's what the contractual indemnity
18 agreement's specific language in that case required. The
19 Otis Elevator case does not say that apart from that
20 specific contractual indemnity language, that you have to be
21 adjudicated without fault or have clean hands for the
22 Griffin factors to apply. So this repeated attempt to say
23 that Otis Elevator is still, even though its contractual
24 indemnity and contractual indemnity can be drafted the way
25 it wants to, it still is an equitable indemnity case.

1 And again, Your Honor, I actually wonder if maybe I
2 should strike the Griffin argument entirely. Because,
3 again, Griffin establishes means of fairness and equitable
4 principles of recovery. If it's not -- if Griffin doesn't
5 apply, then what does? The Court is just going to have to
6 look at the agreement as it is and enforce it on its own
7 terms. The Court is not entitled to rewrite the agreement
8 that's drafted between sophisticated commercial parties. If
9 they want to just simply resort back to the harsh language
10 of the -- well, I say allegedly harsh language of the
11 agreement, then they need to be careful what they wish for.

12 But we still believe Griffin applies, and that when
13 you read Otis Elevator, you will see that Otis Elevator is
14 not saying that as a matter of law, one must be without
15 fault to follow the Griffin factors. They are just simply
16 applying the specific provisions of that contractual
17 indemnity agreement that was in that case.

18 THE COURT: Let me ask, is the gist of what you are
19 trying to accomplish to get the window folks, Weather Shield
20 and Muhler, to reimbursement you all everything that you
21 paid out, that portion you allocated to their fault, without
22 them having an opportunity to determine that some of this
23 was due to faulty work by Superior, that Superior just gets
24 a free ride on its own bad work?

25 MR. MAJURE: Your Honor, it goes back to the

1 principle of our law, that you cannot being indemnified for
2 your sole negligence. But if an agreement is reasonably
3 clear, or as they say, unequivocally clear that there is an
4 intention to be indemnified for one's concurrent negligence,
5 that absolutely, positively is enforceable under our law;
6 however, fair or unfair that would be --

7 THE COURT: The agreement doesn't have to spell
8 that out to show that's what you clearly intended, even
9 though y'all --

10 MR. MAJURE: Well, we admit that the body of
11 language that we are asserting against Weather Shield is not
12 as substantial as the body of contractual language we are
13 asserting against Muhler, which I view to be practically
14 ironclad. But as to Muhler, a sophisticated commercial
15 entity who is negotiating this with their counsel -- and
16 I've never in my life heard very commonly used words in our
17 vernacular being construed as if they were somehow some
18 ancient form of Latin. I mean, it says: Weather Shield
19 agrees to unconditionally indemnify both Superior and
20 Concord and Cumberland, LLC against these allegations and
21 will pay all damages incurred by either/or both.

22 Well, all damages includes the concurrent
23 negligence of Superior. The only thing that we can't get is
24 our sole negligence, which we are not seeking, which we
25 recognize we are not entitled to by law.

1 What Weather Shield and Muhler are doing is
2 desperately trying to be rescued from the agreement that the
3 negotiated with their own attorneys and signed, that was
4 exhaustively reviewed, and now trying to create ambiguity
5 about terms that really are unambiguous. I mean, the word
6 unconditionally means without condition. All damages means
7 all damages, not just some subset. It says all damages.

8 So we think that that is -- in the context that we
9 are in this case, it is abundantly clear what all damages
10 means.

11 And let me just -- I tried to make a list of the
12 counter arguments.

13 THE COURT: What is the responsive argument? You
14 are seeking to enforce the contract that y'all breached by
15 not paying the money?

16 MR. MAJURE: Well, I wanted to get to that, Your
17 Honor. The statement was made -- and I tried to write it
18 down as closely as possible -- that we admitted that we did
19 not pay the amount due under the contract. Now, that's not
20 what we said. What we said was we didn't pay the contract
21 balance. And the reason we didn't pay the contract balance
22 is because there are two specific clauses in the contract
23 that specifically allow us to withhold payment for pending
24 claims or work that does not comply with the contract
25 documents.

1 And I mentioned it before, but I will say it again.
2 It's article 10.1.1, Subsection (c), as well as Article
3 5.3.3, Subsection (a). Those subsections of the subcontract
4 explicitly allow Superior to withhold a portion of the
5 payment for pending third-party claims or nonconforming
6 work.

7 THE COURT: That wasn't modified by the agreement,
8 the June 11th agreement, at least that portion of it about
9 paying money versus holding back money?

10 MR. MAJURE: Well, the agreement, Your Honor, says
11 that it does not modify the subcontract except to the extent
12 that explicit language says so. And I don't see anything in
13 that agreement that says that those rights of setoff were
14 eliminated or altered.

15 So if they are going to take that route, they need
16 to show me a clause in there that says Superior's right of
17 setoff pursuant to the subcontract is eliminated or no
18 longer exists.

19 THE COURT: I'm just raising the questions that
20 come to my mind.

21 MR. MAJURE: Sure, sure.

22 THE COURT: This is an interesting case.

23 MR. MAJURE: The statement was made by counsel for
24 Weather Shield that the agreement says that we have to
25 forego litigation. That's not the term that's being used.

1 It is saying that we will not pursue litigation. And we
2 think that the context of this case makes it clear that we
3 do not pursue it. It came to us. And we naturally have
4 to -- if we don't assert our compulsory cross-claims or
5 counterclaims, well, then, Your Honor, I've committed
6 malpractice. I have to assert these claims. I have to
7 present them or they can be deemed waived.

8 So I think that there's -- we definitely did not
9 agree to forego litigation, it was to not pursue it. And we
10 did not pursue or initiate litigation until it -- until
11 litigation came to us and we had no other choice.

12 THE COURT: Considering that the climate that
13 exists for people filing defect claims, not by the party in
14 whose position you are in, the contractor, but the
15 contractor being sued by homeowners association or
16 dissatisfied purchasers, whatever, would not -- shouldn't
17 that not have been reasonably anticipated such that that
18 language would have been covered in the agreement in the
19 event you were sued, such as writing in there that we will
20 not initiate litigation, but if we are sued, we have to
21 protect our interest or something? Why wasn't that -- is
22 that something that should have been in the agreement, or is
23 the agreement modified based on the fact that you didn't
24 initiate the litigation but someone else did against you
25 which forced you to then sue them?

1 MR. MAJURE: Well, if Superior had been sued by
2 itself and Weather Shield and Muhler had not been made
3 parties to the case, and we reached out and asserted a
4 third-party claim against them, I could see how that could
5 be construed as pursuing litigation. But the fact of the
6 matter is they were sued alongside with us. We were all
7 served together. We didn't do anything to do that. They
8 were going to be sued. And they were going to go through
9 all of the litigation activities they went through. They
10 were going to go through all of the costs and expenses they
11 had in defending the plaintiff's claims whether we filed
12 those cross-claims or not.

13 So when you are looking at the underlying intention
14 of not being sued, it still happened to them no matter what.
15 It really doesn't make any effective difference if they are
16 a co-defendant being sued along with us if we just happen to
17 assert compulsory cross-claims.

18 THE COURT: You really didn't sue them, in other
19 words?

20 MR. MAJURE: Exactly.

21 MS. VARNADO: If counsel agrees to withdraw that
22 cause of action.

23 MR. BROWN: Your Honor, may I address?

24 THE COURT: Yes, sir.

25 MR. BROWN: There's a simple answer to this debate

1 in the agreement. The agreement starts out and
2 acknowledges -- and I'm going to cover -- I apologize for
3 jumping up. In the beginning --

4 THE COURT: I was trying to prod you to get up.

5 MR. BROWN: You were successful. In the preamble
6 to the agreement: Whereas, during the construction process,
7 testing was performed on certain windows and doors. The
8 results of the test indicated that some of the windows
9 tested failed. That generated the problem. We have
10 defective windows.

11 As you so adequately pointed out, we know what's
12 going to happen if we sell defective windows. This was a
13 three-month process in which the project basically stopped.
14 And what we have are discovered defects that we are dealing
15 with. The paragraph that everyone is talking about, 13
16 specifically says: Return for this agreement, not to pursue
17 litigation against Muhler and Weather Shield with respect to
18 the discovered window and door defects.

19 Now, the project stopped their lawsuits. People --
20 Superior is losing money on general conditions because the
21 project is not going forward. They had the opportunity at
22 that point, as did the owner. But the use of the word
23 discovered is very precise. It is in the past tense. And
24 the only promise is, we are going to let you go forward, and
25 in consideration, we will not sue you for discovered, past

1 tense.

2 THE COURT: That word is in which paragraph again?

3 MR. BROWN: Paragraph 13. It doesn't say generally
4 we won't sue and will never sue you. We will not sue you
5 for the discovered, past tense, defects.

6 In our exhibits, the payer application for the end
7 of February has the windows and doors at 85 percent
8 completion. At the end of May, the windows and doors are
9 still at 85 percent. Everyone has lost a lot of money
10 trying to figure out whether these are good windows to go
11 forward or not. But that sentence is very clear that it's
12 talking about, we are not going to sue you over something in
13 the past tense discovered. The beginning of the document
14 recognizes that defects are discovered.

15 So I don't see any way to read that as a blanket
16 guarantee that if we find out in the future that these
17 windows aren't any good the second time, we will never sue
18 you. That would be a stretch to think they extracted that
19 kind of promise out of Superior or the owner.

20 So I think if you look at the word discovered, it
21 puts to bed the question of what was promised.

22 MR. MAJURE: And I must say I concur with
23 Mr. Brown's analysis. There was -- going down the list of
24 counter arguments made by Weather Shield, there was also
25 additionally an argument that we were trying to misconstrue

1 this agreement as a duty to defend versus a duty to
2 indemnify. And that's just simply not the case. We have
3 nothing in the motion before the Court for partial summary
4 judgment that entails a breach of an alleged duty to defend.
5 So that's simply not the case.

6 Going back to this Paragraph 12 that you've
7 probably heard 25 times today, Your Honor, the claim they
8 are making that we are ignoring the remainder of the cross,
9 Superior's ignoring the latter half, that's not true. What
10 it is is they just disagree with our interpretation of the
11 language. And because we disagree, they want to claim that
12 we are ignoring it. No. We just don't agree with their
13 interpretation.

14 The fact of the matter is they want to more
15 narrowly confine the language of the determination of a
16 court of competent jurisdiction or award of arbitration.
17 They want to narrow that beyond what it actually says and
18 have you read that to say, by a verdict or by a final
19 adjudication by an arbitrator. That's not what it says.
20 And so the determination that we are seeking is that what we
21 are here for today and at the damages hearing that we are
22 seeking. So that still falls within the scope of that
23 language. It's just that Weather Shield and Muhler want you
24 to think that it's more narrow than it really is.

25 There's also an argument made that the

1 apportionment of liability under the tort statute due to the
2 fact that this is a post July 2005 project eliminates common
3 law joint and several liability, and that we should have
4 waived for how that allocation of liability would have
5 fallen out. But the problem with that argument is that
6 that's only worth anything if the only cause of action that
7 we are facing is negligence. There's nothing -- there's
8 nothing in our law that I'm aware of, Your Honor, that says
9 that the tort claims statute -- excuse me, the contribution
10 statute with its new July 2005 amendment applies to a breach
11 of warranty claim, a breach of negligence, per se, claim
12 dealing with the building code, a breach of the implied
13 warranty of workman-like service, which are all causes of
14 action that the plaintiff had. So, in essence, there are
15 causes of action that the plaintiff was seeking that would
16 not have necessarily fell into that statutory scheme.

17 Also, in respect to their attack of the amount
18 paid, we note this in our memorandum, the window repairs
19 were by far, by far, the single most expensive line item of
20 repair in both the plaintiff's -- the plaintiff's repair
21 estimate as well as our own repair estimate. So if the
22 damages that we are looking at in a proportional sense are
23 being called into question on a facial level to try to bring
24 them into question, we would just note that if you look at
25 the estimates for what was being called for in repairs, I

1 think it comports with how the proportion of liability could
2 have fallen out.

3 Also, there's the argument that was made by Weather
4 Shield that Superior should have waited for the window
5 defendants to settle the claims before we settled. Well,
6 Your Honor, we didn't settle until the fourth mediation,
7 after three years of being in the case. What belies their
8 argument that we were colluding and somehow inflating the
9 claim and manufacturing this to push everything to the
10 windows is the fact that the case lasted for three years.
11 We took over 40 depositions and probably read a half a
12 million pages of doctor production. If it was our intention
13 to collude and to railroad this thing into the window
14 defendant's corner, surely we would not have waited for the
15 fourth mediation and three years of litigation to do that.
16 We could have done that in year one, Your Honor, if that was
17 the way we were going to take this thing.

18 Also was raised the issue of whether or not we
19 needed to have an expert to testify as to the reasonableness
20 of our settlement. It is true, Your Honor, that several of
21 the cases that deal with Griffin did entail the use of an
22 expert. It appears that, I think at a minimum, Otis
23 Elevator may have used an expert. But there's nothing in
24 the case decisions that states that you have to have an
25 expert witness to address the issue of reasonableness of a

1 settlement.

2 And, Your Honor, I will say that is purely an issue
3 that falls upon legal reasoning and legal analysis. An
4 expert like that might be necessary to assist a jury of
5 laymen, but in a bench trial, where the judge is the expert
6 deciding the case, we think that we are clearly comfortable
7 with allowing the Court to decide legally what is reasonable
8 versus having to bring in a lawyer to tell the judge what is
9 reasonable and what the law says about Griffin vs. Van
10 Norman.

11 There was also a mention of windows being not owned
12 by the unit owners, and the fact that not all of the unit
13 owners had filed suit in the case. It is true that the
14 master deed does state that the windows themselves are the
15 property of the unit owners. But everything else around
16 them -- and this is in the master deed as well -- everything
17 else around that window and part of the common elements, is
18 the province of the HOA. And not only that, but you can't
19 do anything to those windows without the HOA being involved
20 in the case.

21 And in addition to that, the evidence of the case
22 also shows that most of these unit owners, including unit
23 owners who are not plaintiffs, assign their rights to the
24 HOA for claims under the windows. Now, was it all of them,
25 Your Honor? I can't say that. I don't know. But we do

1 know that there were a number of assignments made by
2 nonplaintiff unit owners to the HOA for their windows. But
3 that still would be -- that's not an issue that matters for
4 the motions before the Court seeking partial summary
5 judgment. If Weather Shield's wants to raise that in the
6 damages hearing, they are certainly entitled to do so.

7 That will be all. Thank you.

8 MS. VARNADO: Let me first address the issue of
9 discovering defects. The defects that they have sued us for
10 are the same defects that they were complaining about,
11 alleged defects that they were complaining about when the
12 June 2007 agreement was executed, that the water leaks
13 through the windows. There's not any other defect that has
14 come up, something new that the windows, I don't know,
15 turned the lights in the -- when the light comes through the
16 windows that it is distorted or that the window glass is
17 distorted. It is water leaking through the windows
18 themselves. And that is the discovered defect that they
19 were dealing when the June 2007 agreement was drafted. And
20 it's the same issue that they brought their breach of
21 warranty claim on when the lawsuits were filed.

22 Now, Mr. Majure says that if he didn't bring those
23 lawsuits, if he didn't bring those cross-claims against
24 Weather Shield and Muhler, then he would have been
25 committing malpractice. But that's not true. He could have

1 told his client, listen, we've been sued, we can file
2 cross-claims, I'm going to file a cross-claim for indemnity
3 under the June 2000 agreement against Weather Shield, but if
4 I bring a lawsuit for breach of warranties or claiming that
5 the windows are defective, I will have violated our promise
6 not to sue Weather Shield in the June 2007 agreement and,
7 therefore, waived our ability to get indemnity. So, client,
8 we need to decide which claim is stronger and which one we
9 want to pursue. So they didn't have to bring that claim.

10 And the difference between pursue and forebear, in
11 the end, when you file cross-claim, you pursue litigation.
12 And they pursued litigation and prosecuted those window
13 claims.

14 The language, you said something to the effect,
15 Your Honor, that, well, if they were going to be able to
16 bring a suit later, couldn't that just have been said in the
17 agreement. And I agree, it could have been. . . And, in fact,
18 in an initial draft said that the agreement wouldn't be a
19 bar to them bringing suit in the future related to issues
20 discovered with respect to the windows and doors and all
21 other breaches, or whatever reason. But that language was
22 stricken. And the language that we ended up with was that
23 the sufficient consideration is Superior's not going to
24 pursue litigation against Muhler and Weather Shield
25 regarding the discovered window and door defect. That was

1 the condition that they agreed to then. They want to forget
2 it now, but they agreed to then.

3 The issue with Otis, nowhere is the contract
4 language, the indemnity language set forth. So when
5 Mr. Majure says that the contract language said that --
6 whatever he said it said, indemnity language is not in Otis.
7 The indemnity contract language isn't in Otis. But Otis
8 goes back to, again, under standard contractual indemnity,
9 you are not indemnified for your own negligence unless the
10 contract specifically says it clearly and unequivocally.

11 When Mr. Majure is talking about the indemnity
12 language, whenever he wants to read it to you, he skips all
13 damages incurred as determined by the Court or an
14 arbitrator. It simply is another important precondition to
15 bringing suit. And when we discussed the analogy between
16 the duty to defend versus the duty to indemnify, what I'm
17 saying there is, if you read the contract language which
18 states at the beginning that the only precondition to the
19 indemnity is just the virtue of the fact that somebody has
20 brought a lawsuit, and ignore the fact that it also requires
21 damages incurred as adjudicated by the Court, then you are
22 interpreting it like a duty to defend, which a duty to
23 defend is triggered when -- just like virtue of a suit being
24 brought. But that's not the type of clause we have here.
25 We have a no-action clause, which is triggered only after a

1 court has determined that there is liability -- that there
2 are damages. Once the damages are determined by a court,
3 then it's triggered. But it's not triggered in this
4 instance because no court has found that Superior owes any
5 damages. They have not incurred any damages that a court
6 has determined or an arbitrator has determined. And that's
7 simply just how this paragraph was set up, whether they like
8 it or not.

9 In terms about talking about whether Superior
10 should have waited for the fourth mediation, that is, in
11 dealing with the Griffin factors, and in dealing with
12 Griffin factors, they went ahead and settled at the fourth
13 mediation, but the window defendants didn't settle until the
14 fifth mediation. But they didn't get any benefits. What we
15 are saying is, was it a reasonable thing to do? That's one
16 of the factors. And they got no benefit from settling
17 before the window defendants did. They likely paid more
18 because they settled before the window defendants did,
19 because plaintiff had no idea how much it was going to get
20 from the window claims. And they got no benefit because
21 they weren't out of the case. They are still in the case
22 pursuing other parties and pursuing us. And so they weren't
23 done.

24 Now, if they had settled and bought their entire
25 piece at the fourth mediation, then arguably even before the

1 window defendants did, then arguably that might have been a
2 reasonable thing to do to allow them to get everything they
3 want out of that settlement, but they didn't. And it didn't
4 benefit them in terms of winding things up. They still were
5 incurring fees and costs and prosecuting and defending
6 claims. But unless you get to the Griffin factors, there's
7 no reason to even address that issue.

8 And then finally, again, under the Griffin factors,
9 the expert testimony regarding the reasonable settlement,
10 what they want the Court to decide -- Mr. Majure says the
11 Court can decide whether or not something is reasonable on a
12 legal basis. But even though the Court is here, we have no
13 jury, but, nonetheless, you are acting -- so the Court is
14 acting as the fact finder, but you don't find the facts on
15 the law. You find the facts based on the evidence that is
16 presented by the parties. And they would have to present
17 evidence that their claim is reasonable. And they haven't
18 done that from a summary judgment standpoint at all. And we
19 argue that they will need some kind of testimony, whether
20 it's expert or not, on which the fact finder can find facts.
21 And one of the facts would be the reasonableness, not as a
22 matter of law, it's a factual determination, and you need
23 evidence to support that decision.

24 Finally, again, there's no evidence in the record
25 of any of these assignments. So if -- even if to repair

1 around windows they needed the HOA's permission, the HOA
2 isn't being sued, but they couldn't recover for the
3 individual unit owners' windows. And. The remedy they need
4 in order to fix allegedly windows that leak through the
5 window, would be to replace the window. And those windows
6 were the property of the individual unit owners; should not
7 be included in the entitled damages claim. Thank you.

8 THE COURT: All right. Mr. Brown?

9 MR. BROWN: Yes, thank you. Your Honor, I'm going
10 to grab the podium. I think it's fair to say that the
11 arguments they have made or they contend that that also, in
12 effect, affects our rights under that agreement. And
13 basically, it's the same argument about Weather Shield and
14 Muhler that they made to Superior's claims. And I'm
15 responding to those.

16 I feel a little bit like I've got about 20 ducks
17 coming in, and I think I could kill them all, but I just
18 don't know where to start. And there's just been so much
19 said and so much confusion. I think it needs to be
20 clarified.

21 I hate to say this, Your Honor, but I think a
22 little more attention to the details of the case and the
23 actual language of the cases will clarify what we are
24 dealing with. It has some complexity to it. But in the
25 end, it is relatively simple in terms of what needs to be

1 done. . And if Your Honor will bear with me late in the day,
2 let me go back into the case and outline what we've got.

3 Now, I should have had or I asked to have hand
4 delivered to Your Honor a volume that contains our
5 memorandums in response to the motion.

6 THE COURT: Yeah, I have it.

7 MR. BROWN: A number of exhibits and copies of the
8 cases, and I'm going to refer to a few additional cases.
9 But let's go back and put this in context in terms of
10 indemnity. The principal argument is an indemnity.

11 Now, we have a contract with the architect. The
12 architect has moved for summary judgment. That's a little
13 bit different issue. But we also have warranty claims and
14 we have negligence claims. There is no doubt that the case
15 law in South Carolina has allowed a party to recover under
16 contract -- warranty contractual indemnity and equitable
17 indemnity. The proposition that somehow you have only an
18 equitable indemnity claim when you pay money in settlement
19 simply isn't true. And the case is from '64 forward from
20 the Electric and Gas case. South Carolina utilities have
21 recognized that equitable indemnity is simply another remedy
22 that you own, along with your other remedies, being
23 contractual indemnity, or your contract that is breached.
24 And the case is -- up to the McCoy case two weeks ago affirm
25 that.

1 Let me go back then to the beginning of this case.
2 And since what we are talking about is the recovery of money
3 paid to others, that is generally the definition of
4 indemnity and why we are wrestling so hard with indemnity
5 and why it has become so confused.

6 This project began with all of these players in the
7 room participating before contracts are even signed. And
8 everybody knew that this was a condominium project that was
9 going to be sold to third-parties. This is not a building
10 that was being built for Concord for it to use. We all are
11 very aware, and very aware as Your Honor has pointed out of
12 the propensity to build a condominium and get sued. I'm not
13 sure what the batting average is, but it's got to be way up
14 there. So everybody knows that the duties they are taking
15 and the acts they are performing are going to have an impact
16 on third-parties. As an example, if you look at Exhibit 2,
17 the 101, Your Honor, if you want to look at it and follow
18 it, I will slow down.

19 THE COURT: I have it.

20 MR. BROWN: Attached to the contract -- and I
21 apologize they are not individually. But if you run over to
22 about 20 pages in, there are a series of clarifications
23 dated February 21st, 2006. And these are the parties'
24 understandings of what is going to be built and their
25 responsibilities as of the date of the contract. The

1 contract was signed March 8th, 2006. So if you look at the
2 Division 8, if you look in the upper right-hand corner, it
3 should be Superior, Concord and Cumberland 18442.

4 THE COURT: This is Exhibit 1?

5 MR. BROWN: Exhibit 2, Your Honor.

6 THE COURT: Exhibit 2. I'm sorry. Exhibit A?

7 MR. BROWN: Yes, sir.

8 THE COURT: Tab A of Exhibit 2?

9 MR. BROWN: Yes, sir.

10 THE COURT: Okay. I have it.

11 MR. BROWN: And if you go over to Division 8, it
12 states, Item 2: Weather Shield lifeguard aluminum clad
13 windows and doors are included and will be installed in
14 accordance with the manufacturer's installation
15 instructions.

16 Per Weather Shield, quote, dated January 10, 2006:
17 Shop drawings to be submitted and approved. Windows
18 supplied and installed by Muhler.

19 Now, that's simply to say this crowd began together
20 to put in windows in a condominium unit to be sold to
21 third-parties on the day of the contract. Nobody was
22 fooled. Nobody was brought in and forced to do something.

23 The reason I point that out is that if you look at
24 the Royal vs. Globe Communications case, Page 389, and I
25 believe that's been cited a number of times, this is the

1 quote from the Court: Equitable indemnity, on the other
2 hand, is based upon the specific relation of the indemnity
3 to the indemnitor in dealing with a third-party.

4 The definition also involves: In which the first
5 party is liable to pay a second party for a loss or damages
6 the second party incurs to a third-party.

7 From day one, all of these parties are operating
8 under the circumstances that are classic grounds for
9 indemnity or equitable indemnity.

10 And then we turn to the liability. We know for a
11 long time, and Concord and Cumberland know, and these
12 gentlemen know, these company know, that Concord and
13 Cumberland will have a no-fault, no-conduct liability to the
14 homeowners as a result of any defects or deficiencies that
15 they create and that Concord sells to the homeowners. It
16 will be an imputed liability because we don't get to claim
17 we acted in good faith. We don't get to claim these people
18 did it. We know that if we sell a product, a building
19 encompassing these people's deficient work, we are going to
20 have to pay without regard to fault, without regard to
21 negligence, without regard to any discussion of how hard we
22 tried.

23 So that we start with the premise that we are
24 hiring them as subcontractors -- as contractors to deliver
25 us a good product because we are liable for that product by

1 imputed fault, you can say, by virtue of the warranty of
2 habitability. Now, this project started. From the day one,
3 it's going to be Weather Shield windows. In February/March
4 of 2007, Weather Shield is installing the windows. Excuse
5 me, Weather Shield is supplying; Muhler is installation.

6 Concord and Cumberland, in an effort to avoid being
7 here today, paid to have a company come and review the
8 windows and water test them in their installed condition.
9 The purpose of that test wasn't really to test the windows.
10 It was to test the installation and to determine if the
11 flashings and the perimeter of the windows would hold that
12 water as it was the intent of the design.

13 They learned not only was there a few problems with
14 the perimeters, but the windows themselves leaked. A good
15 window does not leak. A defect window leaks through the
16 window.

17 Weather Shield was notified. And the first step in
18 that process under the contract is with the architect to
19 reject the work as not in compliance with the contract
20 documents. Weather Shield said, you've done your test
21 wrong. And we said, okay, who would you want to have the
22 test performed by? They said ATI. ATI came. They
23 performed several tests and reported that the windows were
24 defective.

25 Now, at this point we are looking at either going

1 to get other windows or figuring out how to go forward with
2 the Weather Shield windows. And the last thing we want to
3 do is sell to the unit owners defective windows.

4 Negotiations ensued in which Weather Shield and
5 Muhler both insisted their windows were proper and insisted
6 they could fix them and remedy them, and that they should be
7 entitled to go forward with the project. Obviously, they
8 are going to be in breach of contract if they are supplying
9 defective windows.

10 That lead to the agreement of indemnity that we
11 have talked about so long today. It's basically the same.
12 Concord and Cumberland, although not a signatory to the
13 agreement, has two statuses. They are, first of all, an
14 acknowledged third-party beneficiary. And, second, they
15 have direct rights under the agreement. We are not asking
16 to recover under this indemnity because we are a third-party
17 beneficiary. We are asking to recover under the indemnity
18 because our name is placed in the sentence where there's an
19 obligation to indemnify.

20 And this process took awhile while the job is
21 sitting there. And it's being delayed and people are losing
22 money. This agreement, whatever Mr. Meyer might want to
23 say, was signed by the vice president of his company, I
24 don't think the terms are ambiguous.

25 Now, I want to go through these terms because it

1 answers a number of questions Your Honor raised. And it is
2 at the heart of this case. This agreement under the law is
3 also the springboard and the creator of the special
4 relationship that gives rise to equitable indemnity.

5 Your Honor has stated -- asked the question before,
6 how long has joint liability been around? A long time.
7 Joint tortfeasor, joint several liabilities, has been around
8 a long time. It wasn't until the act allowing contribution
9 was passed that it was amended.

10 But if we look at this agreement, at Page 1, it
11 first acknowledges that defects were found in the window.
12 If you have it, if your Honor has that agreement, I believe
13 it will be Exhibit 5.

14 THE COURT: Yes, sir.

15 MR. BROWN: It then goes on to state that Muhler,
16 Weather Shield, and Superior agree to resolve any product
17 noncompliance. That Paragraph 3 answers Your Honor's
18 question about why wouldn't you put in language about future
19 claims if you intended to have a right to future claims? We
20 did. That language is in the paragraph, Paragraph 3:
21 Muhler and Weather Shield agree that the facts discovered
22 during the window testing do not create a claim or state any
23 facts that would have included any right or obligation under
24 any applicable statute or limitations.

25 The next sentence: In the event of any future

1 claim regarding the windows or doors by any person or
2 entity, Muhler and Weather Shield waive the right to certain
3 of these events, including any obligation under the statute
4 of limitations.

5 Now, you do that only for one reason. We
6 understand we may get sued in the future. We don't want to
7 be in a situation where we learn of defective windows, they
8 assure us they've taken care of them, later we get sued by
9 the unit owners, and then they say to us, oh, the statute of
10 limitations has run. We have an expressed agreement waiving
11 that, so that future claims stand on their own. And if
12 Weather Shield, or the understanding of this agreement is we
13 are wiping out any future claims, you don't deal with the
14 statute of limitations as to future claims.

15 So I think this is about as compelling evidence as
16 you can get, along with the past tense word discovered, to
17 recognize that we contemplated by this agreement that we
18 might get sued in the future, and we will deal with it as if
19 it's a problem that arose then.

20 If you go on through the agreement, Paragraph 5
21 indicates that they've tested the windows. Paragraph 6
22 warrants and represents that the tested windows have been
23 replaced with compliant windows, such that the windows and
24 doors installed or to be installed are in new condition.

25 Now, the question was -- or the answer was, gee,

1 the defects we are suing about today aren't new, they
2 existed back then. No. We obtained representations and
3 warranties that they had fixed the windows, that the windows
4 then existing are in new condition, free of defects.

5 What we are dealing with now are subsequent defects
6 in subsequent windows installed that had not been installed
7 at this time. They warrant that the windows and doors meet
8 the design pressure ratings. Number 9, they agree they will
9 remedy any problems. And then 11 and 12 is the indemnity.

10 Now, the indemnity is as simple as you can get. It
11 is not ambiguous. And there are two elements of the
12 indemnity. The first element -- and that element has
13 accrued. The liability -- the first question has the
14 condition of the indemnity accrued or not accrued. The
15 condition is that we get sued. It is not that the windows
16 are proven to be defective. It is not that the windows
17 later are found by a court to be defective. It is not even
18 that the windows are defective. The condition of the
19 indemnity, first condition of the indemnity, is that we are
20 sued with allegations. And allegations is not a word you
21 use by mistake. It's not proof.

22 Mr. Meyer, who is a lawyer, who says it's
23 ambiguous, it's not ambiguous, but I want to put in parole
24 evidence agreed to the word allegation as a trigger to his
25 obligation to indemnify. You can't be confused as a lawyer

1 about what allegations mean.

2 We have been sued. We are entitled to indemnity.
3 And it is just that simple. And the agreement is just that
4 simple: Hereafter sued by any subsequent owner.

5 Let's put it in context. We agreed before that we
6 won't raise statute of limitation when that date comes,
7 knowing we are going to have to hereafter be sued. The
8 indemnity involves the existence of suits to take place here
9 after. But the forbearance to sue involves discovered
10 defects. But somehow today we read this agreement as a
11 waiver of Superior's right to sue later. It just doesn't
12 fit.

13 But the sole condition of the indemnity is a suit
14 is filed alleging defective installation as to Muhler or
15 defective windows as to Weather Shield. And we know as an
16 absolute fact that occurred.

17 Then once the triggering event has occurred, then
18 the question is, what does the indemnity cover financially?
19 It recovers damages, which has a legal meaning in the South
20 Carolina cases that have repetitively held that attorneys'
21 fees for being sued are damages contemplated by breach of
22 contract. That's an Addy v. Bolton case: Pay all damages
23 incurred by either/or both, as determined by a court of
24 competent jurisdiction. Your Honor, is certainly a court of
25 competent jurisdiction.

1 To somehow add into that agreement a sentence, what
2 I really meant was you had to go try and the only thing I
3 would ever pay you for was a judgment, is just -- can't be
4 the meaning because it's a hidden term that no one was put
5 on notice of.

6 The only determination under the agreement is what
7 are the damages. And that I agree with Your Honor, that is
8 a question that has to be evaluated upon the testimony and
9 upon the evidence. But there are two forms of damages that
10 occur when you get sued. One is, I've got to defend it,
11 I've got to handle it, I've got to pay for the process. And
12 the other form of damages is, I've got to pay to get out of
13 this litigation.

14 Now, they certainly can raise the issue, this
15 element, we shouldn't pay for this because that relates to
16 the architect. This is summary judgment. They are asking
17 on a summary judgment motion to presume all of this will
18 happen. This is Your Honor's job at trial; burden I will
19 call it. Because if this is this confusing, there's no
20 telling what's going to happen at trial.

21 But the fact of the matter is, the evidence will be
22 presented. And the issue really isn't indemnifying them
23 against negligence. It's a proximate cause issue. What is
24 the proximate cause? What damages are fairly the proximate
25 cause of having been sued for defective windows? Certainly

1 buying out that liability is one. And the cost of expenses
2 of getting to the point that you can buy out of that
3 liability is the other broad base.

4 Now, this case has the burden that other cases
5 don't of not having a single source of injury. I have to
6 agree with that. Someone who fell down the elevator shaft,
7 we have one incident and the settlement in that case
8 involves that one incident. But there will be issues for
9 Your Honor to decide upon the testimony of what are the
10 damages that proximately flow. And that's the issue. It's
11 not whether you are going to indemnify them for negligence
12 or partial negligence. It's a contract standard. It is not
13 an indemnity against their negligence. It is not an
14 indemnity against their bad conduct. It is an indemnity
15 against getting sued, because we knew where we would be if
16 their representations that the windows were great were
17 wrong. And that evidence is copious in support for the
18 proposition that the windows themselves leaked. And there
19 is also testimony that there were installation deficiencies.

20 That case simply needs to be tried. And I think it
21 is -- whether you grant summary judgment or not, it is a
22 damages case because there's no question but that these two
23 parties were sued for defects and deficiencies. And there
24 is no question but there is evidence that would support a
25 finding that there were deficient windows and there was

1 deficient installation.

2 Now, the Otis Elevator case, Your Honor asked the
3 question: What do I have to try? And the answer I think is
4 provided by both Griffin and Otis in that the standard as
5 set forth Hardin, and that standard is this, that the
6 settlement is bona fide with no fraud if in the
7 circumstances of the decision to settle is a reasonable
8 means of protecting the innocent party's interest. It is
9 not a means of deciding what would I have actually lost.
10 Did we make a decision to protect our interest, which means
11 we could have been found liable even though we don't believe
12 it?

13 The second prong are the -- first is bona fide, it
14 is a reasonable decision. And three, if the amount of the
15 settlement is reasonable in light of the third-party's
16 estimated damages and the risk and extent of the defendant's
17 exposure if the case is tried. It goes on to say: Whereas,
18 here the indemnitee gave the indemnitor notice and an
19 opportunity to participate. Which in this case, three
20 years, four years of litigation certainly has provided
21 Weather Shield and Muhler the opportunity to take away from
22 Superior and Concord the necessity of protecting their
23 interest.

24 The standard is this: The indemnitee is not
25 required to prove the plaintiff's actual ability to recover

1 the amount paid in settlement; not required to prove the
2 plaintiff's actual ability to recover the amount paid in
3 settlement so long as the indemnitee proves that he was
4 potentially liable to the plaintiff.

5 It is a settlement decision. And that is the
6 standard set forth in Hardin. So Your Honor does not have
7 to try the whole case. There certainly will have to be put
8 into evidence the range of damages. And I think that
9 plaintiff's damages for repair were about \$5 million and
10 probably another \$5 million in loss of use, little too high.

11 MR. MAJURE: It's more than 2.

12 THE COURT: Let's say \$7 million.

13 MR. BROWN: I'll tell you what we paid. Concord
14 and Cumberland paid \$625,000 to avoid a breach of warranty
15 of habitability verdict for \$7 million. Now, I don't think
16 anybody has contested or said that's unreasonable or will
17 contend that, but I think it will be a fair question or a
18 fair, easy answer to say that is reasonable given the
19 potential, which is the standard. I acknowledge that Your
20 Honor will have to face the question and answer the question
21 from the defendants: Well, gee, all of that should not be
22 credited to us. But that is why we have the trial and that
23 is why today has been -- we spent 75 percent of the day
24 talking about all the stuff that ought to take place at
25 trial because we are way premature for summary judgment.

1 The evidence will be presented before Your Honor.

2 Now, in terms of what they paid, it's in the
3 documents. I don't know that. But everybody will have to
4 show that what we paid was the proximate cause.

5 Now, we also have the issue of concurrent cause,
6 sole proximate cause is not necessary, and joint and
7 several. For example, the exterior skin of the building can
8 be allocated and partially the blame of the architect. And
9 it is partially the blame of Muhler and Superior and Weather
10 Shield.

11 And I believe the single injury rule has been
12 around for a long time which states that if multiple parties
13 cause a single injury, they cannot be fairly allocated by
14 causation, they are all jointly and severally liable. And
15 that will be one option for Your Honor based upon what
16 testimony is presented.

17 But summary judgment is not the place to make all
18 of those considerations. And this case cries out that there
19 is adequate grounds to go try it will.

20 Now, the Court of Appeal -- excuse me, the Supreme
21 Court, if I can bear upon Your Honor to talk a minute about
22 equitable indemnity, the McCoy case that's in your file came
23 out about two weeks ago from the Supreme Court Judge
24 Kittredge addresses the issue of settlement. It's actually
25 Page 18 -- I'm sorry, Page 19, second paragraph: Miles

1 asserts the trial court properly denied appellants' claim
2 for attorney's fees as Miles was never found liable for the
3 damages caused to the McCoys. We reject Miles's argument
4 for two reasons. First, it was not presented to the trial
5 court; and second, in any event, the argument is without
6 merit. It is true that Miles reached a settlement with the
7 McCoys, thereby precluding entry of a judgment on the
8 underlying claim. The absence of a judgment, however, does
9 not preclude appellants' equitable indemnification claim.
10 Appellants' equitable indemnification claim is grounded in
11 Miles's breach of the purchase agreement, which is the law
12 of this case.

13 Now, McCoy involved an owner of a gas station who
14 had oil spill and contamination, who sold it to another
15 person without disclosing that in the purchase agreement.
16 And then the purchaser was sued by a next-door neighbor.
17 And they sued -- they settled with the next-door neighbor
18 and then sued the seller. And the Court, Judge Early, found
19 that there was a breach of the purchase agreement and
20 awarded complete damages except for attorneys' fees.

21 And the appeal to the Supreme Court was whether
22 attorneys' fees should be awarded as part of equitable
23 indemnity. And Judge Kittredge said absolutely. You are
24 entitled to your damages on breach of contract. You are
25 entitled to your damages and your attorneys' fees under

1 equitable indemnity. You are entitled to both. And we are
2 entitled to pursue both, both our contractual indemnity and
3 our equitable indemnity.

4 If you go back to the South Carolina Electric & Gas
5 case in 1964, a copy of which is in your book, that involved
6 Electric and Gas being given the franchise for electricity
7 in Holly Hill, and by being given the franchise, they were
8 responsible for the power poles and any work associated with
9 it. Electric and Gas got South Carolina utilities to remedy
10 a pole in which they repaired the sidewalk. They did the
11 work negligently. The construction was poor. A depression
12 was caused and a lady fell and was hurt. And Electric and
13 Gas settled with her. And the Supreme Court in 1964 said
14 that Electric and Gas was entitled to indemnity from the
15 contractor for the defective work that it performed.

16 And this goes back to name another premise that is
17 replete in the law, and that is this. The fault that
18 precludes an equitable indemnity claim has been held over
19 and over not to include passive negligence or the failure to
20 discover the wrongdoing by the party you hired. That was
21 affirmed in the electric and gas case and a number of cases
22 that have followed.

23 A party who I contract with to perform work who
24 performs it negligently, I don't have to discover his error
25 in order to get equitable indemnity. I may owe someone

1 money, but since my fault is solely the result of my failure
2 to discover, my fault is imputed and, therefore, I'm
3 entitled to equitable indemnity.

4 Go back again to where we were in March of '07.
5 They represented to us that the windows were good, the
6 installation was good, we will fix anything that goes wrong,
7 we will guarantee the windows are merchantable, and if you
8 get sued, we will indemnify you. Those circumstances are
9 almost identical to the Stuck case in which someone went to
10 the company to buy a piece of lumber-producing equipment.
11 They met face-to-face. The seller of the truck took it out,
12 met with him, told him this is exactly what you need, it's a
13 good truck for you. He bought it on those representations,
14 drove it down the road. Next day to axil slipped and he
15 killed somebody.

16 The Court in its opinion held and affirmed that
17 this is not a joint tortfeasor situation. There were
18 warranties that fit for this particular purpose. There were
19 expressed warranties that this truck is what you need.
20 Those expressed warranties were breached. And the Court
21 upheld equitable indemnity for Stuck who is driving the
22 truck who was told it was fine. And the Court noted that
23 the equitable indemnity is grounded on the warranties and
24 affirmations.

25 Weather Shield and Muhler gave Superior and Concord

1 express warranties that the windows are satisfactory. And
2 we relied on those. And neither one of us had any
3 obligation for the purposes of equitable indemnity to go
4 behind that and determine whether it was true or not. And
5 that premise has been held over and over.

6 And when the windows turned out to be bad, we are
7 entitled to indemnity just like McCoy was entitled to
8 indemnity when it turned out the ground was contaminated,
9 and Mr. Stuck was entitled to indemnity when the truck was
10 bad. And Electric and Gas was entitled to indemnity when
11 the person they hired to remedy the sidewalk turned out to
12 have done it negligently.

13 Now, this -- that is the essence of what we've got.
14 And no one has said that there's no evidence of my
15 liability. Mr. Nistad has talked about his own expert
16 finding out and talking about how bad the windows were.
17 Other experts have talked about the errors in installation.
18 That is sufficient easily to get passed summary judgment.
19 There are any number of issues, but the law is very clear on
20 equitable indemnity. It is very clear on contractual
21 indemnity. And there is nothing to do today but to go on to
22 October 27th and try this case, which is a simple case on
23 either equitable indemnity or the terms of the indemnity
24 that we have been sued, what are the damages. They could
25 put in their evidence. We will put in our evidence. Your

1 Honor will be the decision maker to determine, in addition
2 to attorneys' fees, how much of our settlement do we get
3 back?

4 And that's really what this case is about. You
5 don't have to try the whole case. You just have to evaluate
6 whether 600,000 or 700,000 or 200,000 was reasonable in
7 light of \$7 million worth of liability. I doubt anybody in
8 here made an unreasonable settlement, particularly Weather
9 Shield and Muhler. What was the potential?

10 So we've gone around the block and back about all
11 kind of nuances, but the agreement is simple. The agreement
12 has been triggered. It's up to Your Honor to decide the
13 damages and make an award.

14 THE COURT: All right.

15 MR. BROWN: I know there were a few other points I
16 wanted to comment on. I think I covered them, but --

17 THE COURT: We can take a break for a few minutes.
18 And if you think about anything else, we will come back in
19 five minutes.

20 (Whereupon, recess transpired.)

21 THE COURT: All right.

22 MR. BROWN: May I add one more thing?

23 THE COURT: They tell me a storm is bearing down on
24 Charleston and we are about to abandon ship here. Go
25 ahead.

1 MR. BROWN: Very quickly. The question they didn't
2 get paid so we can abandon the agreement. The agreement was
3 the sole reason the windows were put in. And the indemnity
4 was critical for them going forward to put in the windows.
5 If they didn't get paid --

6 THE COURT: Say that again. The agreement --

7 MR. BROWN: The windows were found to be defective.
8 The only reason we went forward with their windows -- and
9 everybody wishes we hadn't, but we did -- was they signed
10 this agreement affirming that they had been corrected for
11 first quality, and if they are not and you get sued, we will
12 indemnify you. They went forward and put in their windows
13 and have exposed us to the risk that the agreement was
14 signed to avoid or to take care of. And the risk that is
15 discussed in the agreement has accrued. You cannot rescind
16 an agreement or walk out of it unless you can return the
17 parties to their preagreement position or something akin to
18 that.

19 Now, they had the opportunity to refuse to work
20 until they were paid. I don't know what happened. But they
21 went forward, put in the windows, exposed us to the risk and
22 exposed Superior to the risk. The risk has accrued. The
23 condition of the indemnity has been triggered. But now they
24 want to walk away and say, well, gee, Judge, please rescind
25 this agreement because we didn't get all the consideration

1 we wanted. It can't be done after all of the risks and the
2 events have accrued.

3 They put their windows in; exposed us. Now they
4 want to walk away. There is no basis in the law to rescind
5 an agreement with that kind of prejudice to accrue to
6 Concord and Superior as a result of doing that.

7 THE COURT: Okay. Let me ask you all. We haven't
8 heard from the architect and we set aside two days to do
9 these motions. So we will be here at some point tomorrow.
10 I don't know how much more time y'all need to talk about it,
11 but what time do you all want to come back tomorrow, whoever
12 needs to come back? Because we are going -- I'm going to
13 beat this storm if I can and get out of here.

14 MS. VARNADO: Your Honor, we kind of took motions a
15 little background because we have not argued our motion for
16 summary judgment against Henry's clients. Both Muhler and
17 Weather Shield will need time to argue our motion. And then
18 the architect has its motion to argue.

19 THE COURT: Just tell me what time. I'm good.

20 MR. BROWN: Ten o'clock.

21 MS. VARNADO: Ten o'clock?

22 THE COURT: Okay. We will stop now and come back
23 at 10 tomorrow morning. I'm trying to help you all out.

24 (Whereupon, the proceedings are adjourned for the
25 day.)

1 (Whereupon, the proceedings continue on July 29,
2 2014.)

3 THE COURT: Good morning. Who is up?

4 MS. VARNADO: I am, Your Honor; Christie Varnado
5 for Weather Shield.

6 THE COURT: Ms. Varnado, good to see you.

7 MS. VARNADO: And what happened at the close of
8 yesterday was slightly backwards, because Mr. Brown argued
9 in opposition to Weather Shield's and Muhler's motions for
10 summary judgment, but we hadn't yet presented our arguments
11 against Mr. Brown's client, Concord and Cumberland, LLC, in
12 summary judgment. So just keeping that in mind as to where
13 we are.

14 THE COURT: Okay.

15 MS. VARNADO: So, yes, Weather Shield has a motion
16 for summary judgment against both Superior and Concord and
17 Cumberland, LLC. And I have -- if I may, this is Weather
18 Shield's memo in support. It's also a supplemental memo, a
19 second supplemental memo, and an appendix. And the reason
20 for the various supplemental memoranda came about in part
21 because we didn't have all of the materials -- excuse me, we
22 didn't have a transcript from one of the deponents until
23 after our brief was due. So that is the second
24 supplemental.

25 The first supplemental memo just indicates that we

1 had adopted the findings of fact and conclusions in portions
2 of Muhler's brief because Muhler's issues and Weather
3 Shield's issues were the same issues, and then the appendix
4 addressed some of the factual errors that were relevant to
5 the summary judgment motion that were in Superior's brief.

6 As the outset, our first issue or first point in
7 our motion for summary judgment addressed Concord and
8 Cumberland's cause of action for contribution, and it is my
9 understanding that Concord and Cumberland agrees that they
10 have not satisfied the requirements for contribution against
11 Weather Shield. They haven't -- they never purchased the
12 release on behalf of Weather Shield.

13 THE COURT: All right. Mr. Brown.

14 MR. BROWN: Your Honor, that's correct. It was
15 pled as contribution. We settled ourselves out. We didn't
16 buy them out; we didn't buy out JDavis or Muhler. So we
17 would not have a contribution claim.

18 MS. VARNADO: And so, as the first point, we assert
19 we are entitled to summary judgment on that claim.

20 THE COURT: So that's -- you have it as agreed that
21 they have a right to summary judgment on that claim?

22 MR. BROWN: Yes, sir. I agree we do not have a
23 contribution claim against --

24 THE COURT: So you will prepare something on that
25 point at least?

1 MS. VARNADO: Yes, I will, Your Honor.

2 The next issue I will address is the contractual
3 indemnity claims filed by both Superior and Concord and
4 Cumberland against Weather Shield. We addressed that in
5 some respects mainly focused on Superior yesterday, but much
6 of what we discussed yesterday is equally applicable to
7 Concord and Cumberland. Concord and Cumberland is a
8 third-party beneficiary of the June 2007 agreement, which is
9 15A in Weather Shield's exhibits. They are not a signatory
10 to the document. That is the only document by which Concord
11 and Cumberland can seek contractual indemnity from Weather
12 Shield.

13 The same arguments as to Superior, that the
14 document is void for lack of consideration, apply to the
15 third-party beneficiary, Concord and Cumberland. The fact
16 that it lacked consideration because of the failure to pay
17 Muhler, and as a result of the failure to pay Muhler, there
18 was a failure to pay Weather Shield, and the forbearance to
19 bring suit.

20 Now, interestingly, the forbearance from bringing
21 suit does not address Concord and Cumberland, and,
22 interestingly, Concord and Cumberland did not sue Weather
23 Shield for breach of contract, or negligence, or breach of
24 warranty. Concord and Cumberland's claims against Weather
25 Shield were indemnity claims and the contribution claim.

1 This document did not prohibit Concord and
2 Cumberland, however, had they wished from bringing a suit
3 against Weather Shield in -- for alleged breach of warranty
4 and thereby requiring it to waive anything under the
5 contract. The only party who was, as part of the
6 consideration, required to not pursue litigation against
7 Weather Shield was Superior. Unfortunately, Superior
8 pursued litigation against Weather Shield for allegedly
9 defective windows, therefore, removing the consideration
10 that supported this document. The --

11 THE COURT: When you say, removing the
12 consideration --

13 MS. VARNADO: Meaning -- perhaps that's not the
14 best choice of words. But rendering the document without
15 consideration, the contract. It's not a contract because it
16 doesn't have consideration.

17 THE COURT: So can you have a contract and then not
18 have a contract? If the contract contains multiple things
19 that could be considered for consideration, such as a
20 promise for a promise, or forbearance, and certain other
21 mutual promises, if it fails on one of those things, do you
22 still have a contract? Such as, if you have a promise for a
23 promise, but then you don't -- but then they don't pay the
24 money, does that mean that you have no contract or you have
25 a breach by both parties, or what do you have?

1 MR. MAJURE: Your Honor, I might be helpful in this
2 regard.

3 MS. VARNADO: I have the mic. You'll have your
4 turn when I finish.

5 MR. MAJURE: I was hoping to clarify.

6 MS. VARNADO: Well, first, the specific
7 consideration in this contract, you know, in consideration
8 -- we accepted in consideration the agreement not to pursue
9 litigation. So -- and the other consideration that was in
10 the contract was to pay Muhler, and neither of that -- so
11 there's none of the two elements of consideration came to
12 pass. You've got to have -- you've got to have some. So --

13 THE COURT: I'm just thinking in terms of, say, at
14 the beginning of the agreement, as Mr. Brown says, we've got
15 a problem out here, the windows are bad, thing are bad, the
16 whole project is at a standstill, no work is getting done,
17 we've got to move, if we are going to get this building
18 built, we've got to resolve some of these problems. And
19 that Weather Shield and Muhler says, okay, we've caused --
20 in part we caused these problems, we acknowledge that, so
21 this is what we agree to do to fix the problems, and you
22 enter into this agreement. So -- but the agreement is not a
23 enforceable agreement because of what?

24 MS. VARNADO: Correct., And --

25 THE COURT: Because of what?

1 MS. VARNADO: Because they didn't -- they didn't
2 pay Muhler, as agreed under the contract, and they pursued
3 litigation against Weather Shield claiming defective
4 windows. The promises in this agreement were all to be
5 performed in the future. It wasn't a situation -- or mainly
6 to be performed in the future. It wasn't a -- a -- you
7 know, A did this and B did that, therefore we agree with
8 this consideration, we release -- like a release, we release
9 these people. It wasn't something to be done
10 contemporaneously with the signing or prior to the signing.
11 It was something that was -- all the actions were to be done
12 afterwards.

13 THE COURT: Just one other question and you can
14 continue on with your presentation. So if there is no
15 agreement, then do they still -- the folks who hired y'all,
16 or contracted with y'all, do they still have a claim for
17 breach of warranty, negligence, et cetera, against your
18 clients or are they not seeking that in this case?

19 MS. VARNADO: Concord and Cumberland is not seeking
20 any breach of contract or breach of warranty. Superior
21 is -- has a claim for breach of warranty. We don't believe
22 it's a viable claim for other legal reasons, but we didn't
23 address it in summary judgment. But they have that claim
24 and have made that claim.

25 THE COURT: So that still exists regardless.

1 MS. VARNADO: Yes, sir. So, then, moving forward,
2 we have -- a point in response to something that Mr. Brown
3 said yesterday when we were talking about the forbearance
4 from bringing the lawsuit. He pointed to Paragraph 3 in
5 which Weather Shield and Muhler agreed that nothing that had
6 happened with the windows prior to this time would trigger a
7 statute of limitations in a later suit by any party. That
8 didn't mean Superior, who was required not to sue Weather
9 Shield for defective windows as part of the consideration of
10 the document.

11 On the other hand, it would not have -- had we been
12 sued by Mr. Brown's client for some breach of contract or
13 some other claim, then Paragraph 3 should have precluded us
14 from claiming the statute of limitations. But that does not
15 set up the fact that it was contemplated that Superior could
16 both sue Weather Shield and Muhler for allegedly defective
17 windows in the future and also seek to enforce the indemnity
18 provisions within the contract, because the contract told
19 them they couldn't do that, they had to choose one or the
20 other.

21 The determination of whether or not the indemnity
22 has been triggered goes back to Paragraph 12, and goes back
23 to the statement that I made yesterday in interpreting the
24 conditions under which that paragraph is triggered. The
25 indemnity requirement is triggered within the language of

1 the paragraph because that's the language the Court has to
2 use. It can't use some other language. The language in
3 Paragraph 12 is what the parties agreed to.

4 THE COURT: Is triggered if they are sued?

5 MS. VARNADO: If they are sued and if they have a
6 judgment --

7 THE COURT: Right.

8 MS. VARNADO: -- and they have incurred damages or
9 an arbitration award. There's two points. Goes back to
10 what I was saying with my kids. If we -- in the event it
11 doesn't rain, we will go to the pool tomorrow, if you do
12 your chores tonight. They have two conditions; it's got to
13 not rain and they have to have done their chores.

14 THE COURT: Is it triggered if they are sued and I
15 determine that they are entitled to damages?

16 MS. VARNADO: Well, under that scenario, that means
17 there automatically had to be a lawsuit, and I don't think
18 that the parties contemplated that there would be a lawsuit
19 between each other. Right? There would have to be a
20 lawsuit whereby a judge -- between the parties. The parties
21 would have to sue each other where the judge determined the
22 damages.

23 What this Paragraph 12 contemplates is a situation
24 where Superior, or its third-party beneficiary, Concord, is
25 sued by the owners of the units, or the HPR, and the HPR

1 successfully recovers damages that are the result of
2 defective windows. Otherwise, what this -- to interpret it
3 otherwise means that you need to have a trial between
4 Superior and Concord and Cumberland and Weather Shield and
5 Muhler in order to have the indemnity provision triggered.

6 Now, there's been a couple of statements, again,
7 that Mr. Meyer, who was Weather Shield's general counsel at
8 the time that the parties negotiated the 2007 agreement, has
9 said something about the document being ambiguous. He does
10 not. And I commend you -- or recommend to you to read his
11 affidavit, which is Exhibit 15.

12 In his affidavit, what it does, Your Honor, it sets
13 forth the parole evidence and the history of the events as a
14 fact witness as to how the negotiations took place, what
15 language had been initially put forth. And the language
16 that initially had been put forth for the indemnity
17 provision would allow Superior and Concord and Cumberland to
18 get the indemnity that they wanted and would have required
19 Weather Shield and Muhler to have stepped in and defended
20 them during the trial of the case -- during the initial
21 parts of the case.

22 Initially, it had defend and indemnify. It had
23 nothing about a judgment. It was simply, pay all
24 liabilities and damages and cost.

25 THE COURT: Parole evidence, we looked at that.

1 When would it have applied, the parole evidence?

2 MS. VARNADO: The parole evidence would apply if
3 the Court determines that the language in Paragraph 12, for
4 instance, is ambiguous. Mr. Meyer does not say it is.
5 Mr. Meyer says, it means what we say it means and we think
6 everybody should think it means. The interpretation,
7 though, that Superior and Concord and Cumberland are putting
8 forth is considerably different from the interpretation that
9 Weather Shield has. If the Court --

10 THE COURT: It's just rare that you have a lawyer
11 who has done some work and comes to court and tries
12 explaining what they meant by the work that they did.

13 MS. VARNADO: I understand it's odd, but it was at
14 my request, Your Honor, because he was the author of the
15 e-mails in which -- that set forth what the negotiations
16 were. And so his affidavit has -- it goes through 15K. It
17 has several exhibits attached to it. The exhibits attached
18 to it are drafts of the agreement that show what language
19 was negotiated away, what language was taken out. So that,
20 initially, the parties -- initially, Superior wanted this
21 language; they wanted defense, they wanted liability, costs,
22 fees, you know, no judgment.

23 Weather Shield responded and said, no, we are not
24 going to agree to that, this is our draft, this is why and
25 that's why. From that standpoint, that's just the parole

1 evidence to allow the Court to understand the intent of the
2 parties.

3 THE COURT: Have you ever determined the intent of
4 the parties based on various things that were negotiated
5 before you have an agreement?

6 MS. VARNADO: Yes, Your Honor. Yes, absolutely. I
7 mean, that's -- how else do you -- if the language is
8 ambiguous, how else do you determine the intent?

9 THE COURT: Well, you may have the intent of one
10 party versus the intent of another party, but as to the
11 mutual intent of both parties ... I understand.

12 MS. VARNADO: And, to be honest, the briefs of
13 opposing counsel contain no evidence as to what their intent
14 was. So from a summary judgment standpoint, the only
15 evidence is the evidence presented by Weather Shield. But
16 then moving forward, even if the indemnity provisions were
17 triggered, the indemnity owed by Superior and Weather Shield
18 is still limited. As we set forth in the brief, first of
19 all, there's no indemnity for the negligence of either
20 Superior or Concord and Cumberland.

21 And at one point in its brief, Concord and
22 Cumberland admits that the written indemnity does not
23 require Weather Shield or Muhler to indemnify Concord and
24 Cumberland for its negligence. And that is true I think,
25 again, by a plain reading of the language in Paragraph 12.

1 There's no clear and unequivocal statement that we
2 are indemnifying either party for their negligence or their
3 fault. We are only indemnifying them for damages awarded
4 and not -- but also -- but having -- but with the basic
5 understanding that unless it's clearly and equivocally
6 stated in a contract, that the liability, the fault that is
7 being indemnified, is for the party's own negligence, or
8 part negligence, or part fault, then it can't include that.

9 THE COURT: That sounds like a pretty shrewdly
10 negotiated contract, almost as if the other side wasn't
11 represented.

12 MS. VARNADO: But they were, Your Honor, and they
13 were -- there were lots of lawyers involved in that process.
14 and there's lots of e-mails. I think the important ones
15 that -- I've attached to Mr. Meyer's affidavit.

16 And I need at this point to make a correction to
17 something I said yesterday, and that is in talking about the
18 Otis case. Mr. Majure mentioned the Otis case and the
19 indemnification language was in the Otis case; and I said
20 that language wasn't in there. I was incorrect. It is in
21 there, but actually it supports our point. Because in the
22 Otis case the language stated that Hardin Construction
23 assumes complete responsibility for any accident to persons
24 or property, how so ever caused, and will indemnify and save
25 Otis Elevator harmless against all loss, damage, claims,

1 liability or expenses arriving therefrom, except such loss,
2 damage, claims, liability or expense as may be occasioned by
3 Otis Elevator's acts or omissions.

4 So this Otis Elevator case specifically has that
5 clear and unequivocal language that would be needed -- well,
6 it's not -- excuse me. That's not what I meant. But this
7 clearly and unequivocally says that Hardin doesn't have to
8 indemnify them for their loss. But that's not the level
9 that's needed; you don't need that. The clear and
10 unequivocal language needs to go in the other direction.

11 The clear and unequivocal language needs to say
12 that the parties seeking indemnity -- excuse me, the party
13 owing indemnity is required to indemnify the party seeking
14 indemnity from their own fault or negligence. That's the
15 direction that the clear and unequivocal has to go in, not
16 the other direction. But, regardless, that type of language
17 isn't in Paragraph 12.

18 THE COURT: Well, I was just reading the submission
19 by JDavis and I know that takes us in another direction,
20 that's a separate issue, but somewhere in here she starts
21 with the premise that the contractual indemnity -- where is
22 it? Interesting statement. I don't remember whether it
23 applies to this case, but to the extent it does -- I will
24 come back to it when I locate it, but it's a contractual
25 indemnity buys -- transfers the risk or something?

1 MS. HOLBROOK: Yes, Your Honor. I believe you will
2 find that on Page 18.

3 THE COURT: Page 18. Let me see how she says it.
4 The bottom of Page 18, for the purposes of a claim for
5 contractual indemnity, which involves a transfer of risk or
6 consideration, the contract itself establishes the
7 relationship between the parties. It's a Rock Hill case.

8 MS. VARNADO: Yes. Yes, Your Honor. That's true.

9 THE COURT: So -- in most of the argument yesterday
10 concerning the negligence of Concord and the negligence of
11 Superior and how this -- this -- the indemnity provision
12 should not apply based on their own negligence and things
13 that they did wrong as far as construction. Did you all
14 contract away any -- all the risks of their own negligence
15 by entering into this contractual indemnity arrangement --

16 MS. VARNADO: No, Your Honor.

17 THE COURT: -- and is that what she's saying in
18 this case?

19 MS. VARNADO: Well -- well --

20 THE COURT: Because sometimes when I get the
21 third-parties out there, then they kind of torpedo one of
22 their own sides unintentionally.

23 MS. VARNADO: Sure. And I don't disagree with her
24 statement or summary of the law, and I think it's applicable
25 here because we didn't contract away all of the risk.

1 You've got to look at the terms in Paragraph 12, and
2 Paragraph 12 does not say that Weather Shield would
3 indemnify Superior or Concord for their negligence or fault.

4 THE COURT: I mean, was that the intent of the
5 parties, for them to transfer the risk for consideration?

6 MS. VARNADO: They transferred some risk for
7 consideration, absolutely. They transferred the risk that
8 if they were sued by an owner and damages were awarded
9 against them for defective windows that were the result of
10 Weather Shield's fault, that Weather Shield would reimburse
11 them for their attorney's fees and pay those damages.

12 THE COURT: So, then, in response to the argument
13 that the summary judgment -- well, summary judgment is
14 premature because we haven't gotten to the point in
15 determining damages, that the entire case should be heard
16 and an order issued at the end after some determination of
17 damages -- after that determination is made or are we just
18 -- can we reach that point of deciding the entire matter
19 here since we have not determined what damages they are
20 entitled to, to be indemnified for? Of course, you say they
21 are entitled to none because they don't have an agreement

22 MS. VARNADO: Well, we'll start with that, but
23 beyond that, assuming the agreement is valid for the purpose
24 of this argument, they would not be entitled to recover at
25 all if their negligence or fault join with that with Weather

1 Shield. And as I'll discuss more in another point, both
2 parties have considerable active fault that contributed to
3 issues with the windows.

4 THE COURT: Normally in these cases, I mean, at
5 least when it comes to trial, we get the legal issues, and
6 somehow or another the parties figure out among themselves
7 all of these issues that y'all are now wanting me to figure
8 out as a matter of law. And, I mean, I certainly see where
9 it's murky and complicated and trying to get it all sorted
10 out, but it seems as if through yesterday and today, that
11 y'all were seeking to have me sort it out in advance of the
12 trial.

13 MS. VARNADO: Well, Your Honor, I think the reason
14 why we're having you sort this portion out before trial is
15 because both Concord and Cumberland and Superior settled
16 with plaintiffs. So there's never going to be a trial to
17 find out how much money they owed plaintiffs, I mean,
18 because plaintiffs have settled. They bought their piece;
19 they are gone.

20 Now, when drafting the agreement, the folks for
21 Superior and Concord could have added into that Paragraph 12
22 the fact that it could be a determination by a court, award
23 of arbitration, or a settlement in which Weather Shield
24 participated or was allowed access or was invited, or they
25 could have just said or reasonable settlement. They didn't

1 include reasonable settlement. So the point is they are
2 precluded --

3 THE COURT: Y'all are in the litigation, so, I
4 mean, does that -- they didn't allow you to participate or
5 you chose not to participate or --

6 MS. VARNADO: We were not invited into their
7 settlement negotiations with plaintiffs. So their
8 resolution of their -- when they paid money to plaintiffs
9 and made allocations as to how much they were going to
10 allocate arbitrarily to windows and doors as opposed to the
11 rest of the building and the rest of the causes of action,
12 Weather Shield and Muhler were not invited into that process
13 and were not able to participate in that process.

14 And this goes back to the no-action clauses that I
15 have some cases about in my brief. And those are no-action
16 clauses and that's what this is, a no-action clause. No
17 liability even -- no indemnity is actionable unless there's
18 the judgment.

19 THE COURT: Yeah. In many, many cases that I've
20 heard, that would be a typical -- I get that argument, that
21 we have to first deal with the liability case for damages
22 and then we'll hold off these indemnity claims until after
23 that is done.

24 MS. VARNADO: Right.

25 THE COURT: And I was thinking that's what we were

1 doing in this case, at least initially since the first --
2 the liability claims were settled and then the indemnity
3 claims are coming at the end, but your argument is
4 essentially that they have to come -- well, to be able to
5 assert them, they must be -- they come before the end. I'm
6 trying to get the --

7 MS. VARNADO: Yeah, let me explain.

8 THE COURT: -- I'm trying to get the full gist of
9 -- the whole perspective of all of this, number one; and,
10 number two, just a question of -- since yesterday I was
11 given cases from Arizona and Florida and many other places,
12 and a few cases from South Carolina that were not directly
13 on point of facts of what we're dealing with as far as a
14 construction case. Do we have any southern law or are we
15 making law from this case? Of course you can make law from
16 any case.

17 MS. VARNADO: Yes, you can. Okay. The no-action
18 clause or the no-action indemnity clause, however you want
19 to phrase it, is just what we have here. It only requires
20 the indemnity to kick in or be actionable if the party
21 seeking the indemnity has already obtained a judgment or an
22 award against it. And that's how this language was phrased
23 in this Paragraph 12.

24 If, in a typical indemnity claim where -- like
25 Otis, for instance --

1 THE COURT: Just remind me then, this
2 interpretation of the no-action clause that you just gave,
3 what it requires in order to trigger it. Is that based on
4 prevailing South Carolina law?

5 MS. VARNADO: Yes, sir, and let me find that for
6 you in my brief. On Page 28 of Weather Shield's memo of law
7 in support of this motion for summary judgment, the cases
8 that I mentioned there are all South Carolina cases.
9 There's Travelers Indemnity Company vs. Canal Insurance
10 Company, 254 South Carolina Reporter 92, that's a 1970 case.
11 And what that case says, in construing these no-action
12 clauses, the courts recognize that it is a condition
13 precedence to an action for indemnity under the terms of the
14 contract that the amount of any claim or loss shall first be
15 fixed and rendered certain, either by judgment, or in this
16 paragraph there, by agreement of the parties involved.

17 And the Sexton case, which is another South
18 Carolina case from 1963, states, if there's no judgment,
19 then it is determined that the party has not suffered any
20 damage for which it can seek indemnity and has no right of
21 action. And so, therefore, under the Travelers case --
22 there's Travelers, Sexton and a Farr case, another South
23 Carolina case cited in that brief. The party who is subject
24 to a no-action clause who reaches a voluntary settlement
25 without a -- with a third party without permission of the

1 indemnitor, and without obtaining a judgment, can't seek
2 indemnity under the terms of the contract.

3 And that's what this -- this indemnity provision in
4 Paragraph 12 is just not your typical indemnity provision,
5 like you would find in the Otis case --

6 THE COURT: Well --

7 MS. VARNADO: -- because of the mention of
8 judgment.

9 THE COURT: Well, I'm saying in the connection with
10 a construction defects case and the type of issues that are
11 raised -- I know the Travelers case is from 1970. That's
12 pretty recent in relation to the other cases you cited, and
13 the one from 1963 is the Sexton, 1958 Farr vs. Canal
14 Insurance. Looking at those cases, I haven't seen them, I'm
15 sure there's probably some simple fact pattern unrelated to
16 the type of situation that we're dealing with here.

17 MS. VARNADO: That's true. But that is just
18 recognized -- Judge Bell, in one of his opinions, and I'm
19 afraid that the case name is escaping me at the moment, but
20 I'll get it for you, he went through different types of
21 indemnity that were out there.

22 THE COURT: Judge Bell?

23 MS. VARNADO: Judge Bell.

24 THE COURT: The one who passed in the mid-'80s?

25 MS. VARNADO: Yes, sir. But he went through

1 various -- well, it was the '90s, Your Honor.

2 THE COURT: He was the one that was elected to the
3 Court of Appeals and then died rather quickly?

4 MS. VARNADO: He was on the Court of Appeals. I
5 think he died right after he was elected to the Supreme
6 Court.

7 THE COURT: Supreme Court, Court of Appeals, maybe
8 Supreme Court. I remember it though. It's been a long
9 time.

10 MS. VARNADO: He was my professor in law school,
11 which is why I noted it was him. And I was in law school --
12 I graduated law school in '93, and he was on the Court of
13 Appeals at the time and then got elected to the Supreme
14 Court and then passed.

15 But he went through some of the types of indemnity
16 contracts that are out there, and the typical one is the
17 hold harmless. And that's what Otis Elevator is, and that's
18 what is analogous when you have an equitable indemnity claim
19 that you're seeking; the one party holds the other party
20 harmless. But this is not that and it doesn't fall under
21 any of the other types of indemnity provisions.

22 THE COURT: The other types would not involve a
23 transfer of risk, would they?

24 MS. VARNADO: Well, yeah, they do. But those don't
25 -- what this -- Judge Bell didn't address this, but this

1 language is different from any of the other contract
2 language that Judge Bell went through. This is a no-action
3 clause, and the thing that makes it a no-action clause is
4 the requirement of a judgment before the indemnity right is
5 triggered.

6 THE COURT: Before you even file the lawsuit or
7 before you can get the relief granted -- before the relief
8 can be granted?

9 MS. VARNADO: Before you have suffered any damage
10 that allows you to file a claim.

11 THE COURT: I understand. I'm just asking you
12 these questions. I'm sure everyone here has an opinion.

13 MS. VARNADO: I know they do. But that's -- I
14 mean, that's what type of clause this is, is a no-action
15 clause. And it is based on -- I mean, these cases talk
16 about it. I didn't see many other cases in the modern era
17 -- and I confess I didn't look all over the country on these
18 issues because we had South Carolina law from 1970, which
19 was on point, as far as I was concerned.

20 So, anyway, this is a no-action clause and it being
21 a no-action clause, the issue of the judgment has to -- it
22 is a pre-requisite to them having damages to file a case,
23 and since they settled, they're never going to have the
24 damages. And so the Court can find that -- without going
25 into anything further as to how much -- who's liable or

1 who's at fault and not at fault, the Court can find that
2 since they have not obtained a judgment, or an award of
3 arbitration, the indemnity under this no-action clause has
4 not come to fruition and they can't recover.

5 And in those cases, the Travelers case I'm not --
6 you know, this Travelers case explains it perhaps much
7 better than I am.

8 THE COURT: So, therefore, your summary judgment
9 should be granted.

10 MS. VARNADO: Absolutely. But then going forward,
11 also, should you disagree with me and should you find this
12 to be not a no-action clause, but some type of typical
13 indemnity provision, which you're familiar with in which the
14 parties try the underlying case and then they reserve the
15 indemnity claims thereafter, the -- then I want to point out
16 to the Court that they're asking for so much more than
17 they're entitled to recover.

18 They are -- they can't recover for claims by
19 nonowners. Superior says it's reserving its -- part of its
20 claim until it resolves its claim with Concord and
21 Cumberland, LLC. Well, Concord and Cumberland, LLC was not
22 a subsequent owner. They were the developer. Under
23 Paragraph 12, the only indemnity is from subsequent owners.
24 And they can't seek against Weather Shield recovery for
25 claims for improper installation of the windows. They can't

1 seek for the improper flashing of the windows. They can't
2 seek recovery for other -- you know, the stucco in the
3 balconies and all that which they have included.

4 For instance, when they deposed the plaintiffs,
5 they put 100 percent of their time spent in deposing the
6 plaintiffs on their bill that they've submitted as their
7 damages against Weather Shield and Muhler. The language in
8 Paragraph 12 limits what they can recover against Weather
9 Shield for

10 THE COURT: All of that would be sorted out at a
11 trial if we get to an opinion?

12 MS. VARNADO: Yes. If you disagree that this is a
13 no-action clause and that they get to go, then that should
14 be sorted out at that point. Although, I think it would
15 help if the Court would find that they were -- at the
16 summary judgment stage to find they are limited to claims by
17 nonowners and you won't be entertaining claims by
18 co-defendants or Concord and Cumberland, LLC.

19 Now, going back to the -- or going next to the
20 equitable indemnity claim. Of course, as we discussed
21 yesterday, Superior has withdrawn its claims for equitable
22 indemnity, but Concord and Cumberland has not withdrawn its
23 claims. It still has claims for equitable indemnity.

24 The first prerequisite to an equitable indemnity
25 claim is the demonstration of a special relationship between

1 the indemnitee and indemnitor. The McCoy case says that,
2 that Mr. Brown discussed yesterday. It was decided in June,
3 and that's Opinion Number 27397, but special relationship
4 wasn't at issue in the McCoy case. It was simply correctly
5 cited by the Court, but brushed past because there was no
6 question that in McCoy, what you had there was a buyer and a
7 seller.

8 And McCoy resulted from the seller's failure to
9 disclose a petroleum leak to the buyer of his property, and
10 then when the buyer was sued by adjoining neighbors claiming
11 that the petroleum leak had caused damage to their property,
12 the Court held that there was a special relationship between
13 the seller and the buyer, and there was no question. Here,
14 however, there is no special relationship between Weather
15 Shield and Concord and Cumberland, LLC to support an
16 equitable indemnity claim.

17 Concord and Cumberland, LLC was the developer of
18 the building. Weather Shield was the manufacturer of the
19 windows. In its responses to Weather Shield's Request for
20 Admission, Concord and Cumberland, LLC admits that it had
21 no -- it did not purchase the windows from Weather Shield,
22 it didn't enter into any contract to purchase the windows
23 from Weather Shield, and as set forth in our brief, there
24 was no direct dealing between Concord and Cumberland and
25 Weather Shield in relation to this project.

1 Weather Shield wasn't involved at the beginning.
2 Mr. Brown seemed to make it sound like Weather Shield was at
3 the table when the contract documents were formed. And
4 that's simply untrue and there's no evidence to support
5 that. Weather Shield -- Weather Shield was not a party to
6 the contract documents, which is also admitted by the
7 parties. Weather Shield's only dealing -- direct dealing in
8 this case was with Muhler. Muhler purchased the windows
9 from Weather Shield and sold those windows and installed the
10 windows at the project. So there is not a direct
11 relationship between Concord and Cumberland and Weather
12 Shield.

13 Now, the case that is very clear, and you actually
14 mentioned it a few moments ago, is the Rock Hill Telephone
15 Company vs. Glow Communications case. And that case makes
16 very clear -- and this is a case from 2005, Your Honor. It
17 makes very clear the requirements of a special relationship.

18 Now, it quotes the language that Mr. Brown read to
19 you about a right of indemnity exists whenever the relation
20 between the parties is such that either law or in equity
21 there is an obligation on one party to indemnify the other,
22 as where one person's exposed to liability by the wrongful
23 act of another in which he does not join. But the Court --
24 that language you see in almost every case where indemnity
25 is at issue.

1 What is important about the Rock Hill Telephone
2 case is, the Court there delved into that language to help
3 us understand what is meant under South Carolina law by that
4 type of special relationship. And in this instance, what
5 you had in Rock Hill, you had a utility company who hired a
6 contractor to do some work along a roadside. The contractor
7 hired a subcontractor, and the subcontractor had his
8 backhoe, or some type of machinery, on the side of the road.
9 A motorist came along, ran into the backhoe and was injured.
10 She sued the utility company. The utility company in this
11 Rock Hill Telephone case was not permitted to seek indemnity
12 from the subcontractor because that relationship, the Court
13 held, was too attenuated.

14 The utility company could have sought indemnity
15 from the contractor it hired, but not the contractor's
16 subcontractor. The Court clearly held those entities
17 were -- their relationship was too attenuated to allow the
18 cause of action for indemnity to attach. There was not a
19 special relationship between the parties. Likewise here, no
20 special relationship between Weather Shield and Concord and
21 Cumberland, LLC.

22 THE COURT: That was -- that one was equitable
23 indemnity.

24 MS. VARNADO: Right; and we're talking about
25 equitable now. Yeah, contractual indemnity, separate issue.

1 THE COURT: You know, most of that sort of makes
2 common sense, too.

3 MS. VARNADO: Yes, it does. You have to have some
4 relationship between the parties. And here, this is the
5 equitable -- equitable indemnity claim, you have to have a
6 special relationship. And in this instance, Weather Shield,
7 the manufacturer, and Concord and Cumberland, the developer,
8 who had no direct interaction or contract in terms of
9 purchasing the windows that were installed on the building,
10 they were in the same position as the subcontractor of the
11 contractor, except perhaps even more remote.

12 THE COURT: Well, do they disagree with that
13 argument?

14 MS. VARNADO: I think they do.

15 MR. BROWN: Absolutely, Your Honor. Your Honor, I
16 think, just one comment, special relationship arises out of
17 an agreement. The contractual agreement -- there was a
18 multi-party negotiation that she's described with a lot of
19 everybody talking to everybody and we were being assured, go
20 ahead and buy windows and sell them to the third party. If
21 that doesn't create a special relationship, I don't know how
22 you do that.

23 THE COURT: Okay. I just wanted to know whether
24 there was a disagreement.

25 MS. VARNADO: Yeah. And the point on that, Your

1 Honor, if he's using the June 2007 agreement as the sole
2 basis for this relationship, first of all, he's not -- his
3 client isn't a party to that; but, second of all, they --
4 there's an indemnity provision within that agreement. And
5 that sets forth what indemnity, if any, the parties are
6 entitled to as a result of entering into that contractual
7 agreement.

8 If the June 2007 agreement was silent as to
9 indemnity, then perhaps he could say that that contract set
10 forth some basis for indemnity. But even so, it's too
11 attenuated. He's not a signatory to the document. He comes
12 as a third-party beneficiary to that.

13 The Rock Hill case also goes on to talk about the
14 vicarious liability passive-active issue that Mr. Brown
15 brought forth in yesterday's argument. And his assertion is
16 that the only -- that even if there is fault on behalf of
17 Concord and Cumberland, that fault is only passive. It's
18 only the failure to detect that the windows were defective.
19 That's the only reason why he was in that lawsuit by the
20 plaintiffs in relation to the windows, but that is not the
21 case.

22 His fault, his company's fault, Concord and
23 Cumberland's fault in this matter, in relation to the
24 windows and doors, is not that type of passive negligence
25 where one party hires another party to do something and does

1 nothing other than the hiring process. That's not what
2 happened here.

3 Concord and Cumberland provided their agent -- the
4 architect provided plans that set forth the installation
5 methodology of the windows in a manner that was in violation
6 of Weather Shield's manufacturing instructions, which
7 resulted in problems with the windows. His company also --
8 Concord and Cumberland's agent also provided construction
9 administration that allowed pans that were reverse sloped
10 and coatings to be put on outside of the building without
11 weeps and flashings in the construction of a barrier stucco
12 system, all in violation of Weather Shield's installation
13 instruction. And it was designed that way.

14 In addition, not only did they not passively
15 provide the plans that caused problems with the windows,
16 they then hired Metro, another company, who came in and
17 altered every window in the building. They removed the cap
18 glazing that had been placed by Weather Shield from all the
19 windows and replaced it with their own. And the allegations
20 continue to this day that windows leak through that pathway.

21 It is Concord and Cumberland's agent that they
22 hired who touched the windows, who altered the windows, and,
23 therefore, they can't hide behind just vicarious liability
24 or passive negligence; they actively were involved in
25 altering the windows.

1 THE COURT: Does that go to the extent of the
2 damages or whether they have a right to any damages?

3 MS. VARNADO: That goes to whether you -- because
4 the way equitable indemnity goes, one must have clean hands
5 in order to be equitably indemnified. And the exception to
6 the clean hands is, that if the fault is only passive, in
7 certain situations a party may recover regardless; but in
8 this instance, they can't hide behind -- they weren't
9 passive. Their actions towards the windows were active and,
10 therefore, they do not come to this court with clean hands.

11 This -- so not only is there no special
12 relationship, they don't have clean hands and, therefore,
13 they can't seek indemnity, equitable indemnity.

14 THE COURT: Okay. They can't seek it or they're
15 not entitled to it?

16 MS. VARNADO: They are not entitled to equitable
17 indemnity.

18 THE COURT: I have to hear the evidence to -- if
19 it's a matter of equity, wouldn't I have to sort of hear
20 that out?

21 MS. VARNADO: Well, they need -- on summary
22 judgment, in Weather Shield's brief and Muhler's brief,
23 which we've adopted, sets forth evidence and facts which
24 demonstrate that Concord and Cumberland has done -- through
25 its agents, did direct work and directly affected the

1 windows.

2 THE COURT: Well, I'm going on the premise that
3 everyone messed up. Everyone did something wrong; that's
4 the premise I'm going on.

5 MS. VARNADO: But they haven't provided any
6 evidence to the contrary.

7 THE COURT: That --

8 MS. VARNADO: That they didn't mess up. They
9 simply said their -- his brief only says that we are -- our
10 only fault was we bought these windows and didn't notice
11 problems with them in passing along, but that's just not
12 true.

13 THE COURT: I'm going on the premise at this point
14 that everyone -- all the folks were negligent in some way in
15 this construction. So where does that -- if I assume that,
16 where does that leave this issue?

17 MS. VARNADO: Then they can't get equitable
18 indemnity. You have to have clean hands for equitable
19 indemnity.

20 THE COURT: So if you --

21 MS. VARNADO: You are a joint tortfeasor or if you
22 join in causing the harm to the plaintiffs, then your hands
23 are not clean and you can't get equitable indemnity. Short
24 and sweet.

25 THE COURT: So negligence equals unclean hands?

1 MS. VARNADO: Negligence or some other fault.

2 THE COURT: Okay.

3 MS. VARNADO: But in this instance, the only
4 evidence in the record is their design -- their provision of
5 plans that caused problems and their provision of work by
6 Metro that altered the windows. And so there's no
7 evidence -- I don't know how they can present -- I mean,
8 they simply were -- their hands were involved.

9 THE COURT: Well, you have the Myles Glick
10 affidavit showing that they did something wrong, so --

11 MS. VARNADO: Right.

12 THE COURT: -- I have to -- there is some evidence
13 that they did something wrong obviously.

14 MS. VARNADO: Right. There's no evidence they did
15 it right.

16 THE COURT: Does that totally wipe out an equitable
17 indemnity claim?

18 MS. VARNADO: In this situation, yes.

19 THE COURT: Or is that an issue of fact to be
20 determined at a --

21 MS. VARNADO: Well, from a summary judgment
22 standpoint, they have to give you a scintilla of evidence.
23 So it's not a big burden, but they have to give you a
24 scintilla of evidence that their hands are clean. And
25 Weather Shield's hands are dirty.

1 THE COURT: Unless they did -- they did everything
2 perfectly.

3 MS. VARNADO: They have to have some evidence that
4 they did, they can't just say it. And there's nothing --

5 THE COURT: Nothing, I understand.

6 MS. VARNADO: Yes.

7 THE COURT: All right.

8 MS. VARNADO: Thank you.

9 THE COURT: Let's take a few minutes.

10 (Whereupon, recess transpired.)

11 THE COURT: Yes.

12 MR. NISTAD: Your Honor, I think it's probably best
13 if I go next --

14 THE COURT: Okay. Very good.

15 MR. NISTAD: -- because our arguments parallel each
16 other and then they'll have time to respond.

17 MR. BROWN: That makes sense. I can respond to
18 both at the same time.

19 THE COURT: All right.

20 MR. NISTAD: At this point, it's basically,
21 Muhler's motion for summary judgment. A lot of the issues
22 were addressed yesterday in responding to Superior's motion
23 for summary judgment, but at this point the motion for
24 summary judgment is against both Superior and Concord and
25 Cumberland.

1 It might help to kind of set the stage just a
2 little bit in a very basic form. Our argument addresses the
3 fundamental disagreement between the parties about what is
4 the scope of indemnity. Here Concord and Cumberland are
5 seeking indemnity for Muhler's negligence and their own
6 negligence. Muhler argues that they are not entitled to
7 indemnity for their own negligence.

8 And for the purposes of this portion right now, I'm
9 not going to address the issues that -- where the argument
10 would be they're not entitled to any indemnity at all. I
11 think we've been through that plenty, have beat that horse
12 to death. And I think in this framework, it allows you to
13 segregate in your mind the options that you have, because I
14 think at the end of the day you do have some options; one
15 being you deny everything; the other being you grant
16 everything, and then any number of options in-between.

17 At this point, the argument focuses on summary
18 judgment of a very narrow issue that basically solves that
19 difference; are Superior and Concord entitled to indemnity
20 for their own negligence? And then I would like to point
21 out some issues real quickly about our discussions of
22 installation of the windows. And at times, that discussion
23 has gotten confused.

24 Muhler's contract was for installation of the
25 windows in a rough opening prepared by Superior and/or

1 Superior's direct subcontractors, people we have no
2 responsibility for in our argument. There is testimony that
3 there's major problems with the installation of the windows
4 as it relates to the buck and pan system, a buck and pan
5 system that was designed by JDavis Architects. It was
6 partially designed in consultation with another agent of
7 Concord and Cumberland, SKA, Sutton-Kennerly & Associates,
8 and, ultimately, that was the design that was executed by
9 Superior.

10 There is ample evidence that that design alone --
11 even if the windows were perfect or if the windows could be
12 fixed in place, that design alone, that defect in the
13 design, would require all the windows to come out of the
14 building. And so you have a situation where an ample amount
15 of the damages associated to the windows can be placed upon
16 the shoulders of Superior and Concord and Cumberland through
17 their agent, the architect, and not on Muhler. So --

18 THE COURT: You say it can placed on --

19 MR. NISTAD: It can be placed on Concord and
20 Cumberland and Superior, and not on Muhler, because if you
21 have the buck system that's wrong and the pan system that's
22 wrong, but the actual window itself is okay, whether it's --
23 the window is not defective to begin with or it can be
24 repaired and placed, there's still testimony that because of
25 the failure to design a buck system that has a sloped pan,

1 the failure to install the pans with some sort of slope, the
2 failure to design the pan so that it is flashed to daylight
3 rather than flashed just to the inside of a water barrier
4 system and traps water inside, are all installation issues
5 that cannot be attributed to Muhler.

6 Muhler simply put the window in a rough opening
7 which was the buck system with the pan. If the pan system
8 is causing the problem, that's an installation issue that
9 cannot be attributed to Muhler. So there's evidence there
10 that just because there's installation issues doesn't mean
11 it lands all on the shoulders of Muhler. And all of that
12 goes to the possibility that the responsibility for the
13 windows can be apportioned among all the parties here, which
14 I think is something you acknowledged just a little bit ago.

15 So with that framework I can move on to what the
16 primary argument about this indemnity provision is. And I
17 think you're a little concerned with the fact that there are
18 so many out-of-state cases and how do you handle those and
19 what kind of weight do you give those?

20 THE COURT: I'm fine with it. I was about to ask
21 you all earlier if y'all would just stipulate that
22 California law applies, I'm sure we could --

23 MR. NISTAD: I've gotten burned by California law
24 back in Tatum vs. MUSC where this Court of Appeals adopted
25 the dual persona doctrine and the Supreme Court eventually

1 reversed. So California law scares me probably the second
2 most versus Louisiana law.

3 THE COURT: I'm sure they've had many of these
4 situations.

5 MR. NISTAD: Yeah, I don't think there's any
6 California law in front of you at this point, so -- but if
7 we go back to indemnity law, that's solid South Carolina
8 law. And some of this is just reiterated as of July 23rd
9 and actually to Opinion Number 27420. And in that opinion
10 the Supreme Court states, we have long recognized that a
11 contract of indemnity will not be construed to indemnify the
12 indemnitee -- which in this case is Superior and Concord and
13 Cumberland -- against losses resulting from its own
14 negligent acts unless such intention is expressed in clear
15 and unequivocal terms; may cite the Lawrence case which is
16 in our briefs.

17 THE COURT: Contractual indemnity.

18 MR. NISTAD: Contractual indemnity.

19 THE COURT: So basically when it comes to -- even
20 though one is contractual and one is equitable, in fact
21 they're both equitable.

22 MR. NISTAD: Equitable indemnity is not allowed if
23 there's any unclean hands, any contributory negligence or
24 any concurrent negligence on the part of the party seeking
25 equitable indemnity. Contractual indemnity -- because of

1 some of that language we talked about yesterday where it
2 says, even if part of that negligence is caused by the
3 negligent acts of the indemnitee, that last sentence -- that
4 last part of that little section simply eliminates the
5 argument that if you're negligent at all on your own, you
6 don't get indemnity. It says you can still get indemnity
7 even though you've been negligent.

8 What it doesn't do is go to the next level, which
9 says, I am also getting indemnified for my own negligence.
10 What Superior is asking for, Concord is coming in to ask for
11 -- at this point, I think all they're entitled to is
12 indemnity for that part of Muhler's negligence that caused
13 them damages. And so --

14 THE COURT: So the test is going to be an equitable
15 indemnity test even though it's --

16 MR. NISTAD: No, no.

17 THE COURT: I know it's not an equitable indemnity
18 test to wipe out the claim totally, but in the sense of
19 determining what is justified under the contractual
20 indemnity agreement.

21 MR. NISTAD: I think what it boils down to is, they
22 are talking negligent. I think they are going to put up
23 evidence that Muhler is negligent. Do they get
24 indemnification for everything or do they get just that
25 portion of --

1 THE COURT: The Supreme Court said no.

2 MR. NISTAD: Yeah.

3 THE COURT: According to what you've just said.

4 MR. NISTAD: Well, you can contract for that
5 provision. They could have contracted for Muhler to
6 indemnify them for their own negligence. And there's -- and
7 there's a reason why we have this standard of clear and
8 unequivocal language, which is a very high standard. Much
9 higher than any typical burden of proof you have in a civil
10 court or even the General Sessions. But it deters parties
11 from negligent conduct and it promotes due care.

12 THE COURT: Or reckless conduct.

13 MR. NISTAD: Yes. And so in that scenario -- and
14 this is all South Carolina law -- the parties seeking
15 indemnification for their own negligence has -- you know,
16 the language is strictly construed and their burden of proof
17 is strictly construed. And so you get to the point to where
18 -- to strictly construe this contract, courts -- I should
19 point out that this clear and unequivocal standard is almost
20 uniform in all the cases we've given you. So South Carolina
21 law, maybe for the first time ever, is consistent in at
22 least one point with laws of a lot of other states.

23 THE COURT: Let me ask you this.

24 MR. NISTAD: Sure.

25 THE COURT: Clear and unequivocal standard, is that

1 used to determine whether the contract exists or what the
2 contract provides?

3 MR. NISTAD: It's for what the contract --

4 THE COURT: Is it used exactly to determine whether
5 a contract exists -- whether a contract of indemnity exists
6 or what is provided for in the contract?

7 MR. NISTAD: What is provided for in the contract.
8 And that's why at this point --

9 THE COURT: So you're not joining the argument that
10 there's no consideration?

11 MR. NISTAD: No, I have joined in that argument.
12 It's out there, and I'm assuming for this point you are just
13 going to deny that, because I want to -- I want to focus on
14 how this one argument works.

15 THE COURT: Okay.

16 MR. NISTAD: Because when you go back and consider
17 this in chambers, you're going to think, well, you know, is
18 there a contract at all? If there's not, how is the
19 contract construed? And you have options, and so this --
20 I'm trying to frame that in this one option that you're
21 going to deny summary judgment, that the contract
22 isn't applicable.

23 THE COURT: It's going to be interesting with all
24 these books of information. I've got a brand-new clerk
25 coming next Monday, so she's not even paying attention to

1 this.

2 MR. NISTAD: She is the loveliest person in this
3 room. She is, without a doubt, the loveliest person in this
4 room.

5 So indemnity for one's own negligence is not
6 favored in the law. It's strictly construed because the
7 provisions of that kind of indemnity contract do not promote
8 due care and -- but rather promote negligence. And so what
9 we've got here is that's the same foundation of law
10 basically that every other state has. It's clear and
11 unequivocal. There's -- it's strictly construed.

12 The only hole in South Carolina law is that it
13 hasn't -- we haven't reviewed the boilerplate language
14 that's in the original general contractor/subcontractor
15 agreement, and there's probably nothing even remotely close
16 to the specific language that's in the 2007 agreement.

17 Other states, and this is where the other case law
18 comes in, have construed the boilerplate language and
19 they've addressed kind of similar language for the 2007
20 agreement. And they're using the same clear and unequivocal
21 standard. And when they address these cases, you know,
22 there's several states that look at the boilerplate language
23 and say, this is not clear. It is equivocal and it's
24 just -- it's not indemnity for the indemnitee's own
25 negligence.

1 And, then, one of the cases that was brought up by
2 Superior, that Florida case, I think that's very
3 instructive, because there was a huge difference between the
4 language of that boilerplate language and our boilerplate
5 language. Because that Florida case -- and I will find it.
6 It's Camp, Dresser & McKee vs. Paul Howard. That language
7 has within its primary paragraph a specific acknowledgment
8 of the negligence of the indemnitee, the contractor. It
9 says the contractor and the subcontractor.

10 Our agreement here does not have any reference to
11 the negligence of Superior or the contractor. It has a
12 specific reference only to the work of the subcontractor or
13 the work under the subcontract. And so I think that's clear
14 and equivocal evidence that there is not an intent to
15 indemnify Superior or Concord and Cumberland for its own
16 negligence. It is clear and -- I'm sorry.

17 And if it's clear and equivocal that it's an intent
18 not to, it cannot be clear and unequivocal that it is an
19 intent to indemnify them.

20 THE COURT: So the suggestion is that there's no
21 way if anyone would have intended to transfer the entire
22 risk such that you would be paying for all of the defects,
23 but the intent was to limit it to whatever problems might
24 exist as a result of the windows.

25 MR. NISTAD: Of Muhler's own work.

1 THE COURT: But to get to all of that and to
2 determine all of that, I have to have you go through the
3 process of you all -- the litigation that seeks to limit it
4 or --

5 MR. NISTAD: I don't think so. I don't think so.
6 I think you can rule on just that one point, that language
7 of the contract is not clear and unequivocal. And so.

8 THE COURT: If the language is clear --

9 MR. NISTAD: If the language is clear and
10 unequivocal, which is a high standard, they get indemnity
11 for their own negligence.

12 THE COURT: So you would have to write a check for
13 what they wrote a check for.

14 MR. NISTAD: And they get the free ride you
15 mentioned yesterday for their own negligence. But that's a
16 very high standard, and the case law that we've presented to
17 you today -- just application of South Carolina case law
18 doesn't allow you to reach that conclusion. And then
19 there's all these examples of other states showing you that
20 other states have reached that same conclusion. It's not
21 clear and unequivocal language.

22 And even if you look at the case law they have
23 presented where some state may have said it's clear and
24 unequivocal, despite some changes in the language for the
25 specific boilerplate language, if you've got two states

1 coming down on either side, it can't be unequivocal.
2 Unequivocal is the key word. It's a word they avoided
3 almost entirely yesterday. Unequivocal is without any
4 doubt.

5 THE COURT: Yeah. Well, every time you speak I'm
6 totally convinced, and then I hear the other side.

7 MR. NISTAD: So --

8 MR. MAJURE: Your Honor --

9 MR. NISTAD: Unless you get away from us and don't
10 hear us buzzing in your ear, then you could make your
11 decision. In your position right now, I would not rule at
12 all, I would just take it under advisement just to get away
13 from our noise.

14 THE COURT: It's so much to read, but I'm sure in
15 the end we will get it right.

16 MR. NISTAD: One of the other issues as far as
17 negligence also goes is that there is evidence of damages to
18 these windows after we installed them. There's evidence of
19 damage by Superior directly to their -- through themselves
20 and other subcontractors for failing to protect the windows
21 in place as the rest of the building goes up around them.

22 There's evidence of other contractors hired
23 directly by the owners who were leaving these windows open
24 for long periods of time in high-wind events, in rain
25 events, and if you leave these windows open -- and this

1 hasn't been mentioned today, but these are casement windows.
2 And casement windows crank and open up like this,
3 (Indicating) like a door, so part of the window's hanging
4 outside the perimeter of the building.

5 When you get a strong wind down the street, it's
6 going to grab that sash and that sash is going to pull on
7 the frame, and in a high-wind event that can cause problems.
8 A guy that's doing interior trim on that unit who is never
9 going to live in it, only wants to get his job done, but
10 doesn't want to boil away because the unit has no air
11 conditioning is going to leave that window open, and the
12 more wind the better. And that damage --

13 THE COURT: Out of all the windows I've ever had in
14 my homes, casement windows has always been the ones that
15 I've had the most problems with.

16 MR. MAJURE: Your Honor, am I allowed to interject
17 for one moment?

18 THE COURT: Yes, sir.

19 MR. MAJURE: With all due respect to Mr. Nistad,
20 everything he's spoken of so far this morning we argued
21 yesterday for 5 1/2 hours. And the motions -- Superior's
22 motions for summary judgment is based upon the exact same
23 agreement that he is referring to; the two motions for
24 summary judgment are the counter positives, the ying and
25 yang of each other to a T.

1 And we argued for 5 1/2 hours yesterday about what
2 the interpretation is of the agreement and how it should be
3 construed, and Mr. Nistad gave a very extensive, very long,
4 as well as I, statement of his client's position. So I
5 would ask for -- in the interest of economy, I would ask if
6 the Court would request The Muhler Company confine its
7 argument today to any aspect of its argument that they did
8 not raise yesterday; because, so far, everything that he is
9 discussing substantively as far as the issues, we discussed
10 thoroughly yesterday.

11 THE COURT: Yeah, I agree. It seems as if what
12 everyone has said today, we heard said -- they said
13 yesterday, except for the -- we haven't heard from the
14 architect.

15 MR. NISTAD: Your Honor, I'm about done.

16 THE COURT: So I understand your point.

17 MR. NISTAD: And I repeated myself some, but some
18 of that was to develop a framework; one, to demonstrate that
19 there is this option and it's partial summary judgment --

20 THE COURT: It's also taking awhile for it all to
21 sink in with me. I'm being introduced to this for the first
22 time.

23 MR. NISTAD: Some repetition was necessary to set
24 the stage for the points I want to make, and it's about
25 done. One is that there's an option here. This is partial

1 summary judgment. If you rule that there's not clear and
2 unequivocal language in either of these contracts, and
3 there's not, then you simply -- the scope of the indemnity
4 that's provided to Superior and Concord and Cumberland is
5 simply indemnity for Muhler's negligence and Muhler's
6 negligence alone.

7 THE COURT: Whether I rule that or not, then you're
8 still contending that the law only allows that. That the
9 law as enunciated in the case --

10 MR. NISTAD: If you grant for summary judgment, it
11 clears up an issue we have, and then -- at least one issue.
12 And -- and so what we're left with is that the trial would
13 change a little bit.

14 THE COURT: Tell me the name of the case from a few
15 weeks ago, again.

16 MR. NISTAD: Ashley II, Opinion Number 27420, it's
17 dated July 23rd. I think Mr. Brown has handed it up
18 already.

19 MR. BROWN: I have a copy and I think I sent it to
20 you by e-mail. I'm going to refer to this case and I think
21 it is very important on the issue, and I will go ahead and
22 give Your Honor a paper copy.

23 THE COURT: It's always good if both sides are
24 citing the same case.

25 MR. BROWN: Your Honor, that case -- I know you've

1 heard this for a day and a half, that case comes to a
2 different conclusion than Mr. Nistad is telling you.

3 THE COURT: Well --

4 MR. NISTAD: The case itself is an entirely
5 different set of facts and that those facts are not
6 analogous to this case at all. What's important about that
7 case is, it reiterates's South Carolina position that it's
8 clear and unequivocal, and the important point that -- that
9 is important because we don't want -- we don't want to
10 promote negligence. We want to promote due care.

11 And so the two points I'm trying to make, you have
12 options in this one minor -- one small option to resolve the
13 major difference between the parties in what we're arguing
14 and what the trial will be. And then --

15 THE COURT: And the major difference --

16 MR. NISTAD: And then the major -- why we have this
17 clear and unequivocal is that it promotes responsibility for
18 all the parties. And that's all I really have.

19 THE COURT: And it clears it up to the extent that
20 they're seeking to be fully reimbursed?

21 MR. NISTAD: That's right, Your Honor.

22 THE COURT: Fully indemnified?

23 MR. NISTAD: Yes..

24 No, Your Honor. I shouldn't -- it's not 100
25 percent, but it's probably 99 percent. I mean, it's a vast

1 majority of what they've paid out.

2 THE COURT: All right.

3 MR. BROWN: Your Honor, thank you. I'm going to
4 the podium again.

5 THE COURT: I'll probably want a proposed order for
6 everyone on what they think is their best argument.

7 MR. BROWN: Yes, sir. I think, as you stated, a
8 lot of this is sinking in, it's sinking into us, but I think
9 this proceeding seems to have gone far beyond strictly
10 answering the question, is there an issue of fact for the
11 Court in almost a primer and a upcoming discussion of all of
12 the factual issues that will have to be addressed in
13 October? But I think there has been --

14 THE COURT: Sounds like a good CLE, too.

15 MR. BROWN: Yes, sir. I've learned a tremendous
16 amount today. I want to say candidly and apologetically and
17 without trying to sound wrong, there's been a tremendous
18 amount of, I think, misstatement of the law and misstatement
19 of the facts, and I don't want to those to sink in.

20 THE COURT: Okay.

21 MR. BROWN: I would like, as I said yesterday, to
22 spend some time and go back through, because there's another
23 very different posture of the facts and the inferences in
24 the facts and the law. And, for example, there is not a
25 single equitable indemnity case in this state that has ever

1 talked about the right in terms of unclean hands.

2 That equity -- a general principle of equity and a
3 general principle of unclean hands, it certainly exists, but
4 the issue of equitable indemnity is very precisely stated
5 and it is not, can we find they messed up the roof and,
6 therefore, the roof bars them from having to do with the
7 windows.

8 THE COURT: Negligence equals unclean hands doesn't
9 exist.

10 MR. BROWN: It exists -- let me look at the case,
11 if I could quote the case. It exists only in regard to the
12 act that we are seeking indemnity for. The case law refers
13 to indemnity for an act in which the indemnitee did not
14 join. Or it refers to indemnity for damages that the
15 indemnitee did not create.

16 Now, the question isn't whether we may have been at
17 fault in the roof. The question is, are we at fault in some
18 fashion to the improper manufacture of windows? That is the
19 precise question that has to be answered, not can they find
20 that we weren't nice or that we didn't pay attention or
21 something. It is the act that we are seeking indemnity for,
22 did we join in that act. That's the language in the case.

23 So the question and the evidence does not simply go
24 to, did we hire an architect? Did that architect make bad
25 plans? Did that architect fail to do things? Ms. Varnado

1 went through a litany of their bad stucco walls and their
2 problems with the brick. None of that has any relevance to
3 the question of whether we joined in her act of
4 manufacturing bad windows.

5 So that distinction needs to be talked about and
6 needs to be discussed. And I think that before we leave
7 today -- and I would ask Your Honor to look at those cases
8 and look at the definition of what is the circumstance that
9 actually affects our right to equitable indemnity.

10 THE COURT: Well, to the extent that they said,
11 well, you changed the -- you didn't follow the instructions,
12 you changed the -- the buck system is flawed, that it's all
13 interconnected. That's their argument, is that your
14 negligence is interconnected with any of their negligence,
15 so they cannot be deciphered.

16 MR. BROWN: In a general abstract sense, that is a
17 proper consideration. In terms of the owner, we had
18 absolutely nothing to do with installing the bucks or
19 designing the bucks. Now, I think Mr. Nistad is correct, he
20 will have the right to show not in terms of negligence, but
21 in terms of damages what is the fair value of what he did.

22 I agree with him, the indemnity says he will
23 indemnify us against the allegations of his bad
24 installation. Those are not considerations that bar
25 equitable indemnity. Those are considerations that define

1 damages, and it can define damages to the point that if --
2 let's take his example of multiple causes for removing the
3 windows. Now, I think that would have been a consideration.

4 There is copious evidence that the windows
5 themselves leaked and were defective and needed to come out;
6 therefore, you buy new windows and put in new windows and
7 you tear out the old windows in order to correct that
8 deficiency. There is abundant evidence that the pans under
9 the windows were improperly put in. That same fact, and I
10 think Mr. Nistad properly points out, would lead to a
11 removal of the window;

12 And then you have another defendant who may have
13 contributed to that. That does not absolve him of the -- of
14 our right to try the case on equitable indemnity. It raises
15 the question of, one, do you have a single injury that
16 cannot be allocated and, therefore, they are jointly and
17 severally liable but subject to offset?

18 If the case were tried, the jury would have the
19 option and, Your Honor, you are the fact finder, of finding
20 that this is a contributing proximate cause, a concurrent
21 proximate cause that cannot be allocated and, therefore, all
22 parties who contributed to that are jointly and severally
23 liable. Or if the evidence allows allocation, Your Honor
24 can look at it and say, I think based on the evidence that
25 Mr. Nistad's clients share for having installed it

1 incorrectly, which there's evidence, is this number.

2 That's why we don't give summary judgment and you
3 hear the evidence; it has nothing to do with barring the
4 right to bring an equitable or contractual indemnity claim;
5 It has nothing to do with negligence. It is a proximate
6 cause issue. I don't know if that answers the question.

7 THE COURT: Yes, sir.

8 MR. BROWN: So I'm going to come back to this, but
9 I want to try to tick off some things. And I think -- let's
10 start -- we were talking about negligence. I want to jump
11 to this question of negligence and indemnity. The Ashley II
12 case, which was filed July 23rd, deals with contractual
13 indemnity. I agree with you the fact pattern is the same,
14 but the discussion in the holding are intended not to apply
15 to this fact finding, but to any consideration of indemnity.
16 And it's a certified question.

17 Judge Kittredge wrote this who wrote the McCoy
18 opinion. He seems to have been assigned the indemnity work
19 in the Supreme Court. But the question was, does the rule
20 that a contract of indemnity will not be construed to
21 indemnify the indemnitee against losses resulting from its
22 own negligent acts, unless such intention is expressed in
23 clear and unequivocal terms, apply when the indemnitee seeks
24 contractual indemnification for costs and expenses resulting
25 in part from its own strict liability acts.

1 And the answer was no, because in that case there
2 is no deterrent effect necessary or needed or available
3 where my liability is vicarious or imputed or implied by
4 law. Your Honor and Mr. Nistad had a very pertinent
5 discussion of the deterrent effect. The Court has held as
6 of the 23rd, that where there is no deterrent effect, where
7 it is imputed by vicarious liability, then the rule of no
8 indemnity for negligence does not apply.

9 If you go on into the case, it specifically states
10 at Page 21, the policy basis for the negligence rule is
11 simple: Barring indemnification when the indemnitee is at
12 fault, serves to deter negligent conduct; however, we have
13 declined to apply the negligence rule to bar
14 indemnification, even in the context of a negligence action
15 when application of the rule would have no deterrent value.
16 And they cite to South Carolina Electric & Gas vs. Utilities
17 Construction, which is the seminal equitable indemnity case
18 in this state, and which holds that the owner who hires a
19 contractor who performs negligent work for which the owner's
20 vicariously liable is entitled to equitable indemnity.

21 This case refers directly to the issue we have
22 before you today. It's not a case that has nothing to do
23 with it. It cites directly to the premise of equitable
24 indemnity in saying, we don't bar indemnity for negligence
25 where there is no deterrent effect. And there is no

1 deterrent effect where there is vicarious liability.

2 Now, when Superior or Concord buys these windows,
3 we can't do anything about increase or decrease, or help or
4 hurt the liability we are going to have to the owners if
5 they make bad windows. Our conduct is not being deterred if
6 we are not indemnified for our negligence because we can't
7 do anything about it, and we -- in fact, the liability is
8 established vicariously under the warranty of habitability.

9 THE COURT: So you are not in the same shoes as
10 Superior?

11 MR. BROWN: No, sir. In some way we are, but,
12 ultimately, we are different in that we are the owner and we
13 go to Superior, who goes to Weather Shield, and they provide
14 us their work, and we give it to the owners under vicarious
15 liability. And this case says there can be indemnification
16 of the party's negligence where there is no deterrent
17 effect, that is, where there is vicarious liability.

18 THE COURT: Is this a settlement case as well where
19 they're seeking -- was this case settled and they were
20 trying to get money back?

21 MR. BROWN: I don't think this case settled. I
22 believe there was a ruling by the court. There was a
23 motion -- the Court changed -- okay. At Page 20, after a
24 bench trial, the District Court found that PCS was liable to
25 Ashley for environmental cleanup cost and PCS was entitled

1 to indemnification for attorney's fees and costs. Following
2 Ross's motion for reconsideration, the District Court
3 vacated and certified the question.

4 And, candidly, I don't think under the law there's
5 a bit of difference between a judgment and settlement. The
6 cases are ripe with examples of settlements that are allowed
7 to be recovered by equitable or contractual indemnity.

8 THE COURT: So in this case, were these issues
9 being determined simultaneously, so as -- as they are
10 presented in this case --

11 MR. BROWN: Yes, sir.

12 THE COURT: -- such that would be contrary to the
13 argument of Weather Shield, that they cannot be determined
14 in the same litigation?

15 MR. BROWN: Correct. This is all one case, a bench
16 trial. The Court found indemnity, but then changed its mind
17 and asked for a certified question.

18 THE COURT: They didn't wait for a damage award to
19 then seek indemnification.

20 MR. BROWN: I don't believe so. But what is clear,
21 is there has been a fundamentally acknowledged change in the
22 rule of negligence and indemnity in this state. Now,
23 according to the opinion, that rule was implicitly
24 recognized in the SC Electric and Gas Construction Utilities
25 case, which is the exact case we have; this case is dead on

1 point. But they say in here that there's -- it is where
2 there is an absence of deterrence.

3 Now, it also addresses your question about risk
4 allocation, which is why I want to -- one reason I wanted to
5 start with it. If you go to page 23, above the heading,
6 Roman Numeral III, an indemnity agreement is an ideal method
7 for businesses to allocate costs and expenses that may arise
8 in future litigation, which is precisely what Weather
9 Shield, Concord, Superior, and Muhler did. If we are sued
10 in the future, here is the allocation of expenses for those
11 future suits. And the Court is specifically endorsing an
12 indemnity agreement which accomplishes those purposes.

13 Indeed, the parties to the 1966 agreement were
14 sophisticated business entities that engaged in an
15 arm's-length purchase agreement and chose to include an
16 indemnity provision in the contract. We find no basis to
17 invoke the negligence rule to trump the plain language of
18 the indemnity agreement, because there's no deterrence
19 because there's vicarious liability.

20 Now, this case I think says to Your Honor that
21 there is no reason to accept the argument of Weather Shield
22 and Muhler, that somewhere and somehow, in some form or
23 fashion, we just need to avoid this whole agreement that was
24 negotiated over a matter of months and signed by the parties
25 to deal with vicarious liability of Concord and Superior in

1 the event of future litigation.

2 Now, to be candid, I think something that has not
3 been pointed out that I think the Court needs to be aware of
4 it, nobody has mentioned it and you may know it, there is a
5 statute, 32210 I believe, that says, in the construction
6 context, a sole negligence indemnity is void, but that
7 statute does not effect, and, basically, in reverse terms,
8 blesses a partial negligence indemnity.

9 Now, by statute, if somehow the evidence showed
10 that Concord and Cumberland was solely responsible for the
11 manufacture of the windows, then I can't ask them to pay me
12 for something I did solely. I can ask them under that
13 document and under this case to pay me, even though I might
14 have been a contributor to the suit. So the question then
15 becomes -- and what I want to try to stress from my
16 perspective is this whole discussion of negligence is a red
17 herring. It's designed to create a basis to try to get out
18 of an agreement that really should be decided on proximate
19 cause because the agreement is so simple and so direct.

20 Now, contractual indemnity. If this is an
21 appropriate time and Your Honor doesn't have any questions,
22 let's go back to the agreement, because the agreement is not
23 an indemnification against negligence. It is
24 indemnification against the cost and consequences of getting
25 sued.

1 Go back to Ashley II. An indemnity agreement is an
2 ideal method for businesses to allocate cost and expenses
3 that may arise in future litigation. That is precisely what
4 was done. We allocated costs and expenses in future
5 litigation. And the Ashley case blesses that, endorses it,
6 and says in the circumstances where there is no deterrent
7 effect, we do away with the bar to indemnity against
8 negligence.

9 Now, having that -- the last week's announcement of
10 the Supreme Court, I think it's pertinent to get back into
11 the agreement. As I do this, Your Honor, I want to go
12 through to raise a couple of points that go back to
13 Ms. Varnado's argument that somehow there is no relationship
14 between Concord and Weather Shield or Muhler. This
15 agreement could not be more akin to a subcontract agreement,
16 and it creates clear rights.

17 Go back to the Globe Rock Hill case that says,
18 equitable indemnity arises out of the acts of the indemnitor
19 and the indemnitee as it relates to third parties. The guts
20 of this agreement is unequivocal, to use that word, clear
21 and unequivocal, related to the fact that these units were
22 going to be sold to third parties, and if the windows are
23 defective, we're all going to be in this deal. And you
24 insist, even though the tests show the windows are
25 defective, that they are good and asked to go for and not be

1 subject to significant liabilities.

2 Consider the impact of the windows being defective
3 at this stage in construction. We have to go find other
4 windows, we may pay more for those windows, and we have
5 significant delays, and Weather Shield is liable to Superior
6 and to Concord for having breached its contract to deliver
7 windows that comply with the contract documents. And they
8 are facing huge damages at this point in time.

9 They acknowledge in the whereas that the results of
10 the tests indicate that some of the windows failed the test.
11 Now we have to make a choice as the owner. And I have to
12 say I participated in that; I remember it well. The agony
13 of deciding, knowing these units are going to be sold, do we
14 get rid of Weather Shield, guarantee litigation by them and
15 us, but then not run the risk of selling defective windows?
16 Or do we allow them to finish, and if we allow them to
17 finish, what do we do to ensure that we have done everything
18 to protect the third parties as well as protect ourselves?

19 There were negotiations and discussions all around
20 among all parties. Weather Shield, Muhler, Superior, the
21 testing company, Concord, and the architect, all are looking
22 at this question of, are these windows suitable to be sold
23 to third parties, which is in the essence to the creation of
24 a relationship that gives rise to equitable indemnity.

25 If you go to Paragraph 4 of the agreement -- after

1 it's recognized that there were defects, after they
2 recognized that in future litigation there will be no
3 statute of limitations, Paragraph 4 states --

4 THE COURT: I will find it in a second. Go
5 ahead.

6 MR. BROWN: Paragraph 4: Muhler and Weather Shield
7 agree that the owner, the owners defined to be Concord and
8 Cumberland, is third-party beneficiary and shall be treated
9 in the same manner with the same benefits that Superior has
10 under this agreement. We are deemed to be the same as
11 Superior. The fact that we didn't assign it is immaterial.

12 There were questions, and the parties desired to
13 preserve the contractual relationships that existed, but
14 this clause specifically states, and Weather Shield
15 acknowledges, that this agreement is for our benefit and we
16 are to be treated the same as Superior and, therefore, there
17 is a contract that is no different than a subcontract. This
18 agreement was designed to represent to the owner and made
19 promises to the owner that the owner would rely upon:

20 I have another copy, Your Honor.

21 THE COURT: I'm looking at -- it's paragraph --

22 MR. BROWN: 4.

23 THE COURT: All right. Treated in the same manner
24 as same benefits that Superior has under this agreement.

25 MR. BROWN: That in and of itself indicates this

1 agreement is creating rights between Superior, Concord,
2 Muhler, and Weather Shield all designed to deal with the
3 premise of a third-party liability in the future, which is
4 the basic premise that creates a right of equitable
5 indemnity, as well as a contractual indemnity under this
6 agreement.

7 Now, the agreement goes forward and Weather Shield
8 makes a number of promises. Paragraph 6: Warranty
9 represents the contested windows and doors have been
10 replaced with compliant windows and doors or satisfactorily
11 remedied and placed. They are represented and warranted to
12 be free of defects in accordance with the terms and
13 conditions of Weather Shield's applicable representations.
14 They represent all windows and doors will be conformed in
15 shop drawings. They represent that they meet the design
16 pressure ratings, and they agree that in the event of any
17 future window or door failure or defective installation,
18 they will repair or replace any defective window or door.
19 And Muhler will repair any other component of the building.

20 That language goes -- I'm going to skip over 11 and
21 12. If you go to Paragraph 15: Weather Shield furthermore
22 agrees that should it be determined that any of the windows
23 or doors of installation contain defects of material of
24 workmanship, that it will replace the units in accordance
25 with this agreement. Weather Shield confirms that the

1 general provisions of the warranty are altered to include
2 this document. Should there be any dispute or inconsistency
3 between the applicable warranty and this agreement, the
4 language of this agreement shall prevail. This agreement is
5 intended to expand the warranty Weather Shield warrants in
6 the products emerging.

7 This is the operative document that defines Weather
8 Shield's liability for these windows, and it is broad and
9 expansive and supersedes whatever limitations they may have
10 had in their original documents. And in the end, in the
11 linchpin of this document, is an indemnity, which was
12 negotiated. And we keep going back to this indemnity and I
13 keep scratching my head and I must be reading something
14 different than Ms. Varnado.

15 She keeps saying this is a no-action agreement and
16 it refers to and indemnifies only against judgment. The
17 word, judgment, is not in here anywhere. Now, let's go back
18 and determine the warranty -- the indemnity, because once
19 they have given us absolute full assurance that these
20 windows are letter perfect and have no defects, if they do,
21 we will fix them, which gives us the assurance that we are
22 treating our unit owners, who are going to buy these units,
23 fairly and gives us assurances that we are selling them a
24 good product, we then have an indemnity that is very simple
25 and direct and unambiguous.

1 In the event either Superior or Concord are sued
2 hereafter by any subsequent owner alleging that one or more
3 of the windows or doors are defective, or do not comply with
4 the warranties and representations made herein, which means
5 that they represented they comply with the documents, they
6 are merchantable, they are free of defects, they are
7 guaranteed to be the best windows, if we are sued
8 challenging the representations Weather Shield and Muhler
9 made, Weather Shield agrees to unconditionally indemnify
10 both Superior and Concord against these allegations. Not
11 any judgment rendered. It says allegations.

12 And the lawyer who says he drafted it -- and if
13 he's the drafter, then the inconsistencies are construed
14 against Weather Shield. He claims to be the drafter of the
15 document. He tells you its unambiguous and then asks you to
16 consider parole evidence, which I find to be quite
17 remarkable.

18 But this same lawyer, if he wanted a no-action
19 clause, simply had to insist on indemnification against a
20 judgment rendered as opposed to indemnification against
21 allegations. And I don't believe a lawyer can confuse those
22 two. The word, allegations, to me jumps out. And it was a
23 critical component of going forward. Because we did not
24 want to have to go through litigation after these promises,
25 after all of these assurances, and then fight a long battle,

1 required to go to trial, prevented from settling the case,
2 and then they will think about paying us for having
3 misrepresented or breached all of these terms and
4 conditions.

5 THE COURT: So you are saying they agreed to
6 indemnify you against allegations. Then does that mean that
7 whatever you pay out, they write a check for that amount?

8 MR. BROWN: Directly, no. If the lawsuit had been
9 solely -- this is the difficulty in this suit. If the
10 litigation was solely about the windows and the only issue
11 was indemnifying us against the claim over the windows,
12 then, yes, the outcome of that case would be what they would
13 have to pay us.

14 THE COURT: All right. Go ahead, I'm sorry.

15 MR. BROWN: Go back and combine the description in
16 Hardin of a settlement and what the inquiry is, and the
17 cases are replete with the ability to recover a settlement
18 as special damages. It really is a question of proof. And
19 if the only issue in the case is defective windows, then
20 what we owe by judgment or what we have paid in settlement
21 in a good faith settlement, reasonable, yes, that is what
22 they would owe because that's what meets the terms of the
23 indemnity.

24 THE COURT: So in that connection you agree with
25 Mr. Nistad?

1 MR. BROWN: I agree with Mr. Nistad in general, but
2 I think that the outcome has to be determined by joint and
3 several rules, single-injury rules, concurrent proximate
4 cause rules. The same thing the jury would be told, that
5 you can find multiple people who combine to create a harm
6 jointly and severally liable.

7 And in this case, depending on what the evidence
8 is, it could be that Mr. Nistad is jointly and severely
9 liable in the cost of the windows, because he is right, it
10 is what I heard -- somebody called it a dog's breakfast. It
11 was a geologist talking about the confusion of everything in
12 the ground. This dog's breakfast of different causes, the
13 pans are wrong, and the installation is wrong, and the
14 windows are bad, and the flashings were put in wrong. The
15 end result of that is you take the windows out and put in
16 new ones. And the proof issue is, can you divide it up?
17 If you can, you divide it up.

18 I agree with Mr. Nistad that we can't ask him to
19 pay for what somebody else did wrong. We can ask him to pay
20 for what he and his subcontractors did wrong; but the issue
21 is not one that voids the agreement. It is simply a matter
22 of proof that the jury -- let's just say this case was being
23 decided in total. And under Ms. Varnado's position, this is
24 the last settlement you will ever see if people have to go
25 to judgment to get indemnification.

1 But if this case were going to the jury and one of
2 the 40 questions they had to answer is, once you have found
3 what Concord owes the owners, then find what Mr. Nistad's
4 client owes Concord, under this indemnity, you would
5 instruct the jury on sole proximate cause of the current
6 cause, single injury. In all of those factors, the jury
7 could decide to allocate it or they can decide to hold them
8 joint severally. Your Honor as the fact finder will have
9 that same prerogative.

10 But it does not say that there's anything wrong
11 with the indemnity or they could walk away from it. They
12 would love to walk away from it, but going back to the
13 premise -- the queen of hearts comes to mind, but here's a
14 document that does not -- an indemnity that does not include
15 the word, judgment, and what is being indemnified against
16 are allegations. It is -- I just cannot get my mind around
17 how we take an indemnity for allegations and declare it to
18 be a indemnity against a judgment.

19 So I think the agreement does several things. It
20 acknowledges and recognizes the complexity and seriousness
21 of the problem, the creation of a special relationship
22 between Concord and Muhler and Weather Shield and, candidly,
23 Superior as well. We have claims against Superior. And all
24 of that will have to go in and Your Honor can find them all
25 liable jointly and severally, Your Honor can allocate it,