

5

23066

23066

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

RECEIVED
DEC 12 2016
SC Court of Appeals

Consolidated Case No. 2010-CP-10-2271

Appellate Case No.: 2016-000076

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

v.

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

Of whom Superior Construction Corporation APPELLANT,
And
The Muhler Company, Inc.....RESPONDENT.

RECORD ON APPEAL

Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
Attorneys for Appellant

Peter Gunner Nistad
Gallivan, White & Boyd, P.A.
Post Office Box 22768
Charleston, SC 29143
843-735-7600

Curtis L. Ott
Janice Holmes
Gallivan, White & Boyd, P.A.
Post Office Box 7368
Charleston, SC 29143
Attorneys for Respondent

1 but it's up to us to provide you with the proof.

2 THE COURT: Well, if the -- not conceding any
3 argument, but Mr. Nistad said by finding you have a valid
4 indemnity agreement, but the Court should find that the
5 response -- that Muhler and Weather Shield's exposure was
6 limited to their own acts, so their own own things that they
7 did wrong, does that offend what you think the finding
8 should be?

9 MR. BROWN: Only --

10 THE COURT: I think you used -- how did you say it,
11 Mr. Nistad? About finding that the agreement -- that
12 provision of the agreement is --

13 MR. NISTAD: Is not clear and unequivocal.

14 THE COURT: Is not clear and --

15 MR. NISTAD: My argument today wasn't that the
16 agreements are void. I'm assuming for today you will find
17 the agreements aren't enforceable. It's just, how do you
18 apply the indemnity?

19 THE COURT: If the Court says that portion is not
20 clear and unequivocal -- is that what you're saying?

21 MR. NISTAD: Not clear and unequivocal.

22 THE COURT: Not clear and unequivocal. If the
23 Court was to say that portion was not clear and unequivocal,
24 how does that prevent you from -- how does that frustrate
25 whatever you are trying to do?

1 MR. BROWN: I don't think it frustrates it at all.

2 I think clear and unequivocal is hardly an issue at all.

3 The language is clear of what is indemnified. What I --

4 THE COURT: He says maybe it is clear, but it's not
5 unequivocal.

6 MR. BROWN: I don't think it's clear and
7 unequivocal. It couldn't be clear. They indemnify -- the
8 simplicity of it is what it makes it clear.

9 THE COURT: Whether I agree with what he wants or
10 not, it's still -- in the end the Court has to decide the
11 extent of their liability. It's not -- as opposed to --
12 or -- you're not arguing that the Court has to -- I got you.
13 That the Court does not have to make them pay for all
14 damages, but only their damages, and the Court has to figure
15 out what their damages -- what damages they caused.

16 MR. BROWN: Yes, sir. I have to concede this --

17 THE COURT: Regardless of whether I say it's clear
18 and, you know, unequivocal or not.

19 MR. BROWN: Correct. The intent is clear and that
20 is this: They indemnify us -- okay, let me back up. If
21 there are allegations that the windows are defectively
22 installed, they indemnify us unconditionally, and I think
23 unconditionally means there are no conditions, other than as
24 stated in the indemnity agreement, against these allegations
25 and will pay all damages.

1 I can't argue to Your Honor that they agreed to pay
2 us or indemnify us against allocations that the roof is
3 wrong. It is -- I mean, I think the simplicity of it is,
4 those allegations that the installation is wrong is what
5 they indemnify us against. Now, it is broad enough that it
6 is not simply -- they are not indemnifying us against the
7 ultimate proof of what they actually did separate and apart
8 from their subcontractors.

9 The agreement was negotiated and the definition of
10 allegations puts us into the Hardin category. We don't have
11 to show exactly to the dollar the isolated portion of their
12 errors. We simply have to show what is the reasonable
13 payment to buy out of the liability caused by their
14 defective installation.

15 THE COURT: So does that go back to what I --
16 question I raised, that the Court would judge that based on
17 a equitable standard?

18 MR. BROWN: Yes, sir, or legal standard.

19 THE COURT: But in determining a legal standard,
20 basically, I would be deciding -- in fairness, what should
21 they pay based on -- so there's a degree of equity.

22 MR. BROWN: There has to be, Your Honor. Now I
23 would love to say that any dollar we spent, they have to
24 indemnify us for. That's not what the agreement says.
25 Also, the agreement doesn't say that I'm indemnifying you

1 only for the calculated cost of putting in one piece of
2 flashing. This agreement was negotiated not to get our
3 money back for the precise problems, but was to get our
4 money back if we got sued because what they promised us was
5 untrue.

6 Indemnities are contracts. They could have agreed
7 to indemnify us for anything. He could indemnify me if I
8 get rained on on the way back to the hotel. But the good --
9 they have to protect the good with the bad, both of us. It
10 is not a standard -- and I think if Your Honor were to rule
11 that he only indemnifies us for the direct precise
12 consequences of the flashing he put in wrong, I think that
13 would understate the obligations of the indemnity, unless
14 you deal with it in terms of proximate cause and concurrent
15 cause.

16 We gave them the opportunity to proceed and enjoy
17 the liability. The indemnity is against being sued and the
18 cost of getting out of the suit, but there's no question,
19 they didn't agree to indemnify us against the allegations
20 that the roof was wrong.

21 THE COURT: Well, basically, if I am to agree with
22 both of you, you and Mr. Nistad, I'll just say to both of
23 you, I think the others fill in to some extent, and I'm
24 going to issue an order that gives you all that limited
25 guidance such that the -- Superior and your company will

1 know that you're not getting a check for all that you
2 otherwise want to get, and Superior and Weather Shield would
3 know that they are not -- they don't have 100 percent
4 exposure for what you're claiming, then -- then what type of
5 order can I issue that gets you all to that point such that
6 if you decide that you want to try to compromise this prior
7 to October 27th, you will at least know the parameters under
8 which the Court has decided these concurrent issues?

9 MR. BROWN: I understand your point and your
10 purpose. Let me answer it this way. One, we are and have
11 been trying to get this case resolved. My concern with the
12 order predicting that all of it can't be recovered I think
13 is not necessarily wrong, but it's premature. Let me say
14 this in regard to JDavis. I think JDavis's problems are so
15 severe that they should pay us for the whole thing, joint
16 and several with other people.

17 THE COURT: Well, I wasn't including that in my
18 comments. I was just saying Weather Shield --

19 MR. BROWN: Well, I think that the problem is, if
20 your order starts predicting that we will only collect a
21 portion --

22 THE COURT: Okay.

23 MR. BROWN: -- I think that it's premature and it's
24 actually going to be counterproductive. I think it is
25 certainly -- I recognize that when the evidence is all in,

1 Your Honor may be persuaded that of our -- some -- over
2 \$1,100,000 spent trying to fix problems, maybe all of it
3 doesn't apply. I think if Your Honor issues an order so
4 ruling at this point in time, I think it's going to get
5 rather aggressively read and I think we may go backwards.

6 We are trying to settle the case, Your Honor, but I
7 think an order that starts to predict the actual outcome is
8 ahead of where the evidence is and what is before Your
9 Honor. Certainly, recognizing that the agreement -- the
10 indemnity is against allegations of defectively built
11 windows and defectively installed windows, is simply
12 matching the language in the agreement. That's not news to
13 us; it's not news to them. It's different than their
14 argument, but the reality is those are the words on paper
15 and that's the guidance Your Honor has in the contract in
16 assessing damages which is the following statement --

17 THE COURT: I mean, at this point in my thinking,
18 listening to all of the arguments on both sides, at this
19 point I'm thinking you have an enforceable indemnity
20 agreement based on what the parties agreed to. Not buying
21 the lack of consideration, you have an enforceable indemnity
22 agreement, but what do you get with this enforceable
23 agreement?

24 MR. BROWN: What we get with the agreement is what
25 found its way into the document -- and it is very simple,

1 it's also very broad, and therefore subject to different
2 opinions -- we get damages as determined by a court of
3 competent jurisdiction, which is yourself.

4 THE COURT: So that's what you don't want me to
5 predict, what the damages are?

6 MR. BROWN: I think we're ahead of ourselves to
7 start predicting what might be the quantum or that we won't
8 get it all or -- I'll give you a example.

9 THE COURT: So the gist of it all is, that summary
10 judgment should be denied and then y'all would be, in a
11 sense, where you were when you came in yesterday.

12 MR. BROWN: I don't know that you need -- well, no,
13 I think we are way beyond. Based on Your Honor's comment, I
14 think the case can be tried on damages.

15 THE COURT: If I deny summary judgment, that's not
16 granting --

17 MR. BROWN: No, sir. No, sir, but I think
18 --practically, I think we are starting to -- we are talking
19 about maybes, Your Honor. I think the real issue -- let me
20 say this: I think the real issue in the case is damages. I
21 think the triggering of the indemnity is very clear. I
22 think what the indemnity is directed toward is the
23 allegations and that is -- what has to be fleshed out with
24 testimony are damages, understanding Your Honor is not
25 giving me that as a ruling.

1 Now, I will say this, so the Court is not misled:

2 If Superior and I don't settle our case, we have a much
3 bigger, longer case that involves the indemnity.

4 THE COURT: Because you have a cross -- you have a
5 suit against --

6 MR. BROWN: Superior for extensive damages that are
7 unassociated with the windows, with delay, with all kinds of
8 things that were problems and where money was lost. If
9 Exhibit, I think, 13 in the book is our statement of
10 damages, there's about \$3,300,000 in checks written
11 accommodating problems and defects and deficiencies in this
12 building.

13 But as far as this indemnity case that we've taken
14 two days to talk about, yes, I think the issue is very
15 simple. The agreement is very clear. There is some
16 complexity in the proof of damages.

17 THE COURT: Okay.

18 MR. BROWN: Now, equitable indemnity, and I talked
19 about some of the cases: The cases I would refer Your Honor
20 to, the -- let me just -- I know I'm taking your time, but
21 it also addresses some other issues. Equitable indemnity
22 and contractual indemnity in this case go hand-in-hand.
23 They are companion theories to recover the same amount.

24 And I want to -- this is Winnsboro -- town of
25 Winnsboro, referring back to Addy v. Bolton, which is sort

1 of one of the primary creators of equitable indemnity, but
2 that case recognized that you could recover under your
3 contract, which can be a contract of indemnity. As an
4 alternate theory, you could recover under equitable
5 indemnity.

6 And the language of the case is this: Where the
7 wrongful act of the defendant has involved the plaintiff in
8 litigation with others, or placed him in such relationship
9 with others, that it makes it necessary to incur expense to
10 protect his interest, such cost and expenses, including
11 attorney's fees, should be treated as the legal consequence
12 of the original wrongful act and may be recovered as
13 damages.

14 If the attorney's fees were incurred as a result of
15 a breach of contract between plaintiff and defendant, the
16 defendant will be deemed to have contemplated that his
17 breach might cause plaintiff to seek legal services in his
18 dispute with the third party. That recognizes that as a
19 breach of contract action, we may recover our damages.

20 The court went on to hold in the alternative, that
21 on the facts of the case, the Boltons could also recover
22 expenses incurred in the litigation on the theory of
23 indemnity. We conclude that in actions of indemnity brought
24 by the duty to indemnify is implied by law and no personal
25 fault of the indemnitee has joined in causing the injury to

1 the third party.

2 Now, that language is something much narrower than
3 unclean hands, personal fault as opposed to vicarious
4 liability, and personal fault joined in causing the injury.
5 So in order to contaminate our right of equitable indemnity,
6 they've got to show personal active fault on our part that
7 helped cause the manufacture of defective windows, which I
8 don't think we have to show. It just is inconceivable, it
9 doesn't exist, but is a question for trial.

10 But I want to emphasize this whole broad theory of
11 unclean hands, gee, we did something wrong, is not the
12 standard for assessing whether or not we have equitable
13 indemnity. Only if our personal fault joined in causing the
14 injury do we forfeit or have compromised our equitable
15 indemnity. As in equity, Your Honor could find a \$3
16 contribution and deduct that from damages. It does not mean
17 that we fully and forever forfeit. It means the Court takes
18 into consideration personal fault.

19 The cases are replete with finding that the fact we
20 don't discover it is no bar at all, but that was an
21 alternate theory. So we are entitled to proceed under
22 contract. We are entitled to proceed under equitable
23 indemnity. The Court in Electric and Gas pointed out in the
24 end there really is no difference.

25 Where you hire someone to build something properly

1 and they build it wrong and you owe money to a third party
2 because they built it wrong, it's really the same outcome
3 whether you call it contractual or equitable indemnity. You
4 have no duty to them to go find it. There can be no
5 negligence or fault without a duty. We've got very good
6 representations that we were buying high-quality windows. I
7 don't know how we have any personal fault that contributed
8 to the breach of those representations.

9 But I would urge Your Honor to consider that
10 there's case law out there much different than has been
11 presented, and the facts and circumstances of this case
12 should be decided under the actual law, and it shouldn't go
13 forward and we should put up our evidence and Your Honor
14 will tell us how we did.

15 THE COURT: All right.

16 MR. BROWN: Is there any other questions?

17 THE COURT: No, sir.

18 MR. BROWN: Anything I can clarify, or try to?

19 THE COURT: No, sir.

20 MR. BROWN: Thank you.

21 THE COURT: All right.

22 MR. MAJURE: Your Honor, as I stated before, I
23 believe that everything that both Weather Shield and Muhler
24 have raised in their arguments for summary judgment against
25 Superior, which are based on the settlement agreements, were

1 addressed in substance yesterday. I have not heard anything
2 that I personally believe to be a new issue of law or fact
3 relevant to the enforcement of these agreements that was
4 raised today that was not raised yesterday; however, if the
5 Court disagrees with me and believes there was something
6 raised that I need to address, I will certainly entertain
7 that.

8 THE COURT: Nothing comes to mind at the moment.

9 MR. MAJURE: Okay. I would though like to, without
10 proceeding into a legal argument -- I sense that the court
11 is trying to envision the different roads, the way the
12 switches could be thrown and which way could send the
13 railroad track down the tracks. You probably feel like
14 you're reading one of those novels where you can choose your
15 own adventure; if I choose this, then I get to go that way.
16 If I choose that, I get to go that way.

17 So if the Court would allow it, I'm not going back
18 into our counterarguments on the substance of the motions, I
19 would like to just, if I could, summarize for the Court how
20 I believe the different options lead to different outcomes
21 and then, in turn, what you would have to do at trial, if
22 that would please the Court.

23 THE COURT: All right.

24 MR. MAJURE: If we are beginning at a starting
25 point that there is a valid and enforceable agreement, as

1 you had hinted to earlier, then the next step I believe the
2 Court would have to decide -- and again, I'm not going to
3 argue them, I'm just going to identify the steps, the Court
4 is going to then need to decide if it's a valid and
5 enforceable agreement. What is the scope of the
6 enforceability? Is it simply as it's stated in the
7 agreement or is it implied that there's issues of negligence
8 that have to be involved?

9 If it's enforced as it's written, then I think
10 Henry has pretty much well summarized where that goes. If
11 you decide that you need to address the issue of concurrent
12 negligence, then you need to address Mr. Nistad and
13 Mrs. Varnado's arguments about whether or not this agreement
14 allows for indemnification, notwithstanding the concurrent
15 negligence of the parties to be indemnified. So that would
16 be something you have to decide.

17 Within that context, if you decide that, yes,
18 Superior can be indemnified for its concurrent negligence as
19 to the windows, then it simply pares this thing down to a
20 damages hearing where you're going to have to -- where
21 Superior is going to have to demonstrate that the attorney's
22 fees it incurred, or costs it incurred, are proximately
23 caused or in connection with the defense of the suits and
24 the allegations of the plaintiffs as to the windows.

25 The window defendants would then be entitled to

1 argue as to the reasonableness of our fees, whether or not
2 the fees that we incurred were proximately caused by it, and
3 then we get to the issue of settlement. Now, the settlement
4 doesn't fall neatly within the same disposition as you would
5 resolve the attorney's fees and the costs.

6 Now -- so, again, we have argued that on the
7 interpretation of the agreement, based as it is written and
8 it aligns with how Henry has stated it, that it is not
9 predicated on a finding of negligence; negligence is
10 irrelevant. And it's not predicated on the finding of
11 judgment because judgment or settlement is never even
12 mentioned. It's within the confines of how broadly the
13 language is written.

14 If that's the case -- if you decide that that's the
15 case, then we don't need to address negligence or concurrent
16 negligence, it doesn't matter, but if you do decide that the
17 issue of negligence and concurrent negligence has to be
18 addressed, then you would then probably need to look at the
19 settlements paid by Superior and Concord and Cumberland, LLC
20 and determine either -- if not under the Griffin factors,
21 then you're going to have to manufacture your own test,
22 because I don't know of anything else that exists as to the
23 enforcement of the recovery of a settlement. You might just
24 have to go resort back to the language of the agreement
25 itself. So --

1 THE COURT: Well --

2 MR. MAJURE: -- so what we're saying is, you've got
3 to make the initial issue of a finding of liability, or not,
4 under the agreement. With Muhler it's a two-fold analysis
5 because we have the contract and the agreement. Muhler has
6 attacked both of them.

7 There is a step where you could decide that the
8 agreement isn't enforceable, but you've already hinted that
9 you seem to be going in that direction. So if that's not a
10 pre-existing hurdle, then with Muhler and the subcontract
11 agreement you're going to have to decide on the concurrent
12 negligence issue. If you decide in accordance with us on
13 the negligence issue, that concurrent negligence can be
14 indemnified, that the scope of the indemnity doesn't allow
15 it, then the only thing that The Muhler Company is going to
16 really need to be able to address at trial is whether or not
17 our settlement encompasses the negligence of others, of
18 outside third parties, because that's the only thing that
19 they are not going to be able to get into. If you're going
20 to take the negligence route.

21 If you're going to take the route of the agreement
22 as it's stated, which is indemnity predicated on an event,
23 then, again, the issue of negligence isn't even relevant.

24 Does that identify the paths well enough for you,
25 Your Honor, as to how this could go? Again, I'm trying not

1 to -- I'm trying to refrain from arguing them and I'm just
2 trying to identify the steps that the Court could take in
3 this novel..

4 THE COURT: Well --

5 MR. MAJURE: I guess we probably all feel like we
6 almost need to create a flow chart, if A and B and C --

7 THE COURT: Yeah. Assuming that there's a valid
8 agreement and both paragraphs 11 and 12 provide that the
9 indemnity that they agreed to unconditionally indemnify
10 Superior and Concord against these allegations, and these
11 allegations relate to if someone sues alleging defective
12 doors and windows. So I think it appears, at least one
13 interpretation, is that this agreement itself is limiting
14 within the causes. It just is not as expansive for whatever
15 you have to pay to whatever you have to pay in response to
16 being sued for these defects, and they agree to indemnify
17 you against those particular allegations in relation to the
18 doors and windows, and will pay attorney fees and costs.

19 So I don't think they -- I think it appears that
20 the agreement itself has -- is limiting. It's not just
21 whatever is paid out. It has to be relevant to the
22 allegations of the defect.

23 MR. MAJURE: Yes. And if what you are saying is we
24 can't make them pay for what we paid for stucco, yes. And I
25 think when you look at the exhibits, particularly the

1 settlement agreements, you will see that this issue that --
2 that is being raised that we can't -- we should not be
3 allowed to -- we should not be held responsible for the
4 negligence of JDavis, we don't dispute that. And that's
5 not -- but the issue is -- that's not what we are bringing.

6 There's nothing that we have settled for that even
7 addresses or touches upon the indemnity of an outside -- of
8 the architect or another subcontractor. We have separate
9 settlements for separate scopes of work.

10 But, again, getting back to your question, is my
11 response giving you everything that you are asking for? Is
12 there some other detail I'm not covering?

13 THE COURT: I think everything is coming clearer
14 and clearer on this entire case, even though I have to read
15 all these things. Without reading anything, I think it's --
16 without reading very much of it, I think it's becoming
17 clearer as to what my view of this entire matter is, and
18 particularly in relation to ruling on these motion.

19 MR. MAJURE: We all await with baited breath, Your
20 Honor, to see what that might be.

21 THE COURT: Well, you know, I just don't --
22 typically, when you have someone seeking summary judgment,
23 courts don't have to worry that much to deny a summary
24 judgment, just say it's denied for whatever reason that
25 might be in their head. It's the granting of the summary

1 judgment that becomes -- that's a problem for a judge
2 because you've got to then have a specific findings as to
3 why you're granting it.

4 So in relation to all of this, I just asked some of
5 the questions to Mr. Brown to see if I agree that summary
6 judgment should not be granted. Do you want me to say deny
7 it or do you want me to go beyond that? And he says, no,
8 because it's ruling in advance on something that I haven't
9 heard. So --

10 MR. MAJURE: And that was one detail that I don't
11 know that I fully agree with Mr. Brown. And I tread lightly
12 when I disagree with him, but I don't think that you're
13 quite so restrained as he was saying. But, in any event, as
14 I was saying when I stood up, I felt like the Court might
15 want to know the logical steps, the logical outcomes, and
16 then what then would have to be entailed with trial. And
17 that's what I was rising to say.

18 In terms of what your options are for ruling and
19 how that then would play out in the trial, are there any
20 other questions you have as to how that -- how the steps
21 that --

22 THE COURT: No, I don't. I typically deal with
23 what's before me and then everything else will fall in place
24 when it has to fall in place. So I don't feel as burdened
25 as y'all probably feel.

1 MR. MAJURE: Well, then, Your Honor, probably -- I
2 think the Court would probably desire proposed orders on all
3 of these issues.

4 THE COURT: Oh, absolutely. I want to break -- I
5 want to hear you out, then we still have to hear from
6 JDavis, right?

7 MS. HOLBROOK: Yes, Your Honor.

8 THE COURT: And we've got to get through with this
9 case.

10 MR. MAJURE: I would just say this one thing, Your
11 Honor; no matter what, the interpretation of this agreement
12 has to be addressed. Everything except -- except for
13 Mr. Brown's equitable indemnity claims, because I stipulated
14 that Superior is going to be dismissing its equitable
15 indemnity claims against Muhler and Weather Shield. So that
16 argument is only their fight, but as to this agreement, the
17 interpretation of the agreement is pivotal. And I believe
18 there's nothing that prohibits you from ruling on that
19 today, which would inevitably have to be ruled on at trial
20 and that would have, I think, a dramatic outcome on how the
21 disposition of this matter fully vets out.

22 THE COURT: Well --

23 MR. MAJURE: Your Honor, I meant to do this
24 yesterday, but I have here on a thumb drive copies of all of
25 the depositions that were cited by Superior in its

1 memorandums. And they are the same ones in both memorandums
2 against Muhler and Superior, but I wanted to hand that to
3 you because I think it runs in the thousands of pages, and I
4 didn't want to give you this much --

5 THE COURT: Appreciate it. Thank you.

6 MS. VARNADO: I do have a few points I would like
7 to address when we return, though.

8 THE COURT: Okay. I want to limit this to some
9 extent because we've got to get through today, and I want to
10 have -- leave some opportunity to hear from --

11 MR. MAJURE: I believe JDavis's motions are the
12 only things that remain. Does everybody agree with that?

13 MS. HOLBROOK: I believe that is correct, Your
14 Honor.

15 THE COURT: Because if y'all want to argue all of
16 that, as long as we've heard the first two, then we will
17 have to come back Friday to finish.

18 MR. BROWN: All of a lot of what is in response --
19 I have a response to JDavis motion that related to what I've
20 already said.

21 THE COURT: All right. We will be back at 2:00.

22 MR. BROWN: If you want electronic or a disk rather
23 than paper, I've got one for you.

24 THE COURT: All right.

25 MR. NISTAD: I have a copy of the case law I can

1 give you on thumb drive, e-mail, or just --

2 THE COURT: E-mail is best.

3 MR. NISTAD: Okay. I will do that.

4 THE COURT: Okay. 2:00.

5 (Luncheon recess was taken.)

6 THE COURT: Okay.

7 MS. VARNADO: Thank you, Your Honor. Just in
8 response to what Mr. Majure said and a couple of points for
9 Mr. Brown. I conveyed to you the town of Winnsboro case,
10 which was the case I was talking about which was Judge
11 Bell's decision from 1990. That was a Court of Appeals
12 case and then the Supreme Court affirmed that decision. But
13 in that, Judge Bell goes through both equitable and
14 contractual indemnity and talks about the various types.
15 And from that and from other cases, let me just see if I can
16 drill down on these causes of action and what needs to be
17 decided by you.

18 First, as to the equitable indemnity claim by
19 Concord and Cumberland against Weather Shield. The
20 equitable indemnity claim can be also termed implied
21 contractual indemnity. As -- that's what the town of
22 Winnsboro and several other cases say, equitable indemnity
23 or implied contractual indemnity. For both of those, you
24 need the special relationship and you need the finding of no
25 fault by the party seeking to be indemnified.

1 And while Mr. Brown says it's not called clean
2 hands, clean hands is a shortcut for what town of Winnsboro
3 says, equitable indemnity cases involve the fact pattern in
4 which the first party is at fault but the second party is
5 not. If the second party is also at fault, he comes to
6 court without equity and has no right of indemnity. So
7 without fault. Now, the without fault for the harm that the
8 party is seeking to be indemnified.

9 So in this instance, we've got leaks through the
10 windows is the harm. In order for Concord and Cumberland to
11 say that it is without fault in regard to leaks at the
12 windows, it would have to show that none of its actions
13 caused the leaks without windows -- leaks at the windows.
14 And the evidence in the record shows that its folks tampered
15 with the windows, its folks designed components of the
16 building that affected those windows, thus, resulting in
17 water or leaks at the windows. So --

18 THE COURT: But can't you contract away your right
19 to make that claim?

20 MS. VARNADO: But that will be contractual
21 indemnity.

22 THE COURT: All right.

23 MS. VARNADO: So just equitable indemnity, if he
24 has contributory fault to the harm caused to the third
25 party, the owners of the units in this instance, then he

1 can't come for equitable indemnity to this court.

2 THE COURT: Let me just ask you this: At the end
3 of the day, does it matter which type of indemnity it is if
4 there is a --

5 MS. VARNADO: Yes.

6 THE COURT: Well, so you're saying whatever finding
7 has to be made, it has to be put in the category of which
8 indemnity it is.

9 MS. VARNADO: Yes. Yes, because that affects the
10 recovery of what damages are recoverable. Because under
11 equitable indemnity, it is assumed that the entire fault is
12 the fault of the indemnifying party, and so all the damages
13 are recovered. Under contractual indemnity, the parties can
14 limit that via contract. So there's a bigger ball of wax
15 potentially under equitable indemnity.

16 And just a special point on equitable indemnity,
17 there is an exception in terms of the finding of the fault
18 under equitable indemnity if the party is passively, only
19 passively at fault. That happens under -- only under
20 certain circumstances, but if they are passively at fault,
21 which means all they did was fail to detect the wrongdoing
22 of the party who did the work, if that's the only thing they
23 did, then that, under certain circumstances, is not a bar.

24 THE COURT: Equitable indemnity only pertains to
25 Concord and Cumberland?

1 MS. VARNADO: Right.

2 THE COURT: Because the others aren't pursuing it?

3 MS. VARNADO: That's right. That's right.

4 THE COURT: And Mr. Brown says, we are the owner,
5 we are like the -- we didn't do any work, we just had our
6 money tied up in this project.

7 MS. VARNADO: Right. But, unfortunately, that's
8 not the case because they hired folks to alter the windows
9 and they hired folks to design the window installation in --
10 in -- that was not in accordance with my company's
11 installation instructions.

12 THE COURT: And all of that liability is then
13 imputed to them?

14 MS. VARNADO: Right, because it's their agents and
15 they directed us -- they directed that to be used. I mean,
16 if I take a hammer to something or I hired an agent to take
17 a hammer to something, I'm equally as liable as far as that
18 is concerned. And so that is the issue with equitable
19 indemnity.

20 THE COURT: Do you agree that they are your agents,
21 Mr. Brown, folks y'all hired?

22 MR. BROWN: Not for the purpose of the analysis
23 you're talking about. In certain circumstances, the
24 architect would be, but not in terms of creating fault. If
25 I could answer it this way; the windows were installed, the

1 windows themselves were leaking, and Weather Shield would
2 not respond with the promises they had made to come fix
3 them. We didn't alter the windows. We made an effort to
4 try to fix what they would not as active mitigation.

5 Now, we did not create the problems. The problems
6 were there when they were put in. What she's saying
7 occurred, yes, we tried to fix them because they refused to.
8 That's the context of what you're going to hear about.

9 MS. VARNADO: But there's also further evidence
10 that Mr. Andrews, who worked directly for Concord and
11 Cumberland, was actively involved in the process and so he
12 was a direct employee.

13 THE COURT: So they were doing work --

14 MS. VARNADO: They were doing work there. They
15 were directing things, directing design there. They didn't
16 take hammers -- except there were a few handymen, but we are
17 not implying that the handymen did stuff. What we are
18 saying is that they -- Mr. Andrews was involved in the
19 design decisions that resulted in issues.

20 THE COURT: You're not claiming they are
21 amalgamated? The men with the hammer or whatever?

22 MS. VARNADO: I haven't made that analysis, Your
23 Honor.

24 MR. BROWN: Ms. Varnado has been very aggressive
25 representing her client, but the things she's saying just

1 didn't happen. We didn't do any work on that project. Now
2 that just didn't happen. Mr. Andrews was there as an
3 owner's representative to answer questions, and that
4 testimony will come out. They are saying they manufactured
5 bad windows.. Mr. Andrews had nothing to do with
6 manufacturing. He had nothing to do with the work.

7 MS. VARNADO: First of all, Weather Shield doesn't
8 admit it manufactured bad windows, nor actually is there any
9 admissible evidence to prove that the reason why windows
10 leaked was it was a manufacturing or a design defect. Let
11 me just put that out there.

12 So -- but the issue, the fault, the harm to the
13 third party is water coming through the windows, and Concord
14 and Cumberland has contributory fault toward the things that
15 caused water to come through the windows. As a result,
16 cannot have equitable indemnity.

17 THE COURT: I don't ever expect y'all to agree on
18 these facts or the law, so go ahead.

19 MS. VARNADO: Okay. So the next point is
20 contractual indemnity. Now, contractual indemnity, first of
21 all -- the first point is, is the contract which gives
22 indemnity, is it valid? And for Weather Shield, the only
23 contract that gives anybody indemnity is the June 2007
24 agreement.

25 THE COURT: All right.

1 MS. VARNADO: If that contract is not valid and
2 enforceable, then nobody gets contractual indemnity from
3 Weather Shield.

4 THE COURT: I understand that much.

5 MS. VARNADO: That's an easy decision. Okay. If
6 the contract is valid and enforceable, then the next step is
7 what indemnity is owed? And for that we look at Paragraph
8 12, in terms of Weather Shield, and we go -- you go through
9 the analysis of the language.

10 THE COURT: We've been through that analysis,
11 haven't we?

12 MS. VARNADO: We have.

13 THE COURT: You want to analyze it one more time?

14 MS. VARNADO: No, I'm not. What I am going to say
15 is that -- and the questions that need to be answered there
16 is, does that language allow Superior and Concord to recover
17 for their own fault that contributed to the window issues?
18 If it does, which I don't think the language allows, but if
19 it does, that leads to one analysis. If it does not, then
20 these settlements that they're trying to recover for, they
21 can't get all of this money. It's -- it reduces considerably
22 what they can recover.

23 THE COURT: And Mr. Brown contends that the first
24 part of it is what's controlling.

25 MS. VARNADO: Yes.

1 THE COURT: That is, the part that says, in the
2 event they're sued?

3 MS. VARNADO: Right. And that ignores the crucial
4 portion at the end.

5 THE COURT: And the suit alleges a defect?

6 MS. VARNADO: Right.

7 THE COURT: Then you agree to indemnify?

8 MS. VARNADO: Right. And that both ignores the
9 part at the end, but it also -- and the way he reads it, he
10 reads it as to require indemnity for Superior and Concord
11 and Cumberland's contribution to defective or damaged
12 windows.

13 THE COURT: Yeah. I didn't understand his argument
14 to be that, and I don't know that I'm -- whatever -- agree
15 with that.

16 MS. VARNADO: Well, he was saying -- I agree with
17 you, Your Honor. He was saying, no, we can't -- this
18 Paragraph 12 means we don't have to -- that Weather Shield
19 doesn't have to indemnify us for the roof. Right? But it
20 also means that Weather Shield does not have to indemnify
21 Concord and Cumberland and Superior for their fault that
22 contributed to defective windows or window issues.

23 THE COURT: All right.

24 MS. VARNADO: That makes a considerable difference.
25 And in order for the Court to find that, it is -- that's

1 where you have to find that clear and unequivocal language
2 saying that Weather Shield agrees to indemnify Concord and
3 Cumberland and Superior for their own negligence or their
4 own fault. And that's just not in there, clearly and
5 equivocally.

6 So if you find the clear and equivocal language,
7 then they're entitled to a much larger recovery if they can
8 recover under that paragraph. If they -- if you limit it to
9 what I think it would say is, it would be -- they would not
10 be permitted to recover for Superior or Concord and
11 Cumberland's fault; only that which is the fault of Weather
12 Shield. Then --

13 THE COURT: I understand that argument. I don't
14 know that I agree that I have to make a finding to that
15 extent. If I'm so inclined to find that this is a binding
16 agreement, the complexities that y'all are reading into the
17 agreement, I may not agree it's that complex.

18 MS. VARNADO: That's true, Your Honor, but, again,
19 that's where you have to address the issue of clear and
20 unequivocal. And in order for --

21 THE COURT: Or the word, unconditionally.

22 MS. VARNADO: Well, does unconditional clearly and
23 unequivocally allow recovery for the liability of the
24 indemnitor and the indemnitee? And there's no case law that
25 would say that. The cases where they say the language is

1 clear and unequivocal, it says, clearly, recover for stuff
2 in which those people are responsible. It doesn't --

3 THE COURT: All right. Let's see what Mr. Majure
4 has to say.

5 MR. MAJURE: I feel like it's groundhog day; we've
6 gone through all this. Weather Shield and Muhler have
7 exhaustively explained what their view of the interpretation
8 is of this language. I think that there are probably
9 passages in the Bible that have had less examination than
10 this. And everything that Ms. Varnado is saying about her
11 interpretation of the agreement, she has stated before.

12 If there's something new for her to add, we're
13 certainly welcome to hear that, but everything I'm hearing
14 right now has been previously provided and we would ask that
15 the Court expedite this process.

16 THE COURT: I was thinking of making points in
17 response, but not rearguing your entire argument.

18 MS. VARNADO: What I was doing, Your Honor, is when
19 Mr. Majure walked through what you needed to decide, then I
20 am saying he stated it confusingly and perhaps misleadingly,
21 and that's why I'm taking you there, And I'm just about
22 finished.

23 The next issue that needs to be addressed if you're
24 upholding the -- Paragraph 12, is also whether -- because
25 the parties settled and, therefore, there is no

1 determination by a court of competent jurisdiction or award
2 of arbitration, that they are seeking to recover, whether
3 that precludes recovery for them under the agreement. And
4 that's a whole discussion about the no-action clause and we
5 won't go back on over it, but that's the other element.

6 THE COURT: Well, I'm about 90 percent -- was at 87
7 percent sure that I will uphold the agreement and uphold
8 their right to recover. And the question is, what can they
9 recover?

10 MS. VARNADO: The next issue -- or the next point I
11 just wanted to make is that looking at Mr. Brown's argument
12 about Ashley II, the Ashley II case. The Ashley II case --

13 THE COURT: Let me stop you for a moment.

14 (Whereupon, an off-the-record discussion takes
15 place on an unrelated matter.)

16 MS. VARNADO: A few comments on the Ashley II case.
17 The Ashley II case is a CERCLA matter.

18 THE COURT: What kind?

19 MS. VARNADO: CERCLA.

20 THE COURT: What does that mean?

21 MS. VARNADO: It is a federal statute that, as it
22 says here, I'm going to read from the case: Congress
23 enacted CERCLA to promote the timely cleanup of hazardous
24 waste sites and to ensure the cost of such clean-up efforts
25 were borne by those responsible for the contamination.

1 And CERCLA imposes strict liability on all of the
2 parties. If you own -- if you are in the chain of owning a
3 piece of property that is a Superfund or hazardous
4 contaminated site, CERCLA imposes liability on everybody.

5 THE COURT: I'm handling one of those cases, too,
6 where BP is being sued, because they've got some of this
7 money and supposedly they didn't clean it up. So I will
8 learn all about that later in that case.

9 MS. VARNADO: Yeah. But what I'm saying is CERCLA
10 is very unique, it's very different from a construction
11 liability situation. But in the context, and as the Court
12 said in its final footnote, we note the narrow reach of
13 today's holding. Our holding is limited to determining that
14 the negligence rule, which would operate as a bar to
15 enforcement of the indemnification provision, does not
16 preclude contractual indemnification under the facts of this
17 CERCLA action.

18 So in this CERCLA action, the Court allowed the
19 recovery of indemnification by a party who was also at
20 fault, contractual indemnification by a party who was also
21 at fault, even though there wasn't clear and equivocal
22 language in the contract that allowed for such recovery.
23 But the reasoning -- and, again, another important footnote
24 to read here is footnote 4, and they are looking at this
25 indemnification agreement.

1 And what the Court determines is, based on the
2 facts, the company was not seeking contractual
3 indemnification for costs and expenses resulting in part
4 from its own strict liability acts. It was -- it was
5 seeking recovery for the damages it paid for that were
6 solely caused by the predecessor owner of the property. And
7 that's just completely different from what's going on in our
8 case. So it is not an applicable case, other than it cites
9 some kind of, you know, broad stroke laws that are correct
10 or rules of law concerning indemnification.

11 THE COURT: Well, when I see that the Supreme Court
12 says, we acknowledge the record before us may be incomplete
13 and we are misinterpreting these facts, they can ask for a
14 rehearing, you know, it puts me in the mind of the many
15 matters that they -- some of the matters they accept in
16 their original jurisdiction without a record below as well
17 as matters like this, certified -- being a certified
18 question as well as some of the decisions that you see in
19 declaratory judgment actions where there's no record upon
20 which the Court is basing its rulings.

21 So -- so I know, I certainly understand that and I
22 don't think it was handed up so much based on what the
23 underlying facts were in this case, but based on
24 pronouncements of law stemming from that.

25 MS. VARNADO: Right. But the specific

1 pronouncement of law that you don't have to have clear and
2 equivocal language, is limited to this CERCLA -- these
3 CERCLA actions, I believe, based on this footnote, and would
4 not apply to the contract that's at issue with the parties.
5 And I think that you could find better cases that aren't
6 clouded by CERCLA on which you could make a judgment and
7 ruling in this matter.

8 THE COURT: Well, I'm leaning toward thinking -- or
9 that the agreement is fairly clear, that the agreement is
10 clear that there's an agreement to indemnify and it's clear
11 as to generally what's -- what the parties agreed to
12 indemnify for. And I don't know that I have to go through
13 and separate out acts of negligence by one party or the
14 other in reaching a decision in this case.

15 It just seems to me that the parties knew what they
16 were getting into and it's understandable as to what they
17 agreed to indemnify the indemnitee for. And I certainly
18 understand that it's not clear cut based on the fact that
19 there are a multitude of defects, but the agreement -- you
20 know, as you all said, there were all these lawyers drawing
21 up all these agreement on both sides. I think they ended up
22 saying exactly what they wanted to say in the agreement.
23 And now we're handicapping it again, and this was entered
24 into -- what year was that? 2000 --

25 MS. VARNADO: 2007.

1 THE COURT: Yeah. So seven years later, we're
2 handicapping what the parties contemplated and what they
3 agreed to seven years ago. In the end, for me, I don't know
4 that it's going to be that complex as y'all are saying it
5 is.

6 MS. VARNADO: I mean, obviously you know my
7 position.

8 THE COURT: That's why I'm leaning toward it.
9 Again, I can't -- I haven't read everything and I haven't
10 had the benefit of all of your post-hearing analysis and
11 proposed orders and recommendations and all that. So I can
12 yet be swayed in all directions possibly.

13 MS. VARNADO: And if I may, Your Honor, just to
14 conclude, I hand up the Town of Winnsboro Court of Appeals
15 and Supreme Court case for you.

16 THE COURT: And then when you say, Court of
17 Appeals, that's -- and the Supreme Court case from the Town
18 of Winnsboro.

19 MS. VARNADO: Your Honor, there's two cases that I
20 handed up. It is the Court of Appeals decision, which was
21 authored by Judge Bell, and then the Supreme Court decision
22 affirming that. They both have commentary in there that is
23 beneficial in understanding the issues before the court.

24 THE COURT: All right. Very good.

25 MR. NISTAD: If I may?

1 THE COURT: Yes.

2 MR. NISTAD: One quick point and then I'll sit
3 down. The ruling that indemnity agreements are enforceable
4 and a ruling that the indemnity language is not clear and
5 unequivocal are not inconsistent with each other. And with
6 that, I think the horse is dead.

7 THE COURT: And the whole analysis about what's
8 required for clear and equivocal is the case that Mr. Majure
9 handed up from Florida?

10 MR. NISTAD: No. No. That's one example how the
11 court can do it and the language there is different than
12 ours. So you have to judge the language in our case on that
13 language alone. The Florida court is instructive because
14 it's different language and they reached a different
15 conclusion.

16 THE COURT: All right. Yes, ma'am.

17 MS. HOLBROOK: Thank you, Your Honor. May it
18 please the Court. I will give my presentation from the
19 podium.

20 THE COURT: Okay. I enjoyed reading your
21 submission. I guess you did it. I don't know if you did or
22 not.

23 MS. HOLBROOK: I'm sorry, Your Honor?

24 THE COURT: I enjoyed reading your submission. I
25 don't know if you did it or not.

1 MS. HOLBROOK: Yes, Your Honor, I authorized that.
2 Thank you, I appreciate that.

3 THE COURT: You must have attended an ivy league
4 school or something.

5 MS. HOLBROOK: I went to Wake Forest University
6 undergrad and had the privilege and honor of clerking for a
7 year in federal court and my judge taught me well.

8 THE COURT: You went to law school where?

9 MS. HOLBROOK: At Wake Forest, Your Honor.

10 THE COURT: At Wake Forest. All right. No wonder
11 it looks so --

12 MS. HOLBROOK: One of the things I had the
13 privilege of learning as a law clerk is that judges
14 appreciate brevity, so I will do my best to accommodate that
15 today.

16 As Your Honor is well aware by now, this is a
17 construction defect case, and I will not get into all the
18 issues but will take some time today to point out a couple
19 of facts that were not specifically addressed by the other
20 parties that I believe have a bearing on JDavis's motions.

21 The plaintiff's claims having now been resolved in
22 toto, what is relevant to JDavis's motion are the
23 cross-claims brought against it by Concord and Cumberland
24 and Superior. Specifically, Concord and Cumberland has
25 pending cross-claims against JDavis for contractual

1 indemnity, equitable indemnity, contribution, breach of
2 contract, negligence, and negligent misrepresentation.

3 I understand from discussions with Mr. Brown that
4 Concord and Cumberland has essentially agreed that JDavis is
5 entitled to summary judgment on the contractual indemnity
6 claim, the contribution claim, and the negligent
7 misrepresentation claim.

8 THE COURT: Is that right?

9 MR. BROWN: Yes, sir. I think in the -- certainly
10 there's no contribution, we didn't buy them out, and there's
11 no specific contractual indemnity, but there is equitable
12 indemnity, breach of contract, and negligence, which you
13 think is adequate, but the other causes of action we will
14 not pursue.

15 THE COURT: Okay. You will submit a order on that.

16 MS. HOLBROOK: Yes, Your Honor, be happy to do
17 that.

18 Concerning Superior, Superior has interposed a
19 cross-claim against JDavis pursuant to the Spearin doctrine.
20 So those are the causes of action leaving aside the ones
21 that have been agreed upon that I will discuss --

22 THE COURT: Which doctrine is that again?

23 MS. HOLBROOK: Spearin doctrine, S-P-E-A-R-I-N,
24 doctrine. And that arises out of a case, US Supreme Court
25 case, United States vs. Spearin. It's one of the cases that

1 was handed up yesterday in my packet of materials, but the
2 reference number for that is 248US132. It's actually a
3 very, very old case from 1918.

4 Before I get into my legal arguments on those
5 various causes, Your Honor, I want to take a few moments to
6 introduce in greater detail a couple of the names that have
7 come up tangentially in the arguments of the other parties.
8 And one of those names was Richard Andrews. Now, Mr.
9 Andrews worked for Estates, and he did so from 2001 to 2008.

10 He was one of the owner's representatives for this
11 project, and in that role he was specifically responsible
12 and tasked by Concord and Cumberland with working with the
13 contractors to help them understand the project and to
14 ensure that they have information they needed. He was also
15 tasked with working with the architect, working with the
16 owner itself to get the products spec'ed for the project,
17 and as part of his obligations, he was charged by Concord
18 and Cumberland to be intimately familiar with JDavis the
19 architect's, plans and specifications.

20 Now, of the individuals representing Concord and
21 Cumberland's interest on this project, Mr. Andrews has
22 testified, along with Mr. Bob Mundy, who is an owner of
23 Concord and Cumberland, that he had the closest working
24 relationship with JDavis and its representatives, and it was
25 his job to be most intimately familiar with the architect.

1 This will become important as we get further along into my
2 argument for a number of reasons, but I did want to provide
3 that brief introduction to Mr. Andrews and who he was in
4 relation to this project.

5 Another name that came up I believe once earlier
6 today was Sutton-Kennerly and Associates, also referred to
7 sometimes as SKA. SKA is now actually legally named SKA
8 Consulting Engineers, so you may see that in the
9 memorandums. That is a corporation -- it's a North Carolina
10 corporation that has an area of expertise devoted to
11 watertightness and the integrity of buildings. That is what
12 they do, and that is what they have done for Concord -- for
13 Estates on projects like Concord and Cumberland in the past.

14 On this particular project, Concord and Cumberland
15 took it upon itself to retain the services of SKA to assist
16 JDavis with providing waterproofing details and, in fact,
17 Concord and Cumberland specifically asked that SKA provide
18 waterproofing details for this project independent of
19 JDavis. Now, that is an important fact, Your Honor, because
20 you will hear a little bit later that Superior took SKA's
21 directives regarding the watertightness and window details
22 as being a directive from Concord and Cumberland itself that
23 superseded the directives of the architect to the extent
24 that they were inconsistent.

25 Now, you've heard a lot today and yesterday about

1 the active and passive dichotomy, and there are a couple of
2 facts relevant to this case and this motion that I believe
3 bear on the active role that Concord and Cumberland played
4 in this project and how that is important to the damages for
5 which they seek to recover from JDavis.

6 One of the important things that Concord and
7 Cumberland did in this particular project is they made the
8 independent decision to override the architect's original
9 specifications for Pella windows, to change them to Weather
10 Shield windows. They did this after they were approached by
11 a salesman from Muhler by the name of Chas Agosti.

12 After selecting the Weather Shield windows, they
13 got SKA involved with coming up with these waterproofing
14 details, and in the process of providing their services, SKA
15 required, and Concord and Cumberland desired, that the
16 Weather Shield windows, that had been switched, to be
17 installed in these metal sill pans that you've heard a
18 little bit about earlier today and yesterday. In an effort
19 to meet the requirements that SKA had imposed and that
20 Concord and Cumberland desired, JDavis did incorporate the
21 metal sill pans into its plans.

22 Ultimately, Concord and Cumberland, SKA, JDavis,
23 Superior, and Muhler corresponded and met with each other
24 and determined -- and settled on a method of flush mounting
25 the Weather Shield windows to wooden bucks. The idea was

1 that these windows would rest -- that the bucks would rest
2 in the steel pans required by SKA and then they would be put
3 into that -- the windows would be put into that system.

4 Now, how do we know that Concord and Cumberland had
5 an active role in coming up with that methodology? Well,
6 Bradley Lawson of Muhler has testified, Your Honor, that
7 Concord and Cumberland was actively involved in determining
8 the installation methodology of the windows through its
9 representative, Richard Andrews. The evidence that we have
10 in this case is replete with examples of just how actively
11 involved Mr. Andrews was in discussions related to design,
12 incorporating design, and instructing Superior that they
13 were to follow design details provided by Sutton-Kennerly
14 and Associates.

15 One of the documents that you will see in support
16 of that is a correspondence dated January 22nd, 2007, and it
17 is an installation directive to Superior that came from
18 Concord and Cumberland. That is attached in your notebook
19 as -- behind Tab 16 as Exhibit 16. In that particular
20 correspondence, Concord and Cumberland specifically invites
21 Superior to contact who it questions, Concord and
22 Cumberland. That's who they invite Superior to contact with
23 questions about these directives. They're not inviting them
24 to contact JDavis to ask about these directives or whether
25 they meet or comply with the plans and specifics, they're

1 asking them to contact Concord and Cumberland directly.

2 Also important to recognize, Your Honor, that
3 Superior never contacted Concord and Cumberland to indicate
4 that it, or any of its subcontractors, had any question
5 about how the windows were going to be installed, and there
6 are no requests for information in the project file
7 supporting that either Superior, or its subcontractors, at
8 the end of the day had any question about how those windows
9 were to be installed based on the directives they received
10 from Concord and Cumberland related to the waterproofing
11 details provided by SKA.

12 Now, Superior's project manager, Wally Baughn, has
13 testified on a point that is important to the active role
14 that Concord and Cumberland had in this project when he
15 stated that in his mind, based on his experience and the
16 particularly active role that Concord and Cumberland took on
17 this project, that a directive from Concord and Cumberland
18 to review and follow SKA's guidance with respect to the
19 window installation superseded any other instructions that
20 may have been given, including instructions from the
21 architect of record regarding that issue.

22 This is important because it has to do with the
23 issue of how JDavis could possibly be responsible for
24 Concord and Cumberland's decision to have and to hire
25 another consultant, ask the general contractor to follow

1 that consultant's advice, and then try to seek relief from
2 JDavis on that point.

3 Now, the evidence supports and we have countless
4 examples that in integrating the Weather Shield windows into
5 this particular project, Superior and/or its subcontractors
6 failed to strictly follow the plans and specifications for
7 the windows. One example of that would be that the plans
8 called for nailing fins, and the evidence supports that not
9 all windows were constructed with those fins.

10 Rodney Robinson, who is -- I think you heard
11 Ms. Varnado represent we recently received his transcript,
12 he was associated with Superior on the project, and he has
13 testified about Concord and Cumberland's active approval of
14 allowing this finless installation. They made a decision to
15 go for it and to allow that finless installation, and that
16 deficiency is important and significant to this case because
17 an expert retained by Superior has testified the nailing
18 fins are an important part of weatherproofing the rough
19 opening.

20 So here you have an example where Concord and
21 Cumberland took an active role, made an active decision, and
22 as a result of that decision, that building is experiencing
23 a deficiency of waterproofing around the windows, the rough
24 opening of those windows.

25 Now, nobody has talked about concerns that the

1 architect has had in this project, and I wouldn't expect
2 them to given where they're coming from, but on several
3 occasions in this project, JDavis expressed its concern to
4 Concord and Cumberland about the difficulties that were
5 being encountered with the use of these Weather Shield
6 windows.

7 And, in fact, in various owner/architect/contractor
8 meetings, JDavis had in my brief unequivocally, I think I
9 might avoid using that word for today, but they stated no
10 less than -- it took no less than three representatives of
11 Concord and Cumberland and to Superior, that they in no way
12 advocated staying with the Weather Shield windows and that
13 the best decision, which should be seriously considered,
14 would be switching back to the originally spec'd Pella
15 windows.

16 Importantly, at that very meeting, Concord and
17 Cumberland itself expressed to JDavis that it had
18 reservations about the installation of the windows and
19 doors. Nevertheless, they ignored the concerns and
20 recommendations that JDavis had concerning switching the
21 Weather Shield windows and they marched forward with those
22 Weather Shield products that ultimately -- we believe
23 ultimately proved defective in their own right, separate and
24 apart from any installation issues plaguing the project.

25 It's also important to note, and Concord and

1 Cumberland points this out in their brief, JDavis rejected
2 those windows. And it was at Concord and Cumberland's
3 direction -- once it had received its agreement in place
4 with Weather Shield and Muhler, Concord and Cumberland gave
5 the green light on moving ahead with the window
6 installation. JDavis was not a party to that agreement,
7 didn't have any say in it, weren't invited to participate.
8 One can speculate why that may be, but, in any event, it was
9 Concord and Cumberland who once, A, a passing test result
10 was achieved, directed Superior to move forward with
11 construction of the windows.

12 Now, another important fact that hasn't really been
13 discussed is the expert testimony of Myles Glick regarding
14 what culpability JDavis might have with respect to the
15 windows at issue in this case. And in that regard,
16 Mr. Glick was asked: Do you have any opinions about whether
17 the architect violated the standard of care in terms of
18 either his construction administration obligations with
19 regard to the windows, or his design of the windows, or how
20 the windows should be installed?

21 Mr. Glick responded: The detailing of the window,
22 the securing of the window to its blocks, or reproduction of
23 the Weather Shield details given to them, I don't hold the
24 architect responsible for that.

25 Mr. Glick goes on to testify as to why he did not

1 believe JDavis was responsible -- JDavis plans and
2 specifications were responsible for the leaks that are
3 occurring in those windows, and that is set forth in our
4 brief.

5 Mr. Glick did go on to say, that irrespective of
6 any design issues that may or may not be in play with
7 respect to the windows, those windows need to be removed and
8 replaced to ensure that no leakage occurs.

9 One of the issues that will be relevant to
10 Superior's claims, as well as Concord and Cumberland's, is
11 the adequacy of JDavis's plans. Mr. Andrews, who we
12 referenced earlier, was charged with being intimately
13 familiar with JDavis's plans and specifications and who has
14 a fair number of years in the construction industry,
15 testified that it was his belief that the final documents
16 presented by JDavis were adequate to properly install the
17 windows.

18 Now, Mr. Andrews is not alone in that opinion. The
19 plaintiff's expert, Myles Glick, also testified that
20 JDavis's plans and specifications were adequate for
21 constructing the project, and to the extent that the general
22 contractor had a question about those plans and
23 specifications, the onus was on them to request further
24 information. And to the extent that they failed to do so,
25 they assumed design responsibility.

1 Now, turning to the legal arguments at issue in
2 this case, as Concord and Cumberland has agreed they're
3 entitled to summary judgment on the contractual indemnity
4 claim, I would not waste the Court's time with any of that
5 today. So that will take us to the equitable indemnity
6 claims.

7 There's been a rather exhaustive recitation of what
8 one is required to show to get equitable indemnity under
9 South Carolina law, so I will not belabor that point;
10 however, I did find it very interesting that Mr. Brown
11 testified or represented to the Court earlier this afternoon
12 that JDavis was not an agent of Concord and Cumberland for
13 fault, as that seems to suggest that if JDavis was not an
14 agent of Concord and Cumberland for fault, then Concord and
15 Cumberland could never have been liable to the plaintiffs
16 for alleged acts or omission of JDavis such that they would
17 be entitled to indemnification from JDavis.

18 The idea is, if Concord and Cumberland is not
19 responsible to the plaintiffs for JDavis because -- or it's
20 not responsible to the plaintiffs for JDavis's acts or
21 omissions, how could Concord and Cumberland be exposed to
22 liability, as is required under equitable indemnity, by the
23 alleged wrongful acts of JDavis. So I think that is an
24 important point to ponder upon as we're considering this
25 equitable indemnity argument.

1 Another issue that we face with the equitable
2 indemnity is the act of negligence of Concord. And I
3 certainly understand Mr. Brown's point earlier about it's
4 not Concord and Cumberland's general active role in the
5 project, you do need to look at specific issues of active
6 negligence relating to the damages for which he seeks to
7 recover from JDavis, however, it is important to note that
8 the most important requirement for the finding of equitable
9 indemnity under South Carolina law is that the parties
10 seeking to be indemnified is a judgment at fault.

11 So to the extent that we are going to the active
12 passive dichotomy, there is ample evidence in the record to
13 support that Concord and Cumberland played an active role
14 with respect to the selection of the windows, with respect
15 to overriding the details that were important to
16 waterproofing the structure, and other examples that are set
17 forth in the brief.

18 Now, in opposing JDavis's summary judgment motion
19 on the equitable indemnity claim, Concord and Cumberland has
20 the two-fold burden of demonstrating a genuine issue of
21 material fact regarding their lack of liability and then
22 also a genuine issue of material fact regarding JDavis's
23 liability. I would respectfully submit to the Court that
24 they can under no circumstances meet their burden on the
25 first element of establishing a genuine issue of material

1 fact regarding their lack of liability in this case.

2 They have argued that they were passively
3 negligent, if they were negligent at all, that the evidence
4 is before the Court. The testimony, the deposition
5 transcripts, the admissions of representatives of Concord
6 and Cumberland, all support that they had an active role in
7 this project, and that their active decisions directly
8 played a role in the issues that we are seeing with those
9 windows and other aspects of the project.

10 For one of the aspects of Concord and Cumberland's
11 claims, they essentially are coming to court -- coming to
12 court and complaining that they weren't told what they
13 already knew and, therefore, they had an obligation,
14 independent of JDavis, to correct based on their own
15 knowledge. And what I mean by that, Your Honor, is they
16 have come and complained that there were some construction
17 administration issues related to JDavis's services. But the
18 issues for which they complain about that are issues that
19 they either had already identified themselves and,
20 therefore, based on their obligations to the plaintiffs had
21 an obligation to correct at that time based on their own
22 knowledge, as well as aspects of the project that they could
23 have, and in exercising due diligence should have noted for
24 themselves.

25 I won't go back over what Mr Baughn testified,

1 that's clearly set forth on Page 25 of our memorandum,
2 regarding the active role of Concord and Cumberland, as is
3 the testimony of Mr. Lawson regarding the active involvement
4 and -- of Concord and Cumberland in the installation and
5 methodology process of the Weather Shield windows, but I
6 believe both their testimony is very insightful and
7 important to this issue of active negligence and would
8 encourage the Court to review their deposition testimony as
9 provided on those points.

10 One of the issues that we have that's unique in
11 this case is the task that was before Richard Andrews and
12 that he testified he understood he had an obligation to
13 undertake and to perform on behalf of Concord and
14 Cumberland. And that was to monitor the project on a more
15 regular basis than even the architect had contracted to do
16 that. He was on-site several times a week, if not every day
17 of the week, and he had a obligation -- he testified that he
18 had an obligation to review the pay applications that were
19 submitted for payment by Concord and Cumberland, and that in
20 doing so he understood his role to be performing essentially
21 the same functions of the architect. And in doing that, he
22 negligently failed every time he was on-site before, during,
23 and following the installation of several aspects of the
24 project to take note and advise Concord and Cumberland of
25 those aspects of the project for which they now complain.

1 This failure on his part was one of active, not
2 passive negligence. And any negligence on the part of
3 Mr. Andrews is directly imputed to Concord and Cumberland in
4 this case. It's also important to note, Your Honor -- this
5 is a little bit of a side point, but it's also important to
6 note that in this case, Concord and Cumberland seeks to
7 recover its attorney's fees from JDavis under its equitable
8 indemnity claim. But Concord and Cumberland was named in
9 the lawsuit by the plaintiffs for actions completely
10 independent of any alleged negligence, act, error or
11 omission on the part of JDavis so, to a certain extent, they
12 were going to be involved in this lawsuit no matter what and
13 certainly the extent of their attorney's fees would not
14 expand to include that acts of JDavis.

15 The claim for breach of contract and the claim for
16 negligence that have been pled by Concord and Cumberland, if
17 you look at the way those claims are pled, Your Honor, they
18 are actually pled as pseudo-equitable indemnity claims.
19 They are very interestingly worded in that they essentially
20 say, in the event the plaintiff's facts as alleged are
21 substantiated, JDavis must have breached their contract.
22 The same is alleged for negligence.

23 So they are essentially trying to get in through a
24 back door, if you will, through equitable indemnity their
25 claims for breach of contract and for negligence. They

1 haven't come forward with specific evidence in response to
2 this motion to show, JDavis you breached this specific
3 provision of your contract, JDavis, you did this wrong, and
4 that is fatal to their claim and is also fatal based on the
5 way that they pled their claims. They are not pled in a
6 fashion that would lead you to believe that those claims are
7 anything other than cloaked equitable indemnity claims, Your
8 Honor.

9 Having abandoned the negligent misrepresentation
10 claim, I will certainly not go through that as well, and
11 that will bring us then to Superior's claims under what's
12 called the Spearin doctrine. The Spearin doctrine, in
13 essence, provides that if a party undertakes to supply plans
14 and specifications for a contractor's use to follow in
15 constructing a project, that party impliedly warrants that
16 those plans and specifications are sufficient to construct
17 the project.

18 And that is set forth in the United States vs.
19 Spearin case. It is further incorporated in a couple of
20 other cases, the Hill vs. Polar Pantries case, and the
21 Beachwalk Villas Condo case, both of which were also in the
22 packet of cases provided yesterday.

23 THE COURT: Tell me the doctrine, what it says,
24 again.

25 MS. HOLBROOK: Yes, Your Honor. It says, when a

1 party undertakes to supply plans and specifications for use
2 by a contractor in constructing a project, that party
3 impliedly warrants that the plans and specifications
4 provided are sufficient for that purpose.

5 Now, in order for Superior to prevail on its claim
6 under the Spearin doctrine, it has to, first, establish that
7 it in fact followed JDavis's plans and specifications; and,
8 second, that those plans and specifications, if followed,
9 were not sufficient to build the project. Now, Superior did
10 not file a written memorandum of law in opposition to
11 JDavis's motion on this point and they have withdrawn their
12 motion for summary judgment. I understand they have
13 arguments they will be making in opposition, but they have
14 not provided any evidence in opposition of our motion in
15 advance of the hearing today.

16 THE COURT: Okay. They have not. Have they filed
17 anything in opposition?

18 MS. HOLBROOK: No, Your Honor, not to our motion.

19 THE COURT: To your motion?

20 MS. HOLBROOK: Yes.

21 THE COURT: So --

22 MS. HOLBROOK: So there was a motion for summary
23 judgment that Superior had pending against JDavis they never
24 briefed anything on that and that motion has been withdrawn
25 by them. We filed a motion for summary judgment against

1 both Concord and Cumberland and Superior. Concord and
2 Cumberland did file a brief in opposition to our motion.
3 Superior has filed nothing.

4 THE COURT: So what does that mean under Rule 56?

5 MS. HOLBROOK: Well, I think, Your Honor, that it
6 would certainly have been appreciated that they provide
7 something in advance. I do believe they have an obligation
8 to come forward under Rule 56 with supporting materials
9 showing that there is a scintilla of evidence such that they
10 survive summary judgment.

11 THE COURT: Well, isn't the provision of Rule 56
12 that a party against whom a motion for summary judgment has
13 been filed and supported by affidavits or otherwise may not
14 rest on their pleadings, but must file something in
15 response, and if they don't, the Court may grant summary
16 judgment, if appropriate?

17 MS. HOLBROOK: I believe that is an accurate
18 statement of the law, Your Honor.

19 THE COURT: What does it mean in the context of
20 your motion for summary judgment against Superior?

21 MS. HOLBROOK: My interpretation of that would be
22 that Your Honor is at full liberty in looking at the
23 pleadings, decide in my favor on summary judgment as to this
24 claim that they have brought against JDavis. That would be
25 my humble opinion.

1 In the event that that is not what Your Honor would
2 decide to do, I'm happy to go into the more specific
3 arguments as to shortcomings of those claims.

4 THE COURT: Well, I mean, are they objecting to the
5 claim -- the motion?

6 MS. HOLBROOK: I believe they have articulated to
7 me that they do object, but have provided nothing in support
8 of that by way of either a brief, supporting exhibits, or
9 anything along those lines. I anticipate all that will be
10 provided on that as of today will be oral argument against
11 my motion.

12 MR. MAJURE: I can confirm that, Your Honor.

13 THE COURT: All right.

14 MS. HOLBROOK: In any event, under that particular
15 claim in order for them to prevail, they must, first,
16 establish that -- all of JDavis's claims and, second, that
17 those claims were insufficient for the project. They are
18 going to have a problem with both problems, Your Honor,
19 because the record is replete with evidence supporting that
20 Superior, and/or its subcontractors for which it would bear
21 responsibility, either deviated from JDavis's plans and
22 specifications or outright failed to follow them.

23 One of the examples we briefly mentioned earlier
24 was the plans calling for nailing fins. We know, it's clear
25 from the record, that not all the windows were installed

1 with nailing fins. We also know and important to Concord
2 and Cumberland's -- the motions against Concord and
3 Cumberland is that Concord and Cumberland specifically
4 okayed that deviation from JDavis's plans and specifications
5 and that that deviation is directly relevant to
6 waterproofing issues. So that is an example where JDavis's
7 plans and specifications in a very material way were not
8 followed.

9 One of the -- by other example, Your Honor, at
10 least one of the subcontractors working on the project
11 testified that he wasn't even provided with JDavis's plans
12 and specifications, calling into clear question how he could
13 have possibly followed those plans and specifications? And
14 this is a subcontractor who was subcontracted with work
15 related to the windows.

16 There's also ample evidence that other aspects of
17 the plans -- that the plans were not followed and that the
18 as-built conditions of that project do not mirror the plans
19 that were provided. And without belaboring that point,
20 there are other additional examples cited in the brief and
21 supporting exhibits.

22 Now, the second aspect of the Spearin doctrine with
23 which Superior is going to have a hurdle, and quite frankly,
24 I don't believe they have enough to survive summary
25 judgment, is evidence that JDavis's plans were insufficient

1 to build that building. Richard Andrews, again, extensive
2 experience in construction industry and tasked with being
3 intimately familiar with those plans and specs, testified he
4 believed the final documents were adequate and proper to
5 install the windows.

6 Myles Glick who is an architect, testified that
7 JDavis's plans and specifications were adequate for
8 constructing the project, and to the extent that Superior,
9 and/or its subcontractors, in reviewing those plans had any
10 questions at all, they had to use the process of submitting
11 requests for information. To the extent they failed to do
12 that, they assumed design responsibility. And that is clear
13 under the law of South Carolina that that would fall on them
14 in that regard.

15 So, in short, neither -- in short, Superior and its
16 subcontractors failed to follow the plans, deviated from the
17 plans, and those plans were sufficient to build this
18 building, and I don't believe they have sufficient evidence
19 to survive summary judgment on that issue, Your Honor.

20 Thank you.

21 THE COURT: All right.

22 MR. BROWN: Your Honor.

23 THE COURT: Yes, sir.

24 MR. BROWN: Thank you, Your Honor. Certainly we
25 are dealing with the motion for summary judgment against us,

1 and it's clear we get all inferences in our failure, and if
2 the facts are conceded but the inferences from those facts
3 are disputed, summary judgment is to be denied. So the
4 question -- most of what we've talked about yesterday and
5 today has sort of been the trial of the case.

6 I think Ms. Holbrook has properly argued her
7 summary judgment, and the only question is whether there is
8 a complete lack of evidence or inference from evidence
9 sufficient to require a judgment as a matter of law. As I
10 go through this, I think it's going to be very clear that
11 there is not and that this case should proceed.

12 We submitted a book of exhibits with testimony from
13 a number of witnesses, including Mr. Glick, and principally
14 Jeff Davis who was the 30(b)(6) representative of JDavis,
15 Joe Murphy, who was the employee who did the construction
16 administration, and Doug Burns who is JDavis's expert. And
17 I don't know if you've had a chance to read our memorandum,
18 but we have quoted from Mr. Glick and extensive testimony
19 from Mr. Davis, Mr. Murphy, and Mr. Burns in which they
20 acknowledge significant and pervasive violations of the
21 standard of care, their own testimony. And I want to go
22 through and point that out to Your Honor. You can certainly
23 read it, but I want to --

24 THE COURT: Well, at least the one that's as most
25 -- more -- most concisely point out that there is an issue

1 of fact such as summary judgment should not be granted is
2 where?

3 MR. BROWN: Yes, sir.

4 THE COURT: Where -- what can you point to in what
5 you provided?

6 MR. BROWN: In the testimony, again, from Jeff
7 Davis and from Joe Murphy and Doug Burns is their expert.
8 Now, let's put it in context. If you will turn to Page 11,
9 I will deal with that first issue. And if Your Honor will
10 allow me to divert a minute, I want to go back to the legal
11 standard to put this testimony in context.

12 THE COURT: Okay.

13 MR. BROWN: The liabilities of Jeff Davis are
14 determined, first of all, by the contract which is Exhibit
15 1. And that contract at -- that basically says that the
16 architect, first of all, in terms of plans, shall provide
17 plans adequate to build the project competently. And
18 there's also a regulatory requirement that those plans be
19 done competently.

20 There's a second aspect of their responsibilities,
21 which are construction administrations and supervision of
22 the work. And in construction administration in 225 and
23 other provisions, in summary, they are to endeavor to guard
24 the owner against defects in the work. They have a
25 two-prong broad scale scope of responsibility; to provide

1 plans adequately drawn and detailed that allow a contractor
2 to build the building intended, and they have a
3 responsibility to be on-site to observe the work and report
4 defects and deficiencies. And a failure in either one of
5 those responsibilities, creates legal liability to the owner
6 for the defects and deficiencies that were built.

7 Now, I think we can say without question that this
8 building was built with numerous defects and deficiencies.
9 Bad windows, leaking windows, leaking stucco, brick, and the
10 exterior skin, everyone here has described that. There's no
11 issue of whether or not the work was done improperly. The
12 question is whether Jeff Davis has a contribution to that.
13 And I think clearly they do in regard to detailing and in
14 regard to plans and specifications.

15 There is a second source of liability for Jeff
16 Davis, and that is at Tab 3, which are the architectural
17 regulations. And both Mr. Davis and his expert, Mr. Burns,
18 agreed that these regulations govern their performance, they
19 were required to comply with them, and they cannot contract
20 away the responsibilities imposed upon them as a licensed
21 architect.

22 So in terms of the testimony, are we raising a
23 question of fact as to liability? I think it helps to
24 understand where the liability is and what the liability is
25 in looking at their testimony. The architectural

1 regulations, and the portions I will refer Your Honor to,
2 start four pages over with the section described, Full
3 Disclosure. Type is small. I should have had it printed in
4 larger, but this is what we have. Have you found that?

5 THE COURT: Which exhibit are you referring to,
6 again?

7 MR. BROWN: 3.

8 THE COURT: South Carolina legislature?

9 MR. BROWN: Yes, sir. These are the rules and
10 regulations, and Mr. Davis and Mr. Burns's expert both agree
11 they are governed by these standards and they have to comply
12 with these standards and these standards cannot be waived or
13 contracted away by the owner, not that there's any
14 contention that we did.

15 But I want to point out some of these because they
16 become directly relevant and pertinent to the question, is
17 there testimony to establish liability?

18 THE COURT: Well, I haven't gone through all of the
19 exhibits, but somewhere in your exhibits do you have an
20 affidavit of an expert saying that they deviated?

21 MR. BROWN: Yes. We have Mr. Glick who testified,
22 and we have Mr. Davis's own testimony, and Mr. Burns who was
23 Mr. Davis's own expert, his testimony.

24 THE COURT: All right.

25 MR. BROWN: If we look at Full Disclosure B4, on a

1 project where a building permit has been issued and the
2 sealing architect and the firm of record have not been
3 engaged to perform at least minimum construction
4 administration services, as defined in Section 5, the
5 sealing architect and firm must report to the permitting
6 authority and the building owner that he and the firm have
7 not been so engaged.

8 The first import of that is, it's not the
9 architect's privilege to say, well, the owner didn't ask me
10 to go enough. It is the architect's responsibility to
11 determine whether or not he is making adequate construction
12 administration visits; and if he's not, he is to advise the
13 owner because the owner doesn't know.

14 So in terms of construction administration, the
15 adequacy and number of visits has to be determined by the
16 architect, and if he's not making adequate visits, he has to
17 advise the owner. He cannot simply assume that the owner
18 didn't want him there and, therefore, that relieves him of
19 his responsibility.

20 Item 5 following, the minimum construction
21 administration services expected of the sealing architect
22 and the firm deem necessary to protect the health, safety,
23 and welfare of the public -- now, these are being sold to
24 unit owners so the public is involved -- shall be periodic,
25 which are repetitive, site observations of the construction.

1 progress and quality, review of contractor submittal data
2 and drawings and reporting to the building official and
3 owner any violation of codes or substantial deviations from
4 the contract documents.

5 So the architect has a regulatory obligation to
6 visit a sufficient number of times periodically and report
7 deviations from the contract documents of violation of code.
8 And he owes that duty to the owner as a privilege of having
9 his license. He cannot blame the owner for not having done
10 his job for him. On item 1, an architect -- Professional
11 Conduct. An architect of a firm shall not sign or seal
12 drawings, specification, reports or other professional work
13 for which the architect or firm does not have direct
14 professional knowledge and direct supervisory control;
15 however, a work prepared by the firm's consultants may be
16 sealed if the architect or firm has reviewed such portion,
17 has coordinated its preparation, and intends to be
18 responsible for its adequacy.

19 Mr. Davis agreed to that in his testimony, but once
20 he puts his seal on it, he and his company are responsible
21 for its adequacy, whether he had someone do it in-house or
22 whether he hired a consultant or he did none of that. His
23 seal buys the responsibility for everything in those
24 drawings whether he has done it correctly or not. He cannot
25 seal a drawing unless he intends to be responsible for its

1 adequacy.

2 Item 4, an architect or firm shall not act in any
3 manner so as to mislead a client or the general public or so
4 as to misrepresent its competence or qualifications. The
5 first testimony we are going to hear is that Jeff Davis did
6 not have the qualifications or the competence to handle this
7 project. And did not say so.

8 Number 3, under Competence, E3; An architect or
9 firm, together with those whom the architect or firm may
10 engage as consultants, shall undertake to perform
11 professional services only when qualified by education,
12 training, and experience in the specific technical areas
13 involved. Those are the highlights of it. But what we are
14 dealing with is the question of, first of all, are the
15 drawings and the details adequate for the purpose intended?
16 They are sealed and are a representation that they are.

17 And, second, there is a legal obligation imposed by
18 the State to make adequate construction administration to
19 seek out and note deviations from the contract documents and
20 advise the owner. And that responsibility was failed across
21 the board.

22 Now, going back to your question, if you go to my
23 brief, my memorandum -- well, let me add this, let me put it
24 in context a little further. The plaintiff in its claim
25 sought to recover for changing and rebuilding and installing

1 the windows, this was Exhibit 7 of the deposition, has asked
2 to rebuild the exterior walls, corrosion damage, to rebuild
3 the water management system, and to rebuild the exterior
4 wall cladding, brick, stucco, and plaster. So, basically,
5 the fundamental sins that the homeowner sued us for were
6 errors in the windows, brick, stucco, and the general water
7 management system.

8 In addition to that -- Item 13 in our brief
9 represents our damages. And in those damages are moneys --
10 in addition to the settlement, are moneys spent by the owner
11 before the suit was filed attempting to correct items having
12 to do with the windows, balconies, stucco and brick. The
13 owner expended \$539,000, which it has asked for against Jeff
14 Davis and Superior, dealing with those same components.
15 Unfortunately, neither Superior nor Jeff Davis stepped up to
16 take care of these problems. We got \$539,000 into their
17 correction, then the homeowner sued, and what we're asking
18 for are those damages relating to those aspects of the
19 exterior skin of the building together with the settlement.

20 So the question then arises, in addition to those
21 responsibilities, is there evidence that Jeff Davis has
22 contributed by bad design or poor construction
23 administration to those aspects of the claim? And the
24 testimony in the brief shows that in all four respects there
25 is testimony that Jeff Davis's design or construction

1 administration was deficient and contributed to the
2 existence of the bad work that we were sued over.

3 If I could go to -- now, this is a long-winded way
4 of getting around to your question, because I think in
5 context it will mean more to Your Honor. If you go to Page
6 15 of our memo -- I'm sorry, Page 13. Well, I'm -- it's
7 late, I'm getting careless. Page 11, let me ask you to go
8 to Page 11 of our memo. This is Jeff Davis who is the
9 30(b)(6), the registered architect, the person who sealed
10 the plans.

11 If I understood your testimony, you stated that at
12 the time of the contract and throughout the job you did not
13 have anyone in your employ who was competent or qualified to
14 deal with the flashings necessary at the stucco openings of
15 the windows?

16 His answer: I would say experience, not
17 competence. I mean, we relied on outside expertise.

18 The question on down: If you did not have that
19 expertise in your employ, the regulations allow you to
20 engage a consultant to provide that expertise? Correct.
21 And if I understand your testimony, you did not have anybody
22 hired by your company at the commencement of this project
23 and throughout the project who had the expertise to
24 adequately deal with the flashings needed in the stucco
25 opening windows; is that true?

1 I would say experience, not competence. I mean, we
2 relied on outside expertise. Question: You can certainly
3 hire consultants, can't you, to fill in? Answer: Correct.

4 Next page. Question: If you did not have the
5 expertise in your employ -- and regulations? Correct. Now,
6 here's the question: If I understand your testimony, you
7 did not have anybody hired by your company at the
8 commencement of this project and throughout the project who
9 had the expertise to adequately deal with the flashings?
10 Witness answered: Not in our employ.

11 Mr. Davis admitted, that contrary to the
12 requirement of the regulations, he didn't have anybody who
13 knew how to deal with the flashings in the stucco wall. If
14 you look at the bottom of 12, he admits he never hired a
15 consultant. 13 -- Page 13, Jeff Davis -- Mr. Davis, I don't
16 mean to cut you off. There's a question asked. Did you
17 have anybody in your employment? Answer: Not in our
18 employment, no. Question: You did not have anybody in your
19 employment who had the expertise to competently
20 professionally deal with the flashings at the stucco
21 windows? Answer: That's correct.

22 He admits he never hired a consultant and he admits
23 at the beginning and throughout the job he never had anybody
24 competent to even say how to handle these windows. And that
25 is a direct violation of the regulations in the contract.

1 On Page 14, we're talking about the periodic visits
2 required sufficient to identify what was going on. Do you
3 believe when you made the contract that you were going to
4 make enough periodic visits to the site to actually
5 accomplish that obligation? Answer: I believed it, yeah.
6 I believed it when we wrote the contract. And if it took
7 more than 15 trips to carry out the obligation, you would
8 expect to perform those additional trips? That's correct.
9 Did you believe in hindsight that you made enough trips to
10 the site for a competent trained person to have carried out
11 that obligation to the owner? I would say given the
12 construction progress that took place, we would have to camp
13 out. So that would be no.

14 I asked him, did you ever inform the owner that you
15 were not making enough trips? The answer is, no. I asked
16 him if he ever advised the building official? The answer
17 is, no.

18 That is a direct violation of the regulations, to
19 know you're making inadequate trips to determine if work is
20 progressing and not advise the owner.

21 He doesn't have anybody competent in-house to deal
22 with the stucco and he's not making enough trips. He admits
23 that.

24 Now, the question came up about the owner and
25 Mr. Andrews, and somehow they are blaming Mr. Andrews and

1 would like to imply that he's been negligent. The first
2 question is, to be negligent you have to have a duty. And
3 there is no duty from the owner to a licensed professional
4 to assist him in carrying out his responsibilities. We have
5 no duty to Jeff Davis to save him from his own failures.

6 If you go back to the South Carolina Electric & Gas
7 case, in which the Court addressed the issue of Electric &
8 Gas not catching it, we see no evidence in this case,
9 however, of any other negligence on the part of the
10 plaintiff. The breach of a legal duty is essential to
11 negligence and such legal duty is that which the law
12 requires to be done or forborne with respect to the
13 particular individual. Without a violation of such a
14 illegal duty there is no negligence.

15 The Court there held that the owner had no legal
16 duty to the contractor to save him from his own errors. And
17 there can be no negligence on the part of Richard Duty that
18 -- or Richard Andrews that JDavis can take advantage of,
19 because as a professional with a license operating under
20 regulations, there is no duty to tell JDavis how to do the
21 job.

22 Now, they went on to testify that Mr. Andrews
23 didn't matter. Despite Ms. Holbrook's very good argument,
24 the testimony states this: And this is from Doug Burns who
25 is their expert and a licensed architect. Page 22 of our

1 memorandum. Despite what the contractor may have done, the
2 contract gives no right to Jeff Davis to presume that the
3 contractor is going to discover and correct his errors,
4 isn't that true? Answer: That is true.

5 Question: The owner having a project manager
6 doesn't alleviate the architect from his contractual
7 obligations, right? No, it doesn't. It doesn't alleviate
8 you. Question: I understand, but they still pay you for CA
9 and part of your -- part of you still have a CA obligation,
10 you have obligations? And one of those owner's obligations
11 is to make sure the work is done, that's the design intend.

12 Now the question of Joe Murphy, whether -- Joe
13 Murphy who is doing the construction administration. You
14 mentioned something about Richard Andrews being on the job
15 monitoring something. If you have made -- if -- but you
16 have made several references to Richard Andrews; do you
17 recall that? Yes. Question: But I'm trying to understand
18 the significance of Richard Andrews. Whether he's on the
19 job or not, you still have the same contractual
20 responsibility to the owner, don't you? Answer: Of course
21 we do. And you didn't rely on him to do your job for you?
22 No, we did not. Question: And whether he was there or not
23 is irrelevant to whether you carried out your
24 responsibilities properly? Answer: Yes, sir.

25 Now, the testimony by JDavis is that Richard

1 Andrews had no impact legally or practically on whether or
2 not they were doing their job properly. Ms. Holbrook makes
3 a good argument, but legally and under the facts in the
4 testimony, Mr. Andrews is a nonevent for the purposes of
5 assessing their liability under the contract or the
6 regulations.

7 The question of Joe Murphy: You didn't need
8 somebody else to tell you whether or not JDavis's contract
9 documents were complied with in the field? No.

10 They talked about Sutton-Kennerly. Now,
11 Sutton-Kennerly's role was not as advertised. He was hired
12 as an advisor who provided advice to JDavis to make
13 suggestions that they could use or not use as they deemed
14 fit. And that was agreed to. In fact, what --
15 Sutton-Kennerly wrote a letter that JDavis ignored and
16 didn't follow, and if you look at the testimony from
17 Mr. Glick, you will see that all of those suggestions should
18 have been followed.

19 But the question of JDavis by Sutton-Kennerly can
20 be handled with JDavis's testimony. This is on Page 24 of
21 the memo. But with respect to Sutton-Kennerly, there's been
22 a lot of discussion over many days about their role. I
23 mean, perhaps providing some drawings or some details or
24 some recommendation, but in the end of the day, yes, it is
25 still JDavis's responsibility, correct? That's correct.

1 And it's not Sutton-Kennerly's responsibility with respect
2 to Concord and Cumberland, correct? Answer: That's
3 correct.

4 Mr. Davis has agreed that Sutton-Kennerly's role
5 did not affect them and they had no responsibility for their
6 work and that Mr. Andrews was not an entity. So under the
7 testimony, there is no inference of fact that the owner did
8 anything contributory to JDavis's professional obligation.
9 In fact, the testimony is conclusive that Richard Andrews
10 and Sutton-Kennerly were nonentities and JDavis's liability
11 stands on JDavis's performance and nothing else.

12 Now, let's run through some of the testimony
13 quoted. The balconies: Mr. Glick testified, and the
14 question was, the balconies in the absence of a slope. So
15 it could be remediated to make the slope, yes? Answer:
16 And possibly use the tile again. We had to change some
17 details because the architect had a detail, that even if it
18 was sloped 2 percent, you couldn't get the water out. Why
19 is that? They blocked it up, they blocked up where the
20 sewer system drains. Question: All right. Then that was a
21 result of the improper design of that roll-off there?
22 Answer: Absolutely. It's on Page 132.

23 So there is testimony from Mr. Glick that the
24 balconies were improperly designed and they would have to be
25 remediated as a result. There's direct testimony of bad

1 design and improper documents in relation to the balconies
2 by Mr. Glick. So there is competing evidence on that.

3 If you look at Mr. Glick in terms of the windows --
4 I can give you one example on Page 32 of the memo. The
5 question then becomes, were the windows designed and was
6 there any contribution by Jeff Davis from Mr. Glick?
7 Mr. Glick testified to the following. Now, Glick -- you can
8 find different answers, but you have to put it in context.

9 Question: Was there a breach of the standard of
10 care on the part of the architect, in your opinion, to
11 detail or approve details calling for the use of a pan with
12 respect to the window installation on this project? Answer:
13 For the use of a pan per se, no, but I think of how they
14 used the pan and the details, they are just bad details.
15 That as an issue of up to itself -- I mean, not up to itself
16 but by itself is not a violation of the standard of care,
17 but when you put it in context of just the water intrusion
18 characteristics, that represents a violation of the standard
19 of care because the details are just bad.

20 Now, let's take the windows. There is testimony to
21 establish a breach of the standard of care in expressed
22 words from Mr. Glick regarding the windows in terms of bad
23 detailing.

24 If we could go then to the brick walls, the masonry
25 walls, those are principally construction administration

1 problems. Now, initially, the question becomes, what is the
2 role in construction administration? Mr. Burns clearly
3 testified that the architect has an obligation not just to
4 go to the site, but to affirmatively look for these
5 problems.

6 This is on Page 31 of the memo quoting Mr. Burns'
7 testimony. Yes, and when we -- we have deposed Joe -- that
8 is Joe Murphy. So, I mean, I think I knew what he did or
9 didn't see, but my point is he should have been looking for
10 those elements, like you expect your CA guys to do, correct?

11 Answer: I think Joe should have looked for some of these.

12 Mr. Burns: I think he visited the site no less than 22
13 times based on the field reports; is that fair? That makes
14 sense. And I think you have testified that you would expect
15 your construction administration guy to at least look for
16 the elements that make a drainable system drainable to make
17 sure they are present, correct? That was your testimony,
18 was it not? Yes, I would have expected my folks at least to
19 have raised up and looked. You just can't go there and
20 close your eyes, correct? Answer: Yes. In terms of
21 standard of care, is that something that an architect should
22 do is get on a cherry picker or get on scaffolding and look
23 at the work to the best of his ability and ensure that it's
24 in compliance with the contract documents? Answer: He
25 should.

1 So in running through the testimony, we established
2 they have a CA, construction administration, responsibility
3 by contract and by regulation, and the testimony on behalf
4 of Jeff Davis is that includes an obligation to look as well
5 as be there.

6 Question then about the stucco in the brick walls;
7 it is very clearly established that both of those systems
8 were improperly built and omitted items that were necessary
9 to make it a drainable system. This is of Jeff Davis on
10 Page 15 of the memo.

11 Question: Documents call for weeps and drainable
12 trim at the sill of the windows, correct? Answer: Correct.
13 You would expect to have drainable trim at the foundation
14 level and stucco, correct? Answer: Yes. In the absence of
15 those accessories, then you have a system that is totally
16 inadequate, correct? Answer: I would -- I would agree with
17 that. Yes, I would agree with that. The architect designed
18 and features to allow the walls to drain, they were not put
19 in, the architect agrees the wall is totally inadequate as a
20 result.

21 Now, the question is, in construction
22 administration, is there a question of fact as there being a
23 standard of care for Mr. Murphy never noting that these
24 essential elements were not being built into the wall.
25 Question: Doesn't that tell us conclusively, Mr. Davis,

1 that if construction administration had looked at only one
2 sill, only one head, only one foundation, they would have
3 noted the absence of these necessary parts? Answer: If
4 they had, yes. And for the record, as far as the record
5 shows, no one ever pointed out the absence of these
6 accessories, correct? That's correct. And the work fully
7 completed was not a drainable system? Yes. I read the
8 report.

9 And other testimony talking about the brick walls;
10 the brick walls were examined and there is testimony that
11 Mr. Davis agreed the brick walls had deficiencies, and never
12 during construction administration did they ever point that
13 out. The question was asked, now, let's go back to the
14 documentation. Every pay application that Jeff Davis
15 signed, they certified to the owner that the work was in
16 compliance with the contract documents. And their
17 obligation was to certify that the work when fully completed
18 would be in compliance with the contract documents.

19 The question was this, and this is on Page 32: If
20 you are going to report to the owner that the work when
21 fully completed will result in a drainable stucco system,
22 then it is mandatory to determine if the drainable draining
23 accessories are put in place? Answer: Yes, that's true.

24 They admit not once during the job did they ever
25 note that weeps, drains, flashings, weep screeds, drain

1 features were not being put in. And the testimony is
2 replete with their failure to do so, even though they
3 acknowledge looking at those items was mandatory to make the
4 certifications that they were required to make and did make.

5 They certified to the owner that substantial
6 completion and in -- in the pay applications that the work
7 was complete and met the contract documents and during pay
8 applications when complete would meet contract documents.
9 They agreed to make -- that to make those certifications it
10 was mandatory to determine if those features were in place,
11 and they admit they never noted their complete and wholesale
12 omission. And that is a breach of the standard of care.
13 Mr. Davis admits they should have looked.

14 Your Honor, I can go on, but it's repetitive. But
15 there is clearly evidence of a breach of the standard of
16 care as to the balconies, the windows, the detailing, the
17 construction administration. Mr. Davis admitted he did not
18 have anybody competent within his hire to even know how to
19 deal with the stucco flashings; he never hired anybody with
20 competence to do that; he never told the owner he did not
21 have the competence; he never told the owner he was not
22 making enough visits; and he totally omitted the observation
23 of absolutely essential aspects of the building and admitted
24 it was mandatory that they look for them.

25 Now, I can't imagine how that does not raise a

1 question of fact, at least in terms of the right to go
2 forward and have Your Honor hear the complete testimony and
3 determine whether or not Ms. Holbrook has an excuse for all
4 of the aspects of Mr. Davis's testimony. But I think -- I
5 hope I have pointed out sufficient testimony on each of the
6 elements of the problem to show that there is a trial at
7 issue.

8 THE COURT: All right.

9 MR. BROWN: Again -- I want to emphasize again, we
10 can't be negligent and I can't be negligent to the doctor.
11 Yeah, I participated in the surgery and I was there during
12 the surgery, but I can't have been negligent in not telling
13 him how to do it. Mr. Andrews may have been there, they
14 agree his presence was immaterial, but Mr. Andrews can't
15 have breached a duty to Jeff Davis such that he excuses a
16 professional negligence.

17 THE COURT: All right. Thank you, sir.

18 Mr. Majure.

19 MR. MAJURE: Your Honor, I will be very brief. The
20 reason that JDavis cannot prevail against Superior on
21 summary judgment as to its Spearin doctrine claims is
22 precisely the reason for which we had to withdraw our own
23 motion for summary judgment which is the issues of fact that
24 preclude summary judgment. If, however, I will -- I am
25 willing to state if JDavis's motion is confined solely to

1 claims related to the windows, we would admit that they are
2 entitled to summary judgment as to that specific aspect of
3 the case; however, their design, as Mr. Brown has
4 exhaustively described, touches every single aspect of the
5 building envelope design. And all I need to do is point out
6 just one aspect of the design that was shown to be
7 constructed in conformance with the plans but was deemed to
8 be negligence, and Mr. Brown has already identified that in
9 his presentation at Page 32 of his memorandum. Thank you.

10 THE COURT: All right. Yes, ma'am

11 MS. HOLBROOK: Briefly, Your Honor. I would just
12 point out in -- two points of clarification. Mr. Brown
13 pointed out that the building was built deficiently. And I
14 would propose to Your Honor that the fact that the building
15 was built deficiently does not translate into details that
16 are violative of the standard of care.

17 The standard of care does not require perfection
18 for those details, and Myles Glick testified clearly that
19 the plans and details provided by JDavis overall were
20 sufficient to build that building, and so we are just
21 bringing that to Your Honor's attention.

22 With respect to the issue of the duty created by or
23 owed to JDavis as it pertains to Mr. Andrews, the argument
24 isn't that Mr. Andrews owed a duty to JDavis. The argument
25 is that Mr. Andrews on behalf of Concord and Cumberland

1 undertook an obligation that created a duty that is relevant
2 to the equitable indemnity claim, and that their active
3 negligence in failing to perform the obligation they
4 undertook precludes them from coming to this court and
5 seeking equitable indemnity. And it is that claim that we
6 are making those arguments with respect to Mr. Andrews, Your
7 Honor. Thank you.

8 THE COURT: All right.

9 MR. BROWN: One sentence, Your Honor; that is a
10 matter for the trial. That's a question of fact whether
11 there was anything that was done that joined in under the
12 definition of cases.

13 THE COURT: All right. What else do we have today?

14 MS. HOLBROOK: I believe that's the conclusion,
15 Your Honor.

16 MR. MAJURE: Run, Your Honor.

17 THE COURT: Very good.

18 MR. MAJURE: Your Honor, just as housekeeping
19 though, is there a specific deadline by which the Court
20 desires the parties to submit their proposed orders?

21 THE COURT: How much time do you all need?

22 MR. MAJURE: Your Honor, I have to admit I think I
23 would like at least two weeks, at least.

24 MR. BROWN: Your Honor, if things don't go bad on
25 me, if not tonight, tomorrow I'm putting my boat on the

1 beach for a week. So I would like to think -- the orders
2 you've asked for, my version is going to be very simple, but
3 I think if I could have the two weeks, it would help.

4 THE COURT: All right.

5 MR. BROWN: I certainly want to try to give them to
6 you ahead of that, but, again, my version of these orders
7 are going to be very simple.

8 MS. VARNADO: I could have it within two weeks.

9 MR. NISTAD: Within two weeks.

10 MS. HOLBROOK: That would be fine, Your Honor.

11 THE COURT: Well, you have two weeks if you have a
12 cover letter along with it explaining why I should sign it,
13 and then copy the opposing side and opposing side will have
14 one week to respond.

15 MS. VARNADO: I don't have a calendar. Can we
16 actually set the dates, Your Honor?

17 MR. MAJURE: Looking at the calendar I have on my
18 phone, Your Honor, it looks like two weeks hence is August
19 12th, if we're going to count today. If we're not going to
20 count today, it would be Thursday, the 13th -- excuse me,
21 Wednesday, the 13th.

22 THE COURT: We won't count today.

23 MR. MAJURE: So Wednesday, August 13th.

24 MS. VARNADO: And then the following week, Your
25 Honor, for responses?

1 THE COURT: Let's just go with Friday to Friday,
2 15th and the 22nd. Is that right?

3 MR. BROWN: Yes, that's correct.

4 THE COURT: Now, concerning the motions that we've
5 settled, that someone joined orders on, those will be
6 separate from the otherwise proposed orders, right?

7 MS. VARNADO: Yes, Your Honor.

8 MR. MAJURE: Yes, Your Honor.

9 THE COURT: Okay. But serve opposing sides with
10 all of them, so in any event there are any problems, they
11 can be brought to my attention.

12 MS. VARNADO: Absolutely.

13 THE COURT: Okay, very good. Good to see y'all.

14 MR. MAJURE: Thank you.

15 MR. BROWN: Thank you for your patience.

16 THE COURT: Sure, absolutely.

17 (Whereupon, the proceedings are adjourned.)
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

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

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter, and Notary Public for the State
of South Carolina at Large, do hereby certify that the
foregoing transcript is a true, accurate and complete
Transcript of Record of the proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.

Witness my hand, I have hereunto affixed my official
seal this 8th day of August, 2014, at Charleston, Charleston
County, South Carolina.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter
My Commission expires:
September 14, 2016

In The Matter Of:

**CONCORD AND CUMBERLAND HORIZONTAL PROPERTY
REGIME, et al.**

v.

CONCORD & CUMBERLAND, LLC, et al.

RICHARD ANDREWS - Vol. 2

September 10, 2013

MERRILL LAD

1325 G Street NW, Suite 200, Washington, DC
Phone 800 292 4789 Fax 202 861 3425

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON NINTH JUDICIAL DISTRICT

CONCORD AND CUMBERLAND	)	CIVIL ACTION NOS:
HORIZONTAL PROPERTY REGIME; et al.,	)	2010-CP-2271
	)	
Plaintiffs,	)	Volume II
vs.	)	
	)	
CONCORD & CUMBERLAND, LLC;	)	
et al.,	)	
Defendants.	)	
	)	

See Page 2 for complete caption

DEPOSITION OF RICHARD ANDREWS
Tuesday, September 10, 2013, 10:30 a.m.
Columbia, South Carolina

Court Reporter: Nancy J. Martin, California and
Delaware CSR, RPR

Merrill LAD

800-292-4789

www.merrillcorp.com/law

6b2b300c-5c8b-41e0-a82b-09eb540bc2bb

1 and balcony waterproofing might be interlaced.

2 MS. VARNADO: All right. I'll pass it along.

3 Go ahead.

4

5

EXAMINATION

6 BY MR. NISTAD:

7 Q. Mr. Andrews, my name is Gunnar Nistad. I
8 represent The Muhler Company.

9 A. Good afternoon.

10 Q. This might be a little disjointed and a
11 little slow because I'm trying to fill in holes.
12 Hopefully, it won't take too long.

13 Did Superior do anything right?

14 MR. MAJURE: Objection.

15 THE WITNESS: They did very little right, in
16 my experience, in construction.

17 BY MR. NISTAD:

18 Q. Let's start with the foundation. Well, let
19 me ask this first: Was there any -- did you ever see
20 a document where it was one of those scheduling
21 documents with the little bars that tell you when
22 things are going to be complete?

23 A. Like a Primavera schedule or a computerized
24 generated schedule?

25 Q. Yeah.

1 A. I do not recall seeing a computer generated
2 schedule for the project.

3 Q. Who came up with the total time for the
4 contract?

5 A. I do not know exactly who came up with that.
6 I would assume that Wally Baughn communicated that to
7 Bob and Leslie and that it got put into the contract.

8 Q. Okay. Typically, that would come from the
9 general contractor?

10 A. Typically, it's a responsibility of the
11 general contractor to explain how long it's going to
12 take to build a building.

13 Q. Do you think eight months was enough time to
14 finish this project?

15 A. I have never sat down and scheduled the job
16 out myself.

17 Q. Okay.

18 A. So I really don't have a huge opinion.
19 Regardless of that, it is a very complex building. A
20 lot of exterior finishes, eight months would be -- as
21 a general blush, would be an aggressive schedule.

22 Q. Okay. When do you think the foundations
23 should have been completed?

24 A. You mean just the pile driving itself or the
25 pile caps and the grade beams and --

1 Q. Pile caps, grade beams.

2 A. To start the scheduling process, I would
3 first want to understand how long the pile driving was
4 going to take to get out of a certain area. And being
5 that it's such a small site, and the pile drivers, you
6 would want to look for them to see how many
7 production -- how many production piles they would
8 drive per day. Then you could pretty quickly do the
9 math and say, "Well, they're going to need so many
10 workdays to be on site," and maybe after half of those
11 workdays you could start pile caps and grade beams
12 behind them in an orderly fashion, following along.

13 In this case just a -- again, a guess might
14 be that you're a total of 2-1/2 months to the finish
15 of grade beams and pile caps from the start of the
16 job.

17 Q. And from the start of the job, how quickly do
18 you think you should have been able to start the
19 framing?

20 A. And by "framing," you mean the work above the
21 garage level?

22 Q. Yeah.

23 A. I would say, just in my guess, you might be
24 at the fourth month. 3-1/2 to 4 months, depending,
25 that you would actually do the -- start the metal stud

1 framing.

2 Q. Did they start the metal stud framing at four
3 months?

4 A. They were already four months behind that
5 schedule.

6 Q. Yeah.

7 A. Four to five months.

8 Q. So the total delay was a year; is that right?

9 A. They delivered a building a year late.

10 Q. So by the time they started framing, they
11 were already four months late?

12 A. Easily.

13 Q. I'm looking at one of these OAC meeting
14 minutes. I got 7- -- well, it's the one dated 7-25 in
15 front of me right now.

16 A. Exhibit 733?

17 Q. Yes. So as of 7-25 they're telling you the
18 completion date is August 1; correct?

19 A. They're saying that --

20 Q. As of 6-29, they're saying the completion
21 date is going to be August 1?

22 A. Right.

23 Q. They didn't meet that?

24 A. That's correct.

25 Q. Superior, I mean.

1 A. That's right. And on 7-25 they presented a
2 new schedule that said they would be complete and --
3 within the next five weeks. So they extended it from
4 August 1 to August 31.

5 Q. And they didn't finish by August 31 either;
6 correct?

7 A. No.

8 Q. Just looking at the headings on this, were
9 there problems with brick that delayed closing?

10 A. There was water intrusion problems in a
11 variety of places that was one of the main issues of
12 building completion.

13 Q. When I'm asking these questions, what I'm
14 trying to say is were the problems with the brick that
15 were unrelated to the windows that caused delay in
16 this project?

17 A. I'm not sure that there was -- I'm not sure
18 how the brick was able to progress and how it impacted
19 the completion of the building.

20 Q. Okay. But as of 7-25 the windows are all
21 in -- correct? -- except for four, three?

22 A. Except for three or four.

23 Q. How about with the stone? Are there issues
24 with the stone that are delaying the project that are
25 unrelated to the windows?

1 A. There was issues with the stone unrelated to
2 the windows, yes.

3 Q. Was there issues with the stucco that was
4 unrelated to the windows?

5 A. Just having enough men, if I saw from other
6 notes here that the production of the stucco had
7 gotten a slow -- it started late and it was going to
8 finish late.

9 Q. Okay. How about the wrought iron? Any
10 delays because of the wrought iron?

11 A. The wrought iron was put in when they did get
12 the steps built, as I recall.

13 Q. Okay. How about handrails?

14 A. Handrails, I mean it's certainly behind
15 schedule when they were done, but they were relying
16 upon several other things to be complete ahead of the
17 handrail installation.

18 Q. So some of these things are small. They have
19 to wait on the completion of something before --

20 A. They're tied to other activities. There's a
21 lot of activities that are tied to predecessors to
22 previous activities.

23 Q. How about the ceramic tile balconies?

24 A. What's your question about them?

25 Q. Was there any delays unrelated to the windows

1 caused by the ceramic tile balconies?

2 A. Yes. The slope of the balconies was not
3 accurate and needed to be corrected, and therefore,
4 they had to fix that before they could put the ceramic
5 tile down.

6 Q. How about with the drywall and insulation?
7 Any delays unrelated to windows?

8 A. Only that the leaking -- no, I'm not aware of
9 any delays associated with drywall and insulation
10 other than it was just a very slow process of getting
11 it done when -- until the right sub and/or work
12 mechanics were on site to get it going.

13 Q. How about the HVAC system? Any delays
14 unrelated to windows that were caused by the HVAC
15 system?

16 A. The HVAC system had delays because of payment
17 issues and --

18 Q. Superior not paying their HVAC subcontractor?

19 A. Not paying their HVAC sub, getting the HVAC
20 subcontract issue extremely late in the game, getting
21 the duct work to dodge around other -- made the duct
22 work installation more difficult than it should have
23 been. Those are definitely delays there not
24 attributable to windows.

25 Q. When you said there's a payment issue with

1 the HVAC subcontractor, is it correct that Superior --
2 I mean that Concord and Cumberland, LLC had paid
3 Superior for the HVAC work, but Superior then didn't
4 pass that payment on to the subcontractor for the work
5 they performed?

6 A. That's our understanding, my understanding.

7 Q. And so the HVAC contractor refused to finish
8 the work until they got paid; is that correct?

9 A. That would be accurate, as best I understand.

10 Q. When you talk about the duct work, that's the
11 failure of Superior to properly coordinate the work of
12 different subcontractors; correct?

13 A. Superior was extremely late in their ordering
14 and procuring goods and services of the different
15 parts and pieces of the project. That in itself
16 created its own delay. Not having what we call your
17 buyout done in a timely manner and the buyout was
18 slow, it caused products to get to the job in an
19 unorganized fashion. The preplanning of the project
20 was poor because it didn't have this lay-down area
21 that we've talked about.

22 The overall staffing of the job was
23 understaffed given the type of project that it is and
24 the amount of paperwork and/or detailing required. I
25 believe they could have used some more qualified

1 individuals on site.

2 Q. Okay. The buyout process you talk about, is
3 that something that's done by these -- the
4 superintendent on site? Project manager? Who would
5 do that?

6 A. Generally, the companies that I've been with,
7 the project manager does the buyout of almost
8 95 percent of the job. They might leave a few things
9 to the superintendent, but not too many. In every
10 construction company I've been with, there's usually a
11 buyout time frame that the project managers understood
12 to be normal and expected, and it's in the frame of 90
13 to 120 days. It's like a target to have the job
14 bought out or contracts in place, any bonds that you
15 wanted from subs in place, insurance certificates, all
16 the normal paperwork items so that the rest of the job
17 can then function because that paperwork effort is
18 done.

19 Q. So that's Superior's responsibility to
20 complete that paperwork?

21 A. Absolutely.

22 Q. And is it -- from your observations, did
23 Superior properly complete that aspect of their work?

24 A. Well, one example I saw in the exhibit with
25 the stucco change order, to buy the stucco for the

1 outside of the building, they were dramatically late
2 on finishing their buyout..

3 Q. How late?

4 A. Up to a year. I mean I don't know the dates
5 of that stucco change order, but it was...

6 Q. Was the HVAC contractor on site late, just
7 from the very first day?

8 A. They were late from the get-go.

9 Q. At that point it's not even an issue of
10 getting paid. They're just not coordinate -- the
11 general contractor didn't coordinate their arrival on
12 site at the right time?

13 A. That's correct. There was something about --
14 if I remember right, there was penetrations from floor
15 to floor that the duct work was supposed to go through
16 that had to be redone, reworked. It didn't line up.
17 I don't know.

18 Q. Okay. Did the late arrival of the HVAC
19 contractor on site prevent other subcontractors from
20 starting their work, like electrical or roof or
21 plumbing or --

22 A. That's the whole problem is I think they
23 started the other guys before they should have started
24 the HVAC sub, and so he was, therefore -- you'll
25 probably find some photographs of duct work that he's

1 having to dodge around the sprinkler contractor or
2 around the plumbing drain lines. And it may be that
3 the plumber is supposed to go first, but there was a
4 huge lack of coordination of where these systems were
5 going to pass each other vertically, horizontally, in
6 a three-dimensional level.

7 Q. There's some discussion of stairs being
8 ordered late; is that correct?

9 A. That's correct.

10 Q. How late were those ordered?

11 A. I would say, based upon this document --

12 Q. Which document are you referring to?

13 A. Hold on. I'm going to find you a number here
14 in a second.

15 Q. Sure.

16 (Pause in proceedings.)

17 THE WITNESS: Based upon Exhibit 729, I believe
18 it is, Document 729 says the PO was issued in
19 February, which is what Superior must have said and --
20 when it was supposed to be actually installed back in
21 January, February of 2007 is when I'm going to say
22 that they ordered it 12 months into the project or
23 11 months into the project, if you discount
24 February 28. So the steel stairs, miscellaneous steel
25 should have been one of the first things ordered for

1 the project.

2 BY MR. NISTAD:

3 Q. So they're up to a year late ordering that?

4 A. Potentially, yes.

5 Q. So you had temporary stairs?

6 A. They had scaffolded stairs.

7 Q. Do you have a picture of that?

8 A. Yes. They were exterior temporary -- you can
9 rent them, and it's a stair tower that they put into
10 those insets of the building.

11 Q. Okay. And did those temporary scaffolding
12 stairwells go all the way up to the top floor?

13 A. I believe it did. At least to the -- through
14 the third floor. It may have been -- let's see if I
15 can find one.

16 (The witness reviewed the documents.)

17 (Pause in proceedings.)

18 BY MR. NISTAD:

19 Q. While you're looking at the stairs, were they
20 installed as early as January?

21 A. They easily could have been. The block work
22 was done for quite a while.

23 (Pause in proceedings.)

24 THE WITNESS: Here's a piece of a view of
25 those stairs. I think I may be in the picture.

1 BY MR. NISTAD:

2 Q. Okay.

3 A. It's a scaffolding.

4 Q. It's Bates stamped CCLLC 0002332. Did I read
5 that correctly, the number that's in the right --

6 A. -2332, yes, it appears you did.

7 Q. Were those stairs sufficient for the work
8 that had to be completed at the building?

9 A. I don't have an opinion on that.

10 (Pause in proceedings.)

11 BY MR. NISTAD:

12 Q. Okay. Is there a number on that one?

13 MR. BROWN: Read it off.

14 THE WITNESS: CCLLC 0002333.

15 BY MR. NISTAD:

16 Q. That's good. You wouldn't say that all the
17 delays on a project are attributed to the windows
18 only?

19 A. I would not say that all the delays on the
20 project are attributable to the windows only, no.

21 Q. Is it fair to say that, if anything, the
22 windows were a small part of a much larger, systematic
23 problem with the management of the project?

24 MR. BELCHER: Object to the form.

25 THE WITNESS: I would say that the windows

1 were a significant portion of the complexity of the
2 project and the delay of the project but not the
3 entire delay and not probably the major part of the
4 delay. I don't know what percentage I would assign
5 that, but -- without a forensic schedule being
6 developed.

7 BY MR. NISTAD:

8 Q. But even if there's no problems with the
9 windows, there was going to be major delays of this
10 project?

11 A. They had a four- to five-month wrinkle going
12 on in the schedule before the windows even entered the
13 picture.

14 Q. You're halfway through the whole delay even
15 before windows get involved?

16 A. That appears to be the case.

17 Q. Okay. And from these exhibits we just went
18 through a little bit ago with these June, July, August
19 OAC meetings, there's still lots of delays after the
20 windows are in?

21 A. There's a lot of work to go on. I don't know
22 that items were -- what was causing any other delays
23 from this moment forward. You know, had all the delay
24 already happened, again, I don't know without a really
25 good, thorough forensic schedule to analyze.

1 Q. Do you think the general contractor should
2 have had a scheduling plan?

3 A. Absolutely.

4 Q. Okay. Do you think they had one?

5 A. I don't think they did.

6 Q. Okay. Have you served as a project manager
7 for a project similar to Concord and Cumberland?

8 A. Not as project manager. I have -- I spent
9 11 years being a project manager on more retail and
10 office-type buildings. I did a lot of
11 pre-construction managing for very similar projects
12 which would be -- a very similar one would be
13 Renaissance on Charleston Harbor from a brick, stucco
14 detailing, two different framing systems involved in
15 Concord versus Renaissance, but from the actual
16 project management, I've only been on the peripheral,
17 watching the general contractor operations do that
18 function of project management.

19 Q. From what you saw, the preproject done by
20 Superior, did you think what they did matched what you
21 would have done?

22 A. It did not match what I would have done
23 and/or usually you would want several folks involved
24 in the preproject planning. I don't know what they
25 did, but what I have experienced is a team of the

1 project management, the superintendent, the
2 pre-construction manager, meeting as a team, even
3 operations manager, maybe at the division management
4 level, meeting as a team to agree on how this project
5 was going to be built and what the appropriate
6 schedule was and who the right subs were, a lot of
7 preplanning.

8 Q. I had a question that just escaped me. Wally
9 Baughn, what was his role?

10 A. He was the project manager of the project.

11 Q. Mr. Barfield, he was the superintendent?

12 A. He was the field superintendent.

13 Q. Okay. There's been questions about whether
14 the project was adequately staffed. Did those -- did
15 those two gentlemen properly staff the project in
16 terms of the project manager and the superintendent?
17 I guess my question is was Mr. Baughn qualified to do
18 this project?

19 A. I think Wally Baughn was qualified to be the
20 project manager. I don't think he had the proper
21 support, and I think that that support really should
22 have originated from the Larry Taylor level, as an
23 overseer of the job, to decide, "I need this many
24 people to do these functions on the projects that I
25 have in Charleston."

1 Q. Okay. What kind of support?

2 A. Some administrative support on site from
3 document handling, some scheduling support, maybe even
4 procurement support. The fact that we almost never
5 got anything in writing from Wally was very hard to
6 understand. His ability -- his inability to get
7 things on the job site on time was a very disturbing
8 occurrence.

9 Q. How early in the project did you have
10 concerns about Superior's ability to finish this
11 project on time?

12 A. Very early. I mean we, being Teresa Hodge
13 and myself, would often ride back and forth to
14 Columbia and Charleston and comment to each other
15 about what month of the year it was and where their
16 status on the project was.

17 Q. Did you ever have any issues with -- or did
18 you ever question the honesty of information you were
19 getting from Wally Baughn?

20 A. I never questioned the honesty of the
21 information from Wally that I recall. I may have
22 questioned some of the information from Johnny
23 Barfield but --

24 Q. Why would you question the information from
25 Johnny Barfield?

1 THE WITNESS: If y'all need some more time of
2 mine, I'm certainly willing to give you what I can.

3 MR. BELCHER: I think we're talking about
4 less than an hour for me. Probably less. Close to an
5 hour.

6 THE WITNESS: I don't mind coming down to
7 Henry's office in the 5:00 to 5:30 range of any day,
8 and Fridays I'm off work usually around 1:00 to 1:30,
9 2:00 o'clock. So Friday afternoons are very available
10 for this kind of thing.

11 MR. BELCHER: Okay. I appreciate your time
12 today, sir.

13 THE WITNESS: Thank you.

14 MR. MAJURE: I would have some follow-ups but
15 do you want to stop now?

16 MR. BROWN: You got 20 minutes.

17 MR. MAJURE: I think I got you covered in 20
18 minutes.

19

20 FURTHER EXAMINATION

21 BY MR. MAJURE:

22 Q. You've been asked a lot of questions today by
23 a lot of counsel about issues relating to delay, and I
24 want to make sure that your opinions about delay don't
25 relate to the end product about the windows. So I

1 just want to ask you do you believe -- well, first of
2 all, do you believe that the windows on the project
3 and the exterior -- windows and doors, the exterior
4 doors on the project comply with the requirements of
5 the contract documents in terms of their performance?

6 A. I do not believe they comply with the
7 contract requirements, as I understand, even to this
8 day with all the documentation of the failed window
9 tests that I've seen.

10 Q. Okay. And do you attribute that failure to
11 anything related to delay issues?

12 A. I don't attribute them to the -- I think
13 you're phrasing it --

14 Q. Well, let me rephrase my question. Is there
15 any kind of delay issue that you've discussed today,
16 delay involving the foundations, delay involving HVAC,
17 delay involving stucco, putting up exterior cladding,
18 do you attribute any of the delay in those activities,
19 as you have testified to today, to the failure of the
20 windows to perform in accordance with the contract
21 documents?

22 A. I don't think that there's a correlation
23 between the delays and the performance of the windows.

24 Q. Okay. And do you attribute in any way, to
25 any degree, the failure of the windows to perform in

1 accordance with the requirements of the contract
2 documents to any other failure of any other element of
3 the building to comply with the requirements of the
4 contract documents? For example --

5 A. I apologize. Your questions are just -- it's
6 a little bit too hard to quite fathom what you're
7 asking. If you'll put it in a real easy format.

8 Q. I'll break it into parts. Do you attribute
9 the failure of the windows to perform in accordance
10 with the requirement of the contract documents to any
11 aspect of the balconies?

12 MS. VARNADO: Objection.

13 THE WITNESS: I don't attribute the failure
14 of the windows to any other balcony concerns or
15 balcony defects or -- if that's --

16 BY MR. MAJURE:

17 Q. Okay. Do you attribute any failure of the
18 windows to perform in accordance with the contract
19 documents to some defect related to the brick
20 cladding?

21 MS. VARNADO: Objection.

22 THE WITNESS: I'm not aware of any defect in
23 the brick cladding per se. I don't think there's a
24 correlation between the performance of the windows
25 meeting the contract documents that tied to the brick

1 performance or brick installation.

2 BY MR. MAJURE:

3 Q. Okay. How about the stucco? Is there some
4 defect in the stucco that you contend causes the
5 windows to fail to perform in accordance with the
6 contract documents?

7 A. No, I do not see a correlation between the
8 stucco and the defective windows.

9 Q. How about the roof?

10 A. Again, no, I don't see a relationship between
11 the roof and the defective windows. Or the failure of
12 the windows to meet the contract requirements.

13 Q. How about any other work performed by any
14 other subcontractor that I've not listed?

15 A. I think the failure of the windows stand on
16 their own failure, not related to any other building
17 component.

18 Q. Okay. And you said that you have not seen
19 any expert reports by any other engineers or anyone
20 like that related to this project?

21 A. I've understood that the Glick firm or Miles
22 Glick, I understand is the name of someone down in
23 Charleston that has made a forensic analysis. I have
24 not seen that report. I've not seen anybody else's
25 expert testimony or witness or forensic information

1 concerning this.

2 My information is from my personal job site
3 visits, certainly while Metro Waterproofing did some
4 remedial work and while one of the homeowners brought
5 their own waterproofing consultant onto the job site
6 to do some destructive work around his fourth floor
7 balcony. Otherwise, it's limited to the window
8 testing that was done that -- the two testing
9 companies performed.

10 Q. Okay. And is it your testimony that -- well,
11 do you attribute any of the failures of the windows to
12 perform in accordance with the contract documents to
13 the preparation of the window rough opening?

14 A. I do not attribute any of the window failures
15 to the preparation of the opening and/or the flashing
16 of the openings or the final attachment of the Tyvek
17 to the window fins.

18 Q. Okay. And you understand when I say,
19 "preparation of the window rough opening," I'm talking
20 about putting in the Tyvek, installing the pans and
21 installing the bucks. You understand that's what I
22 mean?

23 A. Now, the only issue I've seen with the pans
24 is that I think Wally had all the pans made to one
25 consistent depth and that in some cases you'll see

1 some photographs where the depth of the pan got back
2 into the space further than it should be in order to
3 keep the front of the pan, the exterior face of the
4 pan where it needed to be.

5 Q. Okay. Did that condition cause the windows
6 to fail to perform?

7 A. It did not cause the windows to fail to
8 perform to the specs.

9 Q. Okay. And you would agree that the windows
10 and doors leaking under ordinary prevailing weather
11 conditions would be a failure of the windows to
12 perform in accordance with the project documents?

13 A. I would agree with that.

14 Q. And you would agree that the windows being
15 properly tested with a proper protocol -- now,
16 granted, you might not be an expert, but assuming that
17 they're properly tested in accordance with the proper
18 protocol that's relevant to these windows and they
19 fail those tests, that that would also be a condition
20 that fails to meet the performance requirements of the
21 contract documents?

22 A. I understand that if a proper procedure is
23 followed with the proper equipment, properly operated
24 and done in accordance with the ASTM procedures
25 outlined, that the windows from the frame of the

1 window, the actual window proper and not the fin, that
2 the windows failed to meet the plans and spec
3 requirements.

4 Q. Okay. And do you attribute the failure of
5 the windows to perform in accordance with the contract
6 documents to any malfeasance or negligence
7 specifically on the part of Superior as opposed to
8 Superior's subcontractors?

9 A. I'm not aware of any efforts on Superior that
10 created those leaks of the windows themselves.

11 MR. MAJURE: Okay. All right. Thank you.

12 MR. NISTAD: Let me ask you a couple
13 questions real quick.

14

15 FURTHER EXAMINATION

16 BY MR. NISTAD:

17 Q. Can a failure of, say, the exterior cladding
18 manifest itself at the windows as far as water
19 intrusion?

20 A. It could. I mean if there was a --

21 MR. BELCHER: Object to the form.

22 THE WITNESS: If there's a failure to install
23 the Tyvek properly on every opening -- I'm not aware
24 of any of that, but if there is, then you could
25 foreseeably have an opportunity for water to get into

Reply To
PETER GUNNAR NISTAD
Direct Dial: (843) 576-2935
gunnar.nistad@mgclaw.com

January 7, 2016

VIA E-MAIL AND U.S. MAIL

The Honorable Clifton Newman
Third Judicial Circuit
Post Office Box 516
Kingstree, South Carolina 29556-0516

RE: Concord and Cumberland Horizontal Property Regime v. Concord &
Cumberland, LLC; Concord & Cumberland Manager, LLC; Estates, Inc.;
Superior Construction Corporation; Weather Shield Mfg., Inc.; The
Muhler Company, Inc.; et al.
Civil Action No.: 2010-CP-10-2271 (Charleston)
Carrier Claim No.: 703302560001
MGC File No.: 20617.08082

Dear Judge Newman:

I am writing to advise the court that I received Superior's Proposed Order Granting Superior Construction's Motion for Reconsideration yesterday, January 6, 2016. I was in mediation all day January 6 and have depositions scheduled for today in another case. However, I plan to respond to both Superior's proposed Order and assertions made in Mr. Majure's January 5, 2016 cover letter as soon as possible, and reserve the right to do so.

Respectfully submitted,


Peter Gunnar Nistad

PGN/sms

cc: Counsel of Record (w/ encl. via e-mail only)

mge

Reply To
PETER GUNNAR NISTAD
Direct Dial: (843) 576-2935
gunnar.nistad@mgclaw.com

January 8, 2016

VIA E-MAIL AND U.S. MAIL

The Honorable Clifton Newman
Third Judicial Circuit
Post Office Box 516
Kingstree, South Carolina 29556-0516

RE: Concord and Cumberland Horizontal Property Regime v. Concord &
Cumberland, LLC; Concord & Cumberland Manager, LLC; Estates, Inc.;
Superior Construction Corporation; Weather Shield Mfg., Inc.; The
Muhler Company, Inc.; et al.
Civil Action No.: 2010-CP-10-2271 (Charleston)
Carrier Claim No.: 703302560001
MGC File No.: 20617.08082

Dear Judge Newman:

I am writing to clear up several inaccuracies and respond to arguments contained in Superior Construction Corporation's January 5, 2016, letter and proposed Order Granting Superior Construction's Motion for Reconsideration of this Court's September 25, 2014 Order Granting Weather Shield's and Muhler's Motions for Partial summary Judgment; Denying Superior's Motion for Partial Summary Judgment; and Denying JDavis's Motion for Summary Judgment ("Proposed Order"). First, contrary to verbiage in Superior's Proposed Order, this Court did not request "proposed orders from Superior and/or Muhler." Instead, Your Honor invited counsel to submit letters setting forth their positions. (Dec. 4 Tr. p. 29, lines 4-8). At the December 4 hearing, Superior's counsel offered his was "concededly a very complicated approach, and if Your Honor would like me to draft a proposed order outlining that, I would be happy to do it ..." (Dec. 4 Tr. p. 25, lines 7-9). In response, Your Honor asked whether and where Muhler would disagree with Superior's Counsel's proposal to draft a proposed Order, to which the undersigned responded "[a] lot of places. Everywhere." (Dec. 4 Tr. p. 27, lines 14-17).

MCANGUS COUDELOCK & COURIE LLC

Second, Superior continues to state erroneously that case law interpreting language identical to or substantively similar to Paragraph 12.1 of the Subcontract is "almost evenly divided." Superior's statement is correct **only** if the Court reviews **only** the phrase "regardless of whether it is caused in part by a party indemnified hereunder," and ignores limiting language contained in the rest of the Paragraph 12.1. In fact, Superior acknowledges its conclusion is based on an examination of just "this particular phrase." (Proposed Order, p. 13). Such an approach flies in the face of traditional contract interpretation. Alexander's Land Co., LLC v. M&M&K Corp., 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010) (a contract is "read as a whole document" instead of focusing on "a single sentence or clause"); Skull Creek Club Ltd. v. Cook & Book, Inc., 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993) (In determining the intent of the parties, a contract "must be construed as a whole and different provisions dealing with the same subject matter are to be read together"). In its September 25, 2014 Order, this Court properly analyzed the indemnification provision in the Subcontract by looking at all of its provisions, and correctly held that courts considering identical or substantively identical provisions "uniformly interpret this language as not providing indemnification for the indemnitee's own negligence."¹ The fact that some courts reach a different conclusion based on substantively different language, as is true with every case cited by Superior, has no bearing on this case.

¹ The cases cited in the September 25, 2014 Order uniformly interpret indemnification clauses that limit the scope of indemnification to "the performance of the Subcontractor's Work" and to the extent caused by the Subcontractor as not indemnifying the indemnitee for its own wrong-doing. Braegelmann v. Horizon Dev. Co., 371 N.W.2d 644, 646-647 (Minn. Ct. App. 1985); Mautz v. J.P. Patti Co., 688 A.2d 1088, 1092-1093 (N.J. Super. Ct. App. Div. 1997); Cabo Constr., Inc. v. R. S. Clark Constr., Inc., 227 S.W.3d 314, 317-318 (Tex. App. 2007); MT Builders, LLC v. Fisher Roofing Inc., 197 P.3d 758, 765 (Ariz. Ct. App. 2008); Frank v. MSI Constr. Mgrs., Inc., 527 N.W.2d 79, 81 (Mich. Ct. App. 1995); Glendale Constr. Servs., Inc. v. Accurate Air Syst., Inc., 902 S.W.2d 536, 539 (Tex. Ct. App. 1995); and Hagerman Constr. Corp. v. Long Elec. Co., 741 N.E.2d 390, 393-394 (Ind. Ct. App. 2000). In contrast, **none** of the cases cited by Superior on page 13 of its Proposed Order contain all of this limiting language and, therefore, are simply inapplicable to this case.

Superior attempts to dismiss the limitation contained in the phrase "the performance of the Subcontractor's Work" to mean that it can only recover from Muhler for damages related to the windows and doors. (Proposed Order, p. 14). What Superior fails to acknowledge is that both it and the architect unarguably contributed to the condition of the windows and doors as installed – the architect in coming up with a design that guaranteed failure of the windows and doors and Superior for installing bucks and pans improperly, as well as for a host of other acts that negatively affected the windows and doors as installed. These actions on the part of the architect and Superior related to the windows and doors but were not part of "the Subcontractor's work," and, therefore, fall outside the scope of the Subcontract's indemnity provision.² Even under Superior's attempted "hybrid" indemnification provision, discussed below, this language/phrase still limits any obligation to indemnify Superior to Muhler's own work.

Next, after reciting the correct "high standard" it must meet in order to prevail on its claim that the Subcontract and/or 2007 Agreement obligate Muhler to indemnify Superior for Superior's own wrongdoing, Superior embarks on what can only be described as a novel but ultimately unacceptable exercise in contract editing/rewriting in order to meet that high standard. Superior's approach is fraught with problems and errors. First, Section 1 of the 2007 Agreement is a statement of *limitation* on the effect that that agreement has on the Subcontract, as opposed to an instruction to compare the two contracts line-by-line and, where they conflict, insert the language from the 2007 Agreement into the Subcontract (or merge them into some sort of hybrid, as Superior has attempted to do). Superior's entire Proposed Order rests on this ill-conceived and objectionable approach, which must be rejected. Section 1 of the 2007 Agreement simply does not "make[]" it clear that any specific language of the

² That said, this Court does not have to decide or resolve any factual matters in order to conclude, as a matter of law, that the Subcontract does not indemnify Superior for its own wrongdoing.

Agreement controls over the Subcontract." (Proposed Order p. 9). Instead, Section 1 of the Agreement proceeds with the qualifier, that:

WHEREAS, Muhler, Weathershield and Superior agree to resolve any product non-compliance issues upon the following terms and conditions:

1. That any and all testing conducted on the windows and doors to date, the resolution of the issues raised by the testing and completion of the remedial work by Muhler and/or Weathershield ***nor this Agreement has amended or affected any party's contractual rights and responsibilities except to the extent specifically stated in this Agreement.***

This section does not state or even imply that, where there might be a conflict between the Subcontract and the Agreement, the Agreement prevails. Instead, it clearly provides that, where the 2007 Agreement ***specifically states*** that it amends or affects the Subcontract, then the 2007 controls or modifies the Subcontract. This language simply cannot be tortured into the interpretation advanced by Superior. And while Section 11 of the 2007 Agreement contains an indemnification provision, that provision does not ***specifically state*** that it amends or affects the Subcontract. Neither does Section 11 provide clearly and unequivocally on its own that Muhler is agreeing to indemnify Superior for Superior's own wrongdoing, which Superior appears to acknowledge. (See Proposed Order, pp. 12-13, discussing the fact that the terms "all damages" and "unconditionally" are insufficient to meet the clear and unequivocal standard).³

³ Although Superior now suggests that the term "unconditionally" in Section 11 of the 2007 Agreement does not indicate clearly and unequivocally that Muhler was agreeing to indemnify Superior for its own wrongdoing, at the summary judgment hearing, it argued that that term granted it the relief it sought. (SJ Tr. p. 23, lines 5-7) (SJ Tr. p. 48, line 25 - p. 49, line 2) (SJ Tr. p. 85, line 16 - p. 86, line 6).

Second, Superior's proposed approach – looking at different provisions of the Subcontract and the 2007 Agreement and pulling out items that Superior asserts are "in conflict" and then cobbling together a new indemnification provision in order to meet the clear and unequivocal test – is unacceptable, incorrect, and goes beyond contract interpretation to involve this Court in re-drafting the parties' agreement in favor of Superior. Superior even states that its "end product is a custom-drafted instrument," (Proposed Order p. 12), which Superior would have this Court create for it. It is axiomatic that courts interpret and enforce contracts but do not write them for one party or the other. See, e.g., Preservation Capital Consult., LLC v. First Am. Title Ins. Co., 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013); Whitlock v. Stewart Title Guar. Co., 399 S.C. 610, 614, 732 S.E.2d 626, 628 (2012). In addition, courts cannot "alter a contract [using rules of] construction." Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 47, 747 S.E.2d 178, 184 (2013). Essentially, Superior is asking this Court to re-write the indemnity provisions of both the Subcontract and the 2007 Agreement because, standing alone, neither clearly and unequivocally demonstrate an intent to indemnify Superior for its own negligence.

To the extent Superior is seeking reformation of either the Subcontract or the 2007 Agreement, or both, such a remedy is inappropriate in this case because Superior has not pled or even alleged that either contract is the result of a mutual mistake. In addition, the existence of a mutual mistake must be shown by clear and convincing evidence. Progressive Max, 405 S.C. at 51, 747 S.E.2d at 186; Crosby v. Protective Life Ins. Co., 2903 S.C. 203, 206, 359 S.E.2d 298, 206 (Ct. App. 1987) (reformation inappropriate where one party may have been mistaken about the terms of the contract but the other was not).

Superior's Proposed Order contains a host of other errors and problems. For example, the Proposed Order states that "the Prior Order fully adjudicated the respective Motions for Partial Summary Judgment filed by **Superior**, Weather Shield, Muhler and Concord and Cumberland, LLC." Beyond granting Muhler and Weather Shield's motions for partial summary judgment on the indemnification language, the

September 25, 2014 Order denied all motions for partial summary judgement, including Superior's Motion for Summary Judgement Against The Muhler Company, Inc., dated July 30, 2013. However, the Proposed Order clearly grants Superior's prior motion for summary judgement against Muhler. (Proposed Order, p. 3). Thus, Superior's Proposed Order illogically grants its prior Motion for Summary Judgement while reinstating this Court's September 25, 2014 denial of the same.

The ordering paragraphs on pages 3 and 15 of the Proposed Order are flawed in many respects. Whether Superior is entitled to the full sum paid by it to settle the Plaintiffs window and door claims was not before the Court. In addition, the damages as "submitted" by Superior for defense of the windows and doors have not been considered or evaluated by this Court. And, the issue of whether Superior was the prevailing party was not before the Court either. Furthermore, Superior has not asked for this specific relief. In its Motion for Summary Judgment Against the Muhler Company, Inc. and Memorandum of Law in Support of same ("Sup. Motion for Summary Judgment"), all Superior asked for was a finding that it was entitled to indemnification under the Subcontract and the 2007 Agreement for its own negligence, and for this Court to "hold a damages hearing to affix the final determination of damages due and owing to Superior." (Sup. Motion for Summary Judgment, p. 28). Superior's Motion to Reconsider did not seek the relief granted in its Proposed Order either.

In addition, Superior added language and statements to the "Background" section of the Proposed Order to bolster its position which are unnecessary and inappropriate. This language addresses such factual issues as the joint resolution of the design issue concerning window installation, the context of Superior's decision to enter into the 2007 Agreement,⁴ issues of non-payment under the terms of the 2007 Agreement and damages.

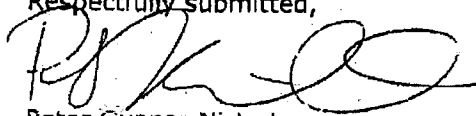
⁴ With regard to Superior's reliance on parole evidence, Superior's counsel argued to Your Honor at the December 4, 2015 hearing, "[a]nd also the law says that you have to look at these agreements in the context of how the parties entered it, and the context of the June

The Honorable Clifton Newman
January 8, 2016
Page 7

Muhler stands by its statement in its December 15 letter that Superior did not make the argument at the summary judgment hearing that certain provisions of the 2007 Agreement cancelled or revised certain provisions of the Subcontract. While Superior argued that the 2007 Agreement "expanded" the Subcontract and that both needed to be taken into consideration, it did not assert that specific provisions of the 2007 Agreement specifically altered or superseded any particular provisions of the Subcontract, or that where there is a conflict between the 2007 Agreement and the Subcontract, the 2007 Agreement controls.

Finally, with regard to Superior's statement in its letter that, if Your Honor denies its Motion for Reconsideration, it will file an immediate appeal, Muhler believes this might be an efficient method of resolving this case. In fact, it may be helpful to the parties as well as to the Court to have this critical and novel legal issue decided before embarking on what is sure to be a lengthy and complicated trial. That approach would almost certainly reduce the chance of having to try this case twice. Assuming Superior follows through on its statement regarding appeal, once the appellate courts have confirmed the scope of the indemnification provisions as a matter of law, the factual issues left to be resolved by this Court will necessarily be more limited.

Respectfully submitted,



Peter Gunnar Nistad

PGN/sms

cc: Counsel of Record (via e-mail only)

2007 agreement is very critical. Parties with knowledge of active issues coming to the table and reaching its agreement, that context is important." (Dec. 4 Tr. p. 24, lines 2-8).

January 5, 2016

VIA EMAIL AND US MAIL

The Honorable Clifton Newman
P.O. Box 516
Kingstree, SC 29556
cnewmanj@sccourts.org
cnewmanlc@sccourts.org

Re: *Concord & Cumberland Horizontal Property Regime vs. Concord & Cumberland, LLC and Superior Construction Corporation Consolidated cases*
Civil Action No: 2010-CP-10-2271
M&G File No.: 4200-0114

Superior Construction Corporation's Proposed Order Pursuant to its Motion to Reconsider

Dear Judge Newman:

Please find attached hereto a proposed Order pursuant to Superior Construction Corporation's Motion for Reconsideration that was argued before the Court December 4, 2015. At the oral argument you indicated that you would entertain such a proposed Order in your determination of the Motion.

In response to Attorney Gunner Nistad's letter of December 15, 2015 to the Court (herein "the Letter") on behalf of The Muhler Company, Inc. (Muhler), pertaining to the specific case law arguments raised by Mr. Nistad, I believe these have been exhaustively addressed in the prior written submissions of the parties as well as oral argument, and therefore I do not see a need to re-argue the issues of case law. The simple fact of the matter is that the extrajudicial case law on the standard form AIA and AGC construction contract clauses is almost evenly divided, with a slight majority of jurisdictions adopting Superior Construction's interpretation of the contract language.

Muhler Company also claims in the Letter that Superior failed to raise its arguments regarding the interpretation of the subcontract and June 2007 Agreements at the Summary Judgment hearing, and provided selected excerpts from the transcript of oral argument before the Court. Upon receipt of the Letter, I ordered a copy of the court transcripts as well, but to date have not yet received them. Therefore I am not presently able to fully respond to these arguments. However, I would like to make a partial and preliminary response to the arguments raised by Muhler that Superior did not raise the argument that specific provisions of the 2007 agreement specifically altered or superseded any particular provisions of the subcontract. First of all, the written agreements in that regard speak for themselves, and was touched upon in oral arguments to the best of recollection. However, from review

Telephone 803-782-4100 • Facsimile 803-782-4140 / 803-454-1258
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

J. R. Murphy John M. Grantland Ron B. Diegel* Brent M. Boyd E. Ray Moore, III Anthony W. Livoti Adam J. Neil Jeff C. Kull Peter E. Farr
Alice P. Adams Tim J. Newton Chris A. Majure Wesley B. Sawyer Jason P. Luther Elliott B. Daniels Hannah D. Stetson Rogers E. Harrell, III Robert M. Peele, III
*Member-American Board of Trial Advocates

of the attachments to the Letter, in which selected excerpts are provided as exhibits, on page 12 of the transcript of record dated July 28 - 29, 2015, I stated that the 2007 agreement "by its terms expands upon the obligations of the subcontract. It expands upon items related to what type of cures of fixes will be provided, touches upon payment issues. It touches upon indemnification. It expands the potential recovery under indemnification that initially existed under the subcontract. So the two instruments go together as to the Muhler Company." On page 14 of the same transcript, I stated at line 18-19 on behalf of Superior "that the 2007 Agreement and the subcontract *in conjunction* with the subcontract provided the relief it [Superior] seeks. [Emphasis added.]

On page 49 of the transcript of record attached to the Letter, the statement is made: "Muhler's liability is predicated on both the subcontract and the 2007 agreement." On page 206 of the transcript, I stated again; "with Muhler it's a two-fold analysis because we have the contract and the agreement." So in essence while Muhler is claiming that Superior did not argue for the reconciliation of the two agreements to be interpreted *in conjunction*, the very pages cited by Muhler actually demonstrate that Superior did argue that the two instruments have to be viewed and interpreted together. While Superior may possibly have not listed every single minute aspect in which the two agreements differ, certainly the substitutive issues that would relate to the Motion to Reconsider were adequately raised, either specifically, or with adequate reference. Again, Superior will examine the entire transcript itself to further rebut Muhler's contentions, but this preliminary response in my opinion adequately rebuts Muhler's contention.

Furthermore, subject to specific confirmation of the record, while Superior set forth its most preferred approach to the interpretation of the Subcontract and 2007 Agreement, more than one possible approach was analyzed which still would have resulted in the same outcome raised by Superior's Motion to Reconsider - that these were extensively argued, and presented to the Court which is well within the reasonable parameters of Superior's Motion to Reconsider.

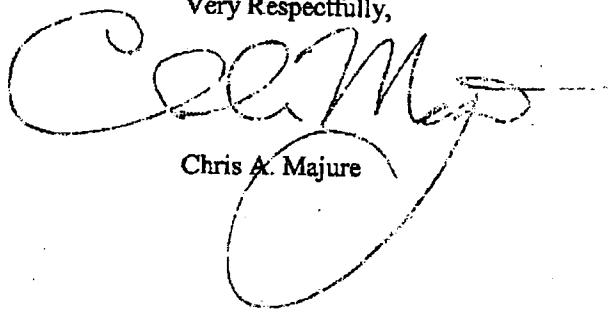
Muhler also points to my comments about the context of how the parties entered into the June 2007 agreement is instructive, in an attempt to contort this statement into a claim that the Agreement is ambiguous and therefore parole evidence would be required, thus rendering the agreements from not being able to be construed under the standard of Laurens Emerg. Med. Spec. v. Bailey & Sons. At no time did Superior ever make the statement before the Court on December 4th that the agreement was ambiguous or that parole evidence was required to interpret it. The reference to context merely is to show the issue of notice and knowledge of the facts giving rise to the agreement, not how to interpret the agreement itself. Superior flatly disagrees that the agreements are ambiguous, has repeatedly argued to the contrary, and has never invited the Court to examine parole evidence in connection with the interpretation of the plain terms of the Subcontract or 2007 Agreement. Superior concurs that the intent at issue to satisfy Laurens "must be specifically stated in the four corners of the documents." Tabo Construction, 2207 S.W.3d at 371. Muhler is simply attempting to manufacture a posture for Superior that it never claimed.

Again, this letter is not a complete response to all of the aspects of Muhler's arguments raised in the December 15th letter, but given the limited time remaining before trial, and the pendency of receipt of the court transcripts, Superior further reserves all rights to further respond to any other argument raised by Muhler not touched upon herein.

The Honorable Clifton Newman
January 5, 2016
Page 3

Lastly, if the Court rules against Superior's Motion to Reconsider, I have been instructed to promptly file an appeal on behalf of Superior. Based upon my present research and review of the specific circumstances of the case, such appeal should not be regarded as interlocutory in nature. In the interest of judicial economy, I felt it proper to notify the Court now rather than later, so the Court could assess if it would be best to stay the case entirely pending the disposition of the appeal, or still move forward as to the trial of Superior and Concord & Cumberland, LLC's claims against Weather Shield. (I have been notified by Attorney Henry Brown that the Developer has settled their claims against Muhler.)

Very Respectfully,

A large, stylized handwritten signature in black ink, appearing to read 'CAM', with a long horizontal flourish extending to the right.

Chris A. Majure

CAM/baw
Enclosure

cc: Counsel of Record (w/Enclosure)

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED
DEC 12 2016
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

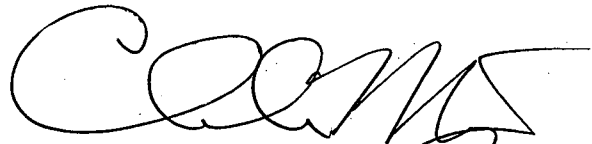
Superior Construction Corporation APPELLANT,

v.

The Muhler Company, Inc. RESPONDENT.

CERTIFICATE OF COUNSEL

In accordance with Rule-210(c), SCACR, the undersigned certifies that the Record on Appeal contains no matter which is irrelevant to the Appeal.



Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com

Attorneys for Appellant

5

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Consolidated Case No. 2010-CP-10-2271

RECEIVED

NOV 22 2016

SC Court of Appeals

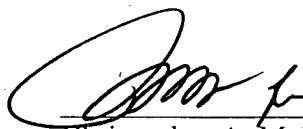
Superior Construction Corporation APPELLANT,

v.

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

CERTIFICATE OF COUNSEL

In accordance with Rule 210(c), SCACR, the undersigned certifies that the Record on Appeal contains no matter which is irrelevant to the Appeal.



Christopher A. Majure, Esquire
Timothy J. Newton, Esquire
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100, ext. 1210/1240
cmajure@murphygrantland.com

Attorneys for Appellant