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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM OCONEE COUNTY

Court of Common Pleas

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SC Court of Appeals

The Honorable Alexander S. Macaulay, Circuit Court Judge

Lower Court Case No. 2009-CP-37-00652

Court of Appeals Case No. 2015-000417

Volume IV of VI

Stoneledge at Lake Keowee Owners' Association, Inc., C.
Dan Carson, Jeffrey J. Dauler, Joan W. Davenport, Michael
Furnari, Donna Furnari, Jessy B. Grasso, Nancy E. Grasso,
Robert P. Hayes, Lucy H. Hayes, Ty Hix, Jennifer D. Hix,
Paul W. Hund, III, Ruth E. Isaac, Michael D. Plourde,
Mary Lou Plourde, Carol C. Pope, Steven B. Taylor, Bette
J. Taylor, and Robert White, Individually, and on Behalf of
All others similarly situated,

Respondents,

v.

IMK Development Co., LLC, Larry D. Lollis, William C.
Cox, Integrys Keowee Development, LLC, Marick Home
Builders, LLC, Bostic Brothers Construction, Inc., Rick
Thoennes,

Defendants.

(Of Whom Bostic Brothers Construction, Inc., is the Appellant)

RECORD ON APPEAL

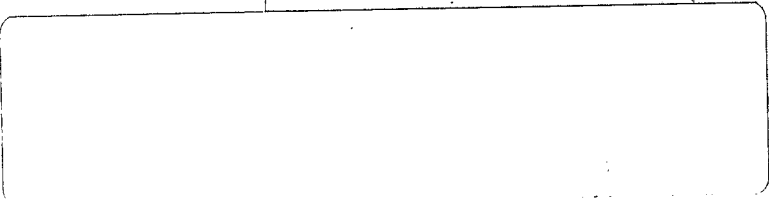
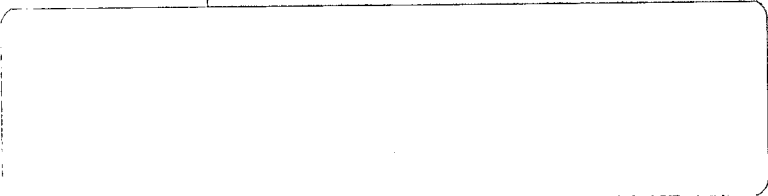
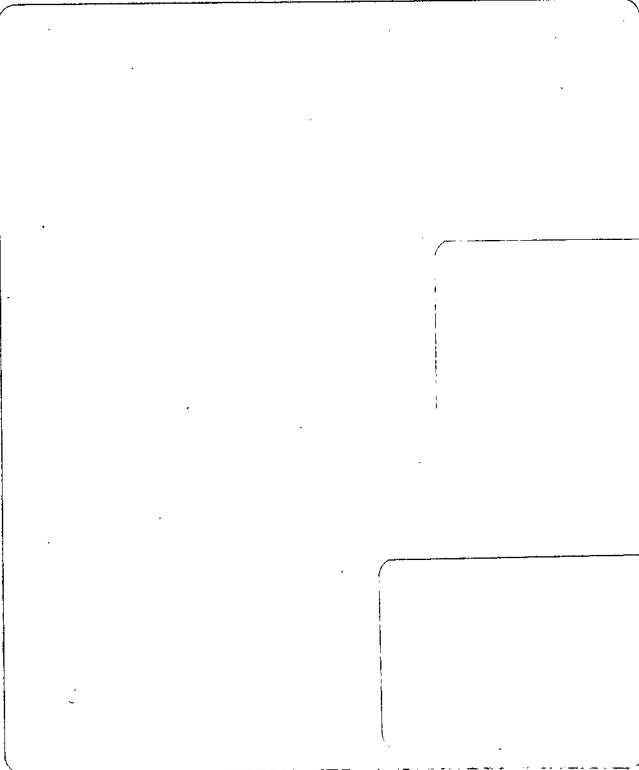
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1 it's one thing because you see a leak in the skylight.

2 And you might say, well, that's because it's not flashed

3 right. But an engineer who came in and did a scope of

4 repair might look and say, you know what, it's not really

5 the flashing. It's the roof-wall intersection over here.

6 True?

7 A. True.

8 Q. And so you have to have both. You have to have the

9 engineer and then the person coming in to make the

10 repairs?

11 A. Yes.

12 Q. And here you've had a lot of interaction with C.S.E.

13 Have you had any interactions with Rick Moore? Do you

14 know that name?

15 A. Yes, sir.

16 Q. He's another licensed engineer in South Carolina.

17 Do you know that to be true?

18 A. Yes.

19 Q. Okay. Have you heard of a fixed-price contract?

20 Does that mean anything to you?

21 A. No.

22 Q. Okay. I'll save that for somebody else. Thank you

23 very much for your time.

24 A. Okay.

25 THE COURT: Mr. Anderson?

1 MR. ANDERSON: Excuse me, Your Honor. May I
2 have half a minute to confer with co-counsel?

3 THE COURT: Certainly.

4 MR. ANDERSON: Thank you.

5 (Pause while Mr. Anderson conferred off the record
6 with co-counsel.)

7 MR. ANDERSON: Your Honor, could we have a
8 sidebar, please?

9 THE COURT: Yes, sir.

10 (WHEREUPON, a bench conference was held off the
11 record.)

12 THE COURT: All right. Mr. Anderson?

13 MR. ANDERSON: Your Honor, I have no questions
14 for this witness.

15 THE COURT: Very good.

16 All right. Mr. Imhoff?

17 MR. IMHOFF: Yes, Your Honor. I'll try to be
18 brief.

19 CROSS-EXAMINATION

20 BY MR. IMHOFF:

21 Q. Mr. Furnari, did you testify earlier that you'd had
22 approximately fifty homeowner repair requests since 2009?

23 A. Over fifty.

24 Q. Okay. And so between 2009 to 2013 November, we're
25 talking about, what, four or five years now?

1 A. Yes.

2 Q. Okay. So doing the math, that's somewhere between
3 ten and twelve repair requests a year over thirty-seven
4 units, Mr. Furnari?

5 A. Yes.

6 Q. And they're all different types of repair requests?
7 Some are foundation, some are window, some are deck, some
8 are skylight, some are roof; right?

9 A. They all involve water.

10 Q. But they're in different places and due to different
11 reasons?

12 A. Yes, sir.

13 Q. So of those ten to twelve a year, there are a couple
14 that may implicate roof issues and a couple that may
15 implicate foundation issues; right?

16 A. Those are only the requests that homeowners are
17 aware of.

18 Q. That's right. Otherwise, if they were unaware of
19 them, they wouldn't make those requests; right?

20 A. No. Our experts have told us and showed us that
21 every unit has water intrusion into the interiors of the
22 walls, the floors, foundations.

23 Q. Mr. Furnari, you're testifying as to what somebody
24 else told you. But I'm going to ---

25 THE COURT: I think you asked him ---

1 MR. IMHOFF: Well, Your Honor, I'm ---

2 Q. Your expert has told you that every single unit has
3 water intrusion through the roof and windows and the
4 foundation?

5 A. Yes, sir.

6 Q. Every one?

7 A. Every one.

8 Q. But these homeowner requests, these ten to twelve
9 over the last four or five years, whatever the numbers
10 work out to, those have increased while you have been
11 aware of these issues; is that right?

12 A. The requests you're talking about have increased?

13 Q. The number of homeowners calling you and asking for
14 repairs.

15 A. Yes, sir.

16 Q. Now, Mr. Furnari, I think you want your home fixed;
17 is that right?

18 A. Yes, sir.

19 Q. And you want all of these homes fixed for all of the
20 folks that live out there; is that fair?

21 A. That's correct.

22 Q. And that's what you're here asking for?

23 A. Yes, sir.

24 Q. And you want it done correctly so that they stop
25 leaking; is that right?

1 A. That's correct.

2 Q. But as a member of the board, you also want it done
3 economically; is that true?

4 A. We are not looking for the cheapest price in town.
5 We're looking for a contractor that's going to come in,
6 stand behind their work and guarantee us that we will not
7 have these issues down the road. So we're not looking to
8 hire the least expensive contractor. If we need to pay a
9 little bit more, that's fine. We need a guarantee, and
10 that's what we want.

11 Q. But price will come into consideration, won't it?

12 A. Price?

13 Q. The cost to do these repairs. The board will take
14 that issue up. You'll get bids and think about who's
15 going to do it and how much it's going to cost is one of
16 the things you'll consider; right?

17 A. Yes, sir.

18 Q. And have you looked at the alternate repairs
19 proposed by Mr. Moore?

20 A. Yes, I have.

21 Q. Are you willing to listen to alternative proposals?

22 A. Yes.

23 Q. And when you and the rest of the litigation
24 committee that's going to make that decision listen to
25 them, are you going to stay here in the courtroom and

1 listen to what those proposals are?

2 A. I plan on being here every day for it. I don't live
3 here full-time. I live in Ohio, as you know. And I took
4 two weeks off from my company that I have twenty-some
5 people working. So I'm dedicated to seeing this through,
6 if that's what you're asking.

7 Q. How many people actually live there in phase one at
8 Stoneledge?

9 A. I don't know the exact number that reside there.

10 Q. Would you say that most of the units are summer lake
11 homes?

12 A. I don't know the reason why other people bought
13 there. I bought it as a retirement home.

14 Q. Do you know how many people actually live there
15 full-time?

16 A. No, I don't.

17 Q. Obviously your committee or you, I think, in fact,
18 Mr. Furnari, you have some faith in J.R. Watkins; is that
19 right?

20 A. Yes, we do.

21 Q. And you trust what he's doing and what knowledge he
22 has and experience?

23 A. Yes, sir.

24 Q. And so you've hired him to do at least these repairs
25 you're testifying about today?

1 A. We hired him to do the emergency repairs for us.

2 Q. Were you here for the testimony of Mr. Hodgins?

3 A. Yes, sir.

4 Q. Did you have any concern in hearing that Mr. Hodgins

5 has proposed a more surgical repair when working for

6 defendants? Has he offered that proposal to you, Mr.

7 Furnari?

8 A. I lost your question along the way. Sorry.

9 Q. Did you hear him talk about the ninety/one rule? Do
10 you know what that is?

11 A. No, I don't.

12 Q. Oh. I'll ask the question again. Did you have any
13 concern hearing that Mr. Hodgins in the past, while
14 working for general contractors, has proposed more
15 surgical, localized repairs?

16 A. He was talking about other projects. I wasn't
17 concerned that he would make that statement.

18 Q. Did you have any concern in his recommendations to
19 the board that he had apparently missed the fact that
20 seven of the units out there do not have decks?

21 A. No, I wasn't concerned with it.

22 Q. And we talked about Trehel a little bit earlier.

23 Did you have any concern that Mr. Folk -- the method in
24 which and the prices in which he proposed to charge the
25 homeowners association?

1 A. I looked at both estimates, and they were pretty
2 close to each other.

3 Q. Did you have any concern with Mr. Folk's
4 measurements in that he included seven decks that don't
5 exist?

6 A. I really -- I'm not concerned with the quantities or
7 the omission of decks. My only concern is when the
8 H.O.A. enters into an agreement that we get a guarantee
9 that we're going to have dry units at the completion of
10 the complete scope of repair. And it doesn't matter what
11 contractor we award the work to; they're going to be
12 handed Derek Hodgins' full scope of repair, and we are
13 going to make sure that the whole scope of repair is
14 enacted on our buildings. And we are going to be looking
15 for a contractor to stand behind the work that they do.
16 So if they missed seven decks in their proposal, that's
17 not a concern of mine.

18 Q. But Trehel refused to come out and help you with
19 these repairs just recently; is that right, Mr. Furnari?

20 A. Yes, sir, they did.

21 Q. And you haven't hired Trehel in three years; is that
22 right?

23 A. That's correct.

24 Q. And did you hear Mr. White's testimony that he
25 thought Trehel was too expensive?

1 A. Whose testimony?

2 Q. I believe it was Bob White, Robert White.

3 A. I don't remember hearing him say that yesterday.

4 Q. And Trehel -- when did Trehel tell you they wouldn't
5 come out? How recently?

6 A. It was approximately five months ago I spoke with
7 Brian Miller. I called him.

8 Q. And he told you they were too busy and didn't want
9 to help you?

10 A. No. He said they would like to do the work, but
11 they were just too busy to come out right now and do some
12 estimating and/or get involved in the project.

13 Q. And despite that, the homeowners association called
14 Mr. Folk to testify about the costs for Trehel to do the
15 work they're too busy to do?

16 A. Well, that probably happened a couple of years ago
17 when this got started that they asked Mr. Folk to do the
18 estimating. This has been going on for over three years
19 now, so ---

20 Q. But Trehel ---

21 A. Go ahead.

22 Q. But Trehel isn't going to do that work, is it, Mr.
23 Furnari?

24 A. I think they will because I had a discussion
25 yesterday with Mr. Folk.

1 MR. BELCHER: Hearsay, Your Honor.

2 THE COURT: I'm sorry. He asked the question.
3 He's entitled to an answer.

4 A. I had a chance to talk with Mr. Folk yesterday. And
5 I asked him if he would -- you know, we talked. And I
6 told him that Brian Miller told me that they couldn't
7 come out. They were too busy.

8 MR. IMHOFF: Your Honor, I understand I asked
9 the question. But now we'll have double hearsay.

10 THE COURT: The thing is, first, Mr. Folk was
11 here and is subject to recall as well as cross-
12 examination.

13 MR. IMHOFF: Okay.

14 THE COURT: But let's do be careful if we're
15 going to try to make -- if we don't get the answer we
16 want, that doesn't necessarily mean that we can attempt
17 to silence the witness.

18 MR. IMHOFF: I understand. I don't have any
19 further questions, Your Honor. Thank you.

20 THE COURT: All right. I think that's probably
21 a good idea.

22 All right. Let's see. Ms. Brown?

23 MS. BROWN: Nothing of this witness.

24 THE COURT: Mr. Hemphill?

25 MR. HEMPHILL: No, Your Honor.

1 THE COURT: All right. Mr. Lyles?

2 MR. LYLES: No further questions.

3 THE COURT: Very good. You may step down.

4 Thank you, sir.

5 THE WITNESS: Thank you.

6 THE COURT: All right. Do you have another
7 witness?

8 MR. LYLES: No other witnesses, Your Honor.

9 THE COURT: That's it?

10 MR. LYLES: That's all the witnesses.

11 THE COURT: Okay. Very good.

12 Mr. Foreman, ladies and gentlemen of the jury, that,
13 I understand, will conclude the morning's testimony. So
14 lunch now. How much -- when would you like to ...

15 MR. FOREMAN: Probably two thirty. Would that
16 be too much?

17 THE COURT: Not at all because I think -- what
18 is it? -- we probably have some things. I can use the
19 time.

20 MR. FOREMAN: We'll be back in here ready to go
21 by then.

22 THE COURT: Very good. Yes, sir, we will be.
23 Thank you.

24 Again, do not undertake the discussion of the case
25 among yourselves in any way or permit anyone to discuss

1 it with you.

2 (WHEREUPON, the jury exited the open court at
3 approximately 1:00 p.m.)

4 THE COURT: Was that summary actually
5 introduced?

6 MR. LYLES: We moved to admit it as an exhibit.

7 THE COURT: I mean, has it been introduced?

8 MR. LYLES: It was 42, I think.

9 Madam Court Reporter?

10 THE COURT: I know it was marked for
11 identification as 42, but I don't remember actually ...

12 Has it been admitted?

13 COURT REPORTER: Yes, sir.

14 THE COURT: Yes, ma'am. All right. Very good.
15 So it is in.

16 The reason I ask, there are two rulings that were
17 made at the sidebar. One was as to Plaintiff's Exhibit
18 Number 42, which I understood was a summary of the costs
19 for emergency repairs. I overruled the objection to the
20 summary, first of all, under Rule 1806 as to summaries.
21 But also, I think it was entitled to come in under the
22 business record rule of 803(6), and that it was --
23 obviously, he's the custodian of that record. He
24 prepared the record along with his wife. And he was
25 familiar with the information that is reflected in there.

1 And then as far as the responses to the question as
2 to not having enough money to repair, undertake the
3 repairs, an objection was made that, of course, there
4 have been settlements in the case and that, therefore,
5 there would be money available to do that. The Court
6 views that as a collateral source in the sense that if
7 there is money available, it's not coming from anyone
8 who's still in the case. And moreover, it could be
9 interpreted as some sort of an admission from liability
10 by someone else other than your party which would be
11 another objection.

12 I just put those on the record not to invite any
13 more argument. It's just to protect the record for you
14 if that was necessary.

15 All right. Two-thirty, now. Are you resting now?

16 MR. LYLES: Well, Your Honor, we still have --
17 that there were some exhibits that were made -- that were
18 marked for identification that we discussed with
19 witnesses. Specifically, the scopes of repair that Mr.
20 Hodgin testified about as well as those standards that
21 were applicable to him. I understood that the Court was
22 going to consider the admissibility of those exhibits.

23 THE COURT: Those are the two notebooks?

24 MR. LYLES: Yes, sir. The scopes of repair are
25 exhibits 27 and 28.

1 THE COURT: Now, when you say, "scopes of
2 repair," is one above grade and one below grade?

3 MR. LYLES: Exactly. 27 is above grade, and 28
4 is below grade.

5 THE COURT: It's almost like a Georgia court.
6 I was talking to a Georgia judge over there. He was very
7 quick to remind me that he was a superior court judge. I
8 said, "What's the other?" He says, "An inferior court
9 judge." So this is above grade and below grade?

10 MR. LYLES: Yes, Your Honor.

11 THE COURT: All right. Mr. Belcher?

12 MR. BELCHER: Yes, Your Honor. Well, with
13 regard to those two exhibits, we would renew the same
14 argument that we made before the Court earlier, that this
15 is a continuing witness. Not only that, those scopes of
16 repair are full of hearsay documentation. Just because
17 he relies on it to form the basis of his opinions on the
18 witness stand does not make them independently
19 admissible, does not make the contents of these documents
20 or these compilations independently admissible because
21 they are hearsay. The case that the Court cited us last
22 week with regard to the admission of estimates ...

23 THE COURT: Right.

24 MR. BELCHER: ... that we are not -- we are not
25 fighting about that. We believe that the estimates that

1 they put forth, whether they be hearsay or not, they're
2 fine to move those into evidence. We're going to move
3 those into evidence, and so are they. But that case
4 deals specifically with estimates, which are not hearsay,
5 but it is something that a contractor has testified to
6 saying, "This is how much it will cost me to do the work,
7 and I will do the work for this price." That is a
8 document that is welcome into evidence. What is not
9 welcome into evidence is all of the testimony and
10 documentation associated with some scope of repair of how
11 he's going to do something. That is the continuing
12 testimony. He's already testified what he's going to do
13 to fix these buildings. His report has the documentation
14 in it as to what he's going to do. But that's all --
15 that should not go back there with the jury and allow him
16 to continue to talk to the jury about what he's going to
17 do.

18 THE COURT: Well, by the way, admittedly, the
19 Court might not have found the -- what is it? -- smoking
20 gun as to the rule, but I also couldn't find -- and I was
21 looking for your continuing argument rule. And I think I
22 did find something. But both of them, they didn't reach
23 it.

24 MR. BELCHER: I think the Fourth Circuit has

25 ---

1 MR. GRESH: Yeah. Your Honor, the continuing
2 witness rule generally -- and the Georgia judge would
3 tell you. It's a Georgia rule that's been applied in
4 Florida, Tennessee and North Carolina and other districts
5 ---

6 THE COURT: Not even in this circuit.

7 MR. GRESH: --- in which I have tried cases.
8 And so I think that's generally ---

9 THE COURT: But those are all in the Fifth
10 Circuit or one in the Fifth Circuit.

11 MR. GRESH: I believe in North Carolina would
12 be ---

13 THE COURT: Well, North Carolina, it would be.

14 MR. GRESH: The foundation behind the adoption
15 of that rule, I think, is applicable here. The scope of
16 repair, what Derek Hodgins spent three days telling this
17 jury I want to have done on these buildings, is in
18 evidence. What these books intend to do is say, here's
19 the foundation for why I want that scope of repair in.
20 And it talks about 2009 building codes and things that
21 were not even in existence in ---

22 THE COURT: All right. I understand.

23 MR. BELCHER: So to finalize the discussion,
24 the estimates, which the Court picked up on, are, in
25 fact, admissible. We have no exception to those.

1 THE COURT: All right. Now, are the estimates
2 separate documents?

3 MR. BELCHER: They are. They're separate
4 exhibits altogether because they're prepared by ---

5 THE COURT: All right. Thank you.

6 MR. BELCHER: Thank you.

7 THE COURT: Anybody else wants to be heard? Be
8 careful. You're getting close to snapping defeat.

9 MR. IMHOFF: My counsel has directed me to sit
10 down.

11 THE COURT: All right. All right. Mr. Lyles,
12 do you have anything further?

13 MR. LYLES: Well, only this. With regard to
14 the standards that are included in there -- I think I
15 mentioned several days ago when we first talked about
16 this -- I am happy to remove the current standards which
17 would be applicable to avoid any confusion for the jury.
18 What's important about ---

19 THE COURT: Well, the only thing is, the
20 current standards have to be met for any work done.

21 MR. LYLES: Yes, sir. And what I suggested to
22 the defense lawyers was that in lieu of actually putting
23 in the current standards where the jury could be
24 confused, which would include the current code and the
25 current manufacturer's information, we just put a sheet

1 in there that says current codes and manufacturer's
2 standards are applicable. And the significance of this
3 and the relevance of this document ---

4 THE COURT: Well, let me say this.

5 MR. LYLES: Yes, sir.

6 THE COURT: Looking at -- as I mentioned, I
7 think the Jenkins versus Dixie Specialty Company case that
8 I cited for reference was a pre-adoption of the Rules of
9 Evidence in South Carolina. And we now have -- and that
10 case relied on the Business Records Act, Section § 19-5-
11 510. Now, we do have the Rules of Evidence. And just as
12 I mentioned earlier, Rule 803, the records of regularly
13 conducted activity or business. And one of the
14 differences in the state rule as compared to the federal
15 rule -- so I don't know how much you want to rely on your
16 federal rule -- is that the state rule requires that
17 subjective opinions and judgments found in business
18 records are not admissible. Now, you want to go back to
19 the Fourth Circuit or the Fifth Circuit? The federal
20 rule doesn't have that limitation. The point is I do see
21 that that could violate our rules, state rules, as far as
22 -- because obviously they are subjective opinions. It's
23 more than just a recitation of what was going to be done
24 or would be done.

25 I'm going to grant your motion to -- what is it? --

1 I won't say suppress, but not admit the records -- I mean
2 the two exhibits 27 and 28. But, now, that does -- now,
3 as far as any estimate based on those, they are
4 admissible.

5 MR. LYLES: Okay.

6 THE COURT: I think they're already in, aren't
7 they?

8 MR. LYLES: The estimates are, yes, sir.

9 THE COURT: All right. Anything else? I just
10 did that to clear the record. Is there anything else you
11 want me to put on the record from the sidebars?

12 (No response)

13 THE COURT: And I can't remember. Ms. Brown,
14 you had an objection or something, did you not?

15 MS. BROWN: Recently?

16 THE COURT: Ma'am?

17 MS. BROWN: Not recently.

18 THE COURT: Yeah. As I say, sidebars are very
19 effective in the sense that you can do things without
20 having to send the jury out, but at the same time, you
21 want to have a complete record.

22 Yes, sir?

23 MR. LYLES: The last thing was this, Judge. We
24 have discussed these repair scopes. But then there were
25 also a number of standards that were applicable to the

1 construction in this case that were marked for
2 identification. They were various industry standards. I
3 think the Western Red Cedar Association, AMMA, several
4 other standards, and they were all applicable to the work
5 that was done. And under the holding in that Elledge
6 case that the Court found the other day and I had the
7 opportunity to read, these standards, I think, relate
8 directly to and are relevant to the duty of care that was
9 owed by Bostic at the time this building was constructed.
10 And under that Elledge case, which allowed the
11 admissibility or admission of these standards and allowed
12 them to go to the jury, on the same basis I would request
13 that these standards, again, which were applicable to
14 Bostic, be admitted into evidence.

15 THE COURT: All right. Thank you.

16 All right. Who wants to be heard on this?

17 MR. BELCHER: Yes, Your Honor. Several things.
18 One, those documents are not learned treatises. They
19 are, in fact, hearsay. Two, they're cumulative evidence.
20 Mr. Hodgins sat up there on the stand for about five hours
21 and testified to breaches of the standard of care with
22 regard to various industry standards. And it's our
23 position that his testimony alone is sufficient to
24 establish for the jury or provides at least the evidence
25 necessary that a jury would need to conclude that we --

1 that Bostic or its subcontractors or any defendant
2 breached a standard of care. So to admit those documents
3 back into evidence to a jury of people who are not
4 construction professionals, it would be confusing, it
5 would be cumulative, it would be hearsay and it shouldn't
6 be admitted.

7 THE COURT: All right. Anyone else?

8 Oh, yes, sir, Mr. Imhoff?

9 MR. IMHOFF: Your Honor, Marick would just join
10 in the same objection.

11 THE COURT: All right. All right. As they did
12 in Lexington or at least -- what is it? -- the Supreme
13 Court on the Lexington case, they did admit the standards
14 at issue there. I think they were the Consumer
15 Protective Safety Commission Guidelines and the American
16 Society of Testing and Material Standards. "Evidence of
17 industry safety standards is relevant to establishing a
18 standard of care in negligence cases. Instructions,
19 safety manuals and codes were properly admitted. It's
20 objective standards of safe construction. The modern
21 trend ..." I like this. I've always liked this. "...
22 is to admit safety codes on the issue of negligence.
23 This kind of evidence is admitted not because it has the
24 force of law but rather as illustrative evidence of
25 safety practices or rules generally prevailing in the

1 industry." And, of course, you do have a foundation
2 requiring that they were in effect at the time. And I
3 understand that you have -- what is it? -- made only
4 those that were applicable to and that they would have
5 applied to the industry involved or the activity
6 involved. And finally that, "We find this evidence is
7 highly probative on the issue of defining," in other
8 words, "403, duty of care under Rules 401 and 402, not
9 403. And evidence is relevant and admissible if it has
10 any tendency to make existence of a fact or consequence
11 to the action are more or less probable than it would be
12 it without the evidence. Evidence of industry standards,
13 customs, and practices are often highly probative while
14 defining a standard of care."

15 The objection is overruled, so the standards will
16 come in.

17 By the way, that's Elledge, E-L-L-E-D-G-E versus
18 Lexington School District 352 S.C. 179, 573 S.E.2d 789,
19 19 -- or excuse me -- 2002. It's still in the last
20 century. All right.

21 Now what? Are you ready to rest?

22 MR. LYLES: Yes, sir, Your Honor.

23 THE COURT: All right. Well, let's -- it's one
24 fifteen. And to be candid with you, we all had a long
25 morning. So why don't we go to lunch and come back about

1 two fifteen to hear your motions. Is that enough time,
2 you think?

3 MR. IMHOFF: For lunch, Your Honor?

4 THE COURT: Not only lunch, but for your
5 motions. But if you're going to do one, you're going to
6 take away from the other.

7 MR. BELCHER: Well, Mr. Lyles -- will you need
8 to bring the jury back in and allow Mr. Lyles to rest in
9 front of the jury?

10 THE COURT: Well, yeah. Well, I would rather
11 go ahead and hear the motions if he is going to rest.
12 And that way, we can go forward after we do bring the
13 jury back. In other words, we'll let him rest on the
14 record in front of the jury. And then -- if I don't
15 grant all of your motions for directed verdict, that is.
16 Either way, we can go forward rather than ---

17 MR. BELCHER: Do you want to give us a few
18 minutes to -- we could -- whatever you wish to do. I
19 mean, if the Court wants to go ahead and ---

20 THE COURT: I was going to give you a little
21 time to think about what you might say.

22 MR. BELCHER: That's a luxury. We'll take
23 that.

24 THE COURT: All right, sir. But I don't think
25 you're going to have -- I'm not trying to do anything to

1 suggest my ruling, but the thing is I don't think we're
2 going to have a voluminous argument. If there's any to
3 go forward, that decision will have to be made now and
4 then again at the close of all the evidence. Either way.
5 What do you want to do? You want to argue them now, or
6 you want to come back at one fifteen? I mean two
7 fifteen, two o'clock.

8 MR. BELCHER: We could be back by two fifteen,
9 I would imagine.

10 THE COURT: Very good. All right. We'll see
11 you at two fifteen.

12 MR. BELCHER: Thank you, Your Honor.

13 THE COURT: And, also, I'm not saying that --
14 you know, I'm not giving you any sort of -- what is it?
15 -- advisory opinion, but I would be ready to go forward
16 with your case if you have something to go forward with.

17 MR. BELCHER: Yes, Your Honor.

18 (WHEREUPON, court stood at recess for a lunch
19 break.)

20 THE COURT: All right. We're back on the case
21 of Stoneledge versus others. As I understand it, the
22 plaintiffs are resting now?

23 MR. LYLES: Yes, Your Honor.

24 THE COURT: All right. We'll rest on the
25 record in front of the jury.

1 Is there anything else from the plaintiff before we
2 proceed?

3 MR. LYLES: No, Your Honor.

4 THE COURT: All right. The reason I ask that
5 question -- y'all are good lawyers. I mean, experienced
6 lawyers. Just as you were mentioning about exhibits, in
7 other words, if there's anything you haven't put in or --
8 what is it? -- has not been admitted that you want
9 admitted, this is the time to do it.

10 MR. LYLES: Yes, sir.

11 THE COURT: And you're satisfied you have
12 everything?

13 MR. LYLES: Yes, sir. The standards that you
14 admitted into evidence, the court reporter has asked me
15 to put those on the record, just the number of the
16 exhibit numbers.

17 THE COURT: Please.

18 MR. LYLES: I saw her looking over. And they
19 were marked for identification as Plaintiff's Exhibit 17,
20 19, 20, 21, 23, 24, and -- let's see -- 25 and 26.

21 THE COURT: All right. Over the objection of
22 the defendants as to Plaintiff's Exhibits 17, 19, 20, 21,
23 23, 24, 25, and 26 are admitted; is that correct?

24 MR. LYLES: Yes, sir.

25 (WHEREUPON, Plaintiff's Exhibits Number 19 through

1 21 and 23 through 26 were admitted into evidence.)

2 THE COURT: Well, all right. Is there any
3 thing from the defendants Bostic Brothers?

4 MR. GRESH: Yes, Your Honor. Are you ready for
5 motions?

6 THE COURT: Yes, sir. Well, I mean, anything.

7 MR. GRESH: At this time, Your Honor, at the
8 close of the plaintiffs' case, the Bostic Brothers would
9 move for a directed verdict generally and specifically.
10 On the specific grounds, Your Honor, we would move for a
11 directed verdict as to the issue of statute of
12 limitations. The statute of limitations in a
13 construction defect case is three years from the
14 discovery of when something, a claim, could have been
15 filed.

16 If your Honor will permit me, I created a time line
17 that's based on all the evidence that has been coming in
18 this week thus far. Your Honor, Bostic Brothers took
19 over in 2002, and it ended in October of 2004. Marick
20 and I.M.K. began running the H.O.A. and others as of
21 April of 2005. And that persisted until approximately
22 September of 2008 at which time the Stoneledge Property
23 Owners Association became run by the homeowners
24 themselves. And that persists out until today.

25 Suit was filed against the Bostic Brothers in

1 February of 2010. Now, when we back that up three years
2 under the discovery rule, those causes of action which
3 were discovered before that time and could have been
4 filed are beyond the statute of limitations applicable in
5 this case. So this is kind of your, if you will, Your
6 Honor, your line in the sand on which we must do our
7 analysis is in that time frame there.

8 And what we've seen through the testimony offered so
9 far by at least three witnesses, they talked about
10 complaints having been made to the Stoneledge Property
11 Owners Association. Well, the property owners of
12 Stoneledge started right here in April of '05. And they
13 could have filed suit against Bostic, against Mr. Nino,
14 and Everado, everybody, as soon as they started getting
15 complaints from the homeowners as to leaky windows, roofs
16 and others.

17 And so what we know is that, you know, Mr. Taylor,
18 the mayor of Stoneledge, as soon as Marick came on site,
19 the savior's here. He came to them with all the
20 problems. Now they're on notice of problems.

21 After Mr. Taylor comes through, here comes the
22 decks. We heard testimony today from Marick saying, "We
23 knew we had leaky decks," not in '05 when Mr. Taylor
24 said, but then later in '05 when Coleman Waterproofing
25 came out and put a membrane over the decks. That is

1 notice of a defect in the 2005 time frame.

2 Then we have other people that have come in and
3 talked about it. Mr. White testified yesterday. Bob
4 White came in and said, "From moment one, moment one when
5 I moved in in 2006, I had leaky windows." It's not
6 important that Mr. White knows that. Mr. White has to
7 give that information, as did Mr. Taylor, to members of
8 the board. And that's why I was talking today with Mr.
9 Thoennes and Mr. Roberson and Mr. Cox. That's their
10 board members as of the 2005 time frame. At that point
11 in time, those gentlemen in their capacity as board
12 members could have filed a lawsuit against the Bostic
13 Brothers for construction defects that have existed up
14 until that time. That would be the same plaintiff that's
15 here today. This is the Stoneledge -- this case is being
16 brought by the Stoneledge Property Owners Association.
17 That came into existence when all of these were already
18 known. And instead of filing suit here, they wait until
19 2010 to file suit after control had been turned over to
20 the plaintiffs.

21 THE COURT: It's a 2009 case.

22 MR. GRESH: It's a 2009 case. But as to
23 Bostic, it was first amended to add the Bostic Brothers
24 in February of 2010. So what we have is it's not
25 constructive notice. This isn't something that we should

1 or shouldn't be aware of. This is actual notice being
2 given to the property owners association who has the sole
3 legal obligation, Plaintiff's Exhibit 3, Plaintiff's
4 Exhibit 4, to maintain and repair the exterior building
5 envelope. All of the siding, the foundation issues, the
6 deck, the roof. That's why that particular property
7 owners association has filed suit in this case, because
8 that's their obligation. It was their obligation today,
9 just as it was in 2005. Their failure to file in 2005
10 precludes them now from coming in in a 2010 lawsuit and
11 claiming that Bostic should be responsible for things
12 that happened more than six years -- six years, not three
13 -- six years prior to when they took over the regime.

14 Constructual (phonic) notice, all that's required --
15 not actual. All that is required for constructive notice
16 is that some right has been invaded or that there is some
17 claim against another party that could be brought. It
18 doesn't mean that they have to know all the claims. It
19 doesn't mean they have to know the entire extent of their
20 damages. Just that the property owners association in
21 2005, 2006 and anytime before 2007, to the extent they
22 were on actual or constructive notice of a claim, that
23 they could have sued Bostic, Nino, and all the other
24 subcontractors and they didn't, that failure stops the
25 statute of limitations.

1 As far as case law, this isn't -- I don't think this
2 is a widely contested issue. But I would point the Court
3 to the Barr versus City of Rock Hill case. That's 330
4 S.C. 640, a 1998 case that talks about when somebody has
5 actual or constructive knowledge to the extent that's
6 required. Understanding if there wasn't full knowledge
7 of the defects until they had Mr. Hodgins come in is
8 irrelevant. They were put on notice of some claims that
9 had been invaded, some claims they could have sued for,
10 and they didn't do it timely.

11 Besides the general issue of statute of limitations
12 applicable to the entire case, Bostic Brothers would also
13 move at this time for directed verdict on the issue of
14 loss of use. There are numerous phase-one plaintiffs
15 that have brought individual claims in this case from
16 whom we have not heard. Anybody who didn't take the
17 witness stand and testify as to their individualized loss
18 of use has waived their opportunity to prove their case.
19 This jury cannot now speculate or conjecture as to what
20 their loss of use might have been, so those claims are
21 waived.

22 Those that did present testimony, there's been no
23 testimony that these plaintiffs will have to move out or
24 anything of this sort. Instead they will be
25 inconvenienced with associated hard hat areas, the

1 scaffolding, of course. But to have these part-time
2 residents who may or may not live there who might
3 experience inconvenience, that's insufficient to get that
4 particular part of the case to the jury of those involved
5 homeowners.

6 I believe on that, Your Honor, that concludes
7 Bostic's motion for directed verdict at this time.

8 THE COURT: All right.

9 Mr. Lyles, what do you say?

10 MR. LYLES: Yes, sir. On the issue of the
11 statute of limitations, I think that the testimony, the
12 compelling testimony, was that these owners were aware of
13 window leaks. They were aware of the porch and deck
14 leaks. And the testimony for the last five days has been
15 when a window leak or a deck leak was reported, Marick
16 came out to the site and fixed the problems. Everybody
17 testified to that effect, including Mr. Thoennes today
18 when he said he believed that they had fixed everything
19 with the Coleman Waterproofing people. Importantly,
20 Marick's not making a claim for those damages.

21 These homeowners, I think, testified consistently
22 that they were not aware of the necessity of a claim or
23 the right to a claim against anybody until after they had
24 taken over control of the board and began to realize the
25 pervasive and systemic nature of the problems at the

1 project. So I don't think that there is any evidence
2 which establishes that the H.O.A. was on notice of a
3 claim in 2005/2006. Certainly not notice of this claim.

4 I would also point the Court to the Magnolia North
5 case, which dealt with the issue of the statute of
6 limitations relative to an H.O.A. and the date that the
7 H.O.A. was turned over to the owners at which time the
8 owners could actually protect themselves and assert
9 claims on their own behalf. And the court did that using
10 the equitable tolling power of the court. And basically
11 what the court said in the Magnolia North case is it
12 would be unfair to say that the statute of limitations
13 was running on a claim that belonged to a homeowners
14 association when it was under the control of the
15 developers. And it wasn't until the date of turnover.
16 when these owners were given an opportunity to manage the
17 association themselves that the statute began to run. Or
18 at least it was equitably tolled during that period of
19 time where it was under the control of the developers.

20 Now, admittedly in the Magnolia North case, the
21 claim at issue was a claim against the developers. But
22 the same reasons would apply here. These owners didn't
23 control the association. They had no ability to file a
24 claim on their own behalf until the association was
25 turned over.

1 I might also point out to the Court as you consider
2 that argument that the people who were in control of the
3 association up until September 2008 were selling units.
4 They had an incentive not to file a claim. They had an
5 incentive not to become involved in litigation since
6 their objective was to get rid of units. So I think that
7 the equitable tolling argument also supports a denial of
8 the motion for summary judgment even as to Bostic and its
9 subcontractors.

10 And these owners acted expeditiously. They filed
11 this lawsuit roughly a year after control of the
12 association had been turned over. A couple of months
13 after I was retained by the association, we amended the
14 complaint and asserted the claim against Bostic. And so
15 they've acted, I think, with haste and appropriately with
16 respect to that claim.

17 MR. GRESH: Briefly, Your Honor?

18 THE COURT: Yes, sir.

19 MR. GRESH: I think Mr. Lyles and I pretty much
20 agree on some things. Marick fixed issues that it could
21 have sued over. As part of its being on the board, it
22 could have filed suit against Bostic for these issues.
23 Instead they tried to fix them. But the Magnolia case is
24 even more telling. What the Magnolia case said was that
25 we're going to equitably toll the statute of limitations

1 because you can't turn a homeowners association over to
2 individual homeowners and then say, ha, got you. You
3 can't sue us because we've tolled it for more than three
4 years because otherwise you would have forced the board
5 to sue itself. And that's the holding of Magnolia.
6 We're not going to force the board to sue itself, itself
7 being the developers. The key issue in this case, and
8 what I think is dispositive of the issue, is that the
9 board as of the '05 time frame is not Bostic. Bostic's
10 not there. It's the I.M.K. people. It's Mr. Roberson.
11 It's Mr. Hollis (phonic) -- I mean, Mr. Cox. It's Mr.
12 Rick Thoennes. Those people in their capacity could have
13 filed a suit on behalf on the same plaintiffs that we
14 have today against Bostic, and they didn't do it.
15 Whatever claims these homeowners may or may not have
16 against the board for the failure of the board to timely
17 pursue a claim against Bostic is an issue that is
18 reserved, but it is not Bostic's issue. Their failure to
19 act timely may be disposed of in another case or in a
20 different part of this case. But as to Bostic -- and the
21 board was on notice of several defects in windows, in
22 siding, and in foundation in the 2005 time frame.

23 THE COURT: Just a moment, please.

24 Could I have exhibit 6?

25 (Off record discussion)

1 THE COURT: All right. Go ahead. I'm sorry.

2 MR. GRESH: Your Honor, the only thing I was
3 going to finish up with this is the board that was
4 created when I.M.K. took over was a legal corporate
5 entity, not-for-profit corporate entity, that has existed
6 throughout. It is the same board when they started it in
7 '05 as it persists today. It's just made up of different
8 board members. But the legal entity who was charged with
9 the responsibility of filing suit, hiring attorneys and
10 maintaining and fixing the outside has been the same
11 since '05 as it persists today. I think that that's
12 what's dispositive of this case.

13 THE COURT: All right.

14 MR. GRESH: Thank you, Your Honor.

15 THE COURT: Mr. Anderson?

16 MR. ANDERSON: Thank you, Your Honor. I have
17 two bases for a motion for directed verdict. One is to
18 join in the statute of limitations. We have one
19 additional fact, though, that needs to be modified. And
20 that is Jose Nino was not brought into this case until --
21 the pleadings against him were filed in October of 2011,
22 and he was not served until February of 2012. And we
23 believe that the ---

24 THE COURT: Do that again for me, please.

25 MR. ANDERSON: Okay. On an amended complaint,

1 Jose Nino was brought in on October 7th, 2011. He was
2 not served, though, until February of 2012. And so we
3 believe that the statute cannot be considered tolled
4 until February of 2012, which would make the controlling
5 date on events February of 2009 for Jose Nino. And I
6 believe that there is clear evidence and testimony,
7 specifically from Mr. Taylor, that he and the board knew
8 that they had causes of action in September of 2008.

9 And that goes -- and the reason I believe that
10 that's important is if Your Honor should look at the
11 issue of equitable tolling, we believe that that would
12 not apply to Jose Nino specifically because he had no
13 participation in the board either by Marick or Bostic.

14 The second basis of our motion for summary -- excuse
15 me -- our motion for directed verdict is that the
16 plaintiff has not presented any evidence that Mr. Nino
17 did anything wrong or that any of his work is the
18 proximate cause of any of their damages or that it
19 violated any of the standards. And we believe that
20 without any of that evidence that Jose Nino should be
21 dismissed.

22 THE COURT: All right.

23 Mr. Lyles?

24 MR. LYLES: Yes, sir, Your Honor. I think that
25 the rule allows us to file a complaint if we file it and

1 get it served within a hundred and twenty days. And I do
2 believe we got Mr. Nino finally served within a hundred
3 and twenty days of filing. So I think the operative date
4 for him would be October the 7th of 2011. Mr. Nino's --
5 the claims relative to Mr. Nino are a little bit
6 different than the claims of Bostic in that the testimony
7 in this case was that Mr. Nino was a framer. In fact, I
8 think that some of the testimony from Jaramillo and
9 others is that by a certain point in 2003, all of Mr.
10 Nino's work was completely covered up by the work of
11 others. The evidence in this case about Mr. Nino's
12 delicts includes, among other things, improperly
13 installed roof sheathing -- there were of plenty of
14 photographs and testimony about that and the effect of
15 that on this project -- as well as improperly constructed
16 firewalls. The testimony being that Mr. Nino applied the
17 framing and sheathing material that went in the
18 firewalls. And Mr. Hodgins, of course, has testified that
19 that was improperly done and that's a fire hazard.

20 I would also point out to the Court's attention or
21 bring to the Court's attention the Graniteville case
22 which says that where expert testimony is required to
23 establish a claim, the statute of limitations begins to
24 run in certain circumstances when that information is
25 gathered by the plaintiffs. And in this case, while

1 water leaks can certainly be things that a normal,
2 average, everyday person would understand could give rise
3 to a claim or water infiltration problems, things like
4 improperly constructed firewalls certainly are not. And
5 all of that was hidden until Mr. Hodgkin and C.S.E. did
6 their investigation in the 2010 time frame.

7 And then finally, going back to this equitable
8 tolling argument from the Magnolia North case, again,
9 these owners served Mr. Nino with this lawsuit just three
10 years -- excuse me -- filed this lawsuit against Mr. Nino
11 just three years after they took over control of the
12 board. The equitable tolling language in the Magnolia
13 North case, I think, applies to this as well, which is
14 that the statute of limitations should be tolled while
15 these people weren't even in control of their board.
16 They proceeded, again, expeditiously and with due
17 diligence and understanding this claim, retaining
18 experts, figuring out what's wrong and ultimately
19 bringing in the parties that need to respond to that.

20 THE COURT: All right. On your time line, let
21 me see if I've got it straight.

22 MR. LYLES: Okay.

23 THE COURT: Where is the ---

24 MR. ANDERSON: Your Honor, could I respond to a
25 couple of things?

1 THE COURT: Oh, certainly.

2 MR. ANDERSON: Okay. I'm sorry. I thought --
3 Mr. Lyles was telling you about framing issues and so
4 forth. None of those were specifically addressed to the
5 work of Jose Nino. Mel Morris indicated that as far as
6 the fire-rated walls, that they're -- that basically he
7 did only the fire-rated wall in which the sheetrock was
8 sandwiched between framing. The pictures and the
9 allegation they are making go to exterior sheetrock. And
10 he specifically testified that any sheetrock put exterior
11 of the wall was the drywaller, not the framer. And so
12 that is a red herring.

13 In addition, all materials and specific direction
14 was given to Jose Nino by Bostic very specifically. And
15 he said that was part of their corporate plan. So as far
16 as materials go, there should be no liability to Jose
17 Nino.

18 And the other area -- and there was no testimony
19 that his work in any way was the proximate cause of any
20 of the damages. One thing I would like to correct is
21 that we did have testimony of one witness that he knew --
22 that was Mr. White -- who spoke specifically on knowing
23 that he had the right to bring a cause of action in 2006.

24 Further, on the -- we would ask you and invite your
25 attention to Dean versus Ruscon in looking at what

1 knowledge is needed in a construction case for tolling of
2 the statute. In that case, a crack was discovered. And
3 then six years plus some months later they brought the
4 lawsuit. And they said that the fact that the crack was
5 recognized and could have been caused by a specific party
6 was enough notice. And we believe that that's the type
7 of situation we have here. You don't need to know the
8 full extent of your claim in order for it to be tolled.

9 Your Honor, Jose Nino was not served until February
10 19th of 2012. And that was done by publication. The
11 complaint was filed on October 7th of 2011. So ---

12 THE COURT: What was the date again? October
13 the what?

14 MR. ANDERSON: October the -- I'm sorry.
15 October the 7th, I believe. Yes, October 7, 2011. And
16 he was not finally served until February 19th of 2012
17 which places him outside the hundred and twenty days.

18 THE COURT: All right. Let me go back. Who --
19 Mr. Gresh, you've got the time line. Let me -- help me
20 with that because that's the first time I've seen the
21 time line here.

22 All right. What's -- 2002?

23 MR. GRESH: That's when Bostic began
24 construction on the property.

25 THE COURT: October 2004?

1 MR. GRESH: Yes, Your Honor. I believe is the
2 date on when Bostic was last on the property.

3 THE COURT: All right. Had they declared
4 bankruptcy or gone insolvent at that time?

5 MR. GRESH: It was on that way for sure.

6 THE COURT: Pardon?

7 MR. GRESH: I don't know if they had
8 particularly at that date or not. I don't think they
9 probably have any evidence ---

10 THE COURT: Well, what I'm just asking is
11 what's the October of 2004 date based on?

12 MR. GRESH: That's the date that we heard from
13 Mel Morris and others that Bostic left the property
14 because it was not being paid by the developer.

15 THE COURT: All right. They weren't being
16 paid, so they left?

17 MR. GRESH: That's right.

18 THE COURT: And then the next date is what ---

19 MR. GRESH: I have April of 2005.

20 THE COURT: April of 2004 -- '5?

21 MR. GRESH: Yes, Your Honor.

22 THE COURT: What's that?

23 MR. GRESH: That's when Marrick -- excuse me --
24 I.M.K. purchased the unfinished buildings, the land, et
25 cetera.

1 THE COURT: Okay. And at that time, it was all
2 dried in?

3 MR. GRESH: I think there's been conflicting
4 testimony as to that.

5 THE COURT: I don't think any of them said they
6 didn't have a roof.

7 MR. GRESH: That may be, but I don't recall.

8 THE COURT: I mean, I don't know. 2007?
9 February of 2007?

10 MR. GRESH: Would be three years before Bostic
11 was named as a defendant in the lawsuit.

12 THE COURT: All right. Bostic was named in
13 February of 2010?

14 MR. GRESH: Yes, Your Honor.

15 THE COURT: All right. Going back to September
16 2008.

17 MR. GRESH: Is when I believe we heard
18 testimony today that the homeowners took over the
19 management of the Stoneledge Property Owners Association.

20 THE COURT: And February 7, 2007?

21 MR. GRESH: Your Honor, that date just
22 represents a mythical point in time.

23 THE COURT: Dates back from February 10, 2010?

24 MR. GRESH: Correct.

25 THE COURT: Well, until September 2008 -- well,

1 first of all, Bostic didn't have any homeowners, did it?
2 There was no homeowners association or anything? Bostic
3 was it. Is that correct?

4 MR. BELCHER: I understand it's Mr. Gresh's
5 motion, but I ---

6 THE COURT: I know. I'm going to relax the
7 rules.

8 MR. BELCHER: All right. There had been one
9 established by the bylaws, by the key point where these
10 red arrows are here is that in this 11/05 -- in this
11 April '05 through 11/05 time frame, that's when Marick
12 and I.M.K. came to the place, re-adopted and re-amended
13 the bylaws to state that it's now Stoneledge at Keowee.
14 Those three red arrows show the day when Marick, I.M.K.
15 were there on site, were on the board, were hearing
16 complaints from homeowners, were, by virtue of their
17 construction background whether being Mr. Cox or being a
18 neighbor charged with actual knowledge of issues at
19 Stoneledge as board members and failed to sue Bostic
20 until 2010.

21 The board is the board is the board. It doesn't
22 matter who's on it. The equitable tolling may stand as
23 to Marick, but it does not stand as to Bostic because at
24 any day prior to February 7th -- I'm sorry, February of
25 '07, Marick, Rick Thoennes, any individual board member

1 or the board itself could have sued Bostic even if they
2 were afraid. And the reason they didn't is because they
3 were selling units. They were making money. They were
4 doing whatever they were doing. They didn't put a
5 lawsuit on the place. They wanted to bandage it up, make
6 the repairs and do whatever they wanted to do. That's
7 all been part of the testimony as well. So those three
8 red arrows show when Bostic -- when the claims were clear
9 to the board, the board should have made those claims as
10 to Bostic.

11 The claims as to Marick are probably still ripe
12 because Marick didn't turn it over to the homeowners.
13 That's the Magnolia case. But the Magnolia case would
14 still require the board who has been the board since it
15 began being a board to sue Bostic.

16 THE COURT: Well, when did it begin to be a
17 board?

18 MR. GRESH: Plaintiff's Exhibits 3 and 4, Your
19 Honor.

20 THE COURT: How about giving me a date. I
21 mean, just tell me.

22 MR. GRESH: The board, I think, was began in
23 August of '03, and the transfer into the Townhomes of
24 Lake Keowee -- okay, this board, the Homeowners
25 Association of Stoneledge at Keowee began November of

1 2005. No. I'm sorry.

2 MR. LYLES: It's actually September of ---

3 MR. GRESH: September of '05 it was enacted and
4 then filed in November of '05.

5 THE COURT: All right. In other words, I.M.K.
6 came in on April 2005, and September 2005 the homeowners
7 association was created?

8 MR. GRESH: Yes, Your Honor.

9 THE COURT: And that actually took effect and
10 the members were appointed by November 2005?

11 MR. GRESH: I think they were elected in that
12 September meeting because minutes in the actual
13 declaration was filed with Oconee County on November 1 of
14 2005.

15 MR. BELCHER: Bearing the signatures of Mr.
16 Thoennes, Mr. Cox, witnesses who have testified here
17 today and as to their knowledge, their actual knowledge,
18 of issues at Stoneledge.

19 THE COURT: I only smile because we were going
20 to do this in fifteen minutes.

21 MR. GRESH: I'm sorry, Your Honor.

22 THE COURT: All right. And then you have no
23 evidence as to negligence on behalf of -- as to Nino?
24 That's your other ground?

25 MR. GRESH: That was Mr. Anderson's ground.

1 THE COURT: I mean, Mr. Anderson.

2 MR. ANDERSON: Yes, sir, that is correct.

3 THE COURT: Mr. Lyles, what about the evidence
4 as to negligence on Nino?

5 MR. LYLES: Well, the testimony -- and I guess
6 Mr. Anderson and I heard the testimony a little bit
7 differently. I think Mel Morris testified pretty
8 explicitly that Jose Nino put up all the drywall that was
9 associated with the firewalls. I know there was a
10 discussion about the interior firewalls which were
11 constructed differently than the exterior firewalls. But
12 the notes that we got from Mr. Morris' testimony was that
13 Mr. Nino put those firewalls up including the sheathing
14 that was put up, the O.S.B. sheathing.

15 We also saw photographs from Derek Hodgins in his
16 report of the roof sheathing that was improperly
17 installed, which had been damaged and contributed to the
18 roof problems. So that's the evidence that we have with
19 respect to Mr. Nino.

20 THE COURT: All right.

21 Mr. Imhoff?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: Anything?

24 MR. IMHOFF: Well, I have several directed
25 verdict motions, Your Honor. I don't know that I have an

1 opinion on ---

2 THE COURT: No. I'm asking for your directed
3 verdicts.

4 MR. IMHOFF: All right.

5 THE COURT: I need to hear you now. I'm not
6 going to decide them this afternoon.

7 MR. IMHOFF: The directed verdicts, Your Honor?

8 THE COURT: I will take them under advisement
9 and decide eventually without prejudice to -- what is it?
10 -- the case. Go ahead.

11 MR. IMHOFF: Starting backwards a little bit,
12 Your Honor, I'm going to join in -- and I think all of
13 the defendants are probably going to join in -- on the
14 directed verdict as to loss of use. The plaintiffs
15 designated a loss of use expert, so to speak, Judy White,
16 whose deposition we took. And she testified about how
17 long they'd have to be out, how much money they wanted
18 and those types of things. They did not put in this
19 case, so the jury does not have anything to consider as
20 to an amount for loss of use, how much the unit -- how
21 much they would be entitled to if they weren't allowed to
22 use it. You know, comparable lodgings, those types of
23 things. I don't know. I haven't heard from Mr. Lyles on
24 this, but I'm guessing they've abandoned that loss of use
25 because there isn't any evidence of what it is other than

1 there might be some. But it would leave it up to the
2 jury to speculate as to what that is.

3 He's not jumping up to agree with me, so he may have
4 a response on that. Would you like me to wait for his
5 response or continue, Your Honor?

6 THE COURT: All right.

7 MR. LYLES: Your Honor, we decided not to put
8 up any evidence of loss of use.

9 THE COURT: All right. So without any evidence
10 ...

11 All right.

12 Next?

13 MR. IMHOFF: Your Honor, the next directed
14 verdict motion -- and I think I may be joined on this by
15 several different folks as to the breach of fiduciary
16 duty. And the breach of fiduciary duty, as I understand
17 it, Your Honor, goes to these individual members of the
18 homeowners association, Mr. Thoennes, Mr. Roberson, Mr.
19 Cox -- I think there was another one; I don't remember
20 their name, but members of the board -- as they sat on
21 the board, the decisions that they made.

22 And the breach of fiduciary duty, especially when it
23 comes to a nonprofit corporation, Your Honor, where the
24 members of that board, the directors of that board, are
25 making decisions is governed by the business judgment

1 rule, Your Honor. And the business judgment rule
2 requires that the plaintiff carry the burden of proof to
3 prove that while sitting on the board of a nonprofit
4 corporation and making judgments in business, that the
5 plaintiffs must prove fraud, self-dealing or
6 unconscionable conduct. And so as to those members of
7 that board and the decisions that they made -- and,
8 frankly, the members of the board that are on it today --
9 the business judgment rule applies. There has been no
10 evidence. First of all, there's been no expert who sat
11 on that stand and testified, this is what the standard is
12 for making decision as a director.

13 But even further than that, Your Honor, there has
14 been no evidence submitted that there was fraud in those
15 nine elements that you have to prove to prove fraud.
16 Self-dealing somehow. You're doing things and you are
17 self-dealing to yourself or unconscionable conduct. The
18 evidence and testimony to this point at the very most is
19 that there may have been, you know, a lack of or a
20 negligence-type of standard, but certainly not
21 unconscionable self-dealing and fraud.

22 And so as to the breach of a fiduciary duty and
23 these folks sitting on the board, I would say that
24 directed verdict should be granted as to the individuals.
25 I think directed verdict should also be granted as to the

1 business entities because they didn't sit on the board.
2 So I'm not sure how Marick or -- well, Bostic's not
3 involved -- but I.M.K. or I.K. or M Group or anybody
4 else, they didn't sit on that board. So I think that
5 would be dismissed as to them.

6 And, again, Your Honor, I have several of these. I
7 can stop and wait for replies, or I can just continue on.

8 THE COURT: Well, I'd like to hear all of the
9 motions now. As I say, I'm not going to be able to
10 decide them this afternoon, and particularly with the
11 jury because I do want to go forward with the case.
12 We've already been out -- what is it? -- a week. But go
13 ahead and state your other grounds too, please.

14 MR. IMHOFF: Your Honor, this is maybe not more
15 of a difficult directed verdict, but I think it's almost
16 as procedural as it is substantive. I'm not sure if the
17 Court looks at it this way, but it looks like to me that
18 we are trying two different cases here. We're trying a
19 builder's negligence case and whether they built the roof
20 and the deck and put the windows in and the stone and all
21 of that, and whether when it was built it complied with
22 the code and industry standards at the time. And that's
23 what we think of as a typical construction case. The
24 case -- and I made this point in the opening, and all the
25 evidence and testimony has supported it. The case

1 against Marick is did they find those defects. Were they
2 negligent in their investigation and their inspection?
3 And so I guess I'm asking for a partial directed verdict
4 because the evidence and testimony is from plaintiffs'
5 expert, Your Honor, that his scope of repair to take
6 everything off of this building was necessary before
7 Marick ever got on the project. All of the roofs,
8 siding, stone, windows, doors, foundation piers, all of
9 that needed to be done before Marick ever got there.
10 Almost like a superceding negligence kind of argument,
11 Your Honor. And the only damage that Mr. Hodgkin could
12 attribute to Marick's failure, as he testified, to
13 inspect was increased damage to the bones of the
14 structure. You know, the framing and the boards and that
15 type of thing.

16 After Mr. Hodgkin was done testifying, I specifically
17 went through those damages with Mr. Folk, if you will
18 remember. And I said, "Okay. You've indicated that
19 there's twenty-five percent -- you're guessing. But
20 there's twenty-five percent damage to the roof sheathing
21 and fifteen percent damage to the siding sheathing." And
22 I went through all of those things with him. And at the
23 end of that, he agreed that the damages attributable to
24 Marick, based on Mr. Hodgkin's testimony, is two hundred
25 and fifty thousand dollars, Your Honor.

1 And so we have two cases. We have a case of
2 original builder negligence with a three-million-seven-
3 hundred-and-fifty-thousand-dollar estimate, taking our
4 two fifty out, and then a two-hundred-and-fifty-thousand-
5 dollar inspection case against my client. And so I would
6 ask for a partial directed verdict on that, or the jury
7 is going to be very confused about what they're
8 determining. And, again, that's why I said at the
9 beginning of this, it's as much procedural. But it is,
10 in fact, two different cases. And it's two different
11 cases based on plaintiffs' expert's testimony attributing
12 only increased damage to the bones of the underlying
13 sheathing to my client.

14 So that would be my second directed verdict or a
15 request for a partial directed verdict, Your Honor.

16 THE COURT: All right.

17 Mr. Lyles?

18 MS. BROWN: Your Honor?

19 THE COURT: Oh, yes, ma'am.

20 MS. BROWN: Your Honor, I.M.K., to the extent
21 that on the personal directed verdict, would join in Mr.
22 Imhoff's motion.

23 THE COURT: Very good.

24 Mr. Lyles?

25 MR. LYLES: Yes, sir. With regard to the

1 breach of fiduciary duty, the Concerned Dunes West
2 Residence case versus Georgia Pacific is the case that
3 finally recognized the fiduciary duty. And the court
4 stated very plainly as follows.

5 THE COURT: All right. What's that cite on
6 that?

7 MR. LYLES: I'm sorry, Your Honor. It is 562
8 S.E. 2d 633.

9 THE COURT: 633?

10 MR. LYLES: Yes, sir.

11 THE COURT: 562 S.E.2d 633?

12 MR. LYLES: Yes, sir. And it says very
13 plainly, "The developer in this case of a P.U.D. owes a
14 duty to the P.O.A. to turn over common elements that are
15 not substandard and that are in good repair. Failure to
16 do so subjects the developer to liability for bringing
17 the common areas up to standard." The court goes on to
18 say in its holding, "That is, developers are held
19 responsible for the condition of the common elements at
20 the time these areas are deeded to the P.O.A. That was a
21 deeded case as opposed to a board-controlled turnover
22 case. "If these areas are not in good repair at the time
23 of conveyance, the developer is liable for the cost of
24 repairs."

25 The Concerned Citizens Dunes West case, which

1 establishes this fiduciary duty, doesn't talk about the
2 business judgment rule. It doesn't weigh the conduct of
3 the developer. It says very simply, when the developers
4 are in control of a board and they turn over control of
5 that board to an association with common elements that
6 are in substandard condition, the developers are liable
7 for the cost of repair.

8 In the -- I believe it's the Magnolia case or it
9 could be the Pope case. Yes, it's the Pope case. Hang
10 on just a second. Pope versus Heritage Communities.
11 That's 717 S.E. 2d. The court continues to discuss --
12 that's a very recent case where the court discusses this
13 and the damages that flow from that breach of fiduciary
14 duty.

15 THE COURT: 717 S.E. 2d?

16 MR. LYLES: Yes, sir. 717 S.E.2d 765.

17 THE COURT: Okay.

18 MR. LYLES: It's very plain. Again, there's no
19 requirement that any elements of the business judgment
20 rule be met. The testimony in this case was crystal
21 clear that the people who were in control of the board at
22 the time of turn over were I.M.K. and its principles, Mr.
23 Thoennes and Mr. Cox. They personally had the fiduciary
24 obligation to turn over a building envelope in good
25 condition. The testimony of Derek Hodgin during his test

1 -- when he was on the witness stand was that in his
2 opinion, to a reasonable degree of certainty, the common
3 elements were not in good condition in September of 2005
4 -- excuse me -- 2008, which is when the common elements
5 or the building envelope were turned over to my clients.

6 I would also refer the Court going back to the
7 Concerned Citizens Dunes West case. There is authority
8 in that case applying the same fiduciary obligation to an
9 H.O.A. of townhomes. And townhomes are somewhat
10 different than condominiums. But the same fiduciary duty
11 applies. And it's -- I won't call it strict liability,
12 but the court is very clear. If the common elements
13 aren't in good condition at the time control of the board
14 is turned over, the developers are responsible for it.

15 On the issue of the damages, it's an interesting
16 argument. And I see it as one of two things. Either the
17 conduct of Marick in not doing an adequate inspection and
18 not making proper repairs has contributed to the single
19 loss that my clients have, which is the cost to repair.
20 Under a joint and several verdict or in a joint and
21 several liability standard, they contributed with the
22 negligence or their negligence contributed, along with
23 the negligence of Bostic and perhaps others who were far
24 more responsible, to cause that one wrong or that one
25 damage. So joint and severally, I guess it would be

1 unfortunate for Marick that they can articulate their
2 damages at a much lower level than Bostic can. But I
3 think that the rule under joint and several is that they
4 buy it.

5 If joint and several doesn't apply, then the
6 apportionment statute applies. And the apportionment
7 statute, if it applies to Marick in this case, is
8 intended to do exactly what Marick wants to have done,
9 which is a jury to say here's what percentage of this
10 larger problem we're going to assign to Marick. And so
11 that will be the answer to the question we just got.

12 THE COURT: All right.

13 Now Mr. Anderson?

14 MR. ANDERSON: Your Honor, if I could just
15 respond to one thing Mr. Lyles said ---

16 THE COURT: Go ahead.

17 MR. ANDERSON: --- about the testimony of Mel
18 Morris. On the issue of placement of the drywall, Mel
19 Morris testified in his deposition if it were applied on
20 the exterior of the walls, it would have been done by the
21 drywall contractor. We had this set for impeachment if
22 he testified any differently. I did not have to use
23 this. So I believe that his testimony was quite clear
24 that the exterior drywall was applied by the drywall
25 contractor and not Jose Nino.

1 THE COURT: I think that's what Mr. Lyles said
2 too.

3 MR. LYLES: What I said is that he testified --
4 there are two types of firewalls. There's an interior
5 firewall, and then there are these exterior firewalls. I
6 think what Mr. Morris said is on the interior, Jose Nino
7 would have had responsibility to put the drywall on the
8 interior face of the wall. And then a drywall contractor
9 would come back and put drywall on the, I guess, the
10 exterior facing the wall. Maybe I had that exactly
11 opposite. But I think he testified in this trial that
12 with regard to those exterior walls where he was doing
13 all the sheathing, he put up the fire-rated wall.

14 THE COURT: All right.

15 MR. LYLES: And I know that the drywall guy
16 didn't do the O.S.B. sheathing, which is the problem with
17 the firewall. Mr. Nino did that.

18 THE COURT: All right. Very good.

19 All right.

20 Now Ms. Brown?

21 MS. BROWN: Yes, Your Honor.

22 THE COURT: Okay.

23 Mr. Imhoff?

24 MR. IMHOFF: Your Honor, I just want to respond
25 to something. That question has come up, and I've heard

1 it kind of kicked around a little bit. The apportionment
2 statute or the contribution statute is very, very clear
3 about joint and several liability in a construction case.
4 And that is that if the C.O. is issued after, I think
5 it's, June 2005 -- July 1st, 2005, it's a contribution
6 statute; it's not joint and several liability. And so I
7 would agree with Mr. Lyles that the apportionment statute
8 would lack merit to make that argument. But I think that
9 it would be clear to the jury if Marick was granted
10 directed verdict on the builder negligence, the original
11 negligence that we were just talking about, and making it
12 clear to the jury that it's the inspection or the alleged
13 lack of inspection of the work that already existed.
14 We're not talking about the original construction. The
15 different case. And that was defined very clearly by Mr.
16 Hodgin.

17 May I go back and address the breach of fiduciary
18 duty, Your Honor?

19 THE COURT: I tell you what. I'm going to hear
20 you more without the jury here if it gets that far. So
21 let's don't -- because obviously I've got to do a little
22 since I haven't been provided, at least not that I know
23 of, authorities that we're hearing about today.

24 LAW CLERK: I've got them on the computer.

25 THE COURT: Oh, you've got them on the

1 computer? That takes care of that. That is if it's the
2 computer that is up here. My problem is that obviously
3 I'm not going to make a decision without something other
4 than your good advices, you know, on how to rule. And
5 you're looking at your clock, Mr. Belcher.

6 MR. BELCHER: Well, Your Honor, just to inform
7 the Court as to where we are right now, we'd be happy to
8 spend the rest of the afternoon with the Court if the
9 Court wants to dismiss the jury for the day. Because it
10 seems to me like this case is getting really smaller and
11 smaller by the day. We have two witnesses left that I
12 can tell, the witnesses that I would call if I were to go
13 next. But I'm not on the caption next. But since I'm
14 the ring leader, if I'm going to start calling witnesses,
15 they're not in this courtroom right now. They're
16 parties, but they're not in the courtroom. So my two
17 witnesses, the only ones that I have left to call, are
18 ready to go tomorrow morning at nine a.m. And I would
19 say between the two of them we would be done by two
20 o'clock in the afternoon. It's going to be very short.
21 It's the same testimony from a scope of repair, Rick
22 Moore, and then putting J.R. Watkins back on to spend
23 about half as much time as we spent yesterday in my
24 estimation.

25 THE COURT: Okay. How about the others?

1 MR. BELCHER: If anyone else has witnesses -- I
2 put a call out last night saying, if you have witnesses,
3 bring them today because ---

4 THE COURT: Mr. Anderson, do you have any
5 witnesses?

6 MR. ANDERSON: No, Your Honor.

7 THE COURT: Mr. Imhoff?

8 MR. IMHOFF: I don't think so, Your Honor. I
9 think Mr Lyles called the ---

10 THE COURT: Ms. Brown?

11 MS. BROWN: No, Your Honor.

12 THE COURT: Mr. Hemphill?

13 MR. HEMPHILL: No, Your Honor.

14 THE COURT: All right. So, really, we're
15 talking about two witnesses. To be very candid, though,
16 I'm just, -- I'm not -- I don't want to -- well, it's
17 three fifteen.

18 MR. BELCHER: There's other work that we can do
19 without the jury here this afternoon as well if we want
20 to discuss charges ---

21 THE COURT: Right.

22 MR. BELCHER: --- and that sort of thing so
23 that we can move smoothly ---

24 THE COURT: Well, I'm just thinking about
25 bringing them in later in the day tomorrow, say, noon or

1 something like that.

2 MR. BELCHER: And then just doing our closings
3 on Friday or letting -- or on Thursday. I'm sorry.

4 THE COURT: Thursday. No. I'm thinking that
5 -- what is it? -- if you've only got two witnesses and
6 we've pared it down as it might be, it might be able to
7 go tomorrow afternoon.

8 MR. BELCHER: We would rest and be prepared
9 for charges, I would say, or for summation if we're going
10 to do summation first and then charges.

11 THE COURT: Tomorrow? I mean, if you had your
12 two witnesses?

13 MR. BELCHER: We could put on our two witnesses
14 in the morning and be prepared to close in the afternoon.

15 THE COURT: All right. Well, the thing is
16 you're -- I appreciate your thought about the jury
17 because I do -- I'm not going to keep them back there in
18 the jury room any longer today. I'm just saying I'm
19 really not comfortable myself as to addressing some of
20 these issues because you've raised -- if you really want
21 me to be candid -- if I really had to be candid, I'd tell
22 you, well, when we start talking about apportionment,
23 those are all matters that have come along after I
24 stopped practicing law. And I know about contribution,
25 but I -- I really do. I need to catch up some.

1 MR. BELCHER: We could plan then, as the Court
2 suggested, to have our witnesses here at noon tomorrow
3 and give the Court plenty of time to study whatever it
4 needs to study tomorrow morning.

5 THE COURT: Well, I want to hear you this
6 afternoon on your motions. So then -- what is it? --
7 maybe in the morning again another nine o'clock -- well,
8 I tell you what. No. Not nine o'clock because I'm not
9 going to hear -- hopefully when we get together the next
10 time, the argument will be more concise as far as what
11 the issues are that I want to address.

12 MR. BELCHER: Okay.

13 THE COURT: All right. So let's do get --
14 let's let the jury go. I'm going to bring them out. I'm
15 not even going to suggest that you rest on the record at
16 this time.

17 MR. LYLES: Yes, sir.

18 THE COURT: But you have rested. And just let
19 them go to -- you want to say noon?

20 MR. BELCHER: That would be fine with us, Your
21 Honor.

22 THE COURT: All right.

23 MR. BELCHER: We'll have our witnesses here at
24 noon to go.

25 THE COURT: All right. Ask the jury to join

1 us, please

2 I tell you what. I'll say twelve thirty. That'll
3 give them a little late -- they can have a brunch at
4 twelve-thirty.

5 (WHEREUPON, the jury entered the open court at
6 approximately 3:19 p.m.)

7 THE COURT: All right. Let the record reflect
8 that the jury and alternate are in the jury box.

9 Mr. Foreman, ladies and gentlemen of the jury, I
10 apologize about having to keep you back in the jury room
11 for over an hour. But certain matters have come up that
12 will have or could have a very direct impact upon this
13 case. And I'm going to suggest that rather than try to
14 go through them all this afternoon -- and it's going to
15 be something that I have to do -- and keep you back
16 there, I'm going to request that you come back tomorrow
17 at twelve thirty. And hopefully, at that time we'll
18 conclude the trial of the case. But rather than keep you
19 back there and rather than trying to rush through
20 something that I want to feel more comfortable about, I'm
21 going to dismiss you for the day and ask you to come back
22 at twelve thirty in the morning. And we'll try -- I did
23 not anticipate this. And I assure you I wouldn't have
24 had you come back this afternoon.

25 All right. With that I will excuse you until

1 twelve-thirty in the morning. Just come back to the jury
2 room. Obviously, do not undertake the discussion of the
3 case among yourselves in any way. Thank you very much.

4 (WHEREUPON, the jury exited the open court at
5 approximately 3:21 p.m.)

6 THE COURT: All right. Let's do this. Now,
7 bear with me. Any other authorities? I have -- what is
8 it? -- Magnolia North Properties versus Heritage.

9 MR. GRESH: Did you get a cite on that, Your
10 Honor?

11 THE COURT: I got that, yeah. That's 397 348?

12 MR. GRESH: Yes, Your Honor.

13 THE COURT: I'm looking at it. And then 717
14 S.E.2d 765?

15 MR. LYLES: Yes, sir. That is the -- let me
16 see which one that one is.

17 THE COURT: Well, that's the one that you gave
18 me, sir. All right.

19 Now, any other authorities that you want me to look
20 at?

21 MR. BELCHER: Yes, Your Honor. It's Laird
22 [sic] versus Rock Hill, which is ---

23 THE COURT: And I had that earlier, but I want
24 to see it. What's the cite on it?

25 MR. BELCHER: I'm sorry. Barr versus Rock

1 Hill.

2 MR. LYLES: I gave it to him.

3 THE COURT: We got it?

4 330 S.C. 640. Okay. That's Rock Hill? Okay.

5 MR. ANDERSON: Dean versus Ruscon.

6 THE COURT: Ruscon?

7 MR. ANDERSON: Ruscon, R-U-S-C-O-N. It's 321

8 S.C. 360.

9 THE COURT: 321 360 South Carolina?

10 MR. ANDERSON: South Carolina, yes, sir. Do
11 you want the Southeast?

12 THE COURT: No, I just need the one. 321 S.C.
13 360, Ruscon?

14 MR. ANDERSON: Yes, that is correct. And also
15 as to the hundred-and-twenty-day rule, it would be Rule
16 3(a). And then also the Mims case at 399 S.C. 341.

17 THE COURT: Okay.

18 MR. ANDERSON: Thank you.

19 THE COURT: Yes, sir.

20 MR. IMHOFF: Your Honor, let's go ahead and
21 start with the contribution among tort feasons act cited.
22 That's § 15-38-15, Your Honor.

23 THE COURT: Just give me that number. § 15-38
24 -- what is it?

25 MR. IMHOFF: § 15-38-15.

1 THE COURT: Okay.

2 MR. IMHOFF: And specifically the note at 2005
3 Act 27, Section 16(4) makes clear about the applicability
4 of that to construction cases.

5 THE COURT: Okay. Effective date?

6 MR. IMHOFF: I don't have it, Your Honor. I'm
7 sorry.

8 THE COURT: It should be ---

9 MR. IMHOFF: 2005.

10 THE COURT: It'll be in the history, in the
11 notes on the statute.

12 MR. IMHOFF: I can hand it to you if you'd like
13 to look to see where it is.

14 THE COURT: I've seen those before. I used to
15 write them. Forgive me. I'm sorry. That was tacky.

16 MR. IMHOFF: I have a couple of cases, Your
17 Honor ---

18 THE COURT: Yes, sir. Well, I want any other
19 cases.

20 MR. IMHOFF: --- about developer liability for
21 our cite of the business judgment rule. Your Honor,
22 first is Dockside versus Detyens, I think is how you say
23 that.

24 MR. LYLES: Detyens.

25 MR. IMHOFF: Detyens. 352 S.E.2d 714.

1 THE COURT: Is that 352 714?

2 MR. IMHOFF: Yes, Your Honor. And then Goddard
3 versus Fairway Development, and that is at 426 S.E.2d
4 828.

5 THE COURT: Okay.

6 MR. GRESH: One last case on the statute of
7 limitations, Judge?

8 THE COURT: Certainly.

9 MR. GRESH: I would cite -- I would direct the
10 Court to Epstein versus Brown.

11 THE COURT: Do what?

12 MR. GRESH: I would ask the Court to politely
13 consider Epstein versus Brown.

14 THE COURT: You didn't say Georgia, did you?

15 MR. GRESH: No, no, no. I know better than
16 that. I know better than that. I would have been burned
17 by that one.

18 THE COURT: Okay.

19 MR. GRESH: This is a great South Carolina
20 case.

21 THE COURT: Oh, all right.

22 MR. GRESH: Epstein versus Brown, 363 S.C. 372,
23 and that's a 2005 case.

24 THE COURT: All right. Do that one for me
25 again. I'm sorry.

1 MR. GRESH: Yes, Your Honor. 363 S.C. 372, and
2 that's a 2005 case.

3 THE COURT: Okay.

4 MR. GRESH: Thank you, Your Honor.

5 THE COURT: All right. Mr. Lyles?

6 MR. LYLES: Yes, sir. I think that you've got
7 the Concerned Citizens of Dunes West, which is 562 S.E.2d
8 633.

9 THE COURT: Okay.

10 MR. LYLES: And you've got that one.

11 THE COURT: 562 S.E.2d 633?

12 MR. LYLES: Yes, sir.

13 THE COURT: Okay.

14 MR. LYLES: Then the Graniteville case, which
15 is 447 S.E.2d ---

16 THE COURT: 447?

17 MR. LYLES: Yes, sir.

18 THE COURT: S.E.2d?

19 MR. LYLES: 226. The Holly Woods Association
20 case, which is 708 ---

21 THE COURT: Just a second. 708?

22 MR. LYLES: S.E.2d 787.

23 LAW CLERK: What was it?

24 MR. LYLES: 708 S.E.2d 787. You've got the
25 Magnolia case, and I think you've got the Pope case I've

1 already given you, I believe. That's the 717 case.

2 On the issue of the apportionment statute, Your
3 Honor, I know the effective date of the statute, and I
4 know what it says about C.O.s. And this case has always
5 perplexed me a little bit because we have a mixture of
6 dates here. But I also think that the apportionment
7 statute is clear that it applies to tort feaßors. If you
8 look at Kennedy versus Columbia Lumber, which is 384
9 S.E.2d 730, I think Justice Toal in Kennedy ---

10 THE COURT: 384 S.E.2d?

11 MR. LYLES: Yes, sir.

12 THE COURT: What is the page?

13 MR. LYLES: It's 384 -- excuse me. 344. 344
14 S.E.2d.

15 THE COURT: S.E.?

16 MR. LYLES: Oh, excuse me, Judge. S.E.

17 THE COURT: S.E.2d, 344 S.E.2d ---

18 MR. LYLES: I gave you the wrong cite. I
19 pulled up the wrong case. You were right the first time.
20 Kennedy is 384 S.E.2d 730.

21 THE COURT: Okay.

22 MR. LYLES: And I apologize for that.

23 THE COURT: No problem.

24 MR. LYLES: But the significance of that case
25 as it relates to apportionment is -- I think Justice Toal

1 in that case makes it very clear that the breach of
2 implied warranty claims are not tort claims. They're
3 different claims. She carefully distinguishes those
4 claims. She talks about tort claims, and she talks about
5 warranty claims. And so the statute -- excuse me -- the
6 apportionment statute applies to tort feasons. I don't
7 know that the apportionment statute applies to implied
8 warranty claims.

9 I've also got some authority -- and, Your Honor,
10 I'll have to email it to you because I can't put my
11 fingers on it right now -- that there is some authority
12 not in South Carolina, I believe from Illinois, that says
13 apportionment should not apply to fiduciary duty claims
14 because of the special nature of those claims. And I
15 could send that to Your Honor by email. And I'll send it
16 to everybody else as well.

17 And I think that that's all of the cases. Thank
18 you.

19 MR. IMHOFF: Are you still hearing arguments on
20 this, Your Honor?

21 THE COURT: I'll be glad to. I tell you what.
22 I don't know when I'm going to get all of these
23 authorities.

24 MR. IMHOFF: I'm glad -- well, I made another
25 directed verdict motion, Your Honor, but it was one of

1 the ones on my list. And I'm glad Mr. Lyles just brought
2 it up. As you know, the implied warranty of habitability
3 has been dismissed in this case. So the only implied
4 warranty cause of action that, I guess, exists against
5 Marick or I.M.K. would be the implied warranty for
6 workmanlike services. And as I was saying earlier, this
7 is two different cases in my opinion. It's the
8 construction and the inspection. My client, Marick --
9 and I.M.K., I think, will join and maybe M Group --
10 didn't build the defective construction in this case. I
11 think that Mr. Lyles may be able to say that ---

12 THE COURT: Well, didn't you take on the
13 construction when you bought the project?

14 MR. IMHOFF: We built the interiors, but none
15 of the at-fault construction, none of the exteriors that
16 are leaking -- I mean, the cabinets aren't an issue in
17 this case. The carpeting isn't an issue in this case.
18 The interior gypsum board isn't an issue in this case.
19 And that's what my client built. It didn't build the
20 leaking roof or the leaking stone or the leaking
21 foundation. And the implied warranty of workmanlike
22 service is that the work ---

23 THE COURT: But you still have the duty to
24 inspect, do you not?

25 MR. IMHOFF: Well ---

1 THE COURT: And you have the ability to do all
2 of that if you inspect and find it wanting?

3 MR. IMHOFF: Well, that's right. And that's
4 the distinction Mr. Lyles was just making, is that the
5 warranty claim he doesn't think goes in the contribution
6 statute. But the inspection would clearly go in the
7 contribution statute. You're right. We have -- the
8 allegation is ---

9 THE COURT: Again, I don't want to get bogged
10 down in the minutia here that -- what is it? -- because
11 this is a directed verdict. I'm not concerned so much as
12 to -- what is it? -- finding, you know, different, I
13 guess you might say, layers or degrees of fault or
14 contribution as much as I'm trying to find out is a party
15 entitled to a verdict as a matter of law, that there are
16 no genuine issues of material fact much like I would have
17 done on summary judgment if I'd had -- what is it? -- of
18 course, we didn't know how the testimony was going to
19 develop.

20 But the main thing is, no, I don't want to get
21 bogged down here on -- what is it? -- the fine points
22 that might be done at the time of post-verdict motions.

23 MR. IMHOFF: Okay.

24 THE COURT: All right. Well, I mean, unless
25 you've got something -- what else? Do you have anything

1 else to say? I mean -- because as I say, you're talking
2 about the difference between, well, liability based on --
3 what is it? -- either inspection or -- what is it? -- the
4 construction, discovery or construction. I might have a
5 different -- I have a different problem.

6 MR. IMHOFF: Yeah, they're two different causes
7 of action. Inspection would be one, and one's the
8 working building.

9 Your Honor, I do have one more.

10 THE COURT: Okay.

11 MR. IMHOFF: And that is to Rick Thoennes'
12 personal liability.

13 THE COURT: Who is this?

14 MR. IMHOFF: Rick Thoennes, Your Honor.

15 THE COURT: Uh-huh (affirmative).

16 MR. IMHOFF: And his personal liability. The
17 pleadings are very, very long, and there's been a lot of
18 testimony. But as to his personal liability -- and I'm
19 really going to need some help from Mr. Lyles what all
20 he's trying to hit him with. But as a director, he was a
21 director of the board, and he would be protected by the
22 business judgment rule. We would ask that any personal
23 liability be extinguished. As a member of Marick, he was
24 a part of Marick Corporation, the corporation of Marick
25 and ---

1 THE COURT: And I.M.K.

2 MR. IMHOFF: Well -- and that was part of
3 I.M.K. And, Your Honor, we would move for a directed
4 verdict on any personal liability of Rick Thoennes as he
5 was working within the corporate form and for a
6 corporation or, Your Honor, as a director on the board.
7 And that's -- most of the testimony I've heard is that it
8 was him as a director looking at the leaks out there and
9 that type of thing.

10 THE COURT: Mr. Lyles, do you have anything to
11 offer?

12 MR. LYLES: Well, none, except that I think he
13 owes the fiduciary duty of a developer. His testimony in
14 this case in terms of his board service, he testified
15 today that he was not only the general contractor who had
16 the license who pulled the permits, but also was in
17 charge of the sales staff. I mean, he was deeply
18 implicated in this personally in all levels.

19 THE COURT: Yes, sir, Mr. Anderson?

20 MR. ANDERSON: Your Honor, if I could just add
21 one more thought on the fire-rated wall, if I could.
22 Their complaint is the type of material that was used,
23 not how it was attached to the wall. And the testimony
24 was very clear that my client had no selection of
25 material. He was told what material to use and where to

1 put it. And so that liability would lie with someone
2 else, which appears to be his complaint on the exterior
3 wall covering. By exterior, I mean outside the building.
4 I don't know what Mr. Lyles' definition of exterior is,
5 but apparently it doesn't include that. But that would
6 just be one additional thought I would like to add to my
7 directed verdict.

8 THE COURT: All right. I tell you what -- yes,
9 ma'am? I'm not going to tell you what.

10 MS. BROWN: All right. Do you want to wait?

11 THE COURT: I'll wait to tell you what after I
12 hear from you.

13 MS. BROWN: Your Honor, I'm just renewing -- or
14 making a directed verdict motion, which is essentially a
15 renewal of my summary judgment motion, with regard to
16 personal liability of Mr. Larry Lollis and Mr. Bill Cox.
17 As you recall in the pleadings, the allegations against
18 Mr. Cox and Mr. Lollis personally are that they
19 authorized, participated in or directed the tortuous or
20 otherwise wrongful acts of I.M.K., Integrlys or both of
21 them, and are personally liable for the liabilities of
22 I.M.K. and/or Integrlys. I would simply say there's been
23 no evidence to indicate that Mr. Lollis ever served on
24 the board and was anything other than simply a monetary
25 investor in this project. And he should be granted a

1 directed verdict on that basis due to the fact that
2 there's been no testimony regarding any conduct of Mr.
3 Lollis that was wrongful, negligent at all.

4 THE COURT: Mr. Lyles?

5 MR. LYLES: Yes, sir. The liability against
6 Mr. Lollis simply stated is this. The testimony in this
7 case is that Mr. Lollis, as a member of I.K., which is
8 Integrys Keowee, misappropriated or siphoned off the
9 corporate assets of I.M.K. They did it in 2007; they did
10 it in 2006 as they sold I.M.K. assets. And then as Mr.
11 Cox said in his testimony when they sold the I.M.K.
12 assets to Mr. Ludwig, the consideration, the cash
13 consideration for that, which he said was only five
14 hundred and eighty thousand dollars, went directly to
15 I.K. and then was disbursed to the members. It wasn't
16 put into I.M.K. And so I am left, again, suing an entity
17 in I.M.K. that is insolvent and has no assets.

18 And to compound that, as part of that sales
19 transaction, I.K. received a promissory note and actually
20 benefitted from the sale of these units after the sale to
21 Ludwig and even benefitted from the sale of units which
22 took place after this lawsuit was filed in 2009. And Mr.
23 Cox admitted that. I'm sorry for Mr. Lollis. But the
24 fact of the matter is that hundreds of thousands of
25 dollars that should properly have been in the coffers of

1 I.M.K. after assets of I.M.K. were sold and used to
2 satisfy a judgment, was put in the pockets of the
3 members. And that's the case against Mr. Lollis.

4 THE COURT: Not the members but the investors?

5 MR. LYLES: Well, he was a member. Ultimately

6 ---

7 THE COURT: Oh, you mean a member of the
8 L.L.C.?

9 MR. LYLES: Yes, sir. Yes, sir.

10 MS. BROWN: Your Honor, the business deal is
11 creatively presented by Mr. Lyles in this situation. The
12 obligation of Integrys Keowee was the fifty percent owner
13 of I.M.K. and I.M.K. was, as has been stated by Mr.
14 Imhoff, with regards to their duty to the H.O.A. The
15 evidence is that the homeowners association had zero
16 assets in the account or very little money in the account
17 when I.M.K. bought it. And I.M.K. spent its own money
18 trying to get the property brought up to where it should
19 be, which is stuff the homeowners association should have
20 done. And these were obligations that were taken on by
21 I.M.K. and Marick, as a part of I.M.K., to bring the
22 property up to where they could begin to sell it. When
23 the property was sold to S.D.I., there's somewhat
24 conflicting testimony on how much money was in the
25 reserve account. But by Ms. Furnari's own testimony, it

1 was at least seventy-five thousand dollars, which was
2 more than they had ever had in the homeowners association
3 reserve. And we had no knowledge of these problems. The
4 testimony has pretty much been consistent by all the
5 parties that there were no construction issues that were
6 there when it was sold to S.D.I., and there were no
7 unfinished construction projects or known defects that
8 were not repaired, and that I.M.K. took on to do
9 obligation of the H.O.A. with its own money. So for Mr.
10 Lollis -- for Mr. Lyles to say that there has been some
11 sort of siphoning off of funds simply isn't supported by
12 the testimony. And, again, I would say Mr. Lollis'
13 involvement in this -- even if Mr. Lollis objected to
14 anything that I.M.K. or I.K. decided to do, Mr. Lollis
15 was a twenty percent investor. He only had twenty
16 percent of the vote. So at the very least, Mr. Lollis
17 should not be here and personally responsible for such
18 conduct that has not ever been alleged. It's not a
19 standard given to us of his fiduciary duty or what the
20 conduct was other than this creative explanation of this
21 duty.

22 Mr. Ludwig, S.D.I., they were not put up in the case
23 on what happened with the money or how that was done.
24 I'm just -- there's no evidence of Mr. Lollis' personal
25 liability or Mr. Cox's personal liability.

1 THE COURT: Thank you.

2 I tell you, I think that my time would be better
3 spent trying to -- never, would I ever achieve it -- but
4 try to get up to where you are with all of your knowledge
5 of apportionment and fiduciary duties and everything
6 else. So I think my time would be better spent -- and
7 forgive me, Mr. Imhoff -- rather than listening to you,
8 trying to find out what you're talk about.

9 Yes, sir. All right. Mr. Hemphill?

10 MR. HEMPHILL: Last but hopefully not least.
11 Your Honor, M Group would move for a directed verdict at
12 this time. I have a case to hand up.

13 THE COURT: Okay.

14 MR. HEMPHILL: But I certainly want to join in
15 the other defendants' motion with regards to the statute
16 of limitations.

17 THE COURT: But, now, this is a -- all of that
18 can be done at the time I do hear the arguments on the
19 thing. But I do want to know the grounds for your
20 motion.

21 MR. HEMPHILL: Yes, sir, Your Honor. We'd
22 certainly join in the statute of limitations ---

23 THE COURT: Well, I mean, I don't know --
24 what's -- oh, you've got a different time line or
25 something?

1 MR. HEMPHILL: No. I just want to get that in
2 the record first, Your Honor.

3 THE COURT: Well, that -- as I say ---

4 MR. HEMPHILL: That's applicable to all.

5 THE COURT: Right. That's going to apply to
6 everybody, but I'll put it on the record when I've got a
7 little better thing than just my scribblings here that I
8 can't read after I write. And I do want to know your
9 authorities.

10 MR. HEMPHILL: Your Honor, M Group has been
11 sued on the theory of successor liability. That law in
12 this state is governed by two cases.

13 THE COURT: Excuse me. What's the theory
14 they're suing you on?

15 MR. HEMPHILL: Per the allegations in the
16 complaint and as you've heard in the testimony, M Group
17 was not even formed until early 2009. This lawsuit
18 occurred in later 2009. It's called successor liability.

19 THE COURT: Okay.

20 MR. HEMPHILL: It's governed by two cases, Your
21 Honor. And those two cases -- the earlier case is
22 reviewed in the second case, Simmons versus Mark Lift
23 Industries, 366 S.C. 308, 622 S.E.2d 213. It's a 2005
24 case. Your Honor, I'll hand that up.

25 THE COURT: Well, that'll be good, yes.

1 That'll save the county some paper. Thank you.

2 MR. HEMPHILL: Your Honor, in that particular
3 case, the court affirmed its earlier finding, which was a
4 1924 case. And that case stands -- those two cases stand
5 for the proposition that in the absence of a statute --
6 I've not seen any reference to a statute -- a successor
7 or purchasing company ordinarily is not liable for the
8 debts of a predecessor or selling company unless -- and
9 there are four exceptions to that. One is that there was
10 an agreement to assume such debts. There was no
11 testimony that there was any sort of buy/sell agreement
12 between Marick Home Builders and M Group. The second
13 exception is that if circumstances surrounding the
14 transaction warrants a finding of consolidation or merger
15 of the two corporations. Mr. Thoennes was -- the only
16 reference in the plaintiffs' case-in-chief, Your Honor,
17 was with the last witness towards my client. And the
18 information which was provided by that witness -- he
19 clearly said that, you know, "No assets came over. There
20 was no merger. There was no consolidation. It's just
21 that one company that built a certain type of homes -- I
22 left it there and it's still an existing corporation."
23 Mr. Lyles brought out that it was insolvent, but
24 otherwise a new company was formed.

25 The third exception is that the successor company

1 was a mere continuation of the predecessor. The witness
2 -- when this testimony came out, Mr. Thoennes testified
3 that it was a new corporation or a new L.L.C. that was
4 formed to build a different product. No assets came
5 over. There were very few assets that Marick had in the
6 form of shovels and brooms. No trucks. No really hard
7 capital assets that came over. I asked him if there was
8 a laptop that came over, and he thinks that the laptop
9 came into being, you know, with M Group. And there was
10 not a laptop with Marick is what I recall from his
11 testimony.

12 And, lastly, that the transaction was entered into
13 fraudulently for the purpose of wrongfully defeating
14 creditors' claims. The only evidence brought out by the
15 plaintiff of that witness was that Marick Home Builders
16 couldn't pay its bills when it ceased doing work. I
17 specifically asked the witness if the purpose of creating
18 M Group was to defraud its creators. And the witness
19 said, "No. That's not me. I would protect my good
20 name." And when you use the word fraudulently, Your
21 Honor, that requires some sort of clear and convincing
22 evidence on behalf of the plaintiff as to the nine
23 elements for a fraud. And we certainly did not hear
24 that.

25 On that basis, Your Honor, M Group would

1 respectfully ask to be dismissed as a matter of law.

2 THE COURT: All right. Very good. All right.

3 MR. LYLES: I hate to burden you any further
4 with this because I know you've got a lot of reading to
5 do. On this mere continuation issue for the successor
6 liability, I'd also like to refer Your Honor to the case
7 of Holloway versus John Smith. And that's 432 F. Supp.
8 454.

9 THE COURT: That's Fed. Supp.?

10 MR. LYLES: Yes, sir. 432 Fed. Supp. ---

11 THE COURT: I hope it's even a South Carolina
12 District Court Case.

13 MR. LYLES: Yes, sir.

14 THE COURT: I think.

15 MR. LYLES: Yes, sir, it is.

16 THE COURT: And what was the page number?

17 MR. LYLES: Yes, sir. It's 432 F. Supp. 454.

18 THE COURT: And it's on what proposition?

19 MR. LYLES: On the mere continuation exception
20 to the general rule of successor liability. It's a 1977
21 case.

22 THE COURT: All right. Anything else?

23 (No response)

24 THE COURT: I did notice that the Simmons
25 versus Mark Lift Industries or whatever was a certified

1 question to our Supreme Court from the District Court.

2 They didn't have a certified question on this one? I

3 guess in 1977 they wouldn't.

4 MR. LYLES: No, sir.

5 THE COURT: It's too soon.

6 All right. Anything else?

7 MR. LYLES: If the jury returns tomorrow at

8 twelve-thirty and we proceed ...

9 You've got two witness, you say, that'll take a

10 couple of three hours?

11 MR. BELCHER: (Nodded head up and down in the

12 affirmative)

13 MR. LYLES: So is it safe to say that we would

14 argue and do our closings on Thursday morning?

15 THE COURT: I guess. Yes, sir. Yeah, I think

16 that'll probably work out. I'm just trying to think

17 because I definitely don't want to keep them here -- I'm

18 not one of those to keep a jury here late in the evening.

19 I used to do that across the way there in the old

20 courthouse. And two of the cases I had I was fortunate

21 enough to have reversed. And I was practicing and lost

22 in the court. Both of them, the juries were held out,

23 and they were kept out until they returned a verdict.

24 One was at two o'clock, I think, and then one was at

25 three o'clock. And the Supreme Court reversed both of

1 them because obviously there was an error there. So I
2 don't do that. I don't beat them to death or anything.
3 And hopefully, they'll come to a better decision.

4 So what I will do, I'd rather, like you say, maybe
5 finish up tomorrow in the morning. And then if I don't
6 grant everybody's directed verdict and then -- what is
7 it? -- ruin Mr. Lyles' life, then -- what is it? -- we'll
8 go forward with the testimony and then probably hear
9 further argument or something like that if I need to.
10 And then do the charge conference and things like that.
11 So do get your charges to Mr. Bowman if you have any.

12 Well, let me just -- this is off the record. This
13 is just management.

14 (WHEREUPON, court stood at recess for the day at
15 approximately 3:51 p.m.)

16 **November 6, 2013,**

17 (WHEREUPON, court convened with all parties present,
18 and the following proceedings were had commencing at
19 approximately 11:05 a.m.)

20 THE COURT: All right. Is there anything from
21 the plaintiff before we begin the motions for directed
22 verdict?

23 MR. LYLES: No, sir, Your Honor.

24 THE COURT: Anything from the defendants? And
25 I'll go through the roll, you might say.

1 Mr. Gresh or Mr. Belcher?

2 MR. GRESH: Nothing, Your Honor.

3 THE COURT: All right. Mr. Anderson?

4 MR. ANDERSON: Nothing further, Your Honor.

5 THE COURT: Mr. Imhoff?

6 MR. IMHOFF: Not at this time, Your Honor.

7 THE COURT: Ms. Brown?

8 MS. BROWN: No, Your Honor.

9 THE COURT: And Mr. Hemphill?

10 MR. HEMPHILL: No, Your Honor.

11 THE COURT: All right. Now, y'all were good
12 enough to provide me with your motions. And, again, I
13 will try to follow the order that we've been using. And,
14 of course -- what is it? -- some of them would apply to
15 more than one party.

16 Mr. Belcher and Mr. Gresh, you have motions for
17 directed verdict, one, as to plaintiffs' claims are
18 barred by the applicable statute of limitations. What's
19 the basis for that?

20 MR. GRESH: Your Honor, the three-year statute
21 of limitations runs from the time that these were
22 discovered. The board of the H.O.A. has the
23 responsibility ---

24 THE COURT: When did it have the
25 responsibility? When did it receive the responsibility,

1 the authority to do?

2 MR. GRESH: It had the responsibility when it
3 became a jural entity capable of suing or being sued.

4 THE COURT: And when was that?

5 MR. GRESH: 2005.

6 THE COURT: Actually, the board at that time
7 was what? Mr. Roberson -- let's see. Was it Mr.
8 Roberson, Cox and Thoennes?

9 MR. GRESH: Yes, Your Honor.

10 THE COURT: And who are they?

11 MR. GRESH: Those were the members of the
12 board. The board ---

13 THE COURT: And who were they? Did they occupy
14 any other position?

15 MR. GRESH: They also do as to the co-
16 defendants. They have perhaps some managerial ---

17 THE COURT: They were also the builders; right?
18 Weren't they I.M.K.?

19 MR. GRESH: No. I.M.K. is the developer.

20 THE COURT: Oh.

21 MR. GRESH: That's correct.

22 THE COURT: So they aren't going to sue
23 themselves?

24 MR. GRESH: No, Your Honor.

25 THE COURT: Well, how about when -- let's be

1 candid then. When they turned it over to the homeowners
2 association -- which I think was in 2010; is that right?

3 MR. GRESH: I believe it was a little bit
4 before that, Your Honor. Perhaps September of 2008 is
5 the ---

6 THE COURT: September of 2008; right.

7 MR. GRESH: The board at that time ---

8 THE COURT: Uh-huh (affirmative).

9 MR. GRESH: --- had the same right that the
10 board had in 2005, and that was to proceed against Bostic
11 Construction for construction defects.

12 THE COURT: Except the homeowners association
13 could sue -- what is it? -- wouldn't have to sue
14 themselves?

15 MR. GRESH: No, Your Honor. The construction
16 defect claims that we've been litigating this entire week
17 relate to the actions of Bostic Brothers Construction and
18 its subcontractors.

19 THE COURT: Well -- but my point was that
20 you're saying that -- if you want to say that Bostic
21 Construction should have been sued by the homeowners --
22 and I think you're probably correct on that -- the
23 homeowners didn't come into being until 2008. And I
24 think that's a transfer of ---

25 MR. GRESH: But the homeowners can't sue for

1 this. The homeowners did not bring a cause of action for
2 construction defect related to the exterior of their
3 buildings. That has to be ---

4 THE COURT: Well, they're responsible for it.

5 MR. GRESH: No, Your Honor.

6 THE COURT: I think -- what is it? -- the
7 bylaws provide that ---

8 MR. GRESH: That the association is responsible
9 for that.

10 THE COURT: Oh, excuse me. I apologize.
11 That's who I'm talking about. Who finally had the
12 authority and the responsibility for it.

13 MR. GRESH: That's right.

14 THE COURT: Other than -- what is it? -- the
15 ones who had responsibility or continuation from Bostic
16 all the way up through when it was finally given to an
17 independent organization.

18 MR. GRESH: That's right. And they had an
19 adequate remedy at law in 2005 that they should have had,
20 and they still today, even now that it's in the
21 homeowners control, have an adequate remedy at law that
22 would preclude the application of any equitable relief
23 here.

24 THE COURT: All right. Well, I find that --
25 what is it? -- actually, it's a jury question if they

1 would want -- the homeowners could have sued if they
2 weren't even in existence back in 2005. Excuse me. 2002
3 to 2005.

4 MR. GRESH: And I think on that point, Your
5 Honor, exhibits 3 and 4, particularly number 4, where
6 it's filed with Oconee County and the Stoneledge Property
7 Owners or Homeowners Association, Inc., is the same
8 plaintiff today as it existed in 2005. That entity could
9 have sued.

10 THE COURT: Is that the one signed by the
11 directors of Tim Roberson, William Cox and Richard
12 Thoennes?

13 MR. GRESH: That's right.

14 THE COURT: The defendants in this action?

15 MR. GRESH: Yes, the co-defendants.

16 THE COURT: And so you're saying they were
17 going to sue each other?

18 MR. GRESH: They were supposed to sue ---

19 THE COURT: Would they sue each other in the
20 corporate capacity or individually?

21 MR. GRESH: They should have sued Bostic
22 Construction Company, Jose Nino, Everado Jaramillo,
23 Easton Construction Company.

24 THE COURT: Well, they were all telling the
25 people that they were going to correct it in their

1 corporate capacity.

2 MR. GRESH: I don't believe Bostic had made any
3 representations or warranties that it was going to fix
4 any of its work.

5 THE COURT: Well, both of the Bostic brothers
6 testified, and they said that they wanted to correct it.

7 MR. GRESH: They wanted the buildings
8 corrected.

9 THE COURT: That's right. And so I guess if
10 they told that to -- that's been their position unless
11 they changed it after the statute of limitations run, I'm
12 sure that's what their position was throughout the --
13 whoever they were dealing with the, the owners or anybody
14 else. So I find that -- what is it? -- they would be
15 estopped from claiming the statute of limitations by
16 reason of their assurances that everything was going to
17 be taken care of, that we -- what is it? -- we want to
18 see you get your units corrected and protected and all
19 that.

20 MR. GRESH: Your Honor, I believe for estoppel
21 to apply that there must be an expressed representation
22 made by the defendant ---

23 THE COURT: Actually, it can be done by
24 conduct.

25 MR. GRESH: Or actions suggesting a lawsuit is

1 unnecessary.

2 THE COURT: All right. Exactly.

3 MR. GRESH: The testimony ---

4 THE COURT: And -- what is it? -- we're going
5 to take care of it.

6 MR. GRESH: The testimony in this case is the
7 first notice that these folks had was when a summons and
8 complaint showed up at their door. These homeowners --
9 the association -- excuse me. The association couldn't
10 possibly have relied on anything Bostic said or acted in
11 accordance with ---

12 THE COURT: So you're saying that they -- from
13 the very first -- what is it? -- told the homeowners
14 that, yeah, you've got three years to bring this suit?

15 MR. GRESH: The homeowners association in 2000
16 ---

17 THE COURT: No. I'm talking about anybody that
18 -- what is it? -- the homeowners association represents.
19 The plaintiffs, in other words.

20 MR. GRESH: The homeowners association could
21 not -- the homeowners, excuse me, could not bring suit.
22 Only the homeowners association can.

23 THE COURT: Well, as I understand it -- we'll
24 get to Jose in a minute. But anyway, as far as -- so
25 that's Bostic. In other words, you say that Bostic was

1 immune to suit after 2005?

2 MR. GRESH: No, Your Honor. But I believe they
3 could have been sued in 2004, '05, '06, '07, but not in
4 2010. In 2010, it simply is too late being that it was
5 in existence with the power and the obligation, I might
6 add, to file suit was in existence as of 2005 and was on
7 notice in 2005 through Mr. Taylor complaining about crawl
8 space, deck issues and windows.

9 THE COURT: Mr. Taylor was a member of the
10 board?

11 MR. GRESH: No. He was the mayor of
12 Stoneledge, not a member of the board. He's the mayor.

13 THE COURT: I'm sorry. I didn't know that --
14 what is it? -- Stoneledge was incorporated. I must have
15 missed that election last night.

16 MR. GRESH: That's right. No. But the board
17 had knowledge through Mr. Taylor from Mr. White. And
18 then what I think is just so clear, they fixed every
19 porch out there because they knew there was a problem
20 with the porch not being waterproofed and leaking. And
21 they did that in 2005. They were on notice that it
22 leaked.

23 THE COURT: In other words they said, well,
24 obviously, they want these things fixed, and we don't
25 need to sue. And that's the conduct that I think was in

1 -- what is it? -- was it Santee or ---

2 MR. GRESH: And I think you're exactly right,
3 Your Honor. That's the ---

4 THE COURT: Oh, excuse me. Yeah. Actually, it
5 was another case. But the cases that do say that conduct
6 by -- what is it? -- undertaking repairs and things like
7 that leads the people to -- what is it? -- think that
8 they don't need to go -- to sue themselves.

9 So, again, I'm going to deny your motion for
10 directed verdict on the statute of limitations and let
11 the jury decide. If you make that equitable argument to
12 them, that they had a chance to sue back, and they did.

13 MR. BELCHER: Will there be -- Your Honor, will
14 you give grounds so that we'll know exactly what the
15 denial is? Is it based on some sort of equitable
16 tolling?

17 THE COURT: Certainly. Well, it's based on the
18 whole thing. The fact is that when Bostic left or had
19 finished its work and passed it on to I.M.K., all of the
20 defects that we find are latent defects. In fact -- what
21 is it? -- that was the testimony, that it was inside of
22 the wall -- what is it? -- it was not -- as I understand
23 even today, the homeowners' responsibility is to the
24 common area, which is the exterior, from the roof all the
25 way down. And then there was testimony to the effect

1 that you can't undertake -- and this was from your -- not
2 your witness, but a witness that was called that said
3 that it is incorrect to say you can correct something
4 where you've been dried in from the bottom to the roof.
5 That you can do it partially.

6 MR. BELCHER: Okay.

7 THE COURT: So anyway, no, that's what -- it's
8 based on an estoppel case.

9 MR. BELCHER: Are you done hearing our
10 arguments on it? You've ruled and you're ready to move
11 on to ---

12 THE COURT: I'm going to let the jury decide.

13 MR. BELCHER: Okay.

14 THE COURT: You argue to the jury.

15 MR. BELCHER: It's a matter of law. That's why
16 ---

17 THE COURT: I don't think I need to, but I
18 think that it's ---

19 MR. BELCHER: The application ---

20 THE COURT: --- very simple that -- what is it?
21 -- on a motion for directed verdict, I'm not concerned
22 about the weight of the evidence; I'm concerned whether
23 or not there is any evidence to support a particular
24 claim. And, also, I have to take it from -- in the light
25 most favorable to the non-moving party and any reasonable

1 inference that might be drawn therefrom. Now, that's
2 Rule 50. Is that good enough?

3 MR. BELCHER: Thank you. And that is fair.
4 But I think as to the application of an equitable defense
5 is a question of law for the court to decide.

6 THE COURT: And I ruled as a matter of law that
7 it is a question of fact as to whether or not -- what is
8 it? -- they could rely on the conduct of the parties.
9 And that'll be up to the good lawyers to argue that.

10 MR. GRESH: Thank you, Your Honor.

11 THE COURT: And let's see. What was the next
12 one? You had two; right?

13 MR. GRESH: The second one was the loss of use
14 claims.

15 THE COURT: All right. I understand that's not
16 being pursued?

17 MR. LYLES: Yes, sir, you're right.

18 THE COURT: All right. So the loss of use is
19 granted. Looking for a word.

20 All right. Next would be Jose Nino. Mr. Anderson?

21 MR. ANDERSON: Yes, Your Honor.

22 THE COURT: Yours is the statute of limitations
23 too?

24 MR. ANDERSON: Yes, sir. We have statute of
25 limitations, yes. And then also a failure to prove.

1 Excuse me. The difference in our time lines are that the
2 action was not commenced against Jose Nino until February
3 of 2012. And so the knowledge that was given to the
4 homeowners' board was present in 2008, late 2008 early
5 2009. And based on the testimony of Mr. Taylor that he,
6 as a board member, knew in September of 2008 that he had
7 a cause of action against the contractors and others, we
8 believe that the filing and service against Jose Nino --
9 the filing in October of 2011 and then service in 2012
10 place him outside the statute of limitations.

11 THE COURT: All right. So you are also using
12 Rule 3?

13 MR. ANDERSON: Yes, sir.

14 THE COURT: That's really -- that's the basis
15 of your statute of limitations, that the service was
16 outside the provisions of the rule?

17 MR. ANDERSON: That is correct. That's part of
18 it, Your Honor, yes.

19 THE COURT: What do you say about that, Mr.
20 Lyles?

21 MR. LYLES: Well, we effected service obviously
22 by publication. And if we didn't make it within the
23 hundred and twenty days that we filed the complaint, then
24 I think that that was a factor, the fact we had to serve
25 it by publication because Mr. Nino was not available.

1 The other thing I would say is that the testimony in the
2 case, I think, was very clear from all of the homeowners
3 association people that they had an awareness after
4 taking control of the board of the right to assert these
5 claims starting in the spring of 2009.

6 Your Honor, yesterday you asked for exhibit 6, which
7 was Jim Logan's letter. Jim Logan's letter was sent to
8 the Bostic Brothers in, I think, June or July 2009. In
9 that letter, Mr. Logan states to Bostic Brothers,
10 "Problems at this project have recently arisen ..." and
11 request their help in investigating those problems and
12 addressing those problems. And that letter is consistent
13 with the testimony of all these owners about when they
14 got an awareness of pervasive problems.

15 THE COURT: So you're addressing the Bostic
16 Brothers statute of limitations too.

17 MR. LYLES: No, sir. This is to Nino.

18 THE COURT: No. I'm just asking -- when you
19 say to Bostic, you were saying Bostic Brothers.

20 MR. LYLES: That was sent to Bostic Brothers.
21 They denied receiving it. But that to me is illustrative
22 of when this homeowners association had an awareness that
23 they had pervasive problems and the potential claim.
24 That was within three years of bringing Mr. Nino into the
25 case. And I'll just candidly say -- it's not necessarily

1 relevant to the argument, but just for the Court's
2 information -- we had difficulty getting Bostic's files
3 in the case which is why there was a delay in bringing
4 the claim against Mr. Nino. Since Bostic had filed
5 bankruptcy, it took a while to get those files and
6 identify the subs.

7 The other thing, Your Honor, is Mr. Nino's defects
8 in this case were the most latent of the defects. That
9 is the construction of those firewalls and the other
10 framing issues. And it is those defects that nobody --
11 and these defects didn't necessarily result in water
12 infiltration, which was manifested earlier. And so these
13 defects against Mr. Nino could not have been discovered
14 until this building was deconstructed. And so I would
15 harken back to the Graniteville case because the cause of
16 action that we have against Mr. Nino ---

17 THE COURT: Well, Graniteville was only an
18 eight-day delay.

19 MR. LYLES: Well, it was only an eight-day
20 after the three years. But the important thing is they
21 said that the homeowners association was diligent in
22 securing an expert, and it's the kind of defects that can
23 only ---

24 THE COURT: Well, how about the Santee case
25 where you've got the rebar inside the concrete?

1 MR. LYLES: Yes, sir.

2 THE COURT: That although you had exterior
3 cracks and things like that that, it didn't suggest what
4 the significance or the seriousness of the defect.

5 MR. LYLES: Yes, sir. And I agree that the
6 fact that they're latent deficiencies is not itself
7 determinative, but these are deficiencies that didn't
8 manifest themselves in any sort of way and were only
9 uncovered during the C.S.E. investigation, which was
10 within those three years.

11 THE COURT: All right.

12 Mr. Anderson?

13 MR. ANDERSON: Thank you, Your Honor. I think
14 that both the Santee and the Dean versus Ruscon cases
15 apply here.

16 THE COURT: Well, the Ruscon case that you had,
17 the significant -- what is it? -- cracks.

18 MR. ANDERSON: I'm sorry. I didn't ---

19 THE COURT: In Ruscon you had significant
20 cracks that -- what is it? -- was the distinguishing
21 characteristics of the cracks, I think. They said that
22 they should have realized that the big cracks out on the
23 exterior would obviously -- that it was more than just a
24 latent defect. Well, not a latent defect, but something
25 that might be ---

1 MR. ANDERSON: Insignificant.

2 THE COURT: --- familiar with the construction
3 or expected in construction.

4 MR. ANDERSON: I was making the point that
5 Ruscon wasn't -- that the -- despite the cracks'
6 insignificance initially, that they were still on notice.
7 And we believe that ---

8 THE COURT: Because they were significant? I
9 mean, you've read the case too.

10 MR. ANDERSON: Yes, sir.

11 THE COURT: I'm afraid I'm stuck with what I
12 read.

13 MR. ANDERSON: Our point is that they knew
14 about Jose Nino. He has been sued twice before in
15 relationship to Bostic. Bostic and the subcontractors
16 with Bostic were known to Mr. Lyles. And we would -- and
17 we don't think that the -- I am sorry.

18 THE COURT: That's all right. Do you need some
19 water?

20 MR. ANDERSON: I've got it. Unfortunately,
21 when the leaves turn, my allergies kick in. I'm sorry.

22 THE COURT: No problem.

23 MR. ANDERSON: Another significant factor in
24 Jose Nino's case is, is that they were late at the time
25 of filing, not just the date of service. And we believe

1 that the action was not joined until service was
2 complete. And so it would be 2012. He has two
3 presidents of the board who testified to known defects
4 and water intrusion in 2005 and 2006, Mr. White and Mr.
5 Taylor.

6 THE COURT: Well, isn't that pretty much the
7 Graniteville case, then, that you need to have somebody
8 to determine what was the basis of the damage?

9 MR. ANDERSON: Well, they had an obligation to
10 investigate that at that time and to go forward. And we
11 believe that the specific identification of Jose Nino
12 does not in itself affect the statute of limitations.
13 And that they need to know that they have a cause of
14 action, which they acknowledge that they knew. We
15 believe that their filing is late based on that.

16 And, Your Honor, we just believe that with the
17 alignment of the dates being three years after the
18 formation of the board by the homeowners that we are
19 entitled to be considered outside the statute of
20 limitations and have -- and that their action would be
21 barred.

22 One other matter that I would like to put forward
23 is, is that we believe that -- and I know you've already
24 ruled on this issue. But for the sake of the record,
25 that Jose Nino would be in a different position in that

1 as a subcontractor, they have no control over the board
2 or representation on any board. And there being -- and
3 that the board was actually owned and controlled by
4 I.M.K., which is a totally separate entity from Jose Nino
5 and also from Bostic, that equitable tolling would not be
6 applicable to Jose Nino.

7 THE COURT: Well, again, it was the testimony
8 -- and I stand by the record -- that when Bostic and its
9 subs left the job that -- I would call it dried-in, which
10 means to me from the roof all the way down to the
11 foundation. Or now I've learned a new term. The
12 envelope was complete. And, in fact -- what is it? -- it
13 would require and did require invasion of the envelope to
14 determine what was there. In fact, I give you credit
15 because somebody found insulation out of place when they
16 took the wall down. And that wasn't Jose's problem. I
17 assume that was put in there by somebody else.

18 Certainly, if that comes up as an issue, or whatever, of
19 damages, then I'd probably grant a motion on that against
20 Jose. A motion to dismiss any actual damages with what
21 was discovered once a wall was opened from the inside.

22 All right. So, again, I am going to have to deny
23 your motion for the statute of limitations.

24 MR. ANDERSON: Your Honor, then going to the
25 next one -- you have just touched on it -- in that once

1 they opened it up, there has been presented no evidence
2 from any of the investigations that the framing work by
3 Jose Nino was improper or that it caused any damage. The
4 conditions shown by the plaintiffs were the result of
5 others not performing their jobs correctly. In the roof
6 issue, there was no drip edge. There was no proper
7 weather-resistant barrier. The trim boards were not
8 properly placed. There was no flashing properly placed,
9 kick-out flashing.

10 And when you go to the decks, you have -- we have
11 specific testimony from the plaintiffs' expert that the
12 framing was correct and that he could lay no fault on the
13 decks on the framer. Specifically testifying to that in
14 that it was the waterproofer and concrete applicator who
15 was principally responsible along with the architect and
16 the general contractor.

17 With the fire-rated walls, Mel Morris had testified
18 that Jose Nino had no control over materials, that all
19 the materials were given to him. And then he was told
20 very specifically where to place those materials. Their
21 complaint about the firewalls and the picture that they
22 keep showing of the O.S.B. and drywall next to each other
23 is a materials and a design issue. There is no testimony
24 that the O.S.B. or the drywall was put up improperly or
25 that the installation of those products in any way

1 affected the fire rating in the walls. It was merely
2 that they used the wrong product.

3 And when you look at the hole in the wall, we've got
4 direct evidence that in 2005 that hole didn't exist. It
5 wasn't there. And that was given yesterday.

6 THE COURT: Well, how about there was another
7 hole in the wall that went through plywood?

8 MR. ANDERSON: I'm sorry?

9 THE COURT: I think that plywood was a part of
10 the framing. In fact, that was the first hole in the
11 wall that I remember seeing. And it was in a basement
12 area or somewhere like that. And it was always referred
13 to as a ventilator for a dryer or something like that.

14 MR. ANDERSON: That would not have been our
15 work, Your Honor. And that is -- that would not be ours.
16 Number one is that if it was a design aspect, that Mr.
17 Nino would not have done that on his own. Mel Morris was
18 very specific in saying that we told him exactly what to
19 put up and where to put it up and that ---

20 THE COURT: Well, I was just addressing the
21 fact that there was an outside -- in the foundation it
22 was discovered -- hole too..

23 MR. ANDERSON: Again, that responsibility could
24 not be laid with Jose Nino because that would be a design
25 flaw. And if he did that -- and there's no evidence that

1 he did that -- it would have been at the direction of
2 Bostic and their people.

3 THE COURT: Would have been what? It would
4 have been what?

5 MR. ANDERSON: It would have been at the
6 direction of Bostic. Specifically at their direction.
7 And we believe that with the fact that the framing -- if
8 you remember, Mel Morris' testimony was that when Jose
9 Nino got done, he had bare framing. And all of the
10 complaints of flashing, building wrap, any work that was
11 done on the building was another trade coming in and
12 attaching their material to Mr. Nino's work. And it's
13 that attachment that gives the waterproofing and all of
14 the things that they say are lacking in the building
15 envelope. It is not the structural framing itself. And
16 we believe that without the -- with the current state of
17 the evidence that there is only one conclusion that can
18 be drawn. And that is that Jose Nino should be dismissed
19 from this case. Thank you.

20 THE COURT: What do you say about that, Mr.
21 Lyles?

22 MR. LYLES: Yes, sir. Your Honor there is -- I
23 think you've already discussed with Mr. Anderson, there
24 are a number of instances in which the framing was
25 implicated by Mr. Hodgins, starting with the firewall

1 construction, which I mentioned. And I candidly admit
2 the fact that J.J. got Mr. Morris to say that Jose simply
3 installed the products that were given to him. I thought
4 that was a good thing. The problem is we've got
5 combustible materials installed by Mr. Nino in a firewall
6 which creates a life safety problem.

7 The hole in the sheathing that Your Honor mentioned
8 earlier, I'll candidly tell you I don't know who put the
9 hole in the sheathing, but I know it was Mr. Nino's
10 product. And I know Mel Morris testified that Nino was
11 the framer. Nino would have put up the sheathing.

12 You know, on the issue of the porch, the only thing
13 Mr. Hodgins said about Nino and the porch was he did not
14 fault the framer for the lack of slope in the joists.
15 That's what he said.

16 THE COURT: It's supposed to be concrete.

17 MR. LYLES: Well, he said -- yes, sir -- that
18 the drawings didn't show a sloped frame, so he didn't
19 fault the framer for that. But Mr. Nino framed up all of
20 the other conditions, all of those other rotten columns
21 and the other components that I think that Mr. Taylor
22 testified when he pulled the top off the stone and
23 reached down, it was nothing but gook. So there, I
24 think, is evidence that the jury could rely on to support
25 a verdict against Nino in this case.

1 THE COURT: All right.

2 Mr. Anderson?

3 MR. ANDERSON: Thank you, Your Honor. If
4 you'll recall in my opening, I told the jury that they're
5 going to see a lot of damage to the framing itself.
6 However, the cause of that damage, from the testimony of
7 Mr. Hodgkin and other witnesses, is the failure to protect
8 the framing, to put the proper waterproofing around it
9 and things like that. We've not heard any testimony that
10 the selection of the material or -- excuse me -- that the
11 installation of the material for the framing was
12 defective in and of itself. And that is all we did was
13 to erect it as required by the plans and the information
14 given by Bostic. It is the lack of flashing,
15 waterproofing, building wrap, weather-resistant barrier.
16 Those things allowed the water to get to our frame.

17 And, you know, basically, we're the victim from the
18 negligence of others. And there's been nothing to point
19 to anything that Nino did that proximately caused the
20 rotted framing.

21 THE COURT: I think that's a very good
22 argument. But the fact remains that there was testimony
23 as to defects in the framing, although you argue that Mr.
24 Nino was not responsible for that. I think that's
25 something that will have to be determined by the fact

1 finders. But your argument that he didn't, I think,
2 could be compelling. But I don't find it so, so your
3 motion is denied.

4 Anything else? All right.

5 MR. ANDERSON: Not from me, Your Honor.

6 THE COURT: All right. Mr. Imhoff?

7 MR. IMHOFF: Yes, Your Honor.

8 THE COURT: Marick and others?

9 MR. IMHOFF: Your Honor, I have several. Is
10 there a particular one you'd like me to start with?

11 THE COURT: The first one.

12 (Laughter)

13 MR. IMHOFF: Your Honor, I think that I made a
14 motion for partial directed verdict on negligence
15 yesterday. And I handed your law clerk, Bo, a case
16 called Roundtree Villas versus 4701 Kings Corporation, I
17 think, this morning. And the basis for that directed
18 verdict is it's a partial directed verdict. And that
19 we're not asking to be dismissed from the case and not go
20 to the jury at all, but limit what the allegations are or
21 the cause of action is against my client. And as I
22 understand it, based on plaintiffs' allegations and Mr.
23 Hodgin's testimony, what we are being accused of and
24 would be liable for is negligent inspection, negligent
25 repair. I think all of the evidence, as you referred to

1 it earlier, is that the entire envelope was constructed.

2 And the reason that I handed Roundtree Villas to the

3 Court is because Roundtree Villas is exactly on point

4 with this case. In that case, a lender ---

5 THE COURT: I thought it did involve a lender's
6 inspection and corrections?

7 MR. IMHOFF: That's right. A lender took over
8 the property. Had to foreclose on the property. Bostic
9 left because of financial issues in this case. A
10 subsequent owner comes onto the scene. That subsequent
11 owner was a lender who then made a construction company
12 to repair and then sell these units. Very, very similar
13 to what I.M.K. and Marick did. Came onto the site. And
14 the court in that case found in almost identical
15 circumstances, Your Honor, that the subsequent purchaser
16 was not liable under warranty theories because they did
17 not build it -- Marick/I.M.K. did not build it -- would
18 only be liable under a negligence theory for damages
19 proximately caused by their negligent inspection and
20 repair. And Mr. Hodgkin testified very clearly -- and
21 it's the only evidence -- that his entire scope of repair
22 was necessary before I.M.K. and Marick came to the
23 project, and that the damages that would be attributable
24 to Marick/I.M.K.'s failure of inspection would be
25 increased damage to the framing -- Mr. Anderson's word --

1 framing, sheathing, and those types of things. And Mr.
2 Folk quantified that as approximately two hundred and
3 fifty thousand dollars of his estimate.

4 And as I said yesterday, this is a case of two
5 cases. The first is the original construction and
6 whether the jury should award damages against the
7 original constructors, Bostic and their subcontractors.

8 The second case is whether Marick/I.M.K. and all of
9 those individuals should have found the defects. As Your
10 Honor indicated this morning, they were latent and
11 required destructive testing. But the damage was already
12 there. And so the partial motion for summary judgment is
13 not to say, go home, Marick. We don't need you here.
14 But only so that the right cause of action with the right
15 damages are submitted to the jury for these subsequent
16 purchasers, such as the lender in Roundtree Villas,
17 which, again, I think is directly on point, Your Honor.

18 And, Your Honor, that is the basis ---

19 THE COURT: All right. That's on your first
20 motion. I've already granted your first motion as to
21 loss of use. But as far as partial builder negligence?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: Mr. Lyles?

24 MR. LYLES: Your Honor, I would agree that
25 Marick's liability should be limited to the damages that

1 flowed from the work that Marick did, whether we call it
2 negligence or breach of implied warranty of service.
3 Unlike what happened in Roundtree, Marick wasn't a
4 lender. Marick was a developer who came in and bought
5 and then constructed and repaired. Did stone work, roof
6 work, deck concrete work, removed and installed some
7 windows and did other work at the project. And I do
8 think that Marick, as a general contractor, would be
9 liable not only in negligence but also for breach of
10 implied warranty of service for the work that Marick did
11 perform on the project.

12 And, again, I think that Mr. Imhoff can make good
13 jury arguments about that. And I think that the
14 apportionment statute, if it applies to the negligence
15 claim, can also address what he believes to be his
16 smaller portion of the pie than Bostic's.

17 THE COURT: Anything else on that question, Mr.
18 Imhoff?

19 MR. IMHOFF: Well, it sort of leads into
20 another issue, which you know we're going to talk about,
21 and probably at length. And that is piercing the
22 corporate veil, the amalgamation. Mr. Lyles just
23 referred to us as the developer. My client, Marick Home
24 Builders, is not the developer. They're a contractor.
25 And they should be responsible for their work, which is

1 the inspection of repairs that Mr. Lyles just spoke
2 about. But that's not four million dollars of what was
3 necessary before we got there. And so I agree with Mr.
4 Lyles that we should be -- Marick, the contractor, should
5 be responsible for the work they did. The point of the
6 motion is that they shouldn't be responsible for the work
7 they didn't do. And that's the basis for the partial
8 motion for summary judgment, Your Honor. But it's going
9 to get into -- and maybe that's what we need to address
10 next -- is this piercing the corporate veil,
11 amalgamation, alter ego, throw everything up against the
12 wall, they're-all-together-and-everything-should-stick
13 analysis. But I think what we probably need to do or
14 know we need to do at some point to see what causes of
15 action are directed at what parties.

16 THE COURT: All right. Now, the parties that
17 you represent are Marick Home Builders and Rick Thoennes?

18 MR. IMHOFF: Yes, Your Honor. And Mr. Gresh
19 actually let me use his board over here. And I've drawn
20 a little thing for that also.

21 THE COURT: All right.

22 MR. GRESH: Would you like me to flip it over?

23 MR. IMHOFF: Again, I.M.K. is the developer
24 that purchased the property. They're the developer.
25 They're made up of fifty percent Marick Home Builders, my

1 client, and fifty percent Integrys Keowee, which is Ms. -,
2 - well, which is not my client. Marick is then made up
3 of Rick Sr., I think they call him and his -- Rick III,
4 fifty percent owners. And then I.K. is made up of Tim
5 Roberson, Bill Cox and Larry Lollis. And I'm going to be
6 a little bit long and potentially indiligent on this,
7 Your Honor, because on the cases that were cited by Mr.
8 Lyles, the attorney was actually chastised by the
9 appellate court for not making his arguments clear for
10 the trial court. And so I have to be a little bit long
11 on this because there are so many obligations and duties
12 and so many steps to get through piercing the corporate
13 veil. And that's why I handed the Court all of the cases
14 that I did regarding amalgamation.

15 Your Honor, in the -- in the Mid-South case, Your
16 Honor, the court goes through a very, very lengthy -- in
17 the Mid-South case, the Court goes through a very, very
18 lengthy analysis and essentially finds that there are two
19 prongs for piercing the corporate veil, Your Honor. The
20 first prong has eight factors of its own. And those
21 eight factors are, number one, that the corporation is
22 undercapitalized. And I suppose what we're talking
23 about, Your Honor, when we're doing this analysis, it is
24 actually piercing the corporate veil two times. I'll let
25 you find it.

1 THE COURT: No, you go ahead.

2 MR. IMHOFF: Okay.

3 THE COURT: And please forgive me. But one
4 thing I've found hard to learn in what I've been doing
5 for a few years now is to read and listen at the same
6 time. My wife says I don't. Go ahead.

7 MR. IMHOFF: The Mid-South case, Your Honor,
8 goes through the two prongs, the first prong being the
9 eight factors which are the corporation is
10 undercapitalized. And, again, what we're talking about
11 at this time is I.M.K. and whether I.M.K. is
12 undercapitalized. I believe the Court actually has to do
13 two analysis to get to this level, down to the Rick, Tim,
14 Bill and Larry. But as I.M.K., at the time that the
15 construction was done or the repairs were done, the sales
16 were done and the development was turned over, the
17 corporation was not undercapitalized. You heard the
18 testimony from Mr. Cox and Mr. Lollis that there was
19 money in the corporation and that they did distributions
20 later on. Failure to observe corporate formalities.

21 There was testimony from all three of them that they
22 would have meetings, that Rick from Marick and Bill and
23 Tim from I.K. would have meetings, and that Rick actually
24 had to submit his invoices to the board of I.M.K., and
25 I.M.K. would have to pay the invoices of Marick. So

1 there were corporate formalities.

2 Number three is non-payment of dividends. I'm not
3 sure that's an issue at all in this case.

4 Insolvency of debtor corporation at time. Again,
5 we're talking about I.M.K. I.M.K. was not insolvent at
6 the time, at any of these times. It later closed down
7 because its work had ended. It had ceased.

8 Siphoning of funds of the corporation by the
9 dominant shareholders. Well, I'm just going to talk
10 about my client, Your Honor. Marick did not siphon any
11 funds out of I.M.K. Marick went out of business and had
12 to assign its share of I.M.K. to a man named John Ludwig,
13 which, as you heard the testimony yesterday, it's a
14 fifty-percent partner in I.M.K. I.K. did not want to be
15 in business with. And that's why they decided to end the
16 business. So there wasn't siphoning of funds of the
17 corporation by the dominant shareholder. There certainly
18 wasn't siphoning of the funds by my client, Marick Home
19 Builders.

20 THE COURT: Well, wasn't there some emails
21 about a distribution of I.M.K. sales proceeds?

22 MR. IMHOFF: Yes, Your Honor. That was long
23 after my client was gone from that corporation. I'll let
24 Ms. Brown discuss that, Your Honor. But it certainly
25 wasn't Marick Home Builders.

1 It says "Non-functioning of other officers for
2 directors." You heard yesterday that there were
3 different roles for the officers and directors in I.M.K.
4 Marick Home Builders was the construction arm of I.M.K.
5 and did some supervision of sales. I.K. was a different
6 set, and they handled the finances and investors, Your
7 Honor.

8 Absence of corporate records. I don't believe
9 there's any evidence of that. There's certainly many,
10 many boxes of I.M.K.

11 And eight is it's merely a facade, that I.M.K. was
12 merely a facade. And clearly, it wasn't merely a facade,
13 Your Honor. It owned the development out there. It had
14 partners and shareholders in the development. And so the
15 second part of that, Your Honor, is injustice and
16 fundamental unfairness. And I don't think that the
17 second prong is satisfied either. I don't think it would
18 be unjust for any liability of I.M.K. to stay with I.M.K.

19 So I think of the two prongs, I think the plaintiffs
20 failed both. And I think that they certainly failed as
21 to piercing I.M.K.'s corporation and the L.L.C. statute,
22 Your Honor, which protects the individual members of an
23 L.L.C. And I do not believe that they can pierce to
24 Marick Home Builders.

25 And, Your Honor, I believe that the analysis has to

1 be done again to get to Rick Thoennes. That once -- if
2 you decide -- if this Court rules that plaintiff is able
3 to pierce the corporate veil between I.M.K. and Marick,
4 then we need to be the same analysis with the same two
5 prongs and eight factors to pierce the corporate veil
6 between Marick and Rick Thoennes. And I don't think that
7 can be done either. And I can go through all of those
8 prongs.

9 But I will say this before we get into that. There
10 hasn't been any evidence of what Marick and its
11 shareholders did in regard to piercing the corporate
12 veil. None. There's no emails about distribution, not
13 following the corporate form, taking money out of it.
14 There's none of those things. There was no evidence of
15 that except that Marick, like many builders in 2008, ran
16 into financial difficulties.

17 So, Your Honor, I could keep going because the
18 plaintiff has actually alleged alter ego, which is
19 another analysis, and amalgamation of interests. The
20 alter ego -- a finding for the alter ego requires a
21 showing of total domination and control of one entity by
22 another and inequitable consequences caused that thereby.
23 And what you're talking about is that I.M.K. would be
24 controlled or totally dominated by another entity. And
25 clearly -- you heard the testimony, Your Honor -- these

1 folks, I don't believe had ever worked before. The
2 members of I.K. and the members of Marick where Marick
3 and I.K. did not control each other. They were fifty
4 percent owners of I.M.K. Neither controlled each other.
5 Not one of their members, the Ricks, Tim, Bill, and
6 Larry, completely controlled I.M.K. You heard the
7 testimony from Rick Thoennes that he had to submit
8 invoices to the board of I.M.K. to get them paid. If he
9 had control of I.M.K., he wouldn't have had to do so. If
10 I.K. controlled I.M.K., they could have told Marick Home
11 Builders what to do. There wasn't any of that testimony
12 or any proof.

13 Your Honor, the amalgamation of interest -- of
14 interests -- I'm not sure what you call it -- I guess
15 piercing the corporate veil doctrine -- is based on
16 blurring of the corporate distinctions. There is such
17 blurring -- and I apologize that I've lost it here.
18 Here. So amalgamated -- that these entities, I.K.,
19 Marick, and I.M.K. are so amalgamated as to blur the
20 legal distinction. And the plaintiffs sat on the stand,
21 and they were able to identify -- Mr. White identified
22 that I.M.K. was the developer and that Marick Home
23 Builders was the builder. And that when he asked Nathan
24 to come over and fix a window or fix a door, whatever it
25 was, he knew that Nathan Hornaday worked for Marick Home

1 Builders and that I.M.K. was the developer and the seller
2 of the project.

3 So the testimony and evidence on its own that we
4 have seen is that the homeowners out there knew.
5 Certainly, anyone who cared to look who owned the
6 development knew. There was not a blurring of who these
7 corporate entities were at all so as to blur the legal
8 distinction.

9 And it's important to point out that in the cases
10 that were handed up by or submitted by the plaintiffs,
11 that when the Court has amalgamated entities -- and you
12 saw this probably in Magnolia. Maybe Pope. I'm not
13 remembering all the cases. But all of the board members
14 were the same in all of the entities. Same officers,
15 same director, same office. Mr. Lollis, Mr. Cox, and Mr.
16 Thoennes testified they did not have the same office.
17 You heard that, in fact, I.K. had its own offices. Had
18 the same telephone number. They were all managed by one
19 person. That clearly isn't true here. All of the
20 employees reported to one person. Clearly, Nathan
21 Hornaday reported to his employer, Marick Home Builders.
22 He did not report to I.K. or even I.M.K.

23 And the delineation of the employees is vague.
24 Clearly, Nathan Hornaday knew exactly who he worked for.
25 He worked for Marick. That was Marick's employee.

1 Shared offices. Not true here. And paid bills of
2 all three corporations. That's not true either. Marick
3 Home Builders was working on other homes at the time of
4 this project. There's a lawsuit in Greenville about
5 that, Your Honor, at the exact same time. Marick Home
6 Builders is a completely distinct and separate entity
7 that was doing other things other than being a member of
8 I.M.K. and working at Stoneledge. And, therefore, Marick
9 is a complete distinct entity which had to pay its own
10 bills on the other houses in Greenville that weren't paid
11 by I.M.K., weren't paid by I.K. It's a complete separate
12 entity from I.M.K. So it is not amalgamated, Your Honor.

13 And all of those property H.O.A. development cases,
14 the court went through that analysis. And the court
15 found that this is all the same guy running this. This
16 is all -- there are different corporations and names, but
17 it's all the same guy. Clearly not true here. They're
18 different people. They have different purposes. Marick
19 is building in different areas at the same time with its
20 own employees.

21 Your Honor, again, I think the same analysis to get
22 down to the individuals is where you would have to find
23 that Rick and Rick III are the alter ego of Marick or
24 there's an amalgamation of interests between Rick III and
25 Rick and Marick so that you wouldn't know that Marick

1 Home Builders was a corporation.

2 I think the plaintiff fails on both levels. I think
3 the plaintiff fails to pierce the corporate veil from
4 I.M.K. to Marick. And I think the plaintiffs fail in
5 piercing the corporate veil between Marick and its
6 individual owners, Rick and Rick III.

7 Let me point out one other thing. Marick Home
8 Builders is an L.L.C. There's a statute specifically on
9 the issue of protection of members of an L.L.C. -- and I
10 think Ms. Brown can give you the cite for that -- that
11 protects the members of an L.L.C. from individual
12 liability and for the actions they take on behalf of the
13 L.L.C.

14 There was a case that came out a couple of years ago
15 -- I think it's called Jade Street. I don't remember the
16 whole thing -- which shook that foundation and made it
17 appear that that was no longer true. That if the
18 contractor that went to the site is liable personally,
19 then you can ignore that statute. But the contractor
20 that sat at his desk and shuffled paper wouldn't be
21 liable because he never individually went to the site.
22 That ruling has been overturned. We are back to the
23 statute now, Your Honor, the L.L.C. statute, which
24 protects individual members of the L.L.C. from personal
25 liability for their acts in furtherance of the L.L.C.'s

1 business.

2 Your Honor, there's one other thing that the
3 appellate court scolded the attorney in one of those
4 cases for. And that was not bringing up fraud. In all
5 of this piercing the corporate veil, there is an
6 equitable and fairness prong. And it is the plaintiffs'
7 burden to prove -- and I'll try to put my hands on it if
8 I get a chance to get back up -- but must argue fraud or
9 prove fraud, wrongdoing, or fundamental unfairness.

10 THE COURT: Or incompetence.

11 MR. IMHOFF: I'm sorry, Your Honor.

12 THE COURT: Or incompetence.

13 MR. IMHOFF: I believe -- I thought that was
14 for the business judgment rule, but ...

15 THE COURT: That is.

16 MR. IMHOFF: Okay. Well, that would be a
17 little bit of different argument as to fiduciary. I'm
18 just talking about piercing the corporate veil. Well,
19 maybe it was. Maybe it would all be part of that too.
20 As a director of the -- you're right. As a director of
21 the homeowners association, the business judgment rule
22 would apply. And all of those things, self-dealing,
23 unconscionable conduct, and competence would come in as
24 to the breach. And so, again, trying to get through for
25 personal liability through a director of the H.O.A.

1 But sticking to this, Your Honor, the plaintiffs
2 have not proven fraud. Clearly, these are separate and
3 distinct entities that are doing things. Or fundamental
4 unfairness. It is not unfair for the plaintiffs, if
5 they're able to, to get a verdict against I.M.K. There
6 is nothing unfair about that. The fact that there may
7 not be as many assets in this company does not make it
8 unfair to them that it was made up of other companies
9 that are protected and distinct under these two analysis.

10 So, Your Honor, again, I was very long with that. I
11 knew I was going to have to be today because I didn't
12 want to get scolded by you or another judge.

13 THE COURT: I don't blame you.

14 All right. Mr Lyles?

15 MR. LYLES: Yes, sir. At the risk of being
16 scolded, I'll try to be more brief.

17 As the Courts have recognized since Kincaid versus
18 Land and Development, there are alternative theories of
19 imposing liability on corporate siblings and on
20 individuals. Mr. Imhoff mentioned piercing the corporate
21 veil, which we, I don't even think, have alleged. It is
22 an onerous process to try to pierce the corporate veil.
23 There are some -- some research that I've done that I've
24 put in front of Your Honor previously about that. But I
25 don't think we have to go through that whole analysis

1 here.

2 Alter ego is also not something that I think is
3 particularly applicable to the case. I do think
4 amalgamation of interests is relevant to this case and is
5 significant. But even before we talk about amalgamation
6 of interests, the claims against Rick Thoennes are, I
7 think, more simple than Mr. Imhoff is looking at them.
8 Mr. Thoennes testified, I think it was yesterday, and he
9 was quite candid about it. He said, "I wore lots of
10 different hats. I was the contractor. I was the
11 developer. I was in charge of the sales team." That's
12 what he said. That's not what a contractor who's seeking
13 to distance himself from a developer would typically say.
14 He performed functions not only as a contractor, but also
15 very much as a developer. He testified that the
16 relationship between his construction and I.M.K. is such
17 that he didn't get a profit for his construction. He
18 waited until the units were sold before he realized his
19 profit. So as part of his construction efforts, he was
20 profiting in the sales of the development -- excuse me --
21 the development and sales of those units.

22 THE COURT: Under that arrangement, would he
23 have profited at all from the construction? In other
24 words, if there was no sale?

25 MR. LYLES: If there was no sale, he would not

1 have profited.

2 THE COURT: Or he was looking to the sale for
3 the profit?

4 MR. LYLES: Yes, sir.

5 THE COURT: For his investment?

6 MR. LYLES: Yes, sir.

7 THE COURT: The same as the three individuals
8 down there?

9 MR. LYLES: For I.K., yes, sir. Mr. Cox and
10 Mr. Lollis.

11 THE COURT: Right.

12 MR. LYLES: So he had a vested interest, not
13 just as a contractor, but also as a developer. And those
14 interests were intertwined as he was sort of joking about
15 putting on hats at different times of the day.

16 In addition to that, we brought a claim against Mr.
17 Thoennes for breach of fiduciary duty. And it's a
18 personal breach of fiduciary duty. Mr. Thoennes himself
19 sat on the board of this association up until the time of
20 turnover, from 2005 until September of 2008. And I think
21 that there was some discussions with Mr. Cox, and perhaps
22 with Mr. Thoennes, that they were sitting on that board
23 not as representatives of the developer or the
24 construction company; they were sitting on that board
25 personally. They were making personal decisions about

1 the activities of that board. And with regard to the
2 fiduciary duty, that's a duty that was owed by them
3 personally. I.M.K. couldn't discharge a fiduciary duty.
4 It has to act through its members. Same thing with
5 Marick.

6 With regard to the Jade Street case -- and it's an
7 interesting history. The Jade Street case, which I'm
8 sure Your Honor is familiar with, did substantially alter
9 the landscape of liability for members of L.L.C.s. But I
10 think that the general rule of tort has always been that
11 members of L.L.C.s aren't insulated by an L.L.C. for
12 their personal torts. And that's what we have alleged
13 here against Mr. Thoennes. And I think that the facts
14 bare that out. The first Jade Street case, it wasn't
15 overruled; it was just changed. If you remember, the
16 Supreme Court actually withdrew its opinion and reissued
17 a second opinion and found differently on different
18 grounds in the second Jade Street case. But the court's
19 fundamental ruling in the first Jade Street case, they
20 never got to it in the second case. And that is that
21 closely held L.L.C.s like these function through the few
22 members that they have. And so when you look at the acts
23 and delicts of these L.L.C.s, you're looking at the
24 actions of these members. That may be an aside.

25 Finally, with regard to this amalgamation of

1 interests theory, it doesn't matter who Nathan Hornaday
2 thought he worked for. The Kincaid case and the cases
3 that follow the Kincaid case talk about that the issue
4 with regard to the amalgamation of interests is whether
5 or not the manner in which these businesses do business
6 creates confusion in the eyes of the people they're
7 dealing with -- in this case, my clients, the homeowners
8 -- about who's doing what. You may remember my clients'
9 expressing some concern and uncertainty about who they
10 were dealing with.

11 And I can't belabor the testimony. There was --
12 clearly Bob White said, "I knew I.M.K. sold my unit."
13 But he never dealt with anybody from I.M.K. beyond that.
14 He dealt with Chip Roberson -- excuse me -- Chip Albert.
15 He knew who Chip Albert was. Steve knew who Chip Albert
16 was. And he was working for the sales arm which was
17 being managed by Marick.

18 And so I think that with regard to all of these
19 entities, there is at least some evidence that the
20 perception in the minds of my clients, which is what's
21 important, is that I.M.K. was Marick, it was Cox, it was
22 Thoennes, and it was Mr. Roberson.

23 THE COURT: Thank you.

24 Mr. Imhoff?

25 MR. IMHOFF: Your Honor, let me go backwards.

1 The standard for a finding that two distinct corporate
2 entities or L.L.C.s in this case are amalgamated is
3 they're so joined as to blur the legal distinction. And
4 I don't know. Maybe it's an element what the plaintiffs
5 thought about it, but it's a legal issue for the Court to
6 look at how combined they are, how amalgamated they are.
7 Again, with the elements of the same board members, the
8 same office, the same phone number. One person is
9 controlling everybody. All the employees report to that
10 one person. All of the employees are doing the same
11 thing. Shared offices. All of the bills are paid.

12 Your Honor, the elements that you need -- that
13 plaintiffs need to meet for the Court to rule that
14 there's an amalgamation of interests is that they are all
15 smashed together in one office with one phone number,
16 with one person paying them. And, Your Honor, that's not
17 the testimony in evidence in this case. Different
18 offices. Different phone numbers. Different employees.
19 Neither one controls the other one. Marick is off doing
20 other buildings, building other construction. They have
21 different members.

22 THE COURT: Just a moment. I'm looking at
23 Plaintiff's Exhibit 3, the Amended and Restated Bylaws of
24 Stoneledge at Lake Keowee Owners Association, Inc. It
25 was amended by the directors on the 1st day of November,

1 2005. Tim Roberson, William C. Cox, and Rick Thoennes.

2 MR. IMHOFF: Yes, Your Honor.

3 THE COURT: Now, that's sort of an amalgamation
4 of those different groups, isn't it?

5 MR. IMHOFF: No. That's just the members, Your
6 Honor. Because they're fifty percent ---

7 THE COURT: Well, I thought we were talking
8 about Stoneledge at Lake Keowee. That's who we have as
9 the other parties. I mean, it's -- that's been the whole
10 problem with this case, that -- what is it? -- those who
11 control things, control how this matter has progressed.

12 I find that there is a little too much self-dealing,
13 if you would, please, in this that needs to be sorted
14 out. And I think the jury would be the better group to
15 do that. So I'm going to deny your motion.

16 MR. IMHOFF: Your Honor, have you done the
17 analysis between Marick and the individual owners of
18 Marick that these individuals were so amalgamated with
19 Marick that there was a blurring of the distinction
20 between the individuals and the corporation? Because I
21 think it needs to be done twice here.

22 THE COURT: Well, I think I've done enough to
23 -- what is it? -- see that there was a certain mixture of
24 the two corporate groups by reason of their individual
25 members.

1 MR. IMHOFF: Your Honor, there were two other
2 parts of that long discourse which was -- the first
3 motion was a motion for a partial directed verdict on the
4 negligence, talking about the negligence of Marick or
5 I.M.K. being limited to the damages that they proximately
6 caused based on Roundtree Villas, based on the testimony
7 of Derek Hodgin, based on the testimony of John Folk.

8 THE COURT: Well, again, there is some
9 testimony there that Marick did undertake to repair and
10 things of that nature. And that would be for the
11 plaintiff to convince the jury that your clients are
12 responsible.

13 MR. IMHOFF: For all of it, Your Honor? For
14 the total?

15 THE COURT: No. For what they did.

16 MR. IMHOFF: So are you limiting the cause of
17 action -- the damages for Marick to the work that they
18 did?

19 THE COURT: If it was involved in with their
20 overall project, no. No, sir, I'm not. I'm sorry.

21 MR. IMHOFF: Okay.

22 THE COURT: Very good.

23 MR. IMHOFF: All right. There was one last
24 part of that that was ---

25 THE COURT: Please.

1 MR. IMHOFF: And that was Rick Thoennes'
2 membership on the board of the H.O.A., Your Honor. And
3 his membership on the board of the H.O.A., as you've
4 indicated earlier, is to be viewed in light of the
5 business judgement rule and that the burden shifts to the
6 plaintiffs to prove the self-dealing, incompetence,
7 fraud.

8 THE COURT: Well, that's what we call the
9 weight of the evidence as far as being able to satisfy a
10 burden of proof. So I'm going to leave that to the jury.

11 MR. IMHOFF: I don't think that's all that I
12 have, but I'll sit down and give somebody else ---

13 THE COURT: Well, the thing is we've got to
14 move on. Let's see. Do you have any others?

15 MR. IMHOFF: I think ...

16 THE COURT: Let's see. You have your breach of
17 fiduciary duty as to Marick and Thoennes.

18 MR. IMHOFF: Your Honor, I can state that in a
19 couple of sentences.

20 THE COURT: Very good.

21 MR. IMHOFF: Okay. A breach of fiduciary duty.
22 Your Honor, the breach of fiduciary duty as to developers
23 turning over projects to homeowners associations is
24 fairly new. And you heard Mr. Lyles yesterday say that
25 he thinks it's a strict liability standard. The breach

1 of fiduciary duty cases that we've looked at actually
2 indicate that to prove a breach of fiduciary duty, you
3 need to prove essentially the same elements as
4 negligence. And that is that there is a fiduciary duty,
5 that you've breached the fiduciary duty, and that you
6 have damages that are proximately caused by the breach of
7 that duty. And so clearly there has to be some finding
8 of wrongdoing. It's not strict liability. We believe
9 and are making the same argument for partial directed
10 verdict that a breach of fiduciary duty in this case is
11 limited to the damages that occurred because of the
12 failure to inspect, or alleged failure to inspect, find
13 and repair the issues which Mr. Hodgins has indicated on
14 the damages underneath the envelope. And Mr. Folk has
15 testified to a limit of two hundred and fifty thousand
16 dollars.

17 THE COURT: All right.

18 Mr. Lyles?

19 MR. LYLES: Yes, sir. What the cases, I
20 believe, starting with Concerned Citizens of Dunes West
21 or actually Goddard say that is a fiduciary exists. I
22 don't have to prove it. A fiduciary duty exists on the
23 part of developers at the time they turn over control of
24 the board.

25 THE COURT: That it would be in good condition

1 ---

2 MR. LYLES: Yes, sir.

3 THE COURT: --- and sufficient assets to
4 maintain it?

5 MR. LYLES: Yes, sir.

6 THE COURT: All right. I deny the motion on
7 breach of fiduciary duty as well. And implied warranty
8 and workmanlike services are the same cases, are they
9 not? Implied warranty or workmanlike services that, I
10 think, Columbia Lumber provides that a builder may be
11 liable without privity of contract within the violation
12 of building codes or industry standards or -- creates a
13 risk for the buyer. And I guess that's what those
14 firewalls would have done.

15 MR. LYLES: Yes, sir.

16 THE COURT: All right. So I deny the motion to
17 strike any action or any -- on the implied warranty of
18 workmanlike service. In other words, it will go to the
19 jury on that. And we've done the piercing the corporate
20 veil.

21 All right. So is that it?

22 MR. IMHOFF: Your Honor, I think there's a
23 joint motion for directed verdict on punitive damages.

24 THE COURT: I hadn't heard it before, but it's
25 being made now.

1 MR. IMHOFF: Yes, Your Honor. And ---

2 THE COURT: Well, let me go through. We still
3 have Ms. Brown and Mr. Hemphill, I think.

4 Ms. Brown?

5 MS. BROWN: Yes, Your Honor. I think that what
6 I'd like to do is address, first of all, Mr. Larry
7 Lollis' -- the complaints against Mr. Lollis. He seemed
8 to be lumped in with the rest, I guess, on the fiduciary
9 duty, the negligence and the implied warranty, I suppose,
10 by his relationship in I.K. He has no ownership,
11 individual ownership, in I.M.K.

12 THE COURT: Well, didn't he share in the
13 profits from I.M.K.?

14 MS. BROWN: He receives -- he shares in the
15 profits of I.K., not I.M.K.

16 THE COURT: I'm looking at some emails,
17 Plaintiff's Exhibit 38. Subject "I.M.K. Distribution
18 Checks."

19 MS. BROWN: Correct, Your Honor.

20 THE COURT: S.D.I. funding, which I understand
21 is the gentleman from Greenville?

22 MS. BROWN: Yes, Your Honor.

23 THE COURT: Integrys Holding ---

24 MS. BROWN: That ---

25 THE COURT: --- Bill Cox, Tim Roberson, and

1 Larry Lollis.

2 MS. BROWN: While it is true that the profits
3 came by check to I.M.K. -- from I.M.K. to the
4 individuals, they are in the percentages ---

5 THE COURT: Well, I hope they wouldn't be more
6 than they were entitled to. But anyway, no. I'm afraid
7 that I do find that there is a certain -- what is it? --
8 involvement. Even though maybe it was not active, there
9 was involvement in the operations of I.M.K. through I.K.

10 MS. BROWN: Okay. And that involvement is
11 simply the receipt of the check?

12 THE COURT: No. That's evidence. It's up to
13 you and Mr. Lyles to determine if that evidence is
14 inadequate.

15 MS. BROWN: And, again, I would point to the
16 statutes on L.L.C. membership which does hold that an
17 individual can be liable for the acts of an L.L.C. that
18 he personally participated in, authorized or directed.
19 And he didn't -- Mr. Lollis didn't authorize or direct
20 anything. And he didn't have enough ownership ---

21 THE COURT: All right. Well, I want to hear
22 Mr. Lyles on that, please.

23 Mr. Lyles?

24 MS. BROWN: Do you want the citation on that?

25 THE COURT: No, ma'am. I've got it. Are you

1 talking about Title 33?

2 MS. BROWN: I am. § 33-44-303(a) and (b).

3 THE COURT: Very good. Thank you.

4 MR. LYLES: Yes, Your Honor. Mr. Lollis is in
5 a different position obviously than Mr. Thoennes is. And
6 it does get to a almost a piercing-the-corporate-veil-
7 type of analysis and the Sturkie Court -- the Sturkie
8 factors. Previously in response to a motion that was
9 made in this case, I cited a recent Law Review article by
10 Professor McWilliams. And in that case or in that Law
11 Review article, Professor McWilliams sort of reviews the
12 state of corporate shield and corporate liability law in
13 South Carolina. And what Professor McWilliams says is
14 that the first prong of the Sturkie factor -- there's
15 several factors that Mr. Imhoff mentioned a minute ago --
16 the less important factors, that is those that the courts
17 are not holding as being very weighty include the
18 nonpayment of dividends, the failure to observe corporate
19 formalities, the non-functioning of other officers or
20 directors and the absence of corporate records.

21 McWilliams goes on to say, "The important factors in
22 the first prong of the Sturkie test deal with
23 misappropriation of funds for personal use." That is the
24 evidence that you have before you. You have the assets
25 of I.M.K. being disseminated directly to the shareholders

1 or the members of I.K. and to Marick. And in this case,
2 it was Marick's creditor, S.D.I.

3 The other evidence in this case is that that very
4 process continued through 2007, occurred in 2008 when the
5 I.M.K. assets were sold to Mr. Ludwig. And Mr. Cox got
6 on the witness stand and testified that when those I.M.K.
7 assets were sold, the cash that was paid by Ludwig didn't
8 go to I.M.K. Instead, it went to Mr. Cox, Mr. Lollis and
9 Mr. Roberson.

10 Then I also put in another exhibit from 2009. And
11 this is an exhibit that was an email or an agreement,
12 actually a commission agreement. Because what we learned
13 is after the sale to Ludwig, I.K. actually became a
14 consultant as the efforts continued to sell those units.
15 And what Mr. Cox admitted was that the members of I.K.,
16 including Mr. Lollis, were benefitting from the sales of
17 these units after the lawsuit was filed. And, again,
18 that benefit arose from the sale of assets not of I.K.,
19 but of I.M.K. That's money that should have been put in
20 I.M.K. and allowed to be used to respond to this
21 judgment.

22 That gets us to the second prong of Sturkie which
23 says, "The burden of proving fundamental unfairness
24 requires that the plaintiff establish that the defendants
25 were aware of the plaintiff's claim against the

1 corporation, and thereafter the defendant acted in a
2 self-serving manner with regard to the property of the
3 corporation and a disregard of the plaintiff's claim on
4 the property." And in a nutshell from 2007 forward, Mr.
5 Lollis, regardless of whether he orchestrated it and
6 created this process, Mr. Lollis participated in a
7 process where I.M.K.'s assets were distributed to him and
8 to others. You may remember his testimony which I
9 thought was very telling when he looked at those emails.
10 I said, "Do you remember the email?" He said, "The only
11 thing that was important to me was how much I was
12 getting." And I have no ill will towards Mr. Lollis. I
13 have enjoyed both of those gentlemen a lot. But the fact
14 is that's money that should be in I.M.K. and is not.

15 THE COURT: Yes, ma'am?

16 MS. BROWN: One final point on that matter.
17 Again, I would point out the fact that Mr. Lollis'
18 getting checks as a member and not a manager of a
19 corporation is not anything he had control over. He
20 didn't do any act. He didn't authorize it, didn't direct
21 it to receive the check as part of a legitimate
22 distribution from a company. And I guess the truth of
23 the matter is even if the Court were to accept the fact
24 that distribution shouldn't have been made, Mr. Lollis
25 had no control over that distribution.

1 THE COURT: All right. But as far -- I think,
2 again, it's a question for the jury to determine whether
3 or not there was any self-dealing or incompetence, you
4 might say.

5 All right. And -- all right. So as far as the
6 directed verdict involving Mr. Cox, Mr. Lollis, and I.K.,
7 I deny the motion.

8 And now, Mr. Hemphill?

9 MR. HEMPHILL: May it please the Court, Your
10 Honor.

11 THE COURT: Yes, sir. I think we've been
12 around successor liability.

13 MR. HEMPHILL: On the theory of successor
14 liability, as I argued yesterday, plaintiff has failed to
15 show that it's entitled to any of the exceptions to the
16 general rule. The successor corporation shouldn't be
17 liable for predecessor corporations. That rule hadn't
18 been established in the 1924 case that was, again ---

19 THE COURT: Was that Brown?

20 MR. HEMPHILL: That was the Brown versus
21 American Railroad case. And then affirmed on a certified
22 question from the District Court by our Supreme Court in
23 2005 where they affirmed that rule, the general rule that
24 liability doesn't attach unless it fits under an
25 exception.

1 And it looks like, you know, that the closest that
2 the evidence got was some sort of defrauding of
3 creditors, which is the fourth exception. And we would
4 suggest that it clearly wasn't sufficient.

5 The witness that they relied upon was Mr. Thoennes
6 to try to establish that. And Mr. Thoennes very clearly
7 said from the stand that it was a new corporation. It
8 had different owners. The owners were not the same.
9 There was, in all candor, Your Honor, a little bit of
10 overlap, but it was different owners.

11 And that corporation was created because the other
12 corporation -- there was no market for these townhomes
13 and finer homes anymore, but instead single family homes,
14 a hundred to two hundred thousand dollars. And so that
15 was why this corporation was created. New money was
16 needed, so new investors were invited in.

17 Counsel yesterday argued or presented a case, this
18 Holloway case, which was actually a 1977 Federal District
19 Court case where that general rule from going all the way
20 back in 1924 was not applied. In 2005, the Federal
21 District Court in the State of South Carolina decided
22 they wanted something definitive. So they asked our
23 Supreme Court, and our Supreme Court affirmed that 1924
24 rule.

25 THE COURT: But that's all they did.

1 MR. HEMPHILL: That is what they did, Your
2 Honor.

3 THE COURT: They left the other two questions,
4 I think. They didn't address it, and they said that they
5 don't give -- what is it? -- advisory opinions.

6 MR. HEMPHILL: Yes, Your Honor.

7 THE COURT: Which I thought was interesting.
8 But anyway ...

9 MR. HEMPHILL: But, Your Honor, there's been
10 insufficient evidence in this case from the plaintiff in
11 their case-in-chief to present this is entitled to one of
12 these exceptions to the general rule that a successor
13 should not be held liable.

14 THE COURT: All right.
15 Mr. Lyles?

16 MR. LYLES: Yes, sir. I think that the
17 exception that is most relevant is the mere continuation.
18 The only difference between the M Group and Marick Home
19 Builders was the presence of these two additional
20 investors, one of whom had been previously affiliated
21 with Marick. Most telling, however, was Mr. Thoennes'
22 testimony that the reason the M Group was created was so
23 that he could continue to earn a living because he could
24 no longer earn a living as Marick because Marick was too
25 encumbered with debt.

1 THE COURT: He was also getting social
2 security.

3 MR. LYLES: Yes, sir. He was the license
4 holder for both companies. They had the same job
5 superintendent for both companies. And while there may
6 have been some differences or change in the business
7 strategy, he admitted to me, as he needed to, that the M
8 Group also had a luxury homes division. And so it seems
9 to me that ---

10 THE COURT: I think he also said that all of
11 his corporations or whatever, construction companies,
12 operated under his personal license?

13 MR. LYLES: Yes, sir.

14 THE COURT: Unlimited contract?

15 MR. LYLES: Yes, sir.

16 THE COURT: All right. All right. Motion
17 denied.

18 Let's see. This jury -- now, I will entertain your
19 motion about striking punitive damages. Who wants to
20 take responsibility for that?

21 MR. IMHOFF: I'm trying to pick the most
22 successful defendant, Your Honor. And I don't know ---

23 THE COURT: Was it Mr. Gresh was the first one
24 to put forward the loss of use?

25 MR. IMHOFF: I nominate Mr. Gresh, Your Honor.

1 THE COURT: Well, what do you say about that?
2 You don't want it?

3 MR. IMHOFF: We do not want it, Your Honor. As
4 a group, we have ---

5 THE COURT: Is that enough said?

6 MR. IMHOFF: Well, we don't think it's a
7 punitive damages case, Your Honor. There is not evidence
8 that this is -- as to my client. Let me just talk as to
9 my client. And, again, we're talking about an inspection
10 and whether or not he inspected or should have known.
11 That type of thing. It is not a punitive damages case
12 for failing to realize after some number of windows,
13 which is in dispute, or some number of basement leaks,
14 which is in dispute, that there were incredible latent
15 covered-up defects. It's a negligence case, Your Honor.
16 It is not a punitives case against my client.

17 The same is true, I believe, in his role as a
18 director of the homeowners association. He had the exact
19 same knowledge, opinions, and beliefs sitting on as the
20 director or a director on the homeowners association as
21 he had as a general contractor. And that is that this
22 was good construction by Bostic Brothers that was passed
23 by Oconee County. And he had -- and he did not believe,
24 the testimony was, that the leaks out there or the issues
25 out there were pervasive. And all of these things were

1 underneath all of this stone and shingles and all of that
2 thing.

3 So I would state that this is not a punitive damages
4 case as to Marick Home Builders and Rick Thoennes, Your
5 Honor.

6 THE COURT: Are you pursuing your punitive
7 damages, Mr. Lyles?

8 MR. LYLES: I am, Your Honor, with respect to
9 Bostic. And with respect to Bostic ---

10 THE COURT: Oh, I see some movement. You may
11 sit down, Mr. Imhoff.

12 MR. LYLES: The law is clear in South Carolina
13 the violation of the applicable building code is
14 negligence per se in the evidence of reckless, willful
15 and wanton behavior. I think the photographs in this
16 case paint a compelling picture of a complete disregard
17 of the rights of others, including the right to personal
18 safety with regard to the construction of these
19 firewalls. So as to Bostic, I am going to pursue that.

20 THE COURT: Well, let me do that first, to sort
21 of clear things up. All right. So I grant the motion as
22 to punitive damages against Jose Nino, Marick Home
23 Builders, Rick Thoennes, I.M.K., Integrys Keowee
24 Development, William Cox, Larry Lollis, and M Group.

25 So that leaves you, Mr. Belcher.

1 MR. BELCHER: Okay, Your Honor. I've been
2 sitting here quietly listening to what's going on.

3 THE COURT: You've done a wonderful job too.

4 MR. BELCHER: Well, I hope so. I hope so.

5 THE COURT: Now you're looking for a reward.

6 MR. BELCHER: I've been talking to myself on
7 the inside about what's going on here today, but ...

8 The punitive damages in this case don't belong to
9 Bostic Construction. The punitive damages belong to this
10 soap opera where Mr. Lyles isn't even pursuing them. You
11 can't hold Bostic Construction Company, a non-jural
12 entity at this time, liable for punitive damages for the
13 way they built these buildings. Did they build them
14 negligently? Maybe. But did they complete them? No.
15 Were they ever offered an opportunity to cure any
16 defects? No, not until two months before a lawsuit was
17 filed.

18 THE COURT: Well, actually -- what is it? --
19 they walked off for the mere reason they weren't being
20 paid.

21 MR. BELCHER: And that's a suitable reason to
22 walk off. I've walked away from some clients for that
23 reason.

24 THE COURT: Well, certainly that was more of a
25 failure to communicate, I guess.

1 MR. BELCHER: It's simple negligence, if
2 anything. The negligence per se, the violation of a
3 building code ---

4 THE COURT: Well, that's the one thing that
5 concerns me because obviously building codes are given
6 the same -- and it's been throughout this testimony about
7 the local government adopting building codes, that they
8 become the same as a statute.

9 MR. BELCHER: And, Your Honor, the evidence in
10 this case reflects that every time a building code
11 official came out and inspected these things, it passed
12 the code. So Bostic was not intentionally or in any way
13 violating a building code because it passed codes from
14 the building authority. And that's what Marick relies on
15 in its whole case as to why Bostic is the bad guy in all
16 of this. And Marick came along with forty years of
17 experience in building, couldn't tell that there were
18 issues with these buildings that had sat open to the
19 elements for a whole year. We complied with the building
20 code as far as we knew because we passed inspections. We
21 didn't fail any inspections and cover them up. We were
22 not the people putting the band-aid on this project like
23 Marick. We were trying to build a building. We were
24 building it to code. If we had flunked any inspections,
25 we went back and corrected the work. So for them to sit

1 here now and armchair quarterback us and say through an
2 expert that we violated some building code after the
3 building authority ---

4 THE COURT: Whoa, whoa, whoa, whoa, whoa.

5 MR. BELCHER: --- ten years later.

6 THE COURT: It's going to be more than the
7 expert's testimony. It's going to be the fact that there
8 are building codes and that -- what is it? -- there's
9 been evidence of violations.

10 MR. BELCHER: But there was -- but you have to
11 have the different standard there. You have to show --
12 one, you have to show clear and convincing evidence to
13 award punitive damages.

14 THE COURT: Right.

15 MR. BELCHER: And it's a heightened standard.

16 THE COURT: Yeah, but that -- but there again
17 ---

18 MR. BELCHER: Bostic's conduct was to -- I
19 apologize.

20 THE COURT: Well, I was just going to say
21 that's a weight problem rather than whether or not it's
22 at issue.

23 MR. BELCHER: All right. Well, Bostic's
24 conduct was to comply with the building codes in that
25 they build buildings. They called the building

1 officials. The building officials came out, inspected
2 the buildings, passed their inspections before the wrap
3 was on the buildings, before the roofs were on the
4 buildings, before electricity was run to the buildings.
5 Bostic, as far as it was concerned, had complied and
6 passed all the building codes. That should be the
7 measure as to whether or not punitive damages ---

8 THE COURT: Do you have any authority for that
9 because that's an interesting proposition? What you're
10 saying is a certain immunity by reason of the lack of
11 government action.

12 MR. BELCHER: I'm not suggesting that they're
13 immune.

14 THE COURT: I'm just -- you're -- all right.
15 You're not suggesting it, but, I mean, that's what it
16 sounds like.

17 MR. BELCHER: What I am suggesting is that you
18 have to show that the violation of the statute -- I mean,
19 negligence per se is not just that there's a statute and
20 it was violated. You have to show additional ---

21 THE COURT: Causation.

22 MR. BELCHER: Right. You have to show
23 additional measures just to get to punitive damage -- to
24 get to the punitive damage analysis of it.

25 THE COURT: No. I think -- what is it? -- the

1 old -- what is it? -- motor vehicle law deals with that.
2 That -- what is it? -- if there's -- if there is a
3 violation of a statute, that is negligence per se as well
4 as evidence of recklessness, willful and wantonness. The
5 only evidence of it. But that's what I'm concerned with
6 at this particular stage.

7 Now, also, our courts have said that as far as
8 punitive damages, the trial judge is somewhat of a
9 gatekeeper to determine whether or not it reaches that
10 level as to be submitted to the jury. I don't know if
11 you can argue it's not almost a per se type of thing.

12 It's just ---

13 MR. BELCHER: All right. If the argument is
14 that Bostic Construction is negligent per se because it
15 violated the codes ---

16 THE COURT: No, no, that's not what I'm saying.
17 What I said -- well, you were arguing that -- what is it?
18 -- not every violation -- I mean, every violation of a
19 statute or building code or industry standard adopted by
20 a local government is not evidence of reckless, willful
21 and wanton.

22 MR. BELCHER: Exactly. And lest we forget that
23 the exact same building codes that he wants to hold us
24 liable for punitive damages for are the building codes
25 that Marick/I.M.K. also violated by virtue of pulling

1 these permits and obtaining certificates of occupancy.

2 And he's willing to let that go by the wayside and try to
3 stick it to us.

4 THE COURT: Two wrongs make a right? My mama
5 didn't say that.

6 MR. BELCHER: All right.

7 THE COURT: I'm just asking you. That's just a
8 -- now you're getting into an equity argument. And I
9 just ...

10 What do you say, Mr. Lyles?

11 MR. LYLES: In terms of the punitive damages?

12 THE COURT: Well, yeah, the punitive damages.
13 I do feel that courts have a sort of gatekeeper --
14 otherwise, we might be motivated by something other than
15 -- what is it? -- reasonable judgment.

16 MR. LYLES: Yes, sir. You're absolutely
17 correct. And that's addressed in either the Magnolia
18 North or the Pope case in the context of a construction
19 case. What we also know in South Carolina law is that
20 property damages can serve as the basis for an award of
21 punitive damages. With regard to his argument that
22 somehow he has immunity from that because he passed a
23 certain level of inspection, there's nothing in the cases
24 that say that. In fact, Derek Hodgin's testimony in
25 court the other day when I asked him was, "Mr. Hodgin,

1 does the approval of a building inspector during a
2 building inspection relieve the contractor from complying
3 with the building code?" And he said, "No." And it
4 doesn't. And Mr. Moore, I'm sure, will testify the same
5 way later today. And so where there are violations of
6 the building code is evidence of negligence -- is
7 negligence per se and evidence of recklessness.

8 THE COURT: All right. Let me note for the
9 record that the motion for directed verdict as to
10 punitive damages has been made, and I am going to take it
11 under advisement. I really do have concern for it. But
12 that'll be the only thing I'm leaving open now until the
13 close of testimony.

14 Yes, sir, Mr. Imhoff?

15 MR. IMHOFF: I don't want to snatch -- what do
16 you call it? -- defeat from the jaws of victory.

17 THE COURT: You don't want to snatch defeat
18 from the jaws of victory.

19 MR. IMHOFF: But this is -- but may be heard as
20 an attorney who has a phase-two issue and not prejudice
21 myself on your ruling here in phase one, if I may. A
22 friend of the court brief, so to speak, Your Honor. It
23 is an interesting issue -- and here's why -- to me.
24 Because the code section that the expert testified that
25 Bostic violated, or frankly that Marick violated in phase

1 two, is a general code section. It's not the code
2 section that says put a window in this way, put a nail
3 there, put a structural beam there. It's ---

4 THE COURT: Weatherproof.

5 MR. IMHOFF: --- weatherproof. And so -- even
6 if every one in all of these cases complied precisely
7 with every section of the code, but it leaked, it's a
8 code violation. And that's what you have here. That
9 it's a code violation because of this catch-all
10 weatherproof, flashing, caulk, trim. So any building
11 that leaks in the State of South Carolina under that
12 analysis is negligence per se because it's a violation of
13 the building code. And that is an incredible change. I
14 think it would be a foundation shift in the law of the
15 State of South Carolina.

16 THE COURT: All right. Very good.

17 MS. BROWN: It doesn't lead to ---

18 MR. IMHOFF: But it doesn't lead to punitives;
19 right.

20 THE COURT: As I said earlier, I am taking the
21 question of punitive damages under advisement, but the
22 other motions that have been made and ruled on will stand
23 until they're renewed at the close of all the evidence.

24 All right. It's a little bit past what I'd hoped to
25 be back and have -- I think ...

1 Is the jury back there?

2 THE BAILIFF: Yes, sir.

3 THE COURT: All right. Have you got all of
4 them?

5 THE BAILIFF: Let me check and make sure.

6 THE COURT: Well, anyway, y'all -- maybe you
7 don't need a break, but I do. But we've asked the jury
8 to come in a little bit earlier this morning. And Mr.
9 Belcher, do you think your witnesses that you're going to
10 have this morning or this afternoon, are they here?

11 MR. BELCHER: They're here, Your Honor.

12 THE COURT: Okay. What would be your pleasure,
13 or what would you want us to do?

14 MR. BELCHER: As far as a break?

15 THE COURT: Well, do you want to take up your
16 witnesses now and then take a lunch break -- I think you
17 said they weren't going to be that long -- and then spend
18 the rest of the afternoon going over charges and anything
19 else if it should go forward? Or would you want to take
20 a little short break for lunch for us and then come back
21 in an hour or so?

22 MR. BELCHER: I'll defer to others. But I'd
23 like a five-minute break.

24 THE COURT: Well, let's do this. We'll take a
25 very short break. And then at that time, y'all discuss

1 what you'd like to do. Otherwise, I'm going to be here
2 regardless.

3 You have two hours of testimony, you say?

4 MR. LYLES: I would think, Your Honor, with a
5 break in-between, it's probably two and a half, two.

6 What do you think?

7 I think it'll take up most of the afternoon.

8 THE COURT: All right. So we're going to have
9 to -- while y'all are on your way out of the door and all
10 of that, think about taking about an hour for lunch,
11 coming back maybe at one thirty.

12 MR. BELCHER: We'll just plan that. We'll do
13 that.

14 THE COURT: All right. Yeah, y'all go ahead
15 and take a break and then -- what is it? -- but do come
16 back as soon as you can, and then we'll have the jury and
17 we'll give them a little additional time.

18 MR. LYLES: Yes, sir.

19 (WHEREUPON, court stood at recess for a short
20 break.)

21 THE COURT: All right. Let's see. Anything
22 before we bring the jury back?

23 MR. LYLES: No, sir.

24 THE COURT: From the defense?

25 MR. BELCHER: None, Your Honor.

1 THE COURT: All right. I do understand that
2 about an hour -- it might now be an hour and forty -- I
3 mean, one forty-five rather than one thirty.

4 All right. Ask the jury to join us, please.

5 (WHEREUPON, the jury entered the open court at
6 approximately 12:49 a.m.)

7 THE COURT: All right. Let the record reflect
8 the jury and alternate are in the jury box.

9 Mr. Foreman, ladies and gentlemen of the jury, I do
10 want to thank you for your patience and apologize for
11 having to keep you waiting.

12 We do have a little more testimony. It's going to
13 take maybe as much as a couple or three hours. However,
14 there are certain other things I have had to take up this
15 morning before we could even get to this point. And
16 we've completed that.

17 I'm going to again impose upon your patience and
18 indulgence and ask you to take about another hour and
19 come back at one forty-five. And at that time, we will
20 complete the trial of the case. I do need a break myself
21 as well as the attorneys. And then we'll go -- is what
22 we call -- we're going to finish up with the testimony.
23 And we probably will not try the case today. I'm going
24 to give you a break this evening, and then we'll go to
25 the jury in the morning. And that will be the final

1 part. We will try to conclude all the testimony and
2 evidence today.

3 All right. With that, I'm going to ask you to take
4 a lunch break or whatever. And I know it's kind of
5 brunch break. But anyway -- and then come back at one
6 forty-five. Thank you very much.

7 Everyone else remain seated while the jury retires
8 from the courtroom.

9 (WHEREUPON, the jury exited the open court at
10 approximately 12:51 p.m.)

11 THE COURT: All right. I'll see you back here
12 at one forty-five.

13 (WHEREUPON, court stood at recess for a lunch
14 break.)

15 THE COURT: Thank you very much. You may take
16 your seats.

17 All right. Anything from the plaintiff before we
18 begin?

19 MR. LYLES: I do have one thing, Judge.

20 THE COURT: Yes, sir?

21 MR. LYLES: And this relates to the next
22 witness, and actually, I think, the next two witnesses.
23 There were some questions asked of Derek Hodgins yesterday
24 during his cross-examination about other projects and
25 other jobs that he had worked on with either other

1 lawyers or other experts.

2 THE COURT: I see.

3 MR. LYLES: And my concern is -- and I would
4 like to interpose an objection to questions about other
5 jobs that aren't relevant to this case that these experts
6 have worked on together or otherwise. And the problem
7 I've got is if Rick starts comparing this job to another
8 job in Charleston or Myrtle Beach that I wasn't involved
9 in, I have no ability to cross-examine the witness on
10 that. And so I'm just -- in light of the questions that
11 were asked of Derek in cross-examination, I just want to
12 alert the Court to my concern.

13 THE COURT: Well, were you involved in those
14 cases or those jobs that Mr. Hodgins was asked about?

15 MR. LYLES: No, sir, I wasn't.

16 THE COURT: All right.

17 Mr. Belcher?

18 MR. BELCHER: Well, Your Honor, I don't know
19 that it's going to come up. But I don't want to do
20 anything to restrict Mr. Moore's testimony. He's an
21 expert witness which means he's entitled to rely on all
22 of his life experiences and observations.

23 THE COURT: Not exactly. But -- what is it? --
24 he is only if it goes towards his testimony and opinion.

25 MR. BELCHER: Right. And he can say -- and

1 that's my position, Your Honor, is that if he's going to
2 have the opinion that this is just like ten other jobs
3 that I've done with Mr. Hodgkin, and in all those jobs it
4 was a defect, that's his opinion. If there's no way to
5 cross-examine him, I guess that's tough, but I mean ...

6 THE COURT: Do what now? I sort of missed the
7 question.

8 MR. BELCHER: All right. If he were to testify
9 -- and I don't know that he will. But if he's going to
10 testify that the Stoneledge project is just like ten
11 other projects I've done with Mr. Hodgkin ---

12 THE COURT: Who is I?

13 MR. BELCHER: Mr. Moore.

14 THE COURT: Okay.

15 MR. BELCHER: If Mr. Moore is going to testify
16 that this project is similar to other projects that Mr.
17 Moore has worked on with Mr. Hodgkin where Mr. Hodgkin
18 required a scope similar to Mr. Moore's, then I think
19 he's entitled to do that. I think that's ---

20 THE COURT: Is that what you're talking about,
21 Mr. Lyles?

22 MR. LYLES: Well, I am because without Mr.
23 Hodgkin here -- and he's not here -- I am unable to verify
24 that the jobs were the same or that the circumstances
25 were the same. And so that's my concern. And I don't

1 know that those jobs were relevant.

2 THE COURT: Well, I'm not exactly sure if I
3 understand the relevance of other jobs that an expert
4 witness has worked on because obviously they're not the
5 same, and yet ---

6 MR. BELCHER: Here's where we're coming from,
7 Your Honor.

8 THE COURT: Please help.

9 MR. BELCHER: Yes. One way that I can imagine
10 it coming in -- and, again, this is all so speculative at
11 this point, but let's address it now. It goes to the
12 credibility and weight of another witness, and the
13 credibility ---

14 THE COURT: You're not pitting a witness
15 against a witness, are you?

16 MR. BELCHER: No, no. But you're allowed ---

17 THE COURT: Well, no, you're not allowed to pit
18 witnesses against witnesses.

19 MR. BELCHER: Exactly. And that's not what I'm
20 suggesting, but ---

21 THE COURT: Well, I thought that's what you
22 said.

23 MR. BELCHER: Well, to the extent it's a battle
24 of the experts, which is what we're engaged in ---

25 THE COURT: No. That's one thing that we don't

1 do. We don't battle. We -- what is it? -- present
2 information to help the jury make a decision.

3 MR. BELCHER: Right. And at issue with Mr.
4 Moore is the reasonableness of his scope compared to the
5 reasonableness of Mr. Hodgins's scope. And relevant to
6 that would be the fact that Mr. Hodgins and Mr. Moore have
7 worked on projects together and had similar opinions in
8 the past.

9 THE COURT: Well, I don't see any problem with
10 that.

11 MR. LYLES: Well, except I don't know anything
12 about those jobs. Mr. Hodgins yesterday was asked ---

13 THE COURT: Well, maybe you need to ask him.
14 He's going to be on cross-examination.

15 MR. LYLES: I can.

16 THE COURT: And I think Mr. Belcher is right
17 there that -- what is it? -- if they have agreed. But
18 it's one -- pitting one witness against the other. You
19 can find out if there were differences or if there was
20 something that might have affected the commonality.

21 MR. LYLES: Well, I guess to the extent he
22 wants to testify that, well, I've agreed with Derek
23 before on jobs, I can certainly think that that would be
24 reasonable and I think Mr. Hodgins would tell me that too.

25 THE COURT: Well, we'll see. But do understand

1 that there is a limit to -- what is it? -- what a person
2 can testify to even as an expert because it has to be --
3 what is it? -- something that is within his expertise.
4 But also, that -- what is it? -- it's relevant to his
5 testimony. I don't want to hear somebody get up and
6 suggest that they are a great American or something like
7 that. It might give weight to their credibility, but --
8 what is it? -- that's not an issue here.

9 MR. BELCHER: Yes, Your Honor. And I don't
10 anticipate it being an issue, I really don't.

11 THE COURT: Very good.

12 MR. BELCHER: I just don't want to be
13 pigeonholed before I start.

14 THE COURT: Well, he's not pigeonholing you;
15 he's just telling you where don't fly into.

16 All right. Anything else from the plaintiff?

17 MR. LYLES: No, sir, not at this time. I
18 understand I'll rest when the jury comes in.

19 THE COURT: Well, that's one thing, an
20 instruction I was going to give you. By the way, just
21 for the benefit of the parties -- I don't think it's
22 necessary, but -- but I intend to just recognize Mr.
23 Lyles who will rest, and then I'll recognize, I guess ...

24 Mr. Belcher, you'll be doing the examination?

25 MR. BELCHER: Yes, sir.

1 THE COURT: Then I'll recognize you without
2 saying subject to all of the motions and rulings of the
3 Court heretofore made. In other words, you all have
4 raised your directed verdict motions. All right. In
5 other words, I won't have to say that.

6 Do you understand that, Mr. Lyles?

7 MR. LYLES: Yes, I do.

8 THE COURT: All right. Do you understand, Mr.
9 Belcher?

10 MR. BELCHER: Yes, Your Honor.

11 THE COURT: And all those for whom you speak on
12 this one issue.

13 MR. BELCHER: I'm not so sure I speak for them.

14 THE COURT: Very well.

15 Ask the jury to join us, please.

16 (WHEREUPON, the jury entered the open court at
17 approximately 2:09 p.m.)

18 THE COURT: All right. Let the record reflect
19 the jury and alternate are in the jury box.

20 Mr. Foreman, ladies and gentlemen of the jury, I
21 recognize Mr. Lyles.

22 MR. LYLES: Your Honor, the plaintiff rests.

23 THE COURT: Very well. Thank you, sir.

24 MR. LYLES: Yes, sir.

25 THE COURT: All right. That completes the

1 plaintiffs' case, and I will now recognize Mr. Belcher
2 for the defendants.

3 MR. BELCHER: Thank you, Your Honor. May it
4 please the Court. We would like to call -- Bostic
5 Construction would like to call Mr. Rick Moore.

6 (WHEREUPON, the witness was duly sworn.)

7 THE COURT: All right. If you would, please,
8 sir, give us your full name for the record spelling your
9 last name.

10 THE WITNESS: Richard Holden Moore, M-O-O-R-E.

11 THE COURT: Very good. Thank you, sir.

12 RICHARD HOLDEN MOORE,

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MR. BELCHER:

16 Q. Good morning, Rick. I'm going to call you Rick for
17 purposes of today; is that fair?

18 A. Sure.

19 Q. Take a minute and tell the jury a little bit about
20 yourself, your experience and qualifications.

21 A. After graduating from high school in Columbia, I
22 went to Charleston and attended the Citadel. I graduated
23 from the Citadel with a bachelor of science degree in
24 civil engineering. Upon graduation, I was commissioned
25 as a Naval officer in the Civil Engineering Corp and

1 spent four years working with the Navy's construction
2 battalions -- otherwise many people know them as the
3 Seabees -- working construction, managing construction
4 and doing design both in the U.S. and overseas in places
5 in the Indian Ocean and Japan and Europe and some parts
6 of the U.S.

7 After four years of working with the construction
8 battalions, I attended graduate school at the University
9 of California Berkeley and earned a bachelor -- excuse me
10 -- a master of science degree in civil engineering. From
11 there, I attended the Navy's Advanced Civil Engineering
12 School for its civil engineering corp officers, and then
13 was designated as a contracts officer and managed design
14 and construction work for the Navy in Washington for four
15 years.

16 Following that, I became a private manager for a
17 large general contractor building mid-rise buildings in
18 downtown Washington before moving back to Charleston,
19 South Carolina, and taking up a consulting career. I've
20 been working full-time in the practice of forensic
21 engineering for about twenty-three years.

22 I am currently with a company called Moore Hackney
23 and Associates, and my entire practice is forensic
24 engineering.

25 Q. All right. Tell us a little bit more about forensic

1 engineering. You're not always in courtrooms, are you?

2 A. No, I'm not.

3 Q. All right. What all types of engineering do you do?

4 A. My company and my practice personally is a
5 consulting engineering practice. What I do is evaluate
6 structures for building owners, for homeowners or
7 homeowners associations. I assist designers and
8 architects in terms of details for roofing and
9 waterproofing design. I do analysis of building
10 construction and do repair designs.

11 Q. And does some of that to some extent also deal with
12 due diligence for people who would be buying large
13 buildings and making large asset purchases?

14 A. Yes. Part of the practice is to do evaluations of
15 portfolios or individual properties, primarily strip
16 shopping centers or shopping malls.

17 Q. Okay. And what percentage of your work at Moore
18 Hackney would you say is related to things other than
19 lawsuits and things like that?

20 A. As a firm of five engineers, I would say our
21 practice is primarily forensics, but it's pretty well
22 split between non-forensic-type activities like due
23 diligence and forensic work. My personal practice though
24 is all forensics, and a number of the projects I work on
25 are in litigation.

1 Q. All right. And tell us a little bit about any
2 contract administration you do, if any.

3 A. For repair designs and the implementation of those
4 designs, I do see over work personally, and I have a
5 staff of professional engineers that work with me to be
6 on site and to observe construction, make sure it's done
7 in compliance with our designs.

8 Q. And do you understand that one of the issues that
9 the jury has been asked to look at over the last few days
10 are the roofs at Stoneledge?

11 A. Yes, I do.

12 Q. All right. Do you have any particular
13 qualifications that would allow you to form opinions with
14 regard to the roofs at Stoneledge?

15 A. Yes. I'm a registered roof consultant through a
16 group known as R.C.I. I am also a registered exterior
17 wall consultant and a registered waterproofing
18 consultant.

19 Q. All right. And what does it take to become a
20 registered roofing consultant, waterproofing consultant
21 and -- did you say building envelope consultant?

22 A. Yes.

23 Q. All right.

24 A. Each one of those designations has an application
25 process where you have to demonstrate that you have

1 experience actually doing evaluations and design of
2 either roofing, waterproofing or exterior walls. Then
3 you have to show that you've successfully completed the
4 class work that's required. And then once you've done
5 that, you're allowed to sit for an extensive exam, which
6 is usually about eight hours. Two exams are eight hours,
7 and one, I think, is six hours.

8 Q. All right. And one of the other things that you
9 also need for that is you need recommendations from
10 people in the professional field; is that correct?

11 A. That's right.

12 Q. All right. You understand also -- so we've covered
13 sort of the forensic engineering, the roofing, the
14 waterproofing, the building envelope. Tell us a little
15 bit about your experience with conducting remedial repair
16 jobs on projects similar to Stoneledge.

17 A. Explaining my experience working as a Naval officer,
18 I have worked on somewhere above fifteen projects total.
19 And of that total, over a hundred of those are multi-
20 building, multi-family condo or apartment buildings. And
21 those have involved both the analysis and the design of
22 repairs similar to Stoneledge.

23 MR. BELCHER: Your Honor, at this time, I would
24 offer Mr. Moore as a testifying expert witness in the
25 fields of waterproofing, roofing, forensic engineering,

1 building envelope, remedial repairs and contract
2 administration.

3 THE COURT: How about external walls? I think
4 he's qualified in external wall consulting?

5 MR. BELCHER: External walls.

6 THE COURT: Is that right, Mr. Moore?

7 THE WITNESS: Yes, Your Honor.

8 THE COURT: All right. Voir dire?

9 MR. LYLES: No, sir, Your Honor.

10 THE COURT: All right. Mr. Foreman, ladies and
11 gentlemen of the jury, as I've mentioned now with other
12 witnesses that have been qualified as an expert, this
13 witness, by reason of his background, training and
14 experience, has been found to be an expert in the area of
15 forensic engineering, particularly roof, external wall,
16 waterproofing and envelope designs. And as I say, as a
17 forensic engineer as well. So he will be permitted to
18 give his opinion. However, all testimony, experts or
19 otherwise, is for your evaluation.

20 You may continue.

21 MR. BELCHER: Thank you.

22 Q. One question that was asked of Mr. Hodgkin -- and
23 I'll just go ahead and ask it to you for the benefit of
24 this jury -- do you even keep track of what type of --
25 who you've been retained by and projects like this,

1 whether it be a plaintiff in lawsuit or a defendant in a
2 lawsuit?

3 A. Only in general terms. What I do know is that it
4 varies from year to year. My clients generally are
5 contractors or homeowners groups or homeowners. But in
6 terms of whether that's plaintiff or defendant, that's
7 sort of separate. I just generally keep up with who the
8 clients retained us. But I do and have worked for both
9 plaintiffs and defendants over the years.

10 Q. And does it matter to you who you're working for
11 when you go out and take a look at a project like
12 Stoneledge?

13 A. No. What I try to do is I try to call it like I see
14 it. I try to call it straight down the line of what I
15 believe is the most reasonable and best approach to
16 evaluation and repair.

17 Q. All right. Would it be fair to say that at
18 Stoneledge, there's some good and some bad?

19 A. In terms of the construction?

20 Q. Yes.

21 A. Yes, absolutely.

22 Q. All right. I understand that today you've sort of
23 prepared a presentation for the jury to talk about what
24 you did out there. I just have a couple more questions,
25 and then I'll let you get to your PowerPoint. All right?

1 A. Okay.

2 Q. Some of the questions I asked Mr. Hodgkin the other
3 day just -- I want to make sure that as you're testifying
4 we're sort of using the same standards that I required of
5 Mr. Hodgkin. And that is that there is a forensic
6 approach, a scientific method, associated with what you
7 do when you approach a project like Stoneledge. Is that
8 fair to say?

9 A. There is. And we try to approach each project with
10 an orderly systematic approach with steps so that we
11 don't miss anything.

12 Q. Okay. And tell the jury real quick, you know, what
13 is your process? What is the forensic method you use?

14 A. There will be a little bit in the presentation about
15 that. But generally, what I try to understand is the
16 background of the project. What has been reported to be
17 problems? And then from there, understand how the
18 project came into being, how it was designed, how it was
19 built, who built it. And then I try to go to the field
20 and understand myself what was built and why it's gone
21 wrong.

22 From there I do research on industry standards and
23 the code. And I look for a reasonably good fix to put it
24 back together.

25 Q. And just so we're on the same exact plane as we were

1 with Mr. Hodgkin, you were in the gallery. Did you hear
2 me ask him about the ninety/one rule?

3 A. I did.

4 Q. All right. And is that a rule that you ascribe to?

5 A. It is. It comes under the, sort of a qualitative
6 analysis meaning as an experienced building envelope or
7 roofing or waterproofing designer/investigator, you know
8 where you typically find problems. You know where the
9 weak points are in a typical building envelope or
10 waterproofing or roofing designs. And those are places
11 you typically go to find problems. And experience tells
12 you that you're usually right, that the weak points in a
13 design are typically where you find problems.

14 Q. All right. And the other assumption that I asked
15 Mr. Hodgkin is that it's the water intrusion that causes
16 the rot; correct?

17 A. It is. It's the water intrusion. It's the failure
18 to manage the water properly. It's not that water gets
19 in; it's that it's not managed properly.

20 Q. All right. Here on your first slide, tell us what
21 your first slide depicts.

22 A. The first slide is showing just an overview of the
23 first eight buildings constructed at Stoneledge.

24 Q. Okay. Are they numbered in any particular way for
25 the purpose of your examination?

1 A. There is. And there will be a slide, if you fast
2 forward, that show the numbering.

3 Q. All right. Just walk us through here.

4 A. Okay. Overview of the project location. I don't
5 think that's a secret to anyone. It's located on a very
6 nice point of land on Lake Keowee.

7 Next slide.

8 Those are the first eight buildings in phase one,
9 numbered from the bottom at one, building number eight at
10 the top of that photograph. You may have seen some of
11 these in actual photographs prior to today, but the
12 building types are three basic designs. A park side, a
13 Hickory and a Hampton. Each of those have a front on the
14 parking lot with the garage on the front side, the back
15 side facing the lake with an uncovered balcony and a
16 covered porch. A number of the units have a bottom
17 basement walkout. It's covered by the second-floor porch
18 or screened porch.

19 In the first phase, Bostic Construction obtained
20 C.O.s for the buildings that you see highlighted in
21 yellow and didn't get the C.O.s for the remaining units
22 in phase one. So I further answered -- to Mr. Belcher's
23 question is, what did we do, and what were we asked to
24 do. Our background work was to understand how the
25 project came to be and how the problems developed.

1 Which what we did is to review C.S.E.'s reports and their
2 photographs because they were on site about a year and a
3 half before we got started. From there, after we had
4 analyzed C.S.E.'s work, we looked at the project plans
5 and other documents we had from construction and then
6 went to the field. Spent several days making test cuts.
7 And I'll lead you through some test cuts that I took.
8 And I made a total of eighteen test cuts at five of the
9 eight buildings. What I wanted to do was not to exactly
10 duplicate the efforts of C.S.E., but I wanted to confirm
11 for my own benefit where I thought the problems are and
12 compare that with what C.S.E. had reported.

13 The other three steps, once I'd done my field work
14 to research the problems, look at the code and building
15 industry standards and from there develop a scope of
16 repair. Once I developed a scope of repair in draft
17 form, I started to have conversations with a contractor,
18 in this case, Watkins Services, to let them know what I
19 was thinking. And then that was a dialogue process where
20 they asked questions of my scope and from quantities or
21 make sure they understood it. I gave them information
22 back. And so that was an interdiver (phonic) process over
23 a period of months which finally ended up in an estimate
24 from Watkins Services.

25 Q. All right. At any time during this evaluation

1 process, did I or any other attorney on behalf of Bostic
2 Brothers or Bostic Construction direct you in any way on
3 how to conduct your investigation?

4 A. No.

5 Q. How were you able to gain access to the units?

6 A. I asked for permission from the plaintiffs, and they
7 obtained permission from a number of the owners to let me
8 make test cuts in their units. And so several days were
9 set aside for me to make test cuts. And other parties
10 and other experts were allowed to come look at the work I
11 was doing.

12 Q. All right. Now, did you say you had -- how many
13 units were you able to make test cuts on? Actual units.
14 Not buildings, but units.

15 A. I make -- well, some of the units I had looked into
16 -- looked in the basements and looked in the crawlspace
17 without actually making a test cut. But there were five
18 buildings, each containing multiple units. So there
19 were, I believe, six units where test cuts were made.
20 And I believe there were another three or four where I
21 went into basements and the crawlspaces without actually
22 making a cut.

23 Q. So you took an opportunity of every unit that
24 allowed you to do an investigation and perform test cuts?

25 A. I did. In addition, though, I did visual

1 observations around the exterior of all eight buildings
2 and all thirty-seven units.

3 Q. All right. Go ahead and tell us about your next
4 slide. I think that sort of moves into where we were
5 just talking.

6 A. Once I had scheduled the field work, I got
7 permission from the plaintiffs, the H.O.A., to look at
8 several different units. And so I made observations
9 visually of all thirty-seven units. And then I selected
10 a total of eighteen locations to actually open up the
11 walls or ceilings or areas so I could get a better of
12 idea of how the buildings were constructed. And so this
13 is a summary table telling which building, which unit,
14 which day I was on site.

15 Go to the next slide.

16 So you'll notice under that four at the far left of
17 that column shows that on building four on the 14th of
18 March, I looked at unit twenty-one, the Taylor unit, and
19 made two test cuts, test cuts fifteen and eighteen. As
20 well I went into the crawlspace to make visual
21 observations.

22 Next slide.

23 A similar format for buildings five and six. You
24 can see the other three unit owners who allowed me access
25 and the test cut numbers that are associated with each of

1 their units. In addition, on unit twenty-four, building
2 five, I made non-destructive observations of the
3 crawlspace.

4 Next slide.

5 Similar information is on this slide showing what I
6 did for building seven and for building eight. You'll
7 notice for building eight, there are -- it says, "T.C.
8 one through T.C. six." So that's six test cuts for unit
9 thirty-seven.

10 Q. All right. Let me stop you there before you go to
11 the next slide. I see that these slides are titled
12 "Field Survey." Is it fair to say that you conducted a
13 field survey of all thirty-seven units?

14 A. I did. I made visual observations of all thirty-
15 seven units.

16 Q. Tell us the importance of the survey part of the
17 forensic method that you implemented in this process.

18 A. What I was trying to do was look at the buildings
19 that had been built and compare what had been built to
20 the plans I reviewed and to see if they generally have
21 similar materials, a similar look, to what I had seen in
22 the plans. I also was trying to confirm things I had
23 read in the C.S.E. reports, references to staining or
24 issues where rot might be visible or issues with cracked
25 concrete or roofing. So part of that was just to help me

1 get set and understand what I was looking at.

2 Q. And we'll talk later about the scope of repair, but
3 you also have additional surveys that need to be
4 conducted prior to engaging in any real repairs or
5 remedial work out there. Is that fair to say?

6 A. That's correct.

7 Q. All right. We'll talk more about the -- perhaps you
8 can talk more about the importance of those surveys when
9 we get to that part of your testimony.

10 A. I'll be glad.

11 Q. All right. Tell us what you did with regard to test
12 cuts on your next slide.

13 A. For test cuts, what I was trying to do was to look
14 at places that I thought might fall into sort of the
15 ninety/one rule where I know as a registered roof
16 consultant or waterproofing consultant or wall
17 consultant, I know where I would expect I would find
18 problems. And from just the stain pattern you could see
19 on some of the buildings, you confirm places that I
20 thought I should look. And so I chose locations within
21 walls and ceilings that I thought I could get a good
22 sense of how the units were built and where the problems
23 might be.

24 Q. Okay. So here we're looking at an open deck and a
25 screened-in porch intersection; is that correct?

1 A. That's right. And that's what each unit has on the
2 rear, although some of the units don't have -- are not
3 built on a basement; they're built on a crawlspace. They
4 don't have that elevated system that's shown in that
5 picture.

6 Q. Okay.

7 A. I'm going to show you a series of photos from two
8 test cuts. You may recognize some of these photos. At
9 least two of these photos were in Derek Hodgins
10 presentation of my test cuts. The first one here is test
11 cut number two. This shows a balcony column, a balcony
12 beam on sort of a joint section between an open balcony
13 and a screened-in porch.

14 Next slide.

15 And so this photo shows that I'm starting to take
16 the stone off. This is the veneer stone, and underneath
17 it is wire lath. From there, I wanted to get to the
18 underlying wood framing to see what the conditions were.
19 And this is the photo you saw in Derek Hodgins
20 presentation of test cut number two showing wet and
21 rotted sheathing. And so I took photos of good
22 conditions and of bad conditions. There are a number of
23 pictures that I have that show rot, and there are also a
24 lot of pictures I took showing undamaged materials. And
25 this is one of the ones you've see before. It is clearly

1 rotted and damage to that exterior wall beam of this back
2 balcony.

3 Q. All right. And as we were talking about with regard
4 to the forensic method, it's not just that water gets in,
5 it's that it needs to get out; correct?

6 A. It needs to be managed. It needs to be given a path
7 to find its way out so it doesn't -- it's not retained
8 within the wall.

9 Q. So the problem here is that the water has not been
10 able to get out?

11 A. That's right. It's gotten in. It can't find a path
12 out. It stays and penetrates the wood. And then over
13 time, it rots the wood.

14 Q. And have you developed a scope of repair that is
15 going to fix the damage and engineer a pathway for the
16 water to get in and out so that this never occurs again?

17 A. I have.

18 Q. Continue, please.

19 A. Next slide.

20 This is another test cut, test cut number eighteen.

21 You'll also see in a minute the photograph from -- that I
22 took that was borrowed for Derek Hodgins' presentation.

23 Test cut eighteen, here we've taken the stone off.

24 Again, I've gotten to the lath. And you can see on the
25 wire lath some rust stains which indicates there's some

1 water that may be a problem there.

2 Next slide.

3 This is a photo that was included in Derek Hodgins'
4 presentation. You can see that the wood sheathing there
5 is rotted similar to what was found in test cut number
6 two. Water's gotten into this place. It doesn't have a
7 path out. It's caused rot.

8 Q. Now, is this a condition that you typically see in
9 projects similar to Stoneledge where there's just been a
10 detail omitted or an extra piece put in or something
11 that's caused this condition?

12 A. Yes. I mean, people don't call -- they don't call
13 engineers like Derek Hodgins or me when the building's
14 performing well. We get called out when there are
15 performance problems with buildings. And so this kind of
16 problem is what we typically see.

17 Q. All right.

18 A. This photo is showing the front side of the unit.
19 And the reason I've included this is it shows you the
20 front entrance. And right to the right of the front
21 entrance, there's a wall jut out. When you go into the
22 crawlspace -- and there will be some photos from the
23 crawlspace. I just wanted to get you a sense of what
24 that looks like on the outside of the building and then
25 compare that to what you'll see in the crawlspace of the

1 units. There was a lot of discussion previously from Mr.
2 Hodgin about waterproofing issues and crawlspace
3 problems. And so I wanted to look into a number of the
4 crawlspaces.

5 Q. Please orient the jury with what they're looking at,
6 what they would be looking at if they were on the outside
7 of this space.

8 A. If you look at this photo and then imagine the
9 previous photo, there was a picture from the front. And
10 if you can imagine that you suddenly were inside that
11 front wall to the right of the stairs, this is what you'd
12 see typically in a crawlspace. The next photo. And what
13 you can see here are two things. One is the foundation
14 wall system called Superior wall. It looks like it's got
15 insulation, that blue board, but it's also got what is
16 concrete studs basically. But it's a wall panel. That's
17 a Superior wall system. Sitting on top of the Superior
18 wall system, you see the insulation to the floor. At the
19 top of the photo is the wood floor system. So you've got
20 a concrete panel system for the foundation. On top of
21 that, you have wood framing. And this is what you
22 typically will see in a crawlspace. To the left in that
23 photo, you see a wall that's gray. That's the actual
24 basement wall. That's another Superior wall system, but
25 it goes full height. So to the left of that gray in the

1 photo would be the basement area, the livable space.

2 Q. All right. So as we're looking at this Superior
3 wall system, this is probably as good a time as any ...

4 MR. BELCHER: And by the way, Madam Clerk, do
5 we have the pointer?

6 THE CLERK: It's on the ...

7 Q. Just in case you need that, feel free to use it.

8 The Superior wall system, what we see there, we see
9 styrofoam insulation on the inside of it. What is on the
10 other side of that styrofoam insulation if you were to
11 dig down in front of the house?

12 A. On the opposite side of the blue styrofoam is
13 concrete. It's a concrete shell. So it's -- from the
14 outside, it's concrete from top to bottom. You'd have to
15 drill through it with a concrete drill to get through it.
16 But what you're looking at is the back side which is
17 insulated.

18 Q. All right. We'll talk a little bit more about that.
19 But I apologize for the interruption. Please proceed.

20 A. There are a series of photos I'm going to go through
21 fairly quickly. But what I wanted to give you is a sense
22 of what you see below the ground in the foundation. Here
23 we've got a wood floor system sitting on top of the
24 Superior wall system. And you can see here some evidence
25 of some staining that took place at some point in time.

1 At that point when I was there, it was dry. But at least
2 it had been wet at some point in time. And this is one
3 of the first indications to me of what might be a problem
4 with the foundations in that where you go from the
5 Superior wall system here and transition to a wood wall
6 system here, that joint is not well protected. And so it
7 can allow water to get in. So you see stain like you see
8 in this photo. And I saw that in a number of the
9 crawlspace areas that I went in.

10 Q. Okay. Can you please quantify or qualify that stain
11 as being severe or moderate, at least a cause for
12 concern?

13 A. In this condition, it's more of just something that
14 has discolored the wood. It was dry when I was there.
15 It certainly hasn't caused rot. Once you -- if you have
16 continued wetting at this point where it stays wet over a
17 period of months or years, then it can cause rot. But at
18 this current state, it wasn't causing a problem. I don't
19 know if the leaking occurred during construction before
20 the whole wall was assembled completely or after. But at
21 some point in time, there's been some leaking in that
22 joint.

23 Q. Okay. And based on that photograph and some others
24 of this intersection, your scope that we're going to talk
25 about here in a few minutes, has a way to make sure that

1 that condition, even in its mild condition here, is not
2 going happen anymore?

3 A. Yes. I saw that typical condition enough times to
4 tell me that that had to be addressed. So the scope of
5 repair includes a specific design for that joint.

6 Q. Carry on.

7 A. Again, a crawlspace. You can see someone over here.
8 You may remember some testimony about an owner who was
9 looking through from his basement up on a ladder and kind
10 of pointing and looking into the crawlspace where there
11 had been some leaking into that area. So that's an owner
12 standing on a ladder looking into the crawlspace area.
13 And there is some black plastic that I think the owner
14 had put on the ground or someone had put on the ground to
15 try to control some moisture there. The thing I want you
16 to see here is that the Superior wall system, which is
17 concrete and insulation, is in good shape. And in most
18 cases, the floor system is in good shape. What needs to
19 be addressed is the joint between the Superior wall
20 foundation system and the wood framing.

21 Q. Okay.

22 A. One of the things that also is a potential problem
23 that we saw in our test cuts -- and it's addressed in the
24 scope of repair -- is where different types of utilities
25 penetrate the wall. Here we've got a vent pipe going

1 through a wall. And if it's not sealed properly, you can
2 get some staining lines and water can get in. And you
3 can see some of the stain lines very faintly on the
4 bottom here as you're coming down the wall. So that's
5 the part of the -- one of the problems with the
6 foundation systems. You've got to address all the
7 penetrations.

8 Q. And we don't know who put that penetration in there,
9 do we?

10 A. Well, I believe it might it might have been one of
11 the subcontractors. But it's one of the utility trades.

12 Q. Okay. Go ahead, please.

13 A. Again, another typical picture showing this Superior
14 wall system and the wood framing above it. The exterior
15 wall system you may have heard reference to. Remember
16 the O.S.B. sheathing here. This is a product made by
17 L.P. It's a structural wall sheathing. Most places in
18 the foundation you'll see that this O.S.B. is in pretty
19 good shape. I just want to show you some pictures so you
20 can understand that it's not rotted everywhere. It's
21 rotted in some places, but the majority of it looks like
22 this.

23 Q. Okay.

24 A. This is a photo showing some waterproofing that had
25 been applied to the back of a sheathing board. At some

1 point in time, maybe original construction or followup
2 construction, someone added some waterproofing. There
3 was a problem at that point between the wood framing
4 system and the Superior wall system.

5 Q. Now that we've seen some other photographs there,
6 did you see within the last couple of days that somebody
7 had drilled a bunch of dryer vent penetrations into these
8 walls?

9 A. I did see those photos.

10 Q. Is this one of the places where that penetration had
11 been stopped up?

12 A. This might have been one of those or may have been
13 where a sewer drain went through the wall.

14 Q. Okay. Carry on.

15 A. A similar picture, the wall system sitting on a
16 Superior concrete system.

17 And another photo showing penetrations to the wall
18 system. And each of those penetrations have to be
19 addressed as part of a sound building envelope.

20 Q. And your scope has a line item to correct those
21 issues?

22 A. Yes.

23 Q. Okay.

24 A. Again, you can see in the crawlspace area here.
25 Right at the bottom, you see a sewer drain line going

1 through. Now, this is different than the other ones that
2 were in the pictures. This drain line is actually going
3 through the Superior wall system, so a hole had to have
4 been drilled or knocked through the concrete in order for
5 this pipe to be installed. And you can see around the
6 pipe there's some gray material, some grout, where it's
7 been sealed. So there are places that you have to seal
8 both the Superior wall system around the pipes or around
9 the wood sheathing system up above it.

10 So in addition to looking in the crawlspaces, I went
11 around the exterior of the buildings and made test cuts.
12 And I described those one through eighteen. The first of
13 which, this is test cut number one. What I'm showing
14 here is a side wall of the unit. And the Superior wall
15 system that we just saw in the crawlspace is the concrete
16 and styrofoam system. That wall system extends in this
17 picture on the side wall from down at the ground, which
18 is below the bottom of the picture, up to and above the
19 top of this window. So you see there's quite an area of
20 the Superior wall system above grade. And it's clad with
21 stone. So I wanted to see how the performance of the
22 windows were that were installed within the Superior wall
23 system. And that's why I took apart in test cut number
24 one one of these windows.

25 Q. Can we use this photograph real quick? Because you

1 were here for all of Mr. Hodgins testimony?

2 A. I was.

3 Q. All right. And Mr. Hodgins and I had a back-and-
4 forth about whether the Superior wall system provides a
5 straight floor plate across the top or whether it steps
6 down. Based on your review at this test cut, do you have
7 an opinion as to whether the conditions are the way I
8 drew them on that piece of paper or whether they are the
9 way Mr. Hodgins suggested?

10 A. I haven't see anything myself in that crawlspace
11 work or any photograph that tells me there's a step down.
12 Everything I've see suggests that the top of the panels
13 are level across and that the wood framing system sits on
14 the level tops of those Superior wall systems.

15 Q. Okay. And I know we're jumping ahead. But based on
16 what you heard Mr. Hodgins testimony to be, do you agree
17 with him that if that is all a Superior wall system, you
18 don't need to take the stone off the Superior wall
19 system?

20 A. At the point where I was making test cuts, I wanted
21 to confirm that. After my test cuts, I was convinced
22 that that was unnecessary.

23 Q. All right. Go ahead, please. I wanted to make that
24 point. I'm sure we'll get to it later.

25 A. Okay. So what I've done is take stone off the wall

1 adjacent to a window. And you can see behind the stone
2 some what's called a scratch coat. And then the face of
3 this Superior wall, this concrete wall system. And it's
4 got a wood window. You've got some wood blocking that's
5 been flashed so it can accept the window. What I wanted
6 to see was was water getting in between the stone and the
7 window. And what I found is that the wood framing around
8 the window was in good shape. The flashing that had been
9 installed with this window was keeping the water out, and
10 that there's no place for water to go here because it's
11 on the face of the structural wall system which is
12 concrete. So there's nothing that's going to rot back
13 here. The only thing that can rot back here would be
14 this wood block. It was in good shape.

15 This shows you sort of another view of a window jamb
16 adjacent to the stone.

17 So I also wanted to look and see how the trim was
18 performing. We've got cedar trim that surrounds the
19 windows. And I'm looking from the test cut up to the
20 bottom of the cedar trim. And so here is the window
21 flashing, that piece of trim that's been removed. And
22 here's the bottom of the top piece of flashing. You can
23 see the outline of where the painter did his work. And
24 the trim was also in good shape. So in test cut one,
25 what I found is that where stone was installed on

1 Superior wall system, there's not a problem for rot. And
2 it looked like in this case that the walls and the trim
3 around the windows installed in this unit were also
4 performing pretty well.

5 Q. And let me ask you because, you know, obviously one
6 of the big distinctions here is that Mr. Hodgkin wants to
7 pop out every single window because he takes exception to
8 it. Would that be a window that in your estimation would
9 need to be removed and replaced?

10 A. No. Based on the installation techniques for the
11 flashing of this window, it looked like it was well
12 flashed, and it was performing well. Now, if this window
13 had had rotting trim or there was evidence that the
14 fasteners were corroded or that somehow water was able to
15 get in around the corners of the window, that'd be a
16 different story. But this was a well-flashed window.

17 Q. All right.

18 A. This is test cut number four. So I looked at both
19 windows, walls. And I wanted to see now where the stone
20 intersects siding. So I pulled apart a corner which is a
21 typical weak point when you have siding coming to a
22 corner. Next slide.

23 Test cut number four. And so what I wanted to see
24 -- and you heard testimony a few days ago from Mr. Hodgkin
25 that there was some problems at this area. The water

1 table, which is the top of the stone where it meets the
2 siding, was not flashed properly. And so I could see
3 this problem very clearly here. You've got metal
4 flashing at the bottom of the siding. It sits on top of
5 this water table piece of strip and then stone, but it's
6 lapped improperly. And so here, I definitely agree that
7 this is a problem and it needed to be corrected.

8 Q. All right. And just so the jury's clear, you have
9 your fair share of photographs where this condition could
10 have looked a lot worse in some places and better in
11 others; fair?

12 A. That's fair enough.

13 Q. All right. And your presentation here today, while
14 it may not contain all the doom and gloom that Mr.
15 Hodgkin's did, your presentation here is directed at
16 showing the jury why your scope, your surgical scope, is
17 appropriate. Is that fair to say?

18 A. Well, I'm trying to show that there are a number of
19 places where there is water damage. And there are plenty
20 of pictures out there -- and I took a bunch of pictures.
21 I think those may have been placed into evidence or maybe
22 placed into evidence. There are a bunch of pictures I
23 took. But I also wanted to show that there are large
24 areas on the buildings at this project where moisture has
25 not penetrated and where the components are performing

1 well. And so in my mind, that justified a surgical
2 approach to the repair.

3 Q. And any deficiencies that are observed here in test
4 cut number four, your scope has a line item that
5 contemplates the complete repair of that condition?

6 A. It does. Even though at this particular location
7 there wasn't rot behind this weather-resistant barrier
8 and this trim wasn't rotted, this flashing installation
9 is incorrect. So it has the potential to cause a problem
10 over time. So it's part of the repair scope. It needs
11 to be fixed.

12 Q. So even though there's no damage there, your scope
13 is still going to go in there and make sure that it's
14 done right?

15 A. It is.

16 Q. And not just done right, but done right to the way
17 they currently do it; right?

18 A. Well, any repairs that are made need to meet the
19 current code and current industry standards.

20 Q. And is that type of condition there with that
21 reverse lapping of the flashing there a condition that
22 you typically see from construction of this age?

23 A. It varies. It really has to do with the knowledge
24 of the subcontractors who are doing the flashing. It's
25 not untypical in the buildings I look at. But, again, I

1 don't get called out to buildings that are performing
2 perfectly. I get called out to buildings that are having
3 problems. So it's a typical problem we see.

4 Q. Okay. And your scope not only contemplates fixing
5 that condition, but if there should be any damage behind
6 any walls where that condition is found, your scope also
7 includes repairing that damage; right?

8 A. It does. And you can see a little bit in the next
9 slide or two.

10 Q. Go on.

11 A. At the corner -- and it's a little bit hard in the
12 picture here. But right here next to my hand, when you
13 pull that weather-resistant barrier away at the corner,
14 there was the beginnings of some rot. There has been
15 enough water there when it was gray. And over time,
16 eventually it was going to cause rot. So this is a
17 typical leak point, this corner board, corner trim, so
18 that's what I was going to see is had it caused rot up
19 until then. I hadn't caused rot, but it was going to.
20 And that's why it needs to get fixed.

21 But this photo also shows something that I'm going
22 to talk about later in the presentation. This is gypsum
23 sheathing. So this wall is a rated wall assembly. It
24 means it has to have a one-hour rating to protect the
25 adjacent unit. And so you can see here wood sheathing,

1 and then you see gypsum sheathing, and then you see the
2 siding. I'll go more into detail about the design. But
3 in this particular location, there's weather-resistant
4 barrier covering the wood sheathing. And there's a
5 weather-resistant barrier covering the gypsum sheathing
6 as well.

7 Q. And to the extent that there is a problem in this,
8 depicted in this photograph, your scope, is it going to
9 require a survey of every intersection like this where
10 this problem may or may not occur?

11 A. Yeah. My scope of repair requires the contractor to
12 survey and then to prove to the person doing the
13 construction administration that all along the joint
14 between stone and siding that it's been looked at, any
15 rot that's found is replaced, and any flashing that's
16 reversed back gets properly installed.

17 Q. So you may find conditions better than this, you may
18 find conditions identically like this at similar places,
19 and you may find conditions that are worse. But your
20 scope says look at every single one of them and figure
21 out which ones needs fixed and fix them; fair?

22 A. That's fair enough. And I know there are some that
23 are worse, and there's some that Derek Hodgkin showed in
24 his presentation where there is some severe rot at some
25 of those locations.

- 1 Moving on to another test cut, test cut number six.
- 2 And now I've moved to look at ceilings on these back
- 3 porches where a lot of the focus from C.S.E. was on on
- 4 the amount of damage there. And so here I'm looking at
- 5 the ceiling underneath a porch. And so if you remember
- 6 the photograph that showed the back of the building,
- 7 you've got an open deck, and you've got a screened porch.
- 8 And the question I wanted to answer was is it rotted
- 9 everywhere, or is it rotted only on -- near the columns,
- 10 or is it rotted only underneath the open porches? Where
- 11 is it rotted? Where is good? And so test cut number six
- 12 is one of those where I looked first at a screened porch
- 13 where I didn't expect to find too much damage.
- 14 Q. And you've seen the photographs in Mr. Hodgins sort
- 15 of PowerPoint presentation in the opening argument. And,
- 16 you know, have you looked through these, the ones that
- 17 are in evidence?
- 18 A. I have.
- 19 Q. All right. And you've seen this picture that Mr.
- 20 Lyles stood up with at the beginning to tell the jury
- 21 what a mess this place is?
- 22 A. Yes, I've seen that.
- 23 Q. All right. And you've taken pictures that may be
- 24 similar to this in some places; right?
- 25 A. I have.

1 Q. All right. Well, let's show the jury what else you
2 found.

3 A. Okay. Again, just an overview of test cut number
4 six showing the cedar ceiling at the first floor, looking
5 up to the underside of the screened porch. And so I
6 wasn't surprised to see this. This is looking -- I am
7 standing on a ladder looking at the top side of the
8 ceiling beneath a screened porch. And you can see here
9 both the wood framing and the ceiling is clean, dry and
10 undamaged. And that's what I expected to find. I wanted
11 to make sure how far the damage had extended. Was it --
12 you know, where was the line between damage and no
13 damage? And this is the subfloor on top of the framing
14 at that same location. Again, no damage to that O.S.B.
15 sheathing. This area though is fairly protected from the
16 weather. And that's what you'd expect to find.

17 Also at the same test cut. Now I'm looking at the
18 back side of where the stone is located. And if you
19 remember in my presentation, there was a test cut that I
20 showed you that also Derek Hodgkin showed you where I
21 pulled the stone off and there was extensive rot.

22 Test cut number two and test cut number eighteen.
23 You know, there are places where it doesn't look clean
24 and dry like this, but it's actually rotted. So you
25 can't just assume that everywhere there's stone coming

1 together with a balcony it's rotted. You have to go do a
2 survey to figure it out. Because in this particular
3 picture, this beam has stone on the outside of it. It's
4 in good shape as well as the floor trusses and the
5 subfloor. So it's not universally damaged, although
6 there is damage there in other locations.

7 Q. So just so we're clear because we remember looking
8 at the outside of that where you had pulled the stone
9 off. And I know it may be a different location. But now
10 we're looking at the other side of that board. Maybe not
11 the exact same board.

12 A. Right.

13 Q. But this is looking -- this is from the inside
14 looking out. We've looked from the outside in, we've
15 seen damage on the face of that board; right?

16 A. Yes.

17 Q. All right. Now, unlike Mr. Hodgins' scope which
18 would say this is an uncovered deck, to take the whole
19 deck down, your scope is going to say we need to replace
20 this board if its rotted; right?

21 A. Well, my scope includes replacing whatever's
22 damaged.

23 Q. Right.

24 A. Either that first board, or if it's damage to the
25 floor system, it has to come out. Or it's damage to the

1 subfloor, it has to come out. Wherever there's water
2 damage, it has to come out. I think the main difference
3 -- and I'll talk about it in the scope of repairs. The
4 main difference is I don't assume that you have to tear
5 it all off just to deal with the places that are rotted.
6 My approach is you make the survey, you open it up, you
7 see where the rot is, you make a surgical repair. If
8 it's rotted, you pull it out and replace it. And then
9 you put it back together. And you put it back together
10 properly.

11 Q. Okay. Let's take a look at the next one.

12 A. Another test cut again. This is a balcony that had
13 a screened porch. This is the screened area. This is
14 the bottom where the concrete deck is. And I'm looking
15 at the stone area just below the concrete deck. So I'm
16 pulling the stone off. I'm trying to understand is where
17 it was rotted -- and I showed you earlier in the
18 presentation when I took the stone off and it was rotted
19 -- is that universal? Is it always rotted when it's
20 below the screened porch? And so here I pulled the stone
21 off, and the lath looks clean. It doesn't look corroded.
22 And I wanted to see again what the actual wood material
23 was beneath it. So I'm peeling off the layers. There's
24 the weather-resistant barrier. It's got some holes in it
25 from us pulling the lath off. And when I peel back the

1 weather-resistant barrier, you can see the wood exposed.

2 And you see when you pull all the layers back that the

3 wood underneath is not rotted. So it's -- sometimes it's

4 rotted; sometimes it's not. But you've got to go look

5 and find the places that are rotted.

6 Q. Now, Derek Hodgins' scope under these circumstances,

7 regardless of what he found back there, he's already

8 pulled that whole wall of stone off; is that fair?

9 A. His scope would include the stone in the area of the

10 open balconies.

11 Q. Open balconies?

12 A. And he gets -- this is right -- really at the

13 transition from screened porch to open balcony. So at

14 some point, he's taking it all out and replacing it all

15 new. And then at some point they can just, you know,

16 replace the stone there. He's got all the stone coming

17 off whether it's rotted or not, and then framing on the

18 open balconies whether it's rotted or not.

19 Q. Okay.

20 A. This is probably the best example I can show of the

21 stark contrast between rot and good wood. This is test

22 cut number nine. It's underneath an open balcony, so

23 it's exposed to the weather. It's an area where

24 generally there have been some problems. And so I'm

25 looking up underneath an open balcony. And there's a

1 photograph that I've taken. I think it's been entered
2 into evidence. It shows really bad rot. I mean, there's
3 water getting in. The floor system is in bad shape. But
4 it occurs right along the edge of the balcony. And then
5 if you survey and look at the rest of the whole balcony,
6 it looks like this. There is absolutely no evidence of
7 damage either on the subfloor or the framing of the
8 ceiling. So that's what this photo depicts is the rest
9 of the balcony that doesn't have the damage. And so that
10 goes to my scope of repairs. I want to find out where
11 it's damaged, fix it where it's damaged. If it's not, if
12 it's performing well, leave it in place.

13 Q. And just so we're clear, the Derek Hodgkin scope
14 would say we've already torn that down before we've
15 looked at it because all the porches have to be replaced?

16 A. All of these get replaced by pressure-treated
17 material whether it's this condition or whether it's
18 rotted.

19 Q. And you have more pictures than just these couple
20 that you're going to show us here today for example
21 purposes of this condition being persistent throughout
22 the whole complex; right?

23 A. Well, what I'm trying to show you is you've seen
24 plenty of pictures of rot. I don't want to show you more
25 pictures of rot. It's there, and it needs to be

1 addressed. I'm just trying to show you the contrast that
2 it's not all rotted and you need to figure out where the
3 rot is and fix where the rot is.

4 And this is another picture of the same test cut
5 looking a different direction. Again, you can see the
6 ceiling's not damaged and the floor system's not damaged
7 even though it's underneath an open balcony.

8 And just one more picture. Same thing looking at a
9 slightly different direction.

10 Another test cut, test cut eleven. This again is an
11 area that's very close to where a screened porch joins an
12 open balcony. And so I opened up the ceiling so I could
13 look both ways. I wanted to see is the open balcony a
14 problem. So you could see the ceiling which appears to
15 be in good shape in test cut eleven, undamaged by water.
16 But that's underneath the screened porch.

17 Next slide.

18 But as you get up into the overhead, climb a ladder,
19 you can look both ways. And you can see that along the
20 front side, not only is it undamaged in the screened
21 porch -- which you'd expect because it's fairly well
22 protected from the weather -- but on the other side,
23 there are places that were rotted and there are places
24 that are not rotted. And that's what I'm trying to show,
25 that it's not all rotted.

1 This is the open ground. I'm looking down from the
2 hole toward out. And then I'm looking toward an open
3 balcony where it's open to the weather. And I just
4 showed you a picture of where it was underneath the
5 screened porch. This is an area that typically has lots
6 of damage along the outer edge, bad rot. And you've
7 already seen some of those pictures. I mean, there's no
8 question it needs to be fixed. But the rest of it, the
9 framing and the subfloor and the ceiling, are in good
10 shape. There are some of these open balconies where
11 there's spot damage. Once you open it up and take the
12 concrete off, you can see where that spot damage is and
13 make the repairs.

14 Another test cut again. A screened porch. I opened
15 up the area. I wanted to see if universally do you have
16 a problem where the stone intersects the screened porch.
17 And what I found here was that the sheathing was not
18 damaged. You can see that there's no staining on the
19 weather-resistant barrier. The lath is not eroded.

20 That's just an area just to get you fixed that
21 there's two open panels of the screened porch here and
22 here. And this is sort of a column area that I was
23 opening up next to.

24 Again, after I had opened it up, I was sort of
25 reconstructing just to kind of get my series of photos to

1 show that the lath is in pretty good shape there.
2 There's no corrosion on this metal lath. And it had
3 weather-resistant barrier in layers, and it was doing an
4 adequate job of managing water. And, again, you may look
5 at that and say, well, it looks kind of dirty. Well, it
6 is kind of dirty. I mean, that's -- I don't know if it
7 came from original construction or not, but it's dry and
8 it's not rotted.

9 That's just an overview of the area of test cut
10 thirteen.

11 Again, another test cut, test cut fourteen. This is
12 under a deck, an open deck. So at this place I had very
13 bad rot at the columns on the outside of the balcony. I
14 took those pictures, and they've been submitted, I think,
15 into evidence. Pictures similar to what you saw from
16 Derek Hodgkin. But I also wanted to show this is -- it's
17 not rotted everywhere. You've got subfloor that's in
18 good shape.

19 Q. Now, let's slow down there for the jury. The
20 columns, those stone columns on the outside, you're going
21 to talk about those in your scope. I just want to make
22 sure that the jury's clear. Your scope, it anticipates
23 that you're going to take off all those columns and put
24 them back on; right?

25 A. Right.

1 Q. And you're going to frame them up and make sure that
2 the contractor does it right?

3 A. Yeah, the stone has to come off. The entire -- even
4 though I only looked at a few of the columns, I think I
5 saw six or maybe seven columns. But they're in bad
6 shape. They have to come out. The stone has to come
7 off, and they need to be reframed. And we've included
8 for our scope of repair -- even though I haven't seen
9 them, I saw consistent damage that included all ninety-
10 three columns. They all have to come out and be redone.

11 Q. Go ahead.

12 A. So, again, just to put meaning to the opening of the
13 ceiling area, it's a little bit dark. But what I'm
14 showing is the condition of the ceiling with floor
15 framing. And then you can start to see an isolated spot,
16 a dark spot right here. You know, that's damage. That's
17 rot. When the concrete deck, in our scope of repair, is
18 removed, then you can get to that subfloor and remove it,
19 cut it out and replace it. And that's what this photo's
20 trying to show, that you've got rot on the subfloor, but
21 you don't have rot on the adjacent floor framing or you
22 don't have rot on the ceiling there.

23 Agin, though, but if you look across the balcony to
24 the open area, the vast majority of the area is still
25 pretty pristine without staining and damage, although the

1 outside columns are in very bad shape.

2 Q. So we're shifting gears here, right, from the
3 porches?

4 A. Yes.

5 Q. Okay.

6 A. So I looked at a number of the porches because
7 that's where a lot of the emphasis from C.S.E. and where
8 homeowners had noticed problems. And I also wanted to
9 confirm what was going on in the waterproofing in the
10 foundation. So I opened up a number of holes. And what
11 I was trying to understand is what happens. Where does
12 the stone go? Where does the water get in? So I've dug
13 a hole here, test cut sixteen. And I'd measured from a
14 window that's right here to try to figure out where does
15 the wall change from wood framing to Superior wall
16 system. And what I found at this particular location is
17 the wood framing extends below grade, meaning -- I think
18 it's right around here is where there's wood. You've got
19 some wood framing buried in the ground. And then you
20 start your concrete. It's a very good place for water to
21 get in, especially if it's not properly waterproofed.
22 And so that was one of the things I confirmed in my mind.
23 We needed to have a special design for this type of
24 location.

25 Q. And everywhere you find that location of wood below

1 ground, whether it's been impacted by water intrusion or
2 not, you are going to remove stone, re-grade and address
3 those issues?

4 A. I am. And what I asked Watkins Services to do, even
5 though we know that not all thirty-seven units have
6 basements, so they're not all -- you have some slab on
7 grades. Even though Watkins has made some repairs to
8 four of those units, I told him to include for his
9 estimate's sake all thirty -- just assume it's thirty-
10 seven, you know. And based on the scope that we've given
11 you, include all thirty-seven even if it means you're
12 over-estimating the amount of work that's going to be
13 done. Because some of these places will be easy to get
14 to like this where it's about six or seven inches below
15 grade. Some places are going to require some more
16 digging. So it's going to even out, average out that you
17 -- you know, that you include all those.

18 Q. But your scope was designed such that it's going to
19 address any problems where that wood sill meets the
20 Superior wall system and those people, to the extent
21 they've had any leaks at that area, those leaks aren't
22 going to happen?

23 A. That's right.

24 Q. Okay.

25 A. Again, just other views of test cut number sixteen,

1 just trying to show where the grade or change was.

2 Here, I've taken -- test cut sixteen, taken the
3 stone off, and I've confirmed that I'm at the top of the
4 Superior wall system. So here is the transition point.
5 You've got concrete foundation here. Above it where this
6 point is is wood framing. And so basically, we've buried
7 that joint. And that joint is susceptible to moisture
8 intrusion and needs to have a special repair.

9 That's a closeup of the same picture shown just
10 previously.

11 And again.

12 Q. Second to the last one. We're almost to the end.

13 A. This is showing a front wall. The previous slide, I
14 was showing you a side wall. This is a front wall where
15 most of the moisture intrusion has occurred, as I
16 understand from homeowners' surveys. This is the parking
17 lot side of the units. And what you can see just to the
18 right is a dryer vent that goes through the wall. And
19 you remember from the photos I showed in the crawlspace,
20 you could see some utilities that went through the wood
21 sheathing. This is one of the vents that goes through
22 the wood sheathing. And some of those like the sewer
23 drains go through the Superior wall. So each place where
24 utilities penetrate the wall, you've got to seal them.

25 Next slide.

1 So here is this dryer vent. And you can see how
2 close it is to the ground. And down here, we have
3 Superior wall system. So we've got two conditions that
4 are a potential problem. One, you go from Superior wall
5 system which is concrete to wood framing right where the
6 grade changes, right where water potentially could be
7 allowed to seep in. So that needs to be waterproofed.
8 Then we've got this dryer vent, and we've got to make
9 sure that water can't splash off the ground up and around
10 that penetration. So that needs to be sealed and make
11 sure it can't get into the crawlspace. So those are two
12 separate conditions that need to be addressed.

13 Q. And they're addressed in your scope?

14 A. They are.

15 That's just another picture of drilling through the
16 stone, getting to the Superior wall system to confirm
17 where the top of the Superior wall system was.

18 Q. And just for the jury's sake, how deep down are you
19 having to dig on these test cuts?

20 A. At the bottom of this particular hole, I believe,
21 was eighteen inches into the ground. The actual location
22 -- we can back up two slides -- you can get a sense of
23 where -- this is where the grade is. The joint between
24 Superior wall system and wood framing is probably about
25 six or eight inches in the ground.

1 Q. So you didn't find any place where you'd have to dig
2 twelve to fifteen feet to address this condition?

3 A. No. Not this particular condition, no.

4 Q. Okay. You didn't find that this condition relates
5 to any place where you'd have to knock down a garage, did
6 you, to fix it?

7 A. No. I mean, this requires some trenching. And I
8 think that's the kind of work that Watkins Services has
9 already done on four of the units as part of their
10 emergency repair. But it's a trench. And it does
11 require some work to remove landscaping, but it's not a
12 big wide open hole where you have to knock down anything
13 adjacent to it.

14 Q. Okay.

15 A. So I had identified before the six steps that I went
16 through. And those are the first three steps. And so
17 after I'd done my field work, what I had to do was to
18 compare the field work with code requirements and
19 industry standards and then develop the scope of repairs.

20 So what I did -- and this is sort of the finished
21 product after the fact. I developed a scope of repair
22 twenty-two pages long. A lot of small print. But it
23 tells the contractor exactly what they've got to do, what
24 they've got to survey, and what they've got to fix. I
25 will tell you, though, there is no scope of repair that

1 can possibly tell you exactly where all the damage is.
2 As you can see from the pictures, you have to open the
3 walls up to find it. And so even though I've included
4 quantities for repair based on photographs from C.S.E.
5 and my own investigation, that's my best understanding of
6 where the problems are. As you get into the project,
7 there are going to be slight variances between building
8 to building, unit to unit, how much rot and how much
9 damage there is.

10 Q. And just so we're clear here, when you developed
11 your scope of repairs, you didn't just turn a blind eye
12 to what Mr. Hodgkin had done, did you, in his scope of
13 repairs? You took his scope of repairs and looked at it
14 as well; right?

15 A. What I did is I looked at each issue that C.S.E. had
16 identified. And I developed a specific repair for each
17 issue. First, I had to look at the code, then look at
18 industry standard, and then say what is a reasonable fix
19 for that based on what I've seen and what Derek Hodgkin
20 has seen. So, yes, every single item that he had listed
21 was addressed.

22 Q. And you've already heard that Mr. Hodgkin didn't look
23 at your -- or he may have looked at your scope, but it
24 didn't change any of his opinions; right?

25 A. I don't know to what extent it may have influenced

1 his opinions.

2 Q. Okay. All right. Well, go on and tell the jury --

3 Okay. Everything on this list addresses everything that
4 was on Mr. Hodgins' list of issues?

5 A. Right. This is sort of the grouping of the issues,
6 each in the twenty-two pages of scope. And each of those
7 bullet items goes into detail specific areas of the roof
8 or specific areas of the walls or specific areas of the
9 foundation that needs to be addressed and how to do the
10 survey and how to fix it.

11 Q. Okay. So what are we going to do?

12 A. Well, we'll start with roofing. And I'll go through
13 these just fairly quickly, trying to summarize twenty-two
14 pages of scope. In the roofing, what we're going to do
15 is we're going to require the contractor to survey all
16 the roof areas. They've got to confirm how the shingles
17 were fastened. Are there splices in the shingles? Is
18 there damage to the shingles? We need to make sure that
19 every unit is surveyed completely. And from there, you
20 can then identify the specific areas of each roof that
21 you actually have to make repairs to. But the first part
22 of that is a complete survey.

23 Now, I did a spot survey in the test cuts, eighteen
24 of them. Derek Hodgins did spot checking and test cuts.
25 And I would say that neither one of us did a hundred

1 percent survey. But what I've required in my scope of
2 repair is that the contractor, when they begin to do the
3 work for roofs or walls or foundation, has to do a
4 complete survey of every single wall, roof or area of the
5 foundation and to identify the specific areas to be
6 repaired.

7 Q. Is this something that a contractor would be paid to
8 do?

9 A. Yes. Actually, the reason I include it for the
10 contractor to put in their bids, they need to get paid
11 for the time and effort it takes to do the visual survey
12 or do the wall cuts to open up areas. And this
13 information would be useful to the person doing the
14 construction administration who could then make the
15 decisions on exactly what areas have to be repaired or
16 put back together.

17 Q. All right. And this survey step, is this a step
18 that Derek Hodgins has included in his repair scope?

19 A. He's got areas like that, yes. He's got some areas
20 where he calls for opening of roof areas, opening the
21 wall areas, to look and see what's there.

22 Q. Okay.

23 A. I would say that this -- in working with Watkins
24 Services, this is a step that they're used to seeing from
25 me when they're dealing with my scope. They're used to

1 having a series of surveys that they have to perform,
2 give me the data, and then I can make final decisions
3 about quantities. And so they're used to putting a price
4 on doing all of that work. It's a lot of work, but they
5 need to be paid for doing that work.

6 In addition to roofing, there's a roof/wall
7 intersections, one of our areas that really causes more
8 damage than just about any place else you see on
9 buildings. They have to survey each of the 106 roof/wall
10 intersections to confirm how much damage is located
11 beneath those. And then there's survey of every single
12 linear footage of eaves and rakes to check for the
13 underlayment, to check the lower-sloped roofs to make
14 sure there are two layers of underlayment as required by
15 code. That will determine which areas of the roof have
16 to be replaced.

17 Q. So we're not leaving any stones or shingles unturned
18 on this survey, are we?

19 A. The idea is to confirm what happens on every single
20 roof slope. And, again, also, there needs to be
21 confirmation through surveys of all the intersections of
22 siding to the roof to make sure that the flashing is
23 properly installed. Where it's not installed properly,
24 where it's missing, then that has to be corrected.

25 A similar approach for attics. There needs to be a

1 visual inspection that's included in the scope of repairs
2 for every single attic for all thirty-seven units to
3 confirm what's happening with the fire protection, what's
4 happening with the trusses, if there's any breakage. Are
5 there penetration problems? Are there roof attachment
6 problems? And that's included as a priced survey from
7 Watkins Services.

8 And then specifically in life safety, this is one of
9 the areas where I spend a good bit of time doing, I would
10 say, detailed analysis in working with both code
11 officials and with Underwriters Laboratory. And the
12 issue here is the wall between adjacent units is required
13 to be -- where it's a common wall inside, two-hour rated.
14 Where it's outside, where you have offset walls, it's got
15 to be a one-hour rated wall. And so what C.S.E. brought
16 to attention is there's some places where there's gypsum
17 wall board, which is part of the assembly, has been
18 damaged by water. And so it doesn't function well for
19 the rated wall assembly. And there's some other issues
20 about whether it's protective, whether it was weather-
21 resistant barrier or whether it was the proper type of
22 gypsum sheathing. And then there's even another question
23 that came up of whether those walls could have wood
24 oriented strand board on them or should they just be
25 studs and gypsum. So I spent a good bit of time

1 analyzing this.

2 And I -- one of the things I've done a good bit in
3 my career, and most recently this year, is to work with
4 Underwriters Laboratory. This year I traveled to Chicag,
5 along with Joe Walker who's working my computer over
6 there. We traveled to Chicago to work with U.L. in their
7 laboratory to build large scale mockups of assemblies and
8 then have those burn -- those test assemblies burned and
9 then to see the performance. And then actually after
10 doing a test to modify those designs and retest them, to
11 re-burn them basically in a two thousand degree huge kiln
12 basically to see how those assemblies work. So we've had
13 a real appreciation of how wall assemblies that are rated
14 are supposed to perform. So we spent a good time
15 analyzing that.

16 One of the things that we wanted to look at was what
17 does the code require. And you can see this is similar
18 to a slide that was in Derek Hodgins presentation.
19 You've got to have at least a one-hour rated wall where
20 these are exterior. And you have to have a two-hour
21 rated wall where it's a common wall basically on the
22 interiors of the units. And that's out of the 2000
23 International Residential Code.

24 So I wanted to look at whether the components -- can
25 what's built there -- does it meet the code? Does it

1 meet the U.L. standards, or does it need to be changed?

2 And so the first place I looked, I wanted to see whether

3 the sheathing material, the O.S.B. material, was proper.

4 There was a question from C.S.E. that that wasn't the

5 same as what the U.L., the Underwriters Laboratory, said

6 is the standard. The plans had a certain wall component

7 that was called for. And that wood sheathing was added.

8 And the inspector didn't catch it, and so that was wrong.

9 And so I went back and wanted to do the research.

10 What's shown here is an engineering evaluation

11 report. And this is how manufacturers tell code

12 officials if their product meets the code. And you can

13 see here, this is a report from the manufacturers of

14 O.S.B. sheathing and plywood that says this product meets

15 the 2000 I.B.C., International Building Code, and the

16 2000 I.R.C., International Residential Code, which is the

17 code basis for this project, meaning that not only is it

18 a good product to use, but it meets the code. And it

19 tells you in their engineering evaluation report that you

20 can put these panels in -- you'll notice the second to

21 the last line -- in fire-resistant construction. And so

22 that's the first step to understanding was the O.S.B.

23 proper.

24 Next slide.

25 So then you look in the rest of the report, and you

1 can see that it's been tested and it's permitted to be
2 installed between the fire protection and the wood studs
3 on either of the interior or exterior side of the fire-
4 rated wood frame wall partition assemblies. So this
5 confirmed that not only are these a good idea for
6 structural -- you know, for constructural consideration
7 to have this O.S.B. sheathing on the wall, it's actually
8 been tested and it meets the code. And so the question
9 of whether O.S.B. sheathing is proper was answered,
10 meaning it's okay to have it there. And, in fact, it
11 adds to the fire resistance of the wall. And we'll show
12 that on a later slide.

13 Q. And just for the jury's clarification here, this is
14 that picture that we've seen a half a dozen times or more
15 of where there's what looks like drywall on the outside
16 of the wall, then some mudding and then some plywood;
17 right? That's the condition we're talking about?

18 A. Well, it's the condition. The question is should
19 there have been wood sheathing on that wall at all?
20 Should there have just been wood studs and then gypsum
21 sheathing? The condition that you just mentioned where
22 we have a section of O.S.B. sheathing and we have a
23 section that has gyp board, that's a slightly different
24 condition. That actually is a defect where that wood
25 sheathing should be covered by the gypsum. I mean, it

1 needs to be corrected.

2 Q. Okay.

3 A. But the basic question which I was trying to answer,
4 do you have to take all that gypsum off and then you have
5 to take all that O.S.B. sheathing off and get back to the
6 studs in order to meet the code. And the answer to that
7 is no. In fact, it meets an assembly that's called
8 Underwriters Laboratory assembly three forty-four. This
9 is actually a tested assembly that Underwriters
10 Laboratory puts out as one of their close to two thousand
11 assemblies and shows exactly that.

12 Next slide.

13 There are five components to it. One, you've got
14 wood studs. It has a one. Two, you've got the wood
15 sheathing, which is O.S.B., which is on the outside of
16 the building. Three, you've got fiberglass insulation in
17 the wall. And then two layers, four and five, of gypsum
18 board, one on the interior, one on the exterior. And the
19 building code tells you how you're allowed to look at the
20 individual component fire resistance and add those up to
21 get a component on, you know, assembly fire resistance.
22 And so U.L. has already done that. They've already
23 tested this assembly. They've given it their Good
24 Housekeeping Seal of Approval. And they call it U.L.
25 three forty-four so that the industry doesn't have to go

1 back and check on it. But what I did was I went back and
2 said, "Okay. Let's just look at what the components are.
3 And do we get to a minimum of sixty minutes or a one-hour
4 rating?" And so when you add the components up, either
5 from the inside if the fire was on the inside or from the
6 outside burning from the outside, you get more than
7 what's required. You get a seventy-five-minute wall,
8 which is twenty-five percent more fire resistance than
9 you're required to have.

10 Q. So when your scope is implemented to address the
11 firewall issues in that picture that we've seen a half a
12 dozen times, you're going to fix -- your scope is going
13 to fix that everywhere that it exists, and it's going to
14 make it even better than it's required by code?

15 A. Yes. You've got to -- where the gypsum is damaged
16 by water, that's got to be replaced. And where there's
17 O.S.B. sheathing that's not covered by gypsum, it has to
18 be covered by gypsum. And then you have to follow the
19 rest of the instructions which are to add mud and make
20 sure your fasteners are spaced properly.

21 Q. And that's all part of the scope that you've given
22 to Mr. Watkins, and he understands all of that?

23 A. Well, the first part of that is to survey those
24 walls and find out where the damage is. And then we've
25 included areas where we know are damaged underneath

1 roof/wall intersections. If they find additional
2 problems, meaning that like the picture where the
3 plywood's not covered by gypsum, to the extent you find
4 more of those, then that also has to be corrected.

5 Q. Okay.

6 A. So the bottom line is the first part of -- the first
7 answer was that it's okay to have O.S.B. sheathing in
8 this wall assembly. It actually helps the fire rating,
9 and you meet that one-hour rating of the wall as required
10 by code.

11 So this is just a graphic pulling out the building
12 code that tells you in the building code how you can add
13 up the different components to see if your wall actually
14 meets the one-hour rating. And so that's what we've
15 done. We've just shown some slides. And so this is not
16 me making up the minutes. This is what the building code
17 tells you you can rely on from testing for the rated
18 assembly. But not only is your issue with water-damaged
19 gypsum sheathing and the potential that some places where
20 plywood or O.S.B. is not covered by gypsum sheathing,
21 there's also a problem with some windows. And you may
22 have heard in Derek Hodgins's presentation that these
23 windows weren't shown on the plans, but they got built
24 this way. So you've got some windows in a fire-rated
25 wall that are what's known as unprotected. They don't

1 have a rating. And so you've got to deal with this in
2 some way in order to have the entire wall be rated.
3 Either you have to take those windows out and you
4 eliminate them basically and you have to put your wall
5 back with wood studs and sheathing and you've lost your
6 window, or you have to replace those windows that are
7 currently there with some type of rated window. And you
8 have to talk to the building officials to make sure they
9 understand that these windows exists and that you are
10 correcting this problem.

11 What we've included is two things in the scope of
12 repair. One is some design work, a lump sum to do the
13 investigation, to meet with building officials, to get
14 their buy-in on what they'll accept, and also to meet
15 with the homeowners. They've got to accept what goes in
16 there. I don't think a lot of homeowners would really
17 appreciate just losing their windows because it's in a
18 firewall. There are other products that are windows that
19 would be acceptable there. And they're expensive, but
20 they can be purchased and put in those openings.

21 Q. And as far as those windows, assuming that they're
22 original construction, the building official has probably
23 already seen that condition out there. Fair to say?

24 A. I think at least on his final inspection they would
25 have seen them. They may not have seen them on some of

1 the rough-in inspections. But on a final, they should
2 have been in place, yes.

3 Q. And that's obviously a fire-rated wall because it's
4 a wall that intersects with another unit; right?

5 A. It is.

6 Q. All right. So the building official saw it and it
7 didn't raise an alarm to him, or those windows wouldn't
8 be there. Is that a fair assessment based on your
9 experience?

10 A. Well, he either overlooked it or just wasn't aware.
11 But it is -- it's a reasonable concern. It does need to
12 be corrected because it's a rated wall. And you do want
13 to establish that one-hour rating throughout that wall.

14 Q. Okay. And your scope is going to take care of those
15 windows?

16 A. Yeah. It doesn't actually provide for the final fix
17 because that's going to be a process of negotiation with
18 the building official and with the homeowners to figure
19 out how to make this thing work. But it does provide for
20 the money to move toward that solution.

21 Q. Okay. Thank you.

22 A. So basically what I'm trying to do in the scope of
23 repair as it relates to fire safety is get rid of the
24 water damage, especially to the gypsum sheathing, then to
25 make sure the gypsum sheathing that's there is properly

1 finished, it's taped and mudded and the fasteners are
2 there, and then to make sure that any places where it's
3 missing that it's put up so that you don't have
4 discontinuity of the gypsum sheathing. That's the goal
5 of the scope of repairs on the fire safety, life safety.

6 And I'll move through these, not to move too slowly.
7 But the exterior walls also get addressed around windows,
8 around stone to siding joints, below-ground waterproofing
9 and so on. I'm just showing on these elevations some of
10 the areas that we've included the surveys for the
11 contractor to do and then to make those repairs when the
12 problems are found.

13 Q. All right. And you've been communicating with J.R.
14 about windows and how he needs to survey them all; right?

15 A. That's correct.

16 Q. And J.R. knows how to put a window back in?

17 A. He does.

18 Q. All right. And you have developed, based on your
19 observation, experience and expertise, a certain quantity
20 of windows that you believe, at a maximum, are going to
21 require some sort of additional treatment to make them
22 code compliant; is that correct?

23 A. That is. There are, I believe, I think a total of
24 three hundred and sixty-eight or close to there. Maybe
25 three hundred and seventy windows in the project. Based

1 on the work, less than a dozen or so problem windows that
2 Derek identified, plus the evaluation I did, I don't
3 believe that all the windows have problems. But I
4 included a total of two hundred windows to remove and
5 reset and reflash, even though I think that's way high.
6 I did want to make sure there's plenty of money in the
7 contractor's estimate to make those repairs.

8 Q. Even though they may pull the trim off of these
9 windows and realize that only five or six of them need to
10 be repaired, under your scope and the estimate you
11 reviewed from Mr. Watkins, the homeowners are going to
12 have plenty of money to do that.

13 A. I think so. Some windows are going to require more
14 work than others. Some you're going to have some rot and
15 have some stud damage, and it's going to take more
16 effort. Some you're going to pull the trim and look at
17 them, like my test cut number one where I pulled the trim
18 off and it was performing fine. There's nothing to do
19 there. You know, put the trim back and move on to the
20 next window.

21 Q. All right. And you're comfortable with the
22 quantities that you've placed in this scope of repair for
23 -- survey them all. But your quantities that you've
24 given to Mr. Watkins, you're comfortable with that?
25 That's going to be a worst-case scenario that what the

1 homeowners are going to find?

2 A. I think the quantity of windows that are included
3 overestimates the problem. But there's also a
4 substantial contingency that I've asked Watkins to
5 include to make sure of whether it's windows or whether
6 it's walls, that any overage is covered by a contingency.

7 Q. Okay. So you feel confident based on that
8 contingency and the quantities you've provided that we're
9 going to address that window issue?

10 A. Yes.

11 Q. All right. Next.

12 A. This graphic is just to show you that in addition to
13 the windows and the stone work, we're also going to the
14 repair work in the balconies and look for issues related
15 to sheathing fastening or siding fastening or missing
16 flashing or improperly installed flashing. So all those
17 things that go into a wall assembly need to be installed
18 properly. Whether they're not there or they're installed
19 improperly, they need to be fixed.

20 This graphic also just shows that we're not
21 including removal of all stone. We're including removing
22 stone veneer where it's on rotted components like the
23 back balconies. And we're including removing stone to
24 check for damage where the intersection between siding
25 and stone occurs. But where we have stone installed on a

1 Superior wall system, which is the concrete product, the
2 foundation, we don't see any need to remove it. We will
3 take off some stone to incorporate some flashing so that
4 it terminates properly. We're not going to just
5 wholesale remove all the stone.

6 One question that came up and that we kicked around
7 for quite a while as we we're developing the scope of
8 repair was what is required for waterproofing or damp-
9 proofing a foundation. And so I again turned to the
10 industry standards for evaluation reports. And I looked
11 at what Superior wall had provided in terms of their
12 evaluation report to the code officials to document how
13 their product performs. And this is their evaluation
14 report. And what it says is their product is basically
15 in conformance with the 2000 International Residential
16 Code, which is the standard for the construction of this
17 project. They also say that you can see here on the
18 damp-proofing, Superior walls have been evaluated as an
19 alternate method of providing foundation wall damp-
20 proofing. Therefore, no additional damp-proofing is
21 required which means their evaluation and testing by an
22 independent agency, a testing lab, have found that
23 they're sufficiently damp-proof as a product once they
24 were cast. That they don't need to have extra coating.
25 The code calls for damp-proofing of concrete walls and

1 masonry walls, you know, that are cast in place. But the
2 Superior wall system as a factory made product doesn't
3 need the additional damp-proofing. Where we're going to
4 do waterproofing is the joint between the Superior wall
5 system and the wood framing which has been shown to be a
6 leak point.

7 Q. And as we sit here today, you have no evidence that
8 would suggest that the Superior walls were failing in
9 their damp-proofing capabilities, do you?

10 A. There was some testimony I heard that possibly the
11 panel joints could be a problem or possibly at the bottom
12 of the walls could be a problem. But based on the leak
13 patterns that I saw in the crawlspaces, it looks like the
14 real problem is penetrations through the Superior wall
15 system or the joint between the Superior wall system and
16 the wood framing. That's the problem.

17 Q. But to go back with some sort of liquid applied
18 membrane or some other damp-proofing simply isn't
19 required?

20 A. It's not required by code, and it's not required
21 based on what I've seen in the field.

22 Q. All right. And that document right there isn't just
23 some sales pitch by Superior wall systems, is it?

24 A. No. It's an evaluation report that the code
25 officials rely on to allow a product like Superior wall

1 systems to be used instead of cast-in-place concrete.

2 So I've talked a couple of times today about this
3 joint between the Superior wall and the wood framing. We
4 had to come up with a design because there's no standard
5 detail to take care of that. So what's depicted here is
6 my design to handle that joint. And it's hard to see.

7 But basically what it does is incorporates multiple
8 layers to sufficiently manage the water. It comes down
9 the wall either between the stone or between the siding.
10 And what you're trying to do is make sure that water gets
11 to the outside and drains and doesn't flow back into the
12 crawlspace. And so that's a detail that handles that.
13 And that's what needs to take place at those joints
14 around the buildings.

15 Q. And when that detail is implemented by Watkins
16 Services, we're going to alleviate the issue of water
17 being able to spill in over that Superior wall system and
18 cause the damage that these people have experienced?

19 A. It will. And it's got to work in conjunction with
20 sealing all penetrations in the wall too.

21 Q. Okay.

22 A. This is some more information from Superior walls.
23 This comes under the sort of the marketing material that
24 Superior walls has. I looked at this first. And, you
25 know, it's interesting. It still falls in the category

1 of marketing material. But it basically reiterates what
2 the laboratory evaluation report says which is no
3 additional damp-proofing is required. And you see in
4 additional material from Superior wall the same thing.
5 We're also addressing windows and doors which we've
6 talked about. All windows and doors need to be surveyed
7 to make sure there's no rot, no moisture intrusion.
8 We've included repairs on a total of two hundred, and we
9 have some that are going to have to come out likely in
10 the firewall, either get replaced by a better type window
11 or come out altogether.

12 The last thing, the last major thing, is the
13 balconies and porches. Basically, we already know and
14 have already determined that these columns that are shown
15 in the middle are all going to have to be replaced.
16 They're just not working. And the areas around those,
17 those arched areas, are also going to have to be replaced
18 because we found damage there too. The area to the
19 right, which is the screened porch, we found very little
20 damage there. And the area between the outside face of
21 the balcony here and the back side where the doors are,
22 you can find areas where there may be spot damage, but
23 it's not uniformly rotted. So that's why we've included
24 replacing the columns, replacing any of the rot damage
25 here, removing and replacing the concrete topping and

1 waterproofing, but by and large, leaving all the
2 undamaged floor framing in place if it's not rotted or
3 hasn't been moisture damaged.

4 Q. And just so we're clear, your scope and Mr. Watkins'
5 estimate contemplates, in fact requires, moving not just
6 the stone off of those columns right there, those two or
7 three columns, but also taking the wood out from behind
8 there whether it's rotted or not and putting it back in
9 there and building that column to where it's not going to
10 be damaged again?

11 A. Yes. And including anything that ties into it like
12 these beams here. One thing this picture does kind of
13 highlight, it shows you that this balcony -- and you'll
14 see this kind of stain pattern -- shows you that the
15 water is running off of the front of that, which is what
16 you want it to do. It's got some slope to it so the
17 water drains off this balcony, but it's not being managed
18 properly. But that's what you want water to do, run off
19 the edge of the balcony. It's not like there's a --
20 there are spot locations where there are low spots, but
21 it's not an overall slope problem throughout the project.

22 Q. Okay. And just real quick -- and you may deal with
23 it here in a minute. But Mr. Hodgkin had an issue with
24 horizontal stone attachment. And I don't know if you've
25 hit it with a slide. But I just want you to show the

1 jury what your scope of repair does with the horizontal
2 stone attachment at these archways.

3 A. What I call it in my scope is overhead stone.

4 Basically, this is material that is -- it's mortared on,
5 but it's being mortared on, you know, in a fashion so
6 it's just being suspended by the mortar. And so we've
7 included replacing any suspended stone here. We call it
8 overhead stone because I think it represents a potential
9 safety problem. And that occurs at these type arches.

10 Q. Hasn't happened yet to your knowledge?

11 A. No. I think Derek Hodgkin pointed to at least one
12 piece of stone. I'm not sure it was an arch. But he saw
13 one piece of stone, maybe two, that had come off
14 somewhere. But the real problem is the fact that it's
15 hanging basically under those arches.

16 Q. And even though that may not be a problem for code
17 or industry standard or even water damaging or anything,
18 it's just something we're going to fix for the homeowners
19 so that it's not a concern in the future. Fair to say?

20 A. Right. It just comes under the common sense
21 principle. It just doesn't make good sense to have stone
22 hung on an arch.

23 Q. With gravity?

24 A. Yes.

25 Q. Okay. Next slide.

1 A. So the slides and the code information in the
2 photographs are meant to depict the process I went
3 through to develop a scope of repairs. And then the
4 process was to have an interactive conversation with
5 Watkins Services where I ask them questions. Do you
6 understand the scope? And they would ask me questions,
7 well, I do, but I don't understand the quantity. And it
8 was a back and forth process to a point where I believe
9 they understand my scope and they believe they understand
10 my scope so they can price it.

11 Q. All right. And my pad thingy went dead. How many
12 more slides do you have here?

13 A. I think this might be the next to last slide.

14 Q. Okay. The scope that you've prepared, do you have a
15 slide that sort of delineates exactly what the scope is?

16 A. I have a slide that shows the front page of the
17 twenty-two pages, and I have the ones that show in
18 bulleted forms the major categories.

19 Q. Okay. Well, I'll let you finish, and then I'll just
20 ask you a couple of final questions about your scope.

21 A. Okay.

22 Q. But go ahead and tell us about the scope that you
23 have here.

24 A. These are the overriding goals of my scope of
25 repair. One, we want to make sure that these homes,

1 these units, are safe and meet the code, especially as it
2 relates to fire safety. Two, that the damage that's
3 occurred due to moisture intrusion is fixed. And three,
4 that even though you can't build a moisture/waterproof
5 structure that's going to last forever waterproofed. You
6 can deal and provide a moisture-resistant structure
7 that's going to give you good durable life. And so
8 that's what we want to do. And that's what I think that
9 scope of repair does do.

10 Q. Now, sir, I just want to sort of sum it all up here
11 for the jury because they've been there for about an hour
12 and a half listening to you.

13 THE COURT: You want to turn the lights on?

14 MR. BELCHER: Yes, please. Thank you, Your
15 Honor.

16 Q. You came to this project the spring of last year?

17 A. That's right.

18 Q. And you've poured a lot of time and effort into not
19 just this PowerPoint presentation, but into the scope of
20 repairs, into your investigation, into determining what
21 needs to be done to these buildings; fair?

22 A. That's a fair assessment.

23 Q. All right. I don't know if you were here or not
24 when Joe and Jeff Bostic testified about what they wanted
25 for their company. But they said they wanted these

1 buildings done right. Okay? Did you hear that?

2 A. I did hear that.

3 Q. All right. Is your scope going to make these
4 buildings right?

5 A. I think it will.

6 Q. Okay. Your scope is going to make sure that all the
7 complaints that the homeowners have, that Derek Hodgkin
8 has brought to you and that you've investigated yourself,
9 your scope is going to make the repairs necessary to
10 address every issue that the plaintiffs have raised?

11 A. As it relates to the building envelope, yes, it has.
12 I'm not aware of any other complaints. But in the focus
13 of C.S.E., it was the building envelope.

14 Q. Right. I mean, the homes could be on a fault line
15 and they could fall into the middle of the earth next
16 week, but that's not part of your scope?

17 A. No, it's not.

18 Q. All right. But your scope is determined to make the
19 repairs necessary to make these buildings water resistant
20 per code, per industry standards, and give these people
21 the buildings that they thought they were getting?

22 A. Yes. That's fair.

23 Q. And we haven't made any opinions or haven't ask you
24 to make any opinions about who's at fault for what part
25 of construction or which general contractor bears

1 responsibility. Your job has solely been to determine
2 for Bostic Construction and Bostic Brothers what scope is
3 absolutely necessary to get these buildings in the way
4 that these people deserve?

5 A. That's the way I approached the assessment.

6 Q. All right.

7 MR. BELCHER: Thank you, Your Honor.

8 Q. Thank you.

9 And finally, just from a technical standpoint,
10 you've expressed opinions today about the scope of repair
11 necessary, the method of repair, the issues that exist at
12 Stoneledge. You understand that you've been qualified as
13 an expert?

14 A. I do.

15 Q. And you understand that the opinions that you
16 expressed here to the jury for them to be treated as
17 expert opinions, you have to testify to those opinions to
18 a reasonable degree of scientific certainty within your
19 field of expertise?

20 A. Yes, I do.

21 Q. And the opinions to which you have testified today
22 with regard to those, do you hold those opinions to a
23 reasonable degree of scientific certainty within your
24 field of expertise?

25 A. Yes, I do.

1 Q. All right. Thank you. No further questions.

2 MR. LYLES: May we take a short break, Your
3 Honor?

4 THE COURT: Certainly.

5 MR. LYLES: Thank you.

6 THE COURT: All right. Mr. Foreman, ladies and
7 gentlemen of the jury, let's do take a short break. And
8 when we come back, we'll complete this witness. Again,
9 do not undertake the discussion of the case among
10 yourselves in any way. Thank you.

11 (WHEREUPON, the jury exited the open court at
12 approximately 3:41 p.m.)

13 THE COURT: All right. Anything from the
14 plaintiff before we take a break?

15 MR. LYLES: No, Your Honor.

16 THE COURT: Anything from the defendants?

17 MR. BELCHER: No, Your Honor.

18 THE COURT: All right. Very good. We'll stand
19 at ease.

20 Mr. Moore, you're under oath, so you cannot discuss
21 your testimony with anyone including the attorneys or
22 anyone else.

23 THE WITNESS: Yes, Your Honor.

24 (WHEREUPON, court stood at recess for a short
25 break.)

1 THE COURT: All right. Ask the jury to join
2 us, please.

3 (WHEREUPON, the jury entered the open court at
4 approximately 3:55 p.m.)

5 THE COURT: All right. Let the record reflect
6 the jury and alternate are in the jury box.

7 We will now have the cross-examination.

8 Mr. Lyles?

9 MR. LYLES: Yes, sir, Your Honor. Thank you
10 very much.

11 CROSS-EXAMINATION

12 BY MR. LYLES:

13 Q. May I call you Rick too?

14 A. Yes.

15 Q. Thank you. The only problem is it's cross-
16 examination, and I'm trying to -- it's a little bit
17 disorganized in my thought processes. So bear with me if
18 you will. Okay?

19 A. Okay.

20 Q. All right. The first thing I want to do is go
21 through some of the photographs that you've shown in your
22 presentation because I want to ask you a few questions
23 about those. Okay?

24 A. All right.

25 THE COURT: Do you need the lights?

1 MR. LYLES: I think -- yes, sir, that would be
2 good if we could dim the lights.

3 Q. Rick, your test cut one is one of the photographs
4 that you showed in your presentation; is that right?

5 A. That's right.

6 Q. And in test cut one, it's one of eighteen cuts that
7 you made. And I think that you showed photographs from a
8 total of about seven cuts, eight cuts. Does that sound
9 right?

10 A. That may be right.

11 Q. Okay. And test cut one shows a window?

12 A. Yes.

13 Q. And that window is installed in a concrete wall?

14 A. Yes.

15 Q. And the installation of that window appears to be
16 good, I think you said?

17 A. Yes.

18 Q. And you didn't find any evidence of rot or
19 deterioration?

20 A. Right.

21 Q. And you wouldn't expect to find rot and
22 deterioration in a concrete wall obviously?

23 A. Well, unless it had resulted into the wood blocking
24 that's around the window.

25 Q. Okay. And how many such windows are there in phase

1 one at Stoneledge?

2 A. I don't know the total number.

3 Q. Do you think it would be more than three? I'm
4 talking about windows that are installed in concrete
5 walls.

6 A. I don't know the total number.

7 Q. And there are a total of, I think, three hundred and
8 eighty-two windows in phase one at Stoneledge. Does that
9 seem right to you?

10 A. I've heard a number that's around three hundred and
11 seventy, but if you've counted them, I believe you. It's
12 three hundred and eighty.

13 Q. And I think, Mr. Moore, this is the only window that
14 you show picture of in terms of taking stone off and
15 whatnot around the window; is that right?

16 A. That's right.

17 Q. Now, you indicated in your testimony that you did
18 not see any evidence that the foundation wall was
19 stepped; is that right?

20 A. Correct. Right.

21 Q. But the only place you took off stone was in this
22 top right-hand corner; is that right?

23 A. Well, at that test cut, that's correct. But there
24 were other places where I was able to see the top of the
25 Superior wall.

1 Q. And the top of the Superior wall went above grade?

2 A. That's right.

3 Q. And how far above grade did it go?

4 A. Well, the places where it actually -- the other
5 places were in a crawlspace where it was generally just
6 below grade. And then as it turns the corner, because
7 the slope of land, it comes out of grade. And it comes
8 -- that you see in that picture right here.

9 Q. Well, that was going to be my point because this is
10 on the sidewalk; right?

11 A. It is.

12 Q. So if you're standing with this wall to your right
13 shoulder, you'd be looking out at the lake; correct?

14 A. Off to the left is the lake.

15 Q. Okay. And so there are only eight buildings out
16 there; right?

17 A. Right.

18 Q. So there are only sixteen total side walls in all of
19 the buildings; right? Of all of phase one?

20 A. Well, they're offset walls, so it's more than
21 sixteen. You've got offset between units.

22 Q. And did you try to calculate or determine what
23 percentage of the total stone in phase one is installed
24 over foundation walls?

25 A. No, I didn't.

1 Q. Would you agree with me that it's a small percentage
2 of the stone?

3 A. No. I think there's a good bit of stone on the side
4 walls and on the back of the balconies and around the
5 columns.

6 Q. Well, I'm specifically referring to stone that's
7 installed on concrete.

8 A. Okay.

9 Q. And would you agree with me that it's a small
10 percentage of the stone, the total stone at Stoneledge,
11 that's installed on concrete?

12 A. I'm not sure you what you mean by little, but I
13 think there's probably more stone installed on wood
14 framing than on concrete. But I'm not sure I agree with
15 little. But I'm not sure how you're characterizing
16 little.

17 MR. LYLES: Let's see. The next photograph.
18 Go to this one. It's test cut eight. Thank you again
19 for doing that.

20 Q. Mr. Moore, the next photograph I wanted to ask you
21 about is test cut eight. You see that?

22 A. I do.

23 MR. LYLES: And if you could go down to the
24 next photograph and maybe one more beyond that?

25 Q. And you made some test cuts there, and I think ---

1 MR. LYLES: Keep going.

2 Q. And ultimately ---

3 MR. LYLES: Keep going again. Keep going.

4 Q. Ultimately, you agreed or you demonstrated to the
5 jury that the wood beneath the stone in test cut eight
6 seemed to be in good condition?

7 A. Yes, it did.

8 Q. And the wood beneath the stone in test cut eight is
9 beneath the screened porch?

10 A. It is.

11 Q. And you heard Mr. Hodgkin testify that he doesn't
12 call for the repair of the framing beneath the screened
13 porches?

14 A. I did.

15 Q. Okay. And this is test cut thirteen, which is also
16 taken beneath a screened porch?

17 A. It is.

18 Q. And so this is framing that Mr. Hodgkin agrees needs
19 to be left in place?

20 A. Right. But the issue of contrast is I also showed
21 test cut eighteen which is a similar location where there
22 is rot. So you really can find places where there is
23 rot, even beneath the screened porch.

24 Q. Okay. And then let me try to finish up with -- now,
25 Mr. Moore, I will tell you candidly, this one caught me

1 by surprise because I don't think I have seen this before
2 today. But there is a -- and this related to the
3 firewalls that has gotten so much attention this week?

4 A. It does.

5 Q. And you agree with me that you've seen photographs
6 from Mr. Hodgkin and perhaps others of O.S.B. sheathing in
7 the firewalls?

8 A. I have.

9 Q. Okay. And you have been explaining to the jury that
10 O.S.B. sheathing contained as a component of a rated wall
11 is okay?

12 A. If it's installed properly, yes, sir.

13 Q. Okay. And, in fact, what it says is, it's okay if
14 the -- let's see the structural -- A.P.A. structural use
15 panels are permitted to be installed between the fire
16 protection and the wood studs on either the interior or
17 exterior side of fire-rated wood frame wall and partition
18 assemblies; is that right?

19 A. Yes.

20 Q. And so the O.S.B. sheathing needs to be covered by
21 the fire protection?

22 A. It absolutely does.

23 Q. And the fire protection is the gypsum sheathing; is
24 that right?

25 A. Well, no. Each of the components in the wall

1 carries a number of minutes of fire protection. And the
2 slide that I had that showed the five different
3 components include the gypsum, the studs, the insulation,
4 and the O.S.B. panel.

5 Q. Okay. Is that the slide you're referring to?

6 A. Right.

7 Q. Okay. And so what you're saying is O.S.B. sheathing
8 can be installed in that assembly?

9 A. Well, this is what U.L. is saying. U.L. has tested
10 that assembly and told code officials that that assembly,
11 344, meets the one-hour rating. I was just adding up the
12 components that the building code allows you to do as an
13 alternate to testing assembly. You know, instead of
14 paying you all to test it, you can actually add the
15 components up just to verify for my own mind that it
16 works. And it does.

17 Q. Okay. But just to be very clear, the photographs
18 that you saw of the fire-rated walls that were exposed by
19 C.S.E. are not constructed in conformance with this
20 assembly?

21 A. There's some places where there is O.S.B. that's
22 missing some gypsum panels. And as I testified to, that
23 needs to be corrected.

24 Q. Okay. And are you aware and have you observed at
25 Stoneledge any fire-rated walls that you can testify

1 today are completed in conformance with that assembly or
2 the U.L. assembly that's called for in the plans?

3 A. What I saw at the corner of test cut number four --
4 and there's a photo in this presentation -- is the edge,
5 the end wall, that shows me not only the components, that
6 I can see O.S.B. and the gypsum sheathing, but I can also
7 see that there is a weather-resistant barrier both over
8 the O.S.B. and over the gypsum sheathing. That's the
9 test cut where I could actually see those components in
10 place.

11 Q. And that's the test cut where your hand was down at
12 the corner?

13 A. Right.

14 Q. Is that right?

15 A. Yeah.

16 Q. And so that was the very edge of a fire-rated wall?

17 A. It is.

18 Q. And you couldn't see what was in the field, could
19 you?

20 A. No, I couldn't. The purpose of that test cut was to
21 look at the corner trim. But I could also see the edge
22 of the firewall there too.

23 Q. Sure. And you saw some indication in Mr. Hodgins's
24 photographs -- this is the one you're referring to?

25 A. Right.

1 Q. So what you're seeing is about an inch worth of the
2 fire-rated wall right there?

3 A. Right, which shows me the point of the wall farthest
4 away from the adjacent unit as the components call for in
5 the U.L. 344.

6 Q. Okay. And, of course, you saw photographs in Mr.
7 Hodgkin's presentation and in Mr. Hodgkin's report where
8 W.R.B. at this project was installed in what I would call
9 a haphazard fashion?

10 A. I think I saw something like that, yeah.

11 Q. Okay. In fact, in that open photograph showing the
12 O.S.B. and the gypsum comprising the firewall, Mr. Hodgkin
13 testified that the gypsum wasn't covered by W.R.B., but
14 the O.S.B. was. Do you remember that?

15 A. I remember that.

16 Q. So do you have a lot of confidence that the balance
17 of that wall is constructed correctly?

18 A. What it showed me is that at the time I did test cut
19 number four -- I had seen Mr. Hodgkin's photographs. And
20 so it tells me that it's not consistently one way or the
21 other. And that's why I've included the surveys. You've
22 got to go check because some walls are probably not done
23 right, and some of the walls may be done right.

24 Q. Okay. And the surveys are an important part of your
25 repair scope?

1 A. They are.

2 Q. Is that fair?

3 A. Yes.

4 Q. All right. Bear with me just a second. I hadn't
5 seen your presentation until today, so I'm going back
6 through my notes. I think I got through that.

7 Mr. Moore, your scope of repair, which was also
8 shown earlier today, is dated June the 22nd of 2012; is
9 that right?

10 A. Right.

11 Q. You've not done another scope of repair?

12 A. What I've done is provided an answer to questions
13 from Watkins Services -- I haven't actually changed that
14 document. I've answered their questions and provided
15 them quantities or clarifications so that when they
16 priced it they could understand what the ...

17 Q. And in preparation for this scope of repair, you
18 went to the project for how many days?

19 A. I made site visits on a total of three days.

20 Q. And the test cuts that you've showed us today were
21 test cuts that were made over the course of two days, I
22 think, the 13th and the 14th of March of 2012?

23 A. That's right.

24 Q. And were you there the day before those test cuts or
25 the day after the test cuts? Or when was your third day,

1 I guess is a better way to say that.

2 A. It was the day before that.

3 Q. Okay. So you've been on this site at Stoneledge for
4 a total of three days?

5 A. That's right.

6 Q. And you produced this report in June of 2012, and
7 you've not been back to the site since then?

8 A. That's correct.

9 Q. And when were you retained in this case?

10 A. The first discussion I had with Mr. Belcher was in
11 December of 2011, I believe.

12 Q. So right at the end of 2011 or the beginning of
13 2012. And that would explain why your visit to the site
14 was about three months later?

15 A. Right.

16 Q. Okay. And so this lawsuit's been pending since --
17 well, Bostic's been in this lawsuit since 2010, which is
18 a little over, I guess, or right at four years. And
19 you've spent three day on the site. Have you been to the
20 site during any of the emergency repairs?

21 A. I have not, no. But I have been provided all
22 Derek's notes and photographs.

23 Q. Of the emergency repairs?

24 A. Right.

25 Q. Have you talked to J.R. Watkins about the emergency

1 repairs?

2 A. I have.

3 Q. And have you talked to J.R. Watkins recently about
4 what he observed as part of the emergency repairs?

5 A. I talked to him about what they -- what his crew was
6 doing. I was most interested in their waterproofing
7 repair on those four units in this phase.

8 Q. Okay. And did he give you some information about
9 that?

10 A. Yes, he did.

11 Q. Okay. Now, you said that in this scope of repair,
12 your description of the work that's necessary to
13 accomplish all the objectives that you and Mr. Belcher
14 have discussed was prepared in June of 2012, but you
15 haven't been back out to the site. Are you aware that
16 Mr. Watkins' price for your scope of work has increased?

17 A. Yes.

18 Q. And increased significantly over time?

19 A. Yes.

20 Q. In fact, Mr. Watkins' first repair scope -- excuse
21 me -- price for your repair ---

22 MR. BELCHER: Objection, Your Honor.

23 THE COURT: I beg your pardon?

24 MR. BELCHER: Objection, Your Honor.

25 THE COURT: Yes, sir.

1 MR. BELCHER: Relevance and facts not in
2 evidence. Can we have a side bar on it, Your Honor?

3 (WHEREUPON, a bench conference was held off the
4 record.)

5 THE COURT: All right. You may continue.

6 Q. Since you've prepared your scope of repair in June
7 of 2012, have you provided Mr. Watkins with additional
8 information?

9 A. I have.

10 Q. And the additional information you've given Mr.
11 Watkins, is it in the form of new quantities that he
12 should consider in preparing his estimate?

13 A. Well, I think it takes the form of several things.
14 One is they were trying to price the surveys. We had
15 those surveys sort of included in individual line items.
16 And at some point, we agreed that it made sense to
17 describe them as single surveys. Like, for example, the
18 roof survey. We had maybe eight different things you
19 want to look at on the roofs. And so we decided to take
20 them out of each individual roof item, put them into one
21 survey so they could get their hands around how much time
22 they need to spend on roof surveys, for example. And so
23 that was changed to help them organize their work. And
24 then there was some quantity differences because they
25 asked questions about what quantities do we need to

1 include so they could price them.

2 Q. And over time, haven't you told Mr. Watkins, "Assume
3 this quantity and assume that quantity"?

4 A. I have.

5 Q. And you've changed that. That's something that
6 you've added since you did your June 2012 scope of
7 repair?

8 A. Yeah. As new information became available,
9 emergency repairs were done, windows were looked at,
10 roofs, yeah, we continued to look at information provided
11 from Derek Hodgins and make assessments.

12 Q. As you learned more about the project, those
13 quantities changed?

14 A. Sure.

15 Q. Okay. Did they change significantly?

16 A. I'm not sure. Some of the line items absolutely did
17 change because we left the quantity out until we were
18 ready to have them finalized. I mean, we left some areas
19 -- if they said, "Tell us how many," we left it blank
20 until we were, you know, close to the process of trial
21 here to make sure we had the most recent information;
22 correct.

23 Q. You would agree with me that properly installed
24 W.R.B., weather-resistant barrier, is necessary behind
25 the walls at Stoneledge?

1 A. It's part of the water management system. If I'm
2 designing a wall system today, I'm definitely going to
3 include that along with flashings. You know, at the time
4 this project was designed and construction, there were
5 parts of the wall that were not required to have it and
6 parts of the wall that were required to have it. But
7 today I would design a wall with it behind all
8 components.

9 Q. Is it your belief that some of the omissions of the
10 W.R.B. in this case is because of the design?

11 A. No. I think the things I've seen with problems with
12 the W.R.B. more go to installation than design.

13 Q. And so you'd agree that W.R.B. is necessary, and
14 it's important that it be properly installed behind the
15 siding on this project?

16 A. I would agree with that.

17 Q. Okay. And it's important, would you agree, that
18 windows and doors are properly installed?

19 A. Yes.

20 Q. And you would agree with me that a foundation, even
21 the Superior wall foundation, either it has to be
22 waterproofed or it has to be properly installed
23 originally?

24 A. Well, not only just the Superior wall itself, but
25 the components that tie into it, especially the wood wall

1 framing which is a real weakness in the foundation system
2 out there now.

3 Q. You agree with me that damaged wood, damaged
4 sheathing, and damage to other damaged building
5 components as a result of these defects needs to be
6 repaired and replaced?

7 A. I do.

8 Q. Repaired or replaced. And you agree with me that at
9 the end of the repair process, the building shouldn't
10 leak? And I'd define leak as water that's not properly
11 managed.

12 A. I will say that when the construction is done, it
13 should not leak. There is a component over time with
14 maintenance that no project, no matter how well done, can
15 be left unmaintained. And so, you know, it has to be
16 maintained even after repairs are done.

17 Q. And you would agree with me that at the end of the
18 repair process, the buildings should comply with the
19 building code?

20 A. The components that are upgraded or repaired are
21 required to meet the current building code. The
22 components that are left in place and are not repaired
23 are not required automatically to be upgraded to the
24 current building code.

25 Q. Okay. You've showed a number of photographs,

1 several photographs, of trusses beneath the porches and
2 decks?

3 A. Yes.

4 Q. Do you recall that?

5 A. I do.

6 MR. LYLES: And can we go back to one of those
7 photographs? And we don't need to dim the lights for
8 just one photograph.

9 THE COURT: What, please, sir?

10 MR. LYLES: We don't need to do that. I think
11 we're okay.

12 Q. And you indicated to Mr. Belcher that the purpose of
13 those photographs was to show that even though there was
14 rot and deterioration on one end or the other of the
15 uncovered porches, that there were components of the
16 trusses that were fine; is that right?

17 A. Well, components of the floor system, not
18 necessarily the truss itself. But there was areas of the
19 whole assembly, either the subfloor or the truss or the
20 ceiling, that were undamaged, yes.

21 Q. Okay. But you would agree with me that up in those
22 areas where there's no cover, it had damage somewhere
23 along the length of that truss, either up against the
24 heated wall or up against the outboard edge?

25 A. Yes. They're typically -- with the exception of

1 test cut nine, which has only outboard damage and no
2 other damage up against the building, those typically
3 have some damage on the outboard, and some have some
4 damage against the outside wall of the house.

5 Q. And one significant difference about your repair and
6 Mr. Hodgins's repair is you intend to salvage, as part of
7 your repair, a good portion of those trusses and maybe
8 the subfloor; is that right?

9 A. Well, it's part of that, but the other part is that,
10 as I understand Mr. Hodgins's scope of repair, he's
11 actually changing design. The designer intended
12 untreated trusses and O.S.B. And I understand Mr.
13 Hodgins's going back with dimensional lumber that's
14 pressure treated. I mean, that's a different design
15 approach. I'm not going to say it's not good, but that's
16 not what the design intent was. So I'm trying to
17 reestablish what the original design was.

18 Q. Have you looked at the original design?

19 A. I've looked at the plans, yes.

20 Q. And you believe that you saw in those plans for
21 phase one the use of untreated trusses?

22 A. What I didn't see was use of pressure-treated
23 material throughout.

24 Q. Would it surprise you to find that the porch and
25 deck system that was originally designed did, in fact,

1 call for pressure-treated floor joists?

2 A. Right. I know that the system changed, yes.

3 Q. The system did change. And so what Mr. Hodgkin

4 called for is what was originally called for by the

5 architect?

6 A. Right.

7 Q. Okay. And then there was a change by the builder?

8 A. Correct.

9 Q. But in any event, as you're trying to save a portion

10 of the truss that does not appear to be damaged, you're

11 going to have to support that truss during your repair

12 and then repair the end that is damaged?

13 A. Right.

14 Q. Okay. And take off all the stone from the columns

15 and whatnot?

16 A. Yes.

17 Q. And so that truss will be suspended by some

18 temporary device; is that right?

19 A. As they are now. They have temporary supports under

20 them now.

21 Q. Sure.

22 A. It needs to have more extensive temporary bracing.

23 Q. And if the truss is damaged on both ends, you'll

24 have to suspend both ends so you can repair each end of

25 the truss?

1 A. Yes.

2 Q. And then on top of the subfloor, you're going to be
3 taking the concrete off; is that right?

4 A. That's right.

5 Q. And then you're going to be repairing any damaged
6 portions of the subfloor?

7 A. That's right.

8 Q. And you think that's going to save a lot of money?

9 A. Yes.

10 Q. But only after the surveys are done so you can
11 figure out how much of that truss you can save; right?

12 A. That's right.

13 Q. I want to talk to you -- you would agree with me
14 that your scope of work -- do you need some water?

15 A. Got it.

16 Q. Okay. I'm the water guy.

17 You've mentioned several times in your testimony
18 about the survey process. And as I understand the survey
19 process, what you are going to do -- and this is included
20 in the Watkins' price -- is the general contractor is
21 going to go out to the project and he's going to perform,
22 at a cost of thousands of dollars, surveys of the roofs,
23 the walls, some of the porches, some of the decks, some
24 of the foundation walls in an effort to figure out what's
25 wrong and what needs to be fixed?

1 A. No, it's not an effort. We know it's wrong. The
2 question and the purpose of the surveys is to prevent
3 wholesale destruction or, you know, demolition of the
4 entire building envelope because my test cuts tell me
5 that we've got substantial areas that are not damaged.
6 And I think it's a waste of material to go in and
7 demolish the entire building exterior in order to try to
8 find the damaged material. I think you need to go find
9 where the damage is first and repair that.

10 Q. Okay. And so your surveys will take place, you'll
11 find the damaged material, and then that will be fixed;
12 right?

13 A. Right. And this is not a new process. This is a
14 process that I've worked with Watkins on on other
15 projects. It's a process that I've done with Derek
16 Hodgkin in the past.

17 Q. And it's a process that works out great as long as
18 the person who's paying for the process is there with a
19 checkbook, and that person can respond if more damage is
20 found than is expected; right?

21 A. Well, no. You have to take care of that in the
22 contingency, and you have to take care of it in the
23 quantities. But you also have to have a person on site,
24 the C.A., an engineer, architect, who can make that
25 decision realtime.

1 Q. My point is this. To price your work -- and we
2 haven't seen Mr. Watkins price yet. We're going to see
3 it in just a little bit. But to price your work, Mr.
4 Watkins has had to rely on some assumptions you've made
5 about how much damage is there?

6 A. Yes, he has.

7 Q. And he's had to rely on some allowances and some
8 quantities that you've given him about work he's going to
9 do?

10 A. He has.

11 Q. Is that right?

12 A. That's right.

13 Q. And then what he's got is he's got a big contingency
14 in there to make sure that if you're wrong, you're only
15 wrong so much and he's got that covered; right?

16 A. Well, there's a contingency line item. But there is
17 also areas of the scope of repair where I've given them
18 the quantities where I know it's more than required. For
19 example, on the waterproofing of the basements, I've told
20 them to allow for thirty-seven because there are thirty-
21 seven units. Well, four of them already have had
22 repairs. And we know that, I think, eight of them don't
23 even have -- are slab on grade and don't have a basement.
24 So we know we've got more allowed for there. So we have
25 a similar type of thing built into the roofing number and

1 the wall number where -- he's going to find areas where
2 there's more rot than we expect; he's going to find areas
3 where there is less rot than we expect when he does his
4 surveys. But the only other choice we could go to is the
5 full de-cladding of the entire structure at huge cost and
6 waste of material to find that.

7 Q. Well, you would agree with me that Mr. Hodgkin --
8 with the possible exception of these porches, Mr. Hodgkin
9 wants to do the same thing that you do. He wants to
10 repair the roof sheathing that's damaged. He wants to
11 repair the wall sheathing that's damaged; right?

12 A. Well, I think our goals of the repair, both
13 approaches achieve at the end the same thing.

14 Q. Sure.

15 A. Take care of the rot. They get a building that
16 manages the water and they give you a durable exterior.
17 I mean, the approach or the goals are the same. It's how
18 you get to that end result that's different.

19 Q. That's right. It is different. And Mr. Hodgkin's
20 approach, because of the flashing problems and the W.R.B.
21 inconsistencies and some of the attachment issues that we
22 found and a number of other issues, what Mr. Hodgkin has
23 suggested is take the skin off of the building so we can
24 absolutely see and be certain where we know we have this
25 damage and we absolutely know where the repairs are

1 necessary. That's what he is contemplating; isn't that
2 right?

3 A. Well, as I understood his testimony, there were some
4 things that he originally thought he would have to do,
5 like all of the roofs, every shingle. And then as I
6 understand his testimony, it's not all the shingles; it's
7 just the lower sloped roofs that really need to be
8 replaced. Not all of them, even though that's been
9 priced. And the same for the stone. Originally, they
10 were take every bit of stone off the project. And now I
11 think the testimony, as I understand it is, is that --
12 well, where it's on a Superior wall system, there's no
13 damage occurring. We really don't have to take it all
14 off there. We can leave that on there. So, I mean,
15 there's -- I think there's been an evolution in his scope
16 to some extent.

17 Q. Sure. And the price has dropped, hasn't it?

18 A. Not that I know. I know that the scope seems to
19 have dropped. I'm not sure if there's been an adjustment
20 in price.

21 Q. At the end of the day, Mr. Hodgins' scope of work
22 assures these owners that when that building is de-clad
23 that they're going to be able to see where all the
24 problems are, and they're going to absolutely know that
25 the problems are fixed, that the W.R.B. is then put back

1 on correctly, that the siding is put back on correctly,
2 that the windows are each pulled out and reinstalled
3 correctly; right?

4 A. As I understand his scope, yes.

5 Q. And on the roofs, on the low roofs in particular,
6 these owners will be assured that they see how much
7 damaged sheathing there is, that the low roofs go back
8 on, that they're properly flashed; right?

9 A. Yes, I think that's correct.

10 Q. And under your scope, what you're counting on is the
11 surveys revealing the same amount of damage -- well,
12 first of all, you're counting on the surveys that are
13 being done being done in the right place so that a
14 contractor will be able to see where the damage is;
15 right?

16 A. That's right.

17 Q. Okay. And so whether his surveys are accurate is
18 going to depend on where his surveys are done and how
19 much of the wall he's able to see in the survey; right?

20 A. Right. But it's not like this is a unique approach.
21 It's an approach we've done at other projects.

22 Q. Sure.

23 A. And it works well because it helps you really focus
24 on the problem areas and solve the problem areas and not
25 trying to deal with all surface areas of the building

1 envelope that aren't damaged.

2 Q. And my questions really go to this when I try to
3 boil it all down. It's a question of risk. It's a
4 question of who lives with the risk that your assumptions
5 and your allowances are correct. And the fact is that
6 under your scope of repair, the people who have to live
7 with the risk that you are correct or maybe you're not
8 are my clients.

9 MR. BELCHER: Waiting for a question, Your
10 Honor.

11 THE COURT: Isn't that so?

12 Q. Isn't that so?

13 A. Well, I think ---

14 MR. BELCHER: Thank you.

15 THE COURT: Don't ask the Judge to do anything.

16 A. Robert, what I see with Derek's approach is I've
17 actually already shifted the risk to the homeowners who
18 have to pay the bill upfront for de-cladding an entire
19 project that may not need it. They've already -- they're
20 actually being asked to foot the bill for an entire de-
21 clad. When you look carefully at the test cuts that both
22 Derek's made and I've made, you can see where you need to
23 focus on the ninety/one rule. You know you've got
24 problem areas. You've got to fix those. But you
25 shouldn't ask the homeowners to pay for de-cladding the

1 entire project just to fix that, you know, one percent
2 that's causing the problem.

3 Q. Well, the homeowners are going to ask these
4 defendants to pay for that. And the homeowners want the
5 defendants to bear the risk that's associated with this
6 process. Do you understand that?

7 A. I understand.

8 Q. Okay. And that's the difference between your scope
9 and Mr. Hodgins' scope, is the risk; isn't that right?

10 A. Well, there's risk for some. I mean, if the
11 homeowners are asking a contractor to give them an
12 absolute guarantee that there's no surprises, then the
13 cost -- any contractor is going to want to jack up the
14 contingency so high that their exposure is minimized.
15 Again, that -- it shifts the risk around. But it's doing
16 so for really no reason because you -- by doing the
17 surveys, you can eliminate that amount of risk. You know
18 where the problem is. If you do just a few test cuts and
19 you draw -- you connect the dots between the few test
20 cuts, which I sort of see is what Derek's done. He's
21 done some work, and he's connected the dots and says,
22 "It's all bad." And then you end up wasting a lot of
23 material and wasting a lot of money doing work that
24 really doesn't correct the problem. What you have to
25 focus on is where the problems lie, and that's what my

1 scope of repair does.

2 Q. Your foundation repair. As I understand it, you
3 spoke to J.R. Watkins about the foundation repair that
4 he's been doing to four units out there?

5 A. There are two people. There was a person, one of
6 his crew, that was helping me do destructive test cuts
7 down at the Isle of Palms here recently. And he
8 mentioned he was doing repair work there. So then I
9 relayed that conversation to J.R. and said, "I talked to
10 one of your guys, and he said he was doing some
11 foundation repair." I think J.R. said he'd worked on
12 four units.

13 Q. And do you understand that the repair scope that he
14 is doing is an emergency repair scope?

15 A. I do.

16 Q. And do you understand that the repair scope that he
17 is doing as an emergency repair scope is a repair scope
18 that he got from C.S.E.?

19 A. I figured he got the details from somewhere.

20 Q. And you know that C.S.E. has recommended a far more
21 comprehensive repair to the balance of the wall in its
22 scope?

23 A. I understand they were calling for a complete
24 waterproofing from top to bottom.

25 Q. You have no relationship with my clients; is that

1 right?

2 A. That's right.

3 Q. And when you walk out of the courtroom today, you
4 may never step foot at Stoneledge again; isn't that
5 right?

6 A. That's right.

7 Q. And if your assumptions are wrong and the allowances
8 that you've given Mr. Watkins are wrong, there's no
9 consequence to you, is there?

10 A. I mean, I deal with that in my practice every day.
11 That's why I call it like I see it. I always have.

12 Q. Sure.

13 A. I tell people not what they want to hear, but I tell
14 them what I see. And, you know, they're getting the best
15 use of my expertise in dealing with building envelopes.

16 Q. Sure, absolutely. But my clients don't have a
17 relationship with you, so you owe them nothing in terms
18 of your scope of repair. In fact, in your scope of
19 repair, which was prepared in June of 2012, isn't
20 addressed to my clients?

21 A. No, it's not.

22 Q. It's not addressed to anybody; is it?

23 A. No.

24 Q. It doesn't have your signature on it?

25 A. It does not.

1 Q. And it doesn't have your engineering seal on it?

2 A. No.

3 Q. I think that's all I've got, Mr. Moore. Thank you.
4 very much.

5 THE COURT: All right. Any other examination?

6 MR. ANDERSON: Your Honor, we've got a few
7 questions for Mr. Moore, if I may.

8 THE COURT: Very good.

9 CROSS-EXAMINATION

10 BY MR. ANDERSON:

11 Q. Mr. Moore, did you hear Mel Morris testify?

12 A. I did.

13 Q. And from his testimony, you heard that Jose Nino did
14 the rough framing at Stoneledge?

15 A. Yes.

16 Q. And that that would include the studs, trusses and
17 O.S.B. sheathing or plywood?

18 A. Right.

19 Q. And that he did no other work. Was that your
20 understanding also?

21 A. That's my understanding, yes.

22 Q. All right. Now, in your fixes -- in all your test
23 cuts, one of the things that you show when you show clean
24 plywood and clean trusses and so forth is they're always
25 covered with W.R.B.; is that correct?

1 A. Well, the picture on the screen here is a good
2 example. It's not exactly covered by W.R.B. The
3 subfloor has a waterproof membrane and a topping slab,
4 concrete topping slab.

5 Q. All right. But there is a waterproofing membrane
6 that's on top. And then on top of the concrete is
7 another waterproofing?

8 A. In some places there's additional waterproofing,
9 yes.

10 Q. All right. Now, everything that is put in on top of
11 either the plywood or the O.S.B. is done by a
12 subcontractor other than Jose Nino?

13 A. That's my understanding.

14 Q. Okay. And like the W.R.B. was to be put on by the
15 subcontractor by the name of Eason. The decks were to be
16 done by an individual that operated under the name of
17 KMAC and so forth. And that would also be true of the
18 roofing subcontractor, would be a different person other
19 than Jose Nino; is that correct?

20 A. I'm familiar with K-Mac's scope of work generally.
21 I'm not familiar with Eason and the roofer and their
22 scopes of work.

23 Q. Now, it sounded like in your repair of the fire-
24 rated walls that what you're doing is correcting what is
25 a material selection issue. Would that be a fair

1 statement?

2 A. No, it's not. It's a little more complex than that.

3 Q. All right.

4 A. Dealing with moisture intrusion issues at roof/wall
5 intersections that have damaged gyp sheathing and dealing
6 with places where W.R.B. may be missing and dealing with
7 places where the gyp sheathing may not cover all of the
8 O.S.B. sheathing.

9 Q. All right. And so what you want is the gyp
10 sheathing to cover it all?

11 A. Absolutely, yeah.

12 Q. Okay. Now, the W.R.B., the flashing and the other
13 waterproofing that you have described, all of that is put
14 on to keep the water away from the framing?

15 A. Yes.

16 Q. All right. And the entire design of the building is
17 to keep any rainwater, moisture, away from the framing
18 members?

19 A. That's generally it, correct. Yes, sir.

20 Q. All right. Because when you don't, they rot?

21 A. Over time they will.

22 Q. All right. So to the extent that you found rotted
23 wood, you could conclude then that there was some defect
24 in the W.R.B., the flashing, or some waterproofing
25 exercise; is that correct?

1 A. That's generally true, yes.

2 Q. All right. And that would include the columns?

3 A. That would include the columns, yes.

4 Q. All right. Okay. Thank you very much.

5 THE COURT: Anyone else?

6 Redirect?

7 MR. BELCHER: Yes, just briefly, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. BELCHER:

10 Q. Mr. Moore, Mr. Lyles questioned you or testified --

11 I'm not sure what it was -- that you don't owe these

12 people anything. Do you agree with that statement?

13 A. Well, I was going to say that I feel like I owe

14 them, you know, an honest answer, an honest assessment.

15 You know, I've sworn to give truthful testimony. And I

16 make it a policy to do things in a straightforward manner

17 and call it like I see it.

18 Q. You're a professional; right?

19 A. Yes.

20 Q. You have a license. You practice engineering?

21 A. I do.

22 Q. And all those other designations behind your name;

23 right?

24 A. Yes.

25 Q. And you don't get those by choosing the cheapest way

1 to get something done, do you?

2 A. I look for practical solutions. And sometimes a
3 practical solution might be cheaper than another way, and
4 sometimes a practical solution could be very expensive.

5 Q. And to say that you have no relationship with the
6 homeowners at Stoneledge, are you willing to do the
7 contract administration associated with your scope of
8 repairs?

9 A. Yes, I am.

10 Q. And after this trial, if the jury awards the J.R.
11 Watkins estimate to these plaintiffs, are you willing to
12 go out there to Stoneledge, seal everything that needs to
13 be done with your engineering stamp of approval and make
14 sure that your scope is properly implemented?

15 A. Yeah. I am with Watkins because I'm familiar with
16 their work and their crews. I couldn't say that with any
17 contractor. I mean, it has to be someone that I've
18 worked with.

19 Q. So your contract administration, if they hire you to
20 come out there and work with J.R., you're going to put
21 your engineering stamp on whatever it is you do?

22 A. Yeah. The scope of work that I prepare or any
23 details or any design, I'll stand behind it, yes.

24 Q. And then you're going to stand behind with your
25 professional reputation and in your professional career,

1 you're going to stand behind that scope and make sure
2 that that scope is completed to the tee?

3 A. Yes.

4 Q. All right. And, now, we heard about all of this
5 risk shift of, well, you've got to have the Hodgkin
6 estimate because it puts the risk on the builder or puts
7 the risk on the defendants. Or you've got to have the
8 Watkins estimate because it puts the risk back on the
9 owners. If you're out there and you're doing contract
10 administration and you put your name and your
11 professional reputation on this, which you're willing to
12 do, the risk is on you, isn't it?

13 A. Certainly part of the risk is on me.

14 Q. That's right. This repair protocol that you put
15 together, that's not a band-aid, is it?

16 A. No. I don't put together band-aids, no.

17 Q. And you know that it's going to cost more than two
18 million dollars to do your scope of repair?

19 A. I think so, yes.

20 Q. So it's not a cheap repair?

21 A. No.

22 Q. But it is a permanent repair?

23 A. I think it -- yes, it's a permanent repair, and I
24 think it adequately addresses the problems that are out
25 there.

1 Q. Now, we talked about -- I think Mr. Lyles wanted to
2 address with you the fact that the estimate that J.R. is
3 going to show this jury here in a few minutes has become
4 bigger over time. It's increased in value over time?

5 A. Yes.

6 Q. And you just recently sat down with J.R. and
7 explained to him what the quantities are that need to be
8 in the unit cost values of his estimate. Fair to say?

9 A. Yes.

10 Q. So is it fair to say that up until just a few weeks
11 ago when you sat down with him, it's not that his
12 estimate has gone up or down, it's that his estimate was
13 incomplete. It was missing documented data that it
14 needed; fair?

15 A. In his estimate he had a number of blanks where he
16 had highlighted yellow that he needed quantities. And I
17 wanted to get the latest information. I used the
18 emergency repair information and photographs up through
19 August. So I waited to give him quantities until I'd had
20 the most recent information.

21 Q. Right. And those are the quantities that you're
22 willing to stand behind as being more than sufficient to
23 execute the scope of repair that you've already testified
24 about?

25 A. Yes, it is.

1 Q. All right.

2 MR. BELCHER: May I approach the witness, Your
3 Honor?

4 THE COURT: Yes, sir.

5 Q. I put some photographs in for what's called
6 identification purposes. And I just took a stack of your
7 photographs and let Derek Hodgins peel through a few of
8 them. These are photographs that I'd like you to take a
9 look at. And if you can, please confirm that these are
10 your photographs.

11 A. These appear to be test cut locations and some other
12 general photos, one through eighteen. And these appear
13 to be my photos. I can't tell you that each and every
14 photo in there was taken by me, but it appears to be my
15 stack of photos.

16 Q. Well, photos of your test cuts; right?

17 A. Right.

18 Q. Okay. And you've already testified more than a
19 couple of times that there's good, bad and ugly out
20 there; right?

21 A. There is.

22 Q. All right. And Mr. Lyles wants to beat you up about
23 your presentation.

24 THE COURT: Just a moment. Let's not go into
25 editorializing. And, also, this is your witness.

1 MR. BELCHER: All right. All right.

2 THE COURT: Ask the question and let him
3 testify.

4 Q. All right. Are those photographs an accurate
5 depiction of the conditions that you saw there?

6 A. I'd say they are, yes.

7 Q. All right.

8 MR. BELCHER: Your Honor, at this time, I would
9 like to move those photographs into evidence.

10 THE COURT: Without objection?

11 MR. LYLES: No objection.

12 MR. BELCHER: Thank you. And I don't have any
13 further questions.

14 THE COURT: Very good. Thank you.

15 (WHEREUPON, Defendant Bostic's Exhibit Number B-3
16 was admitted into evidence.)

17 THE COURT: All right. You may step down.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Do you have another witness, Mr.
20 Belcher?

21 MR. BELCHER: No, Your Honor.

22 (Off record discussion)

23 MR. BELCHER: Oh, just J.R. Watkins, Your
24 Honor.

25 THE COURT: Just J.R. How long is he going to

1 take?

2 MR. BELCHER: He's going to take a little bit
3 more than fifteen minutes.

4 THE COURT: Mr. Foreman, ladies and gentlemen
5 of the jury, would you like to finish all of the
6 testimony this afternoon, even though it goes beyond
7 five? Consensus.

8 MR. FOREMAN: Yes. Yes, Your Honor.

9 THE COURT: Very good. All right. Now, let's
10 do that. Do you need a break or anything?

11 MR. FOREMAN: (Shook head side to side in the
12 negative.)

13 THE COURT: All right. You can call your next
14 witness.

15 MR. BELCHER: Yes, Your Honor. The Defense
16 would call J.R. Watkins.

17 THE COURT: Mr. Watkins, you understand you're
18 still under oath?

19 THE WITNESS: Yes, sir, I do.

20 THE COURT: Very good. Do give us your name
21 for the record though?

22 THE WITNESS: Steve Wayne Watkins, II.

23 THE COURT: Very good. Thank you, sir.

24 STEVE WAYNE WATKINS, II,

25 BEING PREVIOUSLY DULY SWORN, TESTIFIED AS FOLLOWS:

1 DIRECT EXAMINATION

2 BY MR. BELCHER:

3 Q. May I call you J.R.?

4 A. You may.

5 Q. All right. J.R., we're getting to the end of the

6 road here. And I know you've been here a few days

7 waiting to testify, and you got to testify once already.

8 I want to go through some of the documentation here

9 that's your estimate for the Rick Moore scope. And we'll

10 get to that in just minute, but first ...

11 MR. BELCHER: It's my understanding that Mr.

12 Watkins has already been ---

13 THE COURT: Sworn. Oh, excuse me.

14 MR. BELCHER: Sworn in and qualified as an

15 expert in his field of expertise.

16 THE COURT: Yes, sir. I believe that's --

17 yeah, that is correct.

18 MR. BELCHER: Okay.

19 THE COURT: Or he is now without objection.

20 MR. BELCHER: All right. Thank you, Your

21 Honor.

22 Q. It's getting late in the afternoon, so I'm going to

23 be brief because I think we're all tired. But just to go

24 through, you've spent a considerable amount of time at

25 Stoneledge; right?

1 A. I have.

2 Q. All right. And before that, your dad, before he
3 passed, he spent a lot of time at Stoneledge as well?

4 A. He spent a few days there. I'm not sure how much,
5 but I know he was there for a few days.

6 Q. All right. And I think you testified earlier it was
7 a project that was very important to him.

8 A. Yes, sir.

9 Q. All right. I have in hand an estimate here.

10 MR. BELCHER: Your Honor, may I approach the
11 witness?

12 THE COURT: Certainly.

13 Q. And just briefly, for identification, is that the
14 estimate that Watkins Services has prepared to implement
15 the Rick Moore scope?

16 A. It is.

17 Q. And did you personally prepare that estimate?

18 A. I prepared it with the help of our estimator, Robert
19 Ayers.

20 Q. All right. And you're saying you typically rely
21 upon him to assist you in preparing estimates?

22 A. For the last ten years, yes, sir.

23 Q. All right.

24 MR. BELCHER: Your Honor, I'd like to go ahead
25 and move that into evidence as Defendant's ---

1 THE COURT: All right. Any objection?

2 MR. LYLES: No objection.

3 THE COURT: Without objection, that will be
4 Defendant's 1?

5 MR. BELCHER: I believe it's 2.

6 MADAM COURT REPORTER: 4.

7 THE COURT: 4?

8 All right. Defendant's Exhibit Number 4 is admitted
9 without objection.

10 (WHEREUPON, Defendant Bostic's Exhibit Number B-4
11 was marked and admitted into evidence.)

12 Q. Do you have a copy of that, Mr. Watkins? I think I
13 just have one. If I put it on the screen, will you be
14 able to see it, you think?

15 A. Sure. That'll be fine.

16 Q. All right. Now, just so we understand, what process
17 did you undertake to develop this repair estimate?

18 A. Well, before Rick Moore, as he testified, gave us
19 our quantities, my father and Robert Ayers prepared that
20 estimate. My dad spent a couple of days on site
21 verifying takeoffs. And he consulted with Robert Ayers,
22 and they prepared the first estimate, which I think was
23 one point three, close to one point four million.

24 Q. Is that your dad's, you said?

25 A. Yes, sir.

1 Q. Okay.

2 A. And once we were given quantities, we plugged those
3 into the estimate and we reached the, I think, two point
4 three million estimate.

5 Q. All right. So the estimate that you prepared prior
6 to the last couple of weeks was incomplete?

7 A. Correct.

8 Q. It just didn't have the quantities that Mr. Moore
9 testified he finally gave to you?

10 A. Right. We had unit prices ---

11 Q. Right.

12 A. --- but we didn't have quantity.

13 Q. Okay. This estimate sort of follows a certain
14 protocol. Can you tell us how you went about preparing
15 this estimate as far as the headings, sub-headings, and
16 all of that?

17 A. The general requirements, that's a pretty standard
18 item for us. Moving below that, roofing. Rick Moore
19 gave us a detailed scope. And we tried to follow his
20 format to make it easy to compare our numbers to his
21 scope line items.

22 Q. All right. So this was a collaborative process --
23 was it a collaborative process with Mr. Moore?

24 A. I'm not sure. I wasn't involved in preparing the
25 cost estimate when his scope of repairs was submitted to

1 my father.

2 Q. All right. But based on your knowledge, do the --
3 like the arched sections and everything that's in item
4 number, the column there closest to the left, they marry
5 up to part of Rick Moore's scope?

6 A. Correct.

7 Q. All right. And does your estimate -- and I won't go
8 through it line-by-line because the jury's going to have
9 it back there when they deliberate, so we're going to
10 just keep this short and sweet. Every line on here
11 marries up to every part of Rick Moore's scope?

12 A. It does.

13 Q. And so everywhere Rick Moore has said, "Conduct a
14 survey," or "plan to repair this" or "plan to take out a
15 hundred windows," you put it here in this estimate?

16 A. Correct. As you see on the far left side, the item
17 number, it has a code like R-1 for roofing section one,
18 R-2, roofing section two. Rick Moore has his scope of
19 repairs in the same format.

20 Q. Okay. So for instance, here we have a survey of
21 roofs; right?

22 A. Yes, sir.

23 Q. And you're doing a -- you're going to survey thirty-
24 seven of them?

25 A. Correct. Well, thirty-seven, yes.

1 Q. All right. And then we've got -- here's a place
2 where we would have what you have testified would be a
3 unit item or a quantity of twenty-seven; right?

4 A. Correct.

5 Q. All right. And it says throughout your estimate,
6 you are relying on what Mr. Moore has said ...

7 A. Correct.

8 Q. ... is going to need to be done?

9 A. Correct.

10 Q. All right. And you've spent a lot of time out at
11 Stoneledge?

12 A. I have.

13 Q. All right. Let's just move to the final page here
14 and make it easy on the jury. You've got your grand
15 totals of what it's going to cost to implement Rick
16 Moore's scope of repairs here at the bottom?

17 A. (No verbal response)

18 Q. And I just want to spend a brief moment with you
19 here. All right? What's your total cost to implement
20 the entire Rick Moore scope of repairs?

21 A. Including markup, it's two million two hundred
22 ninety-two thousand, one hundred thirty dollars and
23 ninety-three cents, if I'm reading that correctly.

24 Q. All right. And that is going to make sure that
25 every line item on Rick Moore's scope is going to be

1 accomplished?

2 A. We're pricing the exact scope, the exact line items
3 that he gave us, the exact quantities he gave us, yes,
4 sir.

5 Q. All right. And just like I think I heard you
6 testify when you were talking about your three point nine
7 nine five apples-to-apples, you told this jury, "We
8 consider that a bid and we'll do the work for it"?

9 A. We did, yes, sir.

10 Q. All right. Same thing for this number?

11 A. Same thing. We consider, like I testified before --
12 I consider the scope that Derek Hodgins gave us and the
13 scope that Rick Moore gave us as a bid package. And we
14 just priced what they gave us.

15 Q. All right. Are you here today or at anytime during
16 this trial to testify as to one scope being better than
17 the other?

18 A. No.

19 Q. Are you going to leave that to Rick Moore and Derek
20 Hodgins and the sound discretion of this jury to determine
21 which one is better to fix these buildings?

22 A. Yes.

23 Q. But you'll do either one?

24 A. I'll do either one.

25 Q. And those are your prices?

1 A. Yes.

2 Q. Now, we've talked a little bit about a contingency.

3 In this estimate, you've got a contingency number based
4 on ten percent; right?

5 A. Yes.

6 Q. All right. And that's a hundred and sixty-seven
7 thousand dollars?

8 A. Yes.

9 Q. And that's going to cover, for instance, if you had
10 to take out a hundred windows. Or if you had to take out
11 -- he tells you you're going to have to deal with a
12 hundred windows; right?

13 A. Two hundred.

14 Q. Two Hundred? That's his quantity. More than half?

15 A. Correct.

16 Q. All right. What if you have to take out more than
17 that? That contingency is already in there; correct?

18 A. Yes.

19 Q. All right. Or alternatively if you had to do more
20 on the roofs, would that be covered by the contingency?

21 A. Yeah. If they're considered separate, yes, sir.

22 Q. All right. Now, that three point nine nine five
23 estimate, which I know is an exhibit here, I think we
24 need to talk a little bit about that too. Have you heard
25 Mr. Hodgins's testimony with regard to some deletions from

1 his scope of work?

2 A. No. I missed the first part of his testimony.

3 Q. All right. Well, if Mr. Hodgin has conceded that
4 stone can be salvaged everywhere there's a Superior wall
5 system, would that reduce your apples-to-apples estimate?

6 A. Yes. If the quantities are reduced on our estimate,
7 the price will go down, yes, sir.

8 Q. All right. And if he has changed his opinion as to
9 the number of shingles that are going to have to come off
10 the roofs and be put back on, would that reduce that
11 estimate too?

12 A. Again, yes, sir. That's a quantity reduction, so it
13 would result in a price reduction.

14 Q. And when that estimate -- when the quantities in
15 those upper line items get reduced, all those other
16 numbers get reduced too; right?

17 A. To mark up percentages, yes, sir.

18 Q. All right. So the contractor figure is reduced?
19 The contingency would be reduced?

20 A. Yeah. Not the percentages, but the ---

21 Q. Dollar value?

22 A. The dollar value, yes, sir.

23 Q. So that three point nine estimate, do you know how
24 old that estimate is?

25 A. If I remember right, I think that's from April 2012

1 maybe. Somewhere last year, yes, sir.

2 Q. That would have been your dad's estimate?

3 A. Yes.

4 Q. And if you were going to do the work of Derek

5 Hodgkin's scope, would you want to put a more recent value

6 on it?

7 A. I've looked at it several times. I'm comfortable

8 with that number. I think that number still holds up.

9 Q. Right. And maybe I asked the question the wrong

10 way. But given the fact that Derek Hodgkin has changed

11 some of his suppositions about what needs to be done,

12 would you want to revisit that number?

13 A. Yes. If I've submitted a scope of repair from him

14 to price that has lesser quantities, yes, sir.

15 Q. Now, it's not included in this estimate -- and I'm

16 almost done, believe it or not. Not included in this

17 estimate is the number to repair basements; fair?

18 A. Fair.

19 Q. Okay. So you have -- your estimate here is for

20 everything, but it does not include foundation repairs?

21 A. No. The four repairs, the emergency foundation

22 repairs we've already made, we'll follow that same repair

23 protocol or procedure to make the repairs in that scope.

24 But it doesn't include anything below that. We normally

25 excavate down two, maybe three feet, but not down to the

1 base of the foundation wall.

2 Q. And that's the protocol that Derek Hodgins has
3 actually given you?

4 A. Well, actually, that's my repair that he endorsed.
5 So, yes, I don't want -- yes.

6 Q. Well, good.

7 A. Well, I ---

8 Q. We'll give credit where credit is due. It's your
9 protocol.

10 A. Well, I don't want him to hear that, you know, that
11 he gave me something he didn't give me.

12 Q. All right.

13 A. Because I'll hear about that later.

14 Q. Have you seen -- the plaintiffs have put up this
15 number, this one point four seven four million dollars,
16 to do that foundation repair?

17 A. Correct.

18 Q. I bet you'd love that kind of money to make those
19 repairs, wouldn't you?

20 A. I wouldn't turn it down.

21 Q. How much is it actually costing you to make the
22 repairs that you've made on the four units in phase one?

23 A. I think they averaged out around eight thousand
24 dollars. I think that's correct.

25 Q. I think you're right. In fact, I think the

1 plaintiffs have already put an exhibit in evidence that
2 suggests that the total repairs for phase one foundation
3 that you've done is about twenty-five. Does that sound
4 right to you, twenty-five thousand across four units?

5 A. It could be, but they're incomplete because we
6 haven't put the stone back in the areas that the stone's
7 been removed as far as the stick-on stone and the wall
8 cladding. So that's why we went with the eight thousand
9 dollar number.

10 Q. Okay. And that stone would just have to be put on
11 pursuant to Derek Hodgins's or Rick Moore's protocol?

12 A. Correct.

13 Q. So you're just waiting to see which one you get
14 hired to do?

15 A. Correct. The owners wanted to wait to see -- they
16 wanted me to wait to make that repair until the lawsuit
17 was finished, to see what type of repair protocol they
18 had.

19 Q. Okay. Well, if you are assuming eight thousand
20 dollars a unit to do those repairs and there are thirty-
21 seven units out there, that's two hundred and ninety-six
22 thousand dollars. And we've already heard testimony that
23 you've fixed four of them; right?

24 A. I assume they're fixed.

25 Q. All right. Do you consider the repairs that you're

1 making to be permanent once complete?

2 A. Yes. Where the water -- we discovered that the
3 water was coming in between the foundation wall and the
4 bottom of the floor framing. I can guarantee that the
5 water will not enter in those areas anymore.

6 Q. Okay. And you haven't had any complaints from any
7 homeowner since then?

8 A. Not that I'm aware of.

9 Q. So if we sit down and we just assume that it's going
10 to be about eight thousand a unit to implement that same
11 repair across all the units that you haven't done that
12 yet, is that a fair number?

13 A. I think that's reasonable.

14 Q. All right. And that would also give you a little
15 bit of wiggle room -- well, let me ask you. Would that
16 give you a little bit of wiggle room since four of those
17 units are -- no -- seven or eight of those units don't
18 even have basements?

19 A. Correct. We still have -- even the units with slabs
20 still have problems. One of the units we actually
21 repaired -- actually two units we actually repaired were
22 on a slab. So there is water that's penetrating or
23 moving over the slab underneath the sill plate of the
24 stud wall.

25 Q. Right.

1 A. So it -- right. That gives us a little extra money
2 to make those repairs, yes, sir.

3 Q. Because if you look at your invoices that you've
4 submitted to the homeowners, are they all for eight
5 thousand dollars, or do they sort of vary depending on
6 what unit you're working on?

7 A. It varies because, you know, the units are very
8 unique. We worked on interior units, not end units. So
9 I'm anticipating the end units may be a little more.

10 Q. But if we shoot for eight thousand dollars as an
11 average, are we going to be okay to make sure that the
12 repairs that you're doing are going to be -- can get
13 done?

14 A. Correct, because you also have a markup that goes on
15 top of that. So the actual repair with the markup is
16 closer to ten, and I'm comfortable with that.

17 Q. Okay. All right. Well, thank you very much, sir.
18 I don't think I have any more questions for you.

19 MR. BELCHER: I'm going to -- do you need to
20 look at this on the thing.

21 MR. LYLES: Yeah, leave that on if you don't
22 mind.

23 MR. BELCHER: Well, it's just not stapled so we
24 can ---

25 MR. LYLES: Okay. Just leave it a little

1 while. I may use it.

2 THE COURT: Mr. Lyles?

3 MR. LYLES: Thank you very much, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. LYLES:

6 Q. Mr. Watkins, you mentioned a moment ago that the
7 foundation repair that you're doing to those four units
8 is not complete?

9 A. Correct.

10 Q. And the stone hasn't gone back up on the wall?

11 A. That's correct.

12 Q. And the fact is that when the owners remove the
13 stone throughout the project in conformance with Mr.
14 Hodgkin's scope of repair, all stone's going to have to
15 come off; right?

16 A. (No verbal response)

17 Q. The stone has to be removed to do Mr. Hodgkin's
18 repair?

19 A. The one point four?

20 Q. No, no. Mr. Hodgkin's repair. The scope of work
21 that Mr. Hodgkin has specified ---

22 A. Oh, yes, sir.

23 Q. --- calls for the removal of all the stone, doesn't
24 it?

25 A. Correct, yes, sir.

1 Q. And it would not make a whole lot of sense to put
2 the stone back on the wall now and ---

3 A. Yes, sir. You're correct. Yes, sir.

4 Q. Okay. Mr. Moore's scope of repair that you've
5 priced calls for the removal and replacement of two
6 hundred or three hundred and eighty-two windows; is that
7 right?

8 A. That's right.

9 Q. Did you recommend that?

10 A. No.

11 Q. Does that seem smart to you?

12 A. I'm not sure what you mean by that.

13 Q. Well, what difference do you understand that there
14 is between the two hundred windows that he says need to
15 come out or be replaced and the hundred and sixty-two
16 that he's not removing and replacing?

17 A. I don't know the difference.

18 Q. Do you have any reason to believe that that other
19 hundred and sixty-two windows is installed better than
20 the two hundred he's telling you to take out?

21 A. Exactly. I don't know either way.

22 Q. And if you install two hundred windows but not the
23 other hundred and sixty-two windows and in a year an
24 owner has a window leak and they call you on the phone,
25 what will you do?

1 A. I'm going to have to go through my records and see
2 which windows we fixed and the windows we didn't fix to
3 see if that is one of our windows. I'm going to assume
4 that it's not. And then hopefully we'll get hired to
5 make that repair.

6 Q. Is it unreasonable to think that you could maybe
7 have a disagreement with an owner in three or four years
8 about whether you replaced a window or not?

9 A. There could be some questions we'll have to resolve.
10 But it will take documentation and pictures. You know,
11 we take -- we create reports and we do -- we take dozens,
12 sometimes hundreds, of pictures daily while we're working
13 to protect ourselves and the homeowners to document where
14 we work and where we don't work especially when we're
15 making limited repairs.

16 Q. And it wasn't your idea to leave a hundred and
17 sixty-two windows in place and remove and replace the
18 other two hundred. Is that fair to say?

19 A. That's fair. Yes, sir.

20 Q. And it wasn't your idea to do a limited foundation
21 repair?

22 A. Correct.

23 Q. That was something that Rick Moore told you to
24 price?

25 A. Correct.

1 Q. And it wouldn't be your idea to leave a fire-rated
2 wall assembly in place when it's not properly
3 constructed?

4 A. Correct.

5 Q. The foundation repair that you have priced for Mr.
6 Moore, I understood you to say that that was actually a
7 repair that you came up with; is that right?

8 A. Yes, sir. It's a typical foundation repair we've
9 made for years. It's been proven to work.

10 Q. And it was an emergency repair?

11 A. Yes, sir.

12 Q. The owners asked you to perform it at their project?

13 A. Yes, sir.

14 Q. And you told them what you thought they needed to
15 do; is that right?

16 A. Correct.

17 Q. No engineer gave you a design for that?

18 A. Correct. We were -- exactly. There's another
19 property that I can't mention that we were asked to go
20 look at. And that's where we started, yes, sir.

21 Q. Okay. But you ultimately got Mr. Hodgins to approve
22 what you were doing in phase one?

23 A. Correct. He came out to inspect our work, and he
24 approved it.

25 Q. Okay. But that was for an emergency repair?

1 A. Correct.

2 Q. So what Mr. Hodgkin says needs to happen with those
3 foundation walls is actually contained within this
4 foundation wall repair scope. Would you agree with that?

5 A. Yes. Well, I would agree that's what he said, yes,
6 sir.

7 Q. And do you have an opinion of whether he's right or
8 he's wrong about that?

9 A. I don't.

10 Q. You rely on him?

11 A. Yes, sir.

12 Q. So the same person who you went to for the emergency
13 repair suggested -- well, doesn't suggest -- says in
14 sealed and signed drawings this is what needs to happen
15 to that foundation wall?

16 A. Yes. Well, we didn't go to Derek, but he came out
17 to look at our work. And he did endorse the emergency
18 repairs, yes, sir.

19 Q. Okay. And Mr. Belcher asked you a question in his
20 direct examination. He asked you if you'd like to have a
21 million four, which is the foundation wall repair
22 estimate of Mr. Folk, to do the scope of work that you've
23 already done out there, didn't he?

24 A. (No verbal response)

25 Q. He said, "Would you like to have that money to do

1 that work?"

2 A. I may have misunderstood what he said. I thought he
3 meant would I like to have that to make that repair?

4 Q. Okay.

5 A. And I apologize if I misunderstood.

6 Q. And I may have misunderstood. So is it your belief
7 that you could do the foundation wall repair for a
8 million four? I think it's actually a million three now.
9 Is it your belief that you could do that?

10 A. I have not done a cost study on that repair, but it
11 doesn't seem unreasonable.

12 Q. Okay. Would a million dollars be more reasonable or
13 likely?

14 A. I'd have to look at it first. I wouldn't want to
15 shortchange myself. Yes, sir.

16 Q. So you wouldn't want to commit to a million dollars,
17 but you think for a million four you can do it?

18 A. Correct. Well, I wouldn't -- in the same breath, I
19 wouldn't take one four if I could do it for less, but I
20 wouldn't want to take one and it really costs one four.

21 Q. If you sign the contract with Mike Furnari for two
22 point three million dollars, which is the Rick Moore
23 scope of repair, would you guarantee to Mike Furnari that
24 he would not have another roof leak at Stoneledge?

25 A. No.

1 Q. Would you guarantee to Mike Furnari that he wouldn't
2 have another leak through his siding?

3 A. Unless we did a wholesale change in that area, no, I
4 couldn't guarantee that.

5 Q. Would you guarantee to Mike Furnari and the other
6 owners out there they wouldn't have any more window
7 leaks?

8 A. I could guarantee the windows we worked on, but not
9 any more.

10 Q. So the other hundred and sixty-two might leak?

11 A. Correct.

12 Q. That's what they're getting for their two point
13 three million is the possibility that almost half of the
14 windows still leak; is that right?

15 A. A possibility, yes, sir.

16 Q. Could you guarantee to Mike Furnari for two point
17 three million dollars that all the firewalls in that
18 project are properly constructed and comply with the
19 code?

20 A. Robert, I don't think I -- it's hard to answer that
21 question because we have -- I think it's five hundred and
22 twenty-eight square feet of an allowance to replace if we
23 find interior gypsum on the exterior walls in those
24 firewall areas. Unless somebody else has it here, I
25 don't know for sure that that is all of the exposed

1 gypsum or not.

2 Q. So you're just not sure if that's ---

3 A. We're just not sure.

4 Q. So as you're testifying today -- I'm sorry. Do you
5 need me to get something?

6 A. No, no, no. If -- no. Go ahead. I'm sorry.

7 Q. As you're testifying today, you don't know that you
8 could guarantee Mr. Furnari that for that two point three
9 million dollars, he's going to have properly constructed
10 firewalls to comply with the code?

11 A. Right now -- those are the exterior firewalls. We
12 have attic firewall work that we're going to do where --
13 we're mandated by the Rick Moore scope to look at all the
14 attic firewalls and make any repairs necessary. If we
15 see anything that's deficient, we're to repair it.

16 Q. Okay.

17 A. But as far as the exterior firewalls, I can't
18 remember off-the-top-of-my-head what the total square
19 footage of that is, so I can't testify whether five
20 twenty-eight will take care of it.

21 Q. Well, Mr. Moore calls for surveying those walls.
22 And so it would be dependent on whether or not the
23 surveys are done and you observe the damage and then the
24 quantities he asks you to assume are correct; right?

25 A. Yes, sir.

1 Q. So you couldn't guarantee that all of the firewalls
2 would be corrected in that two point three million
3 dollars?

4 A. Correct. If that five twenty-eight is not the
5 total, then, yes, sir.

6 Q. And you were asked a question by Mr. Belcher. You
7 said if you find that in fact you need to remove and
8 replace all three hundred and eighty-two windows, would
9 that be covered in the contingency?

10 A. It would use up basically all of it.

11 Q. Okay. And so then if you found that there was more
12 work that needed to be done on the roofs than you
13 thought, you wouldn't have any contingency left?

14 A. Correct.

15 Q. Okay. Now -- and I promise I'm almost done. And I
16 appreciate it.

17 A. I'm trying to answer short.

18 Q. No short jokes.

19 Mr. Watkins, your company doesn't do wasteful work?

20 A. No, sir.

21 Q. You're not in the business of spending peoples'
22 money unnecessarily?

23 A. No, because all we have is our reputation. We're
24 not a flashy company, so we have to use word of mouth
25 based on our reputation. As you know, I'm not the

1 salesman my father was. Don't you?

2 Q. And you're not a guy who charges people to fix
3 things that's not broken or that aren't broken?

4 A. Correct.

5 Q. And yesterday, I think -- did you testify yesterday
6 or Monday? Monday?

7 A. Monday.

8 Q. You told me that you would be willing to sign a
9 contract with the Stoneledge Homeowners Association for
10 four million dollars to fix the building envelope?

11 A. Correct.

12 Q. Okay. Thank you.

13 THE COURT: Anybody else?

14 (No response)

15 THE COURT: Re-examine?

16 MR. BELCHER: Just briefly.

17 THE COURT: Wait a minute. We might have one.

18 MR. IMHOFF: I'm sorry. I was hiding, Your
19 Honor. I will be brief. I will be brief.

20 CROSS-EXAMINATION

21 BY MR. IMHOFF:

22 Q. Mr. Watkins, you're working for the homeowners?

23 A. Correct.

24 Q. And you work for Mr. Belcher?

25 A. Yes.

1 Q. You getting pulled a little bit? Being careful?

2 A. I'm trying to be fair not to answer a question I'm
3 not asked.

4 Q. You were called by the homeowners association to
5 look at a problem?

6 A. Correct.

7 Q. That problem was water in the crawlspace; is that
8 right?

9 A. (No verbal response)

10 Q. In the basement?

11 A. It was on a different property. But, yes, sir.

12 Q. Okay. You investigated that condition?

13 A. (No verbal response)

14 Q. The condition that they called you for, you
15 investigated it? You went out there and looked at it?

16 A. Correct. Yes, sir.

17 Q. Okay. And ---

18 A. I'm just pausing because that happened in another
19 neighborhood, so ...

20 Q. Well, okay.

21 A. Okay.

22 Q. When you went out and did that -- okay -- phase one
23 has -- I can't remember the name of the walls -- these
24 floating wall systems; right? Has the framing; right?

25 A. Well, there are different types. Are you talking

1 about the foundation walls?

2 Q. Foundation walls. And they have framing on top of
3 them?

4 A. Correct.

5 Q. And is the water getting in between that foundation
6 wall and the frame?

7 A. It is. I can't say that that's the only place it's
8 getting in, but that's the only place that I've observed
9 it get in.

10 Q. And you proposed a repair for water getting in the
11 crawlspaces?

12 A. Correct.

13 Q. For the homeowners association?

14 A. Correct.

15 Q. That repair was endorsed by Derek Hodgin?

16 A. Correct..

17 Q. And implemented that repair through the homeowners
18 association?

19 A. Yes.

20 Q. It stopped the water leaking into the basements?

21 A. As far as I know, yes, sir.

22 Q. And that repair, if you do it across all thirty-
23 seven of those units, would cost approximately one
24 million dollars less than Derek Hodgin's repair; is that
25 right?

1 A. Approximately, yes, sir.

2 Q. Thank you, Mr. Watkins.

3 THE COURT: Anyone else?

4 (No response)

5 THE COURT: Redirect?

6 MR. BELCHER: Just briefly.

7 REDIRECT EXAMINATION

8 BY MR. BELCHER:

9 Q. Mr. Lyles asked you if you'd be willing to sign a
10 contract for four million dollars. He also talked to you
11 a little bit about the contingency that's in the two
12 point two nine two estimate and how that might be
13 exhausted because of the windows. If we gave you -- if
14 you were given another ten percent contingency, so a
15 twenty percent contingency instead of just ten on that
16 estimate, would that put you to rest that every single
17 thing in that Rick Moore scope that needed to be
18 addressed to make these buildings not leak anymore could
19 be done?

20 A. It would definitely make me feel more comfortable.
21 I know I can do his scope for that money. Like I said,
22 we consider it a bid. But I would prefer to have another
23 ten percent contingency, yes, sir.

24 Q. Okay. So if you had another ten percent, then you
25 could change out every window? Or not change it out, but

1 pull it out and put it back in ---

2 A. I would have the money to change those windows out.

3 If it was determined or discovered that through our

4 repairs that we had a chronic problem with the way those

5 windows were flashed and they were either leaking now or

6 potentially leaking, like I said, it would eat up our

7 entire contingency. So that would leave us with nothing

8 to fix other problems we may find that were latent or not

9 open and obvious. So I would feel better with another

10 ten percent, yes, sir.

11 Q. So if we give you that twenty percent contingency,

12 are you willing to sign a contract to complete the Rick

13 Moore scope?

14 A. I would for the way it's written, yes, sir.

15 Q. Okay. And that would bring that number up to about

16 two four something probably; right?

17 A. Yeah. I punched the calculator last night. I think

18 it's two point four seven.

19 Q. Okay. And then that contingency would be there for

20 the homeowners to use to the extent that they needed to

21 take out all of their windows; right?

22 A. Correct. Yes, sir.

23 Q. And then that contingency really serves as more

24 money that is in, on credit with you or somewhere else,

25 to take care of everything that needs to be taken care of

1 and then maybe even some other things if the allowances
2 aren't all eaten up; fair enough?

3 A. Fair enough.

4 Q. All right. Thank you.

5 MR. BELCHER: No further questions, Your Honor.

6 THE COURT: Very good. All right. You may
7 step down.

8 THE WITNESS: Thank you.

9 THE COURT: And you may be -- well, let's see.
10 Any reply?

11 MR. LYLES: No, sir.

12 THE COURT: All right. You may be excused.

13 THE WITNESS: Thank you, Your Honor.

14 THE COURT: You're quite welcome. Thank you,
15 sir.

16 All right. You may call your next witness.

17 MR. BELCHER: I don't have any more witnesses,
18 Your Honor. I'm pretty sure about that.

19 THE COURT: All right. Anyone else have any
20 witnesses to call?

21 (No response)

22 Do I understand that the defendants rest?

23 MR. BELCHER: We rest subject to making our
24 final motions, yes, Your Honor.

25 THE COURT: Oh, certainly. But, I mean, you've

1 got to have the close of the testimony before we make
2 final motions.

3 MR. BELCHER: We rest.

4 THE COURT: All right. So all defendants rest?
5 Anyone that is not willing to -- ready to rests indicate
6 at this time. I'll just go down the line.

7 Mr. Anderson?

8 MR. ANDERSON: We would rest, Your Honor,
9 subject to verification of the exhibits, which I think we
10 ---

11 THE COURT: Well, you're not going to leave the
12 courthouse until all the exhibits are -- what is it? --
13 oh, you're talking about the admitted ones and -- ones to
14 be admitted?

15 MR. ANDERSON: Exactly.

16 THE COURT: Certainly. I understand.

17 MR. ANDERSON: All right. Thank you.

18 THE COURT: All right.

19 Mr. Imhoff?

20 MR. IMHOFF: We rest, Your Honor.

21 THE COURT: Very well.

22 Ms. Brown?

23 MS. BROWN: We rest, Your Honor.

24 THE COURT: Mr. Hemphill?

25 MR. HEMPHILL: M Group rests, Your Honor.

1 THE COURT: Very good. And Mr. Lyles has
2 already rested:

3 MR. LYLES: Yes, sir.

4 THE COURT: Very good. And no reply.

5 All right. What I'm thinking about is what time for
6 y'all to come in the morning. I definitely have some
7 things I need to take up with the lawyers before we start
8 the argument and then the charge on the law. I am going
9 to either say ten or eleven. Now, with ten you might
10 have to wait a little bit. With eleven, I will see that
11 we do begin at eleven. And, also, if you come in at ten,
12 we will be able to start as soon as we can after that.
13 But what does the jury ---

14 MR. FOREMAN: Your Honor, we're ready to go
15 whenever you are.

16 THE COURT: Okay. You're very kind. I'm going
17 to say ten thirty. All right. And I apologize about
18 this morning, but it was a miscalculation. But y'all are
19 very kind. And I will see that we -- but I do want to
20 see the lawyers this afternoon before we leave.

21 All right. Very good. Do not undertake a
22 discussion of the case among yourselves in any way. Just
23 be back in the jury room at ten-thirty in the morning.

24 (WHEREUPON, the jury exited the open court at
25 approximately 5:18 p.m.)

1 THE COURT: All right. First of all, as to any
2 exhibits, do I have any of the exhibits Madam Court
3 Reporter?

4 MADAM COURT REPORTER: No, sir.

5 THE COURT: All right. Do you have any that
6 you want to have admitted that might have been identified
7 that have been entered for identification?

8 I tell you what. Let's take a few minutes -- some
9 of you can go and refresh yourselves and then -- but I
10 want somebody up here going through these exhibits. And
11 if you've got any that you have had identified, come up
12 and look to be sure they've been admitted if you wanted
13 them admitted. And then we'll take up those at the time.
14 So let's just take about five minutes, but I do want the
15 parties up here represented in some fashion to go through
16 the exhibits.

17 Put them in order too, if you could, Madam Court
18 Reporter. And by the way, this is all administration.
19 It is not on the record.

20 (WHEREUPON, court stood at recess for a short
21 break.)

22 THE COURT: All right. Lady and gentlemen, we
23 can wait until in the morning to put your motions on, but
24 you've done your exhibits, so the record should be clean
25 by now. Does anybody need to put anything on the record

1 as far as exhibits? From the plaintiff?

2 MR. LYLES: Yes, Your Honor. There's one
3 exhibit that I thought I got into evidence, but I'm not
4 sure that I did. Ms. Brown's looking at it right now.
5 It's a document that relates to her clients.

6 THE COURT: Okay.

7 Anybody else?

8 MS. BROWN: Are you asking on exhibits right
9 now?

10 THE COURT: Yes, ma'am.

11 MS. BROWN: Okay. Let me look.

12 THE COURT: All right. Now, I have not done --
13 and I know y'all don't realize this. But I have not done
14 a construction complex case before in twenty years. So
15 don't be so nice, Mr. Imhoff. I'm very much aware of my
16 inadequacies. But the thing is I need a verdict form.
17 I've seen one, but it's almost a comparative negligence
18 verdict which would be -- I think would be better in an
19 apportionment part of this case. As I understand it,
20 we're going to apportion any damages awarded if any
21 damages are awarded in the initial one. Then that would
22 have to be a separate proceeding from reading the
23 statute. But as far as damages -- well, first of all,
24 has anybody pled comparative negligence?

25 MR. BELCHER: (Nodded head up and down in the

1 affirmative)

2 THE COURT: What's the negligence on the
3 plaintiffs' part?

4 MR. BELCHER: The fact that this H.O.A. for
5 five years sat on this issue and let it get worse and
6 worse and worse. And it's actually part of the problem.
7 And for all the reasons that we moved for directed
8 verdict, it's evidence of negligence.

9 THE COURT: I understand. Well, let me just
10 say that it would appear that the H.O.A. until September
11 '05 were Roberson, Cox and Thoennes?

12 MR. GRESH: I believe in September of '05 is
13 when those individuals took over.

14 THE COURT: Right. Oh, and then they didn't
15 even get rid of it until ---

16 MR. GRESH: It was turned over to the
17 homeowners ---

18 THE COURT: Yeah, 2008.

19 MR. GRESH: That's right.

20 THE COURT: So I can't really -- and, as I say,
21 I think there's some case or whatever that said it's --
22 not paradoxical -- well, I would say incredible that you
23 would expect somebody to sue themselves.

24 MR. GRESH: And if I can kind of get back to
25 it, Your Honor, this would be the board suing Bostic.

1 THE COURT: I understand.

2 MR. GRESH: Which is exactly what we have here
3 today.

4 THE COURT: Right. Got you. Well, as I say,
5 I'm certain if they sued Bostic, there would be a
6 counterclaim of some sort in there or a cross-claim or
7 something else against all of their entities. So I'm --
8 well, I know -- well, let's just say, no, I don't find
9 that that's ---

10 MR. GRESH: I understand.

11 THE COURT: I can't attribute anything to the
12 homeowners association until they got control, which
13 would be 2008.

14 MR. GRESH: Thank you. You see the position
15 that that puts Bostic in, though, in that we have -- they
16 have alleged that this board misappropriated, mismanaged
17 itself from 2005 to 2008 which caused harm to Bostic.

18 THE COURT: Well, that's not what I'm asking.
19 I'm asking do you have anything that this homeowners
20 association did that was negligent.

21 MR. GRESH: Yes, Your Honor.

22 THE COURT: What did they do?

23 MR. GRESH: It started from 2005 when they were

24 ---

25 THE COURT: They weren't the homeowners

1 association in 2005.

2 MR. GRESH: But they ---

3 THE COURT: The homeowners association in 2005
4 was -- let's see. Roberson, Cox and Thoennes are the
5 principles of I.M.K., I think, and all the others.
6 That's going to be my ruling. And it's for the record
7 that I have heard no testimony as to any of the
8 homeowners association members or anything they've done
9 negligently. Do you have any expert or something on
10 homeowners associations that said that what they did was
11 beneath the standard or deviation of the standard of
12 homeowners associations?

13 MR. GRESH: That's the testimony that Mr. Lyles
14 drew out. Mr. Lyles has claims against Mr. Lollis, Cox,
15 Roberson and others ---

16 THE COURT: And they were all principles in all
17 of these other things that was this accumulation, I
18 think, of -- what is it? -- corporate entities.

19 MR. BELCHER: Is it the Court's ruling that Mr.
20 Cox, Mr. Lollis, I.M.K., and I.K. were not negligent in
21 this case?

22 THE COURT: No, sir. No, sir. It's the fact
23 that the homeowners association are the plaintiffs in
24 this action. And they were not members of the homeowners
25 association. They were members of the board of directors

1 that gave the homeowners association finally control over
2 their own property and their destiny.

3 MR. BELCHER: Okay.

4 THE COURT: Denied.

5 MR. BELCHER: Thank you, Your Honor.

6 THE COURT: All right. I haven't heard a
7 motion really ---

8 MR. BELCHER: Right.

9 THE COURT: --- to find any negligence, so I
10 don't find it's a comparative negligence case.

11 All right. So, now, that simplifies the verdict
12 form in a sense. Now, I guess you could.-- I don't think
13 it would be against the statute. But you could use the
14 form that you have because without negligence on the
15 plaintiffs part, then it comes down to -- by the way,
16 that's all preserved for every defendant and their
17 friends on appeal that I found no evidence of negligence
18 on behalf of the homeowners association, the plaintiffs
19 in this case. All right. Whatever the predecessors
20 might have done I don't think is attributable to them.

21 Yes, sir?

22 All right. So, anyway, but then you see the verdict
23 form?

24 MR. ANDERSON: We submitted the verdict form,
25 Your Honor.

1 THE COURT: Right. Okay.

2 MR. ANDERSON: And that was tailored
3 specifically to the construction defect tort actions in
4 the case which my client is charged with. It does not
5 include the causes of action that may ---

6 THE COURT: Exactly.

7 MR. ANDERSON: --- and we have not studied the
8 cause of -- I put that out there so that we could start
9 to discuss it and maybe ---

10 THE COURT: All right. So that's what I need.
11 And normally, in a case where you have more than one
12 cause of action, I usually have each cause of action. In
13 other words, negligence, contract, tortuous interference
14 and all the other, you know, different causes of action.
15 And, also, to which ones it applies to.

16 MR. ANDERSON: We have -- I tried to edit that
17 down. We put the negligence causes of action and then
18 the warranty of workmanlike services which are the two
19 that are against my client. And I didn't have a list of
20 the other causes of action. And then we'd have each
21 defendant listed under those. But that was our proposed
22 format.

23 THE COURT: All right. Well, I need some final
24 format if you don't mind.

25 MR. BELCHER: Yes, sir.

1 THE COURT: Because I'll be honest with you.
2 Every time I go down to look at the pleadings in this
3 case, I mean, it really is. It's kind of like treasure
4 island. You know -- what is it? -- somebody's going to
5 come up out of a cave or something. The point is y'all
6 know what your client ...

7 Mr. Lyles, first of all, you know who your client
8 sued, and y'all know who -- what is it? -- y'all need to
9 get together sometime before tomorrow morning and give me
10 -- and you can put it on the machine. He's very good at
11 -- what is it? -- editing and all that. He has to edit
12 most of everything I say.

13 MR. LYLES: Well, you'll have ours in a couple
14 of hours. We've worked on it today as best we can.

15 THE COURT: All right. Now, but -- all right.
16 So that would be the cause of actions then, I think. And
17 then as far as the apportionment, that would be limited
18 to only the negligence, if I understand. So that will be
19 a second proceeding if you find on the negligence causes
20 of action. Now, how about this? How about the
21 defendants that have settled out?

22 MR. ANDERSON: Your Honor, we believe that they
23 should be on the apportionment section.

24 THE COURT: On the apportionment section?

25 MR. ANDERSON: Yes, sir.

1 THE COURT: Well, doesn't the statute provide
2 for -- what is it? -- offsets on the settlements and
3 apportion according to the percentages that the jury
4 determines as to those who are still in the suit?

5 MR. ANDERSON: I don't ---

6 THE COURT: That apportionment statute was
7 passed after I left the General Assembly, so I don't --
8 really, I haven't seen it as yet. I'm still operating
9 under the joint and several.

10 MR. ANDERSON: Well, the apportionment, when
11 they -- for those that are in the -- that are having
12 their causes of action apportioned, the damages
13 apportioned. Under the statute, you are allowed to
14 include any joint tort feisor whether or not they're even
15 named in the suit. And what we would propose is, is that
16 you include all of the parties that have settled that had
17 those causes of actions pending against them.

18 THE COURT: All right. This, of course, is --
19 what is it? -- section § 15-38-15(c) -- no -- (e).
20 Notwithstanding the application of this section, setoff
21 from any settlement received from any potential tort
22 feisor prior to verdict shall be applied and proportioned
23 to each defendant's percentage. So, apparently, they
24 don't include the tort feisors that settled prior to
25 verdict. Listen, I didn't write it. I just read it.

1 MR. ANDERSON: No. I understand that, Your
2 Honor. But I think that for the apportionment purposes
3 that they are included in the initial apportionment. And
4 then as far as an apportionment of then damages -- and
5 then following that, you take whatever percentage for the
6 remaining people and apply that to the settlement.

7 THE COURT: I looked at your proposed -- what
8 is it? -- verdict form. And I think it's two pages,
9 isn't it?

10 MR. ANDERSON: The finding -- the initial
11 findings are two pages.

12 THE COURT: Yeah.

13 MR. ANDERSON: And then there's a third
14 separate page for apportionment.

15 THE COURT: Listen, you've been -- what is it?
16 -- destroyed my appreciation for what y'all have been
17 doing for the last two years by whittling it down to this
18 distinguished group here. So I've got to deal with
19 people I've never even seen? I'm not sure about that.

20 MR. LYLES: And, Your Honor, there's no
21 evidence relative to those people. The fact that they've
22 settled ---

23 THE COURT: That's why I'm afraid that it is
24 done by setoffs and what I'm used to.

25 MR. LYLES: Yes, sir.

1 THE COURT: But, again, I hope your verdict
2 forms will -- what is it? -- reflect that. And let me
3 ask you about this. This is another thing. How about
4 the defendants -- are you going to consolidate your
5 defendants? I mean, in other words, Nino with the Bostic
6 Brothers? In other words, if -- in the negligence part
7 that -- what is it? -- whatever the subs did would be
8 attributable to the -- I've had a long day. I've had a
9 long two weeks if you want to know the truth. Well, the
10 point is, do you have individual verdicts as to each one
11 of the defendants, or do your verdicts go to parties such
12 as -- what is it? -- I.M.K., which would be Integrys
13 Keowee Development, William Cox and Larry Lollis?

14 MR. ANDERSON: I have not done a breakout. I
15 have done a general verdict.

16 THE COURT: Well, what are y'all going to do?
17 What do you say, Ms. Brown?

18 MS. BROWN: On the verdict form?

19 THE COURT: Right.

20 MS. BROWN: Are we just talking about the
21 negligence?

22 THE COURT: I'm talking about all the causes of
23 action that would apply to any of the defendants
24 individually or through their collective corporate group.

25 MS. BROWN: My understanding is that on my four

1 defendants, I've got breach of fiduciary duty, negligence
2 and implied warranties of workmanlike service.

3 THE COURT: All right. Now, would that be all
4 four?

5 MS. BROWN: I believe they're alleged that way
6 under amalgamation.

7 THE COURT: I.M.K. is made up of those three,
8 are they not?

9 MS. BROWN: I.M.K. is made up of Marick as
10 well. And then ---

11 THE COURT: Well, that's true, yeah. I don't
12 know. Can anybody help the Court, or will anybody help?
13 I've made all of you so mad that -- what is it? ---

14 MS. BROWN: My suggestion -- and I haven't
15 talked to anybody about this. And to be honest with you,
16 I've not done a verdict form in a case this large. Most
17 of my experience in big cases like this is in
18 arbitration, which is a whole lot less formal. But my
19 suggestion would be it goes down with each defendant, and
20 it's a simple -- they've got -- the jury's got to come up
21 with a yes/no. Are they liable? Are they liable on
22 negligence? Yes/no. If it's no, then that doesn't
23 count. And it goes straight down the line.

24 THE COURT: All right. In other words, under
25 each cause of action, you'd list all the parties?

1 MS. BROWN: Yes.

2 THE COURT: That that cause of action might be
3 applicable to?

4 MS. BROWN: Yes.

5 THE COURT: In other words -- what is it? --
6 fiduciary duty wouldn't apply to Mr. Nino, I don't think.

7 MS. BROWN: I don't think so. I think that's
8 -- I think you're correct.

9 THE COURT: All right. Well, do something like
10 that then. You know, at least give me a little head
11 start.

12 MR. IMHOFF: That's what Mr. Anderson did. He
13 just needs to add two causes of action and the parties
14 that go with.

15 THE COURT: Well, that's what -- well, do that.
16 If that's all he needs to do, he can do it before he
17 leaves tonight.

18 MR. ANDERSON: Your Honor, my problem is, is
19 that I need to know what those other causes of action
20 are. And if somebody will just give me those, we will do
21 that.

22 THE COURT: Well, that's what we do. Y'all all
23 work together. Somebody's got to know what's all
24 involved.

25 MR. IMHOFF: A couple of things?

1 THE COURT: Yes, sir.

2 MR. IMHOFF: Your Honor, the special proceeding
3 that you're referring to, is we get -- we tell the jury
4 they're to go back and they're to fill out that first
5 one.

6 THE COURT: Uh-huh (affirmative).

7 MR. IMHOFF: And then if the answers are, yes,
8 all of these people are negligent, then those people go
9 on the second forms for apportionment.

10 THE COURT: Well, also damages.

11 MR. IMHOFF: I'm sorry?

12 THE COURT: Also damages. It actually is a
13 term of damages, not percentages. Percentages are a part
14 of the damages, but it's not comparative negligence, in
15 other words.

16 MR. IMHOFF: But then we send the jury back
17 with the second form to apportion?

18 THE COURT: Second proceeding.

19 MR. IMHOFF: Same jury; is that right?

20 THE COURT: Separate proceeding. I mean, this
21 has been an education for me. Thank you. They have a --
22 you get to -- what is it? -- argue again. It's like a
23 capital case. You get to argue again, but you don't get
24 to put up any other evidence.

25 MR. IMHOFF: I've seen the cases that refer to

1 it as a special interrogatory. Basically, there's a
2 verdict, and then -- that's right -- we argue. And then
3 we send them a second verdict form that's called a
4 special interrogatory.

5 THE COURT: That's a separate proceeding.
6 That's what I'm trying to say.

7 MR. IMHOFF: Okay. So I guess what I would ask
8 at this time -- and I think -- I can't tell ---

9 THE COURT: I tell you -- are you ...

10 Renee, I think this is -- you don't need to.

11 MADAM COURT REPORTER: Okay.

12 THE COURT: All right. We're off the record
13 now.

14 MR. IMHOFF: This part, Your Honor, actually, I
15 would put ---

16 THE COURT: Okay.

17 MR. IMHOFF: --- because -- only because you
18 asked me to be a friend of the Court, and I'm not going
19 to be. I think I'll make it more complex. In that
20 Bostic Brothers ended in 2004. This statute which we've
21 been discussing didn't even come about until 2005. We're
22 gone. We're off the project. We're bankrupt before the
23 Legislature in their infinite wisdom decided to enact
24 this statute. So to apportion as opposed to all joint
25 and several, I think -- I think there's a real discussion

1 as to do we get to apportion, or are you going to
2 apportion us a 2002/2003 actor in a 2012 case? It's a
3 real -- it's a debate that's -- and that's why -- and
4 honestly, Your Honor, I haven't submitted a jury verdict
5 form because I can't come up with one that makes sense
6 that covers both of those issues.

7 THE COURT: All right. Section 16 of Act
8 Number 2005 or 2005 Act Number 32, Section 16 provides
9 that causes of action relating to construction torts
10 which took effect on July the 1st, 2005, and applied to
11 improvements of real property that first substantial
12 completion on or after 2005. So you would be under the
13 -- even the proviso is interesting. All right. It takes
14 effect from -- it took effect on July the 1st, 2005, and
15 shall apply only to causes of action arising on or after
16 that date except for causes of action relating to
17 construction torts which would take effect on July the
18 1st, 2005, apply to improvements to real property that
19 first obtained substantial completion on or after July
20 the 1st, 2005.

21 MR. GRESH: That's right. And there are
22 several homes that were substantially complete and sold
23 and occupied by Mr. Taylor and others that are before
24 2005.

25 THE COURT: Right. And I think that -- what is

1 it? -- it's been decided that -- what is it? -- under the
2 Kennedy versus Columbia Lumber Company that -- what is
3 it? -- you don't have to have privity of contract.
4 You're welcome.

5 MR. GRESH: Your Honor, I'm not arguing whether
6 there was privity or not privity. I'm saying that the
7 statute says it applies to those that are C.O.'d as of
8 '05. Where I have projects that are C.O.'d in 2002 and
9 2003, those pre-date the statute. And I think to apply
10 this statute retroactively ---

11 THE COURT: Well, then we won't apply it
12 retroactively. We'll go back to the joint and several.

13 MR. GRESH: Which I think everybody else in the
14 room has an issue with that.

15 THE COURT: All right. I'll take that --
16 again, that's why we -- I tell the good people on those
17 appellate courts, the Court of Appeals and the Supreme
18 Court, I'm not going to be perfect. I want them to have
19 a job. We can see what happens, what they think about
20 it.

21 All right. But I see your point. But the thing is,
22 I mean, I've got a conundrum. I don't know what to do.

23 MR. GRESH: I understand, Your Honor.

24 THE COURT: So, . anyway -- and by the way --
25 and I don't want to be facetious. But, you know, the

1 wisest judge in the history of the world, at least the
2 Judeau Christian World, the resolution wasn't that good
3 for the baby. And I'm no Solomon. So -- what is it? --
4 if y'all don't help me, I make the decision and then you
5 have to live with it or at least take it up.

6 All right. Now, what?

7 MR. BELCHER: No. I'm just saying that we've
8 looked all over the country for authority that would give
9 us some direction on this. And the best we can say is
10 that it would be our position for the Court to either
11 agree or disagree with, that all joint and several has to
12 apply for us because that's the only time we were
13 involved on this project.

14 THE COURT: I don't know if you want that
15 because really the way it works that I find whether or
16 not you are -- well, only the negligence action, it'd be
17 -- what is it? -- apply to, you know, the damage comes
18 down.

19 MR. BELCHER: Shared on a pro rata share?

20 THE COURT: Well, it would be joint and several
21 before 2005.

22 MR. BELCHER: We don't know.

23 THE COURT: Well, you know, I want to thank
24 y'all for bringing all of this to Oconee County because
25 y'all have been the biggest help. Oh, no, not at all. I

1 understand. These things have to be done.

2 All right. I'll try to do the best. But anything
3 that comes -- if y'all have an epiphany or something like
4 that. All right. I've got a ---

5 MR. ANDERSON: Your Honor, we have submitted a
6 memorandum with a recommendation on how to do that. And
7 I believe your clerk has a copy of that.

8 THE COURT: Wonderful. All right. That'll
9 give me something to do.

10 All right. Have you got any stipulations or
11 anything that we need to put in the record?

12 (No response)

13 THE COURT: All right. The exhibits are good
14 now; is that correct?

15 MR. LYLES: We have one exhibit that we're ---

16 MS. BROWN: Robert, I don't have it in my
17 notes. I have 38, but I don't have 39. Here's my issue.
18 I don't know if you wanted to hear this issue or not,
19 Your Honor.

20 THE COURT: Yes, ma'am, because I've got to
21 make a ruling on it before we go to the jury.

22 MS. BROWN: One of the things that Mr. Lyles
23 has argued today in our multiple discussions, and
24 yesterday, is that he's made a reference to the fact that
25 my clients received money in even 2009, which is true.

1 It's all phase-two money. So ---

2 THE COURT: It's all what?

3 MS. BROWN: It's all phase-two money.

4 THE COURT: Oh, okay.

5 MS. BROWN: And so I guess this is just a
6 request that he not say that in closing. I don't think
7 it's been said in front of the jury.

8 THE COURT: All right. I will agree to that.
9 I mean, we have bifurcated the two phases. And y'all
10 have done a remarkable job in -- what is it? -- avoiding
11 -- of course, you've had a little help. Your client
12 says, "That was in the neighborhood." I don't mean your
13 client, your witness. All right. No. I do. That's not
14 relevant. Anything from phase two -- I don't care if
15 S.D.I. was involved in it -- that's all not included in
16 this. They could have -- what is it? -- if there was
17 anything wrong with it, they went wrong after phase one
18 was closed.

19 MS. BROWN: And then that may take care of this
20 potential exhibit from the standpoint of all but one
21 unit.

22 MR. LYLES: Okay.

23 THE COURT: Well, the thing is, I did see one
24 in there that was antecedent of the what would have been
25 phase two. I haven't looked at it recently.

1 MR. LYLES: And I'm happy to even redact the
2 unit numbers from the document. You know, the issues ---

3 THE COURT: Well, no. The thing is I'm ruling
4 that anything dealing with phase two is going to have to
5 be taken up at that time, and you're going to have to
6 make the same arguments.

7 MR. LYLES: Yes, sir.

8 THE COURT: It's going to have to be that they
9 were still participating in 2009 in the first.

10 MR. LYLES: Okay. So can we take out only
11 phase two?

12 THE COURT: Don't you have one in there that
13 just applies to ---

14 MS. BROWN: There is one. It's unit twelve, is
15 the only ---

16 THE COURT: All right. Well, use that one.
17 That's the point. You don't want to -- what is it? --
18 get reimbursed, do you?

19 MS. BROWN: Well, I don't know what -- I don't
20 really recall. The only thing that I think Mr. Cox
21 testified to that I took notes on was that, yes, there
22 was a commission agreement.

23 THE COURT: And the only thing he was
24 interested was the amount and he gave the amount?

25 MS. BROWN: I don't remember if he gave an

1 amount.

2 MR. LYLES: I don't think he -- I don't
3 remember if he did or didn't. To be honest with you, I
4 don't.

5 THE COURT: Well, you showed it.

6 MS. BROWN: The confusing part of this part is
7 that this is about two separate two companies. This is
8 Medallion, which I'm not sure -- has there been any
9 testimony on Medallion.

10 MR. LYLES: Well, I asked Bill Cox about it, a
11 successor to S.D.I.

12 THE COURT: All right. That's all been -- as
13 far as the rulings on the evidence, it's already been
14 done. And failure to object to the ruling at the time is
15 a waiver of it. All right. So what I'm going to do --
16 but I am -- just to keep the record straight, I'm going
17 to limit it to the one page -- or just one -- you can
18 keep them together. But the only one that's going to
19 come in as that exhibit is going to be the page that
20 relates to one of the phase-one units.

21 MR. LYLES: Yes, sir.

22 MS. BROWN: Yes, Your Honor.

23 THE COURT: All right. Very good. Over the
24 objection of Ms. Brown and anybody else. Everybody else.

25 (Whereupon, Plaintiff's Exhibit 39 was admitted into

1 evidence.)

2 THE COURT: All right. Anything else?

3 MR. IMHOFF: Housekeeping, Your Honor?

4 THE COURT: Yes, sir.

5 MR. IMHOFF: We haven't made -- and we don't --

6 I don't know when you want us here tomorrow. We'll only

7 have an hour and a half in the morning if we get here at

8 nine and the jury's coming in at ten thirty. We haven't

9 renewed our directed verdict motions post-close.

10 THE COURT: All right.

11 MR. IMHOFF: I think you're still taking

12 punitive damages, at the least, under consideration. And

13 we're probably going to have some pretty significant

14 arguments on ---

15 THE COURT: Well, I haven't heard anything yet

16 that does, as far as the Court's concerned as far its

17 gate keeping, that would say that the actions of the

18 parties have been so egregious as to warrant the

19 submission of punitive damages to the jury. The only

20 thing you do have is the statutory or at least violation.

21 And, of course, I find that interesting because

22 apparently it changes according to what code is in

23 effect. In other words, what might have been a reckless,

24 willful, wanton -- what is it? -- action under one group

25 wouldn't be under another group. So I'm going to find

1 that that's not an issue to go to the jury on punitive
2 damages. Punitive damages are out subject to the
3 objection of -- what is it? -- the plaintiff?

4 MR. IMHOFF: Thank you, Your Honor. And the
5 other two things which I think are time consuming are the
6 jury charges. We'll have a lot of disagreements on those
7 because of the piercing -- all those piercing things you
8 said ---

9 THE COURT: I've already ruled on the piercing.
10 I've got each one of you are locked in. I mean, you're
11 in. You can get out on appeal.

12 MR. IMHOFF: I think you said it goes to the
13 jury now, so were preparing charges for that, piercing
14 the corporate veil, the L.L.C. statute ---

15 THE COURT: No. You're right. It's a matter
16 of equity that I will decide. And I decided that it is.
17 That there was enough -- what is it? -- self-dealing and
18 -- what is it? -- even incompetence to -- what is it? --
19 do the ...

20 MR. IMHOFF: So no jury charges on the
21 amalgamation, piercing and statute?

22 THE COURT: No. I've already done that.

23 MR. IMHOFF: Okay. So the jury -- and so
24 tomorrow morning we're going to have an hour and a half
25 for the charges, I guess, and directed verdict ---

1 THE COURT: Well, the thing is, as I see the
2 charges, they're going to be very simple. You've got the
3 causes of action and you've got -- because I'm not going
4 to charge on the facts and charge which defendants.
5 That's going to be up to you.

6 MS. BROWN: Well, Your Honor, I was going to
7 email these to your law clerk in a moment, but I did have
8 some proposed jury charges on the L.L.C. statute.

9 THE COURT: Okay. And if I think they're
10 relevant, I'll -- what is it? -- charge it. If not,
11 you'll appeal it. Listen, I'm sorry. This jury has been
12 good.

13 MR. BELCHER: Yeah.

14 THE COURT: And the more we -- what is it? --
15 take time ya-yaing and -- as we say, ya-yaing about it
16 here, the more it's going to complicate things for the
17 jury. So let's go ahead and see what we can -- and as I
18 say, I'll give you your record. You express what your
19 objection is, I'll rule on it and then we'll move on.
20 43(j), no further argument on motions. All right.

21 MR. IMHOFF: Are you asking us for ---

22 THE COURT: No. I'm just telling you. I'm not
23 asking you anymore. I'm telling you that I am not going
24 to complicate -- I'm not going to make these good people
25 in this jury, tax lawyers or corporate lawyers or

1 anything else, they don't need to try to understand the
2 Code of Laws of South Carolina. They need to understand
3 very simply causes of action that are provided by the
4 statutes. Well, actually it says the law made and
5 provided, which is, of course, the common law. All
6 right. So that's what's going to happen. Sorry if my
7 patience got there.

8 All right. Let's see. The causes of action I have
9 are negligence -- by the way, you know you can't have a
10 charge on negligence unless negligence has -- well, even
11 if it's admitted, everything but causation, it's still as
12 to whether any damages. I'm not going to break that.
13 Y'all -- that's -- I'm not going to worry about it. All
14 right. So negligence, warranty of habitability, warranty
15 of workmanlike service, and breach of fiduciary duty as
16 applies to the relevant parties.

17 MR. IMHOFF: And the warranty of habitability
18 as to the relevant parties?

19 THE COURT: Yeah. Warranty of habitability and
20 warranty of workmanlike service and breach of fiduciary
21 duty and the ...

22 MR. BELCHER: I'm sorry. What was the fourth
23 one, Your Honor?

24 THE COURT: Number one, negligence. Number
25 two, breach of warranty as to habitability. Number

1 three, breach of warranty of workmanlike service. And
2 four, breach of fiduciary duty.

3 MR. IMHOFF: Does anybody think there's a work
4 habitability claim still out there?

5 MR. LYLES: Your Honor, I think that you
6 dismissed my habitability claim by earlier order.

7 THE COURT: This is my law clerk. He was out
8 of the room when I did that.

9 MR. LYLES: I mean, I would like for that not
10 to be the case.

11 And Bo, I'm sorry, I had to rat you out.

12 LAW CLERK: It's three.

13 THE COURT: All right.

14 MR. LYLES: Yeah. I think it's three, Your
15 Honor.

16 THE COURT: Don't get me on ghosts, now. But
17 he was out of the room. All right. Gentlemen and lady,
18 I do -- ladies now. I keep forgetting -- what is it? --
19 we do have ladies here. Do you need anything else right
20 now, or can I go to the house?

21 MR. IMHOFF: Yes, Your Honor. We don't need
22 anything.

23 THE COURT: All right. Okay. But I think --
24 I'll see y'all about nine o'clock or soon thereafter.

25 Listen -- but the thing is, I do want to be able to go to

1 the jury at least by ten thirty.

2 All right. And I thank you.

3 MR. LYLES: Do y'all want a hard copy, or would
4 your rather I send the jury charges by email? What's
5 your preference?

6 THE COURT: Email would be better because then
7 I can work off it. But keep your hard copy because I
8 might have to take it.

9 MR. LYLES: Yes, sir. How about I just give it
10 to you and then ---

11 THE COURT: We're off the record.

12 (WHEREUPON, Plaintiff's Exhibit Number 29 was
13 redacted and remarked after which court stood at
14 recess for the day at approximately 6:06 p.m.)

15 **November 7, 2013**

16 (WHEREUPON, court convened with all parties present,
17 and the following proceedings were had commencing at
18 approximately 10:13 a.m.)

19 THE COURT: All right. Anything from the
20 plaintiff before we begin?

21 MR. LYLES: No, sir, Your Honor.

22 THE COURT: All right. From the defendant Mr.
23 Belcher for Bostic Brothers?

24 MR. BELCHER: No, Your Honor, nothing since
25 last night.

1 THE COURT: Well, what we're doing, I'm trying
2 to get back on the record so everybody's ready to go.

3 MR. BELCHER: We're ready, yes, sir.

4 THE COURT: All right. Mr. Anderson?

5 MR. ANDERSON: Yes, Your Honor. And in a
6 minute, I'll have something to put on the record with Mr.
7 Lyles.

8 THE COURT: Well, we don't get on the record
9 until I get you on the record. So right now you're just
10 saying you're ready to go?

11 MR. ANDERSON: We're ready, yes, sir.

12 THE COURT: All right. I'm sorry. It's been a
13 long two weeks.

14 Ms. Brown?

15 MS. BROWN: We're ready, Your Honor.

16 THE COURT: And I didn't forget about you, Mr.
17 Imhoff.

18 MR. IMHOFF: I'm ready, Your Honor. We're
19 ready.

20 THE COURT: All right.

21 Mr. Hemphill?

22 MR. HEMPHILL: We're ready to proceed, Your
23 Honor.

24 THE COURT: Very good. All right. Now does
25 the plaintiff have anything?

1 MR. LYLES: We'd like to put a settlement on
2 the record between the plaintiffs and Jose Nino.

3 THE COURT: Very good.

4 MR. ANDERSON: Your Honor, the settlement is in
5 return for a full, final, complete release of all claims
6 by the plaintiff and the dismissal of the cross-claims by
7 I.M.K. and Marick against Jose Nino. And Jose Nino will
8 pay two hundred and twenty-five thousand dollars in
9 forty-five days.

10 THE COURT: All right. Is that the full
11 understanding of yours, Mr. Lyles?

12 MR. LYLES: Yes, Your Honor. Yes, sir.

13 THE COURT: Yes, sir.

14 Yes, sir?

15 MR. LYLES: Well, I was going to say, just so
16 the Court will make a note, I was just asked by defense
17 counsel to total up the settlements of phase one. And I
18 was going to give Your Honor that number based on this
19 most recent ---

20 THE COURT: Why don't you give it to them.

21 MR. LYLES: I've given it to them.

22 THE COURT: All right. But, no, you can go
23 ahead and put it on the record if you want.

24 MR. LYLES: With Mr. Nino's settlement, that
25 total is up to two million eight hundred and three

1 thousand dollars the plaintiffs have received.

2 THE COURT: All right. Anything from anyone
3 else?

4 MR. GRESH: Your Honor, one brief housekeeping
5 issue.

6 THE COURT: Wait a minute. Let me see -- on
7 that matter?

8 MR. GRESH: Oh.

9 THE COURT: On the settlement and the total
10 amount of settlements.

11 MR. ANDERSON: Your Honor, I think I'm going to
12 ask to have verification on the record that Marick and
13 I.M.K. are dismissing their cross-claims.

14 THE COURT: Mr. Imhoff?

15 MR. IMHOFF: Yes, Your Honor. Marick withdraws
16 its cross-claim.

17 MR. ANDERSON: I guess it was only Marick.

18 THE COURT: Ms. Brown?

19 MS. BROWN: I'm not aware of them having a
20 cross-claim against Jose Nino.

21 THE COURT: Well, if there are any, then this
22 would resolve it?

23 MS. BROWN: Yes, Your Honor.

24 THE COURT: Very good. Thank you.

25 Yes, sir?

1 MR. GRESH: It's along those same lines, Your
2 Honor. Looking through the pleadings last night, it
3 appears that Marick may still have cross-claims that are
4 pending against Bostic Construction Company. I thought
5 all of those had been resolved at the summary judgment
6 stage, but it doesn't appear that the order actually
7 addressed Marick's claims. Marick filed the cross-claim
8 for equitable indemnity, breach of contract, negligence
9 and breach of warranty. I believe at the close of the
10 evidence, there's been no evidence of a contract between
11 of them or any warranties that might have existed. So I
12 don't think the jury could possibly hear those issues or
13 decide that Bostic ---

14 THE COURT: I thought I had taken care of all
15 the indemnity claims.

16 MR. GRESH: I think you had, Your Honor. But I
17 think on the actual order, I think it said I.M.K./I.K.
18 And it had a lot of people, but I don't think it read
19 Marick. I just wanted ---

20 THE COURT: Well, that's the problem with this
21 case because I have learned that I.M.K. is made up of
22 Integrys Keowee and Marick. So it's ---

23 MR. BELCHER: The motion before the Court,
24 which I believe was granted, was any and all cross-claims
25 whatsoever arising out of anything as to among the

1 defendants are now hereby dismissed.

2 THE COURT: Well, that was my intent, and that
3 would be the intent republished here today.

4 MR. BELCHER: All right. Thank you, Your
5 Honor.

6 THE COURT: Any problem with that, Mr. Imhoff?

7 MR. IMHOFF: Well, yes, Your Honor. I mean, I
8 think we actually had a motion hearing on that where
9 Bostic moved for summary judgment on Marick's cross-
10 claims, and you denied them, Your Honor. There's
11 negligence, breach of contract, and equitable indemnity.

12 THE COURT: Well, the equitable indemnity, I
13 think I took care of. I didn't take care of the
14 equitable indemnity as to Marick and Bostic?

15 MR. IMHOFF: Not between Marick and Bostic and
16 its subcontractors, you didn't. As to Bostic and its
17 subcontractors, you did. As to Marick and its
18 subcontractors, you did, but not between Bostic and
19 Marick.

20 THE COURT: Well, Bostic and Marick are not
21 subcontractors. Aren't they independents?

22 MR. IMHOFF: No. That's correct. That's
23 right.

24 THE COURT: So, I mean, again, as far as -- in
25 other words, I think this case is going to resolve phase

1 one. I don't want any -- what is it? -- cross-claims or
2 anything else out there unless -- what is it? -- it's
3 presented to this jury. And I have not heard any
4 testimony about indemnification or anything of that
5 nature. So I'm going to grant the directed verdict
6 motion to dismiss any claims or cross-claims involving
7 Marick and Bostic Brothers.

8 MR. BELCHER: Thank you, Your Honor.

9 THE COURT: Okay. Thank you, gentlemen.

10 All right. Let's see. Now, Mr. Belcher we've been
11 using you as the head.

12 MR. BELCHER: We've been working on our verdict
13 form, and I think we are very close to agreeing. But
14 before I start, you brought up an interesting point.
15 You've been using me as the head of this. We need to
16 talk about order of closing. I think that's one of the
17 first -- that's actually something that's pretty
18 important.

19 THE COURT: Well, the thing is, I had, as I
20 say, developed a certain order that I've been following.
21 And I don't know if it would do us any good to change
22 that order as far as the jury's concerned. I would just
23 as soon -- and this is the order I have, of course, as
24 you are well aware is Belcher and Gresh, then Anderson,
25 then Imhoff and Brown. Is Vick here today?

1 MS. BROWN: No.

2 THE COURT: All right. Brown and then
3 Hemphill.

4 MR. BELCHER: That was by agreement of the
5 parties as well. But I don't think the parties have any
6 agreement as to how they're going to close. And we
7 would like -- Bostic would like to revert to the order of
8 the caption because I'm the one with the expert, I'm the
9 one with the damages expert, and I'm the one who should
10 ---

11 THE COURT: Well, what do you want to do? I
12 don't know where Bostic comes in the caption?

13 MR. BELCHER: At the end now. With Nino gone,
14 we're at the bottom of the caption.

15 THE COURT: Gentlemen, what do the collective
16 body of defendants say? Now, I'm going to follow this,
17 the one I've been using. Mr. Anderson, you're out now?

18 MR. ANDERSON: That is correct, Your Honor.

19 THE COURT: All right. You don't want to make
20 an argument or anything?

21 MR. ANDERSON: Well, I can still make my
22 closing if you like, but ---

23 THE COURT: No, thank you. I'm being entirely,
24 completely and unadulterated facetious.

25 All right. Y'all resolve that. We're not going to

1 the jury for a little while. All right. Now -- but
2 let's do this. I do want to get your directed verdict
3 motions on the record. So I'm going to follow the --
4 until we do all of that, I'm going to follow the schedule
5 I've been doing or the order I've been doing.

6 So, Mr. Belcher, anything?

7 Or Mr. Gresh, excuse me.

8 MR. GRESH: Thank you, Your Honor. At this
9 time, the Bostic Brothers Construction, Inc., would renew
10 their directed verdict motions that were made at the
11 close of plaintiffs' case and would adopt all of those
12 arguments previously put before the Court as to why this
13 matter is barred by the applicable statutes of
14 limitations that might exist.

15 At the close of the plaintiffs' case, the Court had
16 indicated that it was going to rule or had actually ruled
17 that the statute of limitations applicable was tolled
18 either by equitable tolling or equitable estoppel. I
19 don't know which either of those two principles applied
20 to do it. In either event, the only thing that I would
21 bring up before this Court now -- I don't know that it
22 was brought up earlier -- is that we can't fashion an
23 equitable remedy when there's an adequate remedy at law
24 to address the issues. Equity won't apply in that
25 circumstance.

1 The legal remedy that we have here is interesting in
2 that it's actually being litigated right now. It's being
3 currently pled by the plaintiffs. These plaintiffs have
4 made a breach of fiduciary duty claim against the board
5 of the homeowners association. That is the remedy of law
6 for failure to sue Bostic timely.

7 The situation is analogous to if an attorney is
8 representing a plaintiff and they fail to timely file a
9 lawsuit against a defendant. The defendant doesn't get
10 sued later after the statute runs because the attorney
11 messed up. Instead, that plaintiff would say, "I have a
12 cause of action against my attorney for the attorney's
13 failure to file the claim timely."

14 Here these homeowners have a claim, and they're
15 actually bringing that claim right now, against the board
16 for the board's failure to timely sue Bostic. It is not
17 Bostic's actions that caused the board not to timely sue
18 it. It's the board's failure to carry out its fiduciary
19 duty that it owed to these plaintiffs. So I think where
20 you have an adequate remedy at law, that is the issue and
21 they ought not to get into equity.

22 And the only other point I would actually clarify is
23 that Bostic Brothers, Joe, Jeff, Mel, the corporation,
24 all those things that we've been talking about, are not
25 on this board, were never on the board of the Stoneledge

1 Property Owners Association, Inc. There's nothing to be
2 amalgamated or confused or self-dealt in that
3 circumstance.

4 THE COURT: All right.

5 MR. GRESH: Thank you, Your Honor.

6 THE COURT: Mr. Lyles?

7 MR. LYLES: The only thing I would add to the
8 arguments that we previously made is that the breach of
9 fiduciary duty claim that's been brought by the
10 plaintiffs in this case is not the one that Mr. Gresh
11 just described. It is a breach of fiduciary duty for
12 turning over control of the association when the common
13 elements, the building envelopes, were not in good
14 condition. And so we have not pursued the claim that he
15 contends is being pursued right now.

16 THE COURT: All right. So you do not have a
17 breach of fiduciary duty against Bostic?

18 MR. LYLES: Not against Bostic, no, sir, I
19 don't. And I don't have a claim against the former board
20 for failing to sue Bostic.

21 THE COURT: All right.

22 MR. GRESH: Mr. Lyles' failure to file a claim
23 for beach of fiduciary duty against those board members
24 for their breach of fiduciary duty should not operate to
25 extend the statute of limitations as to those issues.

1 They are defendants. They are on the jury verdict form
2 for breach of fiduciary duty. It's a cause of action
3 that's been pled and proved, I think. And so the jury
4 ought to be able to rely upon that and give them an
5 adequate remedy at law.

6 THE COURT: All right. Let me see if I
7 understand it. Now, Mr. Lyles, you say you do not have a
8 claim against Bostic for breach of fiduciary duty?

9 MR. LYLES: I do not have a claim against
10 Bostic for breach of fiduciary duty.

11 THE COURT: And Mr. Gresh, you say you want a
12 claim against Bostic for ---

13 MR. GRESH: No. Instead, these plaintiffs have
14 a claim for breach of fiduciary duty against the people
15 who were controlling the board that failed to timely sue
16 Bostic. That's a claim that's pled. That's a claim this
17 jury will hear today. They already ---

18 THE COURT: As I propose the verdict form or as
19 I will probably submit the verdict form, it'll be as to
20 each cause of action if it applies to the defendants. In
21 other words, the parties -- so, I mean, under the breach
22 of fiduciary duty, it'll be -- the verdict will be as to
23 the plaintiff and then the defendants to which that
24 applies.

25 MR. GRESH: That's right.

1 THE COURT: And Bostic would be in that number.

2 MR. GRESH: That's right.

3 THE COURT: And what more do you want?

4 MR. GRESH: I want the negligence and implied
5 warranty claims dismissed for the failure to timely file
6 those.

7 THE COURT: Well, that's denied. That hasn't
8 changed since yesterday.

9 MR. GRESH: I figured. I just was pointing out
10 to you ---

11 THE COURT: Well, just put -- for the record,
12 it is. All right. Because I tell you, it's -- I'm still
13 trying to find a case. And I thought maybe y'all would
14 probably know it. Whatever. But anyway, the case about
15 either paradoxical or something that said that -- what is
16 it? -- to expect a board to sue itself. And I still feel
17 it might be an equitable remedy, but I think it's also a
18 matter of law that I have to -- and I'll tell you the
19 origin of the term. Never mind.

20 All right. So that is -- I'm going to deny the
21 motion as to applying a three-year statute of limitations
22 when the defendant was in control of everything and said
23 from the very beginning that it was going -- or at least
24 all the testimony has been that they wanted to repair it
25 and everything else, and so the homeowners that relied on

1 that should not be estopped. Or the association, which
2 didn't even come into power or existence until two years
3 before the suit was brought. All right. Denied.

4 MR. GRESH: Thank you, Your Honor.

5 THE COURT: All right. Next? All right. I'm
6 sorry. I'm doing this.

7 All right. Mr. Anderson? I'm sorry. You're out.
8 Okay.

9 Mr. Imhoff?

10 MR. IMHOFF: Yes, Your Honor. Thank you.

11 THE COURT: All right. And, again, I would --
12 with the Court's permission, I would renew and
13 incorporate -- I renew all of my directed verdict -- my
14 client's directed verdict motions and incorporate all of
15 those arguments with the Court's permission, Your Honor.
16 And let me just go back to my awful drawing over here,
17 Your Honor.

18 But let me start with piercing the corporate veil,
19 the amalgamation here, Your Honor. And if I may ask ---

20 THE COURT: Well, let me ask you. Has anything
21 changed from yesterday?

22 MR. IMHOFF: Well, Your Honor, what the ruling,
23 I think, does is makes Rick III amalgamated into one
24 entity with Larry Lollis, two men who I'm not sure have
25 ever even met. And ---

1 THE COURT: I think that can be said of almost
2 any corporate structure.

3 MR. IMHOFF: Well ---

4 THE COURT: I'm sorry. Listen, is Rick III not
5 a member of Marick?

6 MR. IMHOFF: Rick III is a member of Marick.

7 THE COURT: All right. Is Larry Lollis a
8 member of I.K.?

9 MR. IMHOFF: Yes, Your Honor.

10 THE COURT: And is not I.K. Integrys, Marick,
11 Keowee?

12 MR. IMHOFF: I.M.K., Your Honor?

13 THE COURT: Uh-huh (affirmative).

14 MR. IMHOFF: Yes, Your Honor.

15 THE COURT: All right. Overruled.

16 MR. IMHOFF: Your Honor, you mean denied?

17 THE COURT: I mean, the record is there. I
18 mean, you can argue the law on it, but that's at a
19 different place.

20 MR. IMHOFF: I assume that means ---

21 THE COURT: In other words, Rule 43(j), is it,
22 that says that once a ruling is made that -- what is it?
23 -- no further argument will be tolerated? I don't think
24 it said that, but I might say that.

25 MR. IMHOFF: May I ask for one clarification?

1 THE COURT: Yes, sir.

2 MR. IMHOFF: Okay. I assume that means if
3 there's a verdict against I.M.K., Tim Roberson is also
4 liable for that verdict, Your Honor?

5 THE COURT: I'm not going to get into the --
6 what is it? -- the corporate structures and -- what is
7 it? -- the identity of members. I am just going to take
8 the pleadings, and y'all will be the ones that will fight
9 that out. I mean, if Mr. Lyles wants to collect.

10 MR. LYLES: Mr. Roberson ---

11 THE COURT: Unless you want to pay him. I
12 think that's going to be settled in another arena as
13 well.

14 MR. IMHOFF: Right.

15 THE COURT: Okay. By the way -- let me see. I
16 just want to be sure we haven't -- since we're going to
17 get back into this, I said 43(j). It's (i). No argument
18 shall be made on objections to admissibility of evidence
19 or conduct in the trial unless specifically requested by
20 the court. I do not request any further argument.

21 MR. IMHOFF: All right.

22 THE COURT: I think the record speaks for
23 itself.

24 MR. IMHOFF: Your Honor ---

25 THE COURT: And what does it say, reviews.

1 Yes, sir?

2 MR. IMHOFF: The other directed verdict -- and
3 I'm going to combine a couple in the interest of time.
4 But it is essentially the argument on a partial directed
5 verdict which narrows the cause of action, narrows the
6 damages, for my clients based on the Roundtree Villas,
7 based upon the fact that, Your Honor, your case which I
8 guess went up, Moore versus Moore, which has very similar
9 -- based on what you found, that breach of fiduciary duty
10 has a very similar element.

11 THE COURT: Is that the plumbers?

12 MR. IMHOFF: I'm sorry, Your Honor?

13 THE COURT: Is that the plumbers down in
14 Walterboro?

15 MR. IMHOFF: I don't know if it was plumbers.

16 THE COURT: Well, I mean, that's the only thing
17 I can think of that had fiduciary duty.

18 MR. IMHOFF: But, yes, I believe they were
19 partners, Your Honor. I don't remember if they were --
20 but, Your Honor, the argument is essentially this, that
21 Derek Hodgkin is the testimony that implicates my clients
22 for some of the damages in this case. And the damages
23 that he said from the plaintiffs' own expert's mouth is
24 that the entire repair scope needed to be performed in
25 2005 before Marick ever got there and that the only thing

1 -- this is from his words. The only thing that Marick
2 would be liable for is potentially the damages caused
3 over a period of time from 2005 to 2008 to the sheathing
4 and the framing. That was from his mouth, Your Honor.
5 And elements of both negligence and breach of fiduciary
6 duty or that the damages are proximately caused by the
7 duty and the breach of that duty. And the damages that
8 are proximately caused by my ---

9 THE COURT: What's your remedy?

10 MR. IMHOFF: What? I'm sorry, Your Honor.

11 THE COURT: What is your remedy?

12 MR. IMHOFF: What?

13 THE COURT: Remedy? How do we get out of that
14 conundrum?

15 MR. IMHOFF: I think that we could put in there
16 that do you find that Marick's lack of investigation,
17 lack of repair, caused damages to the structure. I mean,
18 I think you could do it on a verdict -- and we're going
19 to argue the verdict form.

20 THE COURT: All right. We'll talk about that
21 in the verdict form. But as a matter of law, I'm going
22 to deny your motion.

23 MR. IMHOFF: Thank you, Your Honor.

24 THE COURT: All right. Next would be Ms.
25 Brown.

1 MS. BROWN: Again, I.M.K., I.K., Mr. Lollis and
2 Mr. Cox would renew their directed verdict motions and
3 incorporate the arguments that were made earlier. The
4 only thing that has changed since our directed verdict
5 motion, I believe, is the amalgamation ruling. And I
6 guess I'm asking for clarification on -- is the Court's
7 ruling that my four clients are amalgamated, or is this a
8 piercing argument? Is it alter ego? Or is it all three?
9 I guess, for purposes of the record, I just would like to
10 know what the finding is with regards to my client.

11 THE COURT: Well, what's your motion?

12 MS. BROWN: My motion is for a directed verdict
13 on my clients as there is no testimony in the record of a
14 standard for breach of fiduciary duty and that my clients
15 -- and there's no testimony of a breach of fiduciary duty
16 by my clients, in particular, Integrys Keowee, Mr. Cox
17 and Mr. Lollis.

18 THE COURT: Well, that'll be covered by the
19 charges. Very good.

20 MS. BROWN: Okay.

21 THE COURT: So your motion is denied in all
22 particulars.

23 MS. BROWN: Okay. And I guess I am asking for
24 clarification, not as a motion. But on the amalgamation
25 theory, it was unclear to me yesterday whether we were

1 talking about amalgamation, piercing the corporate veil
2 or an alter ego?

3 THE COURT: No. I'm talking about liability.

4 MS. BROWN: Okay.

5 THE COURT: And the liability I find is there
6 as far as on what particular area you've got. If I had
7 to back through the structure again somewhere, you've got
8 the Thoenneses and certain of the groups starting almost
9 with Bostic because I think there was -- was it Thoennes
10 that was the one that brought in the others with Marick,
11 saying that they've got a good project or whatever. And
12 apparently there was some connection there. You've got
13 this continuous -- what is it? -- it's almost -- I don't
14 want to say incestuous, but -- what is it? -- family
15 related and -- what is it? -- corporate involvement. And
16 that's what I find, that -- what is it? -- that that does
17 create a liability.

18 Now, you and the appellate courts can sort that out.
19 But that is what I find, that they would be. The
20 entities are -- what is it? -- what they are, and their
21 liability is the way the action was brought.

22 MS. BROWN: Thank you, Your Honor.

23 THE COURT: Very good. I don't even think
24 Thoennes is -- well, one of -- the father is a party;
25 right?

1 MR. LYLES: Yes, sir.

2 MR. IMHOFF: Yes, Your Honor.

3 THE COURT: So anyway. All right.

4 Now, Mr. Hemphill?

5 MR. HEMPHILL: May it please the Court, Your
6 Honor. Defendant M Group would renew its motion for a
7 directed verdict. In the defendant's case-in-chief,
8 there was absolutely no mention of M Group. So we're
9 left with the same evidence that was in the plaintiffs'
10 case-in-chief which was insufficient to show that M Group
11 would be liable under successor liability theory or any
12 other for that matter.

13 THE COURT: All right. Now, M Group is Marick;
14 right?

15 MR. HEMPHILL: No. M Group is a second
16 corporation to Marick Home Builders.

17 THE COURT: That's what I'm saying. I mean,
18 but that's the origin of M Group? I think -- what is it?
19 -- it's not? I thought when Marick went out of business
20 that M Group was involved because -- forgive me -- wasn't
21 it Mr. Thoennes that said he needed something to do?

22 MR. HEMPHILL: Yes, Your Honor.

23 THE COURT: That's M Group?

24 MR. HEMPHILL: Yes, Your Honor.

25 THE COURT: Overruled.

1 MR. HEMPHILL: Thank you, Your Honor.

2 THE COURT: Oh, boy. All right. Now, Mr.
3 Lyles, we're back to you.

4 MR. LYLES: Yes, sir.

5 THE COURT: You want some directed verdicts?

6 MR. LYLES: The plaintiff actually does have a
7 directed verdict motion.

8 THE COURT: All right.

9 MR. LYLES: Based on the Pope case, Pope versus
10 Heritage Communities, which was previously cited at 717
11 S.E.2d 765, we would ask for directed verdict on the
12 issue of liability with respect to Bostic. Bostic and
13 its attorneys in its opening stated to the jury that
14 there's no question that there are damages and problems
15 at this project. The dispute was going to be about the
16 amount of the fix. And that's been the theme of this
17 trial. That's exactly what happened in the Pope versus
18 Heritage Communities case. And I believe it was Judge
19 Newman directed a verdict against the defendants having
20 found that their admission of defects and admission of
21 damages established liability as a matter of law.

22 Similarly, we would also ask for directed verdict on
23 the issue of fiduciary duty with respect to the developer
24 defense. They too have told this jury that the project
25 is rife with damages. They simply disagree with me about

1 the cost to repair. Every witness who testified in this
2 case, including all of the defendants and the people that
3 I have sued, all testified they were surprised by the
4 damages and wanted to see the building repaired and
5 repaired properly.

6 THE COURT: All right.

7 All right. Mr. Belcher?

8 MR. BELCHER: Yes, Your Honor. We will concede
9 simple negligence for the purposes of the jury form, but
10 we would reserve the right to reserve proximate cause of
11 damages.

12 THE COURT: Well, the thing is, I think that
13 you make a good point. And that's why I even asked you
14 yesterday that, you know, of course, where you do have
15 admission as to liability for causation, it still comes
16 down to a question of credibility as to the resulting of
17 the causation of the damages. And so in an action on
18 negligence that -- what is it? -- you can have a -- it
19 won't be a verdict for -- I mean, for the plaintiff. But
20 it could be a verdict for the defendant for the want of
21 credible testimony supporting the damage, even if the
22 damaged figure is uncontroverted. And that is what Black
23 v. Hodge and Bison versus -- Bison Trucking Company.

24 MR. BELCHER: Well, in response to Mr. Lyles'
25 motion, we don't disagree. We would concede simple

1 negligence. We would reserve the right to argue to the
2 jury the damages and proximate ---

3 THE COURT: Well, that's what I'm saying. But
4 actually you're entitled to a verdict if you can persuade
5 them that there's no credible evidence supporting what
6 you say. But, again, I think you pretty much -- I don't
7 know what the jury's going to do. But -- what is it? --
8 801 that when you put somebody out there speaking for
9 you?

10 MR. BELCHER: Admission by a party opponent.

11 THE COURT: Exactly. Yeah.

12 MR. BELCHER: So we've admitted that we were at
13 fault, but we share the fault with others.

14 THE COURT: Exactly.

15 MR. BELCHER: This is limited solely to the
16 negligence claim. We reserve the right to fully argue
17 that we're not responsible under breach of warranty,
18 which is the other claim out there because the evidence
19 -- there's still room for us to argue that to the jury, I
20 think.

21 THE COURT: Well, I've been trying to say from
22 the beginning that you're entitled to a directed verdict.
23 Not a directed verdict, but a defense verdict even though
24 you admit liability if those damages are not established.

25 MR. BELCHER: Oh, I've had it happen before,

1 yeah.

2 THE COURT: All right. So I overrule your
3 objection.

4 MR. BELCHER: I didn't object.

5 THE COURT: Well, that's what I was just saying
6 because I think it's going to be covered. In other
7 words, you are conceding liability as far as the
8 negligence ---

9 MR. BELCHER: The plaintiffs admit ---

10 THE COURT: --- but not causation, that that
11 negligence was such that it resulted in the damages?

12 MR. BELCHER: Correct. The plaintiffs have met
13 their burden on the first two elements of negligence,
14 which is a duty and a breach of a duty by Bostic.

15 THE COURT: Right.

16 MR. BELCHER: Yes, I think you're right.

17 THE COURT: Anyone else? Is that the only one
18 you wanted, Bostic?

19 MR. LYLES: Well, I would only point out for
20 the record that the -- I think that the Magnolia North
21 case and the Pope case also address the issue of
22 proximate cause. And they say it would be disingenuous
23 for a defendant to get up and say that they admit defects
24 and admit damages but then deny proximate cause. So I
25 would want to put that on the record.

1 The other motion that I would make is that we would
2 also move for a directed verdict on the issue of the
3 breach of fiduciary duty. As established in Concerned
4 Citizens of Dunes West, there's a fiduciary duty to turn
5 over these building components in good condition. The
6 testimony in this case is uncontroverted that they were
7 not in good condition at the time the control of the
8 homeowners association was given to my clients in
9 September of 2008.

10 THE COURT: All right.

11 Who wants to be heard on that? Mr. Imhoff?

12 MR. IMHOFF: Yes, Your Honor. Thank you, Your
13 Honor. Your Honor, Marick and Rick Thoennes did not
14 admit liability. In fact, they vigorously defended this
15 case. And the evidence is not controverted. Steve
16 Taylor, in fact, who was the first president of the
17 homeowners association wrote a letter in 2008 saying that
18 the project was turned over in great shape and with
19 plenty of money and called my clients honest and did a
20 good job on the project. And I think that the breach of
21 fiduciary duty, as you heard me argue earlier, has
22 similar elements of negligence. And you have to talk
23 about whether they breached some standard of care. It's
24 not strict liability as Mr. Lyles is arguing and will
25 argue to you, I think, when we argue about the charges.

1 It actually requires some finding of wrongdoing, and
2 wrongdoing that requires some knowledge or something
3 further than that. And we've denied it.

4 THE COURT: Not wrongdoing. It can be
5 incompetence.

6 MR. IMHOFF: I'm sorry, Your Honor?

7 THE COURT: It can be incompetence, which is
8 not wrongdoing so much. It's omission rather than
9 commission.

10 MR. IMHOFF: Well, I think ---

11 THE COURT: That's a -- what is it? -- but I'm
12 just saying that it doesn't require fraud, and it doesn't
13 require all of the onerous type of activities.

14 MR. IMHOFF: But it requires some showing, Your
15 Honor. And I think ---

16 THE COURT: In other words, it has to have some
17 either misfeasance or nonfeasance, yes, sir.

18 MR. IMHOFF: So I think there are facts in
19 evidence.

20 THE COURT: All right. You can argue the
21 facts. Yes, sir. Overruled. Well, no. You're looking
22 for the granting?

23 MR. LYLES: Yes, sir.

24 THE COURT: I don't think -- as I talked to him
25 about it, I just convinced myself there is a question, so

1 your motion for directed verdict as to liability on
2 fiduciary negligence is denied.

3 MS. BROWN: And, Your Honor, just for the
4 record, I.M.K., I.K., and Mr. Cox and Mr. Lollis join Mr.
5 Imhoff's arguments about that with regard to the
6 fiduciary duty.

7 THE COURT: All right. And the fiduciary duty
8 will -- the liability there will be denied. It'll be up
9 to you to convince the jury or Mr. Lyles to convince the
10 jury.

11 All right. Anyone else?

12 (No response)

13 THE COURT: Very good. All right. Let's see.
14 What's next? The verdict form?

15 MR. BELCHER: There are two things left to
16 accomplish, the charges and the verdict form.

17 THE COURT: All right.

18 MR. BELCHER: And if the Court has already
19 established what its going to charge the jury with. We
20 just need to know so we can proffer some other charges
21 just for the record. Or is the Court waiting for us to
22 give you additional charges or ---

23 THE COURT: I think you've been giving the
24 charges all night, from what my law clerk tells me.

25 MR. BELCHER: So we just -- we need to sift

1 through those. And the Court needs to tell us which ones
2 they are not going to charge, which we can accomplish
3 later. Then we can talk about the verdict form now. But
4 those are just the two remaining items to keep it going
5 here.

6 THE COURT: All right. Just as far as the
7 charge that I -- as part of my normal charge in
8 negligence cases, expert witnesses, burden of proof.
9 Now, do we have any affirmative defenses? I don't think
10 so. Do we? You say no. I've denied comparative
11 negligence.

12 MR. BELCHER: The only remaining one would be
13 mitigation of damages. And that goes along with
14 comparative, so we're going to ---

15 THE COURT: Well, that's also -- what is it? --
16 oh, mitigation of damages, yes.

17 MR. BELCHER: So we'll just withdraw it.

18 THE COURT: All right.

19 MR. IMHOFF: I don't think we withdraw
20 mitigation of damages, Your Honor.

21 THE COURT: All right. I'll charge mitigation.

22 All right. Preponderance of the evidence, direct
23 and circumstantial evidence, negligence. I think you're
24 familiar with that.

25 Proximate cause. Of course, proximate cause does

1 not mean the only cause. And the proximate cause if it
2 leads to one of the direct concurring causes of the
3 injury.

4 Negligence, damages. Have we had any testimony
5 about depreciation?

6 MR. LYLES: No, sir.

7 THE COURT: So it would come down to cost of
8 repairs and incidental damages and consequential damages?

9 MR. LYLES: Yes, sir.

10 THE COURT: All right. So I'll charge as far
11 as the elements of damages the negligence is the cost of
12 repairs and incidental damages and consequential damages.
13 Of course, they're not entitled to conjectural or
14 speculative damages, but actual damages do have to
15 include any past, present and future damages which are
16 established by the testimony or evidence and reduced to
17 present day value.

18 All right. Have we got any -- I don't know about
19 the duty to exercise care in making repairs.

20 MR. LYLES: That would be relevant to the
21 claims against Marick.

22 MR. IMHOFF: Yes, Your Honor, there are several
23 in there. We put the Roundtree Villas case in there, I
24 believe.

25 Is that right?

1 And I think Mr. Lyles has submitted one -- it might
2 have been on breach of fiduciary duty. It had several
3 cites that we submitted a revised version of it. There
4 was some language in there about turning it over ---

5 THE COURT: That's not where I was going. Just
6 duty to exercise care in making repairs. That's a
7 general charge. We're worrying about the specific causes
8 of action.

9 Duty to mitigate damage. I find that is -- and I am
10 going to charge implied warranty of workmanlike service,
11 the breach of an implied warranty. Implied warranty to
12 the damages, are those incidental. Cost of repairs. In
13 order to recover damages, the evidence should be as such
14 to enable the amount thereof to be determined with
15 reasonably certainty or accuracy. Cannot be left to
16 conjecture, guess or speculation. Builder liability, I
17 think is a general charge. Recurring causes.

18 All right. Now, where is Mr. Anderson? Is he gone?
19 Oh, there you are.

20 MR. ANDERSON: Yes, sir.

21 THE COURT: Now, you had a memorandum on
22 apportionment of damages?

23 MR. ANDERSON: Yes, Your Honor, I did.

24 THE COURT: Well, I think that we might have
25 had a little -- what is it? ...

1 MR. ANDERSON: There were actually two
2 memorandums on two different aspects of ---

3 THE COURT: Well, the thing is, I believe,
4 first of all, the apportionment comes in after a verdict,
5 or at least that's what the statute says. After the
6 damages have been determined, then you have a separate
7 action dealing with apportionment. But more importantly
8 -- and this is what I was looking for here -- the issue
9 of third-party negligence or sole negligence is raised by
10 a general denial. So you don't have to plead it
11 specifically and you can still argue. In other words,
12 the burden of proof is upon the plaintiff to prove not
13 only that there was negligence, but that the named
14 defendant or defendants were the cause of that.
15 Otherwise, they failed in their burden of proof as to
16 proving causation -- negligence as well as causation.
17 So third-party negligence and sole negligence is always
18 raised by a general denial. And that it goes back before
19 a lot of your time because that was under the old code
20 pleadings when we had demurrers. I think it's the
21 Funderburke case, if I'm not mistaken. But anyway, I
22 will be charging intervening negligence and third-party
23 negligence.

24 Breach of fiduciary duty. All right. Now, this is
25 the one that you say -- all right. Let me read you what

1 I have. It's three quarters of a page. The plaintiff
2 claims that the developers are in breach of fiduciary
3 duty owed to them. A fiduciary relationship is founded
4 on the trust and competence of one entity and the
5 integrity and fidelity of another. A fiduciary
6 relationship exists when one imposes a special confidence
7 in another so that the latter in equity and good
8 conscience is bound to act in good faith and with due
9 regard to the interest of the one imposing the
10 confidence. The law requires that parties in a fiduciary
11 relationship must fully disclose to each other all known
12 information that is significant and material. And that's
13 the Moore versus Moore case. One standing in a fiduciary
14 relationship with another is subject to liability to the
15 other for harm resulting from a breach of the duty
16 imposed by the relationship. The developer owed a -- the
17 developer owes a fiduciary duty to ensure that the common
18 areas of the condominium -- developer owes and not -- all
19 right. Developer owes a fiduciary duty to ensure that
20 the common areas are in good repair at the time the
21 developer relinquishes control of the -- relinquishes
22 control to the homeowners.

23 All right. Now, that's pretty much the charge that
24 I'll have.

25 Now, what do you want, Mr. Imhoff?

1 MR. IMHOFF: Your Honor, and that's the
2 discussion we were having earlier where that almost
3 sounds like the strict liability standard that the
4 developer owes a duty to make sure it's in good repair.
5 And our position and argument has been all along that
6 there are other elements to that. That the jury has to
7 find that we knew or somehow, as you said, were blind or
8 malfeasance, I think that you said. What did we know?
9 What we should have known. And so we propose an
10 alternative jury charge that goes through the elements of
11 breach of fiduciary duty from R.F.T. Management versus
12 Tinsley and Adams which say to establish a claim for
13 breach of fiduciary duty, the plaintiffs must prove the
14 existence of breach and damages proximately resulting
15 from the wrongful conduct. And I think it would be
16 helpful to the jury to understand what exactly the
17 standard is at the time of that transfer. And, as you
18 know, the argument from Marick has been that they didn't
19 know. That they believed at the time that the common
20 areas were in good repair as did the homeowners at the
21 time, according to Steve Taylor. And so it would be
22 unfair, we believe, to not be able to give a charge to
23 the jury or argue to the jury that it's not strict
24 liability. That if we didn't know or if we believed they
25 were in good shape, that that's a reasonable way to deny

1 liability.

2 THE COURT: All right. What do you say, Mr.
3 Lyles?

4 MR. LYLES: Well, I say that the Court's
5 charge, I think, is a good charge. The latter part of
6 the charge that is opposed by Mr. Imhoff appears to come
7 right out of the case law in South Carolina. And as it
8 relates to the fiduciary ---

9 THE COURT: Which case was it?

10 MR. LYLES: Concerned ---

11 THE COURT: I had it up here.

12 MR. LYLES: Well, we had Concerned ---

13 THE COURT: Is it Dunes?

14 MR. LYLES: Dunes West, yes, sir.

15 THE COURT: All right. As I'm reading Dunes,
16 it was the court's holding in that case that they did
17 adopt the statement from a Missouri court as being the
18 law here in South Carolina. We hold today that it does
19 -- that it does state the law of this state that the
20 developer of a -- that a developer owes a duty to the
21 property owners association to turn over common areas
22 that are not substandard and that are in good repair.
23 Failure to do so subjects the developer to liability to
24 bring the common areas up to standard.

25 MR. IMHOFF: Yes, Your Honor.

1 THE COURT: And what's wrong with that?

2 MR. IMHOFF: Your Honor, that case, as you
3 clearly read, establishes the duty. It doesn't establish
4 the standard for breach of the duty except that, as you
5 just read, I'm sure ---

6 THE COURT: Well, you're saying that that
7 provides some sort of -- what is it? -- well, liability,
8 strict liability?

9 MR. IMHOFF: Well, that's the plaintiffs'
10 argument, Your Honor. In that case, as you know, they
11 turned over roads that they knew were deficient. They
12 had a lawsuit over those roads. And that's why the court
13 ultimately found that not only they had a duty, but they
14 breached the duty. But in that case and in the Magnolia
15 case where the court found that the developer took the
16 opportunity to unload units that they knew that the
17 homeowners association -- or common elements that the
18 homeowners association couldn't afford, they found a
19 breach of the standard of care by some wrongful conduct.
20 And they cited to the wrongful conduct of both of them.
21 But what the courts haven't done for us, Your Honor, is
22 tell us what the standard is. They tell us we've got the
23 duty, but they haven't told us what the standard is. And
24 our defense in this case, as you've heard for the last
25 two weeks, is that at the time it was turned over, both

1 the developer ---

2 THE COURT: Now, you're not asking the Court to
3 charge on the facts, say what a developer needs to do in
4 order to turn over the common areas in a good repair at
5 the time of the conveyance?

6 MR. IMHOFF: No.

7 THE COURT: I mean, should I say that they
8 should have two layers of paint on the outside or -- no.
9 I think you're suggesting that the Court should charge on
10 the facts. And, also, I notice that -- what is it? -- in
11 the Dunes case that certifying the questions they only
12 did one of the three, and that was the one that they did.
13 And they said that that was the law here in South
14 Carolina. And I feel if it's good enough for the United
15 States District Court, it's good enough for the Court of
16 Common Pleas for Oconee County.

17 MR. IMHOFF: What I'm asking for is a standard,
18 Your Honor. Not the facts, but a standard. That we have
19 -- that they have to show some wrongful conduct. Not
20 just that ---

21 THE COURT: Well, we've had testimony
22 throughout the trial as to different standards and all of
23 that. I don't know which one you want me to do. The
24 standard of the sheathing, or do you want the standard on
25 the paint? Do you want the standard on the -- which

1 standard? That's why we have building codes and all of
2 that. There's been testimony to that. And so I think
3 that I -- I'm going to just charge what the Supreme Court
4 gave to the District Court. I'm not going to ask more
5 for me.

6 MR. IMHOFF: Thank you, Your Honor.

7 THE COURT: All right. I will pretty much
8 charge -- well, I'm going to do -- I notice that in Dunes
9 they cite that statement as being the law in this state,
10 that the developers are held responsible for the
11 condition of the common areas at the time these areas are
12 deeded to the property owners association. If the areas
13 are not in good repair at the time of the conveyance, the
14 developer is liable for the cost of the repairs. They
15 cite that twice verbatim. And so I think that any more
16 would be somewhat presumptuous of me. And I'm not Chief
17 Justice Sanders when he decided he was going to adopt
18 comparative negligence.

19 Go ahead.

20 MR. IMHOFF: Well, Your Honor, just one more
21 thing. All the testimony is that they were latent and
22 hidden damages, and that's why we would ask for the
23 R.F.T. charge that goes ---

24 THE COURT: Do I have a latent defect? All
25 right. Well, in other words, I'm not going -- they're

1 numbered. In other words, I'm not going to charge
2 defendant Marick Home Builders' request for charge
3 unnumbered dated November blank, 2013.

4 MR. IMHOFF: That's the R.F.T. Management
5 citation, Your Honor, without.

6 THE COURT: Okay. So I note the objection for
7 failure to charge it.

8 All right. Now, what's next? All right. Now,
9 those are my charges that I'm coming -- I've got a whole
10 stack of your requests, and I need to know how you want
11 me to approach those.

12 MR. IMHOFF: Your Honor?

13 THE COURT: Yes, sir.

14 MR. IMHOFF: We don't have very many, if you
15 don't mind looking at mine first. You've already pushed
16 the R.F.T. to the side, so that would limit the number we
17 have.

18 THE COURT: Okay.

19 MR. IMHOFF: Your Honor, there is one entitled
20 judgment of association directors. And it's the business
21 judgment rule. We would ask that the business judgment
22 rule be charged to the jury for the conduct of directors
23 of the homeowners association.

24 THE COURT: All right. Is this Marick Home
25 Builders' request, judgment of association of directors?

1 It looks like it's from section forty-two of some
2 authority.

3 MR. IMHOFF: It's probably Judge Anderson, Your
4 Honor, but I'm not sure.

5 THE COURT: It's the shortest Judge Anderson
6 charge I've ever seen.

7 MR. IMHOFF: I know. I know, Your Honor. But
8 it does set the standard, as you talked about yesterday,
9 for what the standard for a breach of an association
10 director is.

11 THE COURT: What do you say, Mr. Lyles?

12 MR. LYLES: I say, Your Honor, that we brought
13 the claim for breach of fiduciary duty that was created
14 and recognized by the Concerned Citizens of Dunes West
15 case. That's the claim we brought. And to confuse that
16 issue with the business judgment rule, which is mentioned
17 nowhere in Goddard, nowhere in Dunes West, nowhere in any
18 of the cases that follow Dunes West, would be confusing
19 to the jury.

20 MR. IMHOFF: It is in Goddard, Your Honor.

21 THE COURT: I didn't see it. I mean, not the
22 portion that I quoted or looked at in Dunes West that
23 cites Goddard.

24 MR. IMHOFF: No, Your Honor. You're correct.

25 THE COURT: Goddard is a Missouri case, isn't

1 it?

2 MR. IMHOFF: But Goddard -- it is cited in
3 Goddard. It is cited ---

4 THE COURT: But in Missouri?

5 MR. LYLES: Goddard is a South Carolina case
6 ---

7 MR. IMHOFF: South Carolina.

8 MR. LYLES: --- that preceded Dunes West.

9 THE COURT: Oh, all right.

10 MR. IMHOFF: Well, we're talking about two
11 different ways to get a breach of fiduciary duty. The
12 first is just transferring the property to the homeowners
13 association in general by the developer. And the other
14 is for Rick Thoennes and Marick in their inspection and
15 investigation and role to decide, you know, not to take
16 off more stone or do further investigation. And that
17 would be an individual defense for Mr. Thoennes, Mr.
18 Roberson and Mr. Cox, that their actions sitting on that
19 board and the decisions that they make sitting on that
20 board should be judged by the business judgment rule.

21 MR. LYLES: Your Honor, I don't think I've made
22 that claim. I don't think I've ---

23 THE COURT: Well, that's just it because I've
24 been reading your request for charge. In a dispute
25 between directors of an incorporated homeowners

1 association, an aggrieved homeowner, the conduct of the
2 directors should be tested by the business judgment rule.
3 Now ---

4 MR. LYLES: We have not asserted a claim
5 against the board for failing to make repairs. We
6 offered up evidence of the duty of Marick, the general
7 contractor, to investigate and make repairs when it was
8 on notice of problems. But that's a simple negligence
9 claim against Marick. We've not sued -- we don't have a
10 ---

11 THE COURT: In other words, you're not suing
12 the directors of Marick or the directors of the board?

13 MR. LYLES: Well, I'm not suing the board for
14 ---

15 THE COURT: Marick.

16 MR. LYLES: --- the board's negligence.

17 THE COURT: Not Marick's board?

18 MR. LYLES: No, sir.

19 THE COURT: All right. And neither -- all
20 right. I think they've got enough to look at, so I'm
21 going to deny that as well. I'm going to just give them
22 the charge from Dockside.

23 All right. Next?

24 MR. IMHOFF: Roundtree Villas, Your Honor.
25 It's a little bit further down. I'm sorry. It's

1 liability of subsequent builder making repairs. And as
2 you just heard, that was what Mr. Lyles is alleging
3 against Marick Home Builders. And so it's clearly
4 relevant, Your Honor. Would you like me to read it to
5 you, or do you have it in front of you?

6 THE COURT: I don't have it. I think we've got
7 a bunch of them here. I wish y'all would give us
8 numbers. You know, that's how you submit requests for
9 charges is numbered. And you even have your blank space
10 for that. That way, I could just go to that number.

11 MR. IMHOFF: I apologize, Your Honor.

12 THE COURT: Well, it's -- the thing that
13 bothers me is that we've got a jury out there ready to do
14 their duty. And -- what is it? -- we're ---

15 LAW CLERK: What is the title of that charge,
16 Mr. Imhoff?

17 MR. IMHOFF: It's liability of subsequent
18 builder making repairs.

19 LAW CLERK: We didn't receive that. We have
20 jury charges, breach of fiduciary duty, negligence,
21 business judgment rule and building negligence were the
22 only three.

23 MR. IMHOFF: It was in there.

24 LAW CLERK: It's buried.

25 MR. IMHOFF: Half of them are in PDF.

1 May I tell you what it says, Your Honor?

2 THE COURT: Please.

3 MR. IMHOFF: And I apologize for this. We have
4 them actually somewhere floating around here.

5 THE COURT: Well, let's go ahead and move with
6 it. Tell me what it is.

7 MR. IMHOFF: Your Honor, it quotes right from
8 the Roundtree Villas case, which I talked about the other
9 day. One who undertakes to make repairs, the defective
10 components of a construction project is not liable for
11 the negligence of the prior builder or contractor. The
12 entity who assumes to make repairs to defective
13 components is only liable for damages proximately caused
14 by alleged negligent repair but not for any original
15 damages proximately caused by the negligence of a builder
16 or contractor. And that's exactly this case, Your Honor.
17 And that's, I think, an exact quote from Roundtree
18 Villas.

19 THE COURT: All right. Just a second. Let me
20 see if I can find it.

21 MR. HEMPHILL: Your Honor, I have a copy I'd be
22 happy to hand up to you.

23 THE COURT: Yeah. Do you have one that's
24 highlighted.

25 You know, also, when we cite a case, we're supposed

1 to cite the page number as well as the volume of the
2 reporter. So could you give me any direction as to where
3 I might find this cite in Roundtree Villas? One who
4 undertakes ...

5 MR. IMHOFF: Your Honor, we believe it's page
6 422.

7 THE COURT: 422? All right.

8 MR. IMHOFF: I'm sorry, Your Honor.
9 Southeastern Reporter.

10 THE COURT: I've got 422. I don't find it on
11 that page.

12 MR. IMHOFF: It continues apparently onto page
13 -- it looks like it's the fourth ---

14 THE COURT: All right. Head note four?

15 MR. IMHOFF: Head note four, Your Honor. And
16 it's the last couple of sentences of that head note.

17 THE COURT: Well, now, this was a lender case.

18 MR. IMHOFF: But, Your Honor -- but that lender
19 created an entity which was amalgamated to construct,
20 repair, and sell the units.

21 THE COURT: Overruled. I'm sorry. That's why
22 I need -- and that's why the rules provide that you're
23 supposed to provide the case -- not only -- what is it?
24 -- the cite for the case but also the authority for it.

25 All right. So I find that that would not be because

1 what they're talking about is they put the lender in the
2 same place as the homeowner saying they could have
3 individual contracts. Here we have -- what is it? -- the
4 seller making the repairs. I'm sorry. What is it?
5 There's a phrase that I seldom use, but I heard it in law
6 school. Officious intermeddlers. Anybody interferes
7 with something they don't need to do, then they accept
8 whatever the results are.

9 All right. Next?

10 MR. BELCHER: Are you done?

11 MR. IMHOFF: Yep.

12 MR. BELCHER: Your Honor, we agree with the
13 charge, and we think it's complete. The only question I
14 have is the credibility of witnesses and ---

15 THE COURT: Yeah. Well, I've got all of that
16 here, including their -- what is it? -- appearance on the
17 stand, demeanor, sometimes referred to as the demeanor of
18 the witness.

19 MR. BELCHER: Okay. Then we have no objection
20 to the charge. We believe them to be complete now.

21 THE COURT: All right. Now, Ms. Brown?

22 MS. BROWN: I had submitted, I believe, four
23 charges on the L.L.C. member's liability, individual
24 member's liability, for the acts of the corporation.

25 THE COURT: Now, which -- without looking at

1 the caption, which individual members are you concerned
2 about, Ms. Brown?

3 MS. BROWN: Mr. Lollis and Mr. Cox, and I guess
4 I.K. as a member of I.M.K.

5 THE COURT: All right. Now, all of those
6 participated. Weren't they the corporations? The
7 L.L.C.s?

8 MS. BROWN: I'm sorry. What was your question?

9 THE COURT: I say were they not all members of
10 the -- I mean, they were the L.L.C.s, were they not?

11 MS. BROWN: Mr. Cox and Mr. Lollis were members
12 in I.K.

13 THE COURT: So all of those -- what is it? --
14 that's the L.L.C., isn't it?

15 MS. BROWN: Yes, it is.

16 THE COURT: That's who you're seeking to
17 protect? Again, I think I'm not going to because I
18 haven't heard any testimony about the corporate law in
19 South Carolina, so I'm not going to try and make these
20 jurors -- what is it? -- that'll be something you can
21 argue at the time -- what is it? -- if a verdict is
22 rendered against any individual.

23 MS. BROWN: Okay.

24 THE COURT: I mean, if you want me to make them
25 -- how many hours of corporations did you have in law

1 school?

2 MS. BROWN: Not enough.

3 THE COURT: Well, I mean, do you -- and these
4 people haven't had any.

5 MS. BROWN: I understand, Your Honor.

6 THE COURT: Very good.

7 MS. BROWN: Just for the record, if I might
8 state ---

9 THE COURT: Oh, I'm overruling you on the
10 record, so your objection is protected.

11 MS. BROWN: Okay.

12 THE COURT: All right. Anything else?

13 MR. LYLES: Your Honor, for the plaintiff, you
14 indicated that you were going to do your standard builder
15 negligence charges?

16 THE COURT: Right.

17 MR. LYLES: I think that was included. And we
18 had noted in our submissions -- we had included the
19 builder negligence charges that were numbered eleven one
20 through eleven ten of Judge Anderson's book. And I just
21 wasn't sure about the extent of your builder negligence
22 charges. But I would simply refer to that.

23 And then for the record, I would object to the
24 mitigation charge that I understand you're going to make.

25 THE COURT: I understand. Your objection is

1 noted.

2 MR. LYLES: Yes, sir.

3 THE COURT: All right. Mr. Hemphill, you do
4 have one, don't you?

5 MR. HEMPHILL: I do have one charge on
6 successor liability.

7 THE COURT: All right. We saved that to last.
8 Okay.

9 MR. HEMPHILL: Yes, sir.

10 THE COURT: What do you say, Mr. Lyles? Do you
11 have a copy of the ---

12 MR. LYLES: I got an email from -- I think I
13 got an email from you.

14 MR. HEMPHILL: I emailed it to you.

15 MR. LYLES: Yeah. Do you have a copy of ---

16 MR. HEMPHILL: The charge?

17 MR. LYLES: Yeah. That's okay. Don't worry
18 about it.

19 You know, Judge, the general law -- I think me and
20 Mr. Hemphill agree on the law as it's reflected in Brown
21 and that other South Carolina case. And the name of that
22 case escapes me. And I'm not sure if that's not an issue
23 for the Court to decide as opposed to the jury.

24 THE COURT: That's what I was looking.

25 MR. LYLES: Yes, sir.

1 THE COURT: The Simmons case, of course, is the
2 certified case for another court.

3 MR. HEMPHILL: Your Honor, if I could be heard
4 on that?

5 THE COURT: Please. Of course, you can.

6 MR. HEMPHILL: My position on that is I think
7 the jury needs to know the general rule that successor
8 corporations are not liable. And they need to be able to
9 sort through this evidence that's been presented to see
10 whether an exception applies to that general rule. The
11 arguments have been made with regards to mere
12 continuation, which I believe the third exception as well
13 as defrauding of creditors, which is the fourth
14 exception. I think the jury needs to know what the rules
15 are.

16 THE COURT: What do you say, Mr. Lyles?

17 MR. LYLES: Again -- and I can't give you
18 authority on it. But it seems to me that like the
19 amalgamation theory, that that's an issue for the Court,
20 not the jury.

21 THE COURT: Well, let me see if I understand
22 this. M Group would not have been in existence if Bostic
23 hadn't built the condo development?

24 MR. HEMPHILL: No, sir. Totally separate.

25 THE COURT: Well, I didn't ask you that. I

1 just said, is that not true?

2 MR. HEMPHILL: That is not true, no, sir.

3 THE COURT: In other words, they went out -- M
4 Group -- what is it? -- provided some development?

5 MR. HEMPHILL: M Group was formed in 2009.

6 THE COURT: I didn't ask that. I said -- what
7 is it? -- is M Group not involved in Stoneledge?

8 MR. HEMPHILL: No, sir.

9 MR. LYLES: M Group came into existence because
10 Marick shut its doors.

11 THE COURT: Well, that's what I'm saying. But
12 that was the successor.

13 MR. LYLES: Yes, sir. And M Group would not
14 have been in existence had Marick not gone out of
15 business.

16 THE COURT: And Marick would not have been in
17 business as far as Stoneledge was concerned unless Bostic
18 had started construction?

19 MR. LYLES: Yes, sir.

20 THE COURT: And then I.M.K. came in?

21 MR. LYLES: Yes, sir.

22 THE COURT: And the 'M' in the I.M.K. is
23 Marick?

24 MR. LYLES: Yes, sir.

25 THE COURT: And then Marick then -- what is it?

1 -- got rid of their interest -- or I.M.K. got rid of its
2 interest to -- was it S.D.I.?

3 MR. LYLES: Yes, sir.

4 THE COURT: And so then -- what is it? -- they
5 had to do something with whatever was left, if anything.

6 MR. LYLES: And Mr. Thoennes said that he
7 needed a way to make a living, so he started M Group.

8 THE COURT: That's right. And they operated
9 under his general contractor's license.

10 MR. LYLES: Yes, sir.

11 THE COURT: It sounds like it all -- M
12 corporation wasn't even -- or M whatever Group wouldn't
13 even be here today if it hadn't been for Stoneledge. So
14 I find that's a successor and that it is a mere
15 continuation of the predecessors' -- what is it? --
16 activities, which is Stoneledge, which brings us here
17 today. So I'm going to deny your motion. Noted for the
18 record.

19 MR. HEMPHILL: So you will not charge that?

20 THE COURT: I will not charge that. I don't
21 think it's applicable because I find as a matter of law
22 that they were a successor in the sense of -- what is it?
23 -- continuation of the building that started back in
24 2002.

25 MR. HEMPHILL: Thank you, Your Honor.

1 THE COURT: Okay. If at all. Now, of course,
2 it would be up to you to argue to the jury they haven't
3 done anything.

4 MR. HEMPHILL: I still have that right to argue
5 it?

6 THE COURT: Oh, yes, sir. No. Listen you can
7 do that. But I mean, that's the difference between the
8 law and the facts. You can argue the law all you want,
9 but I'll instruct the jury that whereas they are the
10 judges of the facts, I am the judge of the law. And they
11 have to take the law as I give it to them.

12 MR. HEMPHILL: Thank you, Your Honor.

13 THE COURT: Okay. Very good.

14 All right. Anything else?

15 Now, we've got a verdict form we still need to deal
16 with. Have you got anything proposed? We've been here,
17 I've forgotten how long now. Let's take a short break
18 and y'all bring your heads together and see if you can't
19 -- what is it? -- come up ---

20 MR. BELCHER: Thank you, Your Honor.

21 THE COURT: All right. Very good. But let's
22 do it as soon as we can.

23 (WHEREUPON, court stood at recess for a short
24 break.)

25 THE COURT: All right. We're ready to proceed

1 from the plaintiff?

2 MR. LYLES: Yes, Your Honor.

3 THE COURT: From the defendants, Mr. Belcher?

4 MR. BELCHER: We're ready to proceed, Your
5 Honor.

6 THE COURT: All right.

7 Yes, sir, Mr. Imhoff?

8 MR. IMHOFF: Yes, sir. Do we have a jury
9 verdict form, Your Honor?

10 THE COURT: We are looking at it. That's what
11 we're going to be taking up.

12 MR. IMHOFF: Okay.

13 THE COURT: But I'm also going back -- I was
14 given a notebook that has I don't even know how many
15 pages of requests for charges ---

16 MR. LYLES: Yes, sir.

17 THE COURT: --- before the break.

18 MR. LYLES: Before the break?

19 THE COURT: Right.

20 LAW CLERK: Last night.

21 MR. LYLES: Last night, okay.

22 THE COURT: I mean, this is two weeks of this
23 trial, and this is the first time I've seen it. I think
24 I asked -- and it's not just you, Mr. Lyles, but all the
25 attorneys from the very first, "Give me your requests for

1 charges."

2 MR. LYLES: Yes, sir.

3 THE COURT: And I'm just now getting them.

4 All right. I've looked at -- and these are
5 plaintiffs requests from 11, which apparently are from
6 Judge Anderson's book. And I will consider charging
7 11.1. All right. 11.1, I've got most of that, but I
8 might -- during the final charge, I might include some of
9 it. I will not charge the recklessness language ---

10 MR. LYLES: Yes, sir.

11 THE COURT: --- in the third paragraph. 11.2

12 -- all right. I ruled last night, and I think that is
13 going to be my ruling, that building codes are somewhat
14 different from statutes, ordinances or regulations.
15 Building codes do not require legislative action, but the
16 statutes, the ordinances and regulations require
17 legislative actions. As I understand it and from the
18 testimony -- and I might be wrong, I'm basing it on the
19 testimony I heard -- that a building code is determined
20 by the building official without any sort of legislative
21 approval. And even regulations are -- what is it? --
22 subject to approval by whichever the authority is. They
23 have to submit the regulations for their state
24 regulations to the Legislature. Or if their ordinances
25 are by the county, a local ordinance would have to be

1 approved by the governing body. So I'm not going to
2 charge building codes. So I'm not charging L.2, which is
3 also include L -- negligence per se. And I noticed that
4 in your request for charge on negligence per se,
5 generally you note that Anderson's book states ordinance,
6 statute and regulation. And you substituted building
7 code. And I think that's consistent with my ruling. And
8 I might be in error, but I think inasmuch as I don't find
9 that building codes -- and particular in this case since
10 the testimony you had was that they are adopted by the
11 building official. And which it would be changed
12 depending on which one you came out. Whereas -- and also
13 in further distinction is in the Lexington case, Edney or
14 Eddy or whatever, the Jungle Jim or item that was
15 involved there, that building code was approved by the
16 board of education. So I think I'm satisfied that the
17 distinction is valid or at least for the purposes of this
18 case. So I will not charge 2.

19 All right. I will charge L.3 because they have been
20 recognized as having -- what is it? -- industry-wide
21 standards, but that's done on a deviation rather than a
22 violation. And then, of course, I'll charge L.4, 11.4.
23 Excuse me. 11.5, 11.9. And 11.1 will be incorporated
24 into the charge I had. I think the 13.2. The others I
25 decline to charge. Now, I'll note the objections of the

1 plaintiff for all of those I did not charge.

2 MR. LYLES: Yes, sir.

3 THE COURT: And I note the objections of all
4 the defendants, Bostic Brothers, Marick, I.M.K. and et
5 al, M Group, for my charging the ones I'm going to charge
6 from the plaintiff.

7 Now, that should conclude the charge conference, so
8 now we have the verdict form. I got the verdict form
9 whenever, about ten minutes ago. But anyway, have y'all
10 -- is that a committee product?

11 MR. LYLES: In a manner of speaking, yes, sir.

12 THE COURT: All right. So I mean, you all are
13 familiar with the verdict form that Ms. Kelly sent to me.

14 MR. IMHOFF: That Mr. Lyles? Yes.

15 THE COURT: Yeah, Mr. Lyles.

16 MR. LYLES: We've been discussing it this
17 morning. And I think we have agreement on the use of
18 that verdict form. I'm not sure that Jason is in
19 agreement.

20 THE COURT: Well, let me do a few things just
21 for the housecleaning, as they say.

22 Of course, Nino is now out, so that verdict form --
23 I mean, that verdict will be taken out. And I think
24 that's in one and two. That's on the negligence. All
25 right. The remaining on one on the negligence, Bostic

1 Brothers and Marick being treated separately. And I.M.K.
2 is being treated separately.

3 MR. BELCHER: I.M.K. under negligence as well,
4 yes.

5 THE COURT: Yeah, on the negligence action.
6 Are you in agreement with that?

7 MR. BELCHER: Yes, Your Honor.

8 THE COURT: I think it's appropriate.

9 MR. BELCHER: Yes, Your Honor.

10 THE COURT: In other words, I think the way you
11 did it by putting at the bottom if you find for the
12 plaintiff on the negligence of any of the above-
13 mentioned. In other words, Ms. Brown's clients can be --
14 what is it? -- exonerated or found acquitted or whatever
15 we call it. Get a defense verdict without being
16 included, but yet the plaintiff has to establish the
17 damages that would be limited to only those if the
18 verdict was for the plaintiff.

19 All right. Mr. Imhoff, any objection? That's on
20 one. I guess one and two?

21 MR. IMHOFF: Two, Your Honor, and they both
22 continue through the entire thing.

23 THE COURT: Right.

24 MR. IMHOFF: And that is that we approved of
25 and agreed with Mr. Anderson's proposed verdict form

1 which lists all of the defendants and then is followed by
2 the apportionment statute.

3 THE COURT: That's under the statute. I'm
4 sorry. Read the statute. I don't know if I can find it
5 now. And I do this to Mr. Anderson. Even his memorandum
6 acknowledges that the apportionment comes after a
7 verdict.

8 MR. IMHOFF: Yes, sir.

9 THE COURT: And in a, quote, separate action.
10 The statute reads that way and the excellent memorandum
11 that Mr. Anderson furnished also. So I'm not getting
12 into percentages until we get a verdict.

13 MR. IMHOFF: Well, that's right. And I guess
14 the two things that I would say are that there need to be
15 more defendants included on this first one.

16 THE COURT: Well, no, no. You missed
17 something. I gave you a little gratuitous -- what is it?
18 -- information this morning, that in argument to the jury
19 you can argue that -- what is it? -- not only did they
20 not prove the case against your client, but you can also
21 prove that all of the evidence relates to sole negligence
22 of the plaintiffs or third-party negligence. In other
23 words, unnamed defendants in that case.

24 MR. IMHOFF: And then the second objection I
25 have, Your Honor, is that instead of our suggestion and

1 what we ---

2 THE COURT: Well, by the way, I guess, you
3 know, I could put as one of the percentages in there
4 would be sole -- well, the plaintiff is in there, so that
5 would be the sole negligence -- but third-party
6 negligence as a percentage.

7 MR. IMHOFF: Yes, Your Honor.

8 MR. LYLES: I think, Your Honor, that would
9 fall under the apportionment statute as well.

10 THE COURT: That's what I'm saying, in the
11 apportionment part.

12 MR. LYLES: In the apportionment part.

13 THE COURT: I'm not talking -- I'm trying to
14 get you away from putting a bunch of percentages in the
15 liability part.

16 MR. IMHOFF: The second part, Your Honor, is we
17 suggest and like and believe it's appropriate to have all
18 of these questions up at the top here, but then one
19 damages number because the damages are indivisible. It's
20 one damage to these plaintiffs, and that's what the
21 statute says. In the case of indivisible damages that it
22 should be one number. And then that one number should be
23 analyzed by the jury later in the special proceeding to
24 determine which of these defendants and which of these
25 causes of action are the cause of those damages.

1 Otherwise ---

2 THE COURT: No. They do that by percentages.

3 MR. IMHOFF: Right. But otherwise we're going
4 to have three different numbers on ---

5 THE COURT: Well, but the thing is the
6 negligence only applies to the apportionment. Or
7 apportionment only applies to the negligence action.

8 MR. BELCHER: Correct, Your Honor. You've
9 nailed it. That's why you need three numbers on this
10 initial form. Then we take the negligence number, and we
11 deal with apportionment later. But the breach of
12 warranty is on a form with one number.

13 THE COURT: Doesn't it say joint tort feasons
14 or something like that?

15 MR. LYLES: Yes, sir. Tort feason.

16 THE COURT: Something that implies wrongs,
17 negligence.

18 MR. IMHOFF: And that's why I think -- and we
19 have argued this. But I believe that breach of fiduciary
20 and implied work -- those are torts. And the statute
21 says verdict for damages of two or more for the same
22 individual damages to property, specifying separate
23 verdicts the percentage liability proximately caused by
24 the individual damages -- indivisible damages. And
25 that's what we have in this case is indivisible damages.

1 And they are all torts, Your Honor. And the jury just
2 can certainly parse out who is responsible for what
3 percentage of that one number, not three numbers.

4 THE COURT: I'm not sure. Is fiduciary duty a
5 tort? It's a contract.

6 MR. BELCHER: It is specifically excepted from
7 the apportionment part of that statute.

8 THE COURT: Oh, I'm glad. They did do
9 something right then?

10 MR. BELCHER: Yes.

11 THE COURT: Okay.

12 MR. BELCHER: The apportionment statute and the
13 contribution among joint tortfeasors act applies only
14 tortfeasors. Okay? Breach of fiduciary duty sounds
15 like a negligence cause of action because the elements
16 are similar and the damages are the same. But the
17 legislature, the General Assembly here, has said that is
18 not part of the statute because the breach of fiduciary
19 duty is a different -- there are different elements to be
20 met there. And there's a heightened duty in excess of
21 negligence, simple negligence, because, you know, as
22 partners in a law firm, we have fiduciary duties to one
23 another. That means we can make mistakes with regard to
24 one another.

25 THE COURT: I see.

1 MR. BELCHER: So we need three numbers on that
2 verdict form based on their first ---

3 THE COURT: Well, I am going to send the
4 verdict form back that way subject to the objection of
5 Mr. Imhoff.

6 MR. BELCHER: Thank you, Your Honor.

7 MS. BROWN: Your Honor, just for the record,
8 I'd like to join Mr. Imhoff's objection.

9 THE COURT: All right. And then subject to the
10 objection -- well, I'm going to put all of you down
11 except for Mr. Belcher. All defendants are objecting to
12 what I'm doing.

13 Let's see. All right. Now, we're down to three.
14 All right. On three it will be A, B, C, D verdicts. A,
15 find for the plaintiff or defendant I.M.K.; B, for the
16 plaintiff or I.K.; C, plaintiff or Thoennes; and, D,
17 plaintiff or Cox. In other words -- and then, of course,
18 the bottom line, as we say, is going to be if you find on
19 any -- against any of the defendants, then you go to the
20 damages. But if you do not find against any of the
21 defendants, if all of them are -- what is it? -- defense
22 verdicts, then you don't go to the question about
23 damages.

24 MR. IMHOFF: I understand that, Your Honor. I
25 need to put one other thing on the record.

1 THE COURT: Yes, sir.

2 MR. IMHOFF: It's my understanding that Mr.
3 Lyles is of the opinion and intends to argue to the jury,
4 that the jury -- let's say they decide it's five million
5 dollars -- that they can put five million dollars down
6 for A, five million dollars down for B, and five million
7 dollars down for C.

8 THE COURT: Then you're talking about an
9 election.

10 MR. IMHOFF: Yes, that Mr. Lyles ---

11 THE COURT: Because they're the same damages.

12 MR. IMHOFF: Well, they're all the same.

13 THE COURT: We'll face the election at the time
14 that we see we have to need them. I do not give advisory
15 opinions.

16 MR. LYLES: Your Honor, on that last -- on the
17 last verdict form that y'all just went over with the sub-
18 parts, the reason I included the verdict form like I did
19 when I sent it to you and I put I.M.K. down for breach of
20 fiduciary duty and then included those individuals -- was
21 I was unclear about the Court's ruling about
22 amalgamation? My understanding is that the Court has
23 ruled that those principles of I.M.K. are, in fact,
24 amalgamated ---

25 THE COURT: I'm not directing a verdict against

1 them, no, sir.

2 MR. LYLES: No, sir.

3 THE COURT: I'm just saying that they can be
4 considered as being a part of the board that -- what is
5 it? -- the claim is made against.

6 MR. LYLES: Okay.

7 MR. BELCHER: And, Your Honor, just briefly ---

8 THE COURT: And that'll help Ms. Brown because
9 -- what is it? -- she's going to argue that, you know,
10 they are not subject to liability. And they don't have
11 to go to law school to find that out.

12 MR. LYLES: Okay.

13 MR. BELCHER: And if your answer to this
14 question is this is an advisory opinion, then I'm not
15 rendering -- I understand.

16 THE COURT: Okay. Now, listen. We need to
17 move along, please.

18 MR. BELCHER: Right. Right. Now that we agree
19 that what the verdict form looks like, I just want to ---

20 THE COURT: Well, you're not agreeing, but you
21 are accepting, I think.

22 MR. BELCHER: Okay.

23 THE COURT: Now what?

24 MR. BELCHER: I just want to make sure that --
25 and you may have answered this. And if you have, just

1 tell me to sit down, Mr. Belcher, and I'll be happy to.
2 Is it going to be cumulative that those numbers will all
3 add up to the total of plaintiffs' damages? Because if
4 damages for breach of fiduciary duty are at one place,
5 negligence is another, negligence is another, we would
6 suggest that they would add up to a number that are the
7 plaintiffs' damages subject to they cannot exceed the
8 amount that he puts on a blackboard and asks for.

9 THE COURT: What do you say, Mr. Lyles?

10 MR. LYLES: He's asking us to apportion the
11 damages among the causes of action.

12 MR. BELCHER: Yes.

13 MR. LYLES: And I think that each of the causes
14 of action stand on its own.

15 THE COURT: Well, I was going to say that
16 aren't the damages the same?

17 MR. LYLES: Yes, sir, they are.

18 THE COURT: The fact that -- what is it? --
19 they weren't -- the common elements were not -- what is
20 it? -- turned over in a proper fashion and a proper
21 means, your damages are that they weren't.

22 MR. LYLES: That's right.

23 THE COURT: And all of the damage leading up to
24 that will be included in those damages.

25 MR. LYLES: Yes, sir. And so ---

1 THE COURT: And then as far as going back and
2 doing the repairs, that's how you get -- you find out
3 what the damages are from the initial alleged defect.

4 MR. LYLES: Yes, sir. And the jury shouldn't
5 be required to allocate the damage among the causes of
6 action.

7 THE COURT: I think that's going to have to be
8 a matter of law. Of course, I'm going to be governed
9 somewhat by your arguments. Now, if you -- well, the
10 thing is, let's understand that as far as the Court's
11 concerned, the plaintiffs have a claim. And it's already
12 been decided it is the homeowners' claim, not individual
13 property owners. And just like they're going to have to
14 -- what is it? -- allocate whatever monies, if any, are
15 -- what is it? -- awarded to the homeowners association
16 among all of the people who might make a claim, then
17 that's going to be something for somebody else to do.
18 And as far as if there is any sort of, well, double
19 recovery on the damages, that's going to be something
20 that the Court has to sort through.

21 MR. LYLES: Yes, sir.

22 THE COURT: So I ---

23 MR. BELCHER: We'll take it up after verdict
24 then, yes.

25 THE COURT: All right. Yes. And so let's --

1 I'm not making the jury make that -- it's not as if it
2 was a comparative negligence case. They're not going to
3 -- even in a comparative negligence case, I would order
4 them to find only percentages.

5 MR. LYLES: Yes, sir.

6 THE COURT: That I make the allocation. All
7 right. Anything else?

8 MR. BELCHER: None from Bostic. Once we see
9 the form, we'll be fine.

10 THE COURT: All right.

11 MR. BELCHER: The final form.

12 THE COURT: All right. Here you go. You can
13 look at it. I have a certain -- what is it? -- format
14 that I follow. But, I mean, it's going to be that
15 format, but it's going to be justified and all of the
16 other things.

17 MR. BELCHER: Thank you, Your Honor.

18 THE COURT: All right.

19 Yes, sir?

20 MR. LYLES: Your Honor, before you finalize
21 that verdict form, we have settlement with M Group.

22 THE COURT: Wonderful.

23 MR. LYLES: Yes, sir.

24 THE COURT: So you're going to have another --
25 what is it? -- very good. Yes, sir?

1 MR. LYLES: The plaintiffs are releasing their
2 claims against the M Group for both phases of Stoneledge
3 for seventy-five thousand dollars payable in thirty days.

4 THE COURT: Is that right, Mr. Hemphill?

5 MR. HEMPHILL: Those are the terms.

6 THE COURT: Very good. All right. So time is
7 of the essence?

8 MR. LYLES: Yes, sir.

9 THE COURT: All right. Very good. Which is
10 also in the first settlement with Mr. Anderson's group
11 too. All right.

12 We'll have to redo the verdict form, of course --
13 what is it? -- as to -- and also the caption. We'll put
14 the caption down.

15 MR. LYLES: Yes, sir.

16 THE COURT: All right. Anything else from the
17 -- and by the way, gentlemen, I do thank you.

18 Anything else from the plaintiff?

19 MR. LYLES: No, sir.

20 THE COURT: From the remaining defendants? Mr.
21 Belcher, Mr. Imhoff, Ms. Brown?

22 MR. BELCHER: No, Your Honor.

23 MR. IMHOFF: No, Your Honor.

24 MS. BROWN: No, Your Honor.

25 THE COURT: Very good. There's almost enough

1 room for all of the attorneys at the table.

2 (Off record discussion.)

3 THE COURT: All right. Now, this is a
4 housecleaning thing or whatever. It is now twelve
5 twenty. I would almost suggest let the jury go to lunch.
6 That gives you some time to collect your thoughts,
7 particularly in light of the later developments such as
8 settlements. And then I'm going to -- and I'll do this.
9 You're going -- you're stuck with it because we all have
10 suffered because we weren't better prepared. That
11 includes the Court too because I should have been popping
12 the whip on you all week for two weeks. But I'm going to
13 leave it up to the jury as to when they want to come
14 back. I am going to insist that they do take a lunch
15 break.

16 But is that okay, Madam Clerk?

17 THE CLERK: I've already prepared lunch
18 certificates.

19 THE COURT: Bless your heart. All right. And
20 so anyway -- but if they say they want to come back in
21 forty-five minutes, then we're going to start at two
22 o'clock or one o'clock.

23 MR. LYLES: Yes, sir.

24 THE COURT: Because I do think -- and then that
25 leaves us with -- what? -- three arguments, defense

1 arguments? All right. And I don't know -- again, I'm
2 from the old school that if you have co-defendants -- I
3 mean, co-counsel for a party, one argument by defendants.

4 MR. BELCHER: Yes, Your Honor.

5 MR. LYLES: And we have an opportunity for a
6 brief reply after the defense arguments.

7 THE COURT: Oh, yes, sir. But you do, under
8 the at least the civil rules open fully, both on the law
9 and the others.

10 MR. LYLES: Yes, sir.

11 THE COURT: And if they want to rest, you only
12 open on the law, somebody might grant that motion so that
13 -- what is it? -- you don't get to reply. You don't get
14 to close.

15 MR. LYLES: Yes, sir.

16 THE COURT: All right.

17 MR. LYLES: I'm not smart enough to monkey with
18 the rules, Judge. I'll just tell you.

19 THE COURT: Oh, I know. But I just want to let
20 you know let's don't.

21 All right. Yes, sir?

22 MR. BELCHER: Not so much for me but for others
23 that are still out here. What's the Court going to give
24 us for a time line? I'm going to be very brief. I just
25 want to make sure that we don't have hour-long closings

1 that ---

2 THE COURT: Well, I don't know. I would be as
3 brief as you could. You've got a two-hour limit, you
4 know, on sides.

5 MR. BELCHER: Right.

6 THE COURT: So, I mean -- but I've never used
7 it because I've never had to. So I'm going to leave it
8 up to you. I'm not going to call time on you, in other
9 words.

10 MR. BELCHER: All right. Thank you, sir.

11 THE COURT: Since I'm not setting time on you,
12 I'm not going to call time on you.

13 MR. BELCHER: Thank you, Your Honor. No
14 further questions.

15 THE COURT: Very good. Anybody else before we
16 bring the jury back and let them go to lunch?

17 MR. LYLES: Nothing from the plaintiff, Judge.

18 THE COURT: All right. And this time I'm going
19 to tell them that it's going to the jury when they say
20 they want to come back. In other words, I'm just going
21 to recognize Mr. Lyles right off. All right.

22 Yes, sir.

23 (WHEREUPON, the jury entered the open court at
24 approximately 12:22 p.m.)

25 THE COURT: All right. Let the record reflect

1 the jury and alternate are in the jury box.

2 Mr. Foreman, I'm glad to see you've got a jacket on.

3 I'm afraid y'all are getting used to this. I hope not.

4 We have finished. And I will say this with some

5 confidence, that we are ready to go to the jury. In

6 other words, the argument by counsel and then the charge

7 on the law. But I would suggest -- we've been at it

8 since this morning, and I'll tell you later that -- what

9 is it? -- some good work has been done. But I'm going to

10 leave it up entirely to you. It's twenty after twelve.

11 When would you like to come back?

12 THE FOREMAN: What do you think?

13 THE COURT: All right. When you come back I

14 hope and anticipate that'll be the last time. So ...

15 MR. FOREMAN: One-thirty.

16 THE COURT: One-thirty. Very good. In

17 approximately an hour.

18 MR. FOREMAN: Right.

19 THE COURT: All right. Very good. Again, you

20 have not heard the entire case because you still do have

21 the argument by counsel. By the way, I will say this.

22 There will be fewer arguments than I anticipated at

23 first. So -- what is it? -- that might be of some

24 benefit. But, again, do not discuss anything about the

25 case during lunch or permit anybody to discuss it with

1 you.

2 But with that, I'll see you back at one-thirty.

3 (WHEREUPON, The jury exited the open court at
4 approximately 12:24 p.m.)

5 THE COURT: All right. There's one other
6 thing, and clearly it's a policy thing for me. Rather
7 than have a certification or certificate that it's a
8 unanimous decision, inasmuch as my instruction, of
9 course, will be unanimous, I do it in each verdict. In
10 other words, for verdict one, on the cause of action for
11 negligence as to the defendant, Bostic Brothers, Inc., we
12 the jury unanimously find. And then do that in each of
13 the verdicts. So it says at the beginning of the verdict
14 rather than -- well, I didn't think about that. So the
15 idea being is that it's going to be a natural -- I mean,
16 it's just semantical more than anything else. So I'll
17 take that statement out. And that should be about it.
18 Have y'all seen this?

19 MR. LYLES: Alan's looked at it. We've got it
20 now.

21 THE COURT: All right. You have seen it?

22 MR. BELCHER: Yes, Your Honor.

23 THE COURT: Okay. And, also, what I do is I
24 give a copy of it to the foreman at the close of my
25 remarks on my charge so that I can go over it with him.

1 Then I get the copy back and send them to the jury room
2 and find out if there are any exceptions. I put the
3 exceptions on the record and tell them to commence their
4 deliberation when they receive all the evidence that has
5 been admitted and the verdict form. In other words, it
6 gives them an opportunity if they've got any questions
7 about the form to ask me in Court rather than -- what is
8 it? -- sending notes.

9 All right. So that's the way we'll proceed. Now
10 you've got until one-thirty. Enjoy.

11 MR. BELCHER: When we return from lunch, can we
12 each get a copy of the final, final form just for our
13 table?

14 THE COURT: Yes, sir. Yes, sir. Is it four?
15 Is that right?

16 MR. GRESH: Yes, Your Honor.

17 THE COURT: Four or three?

18 MR. IMHOFF: Four.

19 MR. GRESH: Ms. Brown, Your Honor, has moved
20 up.

21 THE COURT: That's three, isn't it? Oh, Lyles.
22 Y'all want him to have a copy?

23 MR. BELCHER: No, Your Honor. Don't give him
24 anything:

25 THE COURT: I see. I was just trying -- I did

1 want to be sure that I had all of the defendants. The
2 defendants are now Bostic Brothers, Marick Home Builders
3 and Mr. Thoennes and I.M.K. and all of its parties or
4 members.

5 All right. I will see you back at one thirty.

6 (WHEREUPON, court stood at recess for a lunch
7 break.)

8 THE COURT: All right. Is there anything from
9 the plaintiff before we bring the jury back?

10 MR. LYLES: Yes, sir. We had -- looking at the
11 verdict form and realized that Mr. Lollis is not
12 reflected anywhere on the verdict form. And so we had
13 understood incorrectly that the Court's ruling yesterday
14 was the amalgamation of interest was something that the
15 Court had found. And so we assumed that Mr. Lollis'
16 liability would be incorporated with that of I.M.K. And
17 this afternoon when it was made clear that that was not
18 the Court's ruling on that issue, I need to add Mr.
19 Lollis in in some capacity.

20 THE COURT: All right. Where do we have
21 I.M.K.?

22 MR. LYLES: I.M.K. ---

23 THE COURT: That's the third one?

24 MR. LYLES: Well, it was -- we have them in the
25 third one, in the third negligence claim. And we have

1 them in the fiduciary duty claim. And my suggestion was
2 simply to add him as a subpart 'E' to the fiduciary duty
3 claim. And I'll make my argument to the jury about his
4 responsibility.

5 THE COURT: Well, he -- the negligence claim
6 and the warranties are against Bostic and Marick, are
7 they not?

8 MR. LYLES: The negligence claim is, yes, sir.
9 And the -- I think we have a negligence claim against
10 I.M.K. as well.

11 THE COURT: Right.

12 MR. LYLES: And then we have the implied
13 warranty claims against Bostic and Marick only.

14 THE COURT: Right.

15 MR. LYLES: And then we have the fiduciary duty
16 claim which is I.M.K. and its principles.

17 THE COURT: All right. So you need to just add
18 'E' for Lollis? That's your motion?

19 MR. LYLES: Yes, sir.

20 THE COURT: All right. I'm sure Ms. Brown has
21 something to say about that.

22 MR. LYLES: Yes, sir.

23 MS. BROWN: Mr. Lollis did not serve on the
24 board as the individual, so he did not have a fiduciary
25 duty.

1 THE COURT: I thought that my -- all right.

2 Who made I.K.?

3 MS. BROWN: I.K. is Mr. Lollis, Mr. Cox and Mr.
4 Roberson.

5 THE COURT: Well, the third cause of action,
6 the fiduciary duty to the following defendants' breach of
7 fiduciary duty, I.M.K. and Integrys Keowee, which is
8 I.K.; is that right?

9 MR. LYLES: Yes, sir.

10 MS. BROWN: Yes, sir.

11 THE COURT: Well, my notes do show that it's
12 Bill Cox and Tim Roberson and Larry Lollis.

13 MS. BROWN: In Integrys Keowee?

14 THE COURT: Yes, ma'am.

15 MS. BROWN: That's correct, Your Honor.

16 THE COURT: Well, where does Richard Thoennes
17 come in here on I.K.?

18 MR. LYLES: He was a board member. He actually
19 served on the board of the H.O.A.

20 MR. IMHOFF: He wasn't a board member of I.K.,
21 Your Honor. He's ---

22 THE COURT: Well, that's what I -- well, why
23 isn't Roberson on here?

24 MR. LYLES: Mr. Roberson is not a defendant.

25 THE COURT: Oh, that's right. He was the one

1 that was a board member and not chosen to be sued?

2 MR. LYLES: That's right. He was a neighbor.

3 MS. BROWN: Just before you ---

4 THE COURT: Yes, ma'am.

5 MS. BROWN: --- make a decision, I would like
6 to also point out that I am not aware that there has ever
7 been a fiduciary duty claim against Larry Lollis.

8 MR. LYLES: The claim against Mr. Lollis is
9 related to corporate responsibility. I mean, it's the
10 siphoning of the corporate funds and leaving ---

11 THE COURT: He did receive checks?

12 MR. LYLES: Yes, sir.

13 THE COURT: That were intended for I.M.K.?

14 MR. LYLES: Yes, sir.

15 THE COURT: All right. Add him. I'll overrule
16 your objection and grant the motion to add 'E' in the
17 third cause of action. And those were the three that got
18 the -- well, not three because Roberson got a check too,
19 didn't he?

20 MR. LYLES: Yes, sir.

21 THE COURT: But he's not been sued?

22 MR. LYLES: No, sir.

23 THE COURT: All right. So we'll add 'E' over
24 your objection.

25 MS. BROWN: Okay. I have one more issue.

1 THE COURT: Yes, ma'am.

2 MS. BROWN: On the verdict form, if the Court's
3 ruling is that the parties are amalgamated, then for
4 I.M.K. is fifty/fifty I.K. and Marick Home Builders, I
5 don't believe the verdict should be separate. If they're
6 amalgamated, then that should all be one party.

7 THE COURT: Why didn't somebody bring this up
8 to me before lunch at least?

9 MS. BROWN: Your Honor, I apologize. I didn't
10 see ---

11 THE COURT: I'm sorry. It's not -- I mean,
12 it's one of those things that really we have a
13 responsibility greater than just to our convenience. But
14 we do have a responsibility to be sure that the jury has
15 the correct thing, correct judgment to render.

16 All right. As I understand it, the cause of action
17 for negligence is against Bostic as the original
18 contractor or builder. Marick Homes is the second. Now,
19 where does I.M.K. come in as a builder?

20 MR. LYLES: Well, they don't as a builder
21 except through Marick. And I don't oppose her ---

22 THE COURT: Well, let's do strike Marick --
23 excuse me -- strike I.M.K. out of the first cause of
24 action, the negligence.

25 Yes, sir, Mr. ...

1 MR. BELCHER: I don't want to add to this if I
2 don't have to, but they are a negligent party that --
3 they've alleged negligence against I.M.K. of their
4 developer liability for this project.

5 THE COURT: He's shaking his head, so I'm going
6 to take them out then.

7 MR. LYLES: Well, I think that Ms. Brown --
8 now, I think that I.M.K. and Marick should be considered
9 as one party is what I think.

10 THE COURT: Well, I mean, if they are one
11 party, then we'll just add them both together. And then
12 they can -- what is it? -- bring a contribution action.

13 MR. LYLES: I think that's a ---

14 THE COURT: All right. That's what I'll do is
15 I'll add I.M.K. to the second -- or to the first cause of
16 action and the second.

17 We're striking them here, putting them there. And
18 then you put 'S' in parenthesis.

19 All right. Next?

20 All right, Mr. Imhoff?

21 MR. IMHOFF: Your Honor, I'm sorry, but just
22 real briefly.

23 THE COURT: No problem. It's my fault. I let
24 y'all get away from me. I'm serious. I regret it, but
25 what is it? -- we'll see what happens.

1 MR. IMHOFF: Well, I believe it's the same
2 argument I made before, but I just wanted to make sure
3 it's -- in number two, the implied warranty of
4 workmanlike service, there is no possibility for the jury
5 to award damages separately for Marick different from
6 Bostic. And I think your ruling was that the warranty
7 cause of action will not be apportioned, only negligence.
8 So there's no ability on this form for the jury to decide
9 that Bostic Brothers ---

10 THE COURT: Well, I'm going to rule -- at this
11 point, I'm ruling that all objections to the verdict form
12 have been waived that have not been raised prior to lunch
13 when we were requesting them. I will wipe that out if it
14 becomes a problem as a matter of law.

15 All right. Anything else?

16 MR. LYLES: None from the plaintiff, Judge.

17 THE COURT: Very good.

18 Anything further from Mr. Bostic? Bostic? I've
19 already adopted you now.

20 MR. BELCHER: None, Your Honor. We are
21 anxiously awaiting our jury.

22 THE COURT: Very good.

23 Mr. Imhoff, anything further, subject to every
24 objection in the world you can think of?

25 MR. IMHOFF: No, Your Honor.

1 THE COURT: All right. Ms. Brown? Ms. Brown?

2 MS. BROWN: Yes, Your Honor. We're ready.

3 THE COURT: All right. Very good. Subject to
4 all the objections that are made and also my rulings on
5 the further amendment to the verdict form.

6 All right. Ask the jury to join us, please.

7 (WHEREUPON, the jury entered the open court at
8 approximately 1:55 p.m.)

9 THE COURT: All right. Mr. Foreman, ladies and
10 gentlemen of the jury, as I said earlier, we now, what we
11 say, go to the jury. In other words, all the lawyers are
12 finished. All the Judge's rulings have been made. And
13 any errors made in those, as I will instruct you later,
14 will be corrected at some other place and time. But for
15 the purpose of this case, the case is now going to be in
16 your hands.

17 And the final portion of the case will be the
18 argument by counsel. The plaintiff, having the burden of
19 proof on all the causes of action in the complaint
20 against all the defendants that remain here in the
21 courtroom, they will go first. Then we will take each of
22 the defendants as they appear, Bostic Brothers
23 Construction, Marick Home Builders, Rick Thoennes,
24 I.M.K., Integrays Keowee Development, William Cox and
25 Larry Lollis individually. So each one will be able to

1 argue. And then finally Mr. Lyles will be able to close.

2 Now, Mr. Lyles' argument, since he goes first, is to
3 be a complete argument, in other words, on the law and
4 the evidence as he wishes you to see it.. And then each
5 of the defendants will have one time to reply and offer
6 anything they want you to consider before Mr. Lyles'
7 closes. After he closes, then I will give you the law in
8 the case.

9 I recognize Mr. Lollis for his opening argument.

10 MR. LYLES: May it please the Court.

11 CLOSING ARGUMENT

12 BY MR. LYLES:

13 Good afternoon. It's been a long two weeks. And
14 let me begin by saying this. And I'm not saying this
15 just on my behalf; I'm saying it on behalf of my clients
16 and I'm saying it on behalf of my colleagues and I think
17 the other defendants, that your service for the last
18 eleven days has been extraordinary. And your patience
19 with us has been just really impressive. It means the
20 world to all of us, the time that you've given us and the
21 effort that you've given us. And I just want to let you
22 know that we all very much appreciate it.

23 As you know from the evidence in this case, it's a
24 very important case. It's important to a lot of people.
25 And it's important to my clients who are sitting out

1 there, many of whom are sitting out there.

2 I told you the other day that this was a case about
3 a problem. It was a case about a problem that was
4 created by the contractors. And it was a case about a
5 problem that was put off on my clients by the developers.
6 And it's a case that my client -- or it's about a problem
7 that my clients need to deal with. And they want your
8 help in dealing with the problem that they've got. I
9 think y'all know that the problem is the condition of
10 these buildings.

11 Now, in this last final stage of the trial -- and I
12 told you on last Tuesday I was at the beginning of the
13 end of my process. Now y'all are at the beginning of the
14 end of yours. What you'll do is you'll hear the
15 discussion or the arguments of each of us, each of the
16 lawyers in the case. And after we finish arguing our
17 case to you, Judge Macaulay will do what we call charge
18 you. Don't worry. You're not going to be looking for
19 your wallet. He's going to tell you what the law is in
20 South Carolina that relates to this case. So you'll get
21 a crash course in South Carolina law.

22 And then after he finishes that process, he'll ask
23 you to go back to the jury room. And he'll ask you to
24 apply the law that he gives you to the facts of the case
25 as you find them. And then you'll render a verdict. And

1 that's how it'll work.

2 But for the purpose -- the reason I mention that is
3 for the purposes of this closing, I want to first start
4 with a little discussion about the law that I think is
5 relevant and the law that I think that Judge Macaulay
6 would give you at the end of these arguments.

7 We've brought three basic causes of action against
8 the defendants. We brought a cause of action for
9 negligence. We brought a cause of action for breach of
10 the implied warranty of service. And we brought a cause
11 of action for breach of fiduciary duty. And I want to
12 talk to you about each of those causes of action, the
13 elements of the causes of action, and how I think that
14 the law applies to the defendants in this case and how I
15 think we've proven our case.

16 First, negligence has three components. Judge
17 Macaulay will tell you that in order to establish
18 negligence, we have to establish that the defendants owed
19 us a duty. That means they had to either do something or
20 not do something, that they breached that duty, they
21 failed to do or not do what they should have done or not
22 done. And then damages. Those are the three elements of
23 negligence.

24 All of the causes of action we've brought contain a
25 requirement that we establish damages. So I'm not going

1 to talk about damages now. I'm going to move that to the
2 back of my argument. But with regard to duty and breach
3 of duty, I want to review some of the testimony that
4 you've heard.

5 Clearly, you heard through the testimony of Mr.
6 Hodgkin numerous references to duties that were owed to my
7 clients by Bostic Construction. Building code, industry
8 standards, manufacturers' standards, other types of
9 applicable standards. We got those into evidence.
10 You'll see them back in the jury room. Those are things
11 that imposed a duty on Bostic, who was the general
12 contractor for phase one of this project, to build in a
13 certain way and to build in conformance with those
14 standards.

15 You heard about AMMA, and you heard about the
16 Western Red Cedar Association. And you've heard about
17 other types of standards that Mr. Hodgkin referred to.
18 You may also refer -- or remember Mr. Hodgkin's testimony
19 -- and I kept asking him -- probably grated on your
20 nerves. I kept saying, "Is that a breach of the
21 applicable standard of care?" And Mr. Hodgkin says,
22 "Yes." "Is that a breach of the building code?" "Yes."
23 That was all in an effort to establish that Bostic in
24 numerous instances in this case breached the duties that
25 they owed my clients. And I think that that has clearly

1 been established with Bostic.

2 We've also brought negligence claims against I.M.K.
3 and Marick. And you'll see on the verdict form that's
4 given to you later that I.M.K. and Marick are considered
5 one party. You may remember the composition of I.M.K.
6 I'll talk about that a little bit later.

7 How have we proven our negligence claims against
8 I.M.K. and Marick should be considered one? Well, you
9 remember that when Marick got to the site in 2005, it had
10 been abandoned for several months and wasn't in great
11 repair. And Marick pulled twenty-six building permits.
12 Those are also in evidence, and you saw them. And in
13 those twenty-six building permits, Marick obligated
14 itself to comply with the applicable building code.

15 And you also heard the testimony of Mr. Hodgin about
16 Marick. And you remember, reflecting back on Mr.
17 Hodgin's testimony, some of the photographs that we saw,
18 particularly photographs that we saw in unit thirty-
19 three. Remember the unfinished unit. That's a real
20 important unit as it relates to the negligence of Marick
21 and I.M.K.

22 You know, most rooms, like this one, are finished.
23 We have sheetrock on the walls. Behind the walls are
24 studs and insulation. You can't see the wall on the
25 other side. What made unit thirty-three so important to

1 us and so important to Mr. Hodgins and so important, I
2 think, to the negligence claim against I.M.K. and Marick,
3 is that when you walked in unit thirty-three, there was
4 no drywall. There was no insulation. So unusually, you
5 could actually see the back of the outside wall. And
6 what we saw in the pictures that you saw of unit thirty-
7 three were water stains and water damage.

8 And you may remember those photographs. They're
9 coming into evidence too. You can peruse them when you
10 get back to the jury room. It's very clear in unit
11 thirty-three. We saw damage to the back side of the
12 exterior wall around every window and around every single
13 door. We saw damage on the floor. And then when we go
14 to the firewall, that tenant separation issue that y'all
15 are probably tired of hearing about, what you saw there
16 was that wall hadn't been constructed properly. And what
17 was unusual again about that unit is it was all sort of
18 open, almost like we had x-ray vision into what was
19 happening on that building envelope.

20 Mr. Hodgins testified that a general contractor who
21 came onto the site and saw damage like that would be on
22 notice that the windows had not been installed properly.
23 And you may recall there was a discussion with Mr.
24 Hodgins. "Would the general contractor have a duty to go
25 out and investigate other windows in other units to see

1 how they were installed?" And he said, "Well, if there
2 were complaints of window leaks, I think he would."

3 And you remember the subsequent testimony of Mr.
4 White. Mr. White said he complained about leaking
5 windows in phase one. So Marick and I.M.K. were on
6 notice of the improperly installed windows in phase one
7 by virtue of, if nothing else, the back side of the walls
8 in unit thirty-three.

9 And don't forget Mr. Hornaday's testimony. When I
10 showed him the pictures, Mr. Hornaday said, "Yep, that's
11 what we saw. That's what we saw."

12 There were other problems in phase one that Marick
13 was aware of that you heard about. Porches and decks
14 leaking, roofs leaking, basements leaking. And Marick,
15 to its credit, attempted to address those problems on
16 sort of an ad hoc basis. When a problem would pop up,
17 they'd go fix it. But that doesn't sound too bad. The
18 problem is during that process, Marick and I.M.K. were
19 not just acting as a handyman. They weren't acting as
20 simply a contractor out to fix a window leak. They were
21 the seller. They were marketing and selling those units
22 to the public. And instead of investigating the problems
23 and instead of figuring out what was wrong, they patched
24 them up and put them on the market.

25 Even the waterproofing. Mr. Thoennes' testimony

1 about the deck leaks. Well, we saw cracks so we called
2 out Coleman Waterproofing, and we asked them to take a
3 look at it for us. Well, not surprisingly, Coleman
4 Waterproofing didn't say, "Let's do a thorough
5 investigation." They said, "Let's put down some
6 waterproofing." Which, of course, is what Coleman
7 Waterproofing does. Nobody ever tried to find the source
8 of the leaks. Nobody ever hired somebody like Mr. Hodgin
9 who could have gone out there and figured out what the
10 problems really were. That is negligence on the part of
11 Marick and I.M.K.

12 The second cause of action that we brought is a
13 cause of action for something called a breach of the
14 implied warranty of service. And Judge Macaulay will
15 tell you that in South Carolina, our law imposes an
16 implied warranty on builders, contractors, people who
17 undertake construction work. And what the law recognizes
18 is that beyond codes, beyond industry standards even, a
19 builder who undertakes construction impliedly warrants
20 that the work that he does or she does is going to be
21 done in a good and workmanlike manner. I think that the
22 testimony in this case, again, is abundantly clear that
23 with respect to Bostic that simply did not occur. The
24 evidence is crystal clear on that.

25 With regard to Marick, again, we have a failure to

1 investigate. We have a failure to properly repair
2 waterproofing problems, foundation wall problems. And we
3 have a million and a half dollars worth of work that
4 Marick and I.M.K. did to those units in phase one. At
5 least a million and a half dollars worth. That's the
6 value of the building permits that they pulled. And you
7 remember those building permits. It's not like Marick
8 was simply putting in cabinets. The building permits say
9 very specifically that Marick did all sorts of work to
10 those units. So I think we have established our breach
11 of implied warranty of service with respect to both
12 Bostic and Marick and I.M.K.

13 The last cause of action that we brought is a cause
14 of action for fiduciary duty. This may take just a
15 minute. Y'all have learned, as I told you -- as I think
16 I told you you would, you've learned a little bit about
17 homeowner associations if you didn't already know about
18 them. Homeowners associations have remarkable
19 responsibility because it's a community corporation, if
20 you will. And you've heard through the testimony of Ms.
21 Furnari and you heard through the testimony of even some
22 of the other witnesses, some of the defendants in the
23 case, that some of the enormous responsibilities of a
24 homeowners association are, among other things, repair
25 and maintain and replacing building envelope components

1 for thirty-seven units at Stoneledge. So that's an
2 enormous expense, and it's an enormous responsibility.
3 So an association is vested with those responsibilities.

4 Well, you've also figured out in listening to the
5 testimony that typically in a development, as happened
6 here at Stoneledge, for a period of time a developer,
7 after he develops a project or while he's developing a
8 project, a developer controls the homeowners association.
9 The developer controls the board. He decides or she
10 decides what they're going to charge for dues, what sort
11 of maintenance they're going to do, what sort of repair
12 they're going to do. And so the developer is in control.

13 And there are a number of triggering mechanisms
14 typically in regime documents. Sometimes it's the number
15 of units sold. Sometimes, it's the passage of time. But
16 at some point, control of that association is handed over
17 from the developer to the homeowners. Think, if you
18 will, giving the keys to the car to one of your children.
19 That's what it's like. The developers say, we're
20 leaving. You homeowners are now in control and are
21 responsible for the H.O.A.

22 Well, as I said it a moment ago, that's a big change
23 in responsibility because the developers are no longer in
24 control. The homeowners are in control. But that means
25 the homeowners now have responsibility, including the

1 responsibility to repair, maintain and replace the common
2 elements.

3 Because it is such a significant event, Judge
4 Macaulay's going to tell you that the law in South
5 Carolina recognizes that event and imposes upon a
6 developer a fiduciary duty to turn over control of the
7 association and to ensure that at that time, the common
8 elements, or in this case the building envelope, is in
9 good condition. The idea obviously is to make sure that
10 a developer doesn't turn over control, leave, and saddle
11 the homeowners with extraordinary repair and maintenance
12 obligations, which is exactly what happened here.

13 You heard the testimony. September of 2008, control
14 was given from the developers, I.M.K., Mr. Cox, Mr.
15 Thoennes, who were personally serving on the board, to
16 the homeowners. Mr. Taylor wrote a letter and said,
17 "We're glad we're in control now. There's seventy
18 thousand dollars in the bank. We feel good about
19 ourselves." Seventy thousand dollars that the homeowners
20 had paid in to dues and assessments. "But we feel good
21 about it." That was in September of 2008.

22 By early 2009, Mr. Taylor and Mr. White had had to
23 go to a law office. And they had to go to a law office
24 because even as early as early 2009, they realized that
25 they had significant problems with their units. In the

1 spring of 2009, these problems became more and more
2 apparent to them.

3 By the summer of 2009, Mr. Logan -- I think Mr.
4 Taylor testified to this -- Mr. Logan tells Mr. Taylor,
5 "Hey, my handrail fell off my porch." And Mr. Taylor
6 goes over to his house, tries to reattach it and says,
7 "There's nothing to attach it to." And you remember that
8 by the summer of 19 -- excuse me -- 2009, less than a
9 year after turnover, Mr. Taylor pops the top off the
10 column and he says to you, I think on Tuesday of last
11 week, "I reached my hand down in there and pulled out
12 nothing but black mush."

13 These people were in for the ride that you are
14 witnessing. And that's what they've been doing since
15 essentially the day the H.O.A. was turned over to them.
16 That, I think, establishes a breach of the fiduciary duty
17 of a developer to turn over control when the building
18 envelopes are in good condition.

19 And in case there's any doubt, you remember I asked
20 Mr. Hodgkin, "Mr. Hodgkin, do you have an opinion to a
21 reasonable degree of certainty as to whether or not the
22 building envelope was in good condition in September of
23 2008?" He said they were not. So I think we've proven
24 our breach of fiduciary duty claim with respect to I.M.K.

25 Now, I'm going to take just a moment here to talk

1 about I.M.K. and try to hopefully explain some of the
2 testimony you've heard this week. I.M.K. is a limited
3 liability corporation set up under South Carolina law.
4 It's comprised of two members, and y'all have seen, I
5 think, some evidence of that. I.M.K. was comprised of a
6 company called I.K. and a company called Marick Home
7 Builders. I.K. was made up of individuals including Mr.
8 Cox and Mr. Lollis. And I think y'all probably remember
9 some of that testimony. We've sued Mr. Cox and Mr.
10 Lollis and Mr. Thoennes for breach of this fiduciary
11 duty, and we've sued them personally. Mr. Cox and Mr.
12 Thoennes were actually on the board and owed that
13 fiduciary duty at the time of turnover, the duty that I
14 think we've clearly established they've breached.

15 So how about Mr. Lollis? Why is he here? You may
16 remember the testimony of Mr. Lollis from the day before
17 yesterday. Mr. Lollis and Mr. Cox, they were members of
18 I.K., which, again, was the fifty percent member of
19 I.M.K.

20 You may remember that, besides Mike Furnari, the
21 last two witnesses I called were Mr. Lollis and Mr. Cox.
22 And I wanted to talk to them about the sale of the assets
23 of I.M.K. And you remember that in the summer of 2008,
24 I.M.K. had to sell or chose to sell their assets to John
25 Ludwig's company just -- who was a creditor of Marick.

1 Their assets consisted of Stoneledge units. That's what
2 was conveyed. Well, what happened was, as you heard Mr.
3 Cox testify, when that sale took place, part of the
4 agreement was Mr. Ludwig promised to pay not I.M.K., but
5 I.K., almost a million dollars. And you remember Mr.
6 Cox's testimony was as part of that sale, I.K. received
7 five hundred and eighty thousand dollars, which it
8 distributed to its members, including Mr. Cox and Mr.
9 Lollis.

10 Not only that, but as part of that sale to Mr.
11 Ludwig's corporate -- excuse me -- companies, Mr. Ludwig
12 wrote a note or gave a note, a promissory note, to I.K.
13 for the payment of three hundred and fifty thousand
14 dollars. And that note was to be repaid by the sales of
15 Stoneledge units. And you remember me asking Mr. Cox,
16 "Mr. Cox, you were getting proceeds from the sale of
17 Stoneledge units even after this lawsuit was filed?" And
18 he said, "Yes." There's evidence in the record that
19 reflects that. Why is that significant? What does it
20 mean?

21 The other thing Mr. Cox testified to the other day
22 was this. I.M.K. has nothing. It cannot pay its bills.
23 It cannot respond to a judgment. My clients' suing
24 I.M.K. will result in nothing. And the reason there's
25 nothing there is because instead of putting the sales

1 money into I.M.K. so that I.M.K. would be able to respond
2 to a judgment from anybody, including my clients, they
3 put the money in their pockets. That is why Mr. Lollis
4 is here.

5 I told you that all of the causes of action that we
6 have asserted require us to prove damages. And I want to
7 talk about damages next and blessedly for y'all last.

8 But I want to make a point and try to be as clear
9 about this as I can be. The damages that my clients have
10 suffered are the same for every cause of action. There's
11 no mystery here. And I don't want you to be confused by
12 any of the arguments that are made after I sit down. The
13 damages my clients have suffered are the costs to fix
14 these buildings. That's what we're here for. Whether it
15 be for the negligence claim, the breach of implied
16 warranty of service claim, or the breach of fiduciary
17 duty claim, those are the damages for each of those
18 claims.

19 As I said a moment ago, we're really here because of
20 damages. I think damages is the big issue in this case
21 and the greatest source of dispute among the parties to
22 the case. And it relates to the problem that I mentioned
23 two weeks ago, the problem that the contractors created,
24 the problem that the developers dumped on my clients and
25 the problem that my clients now have to deal with. So

1 I'm going to keep talking about the problem. And the
2 problem is what has to happen to fix these buildings.
3 That's the problem.

4 And so how do we fix the problem? What do we do?
5 What can you do to help us get the problem from this
6 table to that table back where it belongs. Well, as we
7 look at the damages in this case, we have to look at two
8 witnesses. No mystery to any of you, I'm sure. We look
9 at Mr. Hodgkin, and we look at Mr. Moore because both of
10 them paint very different pictures of how you fix the
11 damage, which is really the only issue in this case.
12 It's the biggest issue in this case. How do we solve the
13 problem? So let's talk about that a little bit.

14 Mr. Hodgkin has been working with Stoneledge for over
15 four years. Four years Mr. Hodgkin has been out to that
16 project. He's investigated. He did a report. He took
17 hundreds of photographs. His company, C.S.E., has been
18 out there with these owners as they made emergency
19 repairs. They've been up on the roofs. They've been on
20 the decks. They've been crawling down in the trenches
21 where foundation repair were being made. They know the
22 project. They understand the problem. And very
23 importantly for you in your consideration today, they
24 were asked by my clients at the very outset, not only
25 tell us what's wrong with our buildings, tell us how we

1 fix the problem.

2 In January 2011, Mr. Hodgkin produced this. This is
3 his scope of repair to fix the problem. It is a scope of
4 repair that contains a narrative from Mr. Hodgkin, and he
5 testified about it. This document contains
6 specifications. It contains drawings. It contains
7 applicable codes. It contains manufacturers'
8 installation instructions that are applicable today. It
9 contains everything that a contractor's going to need to
10 price this work and price it accurately and hopefully
11 execute and fix the problems properly.

12 And importantly, Mr. Hodgkin testified before you
13 that this document contains his signature. This document
14 contains his engineering seal that the State of South
15 Carolina has given him to certify that the work he's
16 done, he's done as a licensed engineer in South Carolina.
17 Mr. Hodgkin testified to you that he intends to stand
18 behind his scope of work and address the problem that
19 these people have.

20 Mr. Hodgkin also created this document, which is the
21 below-grade repair. It's a fancy term for saying
22 foundations. And it was interesting testimony about this
23 because this document wasn't produced until September of
24 2011, a few months after this one. And you may remember
25 Mr. Hodgkin's testimony about that. He said, "You know,

1 we were trying to find an alternative way to address the
2 foundation leaks without excavating around these
3 buildings and doing all the work that this calls for."
4 And he said, "We explored alternatives and they didn't
5 work out." And so ultimately Mr. Hodgkin developed and
6 produced this. Same document, signed, sealed by Mr.
7 Hodgkin. He's willing to stand behind it.

8 Now, I want to compare that to the expert that the
9 defendants brought in. Mr. Moore is a fine, fine
10 engineer. He is a fine person. So nothing I'm saying
11 today has any reflection on Mr. Moore from a personal
12 standpoint. I think the world of Rick. The problem is
13 Rick wasn't hired by my clients to come and do a fix.
14 Rick was hired by Bostic at some point, he said, in
15 January of 2012, two years after Bostic had been in this
16 lawsuit. And he was asked to do a scope of repair. Mr.
17 Moore spent three days at Stoneledge, March 12th, 13th,
18 and 14th of 2012, a little over a year ago, a year and a
19 half ago. He spent three days. He spent two days doing
20 test cuts. And he showed you those pictures yesterday.

21 And then Mr. Moore came up with his scope of repair
22 which is what the defendants want you to rely on to solve
23 the problem that my clients have. The problem is this
24 really wasn't produced for my clients. It wasn't
25 addressed to my clients. You heard Mr. Moore yesterday

1 admit it's not signed. It's not sealed. This is a
2 document that nobody stands behind. Nobody. This is an
3 idea on how you might fix these problems cheaper than if
4 you do Mr. Hodgins's scope. And that's what it is.
5 Nobody's standing behind it.

6 Mr. Belcher said yesterday after I sat down after
7 making that point, "Well, Mr. Moore, wouldn't you agree
8 to go out there? And wouldn't you agree to sign an
9 agreement with these owners? And wouldn't you agree to
10 do something with your engineering seal on it?" Well,
11 guess what? We're not trying the case next week. We're
12 here today. We're here right now. And after four years
13 of litigation and almost two years of Mr. Moore being in
14 this case, we have a document that he didn't even sign.
15 I don't even know if he created it. But I'm not saying
16 that Mr. Moore wasn't sincere on the witness stand
17 because I think he was sincere. My point is it's one
18 thing to get up in court and talk about something. It's
19 another thing to stand behind it and mean business with
20 it. And that's what's lacking with this.

21 And something else that's lacking with this, and
22 this is something that I'm sure you picked up on
23 yesterday. Mr. Moore's scope of repair and Mr. Hodgins's
24 scope of repair are not entirely different. Both of
25 them, I think, want to see the damaged framing material

1 and damaged sheathing removed and fixed. Both of them
2 want problematic areas fixed. They've got some
3 disagreements, for example, on how much framing to take
4 out of the porches. But I think for the most part both
5 of them want the same things fixed. The difference is
6 Mr. Hodgins's scope of repair actually does it. Mr.
7 Moore's scope of repair -- here's a word that you heard a
8 lot yesterday -- calls for surveys. What he wants is
9 after this trial is over, after you've spoken, he wants
10 to send contractors out there to start looking at the
11 building and figure out where they need to make repairs.

12 Okay. That all sounds fine and good. The problem
13 is you're not going to be here when that happens. I
14 don't think that Judge Macaulay is going to call y'all
15 back together in six months, once Mr. Moore's contractor
16 has gone out there and figured out where the damages are,
17 to change your verdict. We're here today, and we need to
18 solve the problem today.

19 And the proof was in the pudding. You remember two
20 important aspects of testimony about Mr. Moore's report.
21 First, Mr. Watkins who's priced it at two point three
22 million dollars, testified, "Well, let's see. The price
23 used to be about a million three. And then Rick told us
24 to add some stuff in. And so the week before trial,
25 we've got the final estimate which was two point three

1 million dollars." It basically doubled. It doubled
2 without Mr. Moore ever even going back out to the site.
3 Wonder how that happened? Well, I asked Mr. Moore, "Why
4 would the estimate get so big when you haven't even been
5 back out there?" He said, "Well, I learned more about
6 the project. They told me what they found in emergency
7 repairs. And they told me about this, and they told me
8 about that." And I said, "Oh, so as you are learning
9 about the project sitting in Charlotte, you're adding
10 quantities to this scope?" So that tells you how
11 uncertain his number is.

12 The other testimony that I thought was most telling
13 about the inadequacy of Mr. Moore's scope and fixing the
14 problem that we have is this. Mr. Watkins -- and y'all
15 know that we all know each other professionally. And I
16 have great respect for Mr. Watkins. But you may remember
17 I asked Mr. Watkins a series of questions holding his
18 estimate in my hand. And I said, "If you sign a contract
19 with my clients to do this work for two point three
20 million dollars, will you guarantee to Mike Furnari, look
21 him in the eye and guarantee him that all of his roof
22 shingles are on properly?" And J.R. said, "No." I said,
23 "Will you guarantee him that all of his siding is on
24 properly?" "No." "Will you guarantee him that all the
25 windows are installed properly?" "No." And we know

1 that's not going to happen because it only calls for two
2 hundred out of three hundred and eighty-two windows. You
3 may remember that.

4 "Will you guarantee him that his firewalls are
5 properly constructed?" He said, "Well, I don't quite
6 remember what the quantities were." And I said, "Mr.
7 Watkins, as you're testifying today, can you guarantee
8 Mr. Furnari that this contract is going to fix all the
9 firewalls?" And he said, "No, I can't say that today."
10 That's all you need to know about the Rick Moore scope.
11 It doesn't solve the problem because here's what happens.
12 And I got into this discussion yesterday with Mr. Moore.
13 If the contractors get out there as they have done
14 already and they find more problems than you have assumed
15 are there, who pays the bill? He's not going to pay it.
16 Mr. Moore. My clients going to have to pay it. That's
17 the risk. And that's why this scope of repair is not an
18 answer to the problem. It's not. And I would like for
19 you to ...

20 Well, there's one more thing that popped into my
21 head today at lunch that I thought about. I thought it
22 was very interesting. You may remember when I sat down
23 yesterday after examining Mr. Watkins on his estimate --
24 and I got him to say he wouldn't guarantee this and he
25 wouldn't guarantee that. And then I said, "Now, Mr.

1 Watkins, if you found out you had to remove and replace
2 all of the windows, not just two hundred of them, what
3 would happen?" He said, "Well, I think there's enough
4 money in my contingency to cover that." And I said,
5 "Okay. Fair enough. But then what if you found more
6 problems on the roof than you thought or more problems on
7 the wall than you thought?" He goes, "Well, there
8 wouldn't be enough contingency for that." I said, "Thank
9 you." And I sat down. And Mr. Belcher got up. And he
10 said, "Well, how about we just add ten percent?" And Mr.
11 Watkins said, "Oh, that'd make me feel a whole lot
12 better." Well, guess what? That's going to happen
13 tomorrow. It's going to happen next week. That's going
14 to happen in a month. The estimate is a moving target.
15 It's a moving target. It moved yesterday. Two hundred
16 thousand dollars was added to it while y'all were sitting
17 right there looking at Mr. Watkins on the witness stand.
18 Imagine what's going to happen when they get out to that
19 project and they start pulling off that siding and they
20 start pulling off the roof. And y'all are going to be
21 nowhere around. So in terms of fixing the problem, that
22 doesn't cut it. This fixes the problem.

23 I want you to contrast the testimony that I got from
24 Mr. Watkins yesterday with the testimony I got from John
25 Folk on Monday. I asked Mr. Folk on Monday -- I said,

1 "If you sign a contract with my clients to do this amount
2 of work, will you guarantee my clients that the shingles
3 are put on properly?" He said, "Yes." "Will you
4 guarantee that the flashing's done properly?" "Yes."
5 "Will you guarantee the siding is on properly?" "Yes."
6 "Will you guarantee that all windows are in properly and
7 are functioning properly?" "Yes." "Will you guarantee
8 all the stone's on properly?" "Yes." "Will you
9 guarantee that the porches and decks are done properly
10 and won't leak?" "Yes." "Will you guarantee that the
11 building complies with the code?" "Yes." There's a
12 whole different set of answers for this scope of work.
13 And those are the answers that my folks need. It's why
14 we're here, why we waited four years to get to you.

15 I will try to wrap this up. Again, I appreciate
16 your indulgence a great deal. Low tech today. I've had
17 about all the technology I can stand. What I've done ---

18 And, Your Honor, I beg your pardon because I didn't
19 mean to put this ...

20 What I've done is I've prepared a summary of the
21 damages that my clients are seeking. And the documents
22 which establish these damages are all in evidence. The
23 cost of the emergency repairs in phase one. Mr. Furnari
24 testified -- he summarized that. That's a hundred and
25 thirty-nine thousand eight hundred dollars and eighty-one

1 cents. That's what they've already spent.

2 The cost to repair the buildings. Mr. Folk, four
3 million four hundred and nine thousand two hundred sixty-
4 one dollars and fifteen cents. Here I've put Mr. Watkins
5 number, which is three million nine hundred ninety-five
6 thousand one hundred and six dollars and thirty-four
7 cents. Again, that's to do the Derek Hodgins scope of
8 work.

9 It's an interesting case. I've never had a case
10 where a defense expert got on the witness stand and
11 agreed to sign a contract with my client to do the work.
12 I'll leave that to your good judgment. Obviously, we
13 like the guarantees that Mr. Folk gave us. Trehel's a
14 great company. Trehel's done work out there before. You
15 heard testimony that Trehel's interested in doing this
16 job. You've heard that my client said they were willing
17 to hire Trehel to do this job. That's the Trehel number,
18 four million four hundred thousand. But I will candidly
19 tell you, Mr. Watkins said he would do the job for three
20 million nine hundred and ninety-five thousand. So,
21 again, I put that number up there for your consideration.

22 Below that, the foundation repairs. And I
23 apologize. I neglected to talk about the foundation
24 repairs a second ago in terms of the scope and the
25 adequacy of it. The defendants didn't provide a price

1 for this scope of work. They didn't. What they did is
2 -- interestingly enough, as you know already, Mr. Watkins
3 has been out to the project. And my clients asked him to
4 do emergency repairs to four of the units. And that was
5 by agreement of my clients. They needed the emergency
6 repairs to keep the water from pouring into people's
7 units. Mr. Watkins did that and, I guess before trial,
8 suggested to Mr. Moore that that's what I've been doing
9 out there. So Mr. Moore and Mr. Belcher asked Mr.
10 Watkins to go ahead and price doing that repair to all of
11 the phase-one units. And that's their foundation repair
12 and their estimate. Well, think about that. What they
13 want you to do is to give my clients the emergency
14 repairs that they're making. And on top of that, no
15 engineer came up with those plans. No engineer came up
16 with that fix. Mr. Watkins came up with it. If you
17 remember, he testified about that.

18 And I'm not knocking Mr. Watkins at all. I think
19 he's a great contractor. But you may remember, Mr.
20 Watkins said, "I came up with the repair, and then Mr.
21 Hodgkin came out and he endorsed what I was doing." You
22 remember that. The engineer that endorsed his emergency
23 repairs says this is what needs to happen to permanently
24 fix the foundation. Not the temporary repair. Not the
25 emergency repair. And, again, the defendants haven't

1 priced this number. They haven't priced that repair. We
2 did. John Folk priced it at one million three hundred
3 and twenty-nine thousand seven hundred and thirteen
4 dollars.

5 And then the last line is this thing that y'all
6 heard a lot about last week, maybe some this week too, is
7 contract administration services. Those are the services
8 that a design professional performs during the repair.
9 He goes out. He meets with the contractor. He provides
10 additional details. He looks at pay applications. He
11 observes the work. He makes sure the work is done
12 properly so that we don't wind up in a situation like
13 this again where we have a building that leaks like a
14 sieve.

15 Mr. Hodgins testified that those C.A. services are
16 seven and a half percent. What I've done is I've
17 calculated those C.A. services on Mr. Folk's numbers.
18 But it's seven and a half percent of whatever the
19 contract number is. And just to make sure that y'all are
20 clear about that, C.A. services are something that every
21 expert in this case, every expert in this case, testified
22 were appropriate and necessary for this repair.

23 And I'd also tell you this. In case you're
24 wondering about the percentage of seven and a half, it's
25 the same percentage that Mr. Watkins put in his estimate.

1 So seven and a half percent is a reasonable contract
2 administration fee.

3 If you add up all these damages, again, using the
4 Folk numbers, not Mr. Watkins -- I did put that on there,
5 though, for your benefit -- the total is six million
6 three hundred and nine thousand one hundred ninety-seven
7 dollars, which is a pile of money. It's a pile of money.
8 But it's what it's going to take to fix this project.

9 I've never been -- well, let me just -- I've been
10 thinking about this since last week. I'm a music fan.
11 And there's a song that Allison Krauss -- some of you may
12 know Allison Krauss -- she did a few years ago. It's a
13 remake of an old bluegrass song. And I love the line.
14 And the title of the song is "Everybody Wants to Go to
15 Heaven but Nobody Wants to Go Now." And last week when I
16 was listening to the testimony of the defendants in this
17 case, that song popped in my mind, because every witness
18 in this case, every one of them, including the defendants
19 that I have sued and dragged down here, every one of them
20 said, "This building ..." or "These buildings need to be
21 fixed, and they need to be fixed properly." The problem
22 is, they don't want to pay to fix them. That's what it's
23 going to take to move the problem from this table to that
24 table, which is how my clients get the relief that they
25 need. They didn't create this problem. It was created

1 by the contractors and put on them by the developer, and
2 now they're just trying to deal with it.

3 The final point I want to make is this. And this
4 has to do with -- at the end of this case, the Judge will
5 give you a verdict form and ask you to fill out the
6 verdict form. Each of the three causes of action that I
7 have mentioned to you are independent causes of action.
8 Each of them stand on their own. And I told you the
9 damages that we are claiming are the same for each of
10 those causes of action. It's just a question of how do
11 you get to the damages. What do you have to prove? And
12 so I urge you to remember that when you're filling out
13 the verdict form, that this is the amount of damage under
14 each cause of action. And this is what I hope that you
15 will see fit to award my client and help them fix this
16 problem.

17 I may get a chance to speak briefly to you after the
18 defendants go. But, again, I appreciate your attention
19 and your consideration.

20 THE COURT: All right. Mr. Belcher? Oh, let
21 me see. Mr. Imhoff?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: You're next.

24 MR. IMHOFF: Thank you, Your Honor.

25 THE COURT: Thank you, sir.

1 MR. IMHOFF: Well, we've lost Ms. Burton, I
2 guess, to run the overhead down.

3 THE COURT: Oh, my goodness. That's one thing
4 we do need her for. Do you have a tech person?

5 UNKNOWN FEMALE: No. I'm sorry.

6 MR. IMHOFF: That's okay. That's all right. I
7 will go low tech. Your Honor, I'll be fine. I'll just
8 -- if I ---

9 THE COURT: I think it's in the front there, if
10 you want to try. Go ahead and try it.

11 MR. IMHOFF: I will mess it up. I'm not even
12 going to try. Your Honor, I'll go ahead and get started.

13 CLOSING ARGUMENT

14 BY MR. IMHOFF:

15 Ladies and gentlemen of the jury, Mr. Foreman, thank
16 you again from all of us. It's a two-week trial, and we
17 apologize. We know it's construction and it's boring.
18 But thank you. Truly, we mean that.

19 Let me start to make sure that you understand
20 because there was a pile of folks sitting over there. As
21 you see, there isn't a pile of folks sitting over there
22 anymore. But just to make it clear, and I think you do
23 know, I represent Rick Thoennes and his company, Marick
24 Home Builders. And you heard Rick Thoennes built homes
25 for forty years. And I'm proud to represent him.

1 For forty years. And he's lost everything. 2008,
2 as you all know, if you swing a hammer in 2008, then you
3 don't work anymore. And that's what happened. But I'm
4 proud to represent him, and I'm proud of him.

5 And I want to talk to you about the case. I want to
6 talk to you about what Mr. Lyles said and about what
7 you've heard. Mr. Lyles obviously makes a very
8 compelling argument. He's a very good attorney. But
9 this is two cases. There's two cases. I told you that
10 at the beginning of the case. The first case is easy for
11 y'all. It's against Bostic Construction Company. And
12 the reason that that is easy for you is because Jeff
13 Bostic and Joe Bostic and Mel Morris all sat on the stand
14 after putting their hand on the Bible and admitted --
15 they admitted they made mistakes. The buildings aren't
16 right. They admitted that they built them. They
17 admitted that they're not right. And they admitted that
18 they need to be fixed. That's the easy case. That's the
19 first case.

20 The second case is this more complicated case, which
21 I told you at the beginning is, what did that man know?
22 What should he have known? That's the second case. And
23 I'm going to talk to you about what wasn't proven in that
24 case and how I and Mr. Thoennes vigorously defended him
25 and his honor and his honesty.

1 As you know, and as you'll be charged by the Judge,
2 the burden of proof is on the plaintiffs in this case.
3 And what they've alleged is that he knew and now he
4 wasn't honest with them. And that's the crux, and that's
5 the key to all of the charges against him and his
6 company. That's it.

7 The evidence that you heard or the evidence that you
8 didn't hear from Mr. Hodgin -- and, again, it all came
9 from Mr. Hodgin. But what Mr. Hodgin said is when that
10 man after -- it was thirty-five years experience at the
11 time. When he walked onto the project, he had a right to
12 rely on the second or tenth largest multi-family builder
13 in the country. He had a right to rely on all of their
14 subcontractors, who have now disappeared, to do their
15 jobs right. He had a right to rely on an architect who
16 was out there overseeing it. He had a right to rely on
17 the Oconee County building inspector.

18 There's been a little bit of shuffling and a little
19 bit of accusation or evidence that these buildings
20 weren't all up. Somebody said it the other day. I think
21 it was Mr. Thoennes himself. Well, you can't have walls
22 and floors if you -- well, you have to have walls and
23 floors to have a roof. All of these buildings were done.
24 That was a little slight of hand. They were all up,
25 roofs, stone, siding, doors, windows, foundations. They

1 were all up. And Derek Hodgin, the plaintiffs' expert,
2 testified he had a right to rely on all of those people,
3 architects, inspectors, builders, Bostic. When he walked
4 on the site, he had a right to rely that that work was
5 done right. And the work that he pulled the permit for,
6 the work that they're accusing him of, was all interior
7 work. Gypsum, lights, flooring, cabinets. Various
8 stages. Some of these townhomes were completely
9 complete. Some, as you saw, didn't have anything but
10 framing. But that's the work they did. Not the stone
11 that's at issue in the case. Not the siding that's at
12 issue in the case. The windows or the doors or the roof
13 or the foundation. It was all interior work. That's
14 undisputed.

15 So who went out there, or who could testify that Mr.
16 Thoennes knew or should have known? Well, the first one
17 is obviously the plaintiffs' expert. And that's where
18 most of this comes from. The plaintiffs' expert, after
19 he testified about all the mistakes that Bostic Brothers
20 Construction made, which have been conceded and admitted,
21 at the end of his testimony said, "He should have known.
22 He should have known."

23 What did Derek know? Derek Hodgin, what did he
24 know? What we know is it took him four years to find all
25 of that. Twenty visits. Hiring contractors to take off

1 shingles, take off stone, take off siding, dig down to
2 look at the basements. Had to do destructive testing.
3 He said he could walk around out there. He didn't know
4 what was wrong. And this was in 2009 and 2010. He
5 admitted -- this is plaintiffs' expert -- the latent
6 defects. And the latent defects are hidden. "We don't
7 know what's in here. We don't know. We can't see what's
8 in there." They were all hidden. That was plaintiffs'
9 expert. That's what they admitted.

10 Rick Moore, the same thing. Had to go out there.
11 Had to bring a crew to pull it apart and do destructive
12 testing.

13 Oconee County building inspector. The Oconee County
14 building inspector didn't see these defects. Not in
15 2002, 2003, 2004 when the buildings were actually being
16 built, before the siding was on, before the stone was on,
17 before the shingles were on. He didn't see it. He had
18 to come back because he had to check what Rick was doing
19 out there, what Marick Home Builders was doing out there.
20 He was out there again 2005, 2006, 2007. The Oconee
21 County building inspector, whose job it is to find these
22 issues, didn't find them.

23 You heard further testimony the units got sold.
24 They got sold, Ludwig and then S.D.I. and so on. He was
25 back there again. The Oconee County building inspector

1 was back there in 2008, in 2009. He never saw all of
2 these defects. The architect was out there, as you know.
3 He didn't see them. There was an appraiser out there
4 when the property was purchased in 2005. He didn't see
5 them.

6 The homeowners. There weren't very many that
7 testified. I thought that was interesting. The
8 homeowners could not testify to you that they saw them
9 and knew about them. They couldn't do it. Matter of
10 fact -- it was a little bit telling -- the reason they
11 gave for not being able to see the defects and the leaks
12 and the issues, two of them testified there was a drought
13 between 2005 and 2008. Maybe there was. I don't think
14 there was. I think that the issues just hadn't shown up
15 yet, and that's what Rick testified to.

16 The Furnaris hired an inspector, an inspector for
17 all of these buildings. Which every time they're sold,
18 an inspector would go in and look at the building and
19 inspect them. You hire a home inspector, I think is what
20 they're called. He didn't find all of these defects.

21 Bob White, he didn't find them. The interesting
22 thing with Mr. White's testimony was he claims that when
23 he moved into his unit in 2006, he had a leaking
24 crawlspace. From 2006 to 2009, he claims he had a
25 leaking crawlspace. There's no letter. There's no

1 email. There's no objection. But he claims it leaked
2 from 2006 to 2009.

3 He got on the board. He didn't have any concern
4 when he got on the board. He wasn't concerned. There
5 wasn't a letter. There wasn't a memorandum. There
6 wasn't a meeting in 2008. He wasn't concerned because he
7 didn't see it.

8 Mr. Taylor, the mayor of Stoneledge, the big part of
9 this case. A big part of whether or not you can find
10 that Mr. Thoennes knew. Steve Taylor, as he admitted,
11 one of his favorite things -- it may be his favorite
12 thing in the world. It may be Stoneledge. He walks
13 around and picks up trash and checks on neighbors. I
14 think he said he lets the cats and dogs out for neighbors
15 and that type of thing. He's all over that project.

16 He's a realtor. He sells those units. Sold them
17 from the very beginning. Still selling them today. I
18 think we put his website up. And he's got at least two
19 of those Stoneledge units listed for sale. What goes
20 with the sale? What did I say earlier? Folks look at
21 them. They hire a building -- I mean, a home inspector
22 to go look at them. He's been there since 2005. What
23 did Mr. Taylor say about my client, Rick Thoennes? They
24 did a great job. They're honest. That's what he said
25 when he became the president of the homeowners.

1 association in 2008. Mr. Taylor, who let people into
2 buildings, went into units to look at to sell, to market,
3 to show, he didn't know about all these defects.

4 So I believe he said in his letter that the project
5 was in good shape. I will say this for Mr. Taylor, he's
6 an interesting guy. One thing I can assure myself of.
7 Steve Taylor doesn't keep his opinions to himself. If
8 he's got an opinion, you're going to hear his opinion.
9 If he had an opinion that my clients knew and were hiding
10 something or were dishonest, that man over there, you
11 would have known it. There would have been a letter, an
12 email. He would have told everyone. And he didn't. He
13 said my client was honest, did a good job and left them
14 with seventy-five thousand dollars or a hundred thousand
15 if they didn't buy twenty-six thousand dollars in mulch.

16 Now, this could have been made extremely easy for
17 you. Very easy to decide whether he knew in 2005 to
18 2008. They could have marched all of those homeowners in
19 here for all of those units that they claim were leaking
20 and defective between 2005 and 2008. They could have put
21 ten folks, fifteen folks, twenty folks, whatever it is,
22 on that stand to testify that it was leaking in the
23 basement, that it was leaking at windows. Fifteen
24 people. We had a roof leak in 2006. We had a roof leak
25 in 2007. They didn't because they couldn't because it

1 isn't true.

2 These units weren't leaking like they are today
3 between 2005 and 2008. Mr. Hodgkin explained why. It
4 takes a long time for these leaks to develop. It takes a
5 long time for rot to develop. But they didn't bring them
6 in here. And the reason they didn't bring them in here
7 is because it's not true. Because between 2005 and 2008
8 when my client was there, there weren't all of these
9 project-wide issues going on that he should have known
10 about.

11 Like I said, I was hoping for Ms. Burton to help me
12 put this down. I have some photographs that I wanted to
13 show you, but they're going to go back. So I'm just
14 going to use them briefly. These are from Rick Moore ---

15 THE COURT: You can publish them to the jury,
16 if you'd like.

17 MR. IMHOFF: I'm sorry, Your Honor?

18 THE COURT: You can publish them to the jury if
19 you'd like. Let them look at them.

20 MR. IMHOFF: Well, I'll just show them and then
21 I'll sit back, if you don't mind.

22 THE COURT: Very good.

23 CLOSING ARGUMENT

24 CONTINUED BY MR. IMHOFF:

25 These are photographs -- and they're going to go

1 back with you -- that Rick Moore took last year.
2 Admittedly -- and he admitted it -- there are photographs
3 of bad conditions out there. Okay? But these
4 photographs were taken four years after my client left
5 the project after he was supposed to know. This is the
6 project. This is what he saw out there. They're
7 beautiful. Look, natural cedar, shake, siding, roof,
8 stone. They're beautiful. That's a leaking foundation,
9 according to the plaintiffs, that we should have seen.
10 Right there. That's the side of the units. That's what
11 they look like. They're covered in siding and stone.
12 That's a leaky deck. That's the cedar ceiling from the
13 leaking deck. One of them. There are numerous pictures
14 of cedar ceilings that look like that. And these
15 photographs are followed by that, the ceiling removed and
16 damage in that space. Rick Moore showed you that where
17 he would find ceilings that didn't have damage didn't
18 have leaks. But there certainly was damage inside there.
19 Like that one. I think that was Rick Moore's. That's
20 what he saw in 2005 to 2008. That's what Rick Moore saw
21 in 2012.

22 One of the -- obviously their allegation is that my
23 client knew and somehow covered it up and transferred the
24 ownership of the board to these folks. Knowing or should
25 have known, to these folks. I think one of the best

1 evidence on that issue is the fact that that gentleman
2 and that gentleman, Bill Cox, back there and Tim
3 Roberson, who the plaintiffs kindly decided not to sue
4 because he's their neighbor, all had townhomes out there.
5 They didn't run out to someone's house, do a crummy job
6 and then bolt out of there leaving them whistling for
7 their money. That's not what they did. They were
8 neighbors with these folks. Common sense says you do not
9 do a bad job on your neighbor's house who you live next
10 to. That doesn't make sense. If Rick had known that
11 these things were leaking and falling down, he would have
12 gotten out of there. He wouldn't have stayed there, lost
13 his unit to foreclosure. They wanted a good townhome.
14 At the time they were there, from 2005 to 2008, they
15 thought they had a good townhome.

16 Credibility. The facts -- you get to listen to
17 everybody that sits up there and everybody that testifies
18 up there. One of the things that you get to do that
19 nobody else can do -- I'm going to talk to you about it a
20 little bit -- is credibility. You can believe one person
21 over five other people or five people over one person.
22 Sort of a neat thing with our jury system. Because of
23 your experience, your life, people that you've met, you
24 get to determine credibility, who you believe and who you
25 don't believe. And credibility is equal for defendants,

1 plaintiffs and experts.

2 Let's talk about Derek Hodgin a little bit. You
3 heard Mr. Lyles refer again to unit thirty-three. Derek
4 Hodgin used unit thirty-three to claim that my client
5 should have known about the leaks. Derek Hodgin did not
6 know that Marick Home Builders never worked on unit
7 thirty-three. He had pulled all of those permits, looked
8 at all those certificates of occupancy -- Mr. Hodgin had
9 -- had the information in his file to know that that
10 gentleman had not worked on unit thirty-three. But he
11 used that unit, and only that unit, to tell you he should
12 have known. He knew. Derek Hodgin didn't even know that
13 Marick Home Builders never worked in there. Ludwig
14 Corporation took that. They worked in there while Mr.
15 Hodgin was on site. I don't know if that's a leaking
16 unit or not, but Mr. Hodgin didn't go over there and tap
17 Ludwig on the shoulder and say, ah, ah, ah, you've got to
18 fix that window. Obviously, Mr. Hodgin is paid for his
19 testimony and he's paid for his opinions in every case
20 that he works on. He's a forensic engineer. This is
21 what he does. You heard me say it. I do hope it stuck
22 with you.

23 I took Mr. Hodgin's deposition in this case. And as
24 you know, as you've heard, his repair scope is to tear it
25 all down. Tear it all off. You heard Rick Moore say his

1 scope takes all of this stone off, all of the cedar
2 siding, all of the cedar roof, framing, everything,
3 whether it's wet, ruined, perfect, pristine, take it all
4 off. That was his testimony. I took his deposition in
5 this case. He said tear it all down. He worked for
6 plaintiffs eleven days later. Eleven. I was in a
7 deposition. He was hired by a defendant ---

8 MR. LYLES: Your Honor, I would object to this
9 argument. He's testifying about a deposition that he
10 took with Derek Hodgin in another case.

11 MR. IMHOFF: I asked him about this, Your
12 Honor, on the stand. He admitted it. It's in the
13 testimony.

14 THE COURT: What's the relevance to this case?

15 MR. IMHOFF: Credibility, Your Honor.
16 Credibility.

17 THE COURT: Did you ask him -- did you
18 challenge him under Rule 613? Did you show him what he
19 had said?

20 MR. IMHOFF: I asked ---

21 THE COURT: It was a deposition? It was
22 written. The rules require that you do that in order to
23 impeach your witness' credibility.

24 MR. IMHOFF: Your Honor, I have the deposition
25 with me.

1 THE COURT: Well, you didn't use it at the
2 time, so I'm going to tell the jury to disregard anything
3 that has to do with a deposition because the rules
4 provide that if you're going to challenge a person's
5 answer to the question, did you make this statement, they
6 have the right to explain their answer. And he's not
7 here today to do it. That's beyond the scope of proper
8 arguments. And I'm going to direct you to disregard
9 anything about credibility of the witness based on a
10 prior inconsistent -- alleged inconsistency.

11 MR. IMHOFF: Thank you, Your Honor.

12 CLOSING ARGUMENT

13 CONTINUED BY MR. IMHOFF:

14 Mr. Hodgins, despite accusing my client of knowing or
15 should have known between 2005 and 2008, also after I got
16 up to ask him questions, admitted that he was never there
17 in 2005, 2006 or 2008. Had no idea what my client saw.

18 And finally, it may not seem like that big of a
19 deal. But the man was paid for four years of
20 investigation. He was out there, he said, over twenty
21 times. He missed seven decks. Seven ten-thousand-
22 square-foot thirty-foot high decks. Didn't even know
23 they weren't there. Included them in his scope of
24 repair. That's credibility. That's what you get to
25 judge.

1 Now, let me talk to you about the law a little bit.

2 THE COURT: Mr. Imhoff, I'm going to remind you
3 to move on because you introduced an improper element of
4 what you're saying is credibility.

5 MR. IMHOFF: Yes, Your Honor. I'm moving on.

6 THE COURT: Thank you.

7 CLOSING ARGUMENT

8 CONTINUED BY MR. IMHOFF:

9 There's three causes of action: breach of a
10 fiduciary duty, negligence and implied warranty of
11 workmanlike service. The breach of the fiduciary duty is
12 this. The plaintiffs have claimed, as you heard Mr.
13 Lyles say, that my client and his partners, I.M.K., when
14 they transferred the board from the developer to the
15 homeowners association, knew that it wasn't in good
16 shape. That they put the burden on these folks. That
17 they now -- that they were wrong. That there was some
18 wrongful conduct in that transfer. That all goes back to
19 knowledge. What did these folks know when they
20 transferred it over to the homeowners association? I'd
21 like you to remember that when you're looking at that.

22 Negligence. The negligence is that the contractor,
23 Mr. Thoennes and Marick Home Builders, didn't do their
24 work correctly. Their work isn't at issue in this case.
25 The work was already done by Bostic. The leaks were

1 Bostic's work. Not the countertops and not the cabinets.
2 Please keep that in mind.

3 Implied warranty of workmanlike service. That's a
4 little complicated, even for construction lawyers. But
5 it's very similar to negligence. If you build it, you
6 warrant that it's right. My clients didn't build it;
7 Bostic built it. If this was a case about cabinets,
8 countertops and flooring, we have a different discussion.
9 But it's not. The implied warranty of workmanlike
10 service goes to roof, windows, doors, siding, stone,
11 foundation, all things that were built by Bostic
12 Brothers.

13 All right. I'm almost done here.

14 Bostic Brothers who, I assume, will get up here and
15 try to transfer the blame to my client. Listen for it.
16 You'll hear it. Despite the fact that they sat on the
17 stand and admitted that it was their work and they were
18 responsible for it.

19 Now, I want to talk to you about damages a little
20 bit. I'm confident that you heard Derek Hodgins
21 testimony. He sat on the stand up here. And Derek
22 Hodgins said his repair scope, this four or seven million
23 dollars or whatever it is, repair scope was necessary in
24 2004, 2005 before my client ever got there. Before my
25 client ever walked on, that needed to be done because of

1 the errors done by Bostic Construction. I assume you
2 heard that part.

3 And I went through Mr. Folk, well, what could -- and
4 Mr. Hodgkin -- "Well, what could my client be responsible
5 for?" Well, if it leaked for a long time and they knew,
6 you know, they could potentially be responsible for
7 repairing some of the framing that it leaked into. I
8 think Mr. Folk said something like two hundred and fifty
9 thousand dollars. But I'm going to talk about damages
10 anyway, even though those damages existed before we even
11 walked on.

12 This, I think, is the most important part in the
13 case. Mr. Hodgkin and Mr. Moore are extremely
14 credentialed. They've got the degrees on the wall.
15 They've got the background. They've got the firms.
16 They've got the ties and the suits and the testimony.

17 But what was the testimony of J.R. Watkins? The
18 common sense of J.R. Watkins? You've got these scopes of
19 repair to the foundation. What did J.R. say? "The
20 homeowners called me. They had a problem with their
21 foundation. I looked at it. I repaired it. I fixed
22 it." The guy swinging the hammer without the degrees and
23 the tie and the suit and the big fees. What did he do?
24 J.R. Watkins. He just went out there and fixed it. He
25 fixed it for one million dollars less than this repair

1 estimate from Mr. Hodgin. Plaintiffs want to say that's
2 an emergency repair. That is not what J.R. Watkins said.
3 J.R. Watkins said, "It's fixed. It doesn't leak
4 anymore." Who approved that? Derek Hodgin. J.R.
5 Watkins went out there and did -- came up with a fix
6 that's different from Derek Hodgin. And Derek Hodgin,
7 the engineer, approved it for a million dollars less.

8 So -- and I will finish. Again, these townhomes
9 don't leak because of what my clients did. These
10 townhomes leak because they were built incorrectly
11 originally. Please remember that. The Bostics, Jeff and
12 Joe Bostic, admitted that. They accepted that. Mel
13 Morris admitted that and accepted that. They want you to
14 allow them to fix them. Let Bostic Brothers fix them.
15 That's where these damages lie. But do it fairly. Do it
16 with an eye towards common sense. And a million point
17 three repair is done by the guy that goes out there
18 swinging a hammer in the truck for three hundred thousand
19 dollars.

20 Thank you. Thank you. We appreciate it.

21 THE COURT: Ms. Brown?

22 MS. BROWN: Yes, Your Honor. May it please the
23 Court.

24 THE COURT: Yes, ma'am.

25 CLOSING ARGUMENT

1 BY MS. BROWN:

2 Ladies and gentlemen of the jury, thank you for your
3 service this week. I will start off a little differently
4 than my colleagues have. I have four kids. And
5 invariably once a week, on a good week, I get the
6 confession from one of them for something that they've
7 done. And, you know, when they walk in the door, you
8 know what's fixing to happen. Something's happened. And
9 it always start with, "Well, John did or my sister did or
10 somebody else did." And I stop them right in their
11 tracks. I don't want to know what anybody else did. I
12 want to know what you did. What are you responsible for?
13 That's it. Because I don't want to hear any other
14 excuses. I want to know what you did.

15 And that's what this case is about. I mean,
16 everybody's admitted there are problems at this complex.
17 Serious problems. But the question for y'all is who's
18 responsible. Who did it? And it is a complex and
19 confusing case. And I get that. And some of the issues
20 are complicated, but that issue is not. That's something
21 that we all understand. And if you don't have kids yet,
22 you probably understand that from hearing it from your
23 own parents when you were growing up. I don't want to
24 hear what everybody else did. Tell me what you did.

25 I represent four individual parties: Mr. Cox, Mr.

1 Lollis, I.M.K., and I.K. And other parties have already
2 been through the percentages, so I won't repeat that
3 except to say that you need to look at them individually.
4 What did they do?

5 A corporation is an individual. I think Mr. Lyles
6 stated that. It's treated separately from the people
7 that are involved. Those are the rules that we have in
8 the state. And under the law the Judge will give you in
9 a little while, he'll explain to you how to apply those
10 rules to the corporations and the individuals.

11 Now, the question that you need to ask yourselves,
12 are any of my four clients responsible for any of the
13 alleged damages that have been testified to? You've
14 heard the testimony that my individual clients, Mr. Cox
15 and Mr. Lollis, were partners in a group called I.K. And
16 there was also the other partner, Mr. Roberson, who for
17 no good reason apparently was not named as a party of the
18 lawsuit. I.M.K. is the company that was the development
19 company made up of Marick and I.K.

20 Now, what did I.M.K. do? Well, when I.M.K. came
21 onto the project, and they purchased it from Bostic and
22 another party who is missing from this. The original
23 developer, Mr. Carpenter, Bobby Carpenter, is also not in
24 this case for some reason. But when they came into the
25 project, they came on and said, "Oh, look. We've got a

1 problem with some erosion." So I.M.K. fixed it. They
2 didn't ask for the -- the homeowners association had no
3 money. They didn't ask for it. They just fixed it.

4 We had a problem -- a problem was reported with the
5 decks. And what did I.M.K. do? I.M.K. paid for it.
6 They didn't seek it from the homeowners association.
7 They paid for it. And in the meantime, they set up the
8 homeowners association dues so that homeowners
9 association dues were coming into the reserve account so
10 there would be reserves there to take care of any
11 maintenance items that came up. And at the end of the
12 day when it came to 2008 when the property was sold,
13 there was money in the reserve accounts to take care of
14 these issues. And you heard the testimony from there,
15 from the owners that testified and even from Mr. Cox and
16 Mr. Lollis. There were no unfinished repairs, no unfixed
17 damages out there that anybody was aware of when I.M.K.
18 turned the homeowners association over to Stoneledge.
19 And that's critical.

20 And Mr. Imhoff did a great job of explaining, you
21 know, what Marick did in the construction. But when
22 I.M.K. left, they had done what they were supposed to do.
23 They had fixed the things that were brought to their
24 attention. Nothing was left undone. And the homeowners
25 were happy with what I.M.K. had done and performed on the

1 project.

2 They also built boat docks. Again, something else
3 that should have been done by the original developers
4 that I.M.K. did without being paid by the homeowners
5 association.

6 Integrys Keowee, I.K., was sort of the investment
7 arm of the project. Bill Cox and Tim Roberson were also
8 involved, and they sat on the board of the H.O.A. Mr.
9 Lollis provided an investment for the project to go
10 forward.

11 The sale to S.D.I., you heard Mr. Lyles talk about
12 that. And Mr. Cox was very clear. When Marick had some
13 financial difficulties and one of their creditors,
14 S.D.I., came to take over their interest in the project,
15 Mr. Cox was, "I didn't want to be partners with Mr.
16 Ludwig. That was not what we wanted to do, so we had to
17 sell." Mr. Cox had forced the sale. So they sold to
18 S.D.I.

19 Mr. Lyles has made a lot of hay supposedly about
20 people receiving money out of that. Well, when a company
21 sells its assets, the members of the company get their
22 percentage ownership. And you can look at the documents
23 that you'll have back there in the jury room. The monies
24 that the parties received were the exact percentages of
25 ownership that they owned. Nobody took more. Nobody

1 took extra. They got the percentages that they are
2 supposed to get according to the agreements between the
3 parties. So the idea that they lined their pockets with
4 money they weren't entitled to and pilfered it from
5 somebody else is not accurate. It was all done according
6 to the way it was supposed to be done.

7 So we've come back to who's responsible for the
8 damages. And sometimes it's easy for me if I look at a
9 simple analogy. And I go back to my kids and when they
10 come in and tell me something's happened. I have two
11 boys. And this truly has happened before. I have become
12 real acquainted with what happens when you play soft toss
13 baseball in the back yard, supposedly with a bat and a
14 baseball. It goes through windows. Sometimes not mine;
15 sometimes other peoples' windows, unfortunately. And in
16 some situations, I would like to analogize this to this
17 situation. If the ball goes through my neighbor's window
18 -- and let's say the ball was given to them by another
19 neighbor -- is the person whose window is now damaged
20 going to sue the person who gave my kids the ball, or is
21 he going to sue the person who hit the ball into the
22 window? That's the question. I.M.K., I.K., Larry
23 Lollis, Bill Cox, they provided the ball. They didn't
24 hit the ball through the window. They provided the ball.

25 Thank you for your service. And y'all have been a

1 great jury and paid good attention through a lot of
2 tedious testimony.

3 THE COURT: Mr. Belcher?

4 MR. BELCHER: Thank you, Your Honor. May it
5 please the Court.

6 THE BAILIFF: Do you want this?

7 MR. BELCHER: No, sir. Thank you.

8 CLOSING ARGUMENT

9 BY MR. BELCHER:

10 All right. Ladies and gentlemen, I know y'all are
11 tired. You've been sitting here for a long time. You've
12 been patient for two weeks. So I'm going to be as quick
13 as I can here. I really am. I'm not going to spend a
14 whole lot of time reciting through facts and evidence and
15 what you've already heard two or three times. But what I
16 am going to do is I'm going to sort of cut to the chase,
17 what you've heard so far. Okay?

18 You've heard about a couple of different areas of
19 law, concepts of law, that we're going to talk about a
20 little bit more, you and me, just for a few minutes. But
21 I'm not going to spend a lot of time on it.

22 One thing that I want y'all to remember, though, is
23 that the Judge is going to charge you on the law. We're
24 supposed to give you the facts. The law is what it is.
25 You get to decide how those laws that he tells you about

1 apply to facts. Okay? So there's no -- nothing is
2 established here unless that Judge tells you somebody is
3 liable for something. You get to decide all of that.
4 All right?

5 Now, this is a case about negligence. And Mr. Lyles
6 sort of gave you the elements of negligence. All right?
7 Negligence means somebody made a mistake. It's simple.
8 It can happen in a car accident. It can happen with a
9 ball going through your window. It's negligence.
10 Negligence is not something y'all have to decide for
11 Bostic. The boys sat up there on the stand, and they
12 said, "We want to make this right. We didn't know this
13 was going on. We want the buildings fixed. Our name's
14 on this thing." Okay? So you're not going to be asked
15 to decide was Bostic negligent.

16 Now, this verdict form that I'm going to go over
17 with you in a minute says, "Do you unanimously find
18 Bostic negligent or do you find for the plaintiffs?"
19 You're allowed to choose which way it is, but Bostic has
20 already said, "We know that our company made a mistake,
21 and we want these buildings fixed." All right? And
22 that's what they stood up there, and that's what they
23 said. And that's the kind of guys they are. All right?
24 They wanted to be here for this whole trial. They are
25 very sorry that they couldn't be here this past week.

1 They've been texting and emailing me, wanting to know
2 what's going because they are truly invested. They know
3 that their names are attached to these buildings, just
4 like they told you, and they want them fixed.

5 It's funny though. When I started this case -- I
6 don't know how many of y'all know about Joe and Jeff
7 Bostic. They're humble people. They'd probably kill me
8 for talking about them. And they could. Jeff Bostic,
9 not just a football player; he's a world champion
10 football player. I don't know if any of you all are
11 Redskins fans. But twenty years ago or so, less than
12 that -- well, no, it has been that long -- he was one of
13 the Hogs. One of the most famed offensive linemen in the
14 country. He played N.F.L. He and his brother played in
15 the N.F.L. back when it was a job. It wasn't a million-
16 dollar-a-year contract. They played football because
17 that's what they could do. They got a job. They went to
18 college. They got their degree. They never got a
19 million-dollar contract. They retired from that job when
20 their joints couldn't take it anymore.

21 Y'all, we met with Jeff in the hotel room one night.
22 That guy getting up sounds like a bag of bones just
23 crackling all over the place. And you look at his
24 finger. I mean, he was done playing football. It was
25 time for him to do something else. He couldn't retire on

1 some big signing bonus, so they went out and they used
2 their name. That's what they left the N.F.L. with. Not
3 their multi-million-dollar contracts, not their big house
4 and their fancy cars. They left with their reputation
5 and their name recognition. And they put that to work in
6 their second career building buildings. And they did a
7 great job throughout the country.

8 You've heard that they were the second biggest in
9 the country. I think the testimony is actually they were
10 the ninth largest in the southeast. That's what they
11 were. They tried really hard. They built a lot of
12 buildings.

13 They built this project, and it was real important.
14 This is Clemson. This is their home away from home.
15 This is where they are every Saturday during football
16 season. Every weekend that they can be here, they're
17 here. They wanted one of these. They wanted pride of
18 ownership. It makes them sick that this has happened.
19 But you know what else is a little disturbing? They
20 didn't get to know about it until they had a lawsuit put
21 in their hands. And they stood up there. And just like
22 the people they've always been, they said -- they said
23 back in -- well, as soon as they got this lawsuit, "Well,
24 we've got to hire a lawyer now. We've been sued. Let's
25 get these buildings fixed for the company that we used to

1 own them."

2 We hired experts. Mr. Lyles makes a big deal about
3 it taking a year to get an expert out on site. Well,
4 these things take time in the legal business. Getting
5 access. Going through discovery, going through
6 paperwork, getting an idea of what Mr. Hodgins says is
7 wrong with the building. There's a forensic process that
8 we're going to talk about a little bit later.

9 But that's the way these guys are. Get the
10 buildings fixed, get this done, because that's the way
11 they were on the football field. They were raised that
12 way. When the coach comes up and yells at them for
13 missing a block, they say, "Sorry, coach. I'll get back
14 in there and I'll get it done." And that's been their
15 attitude about this entire process for a company that
16 they haven't had for over ten years. They still want it
17 made right.

18 Now, ladies and gentlemen, that's my soapbox.
19 Hopefully the only one. I'm pretty pragmatic about what
20 we have to do here. We've got to get these buildings
21 fixed. We've got to get these buildings fixed. We've
22 got to figure out how to pay for it. That's going to be
23 easy to do. We have two scopes. We have the Rick Moore
24 scope; we have the Derek Hodgins scope. The issues that
25 have been raised by Mr. Lyles and others with regard to

1 Rick Moore, I think, are somewhat overstated. Mr. Moore
2 -- people say -- Mr. Lyles has said that nobody stands
3 behind Rick Moore's scope of repair.

4 People say that y'all are here. You've got to award
5 as much money as you can today because you can't come
6 back in case Rick Moore's wrong.

7 And there was some talk yesterday about shifting the
8 risk. About, well, these homeowners are going to have
9 the risk if you do Rick Moore's scope. Well, we've got
10 to get the risk from this table to this table. Remember
11 what you heard Rick Moore say. One of the last questions
12 I asked him, "Will you put your signed, sealed stamp on
13 your scope of repair and certify that that scope of
14 repair is adequate to correct the issues that you've
15 identified at Stoneledge?" Does anybody here remember
16 what his answer was? "Yes." And then I said, "So then
17 the risk would be shifted to you?" And his answer again
18 is, "Yes."

19 Nobody wants to keep these people at risk for these
20 buildings any longer than they already have been. Rick
21 Moore, licensed, credible, an engineer, knows how to fix
22 buildings, is going to bear the risk with his scope.
23 He's going to sign documents. He will contract with
24 these people. He will make sure that their buildings are
25 fixed.

1 J.R. Watkins, beyond reproach. Ladies and
2 gentlemen, I have to address this real quick. Obviously,
3 there's a goal here to put the biggest number you can put
4 on that building or on this piece of paper here. This
5 four-point-four-oh-nine-million-dollar estimate by the
6 Folk guy, that is not -- y'all can consider whatever you
7 want. But in my mind that's not something that's worth
8 wasting your time on. Mr. Folk's company hasn't been out
9 there in two years. Came up with some crazy number
10 that's the highest one of all that hasn't carefully been
11 considered by anybody really, that we didn't hear from
12 Mr. Folk since the time of his deposition. He's never
13 been back out to Stoneledge. His company has declined
14 work at Stoneledge. He -- and I hope you all heard this
15 because a big deal's been made about it. He said -- when
16 I asked him, my last question, "Can you guarantee that
17 for ..." The total was five point seven million
18 something. "Can you guarantee me that every issue at
19 Stoneledge will be fixed?" And I don't know what he had
20 testified to before. But when I asked him that question,
21 he said, "No, sir." His company will not do the work.
22 They don't want the work. They've refused to come out
23 there and talk to these homeowners. The homeowners have
24 said that the work -- that he's too expensive anyways.
25 This is a number that is prepared solely for the purposes

1 of trial to put in front of you all so you have something
2 to hang a six-point-three-million-dollar verdict against
3 Bostic on. I don't know why it's there. It makes no
4 sense. It's a non-starter. These people aren't going to
5 use him. They're not going to use that estimate. You
6 can completely disregard it.

7 Now, the two scopes that we really have -- and
8 they're both going to be priced out by J.R. Watkins,
9 which makes sense because everybody trusts him.
10 Everybody knows him. He's good guy. He's not going to
11 leave anybody hanging in the balance. The two scopes are
12 at issue. And that's really the biggest decision you
13 have to make on fixing these buildings.

14 Let me tell you why I think the Rick Moore scope is
15 the one y'all need to decide. First of all, I know it's
16 the one you need to decide because it's the one that
17 addresses every issue raised by Mr. Hodgkin. And if you
18 look -- and then some. We're actually fixing some door
19 hinges and some other things Mr. Hodgkin didn't even catch
20 because he didn't look. His estimate is a two-point-two-
21 nine-two estimate. We're fixing a couple of things that
22 Mr. Hodgkin didn't catch.

23 The Rick Moore scope, though, they made a big deal
24 about surveys. They've made a big deal about, "You can't
25 figure out what's wrong with these buildings unless you

1 pay J.R. four million dollars plus to tear all the siding
2 off all these buildings. You can't believe Rick Moore
3 when he says, 'We have to do surveys,' or 'We don't have
4 to pull off every board.' Or 'By doing surveys, we'll
5 figure out what to do.'" I hope you heard the testimony
6 that Rick Moore said when Mr. Lyles was trying to take
7 him down that path, leading him to water. Mr. Moore
8 stood his ground and he said, "You know, Robert, this
9 isn't the first time Derek or I have done a surgical
10 repair using surveys. This is a widely accepted practice
11 in construction remediation for water infiltration."
12 This is not something that Rick Moore said, you know,
13 what? Hum. After twenty-some years, thirty-some years
14 of doing this, let's do it a different way this time.
15 Let's just take surveys. And we'll pay a contractor for
16 surveys. And then whatever's wrong, we'll fix. That's
17 the way you do forensic investigation. You don't go rip
18 the whole wall off the building. You know the ninety/one
19 rule that everybody ascribes to. You know where the
20 damage is going to be. You know it needs to be fixed.
21 You prepare the protocol to fix it. You pay to fix it,
22 or in this case you guys are going to make Bostic and
23 everybody else pay to fix it. And it gets fixed and
24 everybody's happy. Rick Moore's going to stand behind
25 it.

1 Now, another issue that Mr. Lyles and -- I guess,
2 the plaintiffs have with Mr. Moore -- is he says that Mr.
3 Moore and Mr. Hodgkin paint two -- and I'll quote -- "very
4 different pictures about what's going on out there."
5 That's not the case. You're going to have the pictures
6 back there. And I made it a point to show Mr. Moore, and
7 hopefully, eventually you all, we've got the same
8 pictures. We're not painting any different pictures.
9 We're not disagreeing that some things need to be fixed.
10 The picture we're painting is how to fix these things
11 without tearing off all these balconies. And I think
12 ultimately these people are going to be happier when
13 their buildings are fixed without having to go through
14 unnecessary repairs and unnecessary pulling off of their
15 walls and decks and everything else when you can conduct
16 a survey and get the work done that needs to be done.

17 Rick Moore's scope is adequate and, in fact, the
18 practical best way to do it. When you look at these
19 pictures up close -- and you haven't had the opportunity
20 to look at all of them up close. I just really -- I
21 didn't grab the best or the worst. I grabbed a stack of
22 them to have Mr. Moore take a look at them and let you
23 all look at them in evidence. And, yeah, maybe I did
24 somebody a disservice here because I'm sure there's some
25 pretty nasty ones in there. But you're going to see that

1 by and large the good outweighs the bad. And I think
2 that you can infer from that that Mr. Moore's scope is
3 the appropriate scope. It's the one that Mr. Hodgins has
4 subscribed to on numerous occasions in the past. It's
5 one that they have worked together on to implement on
6 other buildings. It's the scope that needs to be done.

7 So with that all being said -- maybe I have, maybe I
8 haven't done my job to convince you -- the Rick Moore
9 scope, I think, is where we start. Now we've got to
10 figure out how we're going to pay for it. All right.

11 This verdict form that you guys are going to have,
12 this is actually a pretty complex little piece of paper.
13 It took the attorneys probably two or three hours to put
14 together. Probably would have taken y'all about fifteen
15 minutes. But what it's going to do is it's going to sort
16 of parse out the questions, the specific questions, that
17 y'all have to answer in this lawsuit. Okay? But as I
18 looked at this form -- and I sort of conceptualized what
19 it was going to look like last night as I was getting
20 ready for today -- the only way I know how to do this and
21 get this form filled out -- and I'm going to talk to you
22 more about it -- is to sort of start at the end.
23 Starting at the end, to me, is if we can agree that the
24 Rick Moore scope is what you implement, let's figure out
25 what that's going to cost. Let's start there. Let's get

1 the number that we have to -- that it's going to take to
2 fix these buildings so the plaintiffs and Joe and Jeff
3 are happy about the whole situation.

4 Now, you're going to have back there in evidence all
5 of these documents. Whoops. Well, you won't have these.
6 I don't know why we're still talking about those. Those
7 aren't evidence. I guess that goes to show that this
8 isn't a good enough scope. It's not in a fancy binder.
9 This is Rick Moore's scope. It's not in evidence either.
10 What is in evidence is J.R.'s estimate. The estimate
11 that just like his four-million-dollar estimate for the
12 wild -- for the larger Derek Hodgins's scope, it's a bid.
13 He considers this a bid.

14 Hay was made about his contingency only being ten
15 percent. I probably was a little too generous yesterday
16 when I stood up and I said, "J.R., what if we tack
17 another ten on? Will that do it for you?" He said,
18 "Yeah, that'll do it." I'm not trying to move the ball.
19 I'm not trying to show that this estimate isn't accurate.
20 I'm just trying to make sure that you guys feel
21 comfortable that if you award this, that it's enough to
22 more than take care of these homeowners as far as J.R. is
23 concerned. So that's why I said, "Let's throw another
24 ten percent on it." And he said, "You've got it."
25 You're going to have that back there.

1 And let me just write some numbers down for y'all.
2 The total on J.R.'s estimate -- all right. This is J.R.
3 And at this point, I'm just asking you to follow me here
4 with the Rick Moore scope. Okay? This is J.R. and the
5 Rick Moore scope. Here's what he's going to charge for
6 that. That's a lot of money to fix thirty-seven
7 buildings. All right? That's going to take care of
8 every single item. And you remember, I had to ask him
9 line by line, "Is that going to take care of the items
10 that Derek Hodgkin put forth in his scope?" So every item
11 of Derek Hodgkin's scope is addressed by Rick Moore's
12 scope and by J.R.'s estimate. That's the money figure
13 it's going to cost for J.R. to do his work from the
14 foundation up.

15 Now, let's take a look at that foundation number
16 because I think that makes -- let's go ahead and concede
17 contingency. This is with a ten percent contingency
18 built into it. That means that ten percent of this total
19 number, which is probably like a hundred and sixty-five
20 thousand dollars or something, is fluff on top of
21 markups, on top of fees, on top of allowances that
22 probably aren't going to be used. So if we don't have to
23 take off, you know, every single roof/wall intersection,
24 if there are things in there where Rick has said do a
25 hundred of them and we only have to do ten, there's fluff.

1 in there. There's all kinds of fluff in two point two
2 million. But we still added that contingency of one
3 hundred and sixty-five. And I conceded yesterday or
4 conceded for J.R. or, I guess, for Joe and Jeff, for the
5 Bostic Brothers Company, another ten percent. That's
6 what ten percent is.

7 Now, that number -- the way you get to that -- and
8 you'll see on the estimate. The way you get to that is
9 the contingency is actually based on an above-the-line
10 number. So before you add all the markups of profit and
11 everything, the actual contract is -- well, you'll have
12 it back there. But it's one point six five. Then you've
13 got all the permits like contingency, overhead, profit,
14 and all that stuff that gets you to two two. So I added
15 one sixty-five. And this is my plus ten contingency. So
16 you've got ten plus ten or twenty percent in these two
17 numbers. Okay?

18 Now, you've already heard about these others
19 damages. Let's do foundations first. Okay? They want
20 to -- Trehel wants to charge one point three seven
21 million -- no, no -- one point three two nine million to
22 do thirty -- I guess thirty-three houses' foundations.
23 Some of them have basements. Some of them don't. It's a
24 ton of money to dig an eighteen- to three-foot-deep ditch
25 around a house. J.R. has shown that he can do it for

1 about eight thousand dollars on average a unit. Some of
2 these units, it's not going to take that much; some of
3 them, it's going to take a little bit more.

4 And if you look at the emergency repair exhibit.
5 Well, it's floating around here somewhere. You'll have
6 it. It's that list of all their expenses for repairs
7 that they've made since 2009, I guess since they filed
8 the lawsuit. You look in there and you'll see Watkins
9 Services has charged twenty-five thousand for four
10 balconies. So that's about -- it works out, I think, to
11 eight thousand twenty-two -- not balconies. Foundations.
12 So it works out to about eight thousand twenty-two per.
13 And he said, give me ten, and I'll get it done. So ten
14 thousand dollars for him to make the repairs that he
15 designed and Derek approved and have stopped the
16 foundation leaks. Okay? That's the most important
17 thing. This binder that is in evidence that says here's
18 how I want you to fix these foundations. You've got to
19 do it this way. And by the way, I'm going to send you a
20 bill for this binder on how to do it.

21 J.R. went out there with his contractor's license
22 and said, "Here's how we're going to fix it." And he
23 fixed it. Derek looked at it. Derek checked off on it.
24 And as far as we've heard, there have been no further
25 complaints. They've stopped the leak.

1 Now, ten thousand dollars a unit. That comes out to
2 -- since he's already done four -- three hundred thirty.
3 Okay? And I've got to write "foundation." Now, we've
4 got to deal with that other -- there's one other number,
5 I think, that they need to take care of. And that's the
6 emergency repairs, which are a hundred thirty-nine eight
7 hundred eighty-one. We owe them that. I don't know --
8 well, you know, that's up to you. You don't have to
9 award those. I don't know what they're for. It's just a
10 spreadsheet. It could be fixing windows with balls
11 knocked through them. I don't know. But they put them
12 on the list. We don't know what they are, but they've
13 been submitted as evidence. We'll take their word for
14 it. One thirty-nine eight hundred point eighty-one. All
15 right. Now, that total number. And that's all they're
16 asking for. I'm going to just say "E.R." for emergency
17 repair. That total number is -- that gets us to two nine
18 two six nine eight oh point seven four. It's almost
19 three million bucks. Okay? That's the total.

20 Now, we have to deal with what they talked about as
21 their contract administration. Rick Moore said seven and
22 a half; Derek said seven and a half. So we'll throw the
23 seven and a half on there. And the bottom line number is
24 this. That is three million one hundred eleven dollars
25 -- oh, I'm sorry. Three million one hundred eleven

1 thousand dollars. That's a big number. Three million
2 one hundred eleven thousand -- that's a big number.
3 Three million one hundred eleven thousand two hundred
4 sixty-nine dollars and twenty-three cents. All right?
5 And y'all will have a calculator there. You might want
6 to check my math. Anyways, that's the number. Okay?
7 That's what it's going to cost to fix these buildings.
8 It ain't going to cost that top number. It certainly
9 ain't going to cost that bottom number. It's going to
10 fix these buildings, and it's going to shift the risk
11 from this table to whoever agrees to do the work.

12 J.R. Watkins and Rick Moore, they both would love to
13 do it. They work together on these. It's not unusual
14 for someone like Rick Moore to adopt a project after he's
15 testified for the other side and come in and do the C.A.
16 It happens all the time in this business. So that's the
17 number. That's an enormous number.

18 Now, of course, the Bostics want the buildings
19 fixed. But ladies and gentlemen, I'm here to tell you
20 it's not fair. And I said that I want you to be fair,
21 just and reasonable. It's not fair to stick the Bostic
22 Brothers Construction Company with that whole bill. And
23 I'm going to tell you why later.

24 Here's how we're going to get to how that money
25 needs to be paid. You know what? I need some of those

1 kind that would stick on the wall, like a big poster. I
2 hope y'all can see that. We'll just keep that number in
3 your head. Okay?

4 We've got on this verdict form three different
5 causes of action. All right? One is negligence.
6 Somebody made a mistake in building these buildings.
7 We're going to deal with that. We're going to put it
8 down here. And for negligence, the people that you can
9 find negligent, according to this verdict form, are
10 Marick, Bostic -- okay. And I.M.K. is up here with
11 Marick. And just because there's so many Is, Ms, Ks,
12 Maricks, whatever, let me explain to you. Marick.
13 General contractor, part of I.M.K. Bostic. Couldn't
14 finish the project. Marick and I.M.K. came in and
15 permitted it, put it back into progress -- put the job
16 back on track. Okay? So these are the two you can get
17 negligence from. If you find that these two are
18 negligent, this verdict form is going to have a little
19 line for you to write a number on. Okay? I'll just talk
20 about that last, the negligence.

21 The other issue that we have here are breach of
22 fiduciary duties and breach of unworkmanlike service.
23 Okay. The workmanlike service is what I'm going to call
24 warranty because it's called a breach of warranty of
25 workmanlike service. There are two spots on there. How

1 many do we have left? For breach of warranty, we have
2 two spots again. We've got Bostic, and we've got Marick.
3 You'd think after four years I'd know how to spell
4 Marick. All right. This is another area where the
5 plaintiffs have talked about damages. And it's a
6 separate number. It's number two on the verdict form.
7 Okay? We're going to talk about that over here in a
8 second too.

9 Now, we've got this other one, this third one you've
10 heard a lot about, but you're not going to hear very much
11 about it from me because I'm not in trouble for this.
12 The Bostics aren't. Fiduciary duties. All right? And
13 you get a line on your verdict form for each of these.
14 All right? And I'm going to tell you how we're going to
15 get to that three point one one one two six nine number.

16 All right. Warranty. The Court's going to charge
17 you on what a warranty of workmanlike service is. You've
18 got to listen to the Judge. But this is one of those
19 places where you have to apply the law that the Judge
20 tells you to the facts that you've heard in this case.
21 All right?

22 A warranty? We all have warranties. I'll give you
23 an example of a warranty that I have. Wife bought me a
24 little leaf blower. The guy at Lowe's said, get this
25 one. This is the one we use here to blow out our store.

1 She bought it for me in June. I went home this weekend
2 to blow the leaves. It's broke. It doesn't work. It's
3 under warranty. I had to take it back. And that
4 warranty exists. But until I take it back to Lowe's, I'm
5 not going to get anything done with that thing. And the
6 chances are it sits in my garage for another three weeks.

7 Well, the same thing holds here. They want to hold
8 Bostic liable for this warranty of workmanlike service
9 when Bostic -- it's in the evidence -- was never told
10 that there were issues with these buildings. Bostic left
11 these buildings in 2004, you know, in a way that they
12 didn't want to leave them. They couldn't complete the
13 project. They left an incomplete project. They sold it
14 to somebody at fire sale price to come in and finish it
15 up any way they want. All kinds of unimproved land and
16 everything.

17 The evidence shows that the next time they were ever
18 contacted about these issues was right before a lawsuit
19 was filed. There's a letter in evidence to Joe Bostic at
20 fifteen different addresses, all of which were former
21 Bostic Offices that are no longer and haven't been around
22 forever, saying, "There's some issues out there we need
23 you to do something with." So you heard Joe or Jeff say,
24 "We never got the letter. We would liked to have had the
25 letter, but instead we got the lawsuit. You found us and

1 you sued us."

2 So my position to you, ladies and gentlemen -- and
3 it's one that I'm not embarrassed to tell you -- is that
4 these warranty damages, one cannot honor a warranty if
5 one is not asked to honor it. We're going to talk a
6 little bit more about it under the fiduciary duty
7 heading, and it's going to make even more sense to you.
8 But if you don't ask Bostic to come out there and fix
9 things -- if there's a reason they didn't -- if you don't
10 ask Bostic to come out there and fix things within a
11 reasonable time, how can you later sue it because it
12 didn't come out and fix things?

13 All right. So here I'm going to tell you -- and I'm
14 not going to be embarrassed to tell you -- I don't think
15 that you should find that Bostic is liable for any
16 warranty liability.

17 Now, let me tell you why because I think it
18 dovetails in with this breach of fiduciary duty. What we
19 heard yesterday afternoon -- and I know y'all are tired.
20 Maybe some of you picked up on it; maybe some of you
21 didn't. And I don't -- was it yesterday or the day
22 before? It was the day before when a couple of those
23 homeowners started testifying and then Thoennes and Cox
24 and Lollis and all those guys started testifying. I
25 don't know if you picked up on it, ladies and gentlemen,

1 but it was like an episode of Dallas. It was -- what was
2 going on after Bostic left this project and it was
3 purchased by this next group of people wasn't right.
4 What was going on was a breach of a fiduciary duty.

5 Let me elaborate. And this is my job to argue the
6 facts to you. This is what I heard. Maybe you heard it
7 too. What happened was this group of developers, this
8 group of investors, came in there. They saw this project
9 was in trouble. I think you heard that Bobby Carpenter
10 called one of them and said, "The bank's going to take
11 it, man. Come in here, take it over. We'll sell it to
12 you for what we owe on the note and some of the mechanics
13 liens on the property. Take it. Do what you want with
14 it."

15 Then you heard Mr. Thoennes say that, you know, he
16 and the Marick guys went out there and looked at it. And
17 they said, "It's in pretty bad shape," I think you heard
18 him say, "but this is a pretty good deal. For six
19 million dollars, we get all this land, we get all these
20 buildings that are partially built. All we have to do is
21 permit them and put about one and a half million dollars
22 into them, these twenty-six that Bostic's developer
23 didn't sell, and we've got ourselves a goldmine here.
24 Let's get in on this." So they did.

25 But the thing that you haven't heard much about, but

1 you've heard enough about to consider it, is that these
2 buildings that Bostic's developer didn't sell sat empty
3 for a year. They sat there with broken windows. I think
4 people said with paper hanging off of them. Some without
5 doors. Some without windows. Some obviously having
6 water intrusion through door jams that were left ajar.
7 Maybe foundations are leaking, and we know that to be a
8 problem out there. So these guys come in, and a year
9 later they slap a coat of paint on it, or so they say.
10 They spent one and a half million dollars on some
11 expensive paint and flooring and countertops. But they
12 spent one and a half million dollars, and they got these
13 things C.O.ed. And they started selling them off to
14 these people out here in the gallery and others. And
15 they each kept one. And I think, ladies and gentlemen, I
16 think if you think about it, there's a reason they kept
17 one. They wanted to sell all the rest of them. So you
18 know what they did? They kept one for themselves. They
19 owned them.

20 And what did they do according to exhibit 3? I want
21 y'all to read part of this one. I think it's this one.
22 Let me see. Yeah, it's 3 and 4 together. These are
23 their bylaws. These are the formation of the Stoneledge
24 H.O.A. This wasn't the H.O.A. that was in place for
25 Townhomes of Keowee. This is the H.O.A. that they put

1 into existence sometime in mid to late 2005 after Bostic
2 was long gone. You know what they did? Mr. Cox, Mr.
3 Lollis, Mr. Roberson and to some extent, Mr. Thoennes.
4 You have Mr. Thoennes, Mr. Roberson, Mr. Cox. They
5 became the directors of the board of the H.O.A. What
6 you'll read in here if you take the time to study it, if
7 you like reading H.O.A. bylaws, is that they were called
8 class B members of the H.O.A. They could stay on that
9 H.O.A. and keep it what is called a developer controlled
10 H.O.A. until a certain number of the units were sold. So
11 they could sit on that board. They could direct that
12 board any way they wanted without any significant
13 homeowner input whatsoever. Why did they do that? So
14 that they could cover up the issues that they refused to
15 fix when they bought this project at a fire sale so they
16 could fix those issues with band-aids.

17 So when Steve Taylor comes down to Marick and says,
18 "You're my savior. I'm so glad you're here. Help me.
19 My porches are leaking," what did they do? They called a
20 water-proofer. Spray something on the porch. Fix it.
21 "My door's leaking." "We'll fix that." Not only were
22 they engaged in these patch jobs for the units that they
23 were selling in phase one that Bostic didn't complete,
24 they were placating to the ten or eleven owners that had
25 already purchased, keeping them quiet about what was

1 going on with the project. So any time Mr. Taylor or Ms.
2 Furnari came down the street with a leaky window, of
3 course, they honored the warranty. They didn't want her
4 to get mad and have a reason to sue. And at the same
5 time, they're not going to call Bostic back in that time
6 frame and say, hey, guys, or your subs, fix these issues.
7 One, because they knew they'd bought it at a fire sale
8 and they probably weren't allowed to do that. And two,
9 they didn't want anybody to know that this project had
10 issues that needed to be repaired. It financially
11 benefitted those board members to keep the project moving
12 forward and keep selling off those units that clearly
13 needed repairs in 2005. They knew it. They knew windows
14 leaked. They knew porches leaked. They knew foundations
15 leaked. They kept selling the places. That is a breach
16 of fiduciary duties to these homeowners sitting out in
17 this gallery. And that, ladies and gentlemen, should not
18 go unaddressed.

19 Now, the breach of warranty issue -- I'm back to my
20 verdict form -- is, I think, encompassed in that. Okay?
21 Obviously, Bostic couldn't honor the warranties. Marick
22 was honoring the warranties. And whether they were or
23 they weren't appropriately, whether they were just
24 putting band-aids on these units back then, they
25 certainly breached warranties of workmanlike service.

1 All right. We're going to put a number up there in
2 a minute that I think is appropriate. But here, I want
3 to get us just close to that three million dollars
4 because y'all -- I know y'all are ready to get thinking
5 about this and talking to one another. So we've got
6 three point one one one.

7 Let me just start with negligence. Let me finish
8 with negligence. Negligence is a mistake. Negligence is
9 something that when it causes damages it has to be
10 addressed in a court of law. Negligence is what happened
11 when these buildings were originally built. Negligence
12 costs money to fix. The Bostic brothers and Bostic
13 Brothers Construction wants these buildings fixed. I'm
14 not going to stand here and let them say that they should
15 pay for all of it because they shouldn't. But the
16 negligence of Marick for the construction that it engaged
17 in, one and a half million dollars. And Bostic's
18 construction needs to be fixed. We need to get to the
19 number of three point one one whatever to make these
20 people whole.

21 You know what we're going to do for negligence? If
22 you fill that form out under the negligence, the very top
23 of that form, if you do so find for the plaintiffs and
24 you find for the plaintiffs as to Bostic and you find for
25 the plaintiffs as to Marick, you get a line. You get to

1 write a number. You get to write whatever number you
2 want. You can write one dollar, you can write the number
3 that they're asking for, or you can write the number that
4 it's going to cost to fix these buildings once we've
5 addressed everybody that participated in this situation.

6 The Bostics are giving you a number. Two million
7 bucks. The Bostic Construction Company agrees two
8 million bucks. That's a lot of negligence. Maybe that's
9 more than they should be paying to fix these buildings
10 because, you know, you heard testimony -- that's a big
11 number. And you heard testimony that Derek Hodgins
12 himself -- their expert said, "If those guys who were
13 breaching their fiduciary duties had called Bostic out
14 and said fix this in 2005, '06, '07, '08, when they knew
15 those problems existed, the damage wouldn't have been
16 nearly as bad. The damage would have been much smaller
17 comparably."

18 Now, there's a construction issue that would need to
19 be fixed, but you wouldn't have the rot. You wouldn't
20 have the deterioration. You wouldn't have the porches
21 falling off. But I'm still, at the direction of others,
22 putting that number up there. Two million dollars. All
23 right. That's not walking away. That's not trying to
24 get off scot-free. That's not trying to put a band-aid
25 on this project. That's to fix these buildings. That's

1 what it's going to cost to make these people whole, to
2 get them close enough to this.

3 Now, ladies and gentlemen, the soap opera that was
4 I.M.K., I.K. and people cashing their checks and riding
5 around on boats and not even really knowing what's going
6 on out there, just making -- you know, letting the money
7 roll in on the backs of these homeowners. I'm going to
8 tell you right now -- I'm not embarrassed about it --
9 there's no reason that they should walk out of here
10 paying less than that to these people in the gallery.
11 Their conduct, had it not been what it was, would not
12 have put these people in the courtroom. They sat there,
13 and you already heard, collected money, even after this
14 lawsuit was filed. They knew what they had done. They
15 knew that they had controlled that board for as long as
16 they could until there were enough homeowners out there
17 to take them out. And ladies and gentlemen, the number
18 one of piece of evidence that you're going to see about
19 that in here -- bear with me just a second. It may have
20 jumped off the table.

21 (Off record discussion)

22 CLOSING ARGUMENT

23 CONTINUED BY MR. BELCHER:

24 You're not going to have it in evidence. It didn't
25 get marked as an exhibit. But you heard the testimony.

1 The number one most concerning thing about this is that a
2 homeowner in 2008 or 2009 really sparked this off and
3 said, "H.O.A. isn't doing anything for me. They're not
4 helping. I need to get somebody involved. I need to go
5 to Logan, Jolly and Smith, that law firm, and I need to
6 do something because the H.O.A. isn't protecting my
7 rights." And that was just after the turnover. But
8 those guys stayed on that H.O.A. They stacked the board
9 for as long as they could to avoid anybody knowing what
10 was going on and to avoid the lawsuit that they now find
11 themselves in.

12 So, ladies and gentlemen, that's a generous number
13 right there, one million dollars. They're getting off at
14 a million bucks for what they did.

15 Now, we've got to bridge a gap here. Warranty. I
16 don't think it can be argued that Marick was part of
17 this, but they breached the warranty of workmanlike
18 service. They went through -- and you do have these in
19 evidence for sure -- and obtained permits for the
20 unfinished units. Building permits from the Oconee
21 County building authority. Building permits that say, "I
22 hereby certify that I have read and examined this
23 document and know its contents. All provisions and laws
24 and ordinances governing this type of work will be
25 complied with whether specified herein or not." And it

1 says that the permit becomes null void after six months.
2 They're certifying to the Oconee County building
3 department and to these potential future homeowners that
4 when they undertake to finish these buildings -- and it's
5 not just -- you can say what you want. So what? The
6 roofs were on. For one point five million dollars,
7 they're certifying that these buildings will be built to
8 code. And they can sit here now and say, "We didn't
9 know. We didn't know. We didn't know." They knew the
10 second Steve Taylor comes running down the street to Mr.
11 Thoennes saying, "You're my savior," in 2005. "Come help
12 me with my unit." They knew shortly thereafter when Bob
13 White moved in in June of 2006 and said, "My basement's
14 leaking. My windows are leaking. Everything's leaking."
15 They knew. They knew when they had to hire Coleman
16 Waterproofing to come out there and repair all the decks,
17 put that water coating down on them. They knew. They
18 refused to do anything about it.

19 Ladies and gentlemen, we have some space here we
20 have to fill. We have one more blank to fill. I would
21 suggest to you that the minimum we have to fill in on
22 that is one one one two six nine. Right? That's getting
23 off scot-free. That is getting off scot-free.

24 Ladies and gentlemen, I have appreciated all of your
25 time. And I know you all have been very patient with us.