THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-10-3326
Case No. 2014-CP-10-4335
Appellate Case No. 2017-000542

Waverly at Hamlin Plantation Townhome Association, Inc., ***Respondent,***

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., ***Defendants,***

And

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes Inc., Builders Support Services of the Carolinas, Inc., ***Third-Party Plaintiffs,***

v.

Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builders FirstSource, Inc., a/k/a Builders FirstSource-Southeast Group, LLC, a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Eli, Inc, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanches Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC, ***Third-Party Defendants,***

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the ***Appellant,***

And Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., ***Defendants***,

And

Jeffery Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Partricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespie, Jared D. Overcash, ***Plaintiffs***,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., as Successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a Jon Wieland Homes and Neighborhoods, Inc., Bar Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's FirstSource, Inc. a/k/a Builders FirstSource-Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medine a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC, Juan Luis Sanchez a/k/a Sachez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasque, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC, ***Defendants***,

Of whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Successor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc., is the ***Appellant***,

And Jeffrey Sills, Individually and as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephani Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Maryann Walsh, Patty Whitmire, Donald L. Tomasello and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan S. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David

McCartney, Paul and Patricia Waters, James and Andrea Lowry, R. Robinson, Jr. Thaddeus R. and Barbara A. Kuczynski, Beverly Sunders Carlson, Lisa Roeck, Elizabeth Jackson, Charles and Mary Kathleen Jenkins, Linda M. and Earl K. Rigler, Jr., John Twomey, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Carol and Chris Gilespie, Jared D. Overcash, are the ***Respondents,***

And Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting, and The Muhler Company, Inc., ***Defendants.***

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Okay. All right. Guys, y'all have a good that afternoon.

(WHEREUPON, hearing concluded 1/17/17, 4:00 p.m.)

(WHEREUPON, hearing resumed 1/19/17, 9:19 a.m.)

THE COURT: Did you all complete the depositions that y'all were scheduled to complete yesterday?

MR. MANOS: We did, Your Honor.

THE COURT: And when do you think the court reporter will be able to get the transcripts for you?

MR. MANOS: We got rough drafts last night.

THE COURT: Oh, perfect. That works. So those were completed. And I guess then the next question, Mr. Manos, is are you going to need to procure an additional witness?

MR. MANOS: That would depend on what information Your Honor might hear about what happened yesterday.

THE COURT: What do you mean?

MR. MANOS: Well, I would probably like to bring up some of the information, because it is going to depend on your rulings.

THE COURT: I don't understand what you mean. You are going to have to be -- you have got to be direct with me.

MR. MANOS: Okay.

THE COURT: You can't take the long way around.

MR. MANOS: Let me ---

THE COURT: Sometimes I can be -- my daddy calls me the absent-minded professor. You have got to like be direct. He says I don't ---

MR. MANOS: Well ---

THE COURT: --- ever see the forest for the trees.

MR. MANOS: The first deposition we took, Your Honor, was by Mr. Bert Snyder. He was the exterminator out there. He was the one that was identified as a witness I think a week prior to trial. And his company issued a letter ---

THE COURT: The termite report. He was supposed to testify about the moisture levels.

MR. MANOS: Yes, Your Honor. And he testified unequivocally that he is not a construction expert, he has never been qualified as a construction expert, and can't say anything about construction defects, what caused them; just like Your Honor suggested when we were having the discussion.

He also testified that before he issued this November 16, 2016, letter that we definitely want excluded that says throughout it construction defect, construction defect, caused by construction defect. And I am happy to hand it up to you, Your Honor.

THE COURT: Well, I don't -- I don't know that that

would -- a letter like that would come in. But I don't know ---

MR. MANOS: I hope it doesn't.

THE COURT: I would have to make a contemporaneous ruling when I hear the testimony. I can't rule on exhibits in advance.

MR. MANOS: That is fine. I hope it doesn't come in.

THE COURT: Because I don't know how his testimony is going to develop. So, you know, I wish I were clairvoyant; but I am not. So I would have to, you know, see how it develops. So I don't know.

MR. MANOS: I appreciate that, Your Honor. More importantly what he testified unequivocally to was that he did not do a project-wide survey of moisture issues at the 105 units at Waverly.

He testified that his technicians do annual inspections of the units, that those are thousands of pages of reports over the last two years, that he did not evaluate those reports, that those reports contained various issues some relating to moisture; some relating to vegetation being too close to the house, some relating to maintenance issues that termite people point out; all of which could cause a termite problem.

He testified the Hamlin, I'on, and Daniel Island are

highly susceptible to termite problems.

THE COURT: All of Charleston is susceptible.

MR. MANOS: Yes, ma'am. And he testified that multi -- multi-family projects cause his company and other termite companies higher exposure -- rather risk, because they are bigger and there are more of them, and that his company made a business decision to issue this letter to basically revoke their termite repair bond.

But he was very clear that he didn't in this case review all of those annual inspection reports that would allow him to have a foundation to testify to any certainty that there is a project-wide moisture intrusion problem at Waverly.

And any such testimony would be inaccurate, not reliable, grossly prejudicial, and any other adjective I think of, if he was allowed to come in and suggest as an expert in the termite field that there is a moisture intrusion-wide ---

THE COURT: I think he can ---

MR. MANOS: --- problem.

THE COURT: --- testify to that. That is a weight issue. That is not an admissibility issue. He is a termite man. That is what they do. They measure moisture.

MR. MANOS: But, Your Honor ---

THE COURT: And a few other things.
MR. MANOS: But what he said was he didn't do a ---
THE COURT: Still weight. And in the meantime he could look at all of the reports. How do you know he is not going to do that? I would imagine ---
MR. MANOS: So now ---
THE COURT: --- now he will.
MR. MANOS: So now he gets to go back and look at the ---
THE COURT: Absolutely they can rehabilitate their witness. That happens every day. As a matter of fact I got reversed one time because I didn't let somebody rehabilitate their witness. That is why it sticks in my mind.
MR. MANOS: So now he is going to get to come in to trial ---
THE COURT: Which one raised actually and it was waived and the appellate court when back and reviewed the whole record and said I was wrong. Lesson learned.
MR. MANOS: So, Your Honor, he hasn't been designated as an expert.
THE COURT: He doesn't have to be. He is the termite man.
MR. MANOS: We just got a chance to depose him. He hasn't worked. Right now before trial he hasn't looked

at these reports. So I didn't -- I asked him about the one that he looked at that didn't have a moisture problem. So now he can go back and create opinions which I won't ---

THE COURT: He doesn't have to create opinions.

MR. MANOS: --- have a chance to ask him about?

THE COURT: It is a matter of him going back and looking at the records of which the court would then give you the opportunity to look at those records so that you can cross-examine.

MR. MANOS: Well, what I guess -- I ---

THE COURT: I assume that they -- they now see that -- that is the purpose of depositions to see the pluses and deficits of your witness. Unless you are doing a de bene esse for use at trial. They can rehabilitate their witness any way they want. I don't know.

I don't know what they might do. They may not ask him to look at those reports. He might take it upon himself to look at the reports. I have no idea. I can't look into the future.

MR. MANOS: I guess my problem as a litigant, Your Honor - and I would like some direction on your part - is we have these cases that go on for three years. We have judges tell us that the scheduling orders ---

THE COURT: Scheduling orders ---

MR. MANOS: --- have some meaning.

THE COURT: Not in state court. Federal court they do. But not here. The Supreme Court has a case on point that says the only purpose of it is to keep y'all on track, to keep you focused.

But it is not -- the purpose of a scheduling order is not to preclude testimony. It is not to prohibit the development of a case.

That's why we have a continuing rule in discovery to update your discovery even during trial. And the remedy is to give you access and to give you time to develop your theory. But it is not to exclude a witness.

MR. MANOS: Well, I will need to talk to my -- I appreciate that. I will need to talk to co-counsel about whether it is in the best interest for my client to ---

THE COURT: So you might want to call your own termite guy and have him look at the reports and see what he -- but, you know, the deficit in that too was he wasn't the person that actually provided the services to the property. But I mean that ---

MR. MANOS: Either ---

THE COURT: But that is your call.

MR. MANOS: I appreciate that, Your Honor. And I will need to confer with co-council ---

THE COURT: Yeah.

MR. MANOS: --- and decide if it is in the best interest of our client.

THE COURT: And I am just sort of looking down the road. I don't know whether Mr. Hayes might ask him to look at the reports. I don't know whether on his own initiative he may go back and look at the reports. Who knows.

You know, a termite inspection is a one-page document. I don't see that as any different than -- even if you are doing condos you still have individual owners of each condo.

You still have a responsibility to that person, whether the HOA is paying the renewal bond, whether an individual resident is paying the bond, you still have to provide a report to that person and it has -- well, I mean it is a uniform report. It is not like they recreate some report. They check some boxes.

I am sure you have got a house. You get your termite inspection report every year.

MR. MANOS: I have read -- I have actually read all the thousands of pages.

THE COURT: Yeah, but we all -- if you are in Charleston and you own a house or some property and you don't have a termite bond shame on you.

MR. MANOS: I agree.

THE COURT: Because one day you are going to wake up and your foot is going to go straight through the floor because some termites have done ate your house out.

I mean we live in a moisture rich climate that is below sea level, that is ripe with subterranean and other termites that love to eat wood and fungus and all of this other stuff. And if you don't have a bond, like I said, you know, shame on you.

But a lot of people run that risk. They don't seem to -- it doesn't cause them any consternation. It would keep me up at night. But we all know what that report looks like. We get them every year.

So I would imagine, like I said, the termite company is no different than any insurer in the business of insuring risk; they don't want to pay more than they have got to.

What they ideally would like to do is treat your property one time, inspect it every year, never have a termite problem that they have to fix or repair.

And they are going to -- sometimes they exceed what I think is the scope of their expertise and they tell you things that they think they have expertise about that they don't.

I mean but usually they will tell you certain things

like your gutters need to be cleaned, the shrubs are too close, it is causing -- it may cause your foundation problem.

What are the other things they tell you. I can't remember -- you know, certain spaces to your house are inaccessible; we can't guarantee this or that.

But the main thing you look for in your termite report is your moisture readings. And they are certainly capable of doing that. I would imagine it is an industry-wide standard for different parts of the country. And they use some kind of an instrument to do that.

MR. MANOS: And ---

THE COURT: But I don't know -- I mean I don't know -- on his own volition he may feel like he needs to go back and look at them. I have no idea.

I mean I have had witnesses say, well, you know after that deposition I decided to go back and look at this stuff. Mr. Hayes might ask them to go back and look at it. I have no idea.

MR. MANOS: And I guess -- maybe it just goes to impeachment, Your Honor. And he ---

THE COURT: Uh-huh. Yes.

MR. MANOS: When I asked -- when I asked him had he done a project-wide survey, did he have any basis to say

that there was a project-wide moisture problem, he clarified and said no because he hadn't actually looked at the report. And so that was my point.

THE COURT: Well, and that is why ---

MR. MANOS: And he didn't have any foundation ---

THE COURT: Yes.

MR. MANOS: --- as of yesterday's deposition ---

THE COURT: Well, and that is why you have ---

MR. MANOS: --- to make such an opinion.

THE COURT: That's why you have testimony under oath so you can impeach him ---

MR. MANOS: Right.

THE COURT: --- and attack the weight of his credibility.

MR. MANOS: Well, to answer your ---

THE COURT: But I don't think that makes it inadmissible.

MR. MANOS: To answer your question directly, Your Honor, I need to confer with co-counsel today about whether we think we ---

THE COURT: Yeah, I need you to make a decision though like post haste. Because then if Mr. Hayes and them want to depose your fellow they need to -- or woman they need to have the ability to do that.

I don't know that it would be practicable before

Monday. But I certainly -- they probably might want to do it sometime during the week.

MR. HASELDEN: Your Honor, ---

THE COURT: Yes, sir.

MR. HASELDEN: --- one thing I would add would be that if we do retain somebody we are going to want him to do a representative sampling ---

THE COURT: Yes.

MR. HASELDEN: --- so that we can say he has looked at a bunch. So he is going to need access to a lot of the townhomes out there.

MR. HAYES: He can have it, Your Honor.

THE COURT: Okay. Y'all work that out. I am sure -- I mean the weekend. You have the whole weekend. All right.

MR. MANOS: That was -- that was Mr. Snyder's deposition. Do you want to talk about Mr. Glick's deposition?

THE COURT: Sure.

MR. MANOS: Let's talk about Mr. Glick's deposition. Yesterday at Mr. Glick's deposition we were provided a report. May I approach, Your Honor?

THE COURT: Sure.

MR. MANOS: Of a site visit that Mr. Glick performed on September 29th. Which that was the first time I ever

saw that document which was supposed to be a -- you know, the first day a day before trial -- or I guess actually a day after trial, that was a document that Mr. Glick went out there on September 29th of 2016. Looked at various things. Published that report. Gave it to plaintiff's counsel that day or the day after according to him.

And, you know, it was never produced. And I understand sometimes with documents in these cases things get missed. But it never got produced.

We got a chance to talk to Mr. Glick yesterday. Then the motion in limine we made he followed that visit up on January 6th.

Before going out on January 6th of this year, which was a week before trial, he contacted a repair contractor and they went out on January 6th and they did various destructive tests to one of the units.

Didn't tell us until after they did it. Didn't give our experts an opportunity to go out there and make observations of what was being taken off and draw their own conclusions, just ---

THE COURT: But are they obligated to do that? They don't have to do that. They don't have to let your experts overlook what they are doing.

MR. MANOS: Well, Your Honor ---

THE COURT: Your experts can do their own tests,

can't they?

MR. MANOS: No, because we didn't have an opportunity to go out there. And actually when I ---

THE COURT: Did you ask?

MR. MANOS: Yes. I made a request actually the week before to request entry to permit land and ---

THE COURT: That is a little -- I mean but why didn't you do it sooner than that? You have had experts sooner than that, haven't you? Wouldn't they want to perform some sort of testing to opine?

MR. MANOS: So is it -- is the rule -- and I just want to be clear. They can -- they can do destructive tests ---

THE COURT: No ---

MR. MANOS: --- and not tell us at any time ---

THE COURT: Let me ---

MR. MANOS: --- but we have to go ---

THE COURT: Let me be clear.

MR. MANOS: --- to court?

THE COURT: I don't do tit-for-tat. You have an obligation to your clients. They have an obligation to theirs.

MR. MANOS: Right.

THE COURT: Your activity is not predicated on what they do. If you have an expert and they need to do

destructive testing you need to do what you need to do to get it done. If they didn't allow you access then you should have moved to the court to give you some access; correct?

MR. MANOS: Your Honor, this -- and I ---

THE COURT: And I just am going to set the ground rules before we even go forward in trial. I'm really not interested in what they did and then you didn't do because they didn't do. That gets to be below a level of professionalism that I feel appropriate.

If you are telling me that you asked -- now this case has been going on since 2013.

MR. MANOS: Right.

THE COURT: I would imagine you retained experts. I would imagine your experts would have wanted to do some kind of testing.

MR. MANOS: They did.

THE COURT: And so why did you wait until the week before to do the test then?

MR. MANOS: And that wasn't -- that is not my point, Your Honor.

THE COURT: Well, that is what you just said to me.

MR. MANOS: Well, I apologize; but I misspoke.

THE COURT: Yeah, ---

MR. MANOS: My point is ---

THE COURT: --- give me clarity.

MR. MANOS: My point is Mr. Glick yesterday during his deposition is going to use those observations on January 6th as confirming testimony, as bolstering testimony, for his prior testimony from two years before; and our experts didn't get an opportunity to observe the evidence that he is using, Your Honor.

THE COURT: What rule does it say that he has to observe -- your experts get to observe their experts doing testing?

MR. MANOS: I would think it just goes to the level playing field and fairness ---

THE COURT: No, we operate by rules. That is called rules of procedure and the rules of evidence. If you have a rule or some case interpreting a rule that says they have an obligation to do that, that is one thing.

I am not aware of folk calling up other people's experts and saying by the way we are going to -- sometimes that do it because everybody goes out and they all do their testing together.

MR. MANOS: Right.

THE COURT: And all the lawyers go with them and everybody observes everything. But I am not aware of any rule that says they have to call you up and say by the way our experts are going to go do their job that we

retained them to do and we would like your experts to go observe if they want to. I don't think they have any obligation to do that.

Now if you want your experts to go do some testing I am not aware of any rule that precludes that. And usually people are able to work that out. And if they are not then you know what your remedies are.

MR. MANOS: Is there -- there is a rule under -- there are rules under 33 and 34 that they are supposed to supplement their discovery ---

THE COURT: Yep.

MR. MANOS: --- and produce their expert's report from September 29th. And had they done that on September 29th I would have asked to go out there and look at the same window that Mr. Glick did and would have sent my experts to ask them to cut on that window.

But usually what we do and when we work together is they tell us that their experts are going out there so we don't have to do it the day before trial, Your Honor.

I mean that is the problem here, Your Honor. Had they notified us on September 29th that they were going out there and looking at this condition and had they notified us before January 6th that they were doing it we would have known about it and we would have made the request.

But how do we know if they don't tell us? That is the problem I am having with this.

THE COURT: Mr. Hayes.

MR. HAYES: Yes, Your Honor.

THE COURT: Would you like to respond?

MR. HAYES: Yes, Your Honor.

THE COURT: I guess I am trying to figure out what are we talking about. What is it -- what relief are you seeking from the court other than us having a general conversation about what Mr. Glick did.

MR. MANOS: I would like you to exclude the evidence from January 6th and January 14th that Mr. Glick intends to bolster his testimony with that we didn't have ---

THE COURT: I need you to ---

MR. MANOS: --- a fair opportunity ---

THE COURT: Yeah, refrain from any editorial comment about what you perceive and let's stick to -- I don't know whether it is bolstering or not. I don't have a clue. But that is -- that is an evidentiary term.

MR. MANOS: I ---

THE COURT: And I ---

MR. MANOS: Okay.

THE COURT: So I -- so let's just keep it neutral.

MR. MANOS: Mr. Glick testified yesterday, Your Honor - and I have got his draft here - that he had

certain opinions of conditions back when he did his destructive tests in October of 2014.

And what he looked at on January 6 and 14 confirmed those opinions and here is why for x, y, and z reasons. And that is why I used the word bolstering.

And I apologize if that is an improper use of the term. I didn't mean to editorialize. But that is what I -- it was confirming testimony, if that is a more accurate term to use.

THE COURT: Mr. Hayes.

MR. HAYES: Yes, Your Honor. In regards to that report/letter of September 29th that he didn't receive it -- which I don't know if they did or not. They said they didn't, so I will take them at their word.

THE COURT: I am sorry, I can barely hear you.

MR. HAYES: Oh, I'm sorry.

THE COURT: Why are y'all sitting on that row?

MR. HAYES: I will walk up. I apologize.

THE COURT: Yeah, y'all need to share. We might need to bring another table in here I guess maybe. Maybe not. We will see. Yeah, it is hard for me to hear you when you are that far back.

MR. HAYES: Your Honor, may I?

THE COURT: Yes. Absolutely.

(WHEREUPON, Mr. Hayes moved forward in the courtroom.)

MR. HAYES: Your Honor, in regards to that September 29th letter that he handed up, if they didn't get it it was an oversight. And it certainly wasn't done on purpose. I don't even know if I got it. We can go back and check. Regardless, Mr. Glick did it. They had a full and fair opportunity to ask him about it.

THE COURT: He gave it to them at the deposition?

MR. HAYES: That's right. And they spent three hours yesterday asking him any and all questions they wanted to about that and the other visit and even stuff that was before then.

Your Honor, also, as I read the rules, they say that an expert can continue to form his opinions during the course of discovery up and to -- and through the hearing, being the trial.

You know, it is often that we have our experts sit in trial and listen to the testimony and it may form their -- it may impact on their opinion.

Sometimes it may bolster it, Your Honor. Sometimes it may have a negative effect on it. And they readjust their opinions based on that.

We don't believe there is any prejudice to the defendants. We have never denied them the opportunity to go out there and do destructive testing.

They spent days out there crawling on -- crawling

all over these buildings, doing destructive testing that they wanted to do that they chose to do.

I don't believe there is a rule that said we have to notify them every time we go out to our client's homes. We have given them more than a fair opportunity to go out there and look at it.

Your Honor, they have had the opportunity to perform any destructive testing they wanted to and pick any windows they want and do anything they needed to. We have never denied them that opportunity. It has been going on since 2013.

THE COURT: Yes, sir.

MR. MANOS: Can I make one comment, Your Honor?

THE COURT: Sure.

MR. MANOS: I would also point out to the court if I may that when his expert goes in and actually opens up another window and take caulks out and takes flashing out he is altering and modifying evidence that he intends to rely on which potentially brings up the spoliation issue as well.

Which is why we don't know, not having our guys out there to observe and see what he is doing; we have just got to take Mr. Glick's word for it that what he says is what he saw rather than our experts having an opportunity to at least make observations.

THE COURT: Yeah, I have been very clear. There is no rule. He doesn't have to call you every time his expert goes out there. He has no obligation to do that.

Now people do it. Like I said, sometimes they all have their experts all go at one time. Really and it is more of a convenience issue to minimize any inconvenience to the property owner so that only one group of people is coming there one time and they are in their way and back out of their way. But they have no obligation to notify you.

And there -- I -- it is a stretch to say there is some spoliation of evidence. How else are you going to do the testing? That is why it is called destructive testing. It anticipates some dissembling of elements to test. So I don't find that ---

MR. MANOS: Which is ---

THE COURT: --- particularly persuasive. But what he has said is you had a chance to go out there; he is not stopping you from going out there. So what is the issue?

If your client -- if your expert feels he needs to now perform another test on this additional window he says you can go do it.

MR. HAYES: They are welcome to, Your Honor.

THE COURT: So what is the issue?

MR. MANOS: All right. Well, it may be to go on to what Mr. Glick did. Because that is not the only thing he did, Your Honor.

On January 14th, one day before trial, Mr. Glick went to probably, I don't know, six, seven, or eight other units and started taking pens and poking them into various pieces of trim and wood at different places and intends to say here is more evidence that we didn't get a chance -- there are 105 units out there so what I have got to again talk to co-counsel about, possibly a day before this weekend before we go to trial on Monday, is do we need to get our guy to go out there and look at the 80 units that Mr. Glick didn't go to and poke a pen where they are solid. And it just never ends, Your Honor.

THE COURT: Well, those are strategic decisions you have to make. I mean, you know, ---

MR. MANOS: Okay.

THE COURT: --- that is why it is call an adversarial system.

MR. MANOS: Okay.

THE COURT: He says you don't have any limitations in going out there. Do whatever you feel you need to do.

MR. MANOS: All right. Well, if that is the case, Your Honor ---

THE COURT: But I am not going to limit their

witness. I mean people -- experts change their opinions all the time.

I have had medical malpractice cases where we have three experts sitting in on the trial and their testimony is totally different from their deposition based on what has developed at trial.

Sometimes plaintiffs testify differently. Sometimes when they are -- and I am using the medical malpractice example again. Sometimes they talk about symptoms they never told the doctor, that the expert never heard about.

That of course then has a domino effect and it changes the opinion. That's why people have their experts sit in the courtroom. There is no rule that precludes that.

MR. MANOS: Okay. And let me ---

THE COURT: But they do have a continuing obligation to make you aware of it.

MR. MANOS: And thank you. And I appreciate ---

THE COURT: As well as it is a reciprocal duty.

MR. MANOS: Okay. All right. So the only thing I would say, Your Honor, that I want this court to understand is I am not looking to needlessly delay this trial. So if we ---

THE COURT: Well, it is not going to be delayed. So that is not going to be an issue.

MR. MANOS: Well, in other words, if we request ---

THE COURT: It has already been delayed four years. It is going to be put out of its natural life on Monday.

MR. MANOS: And that was -- that was kind of my point, Your Honor. In order -- if we potentially have to go get a termite expert, if we make that decision, if we have got to go get our other experts to go back out to the site to look at these various things, that becomes the issue. That is what I need to discuss with ---

THE COURT: Well, I think you need to embark on it and see ---

MR. MANOS: Okay.

THE COURT: -- and just think best and not worst-case scenario. You know, I don't know; it might enable your client to have a different view of this -- all of these things have ripple effects. I don't know whether your experts going out there might change their opinion.

MR. MANOS: I understand.

THE COURT: Might solidify their opinion. Might alter the advice and counsel they have given to you for you to give to your clients. I have no idea. But I think you owe it to yourself to do it if you think you need to.

I am never going to preclude any attorney from doing

what they need to do to protect their client's interest. I am never going to put you in such a situation where you -- I always hated that. I haven't tried a case in 20 years. But, you know, as a lawyer we have got those A-personalities and we are going to beat ourselves anyway. There is something we are going to miss every time. You know, because we think we are perfect. We are not.

It is an unreasonable standard to hold ourselves to, but we do anyway. So you are already going to beat yourself about what you missed, because you are human.

But I don't ever to the extent that a lawyer can have access to something or do something look back later and say, gosh, I didn't get a chance to do that within a reasonable, you know, window of time.

And if your experts need to go back out there -- and Mr. Hayes says go. Because I don't want your client coming back later and saying why didn't you send them back out there to look or why didn't we -- you know, worst-case scenario there is some huge verdict and they say, well, gosh, you know our opinion would have been different if we had known about these other 80 units. And our -- and it may well change your expert's opinion. Or it may well solidify their thoughts on it.

I just think you need to explore it because you

don't -- you know, hindsight is 20-20. And you are already going to beat yourself about enough stuff. So you might as well -- you know, to the extent -- and you and Mr. Haselden will have to make that assessment.

But I don't have any reason to doubt Mr. Haselden when he tells me it was an oversight. I have dealt with Mr. Haselden a long time. He has never like mislead me or told me -- he has always been pretty forthright with me. And I -- and I respect that. And I appreciate that.

MR. HASELDEN: Thank you, Your Honor.

THE COURT: If he tells me something I pretty much can count on it. Now there are some folk I can't give that accolade to; it is like trust and verify.

But when I look at this six volumes of a file that I have -- I was downstairs this morning going through my papers recognizing that I had duplicates of things. And I just said to my secretary and my law clerk we are going to have now go back through my file paper by paper and make sure I don't have duplicates because I am going to get confused.

I need one set of -- I was realizing I had multiple sets of things when I thought I only had one set of this or one set of that.

So if I am dealing with that -- and this is my first real introduction to this case. And y'all have been

dealings with it since 2013 conceivably. It is -- and my opinion would be the same if it were you and Mr. Haselden. It is easy to miss a piece of paper.

But the remedy is to give you access to it and to take any action you feel is appropriate to protect your client's interest as a result of it.

If you need to have your expert look at it, if you need to have your expert go out there and look at -- I don't know whether this deals with one piece of property or two.

But if you need your expert to go out and look at what he looked at and revise their opinion as a result or update their opinion, I say do it.

But I mean that is a strategic decision you are going to have to make. But I don't think that is a basis to exclude Mr. Glick's testimony.

And I know litigation is frustrating. And I know sometimes as lawyers, you know, we don't deal with things until we have got -- you have got 20 different things juggling all at the same time so you pay attention to the thing that is most immediate. And most times you don't really start focusing on getting ready for trial until you actually know there is going to be a trial. And things are missed. I mean it happens.

But I don't think it was deliberate on his part in

any way; and I don't think he was trying to, you know, mislead you.

MR. MANOS: Never ---

THE COURT: Yeah.

MR. MANOS: Never accused him of that.

THE COURT: So, you know, if you feel that you need -- I would suggest that you all coordinate your person -- I mean does he need to coordinate going out there?

MR. HAYES: We will give them -- we will give them ---

THE COURT: Or does he just ---

MR. HAYES: --- unfettered access.

THE COURT: --- need to just do what he needs to do?

MR. HAYES: We will give him unfettered access, Your Honor.

MR. MANOS: That's great.

THE COURT: That works. All right. Do you want your copy back? Because you have got some notes on it.

MR. MANOS: Thank you, Your Honor.

THE COURT: You are welcome.

MR. MANOS: Can we get some direction from the court as to how much time Mr. Haselden and I have to make those strategic decisions?

THE COURT: Oh, you need to make them decisions

today. Don't you think?

MR. MANOS: I am asking you, Your Honor.

THE COURT: You know, maybe it is just me; but I don't see it as a particularly complex -- your experts will know -- I mean they have an opinion.

MR. MANOS: Well, I am just talking about from as far as figuring out how much time they are going to need. It is Thursday morning. One of our experts is in Greenville. We don't have a termite expert yet. I don't know that we want one. I am actually leaning ---

THE COURT: Well, why don't y'all ---

MR. MANOS: --- toward we probably don't want one, but I need to talk ---

THE COURT: I would want y'all to still work toward being ready for trial on Monday. If something, you know, insurmountable -- I mean some -- I mean things happen. Life happens. You get up -- I mean every day is different.

I mean, like I said, if I were clairvoyant I could be in Las Vegas doing a show, you know, if I could predict the future. I can't. So I have to just take it as it comes. But I would work toward being ready for trial on Monday.

MR. MANOS: All right, can I ---

THE COURT: The best you can. I mean and if

something comes, you know, let us -- let me know.

Yes, sir?

MR. MANOS: To the extent we decide we want our expert, Skip Lewis from Greenville, to offer additional opinions regarding some of the things that Mr. Glick looked at, the most practical way to get that information to Mr. Lewis probably is going -- for me to get another expert with ABS locally in Charleston ---

THE COURT: Okay.

MR. MANOS: --- that can get over there.

THE COURT: Okay.

MR. MANOS: Because Mr. -- I don't know what Mr. Glick is doing today. He is in Greenville. I just want to know that there will be no objection by plaintiffs that we haven't named this new expert ---

THE COURT: I think you need ---

MR. MANOS: --- to provide Mr. Lewis information.

THE COURT: Okay, I am confused now. Are you telling me you are going to get a new expert ---

MR. MANOS: Well, just to ---

THE COURT: --- or are you going to get a new expert ---

MR. MANOS: To assist in gathering information quickly in order ---

THE COURT: For him to evaluate?

MR. MANOS: --- to get it to Mr. Glick to look at and rely on. I may not be able to get Mr. Glick down here today -- I'm sorry, Mr. Lewis.

THE COURT: Yeah, you confused me when you said Mr. Glick.

MR. MANOS: I may not be able to get Mr. Lewis down here from Greenville today.

THE COURT: Okay. Well, I don't see that they would have a problem with that.

MR. HAYES: Your Honor, if they want to get somebody to go do whatever they needed to do ---

THE COURT: That is like data collection.

MR. HAYES: That is date collection, Your Honor.

THE COURT: Yeah.

MR. MANOS: Just asking the question, Your Honor. I don't know what is going to be objected to and not, and I want to know in advance.

THE COURT: Yeah, I would assume they wouldn't -- they wouldn't like ---

MR. MANOS: Okay.

THE COURT: --- put up any impediments or roadblocks to you getting that ---

MR. MANOS: So unfettered access and we can go to ABS and get them to do some data collection ---

MR. HAYES: Get data collection and give it to --

submit it to Lewis and ---

MR. MANOS: Are you all fine with Mr. Lewis relying on that?

MR. HAYES: What is that?

MR. MANOS: And you are fine with Mr. Lewis relying on that?

MR. HAYES: If Mr. Lewis would like to rely on the photographs and whatever -- the ABS or whoever you find to go out there, that is fine if he wants to rely on that. Not naming another expert, you are just having Mr. Lewis rely on whatever test ---

THE COURT: Basically for expediency he is going to do some data collection for your gentlemen ---

MR. MANOS: Potentially. I don't have an answer.

THE COURT: --- so he doesn't have to drive three hours here.

MR. HAYES: We are absolutely fine with that.

THE COURT: Okay.

MR. MANOS: Thank you, Your Honor.

THE COURT: All right. Anything else you want to bring to my attention?

MR. MANOS: As far as yesterday is concerned I do not believe so, Your Honor. Thank you.

THE COURT: Okay. Now if y'all have any objections that you are going to want me to rule on regarding these

depositions you need to get me those depositions in advance, like at least by -- and not just these two but any depositions.

Well, I guess I need to ask the first question which is the initial question: Do y'all plan to rely on any depositions being read into the record in the -- I mean instead of the witness being here present? Did you take any depositions in anticipation of litigation that I am going to need to rule on any objections before we get started?

MR. HASELDEN: Your Honor, we submitted to them some deposition portions that we want read into the record at trial. We submitted them on Monday pursuant to the rule.

THE COURT: Whose depositions are they?

MR. HASELDEN: I don't have it with me. But I can tell you generally it is some -- it is homeowners.

THE COURT: Okay.

MR. HASELDEN: Their clients.

THE COURT: Are they going to be testifying?

MR. HASELDEN: They are not on their witness lists.

THE COURT: Because I would image it would have gotten cumulative. Is that why?

MR. HASELDEN: No, ma'am, it is not cumulative.

THE COURT: Okay. No, I mean they are not going to call every person that owns a condo out there?

MR. HASELDEN: No, ma'am. These people ---

THE COURT: That would get like burdensome.

MR. HASELDEN: These people specifically. It really kind of -- it may go to -- it may not be necessary depending on how it goes. I mean there -- we would read it in during our case, but it may not be necessary based on some things we have got set on Tuesday.

THE COURT: Okay.

Yes, sir.

MR. HAYES: Well, Your Honor, we would be happy to submit deposition page line designations to the court whenever the court ---

THE COURT: What depositions are you looking at using?

MR. HAYES: I will let ---

THE COURT: Yes, ma'am.

MS. NOLAN: Your Honor.

THE COURT: Ms. Nolan.

MR. HAYES: Nolan.

MS. NOLAN: There are some 30(b)(6) depositions of Wieland that we will be submitting in our case in chief.

THE COURT: And for what purpose?

MS. NOLAN: For the purpose under Rule 32 as far as a party deponent.

THE COURT: I mean but what is it being offered to

prove? I guess I wasn't clear on my question.

MS. NOLAN: Your Honor, to show the actions of Wieland in our case in chief and to go to some of the elements of our causes of action.

THE COURT: Okay. They are not going to have a 30(b)(6) witness here to testify? Y'all aren't going to call ---

MR. HAYES: Your Honor, may I?

THE COURT: Yes.

MR. HAYES: They named three or four people as a 30(b)(6) witness.

THE COURT: Okay.

MR. HAYES: I don't know who they are going to have here and who they are not. But there is some video testimony, video deposition testimony, that we want to go to -- to go to the jury in regards to some questions we asked them. As the rule allows I believe we are able to use it ---

THE COURT: Yeah, the rule does allow it. But it is preferable if the person is here present and testifying that you ask them that same question and if they don't answer consistently to impeach them. That is the preferable way to do it.

MR. HAYES: Yes, Your Honor. I understand ---

THE COURT: But if they are not, then that is a

whole nother story and a whole nother way. But it is probably the far more effective way to use it.

THE COURT: Yes, sir?

MR. HASELDEN: Well, the other problem with that is a lot of the questions -- I think I have seen a lot of the -- they showed a lot of this at mediation. The stuff they want to get in they edited out our objections. So we would have to go back through and see what they are doing and Your Honor would have to deal with the objection during the videos playing.

THE COURT: Yeah, and I prefer the written -- I mean if you have -- has it been reduced to writing?

MR. HAYES: It has been reduced to writing. But, Your Honor, the reason we do it by video ---

THE COURT: No, I don't have a problem with the video. You can use the video to impeach the witness. It is easier for me.

MR. HAYES: Right.

THE COURT: Than me sitting there -- I -- I can read a whole lot quicker than I can watch it.

MR. HAYES: And the reason we also do it by video, Your Honor, is, you know, the jury has an opportunity to not only ---

THE COURT: I am not questioning your means.

MR. HAYES: Okay.

THE COURT: I am just saying for me.
MR. HAYES: Okay.
THE COURT: If you want me to rule on an objection I need that written deposition.
MR. HAYES: We will get it to you.
THE COURT: And you are going to need it anyway.
MR. HAYES: We will get it to you, Your Honor.
THE COURT: Yeah, you are going to need both of them anyway.
MR. HAYES: We will get that to you, Your Honor.
THE COURT: Thank you. And any objections you have. I just need to be able to read in advance. It is purely selfish why I am asking. Well, not really selfish. It helps you. It is better than me having to stop and wait and do it. And I don't like reading at lunch.
MR. HAYES: Your Honor, we -- we will ---
THE COURT: Because when I am hungry my -- I mean I think I read everything and digest it. But I always don't -- yeah.
MR. HASELDEN: Your Honor, we submitted ours Monday in anticipation of the trial starting Tuesday.
THE COURT: You submitted it where?
MR. HASELDEN: Well, we submitted it ---
THE COURT: To them?
MR. HASELDEN: For the counsel. But we will get it

to your law clerk today.

THE COURT: Yeah, because -- and actually let me say this. If you all can agree, I would prefer you all do that to your best ability; and then what you can't agree on, let me know.

MR. HASELDEN: Okay.

THE COURT: Because some of it I would imagine y'all would be able to work through and agree on. You don't think?

MR. HASELDEN: I am going to do what I did the other ---

THE COURT: I'm sorry, Mr. Haselden, I didn't mean to laugh at you. But that look on your face tickled me.

MR. HASELDEN: I am just going to sit down again, Your Honor.

THE COURT: Y'all don't think y'all will be able to work through the deposition? That seems so cut -- so simple.

MR. HAYES: We will make every effort to. I mean it is testimony that was done ---

THE COURT: It just saves time if y'all can agree. Because then you can do your designations and we can keep it moving. But if not, I mean ---

MR. HAYES: We will do anything we can to get this process moving and make it as ---

THE COURT: Okay. So y'all can -- you know, what y'all can agree on, do that. And whatever you can't agree on, you know, send it on over to me.

Now the other thing, have y'all made any headway in your exhibit lists in what y'all can agree on and what you can't agree on?

MR. MANOS: We have not gotten back together yet, Your Honor. But we can certainly do that this afternoon.

THE COURT: Maybe y'all might want to -- yeah, make use of that time today to do that. Okay.

All right. Is there anything else -- yes, sir, Mr. Nistad. Because you stood up several times. And I'm sorry; I didn't mean to ignore you.

MR. NISTAD: I just wanted to put on the record. I understand your ruling and I know everything that has been hashed out, that Muhler was joining Wieland's motions about Mr. Schneider and Mr. Glick. Just needed to be on the record. And that's all been said.

THE COURT: Well, but you have settled out ---

MR. NISTAD: I only settled ---

THE COURT: --- and your settlement was not contingent on them ---

MR. NISTAD: Right, but I ---

THE COURT: Yeah.

MR. NISTAD: It is -- the evidence against them

still is relevant to their case against me. So it's ---

THE COURT: Okay. I got what you are saying. Okay. Well, I stand by -- I think they need to have the ability to go do the testing. But I am not going to exclude ---

MR. NISTAD: I ---

THE COURT: Yeah.

MR. NISTAD: I just wanted to make sure it was on the record.

THE COURT: Not a worry.

MR. NISTAD: Didn't want to rehash everything.

THE COURT: Not a worry.

MR. MCCARTY: And, Your Honor, I will join in that as well and also apologize for showing up late.

THE COURT: That's okay.

MR. MCCARTY: I was going about 25 miles per hour ---

THE COURT: We heard there was a wreck on the interstate.

MR. MCCARTY: Okay.

THE COURT: Yeah.

(WHEREUPON, conversation regarding traffic was had.)

MS. FRAGALE: Your Honor.

THE COURT: Yes, ma'am.

MS. FRAGALE: Sarah Fragale ---

THE COURT: Yes, ma'am.

MS. FRAGALE: --- for Juan Luis Sanchez. And I also would like to join in the Wieland motions.

THE COURT: Okay. Back to the matter at hand.

Okay. The court has pending before it several motions, one being the motion of the Muhler Company for summary judgment on the cross-claims. The other is the Defendant Sanchez' motion for summary judgment. As well as a joining in the motion to bifurcate, alternatively that was filed by JMC. And then JMC's motion for summary judgment or in the alternative to bifurcate the equitable indemnity cross-claims asserted by John Wieland Homes.

All of these motions in essence argue the same thing and argues the same basis for the motions, with the exception of an argument Ms. Fragale made that I thought was actually quite interesting which deals with the underlying whether if a settlement was reached or if a jury gave a verdict in favor of the plaintiff against her client whether there would even exist any underlying claims that would be subject to indemnity or otherwise because in essence they would have already been held responsible for their individual liability and therefore would not have anything to indemnify the defendant's against which I kind of thought was kind of an interesting argument. I had never -- no one had ever actually argued that before.

But I found it quite fascinating because I think there might be some merit to that argument. But I haven't had enough time to really study it as closely as I would like to.

When you actually look at the actual language of -- if I were to believe that there were a written contract the indemnity language itself might well validate her argument.

But in essence what each of the parties argue is that the claims for breach of contract, breach of warranty, that they all fail because in essence -- and negligence. In essence it is really an indemnity claim couched in other terms, that there is no equitable indemnity even if the contractual indemnity claim fails, and there is in essence no written contract between Wieland and the subcontractor entities, and then also claiming that -- well, actually Mr. Nistad made the same argument, that his liability was extinguished because of the settlement and that there would be no basis for indemnity because they would have in essence taken responsibility for their own -- any responsibility they had as to any of the cause of any existing defects.

I have reflected on these matters a great deal. And what I am going to do, I am not granting any of the motions for summary judgment because there could exist a

question of fact as to whether a contract exists or not.

It is not for me to determine whether there was a meeting of the minds, exchange of consideration, whether the contract was specific enough in its terms. I think all of those are factual issues for a jury to determine.

Now whether it is an adhesion contract, you know, there might be some questions as to whether that is a legal issue for the court to resolve; but I think at this point it may well be premature.

However, what I am going to do is I am going to grant JMC's request which was joined in by Muhler and Sanchez; and there was no objection by the plaintiffs to bifurcate the cross-claims and any other claims that have been brought against the subcontractors.

So we will go forward on the main claims and any of those defendants that are remaining. And we will proceed with that on Monday.

And then what we will do, we will then know whether the indemnity claim is ripe. And then we will go forward and schedule a subsequent trial on the cross-claims if necessary.

So you all work on your exhibits. I don't know who my -- I think I have a different court reporter ---

MR. COLE: Your Honor.

THE COURT: --- next week.

Yes, sir.

MR. COLE: We need to speak on that first ---

THE COURT: Well, you argued extensive yesterday. And the court has ruled. I gave you the relief you requested.

MR. COLE: Well, not quite, Your Honor. Because the problem is if their contractual indemnity claim is still out there then we don't have the confirmed settlement with the plaintiffs because we still have the liability out there. And that is the problem. The settlement ---

THE COURT: No, the case goes forward. You asked me to bifurcate it, right?

MR. COLE: Right, I asked you to bifurcate it if the only thing that was left over was the equitable indemnity claim because then that, you know, is a different animal from the contractual identity.

The contractual indemnity does not take out the liability that the Wieland entities will try to give on us and so you basically are removing us from the main action even though we still have ---

THE COURT: No, you will still be in the main action and there will be an apportionment and then you then go to the other side of it which is their cross-claims. And then basically a directed verdict the court will determine if there is any weight to their argument.

Basically this is an equitable indemnity case.

MR. COLE: Well ---

THE COURT: It actually inures to your benefit because then any fault will be apportioned at that point.

MR. COLE: I agree ---

THE COURT: So then you will know who is responsible for what.

MR. COLE: I ---

THE COURT: Or at least who a jury says is responsible for what.

MR. COLE: I agree that if it is just an equitably indemnity claim it is a different ---

THE COURT: I think ---

MR. COLE: --- analysis.

THE COURT: I think that is the same whether it is negligence or -- the only thing that is going to be left is the plaintiff's claims against you. We are not going to be hearing the cross-claims in this part of it.

It is too complicated. It is too complicated for a jury. It is better to break it into parts and let them decide then whether there in fact exists a contract. If it goes that far.

MR. COLE: Well, the problem is that if Wieland still has their contractually indemnity claims against us then potentially they ---

THE COURT: Still a cross-claim still exists. Which would be tried. And you are not prejudiced because your right to a jury trial is still preserved.

MR. COLE: But then we have to try that claim again; because at the main trials plaintiffs are going to point the finger at Wieland and plaintiffs are going to point the finger at us to try to get to Wieland, and Wieland is going to point the fingers at us. And we are not going to be able to defend that. And we are not going to be able to defend that ---

THE COURT: You are going to be in the case. How could you not defend it?

MR. COLE: Excuse me?

THE COURT: You are going to be in the case. How would you not be able to defend it?

MR. COLE: So we are going to still be at trial is what you are saying?

THE COURT: Yeah, you are still a party. You didn't settle out, right? You are still a party.

MR. COLE: Correct.

THE COURT: The only person that is not going to be in there is Mr. Nistad because his client has settled and it is not contingent on the release of the cross-claim.

MR. NISTAD: However, Your Honor, I -- I never moved for bifurcation.

THE COURT: And you are not in the case anymore, so it really doesn't matter. All you asked for was a ---

MR. NISTAD: Well, I am a third-party and I ---

THE COURT: Yeah, but you are not prejudiced because your claim is still preserved. You still have the right to defend yourself before a jury.

MR. NISTAD: But in this case Wieland can point the finger at Muhler while I am not here to defend Muhler and ---

THE COURT: You are not a party in the main claim anymore. You settled with the plaintiffs.

MR. NISTAD: But they still have to prove their case against me. And it is ---

THE COURT: How are they going to prove their case against somebody who is no longer a party?

MR. NISTAD: Well, I am a party.

THE COURT: You were a party in the cross-claim.

MR. NISTAD: I am a party in the cross-claim.

THE COURT: We are not trying the cross-claim. I bifurcated it. So I am trying to figure out how you are prejudiced. All of your rights are still preserved. Because it is a separate case now where they have become the plaintiffs and you are the defendant.

MR. NISTAD: Well, I think I am just a third-party in a part of the case; and so I can't be ---

THE COURT: You have settled with the plaintiffs.
MR. NISTAD: I did.
THE COURT: You were removed from the caption. You are no longer a party to that part of the case.
MR. NISTAD: I ---
THE COURT: You are only left in the cross-claim.
MR. NISTAD: And so I am still part of that case.
THE COURT: But ---
MR. NISTAD: So ---
THE COURT: But that case is not going to be tried if I bifurcate it. It is going to be tried as a totally separate ---
MR. NISTAD: I would just like the record to reflect I did not move for bifurcation and ---
THE COURT: Noted.
MR. NISTAD: And that ---
THE COURT: I could sua sponte bifurcate it, frankly.
MR. NISTAD: That's fine.
THE COURT: It is complicated. It is way too -- I had to do a flow chart. It is too complicated for a jury to have to do all of that at one time.
MR. NISTAD: And I understand that.
THE COURT: And we are going to end up redoing it.
MR. NISTAD: And I just want to make sure the record

is clear.

THE COURT: Yeah. I think this is the cleanest way to do it.

MR. NISTAD: Okay.

MR. COLE: All right, so as I understand the ruling, we are not -- we are not settled ---

THE COURT: Well, that is your choice.

MR. COLE: Be there ---

THE COURT: You can settle if you want to. I mean it is up to you. And they run the risk of not settling with you. Because they -- it might be less than what you have offered to bring to the table, right?

MR. COLE: Do you mean the -- okay, so we are all going to be there Monday morning to try this case and it is going to be the plaintiffs against I guess Wieland, Ms. Fragale, and my client; and, you know, we are going to go forward and then whatever happens at the end of that ---

THE COURT: Y'all are the only two defendants left, correct?

MR. COLE: I think so if you let ---

THE COURT: Other than this other ---

MR. COLE: --- Muhler out.

THE COURT: --- gentleman that -- well, it is not a matter of letting Muhler out. Muhler has settled. They

are no longer a party with the plaintiffs. They are a party in a cross-claim where now Mr. Manos' client is the plaintiff and he is the defendant.

MR. COLE: Okay.

THE COURT: On what basically is going to amount to either a contractual or an equitable indemnity claim. Because I doubt any of those other claims are going to survive directed verdict. If it gets that far. Because this is really an indemnity claim.

MR. COLE: I agree.

THE COURT: Yeah.

MR. COLE: And I want to address the contractual indemnity part, Your Honor. I believe that we had the opportunity yesterday to put the evidence that is in the record before you so that you could analyze it ---

THE COURT: Yeah, but I don't get to decide whether y'all had a meeting of the minds, whether there was consideration. That is not my job.

MR. COLE: Well, but I will submit to Your Honor at least so that I can get it on the record that I believe that we had enough information so that you could make a judicial decision instead of having to give it to the jury.

THE COURT: That is not the way our law is written. That is the way federal law is written, but it is not the

way state law is written.

If y'all can't decide if there was a contract, it is not for me to sift out who is telling the truth. It is not for me to sift out -- it is not for me to decide whether you had a contract or not. It is for a jury to decide whether you had a contract or not.

And the way it may even have to be done is by special interrogatory. Which is for a jury to first decide whether you had a contract at all and then to determine if there was a breach -- in any way a breach -- it has a lot of -- I mean I have thought about it quite a bit.

I just think it is a lot for a jury to try to digest all at one time. And I think it is going to end up being a mess if it is done any other way than the way I am thinking about it.

Now -- but it is not for me to decide whether y'all had a contract or not. The law does not give -- if there is any issue as to a fact unless you all stipulate that there is -- and if there is any issue as to the law to be applied to those facts it is not for me to sift that out. It is for the fact finder to figure that out. It is for a fact finder to decide whether y'all had a contract or not.

MR. COLE: I will just submit to you I think that we

have shown and Wieland was not able to demonstrate with their opportunity yesterday that there was an issue of fact that needed to go to the jury.

THE COURT: They said there was an issue of fact. They said your client signed a contract ---

MR. COLE: I know that there ---

THE COURT: --- and that they operated pursuant ---

MR. COLE: But their affidavit ---

THE COURT: --- to the contract.

MR. COLE: Their affidavit was deficient. It was incorrect on its face because we were able to show uncontrovertibly that the contract if it had been entered was not entered until after 20 percent of the building -- or the units had been constructed. I just ---

THE COURT: Factual issues. I heard you yesterday.

MR. COLE: All right.

THE COURT: Yeah.

MR. COLE: Thank you, Your Honor.

THE COURT: Yeah.

MR. NISTAD: Your Honor, if I may make one point.

THE COURT: Yes, sir.

MR. NISTAD: I will be relatively quick. And I know we -- handle on what your response would be, so; but I think we presented evidence that the contracts were as to signed as to time, place ---

THE COURT: That goes to offer and acceptance and whether it has been consummated. And they are going to say that they ---

MR. NISTAD: Well, they ---

THE COURT: --- consummated it by their performance.

MR. NISTAD: They didn't provide any evidence that there was a time, place. They just had a simple outdated, said there was a contract. So, you know, I mean I think they have to have evidence of there was a price ---

THE COURT: I am not going to weigh credibility. I am not going to weigh what -- I wasn't there. I don't know who signed what.

MR. NISTAD: I just wanted to make sure the argument was clear.

THE COURT: It was clear. I let y'all argue until your heart's content yesterday. I was not confused. I was clear.

It is not for this court to determine whether y'all had a contract or not. There are clearly questions of fact on the basic elements of a contract. It is not for me to figure that out. It is the posture of the case.

Now, Mr. Hayes, is there anything you would like to tell me after having heard your colleagues about the bifurcation? Are y'all opposed to it or did your ---

MR. HAYES: No, Your Honor, we believe that ---

THE COURT: --- opinions stay the same?

MR. HAYES: We believe -- we agree with the court. We believe it will be the best way to handle this matter and be less confusing for the jury at this stage.

THE COURT: All righty, guys. Work on your exhibits. We will go from there and we will start on Monday.

Mr. Manos, if you have any problems with your issues with your witnesses or otherwise, bring it to my attention. My secretary and law clerk will be in today and tomorrow and they will be able to reach me if necessary and for us to do a conference call if necessary at some point during the day if we have to.

MR. MANOS: Thank you, Your Honor.

THE COURT: You are welcome.

Y'all have a good day.

MR. COLE: Your Honor, could I ask ---

THE COURT: Sure.

MR. COLE: --- do you have the week after next week as well for trial?

THE COURT: Why?

MR. COLE: Well, I mean right now we have got Wieland, Sanchez, us, and plaintiffs in the case. And that is going to be at least 25 witnesses.

And we haven't had the benefit of being part of any of the pretrial discussions about exhibits or depositions or things like that. So we are going to have to, you know, play catch-up for that to get ready for it for Monday morning.

THE COURT: Okay.

MR. COLE: And so I am just trying to figure out, you know, scheduling to make sure that we are prepared with all of us involved to go forward on Monday.

THE COURT: If anything you learn about me is I am meticulous and organized. You let me worry about that and you worry about getting ready for trial.

MR. COLE: Thank you, Your Honor.

THE COURT: Thank you. Have a great weekend.

(WHEREUPON, hearing concluded 1/19/17, 10:57 a.m.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on January 17, 2017 and January 19, 2017.

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

PHYLLIS NORTON, CVR

Date: March 31, 2017

Certified Transcript Provided For: Andrew N. Cole
Certification Reference #033117

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2013-CP-10-03326

WAVERLY AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC.,

PLAINTIFF,

VS.

JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC., ET AL.,

DEFENDANTS.

TRANSCRIPT OF RECORD

JANUARY 23, 2017
CHARLESTON, SC

VOLUME 1 OF 6

B E F O R E:

HONORABLE DEADRA JEFFERSON, JUDGE, AND A JURY.

A P P E A R A N C E S:

JOHN HAYES, ESQUIRE
I. KEITH MCCARTY, ESQUIRE
MARY NOLAND, ESQUIRE
JESSE SANCHEZ, ESQUIRE
Attorneys for the Plaintiff

ANDREW HASELDEN, ESQUIRE
THEODORE MANOS, ESQUIRE
Attorneys for the Defendants

* *

ALSO PRESENT:

ANDREW COLE, ESQ.
SARA FRAGALE, ESQ.
ROBERT CALAMARI, ESQ.
CHERYL SHOUN, ESQ.
JOHN MASSALLON, ESQ.

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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WITNESS

MYLES GLICK

DIRECT EXAMINATION BY MR. HAYES 117

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	MARKED	ADMITTED
1-Glick presentation	75	
2-Glick CV	75	
3-Glick report	75	
4-2003 code	75	97
5-video	75	
6A-6ZZZZZZZ-photos	75	
7-photos	75	
8-Lee affidavit	75	97
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13-installation instructions		97
15-termite report	75	
16 17-Mease report	75	
17 18-Mease CV	75	
18 19-Mease report	75	
19 20-photos	75	
20 21-installation instructions	75	97
21 22-video	75	
22 24-De Santis report	75	
23 25-De Santis CV	75	
24 26-loss of use estimate	75	
25 27-real estate titles	75	

	MARKED	ADMITTED
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34-Moore CV	96	
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12-mintues	96	
13-table of sales	96	
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17-contractor AP	96	
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(The following proceedings were held January 23, 2017, Charleston County, South Carolina, @ 10:43 a.m.)

THE COURT: Good morning. I am Deadra Jefferson. I'm one of your resident circuit judges for the Ninth Circuit which is made up of Charleston and Berkeley County. My purpose this morning is to determine your general eligibility to serve as jurors. For those who do not know, the state is divided into judicial circuits and again yours is the Ninth Circuit which is made up of Charleston and Berkeley Counties. We do not have any criminal court this week so we will only be qualifying for civil court, and myself, Judge Young and Judge Newman will be trying cases this week. With the exception of my case which may prove to be lengthy, and I will get into that in the voir dire process, the other cases are fairly short.

So it is a particularly good week for you to go ahead and conclude and satisfy your jury service. Each of you is here because you meet at least one of three criteria. That is if you are a registered voter, you are a licensed driver or if you have an ID card from the highway department then you are subject to jury service. We

understand the inconvenience that jury service poses both to your personal and your professional lives. And we thank you for being here with us this morning. Hopefully this will be -- we will make this an enjoyable, educational week for you. It is my sincere desire that you will learn that real court is nothing like Judge Judy, Judge Joe Brown, Peoples Court, Judge Matthis. There are so many. I have just lost track and there's a real part of me that it creates a great level of angst to watch those shows because it gives people such a false impression what the court system is really like. Those shows while they take on the nature of a court proceeding are entertainment and they are what we call binding arbitration which means any of you could be a judge in those shows. It's just two people agreeing to allow a third person to resolve their conflict and waive all rights to any appeal. So while they are incredibly entertaining, they are nothing like the real process.

So I hope although probably mathematically it's an improbability that each one of you will have the ability at some point in your lives to serve on jury service so that you will know how it really works and in some small way

reinstill your faith in the system and that the system works because of your willingness to participate in it. Our system is the only kind in the world where 12 ordinary people listen to the facts of the case, apply a complex set of laws to those facts and render verdicts. So again it is my desire that at some point, maybe not this week, that you will have the ability to serve on a jury and to learn firsthand about the process and how very valuable you are to us.

Charleston County is one of the busiest courts in the state. We hold jury trials for at least generally somewhere between three and four trials every week except holidays. So you can well imagine how important your service is to us because while there are many things that we dispose of in a nonjury capacity where the judge acts as the finder of the facts, the majority of what we do requires the service of jurors.

So you are very valuable to us. Your service is so very appreciated and we again thank you for being here with us this morning.

As you look around the room there is some people that you should familiarize yourself with. You will see seated throughout the room

bailiffs who are here. Wave your hands for me. There are about I think 18 bailiffs who are here to assist you. If you have any concern or question during your service please get their attention. They can answer most of your questions and if they can't, they will get to someone fairly quickly to resolve your issue.

Also seated throughout the courtroom are deputies who are here to insure our safety. Seated directly in front of me is my court reporter for this week. Each judge has a court reporter whose responsibility it is to take down the proceedings either by stenography which is I think an overly simplified description of what they do. It has become highly technical and computerized. Or you will see sometimes court reporters have a mask that they use to take down the proceedings.

Seated to my right and to your left are the deputy clerks who will be assisting us this week in moving cases throughout the system. And also my law clerk. The state is very generous. They provide each judge with a lawyer licensed to practice who assists them in their responsibilities and hopefully make us a lot more efficient and move cases throughout the system.

And seated throughout the room are lawyers who are here to observe the jury qualification process.

Jury qualification is done in several stages. At the end of the process I will share with you some general guidelines in an effort to make you feel more comfortable in what I am certain are unfamiliar surroundings to you. We have already gone through the first part of the process which is called roll call where you have provided us with certain information.

The next part of the process requires me to ask questions that are mandated by state law and state law also requires that I administer an oath to you before we begin that process. If you would stand for me so that I might administer the oath to you.

(Thereupon, the prospective jurors were sworn.)

THE COURT: You may take your seats. As I have already indicated, there are certain questions that I am mandated by statute to ask of you. Quite frankly I know some of them may seem intensely personal and you may not want to disclose certain information in the presence of your fellow

jurors. It is not our intent to embarrass anyone. So if there is any question that you do not feel comfortable answering in the presence of your fellow jurors, please make a mental note and come and speak with me privately when I invite you to do so at the end of the jury qualification process.

However, if a question applies to you I will need you to stand and in a loud and clear voice give me your name, your juror number and answer to the question if applicable and remain standing until I have completed speaking with you. It is absolutely essential that we have accurate information consistent with the oath that you have taken, but again I emphasize that we don't want anyone to suffer any embarrassment. So if there is a question that you do not feel comfortable answering, please make a mental note to speak with me privately when I invite you to do so.

Take a few moments to familiarize yourself with your juror number in the event that a question applies to you so that you will have that readily available to you.

(Brief pause.)

THE COURT: Here are the questions regarding your general eligibility to serve. Is

there any member of the panel not a citizen of the United States? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel not now a citizen and resident of Charleston County, State of South Carolina? If so, please stand. Yes, sir, tell me your name and number.

JUROR NO. 396: Dustin Workman. I don't know the number, sorry.

THE COURT: You said Workman?

JUROR NO. 396: Yes.

THE CLERK: 396, Your Honor.

THE COURT: Thank you. Where do you reside?

JUROR NO. 396: It's in Colorado.

THE COURT: Okay. Do you still work in Charleston?

JUROR NO. 396: I'm back and forth a lot.

THE COURT: Have you changed your license?

JUROR NO. 396: No.

THE COURT: Then you are still a resident of Charleston County.

JUROR NO. 396: Okay. I have a

Colorado license.

THE COURT: You have a Colorado license. I misunderstood. So you changed your license, but you have a secondary residence here where you work back and forth. You are exempt from service at least in Charleston County. They may call you in Colorado now. If you will just show your license to one of the bailiffs and then have a great day.

JUROR NO. 396: Thank you.

THE COURT: You're welcome. 396 is excused. Is there any member of the panel unable to read, write, speak or understand the English language? If so, please stand at this time.

(No response from jurors.)

Does any member of the panel have less than a sixth grade education or its equivalent? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel incapable by reason of mental or physical infirmity to render efficient service? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who

has been convicted by guilty plea or trial in a state or federal court of record of a crime punishable by imprisonment for more than one year and your civil rights have not been restored by pardon or amnesty? When I say a court of record, that means in federal court or circuit court, not magistrate court, municipal court or city court. When I say punishable by one year or more, that means the maximum penalty for the offense could have been a year and a day or more, but you may have received probation. And by pardon or amnesty that means if the federal government or state government has given you a pardon or some form of amnesty that has completely restored all of your civil rights. I know this is an intensely personal question. If you wish to speak with me privately you may do so at the end of the process. But if you feel comfortable and if you feel this question applies, I would ask that you stand at this time.

Yes, sir, tell me your name and number.

JUROR NO. 77: David Culp, 77.

THE COURT: Do you want to speak with me privately or are you comfortable talking in front of your fellow panel?

JUROR NO. 77: Speak with you

privately.

THE COURT: You can take your seat, sir, and we will invite you to do so at the end.

JUROR NO. 258: Jeffery Overton, 258.

THE COURT: Do you want to speak with me privately?

JUROR NO. 258: Yes, ma'am.

THE COURT: You may take your seat. Just come forward when I invite you to do so.

JUROR NO. 356: Alvin Tolbert, 356.

THE COURT: Do you want to speak with me privately?

JUROR NO. 356: Yes.

THE COURT: Just come forward when I invite you to do so.

JUROR NO. 53: Tom Cadena, 53. Like to speak with you privately.

THE COURT: Just at the end of the process follow the bailiff's instructions. I will speak with you privately.

JUROR NO. 192: Michael Lane, 192.

THE COURT: Would you like to speak with me privately?

JUROR NO. 192: Yes, please.

THE COURT: Thank you, sir. Is there

any member of the jury a clerk of court, deputy clerk of court, constable, sheriff or other commissioned law enforcement officer, probate judge, county commissioner, magistrate, or other county officer or any person employed within the walls of any courthouse? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who has previously served on jury duty in a court of record? That means the circuit court, not magistrate court, municipal court or city court during this calendar year which is 2017? If so, please stand at this time.

(No response from jurors.)

We will now move to exemptions. An exemption does not mean that you are not qualified to serve. It simply means in some instances the Court has the ability to excuse your service or to transfer your service. For example, those who are 65 years of age or older may be exempt from jury service. We would encourage you to remain with us if you are inclined to do so because you represent a tremendous pool of talent for jury service. However, if you are 65 years of age or older and

you wish to be exempted I will ask that you stand at this time. Another exemption concerns prior jury service. No one is required to serve more than once every three calendar years. Is there any member of the panel who has served in the circuit court during the previous two calendar years which would be 2016 or 2015 and you wish to exercise your exemption? If so, please stand at this time.

JUROR NO. 25: Shawn Bellmartini, 25, and I served two weeks of jury duty in September of 2016.

THE COURT: Just give us one moment to double check.

(Brief pause.)

THE CLERK: Judge, we have a problem, we are checking.

THE COURT: Ma'am, bear with us for a moment. We appreciate your patience.

Please listen carefully, ladies and gentlemen. The next exemption has several parts, all of which must apply in order for you to be exempted on this basis. This exemption is for those who are stay at home parents who have children under the age of seven, you are not employed outside the home and you cannot make

alternate arrangements for their care while serving on jury duty.

Is there any member of the panel who has a small child or small children under the age of seven and you have legal custody of your child or children and you have their principal care, custody and control and you are unable to make arrangements for their adequate care while performing jury duty? If all of these requirements apply to you then you may be exempted on this basis, but only if all of these requirements are present. If you feel this applies I will ask that you stand at this time.

Ma'am, tell me your name and number.

JUROR NO. 134: Lecriesha Griffin. I don't remember the number.

THE COURT: G-R-I-F-F-I-N? No. 134. Yes, ma'am? What's the situation?

JUROR NO. 134: I have a one-year-old daughter.

THE COURT: Are you employed outside the home?

JUROR NO. 134: Yes.

THE COURT: And what are your work hours?

JUROR NO. 134: Subway.

THE COURT: So you work full time?

JUROR NO. 134: No.

THE COURT: What are your hours at Subway?

JUROR NO. 134: From like 10 to 2.

THE COURT: And you said you have a minor child under the age of one?

JUROR NO. 134: She is one.

THE COURT: Ma'am, you would be exempt. Have a good day. Sir?

JUROR NO. 164: Linne Hutto. I have a son. He's eight, but I'm primarily responsible for getting him to and from school and after school activities. I might have a conflict with the time frame.

THE COURT: Are you employed outside the home?

JUROR NO. 164: Outside the home? I am self-employed.

THE COURT: I would imagine that gives you a level of flexibility. I can't exempt you on that basis, but I can allow you to be transferred to make arrangements for your child care.

JUROR NO. 164: Okay.

THE COURT: It's a decision you would have to make. If you are not selected for the case that I am going to try this is probably a good week to get your jury service out of the way. But it's a double edge sword. Either way it's a funny thing. When people talk to me they always end up in the number somehow. I have never been able to figure it out. Like when they don't talk to me they don't end up on a sheet. It's a strange thing. I will give you the option. Have you ever been transferred before?

JUROR NO. 164: No, ma'am.

THE COURT: I will give you the choice do you want to stick with us or do you want to be transferred?

JUROR NO. 164: How does the transfer work?

THE COURT: You will just pick from another list of available court dates. You only pick once.

JUROR NO. 164: Like another week. We will do that if we can.

THE COURT: I will transfer you, sir.

JUROR NO. 210: Leon Lucas, 210. I work at the College of Charleston. I get off at

5:00 p.m. every day, work 8:30 to 5:00 p.m. My daughter, she goes to Charleston also. I have to be there like about around 4:30 to pick her up every day.

THE COURT: You don't get off until 5:00.

JUROR NO. 210: I take my 15-minute break to go get her and then come back to the office.

THE COURT: She sits at the office with you until you get off?

JUROR NO. 210: Yes.

THE COURT: Is there anybody else who can pick her up for you?

JUROR NO. 210: We made arrangements today, but I didn't know that it's going to be a week-long process.

THE COURT: Well, the thing is if you not are selected you will be able to go about your business as you normally do. The only time it affects your day is if you're selected for a jury. If you are not selected you just call back after 6:00 every night to see if we need you. I don't require people to -- like if we don't -- I require the lawyers to let us know if they are going to

need your services because I don't think it's fair to have people waiting around all day to see if we have need of your services. So when you call after six at night you will know whether we need you or not and if you have to come it will be very short because we usually only have to pick one jury, two tops if that be the case.

I can tell you that other than my case there's maybe three cases left on the roster. There are like three cases left. So I will give you the option whether you want to make alternate arrangements and go ahead and get it out of the way or whether you want to be transferred. Because either way you are going to have that same problem and the other difference between this week and other weeks is this week we only have civil court and all the other weeks we have criminal court.

So that's two criminal trial courts and two to three civil trial courts. So the probability of being selected is greater than sticking around this week.

JUROR 210: I can probably make some arrangements.

THE COURT: Okay. No. 210 will remain with us.

JUROR NO. 118: Stephanie Fruchter. Juror 118. I am a stay at home mom. My kids are eight and ten. And I'm responsible for being at home when they get home from school.

THE COURT: What time do they get out of school?

JUROR NO. 118: 2:30.

THE COURT: Again, I cannot exempt you on that basis. But again this might be an easier week for you to get some coverage. They have after school?

JUROR NO. 118: Well, the person I would normally ask is in class all this week so it's just a bad week. I don't mind serving on the jury. This is a bad week to arrange.

THE COURT: I will transfer you. Pick carefully. We can only do it one time.

THE CLERK: Ms. Bellmartini, she did serve.

THE COURT: Perfect. Ms. Bellmartini, do you want to stay with us or do you want to be exempted?

JUROR NO. 25: I'm going to go.

(Jurors laughing.)

THE COURT: No. 25 is exempted. Have a

great day. I think laughter is one of the best medicines so I think this is wonderful. I am enjoying this this morning.

That then takes us to our next exemption. Is there any member of the panel who is attending school, at this time or working in some capacity with a school meaning are you a full-time student, school teacher, school crossing guard, school bus driver or serving in any other school-related function who is unable to serve on jury duty this week as a result of that school involvement? If this applies we will transfer you to a term which will not conflict with your school responsibility. If you feel this applies and you wish to seek a transfer I will ask that you stand at this time.

(No response from jurors.)

Is there any member of the panel who performs services for a business, commercial or agricultural enterprise and whose services are so essential to the operation of the enterprise that the enterprise must close or cease to function if you are required to perform jury duty? If this applies, we will transfer you to another term of court. This exemption is for those who work

seasonal type employment like farmers, commercial fisherman, agricultural type work. If you feel this applies I would ask that you stand at this time.

JUROR NO. 61: Juror No. 61. It's not necessarily seasonal, but me and my wife own a restaurant. I am a chef. It's just the two of us. We are open six days week and --

THE COURT: You are always going to have this problem. So what time is your restaurant open?

JUROR NO. 61: 11:30.

THE COURT: Then it runs. The only benefit I can tell you is that this is a good week because we don't have criminal court going on as well. If you are not selected you will be able to go to work as you normally would.

JUROR NO. 61: You can't transfer?

THE COURT: If I transfer you are always going to have the same problem.

JUROR NO. 61: That's fine. I can't deal with that this week. I'm sorry.

THE COURT: Have you been transferred before, sir?

JUROR NO. 61: No, ma'am.

THE COURT: We can transfer you one time. You need to select carefully because you will not be transferred any further.

JUROR NO. 61: Thank you very much.

THE COURT: Have a good day. 61. Is there any member of the panel who is employed as a guard with the Department of Corrections or at a penitentiary? If so I would ask that you stand at this time because state law provides that you shall be exempted on that basis.

(No response from jurors.)

Is there any member of the panel who is the primary caregiver of a person age 65 years of age or older or a severely disabled person either of whom are unable to care for themselves, cannot be left unattended, you cannot make alternate arrangements for their care and you are not employed outside of the home? This is your primary responsibility. If so, please stand at this time.

(No response from jurors.)

Ladies and gentlemen, that concludes the statutory list of qualifications and exemptions for jury service. It may be that you are qualified and that no exemption applies to you, but that jury service this week would constitute an extreme

hardship upon you for a particular reason. I cannot permanently excuse a qualified juror from service, but under extremely compelling circumstances I may excuse a juror and transfer a juror to another term of court, particularly a juror who has not been transferred before. Please recognize that general inconvenience is not a sufficient basis to transfer your jury service to another term of court. To justify a transfer it must constitute an extreme hardship upon you. I will tell you, however, in advance that if you have a doctor's appointment or some other appointment that was previously arranged for yourself or a family member, please make me aware of that because I can make alternate arrangements for you to meet that obligation.

Ladies and gentlemen, this is now the opportunity for those who did not respond earlier to any personal questions that were asked or any other question that was asked, including those who wish to request a transfer of your jury service to another term of court. If any of the qualifications concern you or if you have a question or concern about a qualification or how a qualification or exemption may apply to you or to

your particular situation, or if you have a question or concern and wish to seek a transfer or if I told you to make a mental note to speak with me privately, if you would come forward and stand in the aisles with the bailiff. That includes No. 77, 257, 356, 53 and 192.

(Bench conference held.)

THE BAILIFF: Juror 77.

THE COURT: Good morning, sir. Tell me your name.

JUROR NO. 77: David Culp. No. 77. Twenty-five years ago I committed a crime, armed robbery.

THE COURT: Have you had a pardon or amnesty?

JUROR NO. 77: No, ma'am.

THE COURT: You would be exempt. Have a great day.

JUROR NO. 77: Thank you.

THE BAILIFF: 382.

THE COURT: Yes, ma'am.

JUROR NO. 382: Martha Whelan. 382. I scheduled a doctor's appointment for a hip injury for this coming Monday because I didn't want it to --

THE COURT: Today?

JUROR NO. 382: Next week.

THE COURT: I will deal with that when I do voir dire for the other case. You let me know. No. 382 is qualified.

THE BAILIFF: No. 356.

THE COURT: Yes, sir. Your name and your juror number?

JUROR NO. 356: Alvin Tolbert, 356. I'm a diabetic. I sit for a long time I am uncomfortable.

THE COURT: We do deal with that. We deal with that all the time. We don't sit more than an hour, sometimes less. If you are selected for the jury just sit next to the bailiff so you can tap them if you need to go to the restroom. You don't have a criminal record?

JUROR NO. 356: No.

THE COURT: You are qualified. Make sure you remind us. No. 356 is qualified.

THE BAILIFF: Juror 284.

THE COURT: Tell me your name and juror number.

JUROR NO. 284: Angela Rawlings, 284. I was hoping to get protection for Thursday and

Friday. I have a course in Florida for continuing education. I need to drive down.

THE COURT: What day are you leaving? When is the course?

JUROR NO. 284: It is Friday, Saturday and Sunday so I am driving down on Thursday.

THE COURT: Okay. What time do you need to leave on Thursday?

JUROR NO. 284: 9:00 a.m.

THE COURT: I will protect you for Thursday and Friday.

JUROR NO. 284: Thank you.

THE COURT: No. 284 is protected Thursday and Friday.

THE BAILIFF: Juror 53.

THE COURT: Sir, tell me your name and juror number.

JUROR NO. 53: 53. And I have felony charges from 2005.

THE COURT: What was that charge?

JUROR NO. 53: Illegal downloading for child pornography.

THE COURT: Have you had a pardon or amnesty?

JUROR NO. 53: No.

THE COURT: Thank you, sir. You are exempt. No. 53 is exempt.

THE BAILIFF: Juror 192.

THE COURT: Tell me your name and juror number.

JUROR NO. 192: Michael Lane, 192. I'm a drug addict in a methadone program. I have been homeless for about six months now. I do have a job that has just started. It's with a tax company. And so going to help me to get back into a home. I can --

THE COURT: I will transfer you. You don't have a criminal record though, correct?

JUROR NO. 192: No.

THE COURT: I will transfer you. No. 192 is transferred. Just pick carefully. We can do it one time.

THE BAILIFF: Juror 323.

THE COURT: How are you?

JUROR NO. 323: I am doing good. Tomorrow I have a doctor's appointment at 11:00.

THE COURT: I can protect you for tomorrow.

JUROR NO. 323: Okay.

THE COURT: Tell me your name and

number.

JUROR NO. 323: Ginneh Slaughter, 323.

THE COURT: Yes, ma'am. Good to see you. No. 323 is protected for Tuesday.

THE BAILIFF: Juror 153.

THE COURT: How are you, ma'am? Tell me your juror number and your name.

JUROR NO. 153: Evangelina Hewitt. My juror number is 153. I do have mental health problems. I don't have a regular diploma.

THE COURT: You can read, can't you? You have a driver's license?

JUROR NO. 153: Um-hmm.

THE COURT: You are qualified. No. 153 is qualified.

THE BAILIFF: Juror 365.

THE COURT: Tell me your name and number?

JUROR NO. 365: 365, Dylan Vories. I just wanted to mention because of the physical illness I have migraines which sometimes is debilitating.

THE COURT: Just let us know if something affects you.

JUROR NO. 365: Call in the morning.

THE COURT: Or if it happens while you're here just let us know.

JUROR NO. 365: Yes, I am sitting there and it could happen.

THE COURT: I understand. Not a worry. No. 365 is qualified.

THE BAILIFF: 213.

JUROR NO. 213: Leslie Lyon, 213. I have a doctor's appointment on Tuesday and Thursday. I also have physical therapy on Tuesday, too.

THE COURT: Do you want to be transferred or do you want me to protect you for those?

JUROR NO. 213: Just stay.

THE COURT: I can protect you for Tuesday and Thursday.

JUROR NO. 213: Thank you.

THE COURT: 213 is protected Tuesday and Thursday.

THE BAILIFF: Juror 258.

JUROR NO. 258: 258.

THE COURT: Tell me your name.

JUROR NO. 258: Jeffery Overton. I was convicted of a felony 2002.

THE COURT: What was it?

JUROR NO. 258: Possession of firearm charges.

THE COURT: Was that circuit court or federal court?

JUROR NO. 258: Federal court.

THE COURT: You still on probation?

JUROR NO. 258: No, ma'am.

THE COURT: Have you had a pardon or amnesty?

JUROR NO. 258: No.

THE COURT: You would be exempt, sir. Have a good day. No. 258 is exempt.

THE BAILIFF: 247.

JUROR NO. 247: Jacqueline Morrow, 247. I don't know if this is relevant, but I take medicine for depression, ADD.

THE COURT: Do you work?

JUROR NO. 247: No, ma'am.

THE COURT: Are you on disability?

JUROR NO. 247: No, ma'am.

THE COURT: I think you are qualified. If you just have any problems let us know.

JUROR NO. 247: Okay.

THE COURT: Just let us know if you

have like an anxiety attack or anything.

JUROR NO. 247: Okay.

THE COURT: No. 247 is qualified.

THE BAILIFF: Juror No. 10.

JUROR NO. 10: I got a handicapped son.

THE COURT: When you say handicapped son what do you mean?

JUROR NO. 10: Brain damage car accident. Not able to do anything for himself.

THE COURT: Do you care for him 24 hours a day?

JUROR NO. 10: I do work, but I have a monitor. I am able to keep in touch with them through work and my phone.

THE COURT: So where are you employed?

JUROR NO. 10: MUSC.

THE COURT: You work full time? Just let us know if your monitor goes off. We can accommodate. I will make sure that they either have a number to call or that you are allowed to somehow check it. Yes, ma'am. No. 10 is qualified.

THE BAILIFF: Juror 153.

JUROR NO. 153: I am sorry. My situation right now is with my grandkids and social

services.

THE COURT: They go to school, right?

JUROR NO. 153: Yes.

THE COURT: And so they go to after school?

JUROR NO. 153: No.

THE COURT: So you pick them up after school?

JUROR NO. 153: No, they go on the bus 7:30 in the morning and then I go to the bus stop and pick them up at 2:00.

THE COURT: Okay. So are you employed?

JUROR NO. 153: No, I'm not. I am disabled.

THE COURT: Okay. So you stay home? I am confused.

JUROR NO. 153: No, I'm home health. I used to work. I'm retired disability. I'm a mental health patient.

THE COURT: I misunderstood you.

JUROR NO. 153: Mental health patient.

THE COURT: Let me ask another question. Did DSS give you custody of the children?

JUROR NO. 153: Yes.

THE COURT: And you pick them up every day? How old are they?

JUROR NO. 153: Six and seven.

THE COURT: You are exempt. Have a good day. No. 153 is exempt.

THE BAILIFF: Juror 214.

JUROR NO. 214: John Macilwaine, 214. When I was in college I had a misdemeanor trespassing.

THE COURT: That's just --

JUROR NO. 214: That was municipal court.

THE COURT: It's 30 days or $500 so you are fine.

JUROR NO. 214: Okay.

THE COURT: No. 214 is qualified.

(End of bench conference.)

THE COURT: Thank you, ladies and gentlemen. The panel is now qualified. Please permit me to share with you some general guidelines for your service this week. By order of the chief justice there can be no pagers, cell phones, tablets or other electronic devices in the on position while you are serving on jury duty. There are many reasons for that. One is that they are

disruptive. The other is that it allows you to have contact with people outside of the system and also access to the internet. As the finders of fact it is essential that you maintain your impartiality and have no other contact while you are serving on jury service. So if you have a phone and you are selected -- or other electronic device and you are selected for a jury, those will be collected when you arrive. They will be given back to you at lunch, collected after lunch and returned to you at the evening recess.

Please have no interaction with anyone in or about the courthouse that you do not recognize to be a fellow juror. Innocent conversation can be very easily misinterpreted. I don't know if you have noticed these things that look like bubbles, but they are high definition cameras that record everything that we do. So I can tell you I don't like having to watch those videos and try to figure out what people are talking about. So the best way to avoid that is just to talk to folks that you recognize to be a fellow juror. Again, we would not want an innocent conversation to be misinterpreted.

We would ask that you be prompt. It is

not fair when we must delay the proceedings because a fellow juror is tardy. By the same token we recognize that things happen and common up. If you are coming from the north area there will be a wreck on the interstate every morning. Traffic will just stop for no reason at all. We recognize that. We have all experienced it. And then also, it is always tourist season in Charleston. The garage will always be packed. So recognize that a lot of people use that garage. Businesses use that space in that garage. People who also pay such as tourists as well as yourself.

So I would also tell you to keep that in mind at lunch because it would seem we most times will have an extended lunch break, but it's not enough time to really move your car because if you move your car you may come back and not have a space. It can take 30 minutes to get from the Meeting Street exit back to that parking lot. So I will just caution you to manage your time wisely.

I will tell you, however, that there will be times when you wait on us. And that is because sometimes we are disposing of matters of law in a case and we cannot allow you to be a part of that because again your impartiality has to be

maintained at all times and we would not want you to be influenced by anything that may go on in those proceedings that are outside of the facts of the case.

So please know that there will be times when you are waiting on us, but know that when you are waiting we are working. If an emergency occurs at home, work or otherwise, please let us know immediately. We do not want you frustrated needing to attend to a responsibility when in most instances we can assist you again in meeting that obligation.

Court generally begins at 9:30. We try to break as close to five as possible keeping in mind that you have other responsibilities. If you are not selected for a jury this morning you will just have to call the jury information line after 6:00 this evening for further instructions regarding your jury service.

If you will just bear with me for a few moments.

Mike Callahan, can you come here for a second.

(Off-the-record conference.)

THE CLERK: Attorneys for Judge Young,

you can go to 4B. Judge Newman has Brown versus Three Oaks. He has a hearing in 3B. I don't know how long that hearing will be. You may want to go up there.

THE COURT: Could counsel approach for me, please.

(Off-the-record sidebar conference.)

THE COURT: Ladies and gentlemen, normally I would take you to my courtroom, but that's a lot people to transport and I thought it would be much more efficient just to select the jury down here.

We are going to go through a process that is called voir dire which is simply a legal term meaning that I am going to ask you some questions so that the attorneys can more effectively exercise their peremptory challenges in jury selection.

If a question applies to you please stand and in a loud and clear voice give me your name, your juror number and answer to the question if applicable and remain standing until I have completed questioning you.

We are going to select a jury for the cases of Waverly at Hamlin Plantation Townhome

Association, Inc., Steve Denby and Waverly at Hamlin Plantation Townhome Association, Inc., there are three separate cases that we have combined to try together, versus John Wieland Homes and Neighborhoods of the Carolinas, Inc. And they are cases numbered 2013-CP-10-3326, 2014-CP-10-4335 and 2014-CP-10-7734.

These cases involve certain alleged defects to a condominium and townhome development in Mt. Pleasant named Waverly at Hamlin Plantation which were constructed during 2005 to 2009.

Before we begin the process of voir dire, I'm going to ask the attorneys for the Plaintiffs to stand and introduce themselves and give us the names of the lawyers in their law firm and then I'm going to ask counsel for the defense to provide us with that same information.

MR. HAYES: John Hayes on behalf of the Plaintiffs.

MR. MCCARTY: Keith McCarty on behalf of the Plaintiffs.

MR. HAYES: Hayes Law Firm.

MS. NOLAN: Mary Margaret Nolan.

MR. MANOS: Ted Manos on behalf of John Wieland. Rob Parker is here with us.

MR. HASELDEN: Andy Haselden also for Wieland Homes and Justin Novack as well.

THE COURT: Can you tell us the name of your law firm and members of your law firm to the best of your knowledge.

MR. HASELDEN: Mr. Novack and I work for a firm called Howser, Newman & Besley. The Charleston office is myself and Mr. Novack and another attorney named James Sullivan. And then in Columbia we have about nine attorneys.

THE COURT: To the best of your knowledge.

MR. HASELDEN: David Howser, James Newman, William Besely, Ben McCoy, Kelly Cannon, Geov Hanna, Michael Jones, Kylie Keesley, Jeff Silverberg, Rick Pierce and Sara Rand-McDaniel.

MR. MANOS: Again, I listed my four partners. Rob Robertson who is retired from our firm. Dunn Hollingsworth. Ted Manos. Paul Rahn and we have three associates, Michael Wright, Wallace Carnwath and Jillian Barton and Rose Beth Grossman Smith.

THE COURT: Bear with us just one moment, ladies and gentlemen.

(Brief pause.)

THE COURT: Ladies and gentlemen, listen carefully. If any of the questions apply to you please stand and in a loud and clear voice give me your name, your juror number and answer to the question if applicable and remain standing until I have completed questioning you.

If you will take a moment to please review your number on your jury summons in the event a question applies to you. Is there any member of the panel related by blood or marriage to anyone who is employed with, is a resident or owner of or who has any ownership interest in Waverly Hamlin Plantation Townhome Association, Inc. or any John Wieland entity? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who is related by blood or marriage to Steve Denby? If so, please stand at this time.

(No response from jurors.)

Does any member of the panel have a close personal or social relationship with anyone who is employed with, has any ownership interest in, managerial interest or who is an owner or resident of any of the Waverly Hamlin Plantation

Townhome entities? If so, please stand at this time.

JUROR NO. 292: 292, Robert Ring.

THE COURT: What is your situation?

JUROR NO. 292: In 2015 I lived for two years in the Waverly subsection, sold a home and have relationships with many people that live in the community.

THE COURT: As a result of this experience do you feel that you can remain fair and impartial and render a fair and impartial decision in this case based solely on the evidence as it will be presented and on the law as the Court will instruct?

JUROR NO. 292: Part of the reason for leaving --

THE COURT: Don't tell me why. But I just need -- it's not a right or wrong answer. I just need a yes or no.

JUROR NO. 292: No.

THE COURT: Thank you, sir. You are exempt from the trial of this case. You may take your seat. Sir, tell us your name for the record?

JUROR NO. 292: Robert Ring, R-I-N-G.

THE COURT: Thank you, sir.

THE CLERK: 292.

THE COURT: Ladies and gentlemen, is there any member of the panel who is related by blood or marriage or have a close personal or social relationship with the following: Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Stephanie Adili, Mark and Brandy Lynn, Russell Robinson, Jessica Baucom, Nancy Coleman, Linda Glitz, Maryann Walsh, Patty Whitmire, Donald L. Tomasello, Patricia Kelly, Chris Leigh-Jones, Edward Ray, Kathy Jo Feagins, Cindy Hunt, Bentgrass Limited, LLC, William and Carolyn Barone, Michelle Ray, Eugene Ray, Cynthia Ray, William Abel, Dean and Conny Mason, Paul Watters, Patricia Watters, R. Robinson, Jr., Lisa Roeck, Elizabeth Jackson, Joe Brittain, Anita Brittain, Gilbert J. Hager, Kelly Hager Holmes.

Again, is there any member of the jury related by blood or marriage to any of these individuals or does anyone have a close personal or social relationship with them? If so, please stand at this time.

(No response from jurors.)

The following are listed as potential witnesses in this case. I will ask that you listen

carefully. Ed Peyser, Jeffery Sills, Steve Denby, Po Minten, Myles Glick, Russell Mease, Gary Moore, Bud De Santis, John Freeman, Lee Cave, Kevin Westendorff of Lowcountry Home Inspections, Inc., Bert Snyder, Palmetto Exterminators, Inc., Kevin Popsin, Jeff Plumber, Dennis Black, James Jim Bell, Scott Parker, Brett Newkirk of Alta Engineering Company, Skip Lewis, JR Watkins of Watkins Services, Inc., Scott Coffman, PE, Dennis Black, Scott Parker, Ryan Butler, Rob Parker, Jeorge Medina, Henry Hayes, Paul Vazquez, Scott Dow, Bruce B. Balmer.

Is there any member of the panel related by blood or marriage to any of the people that I have just listed or does anyone have a close personal, social or business relationship with any of these individuals? Or if any of these individuals have ever performed services for you or your property? If so, please stand at this time. If you will tell me your name and your juror number and remain standing.

JUROR NO. 240: Karen Miller, 240.

THE COURT: What entity was it?

JUROR NO. 240: Westendorff I think it was you said.

THE COURT: If you would remain standing.

JUROR NO. 398: Same, Westendorff.

THE COURT: Name and number?

JUROR NO. 398: Melina Wrenn, 398.

THE COURT: And sir?

JUROR NO. 72: Henry Condon, 72. Westendorff Lowcountry Inspections. Close relationship, personal friend, long time friendship with him.

THE COURT: If you would remain standing. In the back?

JUROR NO. 309: 309, Joe Schmidt. Myles Glick.

THE COURT: Would you say you are friends or have a business relationship?

JUROR NO. 309: Business relationship.

THE COURT: And, ma'am?

JUROR NO. 206: Tracy Low, 206. Lowcountry and Palmetto, business relationship.

THE COURT: As a result of these experiences do you all feel that you can remain fair and impartial and return a fair and impartial decision in this case based solely on the evidence as it will be presented and the law as the Court

will instruct? If your answer is yes, please take your seat. Let the record reflect that all answered yes.

Has any of the panel ever been represented by any of the attorneys involved in this case or any of the lawyers in their law firms? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel related by blood or marriage or have a close personal or social relationship with any of the attorneys involved in this case or any of the attorneys in their law firm or any person employed in any capacity in their law firms? If so, please stand at this time.

(No response from jurors.)

Has any member of the panel formed or expressed an opinion about any issue or matter involved in this case? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel aware of any bias or prejudice toward either the Plaintiff or the defense in this case? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who has a moral, philosophical or religious opposition to sit in judgment of a fellow human being? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who has a moral, philosophical or religious opposition to the filing of lawsuits? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who has ever lived at Waverly at Hamlin Plantation Townhome Association, Inc., and No. 292 does not have to stand again.

If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who has lived in the vicinity of Waverly at Hamlin Plantation Townhome Association, Inc.? If so, please stand at this time.

JUROR NO. 342: I lived in Charleston National which is right down the road from it.

THE COURT: Remain standing.

JUROR NO. 365: Dylan Vories, 365. I

live in the Sound which is the neighborhood next to the Waverly Hamlin Plantation.

JUROR NO. 211: I lived down the street.

THE COURT: As a result of these experiences do you feel that you can remain fair and impartial and render a fair and impartial decision in this case based solely on the evidence as it will be presented and the law as the Court will instruct? If your answer is yes please take your seat.

Ma'am, No. 365, and you're telling me as a result of living next door to this development you can't be fair and impartial?

JUROR NO. 365: Well, the experiences in my neighborhood were fairly similar with a different builder.

THE COURT: You are excused from the trial of this case only. You may take your seat. Is there any member of the panel who has any personal knowledge of the alleged facts and circumstances surrounding this case? If so, please stand at this time.

(No response from jurors.)

Is there any member of the panel who

has read, watched or listened to any potential media accounts about this case? That includes anything that could have been in the newspaper, radio, television, internet or any type of internet blog? If so, please stand at this time.

(No response from jurors.)

This question applies to former employment, not current employment. Is there any member of the panel who was ever formerly employed in construction or design and is not currently employed in that occupation? If so, please stand at this time.

JUROR NO. 39: Barbara Branch, No. 39.

THE COURT: Was it construction or design?

JUROR NO. 39: Both.

THE COURT: If you will remaining standing.

JUROR NO. 67: I was in commercial leasing which incorporated design.

THE COURT: Tell me your name and juror number?

JUROR NO. 67: Vivian Clark, 67.

THE COURT: As a result of these experiences do you feel that you can remain fair

and impartial and render a fair and impartial decision in this case based solely on the evidence as it will be presented and on the law as the Court will instruct? If your answer is yes please take your seat. Let the record reflect that both answered yes.

Again, this question applies to former employment, not current employment. Is there any member of the panel who formerly worked as a developer, contractor, subcontractor, engineer or architect? If you have already stood in response to my previous question you do not have to stand again. If you feel this applies I would ask that you stand at this time. Tell me your name. I will start here.

JUROR NO. 342: Kevin Strader, 342. I'm not quite sure I understood the question. I am an engineer.

THE COURT: Former employment, not current?

JUROR NO. 342: Current, sorry.

THE COURT: That's okay.

JUROR NO. 304: April Sarmento, 304.

THE COURT: Which area was it?

JUROR NO. 304: Defense contractor.

THE COURT: And, sir?

JUROR NO. 186: John Kish, 186.

THE COURT: Which area was it?

JUROR NO. 186: Developer and contractor.

THE COURT: Next?

JUROR NO. 172: Chris Johnson. I believe it was 173 is my juror number. And I was previously employed for a contractor.

THE COURT: Previous you said general contractor?

JUROR NO. 172: Um-hmm.

THE COURT: Let's double check the number.

THE CLERK: 172, Your Honor.

THE COURT: As a result of these experiences do you feel that you can remain fair and impartial and render a fair and impartial decision in this case based solely on the evidence as it will be presented and on the law as the Court will instruct? If your answer is yes, please take your seat. Let the record reflect that all answered yes.

Does any member of the panel know of any reason whatsoever why he or she should not

serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the Plaintiff and the Defendant? If so, please stand at this time.

(No response from jurors.)

Are there any additional questions from the Plaintiff?

MR. HAYES: None, Your Honor.

THE COURT: I'm going to ask another question. Any additional questions from the defense?

MR. MANOS: No, Your Honor.

THE COURT: Ladies and gentlemen, this case has the potential to go for more than one week. I'm not certain whether it may spill into Monday or Tuesday or maybe even Wednesday, just depends on how the trial progresses. It might be that we may well finish on Friday. But just out of an abundance of caution, I need to ask is there any member of the panel who would have a conflict next week if this case were to go into a couple days or three days of next week?

If so, please stand at this time. Tell me your name. Start here and go back. Then start here and go back. Give me one moment. Sir?

JUROR NO. 348: Paul Tamburrino, 348.
JUROR NO. 54: Paul Calcagno, 54.
THE COURT: Sir.
JUROR NO. 214: John Macilwaine, 214.
THE COURT: You can sit down for me. Then, ma'am, in the white shirt?
JUROR NO. 398: 398, Melinda Wrenn.
THE COURT: And you can sit down.
JUROR NO. 222: Sharon Marsowicz. No. 222.
THE COURT: Starting on the next row.
JUROR NO. 280: 280, Carl Przybylek.
THE COURT: And you can sit down.
JUROR NO. 304: 304, April Sarmento.
THE COURT: Next to you?
JUROR NO. 119: Deb Fuller, 119.
THE COURT: As you tell me your number you can sit down. Behind, yes, sir?
JUROR NO. 296: 296, Carleton Robinson, 296.
THE COURT: Next to you?
JUROR NO. 83: Matt Davis, 83.
THE COURT: And now start on this end right here.
JUROR NO. 382: 382, Martha Whelan.

THE COURT: Next to you?

JUROR NO. 218: 218, Luke Malloy.

THE COURT: White sweater?

JUROR NO. 123: Bianca Gardner, 123.

THE COURT: And behind you?

JUROR NO. 332: Arthur Sonntag, 332.

THE COURT: And, ma'am?

JUROR NO. 65: Tammy Cheek, 65.

THE COURT: Thank you, ma'am. Starting on this side.

JUROR NO. 56: Brian Canady, 56.

JUROR NO. 24: Kimberly Beavers. I don't know my number.

THE CLERK: 24.

JUROR NO. 306: 306, Bob Sberna.

THE COURT: Next?

JUROR NO. 210: Leon Lucas.

JUROR NO. 320: Bliss Shurlds, 320.

THE COURT: Okay.

JUROR NO. 72: Henry Condon, 72.

JUROR NO. 323: Ginneh Slaughter, 323.

THE COURT: Yes.

JUROR NO. 284: Angela Rawlings, 284.

THE COURT: Next?

JUROR NO. 186: John Kish, 186.

JUROR NO. 157: William Hoelz, 157.

JUROR NO. 136: Lonny Haddox, 136.

THE COURT: Next to you?

JUROR NO. 221: Christine Marley, 221.

JUROR NO. 206: Tracy Low, 206.

JUROR NO. 112: Jason Franz, 112.

THE COURT: I didn't ask these No. 12 and 13 because they bear directly on the facts of the case. I will note your exception. Also that information is available to you at the clerk of court's website. Now, strikes, how many alternates do you think we need, one or two?

MR. MCCARTY: Two.

MR. HASELDEN: Two.

THE COURT: So the strikes will be -- ladies and gentlemen, if you will give us a few moments, we need to prepare what are called strike sheets. Your numbers will be listed randomly 1 through 26 if my math is correct. If it is not please forgive me, I am trying to look at the sheet in my head and remember what it looks like. 1 through 26. Those numbers that we use have absolutely no correlation to your actual juror number. I say that because oftentimes during the strike process people get gleeful because they

think we are striking their numbers, but the numbers that we use are not your actual numbers. They are completely random. I need to give the attorneys a ten-minute recess to review those strike sheets. As soon as those strike sheets are prepared I will let you know when that ten minutes begins so that you can walk around and stretch your legs if you'd like. I will let you know what time I need you to return at which time we will strike the jury.

We will then take those individuals to my courtroom and then we will split the rest of the panel between Judge Young and Judge Newman so they can select their juries. I greatly appreciate your patience. We try to get as much done today as possible. The old system required jurors to come to the courthouse every morning. We found that inefficient for you and very inefficient for us as well. So we try to get as much done today as possible. We know that it is long. We know it is boring. We do this every week so we are used to it. You are not. So again although I know it may seem a little taxing right now, you will thank me on the back end. It beats you coming up here every morning to see what we need. So again we

appreciate your patience.

THE CLERK: Somebody said they were 280. We don't show a 280.

THE COURT: You mean on the conflict for two weeks?

THE CLERK: Yes, ma'am.

THE COURT: It would be on this side of the room. Who stood up and told me that their number was, 280? Sir, you sure that's your number?

JUROR NO. 278: That's the number on the paperwork.

THE COURT: 278. Bear with us, ladies and gentlemen. We appreciate your patience.

(Brief pause.)

THE COURT: Ladies and gentlemen, you can walk around and stretch your legs while the attorneys review the strike sheets. I will ask that you return to this assembly room by 12:25. I know everybody's watch is different times, this one is a little fast, but it's about 12:13. So again 12:25 according to this clock. Thank you very much.

(A recess transpired.)

THE COURT: Would the bailiffs make sure court comes to order. Please make sure all

the jurors are seated. Give me the high sign when you are sure everybody is back in the courtroom.

(Brief pause.)

THE BAILIFF: All present.

THE COURT: Plaintiff ready to proceed?

MR. MCCARTY: Yes.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, Your Honor.

THE COURT: Strikes are four and four and one and two for each alternate. I will turn you over to the capable hands of the clerk.

THE CLERK: Thank you, Your Honor. And as Your Honor stated, Plaintiff strikes first, four strikes for each side. And we are only using the numbers on the left side. Those are not juror numbers, just the numbers on the left side of the paper. Plaintiff strikes first.

MR. MCCARTY: Please strike No. 17.

THE CLERK: Plaintiff strikes 17. Defense?

MR. MANOS: Defense strikes 4.

MR. MCCARTY: Plaintiff strikes 2.

THE CLERK: Plaintiff strikes 2.

MR. MANOS: Defense strikes 5.

THE CLERK: Defense strikes 5.

MR. MCCARTY: Plaintiff strikes 11.

THE CLERK: Plaintiff strikes 11. That's three strikes out of four for the Plaintiff.

MR. MANOS: 13 for defense.

THE CLERK: Defense strikes 13. That's three out of four for the Defendant.

MR. MCCARTY: Plaintiff strikes 18.

THE CLERK: Plaintiff strikes 18. Plaintiff, you have exhausted all strikes.

MR. MANOS: Defense strikes 9.

THE CLERK: Defense strikes 9 and you have exhausted all of your strikes. Now pick for the first alternate. One strike each starting with the Plaintiff.

MR. MCCARTY: Plaintiff strikes 23.

THE CLERK: Plaintiff strikes 23.

MR. MANOS: Defense strikes 25.

THE CLERK: I am sorry, between 21 and 23 for the first alternate.

MR. MANOS: I apologize. Defense 21.

THE CLERK: Defense 21. And now striking for the second alternate 24 through 26.

MR. MCCARTY: Plaintiff strikes 24.

THE CLERK: Plaintiff strikes 24.

MR. MANOS: Defense strikes 25.

THE CLERK: Defense strikes 25. Now let's follow along with me to make sure we have the same numbers remaining. 1, 3, 6, 7, 8, 10, 12, 14, 15, 16, 19, 20, 22, and 26; is that correct?

MR. MCCARTY: Correct from the Plaintiffs, Your Honor.

THE COURT: From the Defendant; is that correct?

MR. MANOS: Yes, Your Honor.

THE COURT: If you will all listen carefully, line up along the wall as I call your name and bring all of your personal belongings with you. Richard Oley. Sara Schenk. Before we go any further are there any motions regarding the selection of the jury from the Plaintiff?

MR. MCCARTY: None, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Mark Hebert. Paul Webber. William Wolf. Heather Friesen. Chris Donner. David Conrad. Rhonda Buncomb. Christian Mims. Raymond Toler. Keith Clarke. Renee Wilbur. Raymond Rhodes.

Ladies and gentlemen, during this break please do not speak about what you think the case

may or could be about. The bailiffs are going to take you upstairs to my courtroom. And while you're in the jury room they are going to collect your cell phone numbers in the event that we need to reach you outside of court hours. And then we will be up directly to give you some preliminary instructions and then determine how we proceed for the remainder of the day. If you will follow the bailiff's instructions, please.

(Thereupon, the jury exited the courtroom at 12:37 p.m.)

THE COURT: Ladies and gentlemen, I wish I could excuse you for the remainder of the day. Unfortunately I'm not going to be able to do that. It's a little late. We are now into the luncheon hour to select a jury so I'm going to turn you over into the capable hands of the deputy clerk. He is going to give you some further instructions. Again, we appreciate your patience. I hope you all have a wonderful week and a wonderful day.

(Recess taken.)

THE COURT: Mr. Cole and Ms. Fragale, I understand you all wanted to place something on the record, is that correct?

MR. COLE: Yes, ma'am.

THE COURT: If you all would come forward for that purpose. Who wants to proceed first?

MR. COLE: I will go first, Your Honor.

THE COURT: Identify yourself for the court reporter.

MR. COLE: Andrew Cole. I have got Jeorge Medina also listed as JMC Construction, Inc., and JMC, LLC.

THE COURT: You may proceed.

MR. COLE: Thank you. We reached late on Friday afternoon a settlement agreement with the Plaintiffs that we put down into a letter that would comply with Rule 43(k). I'm going to generally reference it that we have dated January 20th. It was signed by Steve Denby both as the class representative and as the president of the HOA and witnessed by Keith McCarty and then signed by Jeorge Medina and then his son Jeorge. I did that because of the affidavit we had before that his son explained everything that was going on to him and I witnessed so that we have signatures from everybody on it that sets forth the general terms that we have with the numbers and the big --

or one of the things was we decided to go ahead and settle with the Plaintiffs without requiring the cross-claims from Wieland to be dismissed and so Wieland's cross-claim is still active and that's just another -- I will bring up something on that in a second. Unless they want to dismiss it right here, that's our settlement right now.

If they are not dismissing it we are still settling it. We have confirmed in writing and now I think it is officially on the record.

THE COURT: Do you want to make the letter an exhibit? What do you want to do?

MR. MCCARTY: I'd rather not.

THE COURT: The only way it's enforceable if it's been -- pursuant to Rule 43(k), it's been reduced to a writing -- I will look at the rule.

MR. COLE: Reduced to writing and signed by all of the parties.

THE COURT: 43(k). Shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record or unless made in open court and noted upon the record or reduced to writing and signed by the parties and their counsel.

MR. COLE: I think we fall into the third category.

MR. MCCARTY: Yes. I would rather --

THE COURT: It is your choice. I need to make sure. Hindsight is always 20/20. Sometimes people think they have complied with Rule 43(k) and they haven't and then they come back to enforce something and find out they have fallen short with the rules requirement. I wanted to make sure that y'all are on the same page.

MR. MCCARTY: I think we are, Your Honor.

MR. COLE: I think we are.

THE COURT: Okay. Now, Ms. Fragale.

MS. FRAGALE: Sara Fragale for Juan Luis Sanchez also known as Sanchez Brothers Painting and I just wanted to confirm for the Court that we reached a settlement with the Plaintiffs late Friday afternoon. That settlement agreement is not contingent on Wieland's cross-claims being dismissed.

THE COURT: Have you likewise reduced it to writing and do you feel it needs to be published in any way?

MS. FRAGALE: No, I do not feel it

needs to be published and it hasn't been reduced to writing at this time.

THE COURT: Okay. So now that then still leaves the cross-claims pending. Is there any indication on behalf of the Defendant Wieland that you intend to dismiss the counter-claims against JMC and Sanchez?

MR. MANOS: Cross-claims are still pending, Your Honor, for Wieland.

MR. COLE: It's what I was expecting. I was just going to say since those are still viable we need a written order from Your Honor just confirming that you denied our summary judgment motion on the cross-claims and that you bifurcated. I have not seen that's been entered yet. It could be, but it wasn't in the court record. Trying to make sure we dot every I and cross every T.

THE COURT: I told you I was meticulous. You will get it when it is done. I was out of the office for a conference so I am certain there's some things downstairs I need to sign that I have to deal with because I had to deal with the jury this morning. So once the orders have been signed they will be -- you will get a notification of it.

MR. COLE: Thank you. One more thing. Before -- and I think we figured out why this happened. Where is Cheryl? She gone? I will say this and Cheryl can verify it later. But she already talked about how the claims against Wheelock were bifurcated. A couple days before the claims against Wheelock were bifurcated, Marvin Infinger circulated a consent order to dismiss their cross-claims against all of the other subcontractors in the case. It looks like that because it then got bifurcated everybody just sort of assumed everything got done. We can't find that order. And so I talked to Cheryl about it. She said she was okay with it, that we'd like to just get Your Honor to issue a form order confirming that the cross-claims by Wheelock has been dismissed.

THE COURT: How am I going to do that sua sponte and ex parte?

MR. COLE: That's why she gets back.

THE COURT: They need to find the order and send it up so it can be signed. Is there anybody who represents all those people present to confirm that?

MR. COLE: I think most of them aren't

around any more because they have all settled.

THE COURT: I am trying to figure out why it is necessary. If they have settled out they are no longer named parties. Wheelock is still a party, but those claims have been bifurcated so I am trying to figure out why I need to deal with it.

MR. COLE: I am just trying to make sure that when it's unbifurcated --

THE COURT: Then we will cross that bridge when we come to it. But that's when that case will be tried and any matters related to that will be dealt with, but Wheelock is not a part of this litigation at this point.

MR. COLE: Okay.

THE COURT: If you all want to try to deal with that before it comes up on a docket that's up to you all, but I don't see any need to interject that into these proceedings.

MR. COLE: So we will -- if we can get signatures and just send it to the court normally that would suffice?

THE COURT: Yes. It would be a consent order.

MR. COLE: Thank you, Your Honor.

THE COURT: I'm going to swear the jury

and send them to lunch and then I guess I need to figure out how much time it will take to deal with this motion to intervene that was filed on the 19th at 3:53.

MR. CALAMARI: Your Honor, Bob Calamari. I filed the motion. I don't think it will take more than 10 or 15 minutes.

THE COURT: Does the Plaintiff feel they need to be heard on that motion?

MR. HAYES: Your Honor, we would join in with Wieland's objection to that motion. They the filed memorandum.

THE COURT: I got it. Well, I didn't get Wieland's memorandum.

MR. HAYES: I just saw it. I think it came across e-mail literally this morning.

THE COURT: Okay. We will try to track it down.

MR. HAYES: Your Honor, John Massalon is the one who will be arguing the motion to intervene on behalf of Wieland.

THE COURT: You mean in opposition.

MR. HAYES: In opposition to the motion.

THE COURT: Did you all tell him he

needed to be over here?

MR. CALAMARI: He gave me his cell phone number and asked me to text him. I will let him know.

THE COURT: Perfect.

MR. HASELDEN: Do you want to hear it now?

THE COURT: I want to hear it now. He sent him a text.

MR. HASELDEN: I didn't know if he would have --

MS. SHOUN: Your Honor, I checked for him. He is no longer in 3D, but this is where he was going to be this morning. I have also sent an e-mail to him telling him the Court may want to hear from him.

THE COURT: He is right across the street.

MS. SHOUN: If necessary I will shoot over there.

MR. CALAMARI: I think he actually went to clock in the memorandum and grab something real quick.

THE COURT: Perfect. I would like to get that out of the way before because I don't want

to stop and start. Please bring in the jury for me.

(Thereupon, the jury entered the courtroom at 12:59 p.m.)

THE COURT: If you will raise your right hands, ladies and gentlemen, so that the clerk can administer the oath to you.

(Thereupon, the jury was sworn by the clerk.)

THE COURT: Ladies and gentlemen, you have been selected for the case of Waverly versus Wieland. There are still some matters of law that I need to take up with the attorneys that are going to take us at least another 30 minutes. And then we all need to eat lunch. So we are going to break until 2:30 at which time I need for you all to return to your jury room.

At that time we will begin with opening instruction and opening arguments and I don't know, we may possibly get through one or two witnesses today. We will see how far we go, but for your planning purposes the Court plans to break at five or as close to five as possible keeping in mind that you have other obligations this our evening.

During this break please do not discuss

the case. Please do not speculate about what you think it may or could be about. Please don't do any independent research on the internet regarding this matter or issues involved in this case. Also I would ask that you refrain from making any comments on any social networking site, Facebook, Twitter, Instagram, Snapchat or otherwise regarding your jury service in this case. Even an innocent comment could be very easily misinterpreted.

Also please do not have any contact with anyone in or about the courthouse. There are a number of witnesses in this case as well as parties and people who look very different outside of the courtroom versus being inside the courtroom.

Again, I would not want an innocent conversation to be misinterpreted. We appreciate your patience. I hope that you all have a good lunch. We will see you at 2:30. They will show you how to come back into the courthouse. Have a great lunch. Try to stay dry.

(Thereupon, the jury exited the courtroom at 1:02 p.m.)

(PLF. EXHS. 1-28 were marked for identification.)

THE COURT: Liberty Mutual has filed a

motion for limited intervention, the gist of which is to seek special interrogatories being submitted to the jury. They submitted a similar motion on December 5th of 2016. Well, actually on October 13th of 2016 which they subsequently withdrew on December 5th of 2016. So this is their second filing of the same motion. Who will be appearing on behalf of Liberty Mutual?

MR. CALAMARI: Robert Calamari of Nelson Mullins Riley and Scarborough, Your Honor.

THE COURT: Who will be arguing on behalf of Liberty Mutual?

MR. CALAMARI: I am, Robert Calamari.

MR. MASSALON: I'm John Massalon and I am here for the Defendants John Wieland Homes and Neighborhood of the Carolinas, Wieland Homes of Charleston, John Wieland Homes, Inc. and Builders Support Services of the Carolinas to oppose the motion.

THE COURT: Did y'all have a memo? I understand memos were filed at some point today or Friday?

MR. MASSALON: Your Honor, we filed one. I will be happy to pass up an extra copy or two.

THE COURT: That would be helpful.

MR. MASSALON: May I approach?

THE COURT: Yes, sir. Mr. Calamari, did you file a memorandum?

MR. CALAMARI: Your Honor, it is within our motion.

THE COURT: That's fine. I wanted to make sure there wasn't anything else you wanted to hand up to the Court. Mr. Hayes, did you all file anything?

MR. HAYES: Your Honor, we have not filed anything.

THE COURT: You are joining in the opposition to the motion?

MR. HAYES: We are joining. I may have a few points if the Court allows.

THE COURT: Certainly. Mr. Calamari, you may proceed, then I will hear from Mr. Massalon and Mr. Hayes.

MR. CALAMARI: Thank you, Your Honor. As discussed, this is a motion for limited intervention filed by me on behalf of Liberty Mutual Fire Insurance Company. Liberty Mutual is the insurance carrier that sold policies of insurance to the Wieland entities represented by

Mr. Massalon in this matter. They have made claims for benefits under the policy and there are certain issues that we feel requires intervention is necessary.

I would initially point out without intervention there's no vehicle for us to make any statements. The defense is being handled by --

THE COURT: Well, that really raises an interesting question. How is your claim even ripe at this point that you need to have a say? If there's no verdict then it is a moot issue. So why then would you be allowed to intervene and sort of interject yourself at the last moment in this litigation and possibly prejudicially to these parties then change the entire way they have determined strategically they are going to address this case when it may become a moot issue.

MR. CALAMARI: Your Honor, we don't disagree with any of those statements. Liberty Mutual is purely trying to follow what the Supreme Court did in fact --

THE COURT: Which also raises another issue because it's a dec action. Is it really -- does it really stand for the proposition that you are arguing that it stands for? Because I think

that's a real strained reading of those three lines in that opinion.

MR. CALAMARI: And, Your Honor, again, we don't necessarily disagree with the Court's comments, but we are trying to protect our interest in seeing the language in those and other cases that we have looked at over the years. But if I may, the lawsuit was filed in 2013. It was not tendered to Liberty until 2016. At which time they got involved, provided a defense and hired Mr. Manos to defend it. Mr. Haselden was --

THE COURT: Didn't someone else represent them prior to that?

MR. CALAMARI: Mr. Haselden was, but had not been tendered to Liberty Mutual.

THE COURT: So who was Mr. Haselden -- who obtained Mr. Haselden's services?

MR. HASELDEN: I was retained by the Wieland entities directly.

MR. CALAMARI: When Liberty Mutual got involved they agreed to pay him to stay on the case. So they continued to provide payment to him so we didn't have to pay.

THE COURT: I just wanted the record to be clear that it wasn't like the case was sort of

lingering out here with no representation. There were, in fact, lawyers involved representing the Wieland interests.

MR. CALAMARI: Yes, Your Honor, absolutely. Liberty Mutual sent a reservation of rights letter initially on the file in May of 2016 and it was later updated in September of 2016.

As Your Honor pointed out, this is the second motion to intervene. We filed a motion to intervene in October and in the letter to the insured explained the conflict, the potential diverging interests, the problems that could result from such a motion. And they countered with a letter from personal counsel Clark Thiel who is with the Pillsbury firm in San Francisco who said absolutely we object to you intervening. It creates a conflict of interest. We don't think you have any involvement in the underlying action that should be defended.

So based on those objections we withdrew our motion. And we are ready to come to trial through Mr. Massalon, not any involvement from Liberty Mutual. And then on January 11th the Supreme Court came out with the Heritage decision. And the briefs and everything leading into the

Heritage decision dealt with how did Harleysville protect its interests.

THE COURT: Well, I think that's a strained reading of that case as well. The whole purpose and the scope of that case talks about the reservation of rights and how it is interpreted. It really -- the peripheral statement about special interrogatories or otherwise, but there are other rules that apply in your intervention and I think it is just a real creative way to read the case and I think it's sort of -- you have to sort of contort yourself a little bit to say that it stands for the proposition that you are advancing which is that you have the right to intervene in the case because the other language in the case is quite interesting because basically you are asking your client who is your insured to fight the Plaintiffs and fight you at the same time which is a little unreasonable really. I don't know that it is ripe to even deal with because the jury could, and I quit trying to figure out what 12 people are going to do. So you never know what a jury might do. A jury might say zero in which case it is a moot issue and you would have affected strategically how these parties tried this case much to your own detriment theoretically

the day of trial. Where they have been working on this now for four years basically, it's just shy of four years. I can't remember the exact filing date of the case. I think it was December of 2013. We are just shy of four years, but they certainly have been working and dealing with this case from a particular procedural history and theory in terms of client and likewise the Defendants have strategically determined how they are going to defend this.

So I am trying to figure out I guess how is it that -- because basically what you're asking them to do is to have the jury insulate you from being responsible under your insurance contract based on the answer they might give.

MR. CALAMARI: Actually, Your Honor, I believe the tenor of that case, I agree with you, deal mainly with reservation of rights letters, but the issues presented to the Court and the tenor of that case seems to be how we preserve evidence so we can decide coverage issues later. And that's what we are asking for. And we understand. The final point that we would make is we are not intending to intervene to harm the defense of this action.

THE COURT: Well, you all don't want to provide coverage, do you?

MR. CALAMARI: At this stage we want to have evidence so when we bring the DJ action --

THE COURT: If you are bringing a DJ action that means you don't want to provide coverage. People don't bring DJ actions if they plan to write a check. They bring DJ actions because they say within the context of the four corners of this insurance document we don't believe we have any responsibility to do anything for you period other than and we are being generous in providing a defense. But in terms of indemnifying you against any loss, we have no responsibility.

So in effect what you would be asking this jury to do is to insulate you so that you don't have to pay them later. So how is that not adverse to their --

MR. CALAMARI: Again, Your Honor, I am not disagreeing with you.

THE COURT: And how they would try the case?

MR. CALAMARI: I am not disagreeing with you such an action could be viewed as adverse, which is why we withdrew the motion originally

based on the objections. But then when the Supreme Court came out with this order and we saw the language in there we felt like we needed to make the motion and ask the Court to participate for the issue of preservation of damages whether it be through --

THE COURT: What else could they be awarded damages for? There is several causes of action, right, against John Wieland. One is a UTPA. There is an unfair trade practices action. There is a breach of implied warranty, a fitness of habitability, fitness for a particular purpose, negligence, breach of contract and breach of fiduciary duty. All of these would have separate verdict forms and they would have to elect. That's assuming they all survive directed verdict.

Then I bifurcated the counterclaim. So then you still don't know how much, if any, indemnity claims would apply to some of these other folks. So isn't it really premature?

MR. CALAMARI: Your Honor, again, I don't disagree with anything. We are trying to comply. It would be actually allocation of the construction damages award whether they are the cost of repairing defective work or cost of

repairing the damage that results from the defective work. That would be the allocation issue. One potentially satisfying the diminution of property damage and the other potentially not satisfying the diminution of property damage.

THE COURT: Anything further?

MR. CALAMARI: Nothing, Your Honor. That would be our motion to permit to intervene, to request the special interrogatories, the special verdict form at the appropriate time. Thank you, Your Honor.

THE COURT: Would you be requesting these special interrogatories that were attached to your original motion?

MR. CALAMARI: Likely, but as your Honor pointed out --

THE COURT: Those are extremely complex and I think have a real great chance of confusing the jury as to what they are really trying.

MR. CALAMARI: Your Honor, again we are not disagreeing with you. We are trying to protect the record and as the trial would pursue we would watch the evidence and whatever you allow to go to jury, that would probably tailor the questions that we would ask.

THE COURT: Mr. Massalon, be glad to hear from you.

MR. MASSALON: I will be brief because I have many of the same concerns the Court has already articulated. Under Rule 24 there are only two kinds of intervention, an intervention of rights under 24(a) and permissive intervention under 24(b). The huge problem with this motion is that this claim by Liberty doesn't meet either criteria because they are not claiming an interest in this case. What they are trying to do as Mr. Calamari has candidly admitted is protect themselves in the event of an adverse verdict and in the event that there is a declaratory judgment case filed and whatnot.

In addition, not having an interest under Rule 24 that gets them in the case, as Your Honor has pointed out, I don't know how either Mr. Manos or Mr. Haselden do what Mr. Calamari is asking to be done without putting themselves in a very awkward position between --

THE COURT: Ethically it puts them between a rock and a hard place because how would they represent their interest and an interest that -- just in terms strategically I would think they

have already formulated how they are going to try this case and this would cause them I would imagine great anxiety in how do you do both.

MR. MASSALON: Absolutely.

THE COURT: From a prejudice standpoint from the Defendants I am concerned.

MR. MASSALON: And so what I think that leaves us with -- and I don't know of such a thing as a limited intervention under the rules. And so what I think that leaves with us is Mr. Calamari jumping in. And so I think he's in the case in the trial. If you allow him to do what he does doing it for Liberty, perhaps they have to be a party, too. And so --

THE COURT: I am trying to figure out how do they intervene. That was the other thing I meant to ask Mr. Calamari. How do you intervene without being made a party.

MR. MASSALON: I don't know the answer to that. From my client's standpoint, that introduces the whole issue of insurance and I wish --

THE COURT: How do you explain their presence?

MR. MASSALON: Exactly. I wish I had a

more articulate way to say this, but it sounds like the net result of this is going to be that the jury is going to spend a lot of time thinking about damages which my client doesn't really want them to think about. Mr. Hayes and Mr. McCarty would like them to think about nothing but damages, but we would like them to think about something else. And it just seems like it is terribly prejudicial. It is premature. And I think if Mr. Calamari is in for a penny he is in for a pound.

So I think that all those issues have to be ironed out and for all those reasons, we would ask that you deny the motion. Thank you.

THE COURT: Mr. Hayes, be glad to hear from you.

MR. HAYES: Your Honor, I will join in that motion and I will try to be brief. Your Honor, again, John Hayes on behalf of Plaintiffs. We find this untimely. Under Davis v. Jennings, four factors, the time has past. Liberty Mutual moved to intervene and withdrew it so they clearly knew that they had -- if they were going to do it they should have done it timely. It was their choice to withdraw it. There is no reason for delay. For them to have not done it until last

week and the litigation has progressed as you said almost four years here. We are on the eve of trial. I believe the Plaintiffs have their strategy. I'm sure the defense has theirs. It was not based upon them being able to intervene. That changes that.

On a trial purpose it's been said, and I will try not to beat this too much, but how do you try the case. This will be so confusing to the jury. Not even -- I guess you would have to put them on the caption, identify their lawyer because otherwise you would have some nonidentified lawyer asking questions if they were able to ask questions during the course of the trial.

Now, with the second stage of it, you said well, we are not going to do that. We are just going to let them do interrogatories. How do you give interrogatories to a jury unless the experts have been questioned, unless the jury --

THE COURT: On those very specific issues which goes back to strategy.

MR. HAYES: On those specific issues. And I am assuming Mr. Manos and Mr. Haselden aren't going to do that. So how do you present them with these interrogatories in the trial that make

absolutely no sense to them. I believe that will lead to confusion to the jury. Mr. Massalon said it very well. In for the penny, in for the pound. It is our contention they are in the case or out of it.

THE COURT: Any rebuttal, Mr. Calamari?

MR. CALAMARI: Nothing further, Your Honor. Thank you.

THE COURT: You're welcome. I just have some real concerns that I think I have already articulated in the nature of the questions that I have asked of Mr. Calamari and the observations while Mr. Massalon made his argument. I am concerned whether Liberty Mutual meets the requirements of both Rule 24(a) or (b). They really are not what we would consider an indispensable party. They really don't have any interest in the litigation. Their interest doesn't arise until a verdict actually is returned against their insured at which time I would anticipate and it is anticipated that they would file a declaratory judgment action to clarify coverage. In other words, what they are -- if there is a verdict, in fact a verdict, what they are required to indemnify their -- in what way they are required

to indemnify their insured. I have read the Harleysville group insurance case and really factually it is not on point. It clearly deals with a declaratory judgment action. The real focus of the opinion is the interpretation of a reservation of rights and whether it is adequate in its working such to put the insured on notice.

Now, there is some glancing language at paragraph 6 that says the right to control the litigation carries with it certain duties including the duty not to prejudice the insured's rights by failing to request special interrogatories or a special verdict to clarify coverage of damages. This is a Tenth Circuit court case that has been cited which the language quoted is, "If the burden of apportioning damages between covered and noncovered were to rest on the insured who is not in control of the defense, the insurer could obtain for itself an escape from responsibility merely by failing to request a special verdict or special interrogatories."

So it really doesn't stand for the proposition for which it is being advanced because this is the exact opposite situation. This is not a situation where the insured is in control of this

litigation. They did not bring the litigation. They are not advancing it. The Plaintiffs have brought the litigation. The defense is defending the litigation.

And I don't know exactly, I am going to have to look at this case to see exactly what the facts were, I'm not sure whether this was another declaratory judgment action. I really have no idea and I don't want to speak out of turn. And the other case is a Fifth Circuit case. I'm not sure what the facts are of that case, either. But it talks about the duty to defend, really talks against -- it really is against the insurer. It doesn't really support the insured getting special interrogatories, but it is more in the nature of an insured shouldn't be prejudiced by an insurer who controls the litigation and who then insulates themselves against liability because they are in control of the litigation.

So I am just not certain it really stands for the proposition for which it is being advanced and for which it has been argued. I don't think factually or legally it is applicable to this case.

My other concern really arises in the

prejudice that would be manifest to the defense and the Plaintiff. As I have already observed, they have been in this litigation a while. There's a strategic way they want to try the case. And I don't think the defense should be prejudiced by basically derailing their strategy to somehow now not to defend against the Plaintiff, but also have to fight their own insurance company who is not a party to the litigation.

And I'm inclined to agree with Mr. Massalon if you are in for a pound, you are in for a penny. You don't sort of get to stir the pot and sort of say I'm in but I'm sort of out. You are either a party to the case or you are not. I am not aware of any limited intervention that's allowed in our state or by an interpretation of our rules. I think when you move to intervene you become a party. Which now adds a whole other dimension to this litigation again dealing with insurance. Jurors are very astute. If you look at the educational background of the jury that was selected in this case, they come from a myriad of backgrounds, but we have some very -- not to sound pejorative in any sense, but I think my daddy always says common sense is far better than book

sense any day of the week.

But I think you have a real good mixture of common sense and book sense on this jury. What is going to end up happening is a bunch of questions that have absolutely nothing to do with this litigation, which I am inclined to agree has a tendency to confuse them and to really detract from what the issues are in the litigation.

Now, having said that, in a dec action, if there's -- sort of looking ahead if I have a crystal ball, and I were clairvoyant which I don't claim to be, in looking ahead if a verdict comes back against the Defendant, how are they prejudiced in really trying these issues that they claim would deny coverage? There's nothing that precludes you from calling experts. There is nothing that precludes you from calling the same expert to apportion this damage and to preserve your client's rights in terms of when you start talking about -- when you deal with a dec action you start talking about very specific language in an insurance contract and how it is to be interpreted and what is included under the ambit of that language. And I really can't discern any prejudice to you that would preclude you from being able to do that, from

calling experts, from saying and even using portions of this record from the experts who are going to testify. Because I think there are -- I am just anticipating because I have tried quite a few of these, I think their testimony will be fairly clear about what they believe caused the damage, what flowed from as a result of this damage and the scope of the repairs. So I really can't discern any prejudice to the insurance company.

Then the other part is I bifurcated the case. So you still are going to deal with the cross-claims in a separate action which is going to come down to an indemnity claim which I think may well give some additional clarity.

So I am just not certain how the insurance company would be prejudiced. I am more concerned about any prejudice be suffered both by the insured and the Plaintiff in terms of strategically how they are to try the case because the information being sought by the insurance company would be totally different and totally strategically different from what I would anticipate the parties intend to try this case.

So I am going to deny the motion. I'm going to ask Mr. Massalon if you could do me an

order. I don't know that there's any real hurry on it, but if you could make any findings of fact consistent with the record, also citing any statutory or case law that would support those findings I would appreciate it and I will be glad to look at it and sign it when you get it for me. Thank you.

We will resume at 2:30. Have a good lunch. We will see you all at 2:30.

(A luncheon recess transpired.)

(PLF. EXHS. 29-40, were marked for identification.)

(DFT EXHS. 1-33, were marked for identification.)

THE COURT: Have you agreed on any of any of the Plaintiff's exhibits?

MR. MANOS: Yes, Your Honor.

THE COURT: What numbers have you all agreed on?

MR. MANOS: We are okay with 4, most of the photographs in 6.

THE COURT: I need you to give me numbers. I will take argument contemporaneously.

MR. MANOS: So we object to 6, Your Honor.

THE COURT: I don't need to know the objections. I just need to know numbers you have agreed on.

MR. MANOS: We are okay with 4, 8, 11, 11A, 11B, 12, 13, 21, 28, 29, 30, 32. That's it, Your Honor.

THE COURT: Plaintiff's Exhibit 4, 8, 11, 11A, 11B, 12, 13, 21, 28, 29, 30 and 32 will come in without objection. What defense numbers have you agreed on?

(PLF. EXHS 4, 8, 11, 11A, 11B, 12, 13, 21, 28, 29, 30, 32 in evidence.)

MS. NOLAND: Your Honor, we have not had a chance to look through the defense exhibits yet.

THE COURT: So the short answer is none.

MS. NOLAND: Not at this time. We do hope to have some numbers for you after we have had a chance to look at the exhibits.

THE COURT: Let me know when you have those numbers.

MS. NOLAND: Yes, ma'am.

THE COURT: Anything before we resume with opening instruction and argument from the

Plaintiff?

MR. MCCARTY: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Please bring in the jury. I have appointed No. 89 as the foreperson.

(Thereupon, the jury entered the courtroom at 2:46 p.m.)

THE COURT: You may be seated, ladies and gentlemen. I hope you all had a pleasant lunch recess. I am going to give you some preliminary instructions so that you will be better able to understand how we will be proceeding in the trial of this case.

The first thing that will occur is that the attorney for the Plaintiffs -- and the Plaintiffs are the persons who have brought these -- this action or suit. Their attorney will make an opening statement which will be followed by a similar statement by the attorney for the Defendants. These opening statements, ladies and gentlemen, are not arguments. Arguments will come at the conclusion of the case.

The purpose of the opening statements is for each party to outline his or her claims and

the evidence which he or she attempts to present in support of these claims. Following the opening statements each side will present its evidence with the Plaintiff once again going first. Evidence may take many forms. It may be testimony, documents, models, photographs or the like. You should pay close attention to all the evidence which is presented by each party because it is you, the jury, who are the sole finders of fact in this case. And no one else will be permitted to weigh the evidence and render a verdict based upon it.

After all of the evidence has been presented the attorneys will make their closing arguments. And unlike the opening statements, the final remarks will be true arguments. That is each side will emphasize certain portions of the evidence and try to persuade you to agree with their version of the facts. Keep in mind that the opening statements as well as the closing arguments do not represent evidence in the case. Give the attorneys your undivided attention and keep in mind that what they say is not evidence.

After the arguments are presented, I will explain to you the law which applies to this case. You will then retire to the jury room to

consider the facts and the law. And once you have done so you will return a verdict in favor of one side or the other.

During the course of the trial the Plaintiffs have the burden of proving their claims. They must meet this burden by proving their claims by the greater weight of the evidence or the preponderance of the evidence. What we mean by the greater weight or the preponderance of the evidence can be illustrated by imagining a traditional set of scales.

When the case begins the scales are even. After all of the evidence has been presented if the scales should remain evenly balanced or if they should tip even slightly in favor of the Defendants, then the Plaintiffs would have failed to have met their burden of proof and your verdict would be for the Defendants.

If, on the other hand, the scales should tip even slightly in favor of the Plaintiffs then they will have met their burden of proof and your verdict would be for the Plaintiffs.

There are a few additional comments that I will share with you before we begin. As I mentioned earlier, although I am the only person

who can tell you what the law is, you are the only ones who can determine the facts. I do not have the right to indicate to you how I might feel about the testimony and evidence presented. And throughout this trial it will be my intention to be fair and impartial toward each of the parties involved as well as their counsel.

Also from time to time you will hear the attorneys say Your Honor, I object. Just as in sports, business or any other structured activity there's certain rules that both sides must obey in the presentation of evidence. These rules have a definite purpose. They insure that you receive the most trustworthy and reliable evidence available.

An objection is the procedure that an attorney uses to call a possible violation of these rules to my attention as the judge of the court. For this reason you should never hold an attorney's objection against them, nor should you conclude from the Court overruling or sustaining an objection that I favor one side or the other.

Also, from time to time you will hear the attorneys say Your Honor, I have a matter of law that I wish to discuss. And it might be necessary for them to approach the bench or it may

be necessary for us to exclude you from the courtroom while they discuss matters of law. The reason we do this is that as I have explained you are the finders of the facts. And sometimes when I am discussing matters of law with the attorneys it might be necessary for me to make some comment about the facts in connection with making a ruling. For this reason we exclude you from the courtroom so that in no way will you be influenced by anything that the Court may say or do in connection with the facts of this case.

During the course of this trial you will be given the opportunity to take notes. Note taking is a privilege that you may choose to exercise or choose not to exercise. Please don't feel you're required to take notes. Not everyone finds note taking helpful to them. If you should decide to take notes please don't try to write down everything that is said. It is virtually and physically impossible. Even the average speaker speaks at over 200 words a minute so you can well imagine it would be almost impossible even if you thought you were being accurate to write it down exactly as it's being said. The only reason the court reporter can do it is because she takes down

things with the aid of a transcription machine and that she does it phonetically. But even with that before she produces a transcript she goes back and listens to a backup tape to make sure that what she is taking down has been accurate. So please do not try to keep an exact record of what is being said. It's physically impossible. And again as the finders of the facts in this case you must rely on your powers of observation. So please do not allow note taking to become a distraction to you so that you can pay attention to the witnesses and make the appropriate determinations regarding their credibility and believability.

You may want to keep an outline of the main points that are being made so that when you retire to deliberate you can allow your notes to refresh your memory. Please be reminded that your notes are for your specific and your individual purposes. They are not to be shared with any other juror. They are only to be used to refresh your own memory. Also be reminded that your notes should not be considered any more reliable than the individual recollection of a fellow juror. Their memory should be considered just as reliable as notes that may have been taken by a fellow juror.

And during breaks and recess your notes will be left in the courtroom or secured during the evening recesses. Please know that your privacy will be protected and those will be secured. We do that so that there is no temptation to prematurely deliberate regarding any issue or matter in the case.

While we are on that subject if you would write your juror number on the white sticker that is on the front of each note pad so that you will be able to identify which note pad belongs to you.

Finally, ladies and gentlemen, I would ask that you pay close attention to all of the evidence that is presented because it is you, the jury, who will determine the facts in this case. And as a result you will have to evaluate the credibility which simply means the believability of each witness who testifies in this case. You are each participating in a contested system. And it is extremely important for each of you to listen carefully to all of the evidence that is presented and I am sure that each of you will perform your duties accordingly.

In order to preserve everyone's rights

I am going to give counsel the opportunity to take exception to any of the Court's instructions. Any exceptions from the Plaintiff?

MR. MCCARTY: None from the Plaintiff, Your Honor.

THE COURT: From the defense?

MR. MANOS: No exception, Your Honor.

THE COURT: Ladies and gentlemen, I would ask that you give counsel your undivided attention. Plaintiff may proceed.

MR. MCCARTY: You know, when I saw you all lined up against that wall this morning, names had been called, the first thing that ran through my mind was I bet when they were celebrating New Year's Eve they never thought well, I'm going to have to spend a month in jury duty. You know? But here you are and we are here and I thank you for being here.

I represent a group of homeowners at a townhome complex called Waverly. Now, Waverly is in a big plantation called Hamlin Plantation. There are 105 of these townhomes. And the townhomes have been built by a company called John Wieland Homes.

Now, John Wieland Homes is a big

company. In order for us to get them in court, we had to name John Wieland Homes and Neighborhood of the Carolinas, John Wieland Homes and Neighborhood of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builder Support Services of the Carolinas, Inc.

John Wieland bought the property these townhomes are on. They hired the subcontractors. They paid for all the materials or they bought all materials and supplied them. They supervised with their own employees the subcontractors. And after the buildings were built they went in with their employees and checked and made sure they were all right. And then they sold the townhomes to homeowners, my clients, for a profit.

This is around 2005, between 2005 and 2009. Long about 2011, 2012 homeowners started noticing problems with their homes. Not run-of-the mill problems, but serious problems. Rotting porches, handrails falling off, things like that. They were all right. Because Wieland also sold them a warranty with it. So they made -- they asked John Wieland to honor the warranty. With few exceptions Wieland refused. So here we are. Almost had no choice. So they had to hire an

attorney and file suit. That was almost four years ago.

In order to get their places fixed they have been on a four-year journey to get to where we are here today.

Now, as part of the lawsuit the homeowners also had to hire experts. The first expert had to tell them what was wrong with their place. Everything that is wrong with your home. His name is Myles Glick. You will hear him testify in a little bit.

Once they find out what's wrong with their units they have to hire a contractor to cost out the job, tell them how much it will cost to fix their homes. That fellow's name is Gary Moore. You will hear him testify tomorrow.

Finally, since these repairs are going to be expensive, they had to hire somebody to tell them how much it will cost to live outside their homes for a period of months. That fellow's name is Bud De Santis and you are going to hear him also. All of these experts had to be paid for by the homeowners.

Now, the problem you are going to see with these houses, some of them are easy to fix.

You can stand on the street and look at them. Some of them are not. Some of them are in the attics, some of them are in the walls, some of them are up on the roofs. We will have pictures, the testimony to show you what these problems are.

In the end, what we are here for is one simple thing. We are asking Wieland to give the homeowners what they should have gotten in the first place when they bought their homes, which is a quality home, which is a home that's built correctly.

One thing as you listen to the testimony that you will not hear is you won't hear that the homeowners did anything to cause these construction problems. Not a thing. The evidence in this case can be technical, and I hate to say it, but it might be a little boring. But the principle is simple. Wieland needs to do the right thing. They need to give these homeowners enough money to fix their homes. Something they should have done years ago. As you sit here today, try and remember three words. The first word is preventable. Had Wieland done the right thing, this would have been prevented. We wouldn't be here today. Okay?

Obvious. It's obvious from the testimony that Wieland violated duties to these homeowners by failing to provide them a quality home that they paid a lot of money for.

The last one is predictable. If you build a home wrong it is predictable it is going to fail. It is going to fail sooner than what a normal home would. Pop, P-O-P. Preventable, obvious and predictable.

Finally, it's not easy to do justice. Use the common sense God gave you. You will come to a good result. Thank you.

THE COURT: You may proceed.

MR. MANOS: Thank you, Your Honor. Good afternoon, ladies and gentlemen. My co-counsel Andy Haselden is sitting here with me. We will be defending John Wieland Homes who is the general contractor of the townhomes. Mr. Parker is sitting next to Mr. Haselden. He is an officer of John Wieland Homes. We sincerely appreciate your time and patience over however long this trial is going to last. We appreciate your fair consideration.

As you heard, John Wieland Homes was the general contractor of these 22 buildings

containing 105 different townhomes. And as part of this construction Wieland hired subcontractors. Those subcontractors installed siding. They installed windows. They painted these buildings. They installed trim. They put shingles on the roofs.

Wieland, as most of you probably know, employed superintendents or builders that were on site their subcontractors. Those superintendents and others also employed individuals to make sure that the customers were getting what they were purchasing, make sure the houses were built as they were supposed to.

And Wieland, like many other companies, had various management employees that did other management factors. Now, Wieland, like all companies, took great pride in its work and tried to provide a quality product to these homeowners and it did provide a quality product.

But Wieland is not perfect. What its subcontractors are not, they are not perfect. Mr. Haselden and I, we are certainly not perfect either. There are some conditions at these townhomes that need to be addressed. You'll see some photographs, Mr. McCarty pointed out a couple

of the conditions that Plaintiffs will focus on. They will show you some eight to ten-year-old handrails on the exterior that had rot on them. They will show you some pickets that have some rot. They are going to focus in on those photos. There are some problems with those. But what you didn't hear, what you are going to hear from Mr. Glick is not that there are some problems. You are going to hear Mr. Glick testify that these eight to ten-year-old townhomes need to be totally dismantled and rebuilt.

You will hear Mr. Glick testify that all of the siding of all 122 buildings, all 105 units needs to be taken off.

You are going to hear Mr. Glick testify that every single window, whether it's under a ten-foot porch or exposed to the wind, needs to be pulled out and replaced. You are going to hear Mr. Glick testify or Mr. Mease, another expert, that every shingle on all 22 roofs of 105 units needs to be pulled off and new roofs need to be put on.

You are going to hear Mr. Glick testify that every handrail, every picket, every piece of wood trim needs to come off these 22 buildings. You are also going to hear Mr. Glick testify that

every single brick entry step going in to these 105 units need to be torn out and rebuilt.

In short, you are going to hear the Plaintiffs testify that these buildings are so riddled with deficiencies that people have been living in in the last ten years that they need to be totally torn apart and rebuilt.

And why are these catastrophic repairs having to be done? What are you going to hear? You are going to hear because the siding isn't nailed technically properly.

You are going to hear the windows may not have a perfect piece of sealant around those windows. You are going to hear that the nails in the shingles may be a little deep or may be a little shallow or may be a little angled. You are going to hear that all those masonry that I talked about, all 105 sets of them, they measured three of them and the tolerances of them aren't exactly to 3/8th of an inch when you walk up them so all 105 steps need to be torn out. How did they reach these conclusions? Mr. Glick is going to tell you that they did approximately seven tests, but of those seven test cut locations on seven buildings, primarily they focused on three of 105 buildings.

Less than five percent of the 22 buildings is what they are basing these catastrophic repairs on.

How much is all this going to cost? Plaintiffs are going to tell you that they need $18.5 million to tear down these townhomes and rebuild them.

To give you a little frame of reference, that's a big number, from 50,000, give you a little frame of reference, most of you all are probably better at math than I am, if you divide 105 into 18.5 million, you get $175,000 per unit. These units are between 1,200 and 1,700 to 2,500 square feet. They are going to tell you they need $175,000 to do these primarily exterior repairs on each unit.

How long is all this work going to take? They are going to tell you it will take six months and that the homeowners are going to have to be out for six months per unit for a total project repair of over four years.

Now, what's interesting is this $18.5 million repair estimate that they are going to tell you is needed, that was given by a company that's not in business. Plaintiffs are going to submit to you an estimate, you heard that

correctly, by a company that cannot do the work. By a company that couldn't do the work when it was in business.

Now, Wieland's experts aren't suggesting as I told you that there are no problems out there. There are some problems out there. And some of those problems are because Wieland is not perfect. As a general contractor certain things weren't done perfectly. And you'll hear our experts tell you which areas weren't done perfectly, which areas need to be fixed and you'll hear our experts tell you how much they think it is going to cost. We will outline all that in front of you.

Some of those things include siding that we've talked about. You don't have to take all the siding, we submit, off to address technical violations. You can add nails. There are no windows out there that are leaking, but if you want to address a technical violation there are things that you can do to address it which our expert will tell you about.

As to the brick steps and the wood pickets, to the extent there are problems with them, our experts will tell you and you'll see that

in their scope there's money to address those issues and certainly if there's a problem with them they need to be fixed. I am not suggesting that there isn't.

More importantly, JR Watkins who you will hear from, one of Wieland's experts who is a repair contractor, he will tell you that he is licensed, he is bonded, he is currently doing work and he will do Wieland's repair scope. Our expert will tell you what needs to be done out there and we will put up a licensed contractor that is currently doing repairs all over South Carolina that's licensed that can actually do the work. He will tell you how he is going to do it and what he will do it for.

Now, it's going to be up to all of y'all based on your collective common sense to decide who you believe. As Your Honor told you you will be doing this after hearing a number of witnesses. You will see a number of photographs and you'll apply the law that she provides you.

There is one thing, though, that I want you to remember that's not going to be up for debate in this case. As you heard from Plaintiffs' counsel, these lawsuits were brought in 2013,

almost four years ago, and after these lawsuits were brought, and after their experts said these buildings needed to be torn apart and said that they needed to spend 18 to 20 plus million dollars to repair them, 31 of the 105 units have been sold to new purchasers. That's the one thing that I want you to think about and keep in your mind as you are listening to evidence as you're judging the credibility of the experts and thinking about these buildings. Thirty-one of these units have been purchased by people knowing that their units need $175,000 worth of work according to Plaintiffs' consultants, that they may be out of their units for six months. Over 30 percent of these 105 units have been sold over the last two years with that information.

Again, we appreciate your time. We appreciate your patience. Thank you for your patience with me. Look forward to working with you. Thank you, Your Honor.

THE COURT: You're welcome. You may call your first witness.

MR. HAYES: Your Honor, Plaintiffs call Myles Glick to the stand.

THE COURT: The witness may come to the

stand to be sworn.

MYLES GLICK

having been duly sworn, testifies as follows:

THE CLERK: Please state your name and spell your last name.

THE WITNESS: My name is Myles Ivan Glick, G-L-I-C-K.

THE COURT: Can you spell Myles as well.

THE WITNESS: M-Y-L-E-S.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. HAYES:

Q. Good afternoon, Mr. Glick. If you would take a moment, I'd like for you to go ahead and give a little background if you don't mind so the jury has a bearing on your educational experience.

A. I think the best place to start is high school. I went to a high school that offered not only your typical high school curriculum, but it was a technical school. Offered a three-year electrical engineering, architectural, mechanical engineering curriculum. I took the architectural in high school and I graduated high school with a

three-year technical degree as well as a standard high school degree. I then went to the University of Cincinnati in Cincinnati, Ohio, went to the architects program. It's a six-year program. Last four years you alternate and go to school three months, you work three months. Go to school three months. Some people call it a co-op program. So by the time you graduate you have already had four years of experience working in the field of architecture as required.

From there I then had my first job on Hilton Head and I worked for Sea Pines Development Company. I was being trained to be a developer with an architectural background. Then in 1974 the Kiawah Island Company started here in Charleston and I became a design manager.

Ultimately I became the director of design and construction. This is for seven years. So I developed Kiawah on behalf of the Kiawah Island Company from 1974 to 1981. In 1981 I went into my own business. I am a practicing architect. And the name of the business is Glick-Boehm & Associates. We are in our 36th year right now.

Q. Mr. Glick, do you have any licenses other than your driver's license, professional?

A. Yes, sir. I have a license to practice architecture in both the States of South Carolina, Georgia and Florida. I also have a NTARB certificate which is a higher level of architectural registration which allows me to get registered in any state in the country.

Q. Have you ever had your licenses revoked for any reason?

A. No, sir.

Q. Have you had any form of complaint lodged against your license?

A. No, sir.

Q. In regards to forensic architect or forensic investigation, would you be so kind to tell us what exactly is a forensic specialist and architect?

A. Well, I think it's almost what you see on TV. I'm a detective. I'm a detective when it comes to buildings, whether it be water intrusion, slip and fall, structural failures; sometimes I work with structural engineers as well. All kinds of cases, but focus primarily on building envelopes such as Waverly, are things wrong not only on the outside of the building, but on the inside where you can't see things going wrong immediately, but

they are going wrong as time goes on.

I always tell people that everybody knows how to tell time, but I know how to build a watch. My forensic investigations started in 1981. I participated in millions of square feet of buildings. I have been on ladders. I have been in lifts. I have taken hundreds of thousands of square feet of buildings apart to analyze why buildings do what they do.

Q. Approximately how many forensic investigations do you think you have done in your career?

A. My forensic investigations on my resume are approximately 150. There is probably another 50 that are included with normal projects, but I think one of the unique things about my talent is I am both a practicing architect, I have 15 people that work for me, as well as a forensic architect. So I am able to provide that service just through the general renovation of a building and to see what's going on with the building to understand how to correct it, but there's 150 on my resume.

Q. Were many of these in South Carolina?

A. I will say just about all of them were in South Carolina except maybe one.

Q. Did you ever investigate this courthouse we are in today?

A. Yes, sir, I did. I was the expert for Charleston County government to do the forensic investigation and participate in the repair of this building that we are siting in today.

Q. Have you done both commercial buildings and multifamily projects?

A. Yes, sir, I did the forensic investigation for the county courthouse, St. Francis Hospital, Mt. Pleasant Waterworks Building, the Black Boyd Building on Daniel Island, 400,000 square feet of -- square feet. Many office buildings, approximately 26 multiple family housing complexes like Waverly which we are discussing today. Many, many houses and other commercial buildings.

Q. Are you a member of any professional societies that have anything to do with your forensic investigation?

A. Yes. The one that's most directly related is the Building Enclosure Council, BEC. I'm a member of that. I am also a member of the AIA, American Institute of Architects, both local level, state and national level. I'm a past

president of the state chapter of the American Institute of Architects in South Carolina. I am a member of the Society of American Military Engineers called SAME. And I am also a member of CEFPI, which is the Council of Education Facility Planners International. The reason I am a member of that is because I design schools. I designed multi middle schools, Murrary-Lasaine, Springfield Elementary. I do that while practicing architecture.

Q. Have you ever been qualified as an expert by a court whether it be state or federal?

A. Yes, I have been qualified as an expert in both state and federal courts.

Q. Approximately how many times?

A. Probably 12 times plus or minus. Of all those cases only 12 have gone to court.

Q. You have been an expert in development is my understanding?

A. Yes, sir. I have been qualified as an expert in development.

Q. Architectural design?

A. Yes, sir.

Q. Construction?

A. Yes, sir.

Q. Construction administration?

A. Yes, sir.

Q. Have you ever worked with developers before?

A. Yes, I have worked for a total of seven and-a-half to eight years between Sea Pines Company and Kiawah Island Company.

Q. Have you been a developer yourself?

A. Yes, I have. I developed 247 Meeting which was a class A 8000-foot office building in downtown Charleston. I eventually sold that project. I then developed 493 and 489 King Street which is both a renovation and brand new construction. It is retail with housing above as well as retail with office.

MR. HAYES: Your Honor, pursuant to Rule 702 I would like to tender Myles Glick as a qualified expert witness in the field of development, architectural design, construction, construction administration.

THE COURT: Any objection or questions?

MR. MANOS: We have a question, Your Honor. No objections to architect.

THE COURT: As long as it is limited to his expertise you may proceed.

MR. MANOS: Sorry. I was not clear, Your Honor.

THE COURT: You can voir dire the witness with regards to expertise. You may proceed.

MR. HAYES: Do you want to voir dire the witness now?

THE COURT: He needs to ask the question. I can't make a decision regarding his qualifications until he does it.

BY MR. MANOS:

Q. Mr. Glick, Teddy Manos for Wieland. You are a developer of what? What did you develop?

A. I developed 247 Meeting Street. It's an office building. It is now the location of a boutique hotel. The Bohemian. I also developed where I am located right now which is 493 King Street and also 489 King Street which is residential housing units above retail.

Q. And you worked for a developer when?

A. I worked for developers directly from 1973 to 1981 and also where I positioned myself, I went into business myself in 1981. I probably worked with 50 developers as my initial clients because of my development background.

Q. Have you ever personally developed a multiple unit townhome complex?

A. Apartments, residential, not specifically townhomes. One is horizontal, one is vertical. It's the same thing.

Q. Are there a number of units at 489 King Street?

A. There are three residential units and a commercial unit.

MR. MANOS: Your Honor, our only objection to Mr. --

THE COURT: I don't take speaking objections. If there is an objection I need to know succinctly what it is in one or two words. Otherwise I need to excuse the jury.

MR. MANOS: Objection to his qualification as a developer.

THE COURT: Mr. Foreman, ladies and gentlemen, I have a brief matter of law to take up with the attorneys. During the break please do not discuss the case and please leave your note pads in your seats. We appreciate your patience.

(Thereupon, the jury exited the courtroom at 3:21 p.m.)

THE COURT: What is the basis of the

objection?

MR. MANOS: Your Honor, he was never designated to provide opinion testimony regarding developers duties.

THE COURT: What did y'all designate him as as an expert, in what areas, Mr. Hayes?

MR. HAYES: Your Honor, I don't have it in front of me. I believe he was designated as an expert in the field of construction and I would think it would include development in any of these.

THE COURT: Well, they are two very different things. Construction is one thing. Development is another. Did you identify him as an expert in the area of development and my other question becomes when did he ever testify as an expert in the area of development? Developing projects does not make an expert in that area. I don't know. You said he's qualified as an expert 12 times, but I don't know what areas.

MR. HAYES: Mr. Glick, do you know when you were qualified as an expert in development?

THE WITNESS: Yes, sir. It was a condominium complex right next to the Crab House on James Island.

MR. HAYES: The one on Wappoo Cut?

THE WITNESS: Yes, sir.

THE COURT: What court?

THE WITNESS: I think it was this type of court as opposed to federal court. Ed Buckley was the attorney and Joe Dupore for the Plaintiffs. And I think the case was against Howard Needele.

THE COURT: With that clarification do you have any objections, Mr. Manos?

MR. MANOS: I do, Your Honor. Because I'm not sure what his opinions regarding development are.

THE COURT: Well, I need to know whether your real objection is about qualification or if your objection is that you did not have the opportunity to question him about his opinions in this area. Two different things.

MR. MANOS: Yes, Your Honor. Both. I think Mr. Glick's professional career is as an architect. Yes, he has done some side development.

THE COURT: Well, the issue is not that. He has been qualified in a court of record in that area. So the issue becomes what's your objection to his foundational knowledge as a developer? That's separate and apart from your ability to question him about his opinions as a

developer in this case. If you have an objection about them not having notified you, I'm going to give you access and you can find out what his opinions are. But you have deposed him several times. Is it going to make a difference to those opinions?

MR. MANOS: I'm not sure -- I'm not sure what Mr. Hayes and Mr. McCarty intend to use the development part of this for because that's my problem.

THE COURT: I don't see how you separate it out. I think he has an opinion basically about the standard of care.

MR. MANOS: My understanding and his report says nothing about what a developer is supposed to do. His report talks about what a general contractor is supposed to do, what codes are supposed to be followed. He didn't talk about a developer -- they are just two very different things and I'm not sure what Mr. Hayes and Mr. McCarty intend to use him for.

THE COURT: Mr. Hayes.

MR. HAYES: Your Honor, I believe he can testify as to the standard of care for a developer.

THE COURT: Well, Mr. Manos says he didn't talk about that since you never notified him so he couldn't elicit that testimony in a deposition.

MR. HAYES: I don't have that in front of me right now, but I did -- I list Mr. Glick as an expert in this case. And they deposed him twice.

THE COURT: You got to tell them what you list him as an expert as. Why would they question him about being a developer if you never told them those are the opinions he was going to elicit?

MR. HAYES: Your Honor, I have to go back and look how I listed him. I don't have that.

THE COURT: Well, I need you to take the time to find out for me when you notified him and what you notified him of.

(Brief pause.)

MR. HAYES: Your Honor, I am trying to find it now. May I have permission to step out in the hall to call my office to ask them?

THE COURT: Sure.

(Brief pause.)

MR. HAYES: Your Honor, we found the

language. Your Honor, he was designated to testify as to his knowledge of alleged issues with the subject buildings as well as other findings or opinions that he has in regards to the subject matter which, Your Honor, we would contend involves development.

THE COURT: I haven't asked for argument. So you got notice of that, Mr. Manos.

MR. MANOS: That certainly came to the lawyers, Your Honor.

THE COURT: So then you would have had the ability to have examined him when you deposed him regarding all of his opinions, correct?

MR. MANOS: Yes, Your Honor. We asked him twice for what his opinions were and he never said anything about development.

THE COURT: Is that correct, Mr. Hayes?

MR. HAYES: Your Honor, I don't recall off the top of my head. I think that he would have answered any questions they asked.

THE COURT: Did you specifically ask him that question?

MR. MANOS: We certainly asked him do you have any other opinions. We had his report and nobody suggested to us that he was going to be

testifying to the standard of care of a developer, Your Honor.

THE COURT: Is that in his report?

MR. HAYES: As far as the standard of care of developer, I do not believe it is.

THE COURT: So how could Mr. Manos then have been notified that you were going to elicit those opinions?

MR. HAYES: Well, we named John Wieland as both the general contractor and developer.

THE COURT: Doesn't put them on notice as to what opinions you're eliciting from an expert. Civil court is not trial by ambush. It's not like criminal court where you can just sort of -- where there's no discovery. The whole purpose of the discovery is to put them on notice what is going on so that it is not like a mystery so they can tailor the litigation and save time where you can. A general statement about his opinion, I think you need to let him know exactly what sort of opinions you are going to elicit and I would think it comes as a surprise to him if he is going to talk about standard of care for a developer and it's nowhere in his report.

MR. HAYES: Your Honor, I apologize if

-- it's not intended to be an ambush.

THE COURT: So the remedy is to give him access to find out what those opinions are going to be.

MR. HAYES: Yes.

THE COURT: How long do you need to do that? I don't think you can really question his expertise, although I don't know that enough questions were asked about that. Based on the questions that have been used to supplement the record, I don't have any question about his ability to opine. The issue becomes your ability to know what those opinions are so that you can effectively cross-examine him.

MR. MANOS: And we were thinking that Mr. Freeman was going to be the one that was going to testify about standard of care. Mr. Haselden was handling that. I was going to cross-examine Mr. Glick which is why I went up. I thought it was going to be about construction. So I'm not sure. If we can have a moment.

THE COURT: Sure.

MR. MANOS: Thank you.

MR. HASELDEN: Your Honor, Ms. Shoun's assistant actually found a PDF form response to Mr.

Glick. It says not only what Mr. Hayes said that it says, but it says a copy of Mr. Glick's preliminary report dated January 5th, 2015 is attached. There's nothing in that report whatsoever.

THE COURT: I have covered that. The remedy is to give you access, not to preclude the testimony.

MR. MANOS: Let's figure out how long we need.

THE COURT: That's why I asked Mr. Hayes was it in the report. That's why I made the observation that it legitimately would have come as a surprise. So the remedy again is give you access, not to exclude the testimony.

MR. HASELDEN: We are going to step out a second and talk about it.

THE COURT: Mr. Glick, do you need to stretch?

THE WITNESS: No, ma'am. But I think I said Howard Needele. I think it was Morton Needele. That was so long ago.

THE COURT: That's okay.

(Brief pause.)

MR. MANOS: Your Honor, I think we

would like probably somewhere between an hour to two hours to depose him since we have the court reporter here.

THE COURT: She can't do that.

MR. MANOS: If we can get a court reporter here in the next 30 minutes can we --

THE COURT: What I would suggest is we go through all of the questions that Mr. Haselden is going to elicit that do not involve opinions about a developer's duty and then you all can depose him tonight if he wants to and you can arrange that, but I can't take court time to do that because it is 20 of 4:00.

MR. MANOS: Okay.

THE COURT: I don't think we are going to finish his direct examination anyway, not this late.

MR. MANOS: Yes, Your Honor.

THE COURT: Any exception from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense to proceeding in that way?

MR. HASELDEN: No, ma'am, as long as we don't have to pay Mr. Glick. He charges 1,500

bucks.

THE COURT: He is entitled to charge for his time. The fact that --

MR. MANOS: We will pay Mr. Glick, Your Honor.

THE COURT: I can't get in the middle of that. Mr. Glick, are you going to be able to make yourself available today to be deposed by the Defendant?

THE WITNESS: Tonight?

THE COURT: I would think so or tomorrow sometime maybe at break I guess or lunchtime. I don't know where you would have that long a break to be able to depose you other than this evening. Where do you live, Mr. Glick? You live in Charleston?

THE WITNESS: I live in West Ashley. Tonight I can't do it because I am presenting at 6:15 at the new city hall for the town of Hollywood to the council.

THE COURT: That might take a minute. We will work it out.

MR. MANOS: Yes, Your Honor.

THE COURT: Please bring in the jury.

MR. HAYES: Your Honor, one

clarification before the jury gets back in here. They are qualifying him?

THE COURT: I would imagine you all have no objection to his expertise at this point since what the real issue was was finding out what his opinions were or do you have an objection about his expertise?

MR. MANOS: We only have an objection as to his expertise in developing.

THE COURT: What's the basis of that objection?

MR. MANOS: The development as I understand that he has been involved in is back from the early 90's. Things have changed in the development world in those 20 plus years, very different issues. I don't know the case that he was qualified as an expert in which I think was also in the 90's. I don't have any information to understand whether he is qualified as a developer or not, Your Honor. I certainly don't have any --

THE COURT: I will deal with that in a moment.

MR. MANOS: Yes, Your Honor.

(Thereupon, the jury entered the courtroom at 3:43 p.m.)

THE COURT: Ladies and gentlemen, we appreciate your patience. Mr. Glick will be qualified as an expert in the area of architectural design, construction and construction administration without objection. The other will be taken under advisement until the other matters which are a matter of law are concluded. You may proceed, Mr. Hayes.

BY MR. HAYES:

Q. Mr. Glick, have you had occasion to visit a neighborhood called Waverly?

A. Yes, sir.

Q. And did you, in fact, investigate a neighborhood called Waverly?

A. Yes, sir.

Q. And in that regard do you have a narrative today to show us in regards to what you have done out there and your opinions?

A. Yes, sir. I have a presentation of the findings from the seven visits that I have been there, yes, sir.

Q. Okay. You have been there seven times?

A. Yes, sir.

Q. Your Honor, we would like to let Mr. Glick -- the question is what you did and what were

your opinions and I believe --

THE COURT: You have to ask direct questions. He can't just give a narrative.

BY MR. HAYES:

Q. Okay. Let me pull the screen up and I will go through the narrative, Your Honor. Okay. Mr. Glick, how many residential units and buildings are out at Waverly?

A. Waverly consists of 105 units. They are townhouse units and they are in 22 buildings. The buildings have different numbered units in them so they vary a little bit.

Q. Approximately which ones did you actually look at out of the 105?

A. It was a combination of 26 units of the 105. I did destructive test holes. In my report there are 15 holes that were taken. They cover six different buildings. The remainder from 15 to 26 is interior reviews. So my reviews were both nondestructive and destructive.

Q. When you say nondestructive and destructive, does every review have to be destructive?

A. No, it doesn't. I think when you do an investigation of this type of project, the most

important thing is to do a nondestructive review because what I am looking for is what I call a pattern of damage. I am also looking for means and methods that the contractor used in his construction of the different buildings.

And what became very apparent to me with my background is that the construction of all the buildings of all the units was the same. The way they put the trim on the windows, the way they put the siding on, things of that nature.

Q. Do you recall when these buildings were built?

A. These buildings were built between 2005 and 2009.

Q. And what residential code -- and actually let me back up and ask you this: What is the building code, Mr. Glick?

A. Well, when you build a building as a professional and remember, Wieland Homes was not only the contractor, they were the developer and they were also the design professional. And as you heard in the opening --

MR. MANOS: Objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: -- they hired the

subcontractors.

THE COURT: That doesn't require expertise. You may proceed.

THE WITNESS: Bought everything for the job. They had total control of everything on that site. The thing that they do not control is how you build those buildings. Those rules of engagement as I call them on the slide basically are stated by the industry or the State of South Carolina.

So the construction was in 2005 to 2009 as you can see, and at that time during that time three different building codes were in effect. The 2000, 2003 and the 2006 International Residential code. And typically the year that we're in, 2017 is not the year of the code. They just adopted last summer the 2015. So there's no parallel between the year we are and the code.

Nonetheless, regardless of any of those codes, the code violations which allowed the water intrusion into these units were violated in every one of those building code issues. There's also installation instructions. The one I am saying here is the HardiePlank itself. HardiePlank is the material on the side of the building, horizontal

siding. It's actually a --

MR. MANOS: Your Honor, objection. I'm not sure --

THE COURT: Basis of the objection?

MR. MANOS: Mr. --

THE COURT: No speaking objections. What is the basis of the objection?

MR. MANOS: Not responsive, Your, Honor, to the question.

THE COURT: Overruled.

THE WITNESS: The installation instructions for roofing materials, siding, they're all stated by the manufacturers. So both the building code manufacturer's instructions and industry standards even would dictate how you build a building.

BY MR. HAYES:

Q. Did you look at the wall sections out at Waverly?

A. Yes, I did. And it's important to understand that there's two types of wall systems in our environment. One is called the barrier wall, that's what that illustrates, where the water will hit the outside skin of the building. Water will not penetrate and therefore the mechanics of

the wall envelope does not allow for the water to then re-exit out. Whereas in water management system assumes that water will get through. That's what you have on your house. That's what I have on my house at West Ashley. We all have in our houses. This building that we are in is a water management wall.

In other words, the building codes recognize that water, the mortar windows leak, caulk joints leak, and it will hit what we call a moisture barrier. Call that WRB, weather resistant barrier. When you go around town you will see some white papers on buildings. Some of you may remember black felt. That's on buildings. That's all the water membrane. So when water goes through the wall it hits the membrane and the water exits the wall. Because not only does water get in a wall, but you also have condensation in our area. So it can never rain and there is going to be moisture in the wall. You have to get it out. So to understand what's going wrong at Waverly, you have to understand water management walls because it's stuff you can't see.

So in constructing the wall you have your studs. Your next item would be wall

sheathing. After that you put your white paper, Tyvek. Your flashing underneath, notice how it is lapped where the felt is on top of -- I am sorry, the Tyvek is on top of the flashing. So you get a shedding effect. That's going to be very important when you see the photographs of how these buildings are built. So you have a shedding effect. You put your skin on the building water will come in and the water will go out.

And another demonstration is again it was raining outside, the water gets trapped in the back of that building for whatever reason. It eventually then comes out. That's how the wall is supposed to work. Whether it's above a window, at the bottom of a wall.

So that is the key issue in understanding today's issues with Waverly. Both the codes, industry standards, basically the rules of engagement and also how walls are built.

Q. Did you take any photos of what a Waverly townhome looked like from the outside?

A. Yes, I did. So Waverly has numerous townhouses. Some of them have double balconies, some have single just like this. So we began to analyze what the buildings themselves, how they

were built. And these are the construction deficiencies that I found. I'm going to show you pictures of them.

Q. What construction deficiencies did you find?

A. I found improper siding installation, so they violated the installation instructions. What's really important about that is the building code specifically says if you violate the manufacturer's instructions you violate the building code. So the building code violations, nobody would want that on their house.

Improper window door trim installation, improper window selection, improper window installation, improper brick steps. You heard about that earlier. And 3/8th of an inch may not be a big deal when you try to argue it, but when you trip on it, it makes it a big deal. Rear fences did not have proper blocking. They were all warping. Entry handrails and pickets, they are rotting because of the way they were built with the improper nails, improper finishing with paint on top of treated wood before it was dry. Improper painting of the handrails was a critical item. And improper felt installation under the roof.

So those are the deficiencies overall. They are building code violations. They are violations of industry standards and they are violations of manufacturer's instructions. Everything you are supposed to follow, everything was violated.

Q. What specifically did you find in regards to the siding installation deficiency or defect?

A. Lack of proper fasteners. HardiePlank, and I am going to show you in a minute, are very specific. They say to use a certain size nail. They say to put the nail into the siding at a certain place, and make sure you put it into the stud. I will show you many examples where they go into the sheathing which is only half an inch think. They don't ever go into the studs. Lack of fasteners. You are supposed to put them every 16 inches. That's how far apart studs are in buildings. We have some examples where they don't exist for 57 inches. That's not going to hold a building together during a severe wind event which the code says you are supposed to do.

They left out flashing where two pieces of HardiePlank come together. This is an example

of HardiePlank material. Supposed to have a piece of flashing in the back of it so if the calk joint breaks down it has flashing. There's none of that. And then the distance between a piece of trim on a window and the siding is an eighth of an inch. So you can caulk that joint because this siding is going to move, expand and contract. That doesn't exist. And also the siding should be two inches off the roof. Reason for that is this type of siding is made out of cement with fibers in it for strength so the water that bounces off your roof and goes into your siding. I will show you examples where it is so close that the cement board is actually deteriorating because of that lack of installation instruction be followed.

Q. Did you find any results of these construction defects? Did you find anything that resulted because these buildings are not properly built?

A. Yes, I did. Water intrusion in the windows, they got into the interior, water intrusion and rot of structural wall framing, water intrusion and resultant rot of sheathing, life safety issues with handrails falling apart because they were rotting and life safety issues with the

brick entry steps because they were just built incorrectly.

Q. Did you find any leaking windows out at -- find any results of leaking windows out at Waverly?

A. Absolutely. On September 9th, January 6th I went out to the site because there was a complaint of water coming through. I went into the townhouse and there was water stains underneath the windows on three different windows. And that's what happens because of the underlying problems which I'm going to show you. It takes time for this to happen. But it's happening. It's happening right now. When you see it is when the building finally says I cannot absorb any water and it goes to the inside. These are wood structures. They go through wet and drying cycles. At some point they cannot do that anymore, just gives up and the building starts seeing the signs of leaking on the inside.

Q. Could you show us your findings and opinions on let's use unit 1037.

A. 1037 was when we first started our test holes, one of the 15. And this is a typical building elevation end unit. And from the distance

everything looks fine. So I wanted to zero in on the building, see the trim around the window. I start to analyze and I call it DT No. 1 which is destructive test hole number one.

And the first thing I saw when I went up on the ladder was that the joint is caulked shut. What happens and what I mean by that is from a demonstration standpoint this is the flashing that's on top of the window. This is the siding that's on it. I talked about water escaping underneath and out. I will show you a picture of that. Comes with the bundle of HardiePlank when it is delivered to the site. You do not caulk that joint you trap the moisture. That's not good at all. That's a violation of the installation instructions. It's a violation of the building codes.

So I went further and began to take apart the building on the sides and found that this eighth inch joint I talked about doesn't exist. That's the blade of a knife. So it's a 32nd of an inch thick. There is no room for the siding to move. The flashing itself was negative slope. So not only was water sitting on there, it was being driven back to the building.

So then I took it apart and I realized that it was HardiePlank. This is the HardiePlank instructions. So if you look at the HardiePlank instructions you zero in on what was just in red, this is the manufacturer saying this, I want you to read this. Important. Failure to install in accordance with the applicable building codes and James Hardie written application instructions may lead to personal injury, affect system performance, violate local building codes and void the product warranty.

So you go through the instructions further and you zero in on some of these little diagrams. One on the left talks about putting the nails in the studs. The one that's third over to the right talks about the two inches between the shingles and the siding, and the one on the far right is showing a gap that should not be caulked.

So there's absolutely no excuse not to put the information -- not to put this product on the building properly. You go to the last page of the instructions, you zero in on the nailing pattern. It specifically says how to nail the product. They don't want you to countersink it meaning you go further than the surface of the

HardiePlank. The reason for that is there's less material for holding when the wind comes. It is going to pull right off the building of a certain magnitude.

So you want to nail the product properly as well. They don't want you to put it on an angle. They want it straight. So those are the instructions and they are also reiterated in a third party test. The building code doesn't say to use HardiePlank or any other product. The building code says -- it speaks to, rather, issues of performance that has to meet structural requirements or wind loading requirements, but they expect the product to be tested by an arm's length third-party group which in this case is the ICC elevation surface. And in their test report they say on the first page general installation must comply with the report and a copy of the report must be available at all times on the job site.

So there's no excuses not to put up this material properly. It comes with the material. And the building code says to do it this way.

Q. What else did you find out at Waverly?

A. So go to the building itself and we

looked -- take off the siding. And you will note immediately that the metal flashing is on the outside of the paper. So remember you got the flashing, what I showed you, this is Tyvek, should go on the side. Looking at the photograph it's on this side. What is significant about that is when moisture gets trapped back there it will go into the building itself. You also note that vertical leg is only two inches and not four inches which is industry standard.

So we call that as I said on my handwriting, that's called reverse lap. Basically wearing a raincoat and tucking it in your pants. It doesn't work. It's backwards. Not one place did I open up on this facility, on these buildings rather was it done correctly. They are all backwards. So when the water hits, the water goes back and back of the flashing. That's the problem in a nutshell.

Q. Continue.

A. So we looked at how they nailed the siding. What you see here is a little flag. That flag represents -- it is a hole where the siding was nailed. The reason I do that is for visual confirmation, but I also stick a flag with a wire

and went in four inches which means it can't be a stud. So not only is the siding not nailed properly, it is not even in the stud.

Q. The flag, is that the little blue?

A. Yes, sir. It's a blue tape that I cut up my hanger from the dry cleaners and stuck it in the wall. So there's no stud there to receive to nail properly from the siding itself.

Q. Continue on 1037 Zinser.

A. So as we continued our investigation on the siding, we opened up other areas as well. And I again look at the windows themselves. So I took this trim off from the window and what I am showing you here is what I said in the early deficiencies. The windows selected on probably 50 percent of the buildings, there is two different window types, are improper for this type of siding.

What I am showing you is a double flank window. This is for demonstration purposes only. These are vinyl windows. This window allows the trim to be put next to it and a caulk joint in between that space. That is called a caulk joint.

Q. You need to hold it up.

A. That space is called an engineered caulk joint space. You have to have a space to do

that. I'm going to show you they didn't do that at all. An engineered caulk joint is made up of backer rod and caulk. Backer rod is like those things you see in a pool made out of Styrofoam, the round things. This is basically 3/8th of an inch wide, not four inches like a pool. You put that in between that little nook and then you caulk on top of it. When you have a window where my finger is going around the corner, there is no place to hold the backer rod. So therefore these windows are inappropriate. These windows are actually made for vinyl siding when you put the siding behind the window lip. So half the windows, 50 percent, are not even right type of windows.

I tested the moisture, 26 percent moisture content in the trim. And this is important throughout the pictures. These readings are described a certain way. This is from Clemson Extension. This is industry standards. From zero to 16 they say not really a problem. From 16 percent to 19 percent it's elevated and of concern. Anything over 19 percent, 20 percent, above is a real problem. Of course, 28 percent or more grows fungus and is a real problem.

So we had a 26 percent moisture content

in a board and you can see it is a sunny day. So this project is holding moisture. It is basically an incubator for things to happen.

Q. Continue on with what you found.

A. I tested it. I get 34 percent. I looked at the nails, the nails holding the trim. Why is this significant? Well, first of all, the nails weren't galvanized nails. We have samples of that that we can show. The code specifically says use galvanized nails to treated wood. Every piece of trim on every one of these buildings is treated which is a good thing. But they used the wrong nails so the nails were rusted.

The other problem I am showing you here is the nail is too short, basically has a half inch after it goes through the wood. That half inch that I am showing you is basically the thickness of your sheathing. So at no time does any of the nails holding any of the trim go into any studs.

Q. Mr. Glick, we just went through Hurricane Matthew or what could be classified as Hurricane Matthew and by that account should not all of the buildings fall down, siding blown everywhere?

A. Well, we went through Hurricane

Matthew, but Hurricane Matthew was a very unusual storm. And I did the research with the National Weather Service and the wind in the airport in Mt. Pleasant which is extremely close, Mt. Pleasant airport, did not have anything over 30 mile an hour winds until late at night and over a two-hour period it reached -- went up to approximately 51 miles an hour, 53. Never went over 53 the entire day. Majority of the day other than for two hours, it was 30 miles an hour.

So we didn't really have a wind event in Mt. Pleasant at this location. We may have had it somewhere else, but not here according to the National Weather Bureau.

Q. Thank you. What else did you find out there?

A. Going through the pictures, reverse laps of the white paper which is WRB, head flashing. You can see it is backwards there in the vertical leg. These are different windows now. So it is not just one window. These are different windows. The bottom of the window has a similar problem. The bottom of the window has what we call a peel and stick. So if you imagine to be the bottom nail, this is how you nail the window to the

plywood on the building. This case is actually not really plywood, but it's good stuff. They put a piece of flashing peel and stick it on top of this. Well, you are not supposed to do that. You are supposed to put it in back of it. Again, when the caulk joints break down the moisture gets caught. It goes down in back of this and as you can see in the next picture on this one it rusts the fasteners.

So basically your fasteners are rusting. They are going to fail in a wind event as well. So these windows are going to pop out of the building. Once a window blows out, air gets inside of a building and you've got a real problem. So every one of the windows were flashed incorrectly on top and on the bottom. That's the damage from the water intrusion.

Q. When you have a fastener like that it's eventually going to fail, correct?

A. Absolutely. It's just a matter of time because you're -- the tape is holding the moisture in. Cannot get out.

Q. Did you find failed fasteners on the property out at Waverly?

A. I found numerous fasteners in the

process of failing, yes. I will show another example later, another area, small area. You think it would be easy to look at, it's only two by two. I started taking the siding off. Of course you didn't have the right caulk joint gaps and there it is now with orange tape. Every one of the nails from all that siding is not in any studs. So it is all in violation of the building code, all presents a danger.

Again, one and-a-half inch vertical leg, should be four inches and a reverse lap because as you see in the arrows water will get in, just goes back in, doesn't shed itself out to come over the flashing like I explained.

Q. Is that what you described as taking your raincoat and tucking it in your pants and going out in a rainstorm?

A. Yes, sir. Is not just not rain. It is condensation as well and again I will illustrate that's how far my flag went in, about four inches so there is obviously no stud there. Moisture content 43 percent in the trim taken off this area. They used blocking without proper flashing on top. And it is deteriorated. You can see it split, cracked, and eventually I went ahead and touched it

and watch what happens. The meter bank is coming off the building. It is pulling out about two inches. So this is a very dangerous situation. Electricity goes through this point. Just really bad construction. Lack of flashing, things of that nature. Looked at the buildings again in the small area that I was talking about. You can see the reverse lap under this window as well. Pull it down and it should be underneath.

So we are now going to another location. This is one of three roofs that I went on personally. I also worked with Russ Mease, a structural engineer, and he went on numerous buildings. So both of us who are representing Plaintiff today have walked the roofs of these buildings.

Q. Why didn't you go on more than three roofs?

A. Why didn't I go? Well, I didn't go because I don't like to do roofs anymore, but Russ is younger and stronger, and that's what I hire Russ to do. You can see here the two inches is not followed. It should be two inches between the siding and the roof itself. And there's the instructions very plainly show it. I started

opening the building up in this area and again you can see 32 inches and moisture. This is condensation. There is not rain. Your buildings condensate. Every one of our homes do this. Water has to get out. And the water is on back of the WRB in this case. The first fastener is seven and-a-half inches from the end. Supposed to have a fastener three-quarters an of inch from where the rule starts. So you have again it's not secure.

Q. This is on a roof?

A. This is on a roof. Totally different location. This is unit 1037 DT3. You can see here the dimension 32 inches between fasteners, not 16 as stated. Moisture content is 23 percent. What that measurement is is the sheathing on the building. I am going through the paper so that sheathing which really should be dry is 23 percent, well over 20 percent, so it's a real problem.

Q. Once the sheathing has been compromised does it have to be replaced?

A. Yes, sir. Basically that entire frame. The structure of these buildings, the way they are designed, comes from the diaphragm as well as some other members. But mostly from the diaphragm. That is created by enclosing the building and

sheathing, so when the sheathing deteriorates you don't have a structural diaphragm. This moisture content is 35 percent. Even higher than the other one. The nails that we took out, the heads are too small so they are not only not -- too infrequent, but they're too small both from a head size and a length size as well.

The rear of the HardiePlank was 99 percent, okay? They say in the instructions try not to get the HardiePlank wet by keeping it low on the ground. Obviously when you paint it it gives some problems, but you don't want 99 percent moisture in that concrete product. It will deteriorate.

Q. Mr. Glick, I'm sure a lot of people have heard of HardiePlank. That's not a wood board. It's what they call a cementitious board; is that correct?

A. Yes. It's made of cement and fibers to give the strength.

Q. It's still not waterproof?

A. It is not waterproof, no. Concrete absorbs moisture.

Q. Is it not supposed to get wet?

A. No, sir.

Q. Or to that extent?

A. Not to that extent. Overdriven nails, I talked about that through the instruction of HardiePlank. This is why you don't do that. That nailhead is halfway through the board which means the board has no holding power whatsoever.

Deteriorated sheathing. You can see the moisture has gotten in some of the staples and it's already beginning to do damage to the sheathing, 28 percent in this area around the staples. When two pieces of flashing come together it should be a four inch overlap so water doesn't blow behind it. We have one inch.

This is an example of the nails. These are not galvanized nails. These are electroplated.

Q. What did you find -- did you do any investigation -- you did an investigation at a lot of homes, but do you have anything to show today about 2995 Treadwell?

A. Yes. We did that as well. And this is when we begin to look at some of the handrails. The bubbles you see is air bubbles and the problem with all the handrails and the pickets, this is treated wood which is good. But they painted it too soon. Treated wood you have to allow to dry

whether it's three weeks or three months or six months. The reason is it's coming with chemicals to protect the wood. Yet at the same time chemicals are wet. So the best thing to do is before you paint any treated wood is to take a cup of water, see if it absorbs the water. It is that simple. If it absorbs the water you paint it. If it bubbles up, it's still too wet to paint.

Q. What are the type of things that can happen besides bubbling if you paint it too soon or if you use the wrong fasteners?

A. The problem with the fasteners is rusting because they are not galvanized and keeping the moisture trapped is rot. And every one of these rails you will see in the sample that I brought today and the rails themselves they were rotting from the inside. So they are all in various stages of rot, some absolutely coming apart. Some beginning to come apart. And so some of the pickets themselves because of the nature of the way it is built and when the nails rust this is what happened. And it can happen at any point in time. There's no connection whatsoever. It is just the chemicals are eating up the nails. This is a picket that just rusted out.

Other examples of used the wrong fasteners. They rot from the inside.

Q. Is that underneath the picket? That's not the top of the picket? Isn't that underneath the railing?

A. Yes, sir. That's underneath the rail so that doesn't even see the rain. You can see the rot is on the underside, not the top side, so that's what I am saying. The rot is because everything is trapped on the inside. This is a result of all that water intrusion is the rot.

More examples of rot at 2968 Treadwell. Looking at 2976. These are somewhat redundant, but I think it is important to recognize that is 105 units. And there's a lot of problems. This is a rail. You can see it splitting. No matter what you do this wood won't take the paint. That's already damaged. So whatever work that's been done out there is really just trying to hold it together until we can repair it properly because remember it still has the fasteners that are against code.

Q. Those are rails people use to walk down the stairs, correct?

A. Yes, sir.

Q. And pickets hold up those rails. What

about 1453 Clancy?

A. We looked at that. Just another example to see if it was built differently. And took off the siding. We got closer in our pictures and our investigation. And we found a number of things. One, the flashing that I talked about where two points come together, took one board, you can see there's no flashing there. You can see the white paper. That's good, but there should be an extra piece of flashing in back of that.

Not only is that called for in the instructions, it is specifically called for in the building code that when you use HardiePlank specifically you put extra flashing where the joints are.

Now, the defense expert says you can correct all the nail problems by just face nailing. So what you are looking at it is where all the face nails. It would be another row in the middle as well. So I want you to go home tonight and think about your oak floors or if you have carpet a building with floors. Picture nailheads everywhere. That's what they expect these owners to accept. It is not a good idea for two reasons. Number one, the heads are not going to take the

paint very long in this environment. Number two, the original and preferred recommendation for installation by HardiePlank's instructions, they say preferred is what we call blind nailing. So there is a whole row of nails hopefully in studs, but not underneath where you can't see. So when you blind nail -- when you face nail this corrective action that is proposed, you hit a nail that you can't see, it is going to slit the board. In addition, if you don't take the siding off you are never going to find the studs. So how do you nail this solution to solve just the nailing problem. You are not solving the flashing problems. Not solving the reverse flashing problems, whether the top of the window or bottom. You are simply adding more nails. So it is a fragmented approach that's inappropriate and that's not what these people bought and doesn't solve the problem, just delays the problem.

Q. Continue.

A. So we go along we look at the boards again and I can start taking the nails out. They weren't even in studs where the boards come together. So when you see pictures later on in this presentation I am going to use the word

puckering. The boards are actually pulling away because there's nothing holding them. The nails are not in the studs. That's where the flashing should be.

So the blue represents another piece of flashing on top of the white paper. That's where it should be. Again new building, new unit, reverse flash, raincoat in the pants analysis, water gets on, water goes in.

Q. Why does that matter if it gets back there?

A. Well, it matters because whether it is condensation or rain, you are supposed to exit the water. When water gets in the building envelope and takes its time, it is going to damage the wall, it is going to rot the wall, it is going to send the water to the inside. It's just a matter of time. It is not a matter of if, it's a matter of when. That's why the code says don't do this.

Now, discovered something else when I began to take off some of the siding. This is the head of a window so that's the trim of the window. Very, very head of the window. When I took that piece of siding off I discovered that the white paper had been cut and not only had the white paper

been cut, but the sheathings had been cut. So what it looks like to me is they already put siding on the building, and they decided that -- they realized, rather, they forgot to allow enough room for the head of the window trim. So they cut the siding out and put the trim in.

So when you keep going in these photographs you see more rips, and then eventually I took a tool and I put it into the groove and then I measured that groove depth. That groove depth as you can see on the next slide is 3/8th of an inch. That sheathing is only half of an inch. So not only is the water membrane violated so water can get to the sheathing, the sheathing is not even structurally sound. We didn't find this in one area, we found this in three or four areas and you will see them.

So we go to other units. You can see what's happening on the rails here. They are split. They are checked. Moisture content is 23 percent. Why would it be 23 percent in a rail that's sitting out in the sun? Because it's trapped. The moisture could not get out. 1080 Treadwell. Doesn't take much to push it in. It's rot. You don't see the rot, but it is there. This

is 1080. This has the splits in the white paper I talked about. The distance between the siding and the trim on this one is also not an eighth of an inch. OSB is cut as well. So you see OSB, meaning the oriented strand board, the sheathing is cut at the top of the window so now it is cut at the side of the window. So this is not a good situation. We took away some of the trim and had major water stains on it. No wonder we had high moisture content. If you see the blue there is stains everywhere. So it is taking on moisture. It shouldn't be taking on moisture. In fact, these boards should have been primed on the back to protect them. So all this treated wood which comes wet is continuing to get wet. It will never dry out.

So regardless of the side or end of it it is all taking on moisture and some of the trim that you see on the end of the board right there, if you take a real close up of this you can see nails rusting. Those are finished nails. Those are nails you use on the inside of a building, not even on the outside. Remember, Wieland developed the project. They built the project. They designed the project. They bought the nails. They

bought the materials. They hired subcontractors. They paid the subcontractors. They were totally in charge of everything you see here.

Other examples of flashing without the proper four inch overlap. Separate totally different area. Now on top of one of the decks, actually fake deck. It's above an entry door and I am looking at the siding and I take off the siding for unit 1453 Clancy and it has absolutely no fasteners.

Q. No nails holding --

A. There was none.

Q. -- the board on?

A. In this whole section. It was 58 inches long.

Q. What is it supposed to be?

A. Every 16 inches. I tested the holes where the nails were and then put the flag again. Absolutely no stud. Overdriven nails again. They did have one example of that flashing. So they did this piece correct. This is one I took off, but unfortunately flags represent no studs and that's where the boards abut each other so if wasn't one problem it was another.

Once again, I think they had the siding

on the building and they decided to put the rail against the building so they cut the siding and put a four by four post. They cut the sheathing. They cut the WRB. Remember, the WRB is the only thing protecting you from the outside moisture. They cut it. So I pull it back. It was either a flag, there's the groove, so the sheathing in this area. Is it also nonstructural. Won't have its structural characteristics intact.

Went to the other side of the deck. DT No. 7. I said wow, let's look at this board. It is small. I can take it off without doing a lot of destruction. Once again they cut the siding, must have cut the WRB. What you are going to see now is when I took this board off and you can watch me take it off, you can see there's no fasteners on the left side of this board. So one fastener on the top right-hand corner. Then no other fasteners, just hanging there all by itself. That's going to come off in a wind event and there it is in the back. Just one fastener. You are looking at the back side, top right-hand corner. Flashing is backwards. So there is no change from building to building. From hole to hole. Reverse flashing. Again, this white paper should go on top

of the metal. As you can see that's backwards.

In the next one you can see it backwards. I stick my tool back there. The water goes right back in. So we found no differences in any of these things.

Again, I'm another on roof now. Another example, it's within two inches. I took off the siding. You can see a number of things wrong here. First of all, I got water on flashing so that's a condensation. This is a sunny day. There's no rain around. But there is condensation. You can see the white paper does not overlap the flashing so you are not getting that lapping action to get the water out. Called a shedding effect.

And then when analyzed the flashing further, looked at the siding, the siding was deteriorating. It was so wet. That's what all those holes are. Just came apart. Obviously defeats the purpose of having siding when it comes apart.

Flashing is backwards as I said with the Tyvek. I got 28.9 percent, well over 20 percent, 19 is the level that we look for, in the sheathing itself so that sheathing is already moving towards deterioration as well.

Close up what's happening is nails rusting from all the moisture. You the got steel in aluminum flashing so you are going to have a reaction of two different metals. You can see the white paper on top of the flashing. It doesn't even make the flashing. Another area on a roof. DT No. 10. Specifically says in the instructions two inches, it is obviously not. And we go about, those of us who know what we are doing, take things off. No. 9, again there is a little overlap, 3/16th of an inch, should be four inches, so it was really happenstance. They just did whatever they wanted to do with no supervision, no oversight.

More of the same problems. Forty percent moisture content in that area, DT No. 9. So as I continued on, I just wanted to look at the sheathing. The sheathing is supposed to be put on the building with an eighth inch gap as well so that it can swell and shrink and extend itself without damaging and pushing itself out. So when this sheathing gets wet enough it will sort of push the siding out and everything on top of because there is no room for the sheathing boards.

So that's another violation. This is what happens when moisture gets in there. This is

the edge where two boards came together. Absolutely deteriorating. And until you get close you don't understand this is really happening; 38.5 moisture content in that area.

Q. Myles, in regards to latent defect, latent defect is something you can't see with the eyes unless you peel off some of the siding in some of these problem areas?

A. Yes. The term is latent structural defect where it is not open and obvious, but there are problems happening and until you take it apart you don't know it is even happening. So there's no way that you could address these issues if you were the homeowners. You have no idea that this is happening.

Q. That would have been -- if they were installed incorrectly during original construction this would have been occurring since original construction, correct?

A. Absolutely. This is all original construction. Finish nails. They didn't even have the improper headnails. Just finished nails. There is a back side of the finish nail holding siding on. It is ludicrous. Thirty-one percent moisture content in that area of No. 10.

Twenty-eight percent. This is the sheathing as I listed on the paper. I am going to a new area. No. 11 a window, got 28 percent. You can see the flashing there. Again flashing is wrong. It is too short. It is caulked shut. So it's consistent construction that's noncompliant. Reverse lap. I want you to take a good look at the flashing. There is so much moisture in there the flashing is deteriorating. This is metal flashing. It's gone. It's been gone for quite some time probably.

Then I went to a different area. Some dormers on top of the building. Again, I'm moving around the project trying to get downstairs, upstairs, sides, dormers, an overview so when the initial opening statement by the defense attorney said I only did certain things, I did things that illustrate and demonstrate the types of construction that was going on to see what was happening.

So as you can see here, rotted sheathing and rotted studs. So there is structural studs. That's a closeup of it. Put my knife into it. Has a four inch blade. I pushed it right in. It is rotted. It is useless, no structural capacity whatsoever.

More example of the same rot. Different angles of it. In some cases you can see the white fungus which means it is over 28 percent. That only grows at 28 percent on a constant basis.

Went to No. 15. Found other boards, again no nails, no side fasteners whatsoever and no felt as you can see on the left side where the two boards butt together. DT No. 12, this is not labeled, but it is 1465 Waverly. And it's the rear dormer. It is another example of a dormer. Wanted to see if it's happening on all of them. And apparently it is. So you get closer, start taking it apart and you see the flashing that's coming up from the roof in back of the trim and it's gone. This is metal flashing that is totally deteriorated. So that moisture has been in there. I can see the stud as water intrudes. It is split. And damage just continues. It is 48 percent moisture content in this dormer frame.

The stains are obvious that it's been taking water for quite some time. You can see the splits in the trim. That's the result of the moisture intrusion. So all the trim is going to come apart at some point. This is miscellaneous problems. These are townhouses so you have one

unit, you have a firewall between them. By codes you are supposed to have a firewall for two hours. This is looking in the attic.

Now the next picture shows you the ceiling of the second floor. And it is interrupted. Doesn't connect itself to the firewall. So there are firewall violations. This a real safety problem.

Another miscellaneous problem is the steps we talked about. Now, you heard that wasn't really a problem. This is one unit. So I want you to imagine walking up a step. That first riser the distance that you step up as opposed to the tread which you step on, first one is six inches, next one is six and-a-half inches, next one is six and-a-quarter inches, lo and behold one is eight inches. That's a real fall hazard. The code says between the worst and the best, meaning between the six inch and the eight, the worst and best, no more than three-eighths of an inch. So the code allows for some tolerance there, not this.

Q. Mr. Glick, nobody has fallen down and tripped on it. Does that mean it is okay?

A. No, sir. It is a code violation. It presents a danger. Another miscellaneous problem

described in my report is the boards. Industry standard you put a piece of blocking in the middle, so right in the middle of all these boards on the back side there should be a piece of wood to stop these boards from going in and out and there's no board there and they are all warping. That's what they look like. I think it's not something I want. But it could have been stopped if they had followed the rules of industry standards as we call them.

I had the opportunity to look at all roofs from the underside. I was on lifts. Russ Mease will speak to this in more detail. But even from what I was doing I will lift up the shingles at the edge of the roof and as you can see there's no building felt. Felt should be underneath the shingles and there was none of the edge whatsoever. So all that sheathing is subject to moisture and rot as well.

Another roof showing the same example. Please remember these photographs were reduced for court today because there is over 400 photographs or thereabouts.

Q. I'm sure the jury appreciates that.

A. So about two weeks ago -- in September I was called back and I went to 1469 Clancy again.

MR. MANOS: Objection, Your Honor.

THE COURT: Basis?

MR. MANOS: Not timely produced.

THE COURT: I don't know what you're referring to.

MR. MANOS: These were the January 6th, 2017.

THE COURT: Overruled. We dealt with that pretrial.

THE WITNESS: These photographs were taken September 29th. This is the first time I was called out there to this unit after a rainstorm. I went to the building, went inside the building and found moisture in the floor of their dining room and this wall is against a party wall or a firewall. So it has an outside exposure. I will show that you exposure. The baseboards were warping. I was able to stick my knife into it so there was a lot of moisture. And actually when I did my moisture meter in the floor it was 40 percent. Should be zero. So clearly water is getting into the buildings.

That's where it is probably coming from. You got the siding too close to the shingles. As I pointed out previously, that's

where the water is coming from, is this area. That's what I call a party wall or firewall. So I looked at the windows where they were complaining about the water. There was water stains as you can see on the right side. That's my hand.

BY MR. HAYES:

Q. Myles, I am having difficulty seeing that.

A. You can see all the water stains. They go up like that.

THE COURT: He can draw on that monitor.

Q. Myles, apparently you can draw on that monitor.

A. You have a special --

THE COURT: No, with your finger.

THE WITNESS: Oh, wow.

THE COURT: Did you draw on it?

THE WITNESS: Just press it? Nothing is showing up. You can really see it on my monitor.

THE COURT: You can see it on yours. We will get the technology checked.

BY MR. HAYES:

Q. That's fine. Just keep showing.

A. It will show up even worse in the next site visit as well. So I went back. Again I got a call, went back to the same areas on January 6th, same unit. And again it shows you can see it's a pattern of water stains coming down.

Q. Like the stalactites or mites?

A. Again I am pointing to the area the water is coming in. So this is a result of all that reverse flashing I talked about and this is what happens when you build a building in violation of the building code, industry standards, manufacturer's instructions this is going to happen. Just a matter of when.

More stains. And the opening of this window, I went outside and I began to take apart the window a little bit. So you are looking at the right side is the jamb and that's called the sill underneath the window. You can see the trim that's to the right of the window. That's a shutter off to the far right. I looked at the caulk joint. I mentioned earlier there should be an engineering caulk joint. That caulk joint should be approximately three-eighths. I have seen a quarter inch or half inch. Industry standard is three-eighth of an inch, so you can put the backer

rod in there, that's Styrofoam, then caulk it. When you caulk it you caulk a joint in proportion two to one. In other words, if this joint is a half inch wide the caulk should be a quarter inch deep. Look how thick this was. It was cracked. This is what you call adhesion failures. There's no caulk. You can't caulk this. It is impossible. The wood should have been moved over more. I took the caulk out and it was hard to get out; that caulk is less than an eighth an inch thick. That's not going to keep any water out. There is no way to recaulk it; there is no way to maintain it. Just built wrong period. Every single window on this entire project is built that way.

That's the nail that I took out of the trim. Again, those nails are rusted. They are not galvanized and they are too short. What's really scary is these nails which only go into the sheathing, not any studs, also have the hurricane clips on top of them to receive the storm. So they're a fake security, a false security thinking you are putting up your hurricane panels. There's really nothing holding them.

That is the back side unprimed of the trim. Just recording the picture that I took on

painted areas on the sill itself. You can see how the sill was built. Took it apart, found reverse flash. Again this is this peel and stick. I pulled back the peel and stick, checked one of the fasteners. I got a closeup for you so I peeled it back. That's the condition of the fastener. It is holding moisture. It's failing. It has already failed. I got 18.6 percent. That's that danger zone. That's into the sheathing. Into the wood trim I got 20 percent.

Q. Could you give us a quick overview of the building code violations?

A. The most important building code violation is R703.1 which basically says -- it's a lot of writing, but what it says is keep water out of the building. Really simple thing. Every homeowner expects that. Every building owner expects that and these people deserve to keep the water out. I have shown you the water gets in. It will continue to get in. There is other areas that are violated. Section R703 talks about the continuous nature of the water resistant barrier. That's the white paper. Not continuous. It is cut. Does not lap properly. Total violation of the building code. The roof assemblies should be

installed in accordance with the manufacturer's instructions. Manufacturer -- every roof manufacturer said put felt under the shingles. There is none. Stairs and treads. That's the three-eighth inch I was talking about on the bottom. Every one of these items I have shown you are all code violations.

Q. Mr. Glick, did you have a chance to look at any construction defects at the John Wieland Sales Center?

MR. MANOS: Your Honor, we have a matter for the Court if we could, please.

THE COURT: Please approach.

(Off-the-record sidebar conference.)

THE COURT: Mr. Foreman, ladies and gentlemen, I have a matter of law that I need to take up with the attorneys. During the break please -- actually since it's a quarter to 5:00 and I think this will take us beyond five I'm going to excuse you for the evening.

During the break please do not discuss the case among yourselves or with anyone else. Don't do any independent research of any type that includes anything that could be found on the internet. Also do not do any independent research

such as riding by this neighborhood or do any sort of independent look on Google maps or other. As the finders of the facts in this case you are bound to decide the case according to the testimony that you will hear from the sworn witnesses and the other evidence that will be introduced.

We will resume at 9:30. You will come directly to your jury room and I believe the bailiffs have already shown you how to do that and also please refrain from making any comments on social media. You all have had a very long day. As I have already said, we are used to this routine. We do it every day. I know that it probably has been exhausting for you so we appreciate your patience. If you would leave your notebooks on that ledge we will secure them during the break. Have a good evening. We will see you in the morning at 9:30.

(Thereupon, the jury exited the courtroom at 4:47 p.m.)

THE COURT: You may proceed with your questions, Mr. Hayes. I am creating a proffer so I can make a ruling.

BY MR. HAYES:

Q. In regards to the John Wieland sales --

THE COURT: You need to ask him questions.

BY MR. HAYES:

Q. Mr. Glick, did you have an occasion to witness construction defects at the John Wieland Sales Center out at Waverly?

A. Yes, I have.

Q. Can you expand on that and tell us what you saw and what you found?

A. During the two-day destructive test in October of 2014 just driving by the site, back getting lunch, things of that nature, I noticed that the sales center was undergoing reconstruction in certain areas as a result of construction defects.

So I went to the sales center and walked around, took a video, took still pictures and noticed that they were replacing all the pickets, all the handrails on their own building because they had already failed. That was the first visit.

Q. Could you show us what you found?

A. Yes, sir. They were removing fences and pickets. They had already replaced by the time I got there the pickets on the actual stair rail

itself. These are closeups of those rails. This is a video that I took. So they were reconstructing the rail system.

Q. Were these the same or similar to the ones you found out Waverly?

A. Yes. In fact, this pile of pickets and everything was the same that was being thrown out that's currently on Waverly. You can see the post was not replaced. Just the post is painted white and the column was painted white. And this is the debris that was left which this shows signs of rotting.

Q. What about siding? Did you find any siding issues?

A. I went back. I was called back. After I had done my initial investigation I was called back to note that they were actually now replacing some siding that had failed. It was raining very hard this day. So I took the best picture I could. It was a big tree in front. Hard to get a picture. One picture shows the siding being replaced.

So on the two visits to this specific building clearly showed that they clearly were having problems with their own building.

Q. Did you rely on those in forming your

opinions? Did it bolster or lessen or did it have any effect at all on your opinions?

A. I relied on everything good and bad. But what this meant to me was as an expert is that their building is failing and they were replacing it and why weren't they doing it for Waverly? They were also failing.

Q. Was it -- do you agree it was evidence of construction defects at another John Wieland home outside of Waverly?

A. It was a home center. Absolutely. Why would you change it if there were nothing wrong? No one spends money just to spend money.

MR. HAYES: Thank you, Your Honor.

THE COURT: Any questions for the witness regarding this issue?

CROSS-EXAMINATION

BY MR. MANOS:

Q. Mr. Glick, you did not touch any of the buildings at the sales center, correct?

A. I physically did not touch anything.

Q. You don't know who built that center, do you?

A. No, sir.

Q. You didn't open up any siding in those

buildings, did you?

A. I did no destructive testing.

Q. You didn't get out of the car. When you drove by it was raining and you took photos, correct?

A. I took those photos.

Q. You just drove by and took some photos, right?

A. No, I got out of the car. I took the photos and it was very hard to get an angle because a tree was in the way and so I was out of the car getting wet.

Q. You don't know when these buildings, this sales center was built, correct?

A. Was already built when I was there.

Q. You don't know when it was built?

A. So I don't know.

Q. Correct. You don't know who built it, which subs, correct?

A. No, sir, but it was John Wieland Homes.

Q. You saw the John Wieland Homes sign, you don't have any idea who owned it or built it, correct?

A. Well, it's a pretty good guess, counselor.

Q. I am not asking you to guess. I am asking you if you know who built it?

A. I don't know which builder that they hired to build it.

Q. All right. You don't know -- you didn't get out or identify any of the materials, you just saw them from the outside, you can see that it is some type of cementitious siding?

A. Yes.

Q. You don't know if it's James Hardie or some other manufacturer, right?

A. No. I did no analysis.

Q. You haven't looked at any manufacturer's specifications to know whether this was built in accordance with those manufacturer's specifications or not? The only thing that you know is that that you saw some pickets and some siding on the ground that was being replaced, right?

A. There's two different questions. Pickets are different than siding. But regardless which siding manufacturer if you followed the instructions why are they replacing it?

Q. I have no idea why they were, Mr. Glick. You don't know either?

THE COURT: Ask a question, Mr. Manos. No editorial comment.

Q. Do you have any idea why Wieland or whoever was replacing the siding and the pickets that we see on the building other than speculation?

A. My observation of the pile of pickets is they were rotted and handrails. My observation of the siding was that something was wrong.

Q. Your observation of the siding was something was wrong by just seeing a picture?

A. Yes, because it was replaced.

Q. Okay.

MR. MANOS: Your Honor, I don't have any further questions.

THE COURT: Any redirect on that issue?

REDIRECT EXAMINATION

BY MR. HAYES:

Q. Did the sign say John Wieland Homes Sales Center?

A. Yes, it did.

Q. Does that in your experience indicate that it is John Wieland Homes Sales Center?

A. Yes, sir.

MR. MANOS: Objection.

THE COURT: Basis?

MR. MANOS: No foundation. His experience is that's what it indicates, a sign is out there? That's not expert opinion. I will sit down.

THE COURT: Overruled.

MR. HAYES: Thank you, Your Honor.

THE COURT: What's the basis of the objection?

MR. MANOS: The evidence is completely irrelevant, certainly is not probative of any material fact of what we are litigating the 105 units pursuant to Rule 401 and 402. All it is meant is to appeal to the passion and prejudice of the jury. It is duplicative. They have got photos of the actual buildings, pickets, railings and siding that Mr. Glick has given an hour and-a-half worth of testimony that he actually looked at, that he actually poked, that he actually prodded, none of which he has any foundation to give any opinions about this sales center because he didn't touch it, didn't look at the installation instructions, didn't do any type of investigation in order to have a foundation to give an opinion.

THE COURT: Would you like to respond?

MR. HAYES: Yes, Your Honor. Under

Magnolia Heritage Community which specifically dealt with construction defects and defects by the same builder on another project it said evidence and testimony of construction defects at other developments are admissible. It tends to prove or disprove some fact in dispute, the fact being the violation of building code and the construction defects found out at Waverly. Proves impact on public interest, shows repetition of past acts. They not only did this at Waverly, they did it in their own building and others. It's also purpose of establishing the facts necessary to prove entitlement to punitive damages. Expert may rely on that in forming his opinion. And what it really comes down to, everything that Mr. Manos asked up here, whether he touched it or how close he was or anything like that, he has a right to ask him on cross. That goes to the weight and credibility of the expert. The Court may find by his testimony that he loses weight and credibility. Thank you, Your Honor.

THE COURT: You're welcome. The objection is sustained. While I agree with the analysis that you have articulated from Magnolia, factually it is not the same. He did not perform

any destructive testing on the John Wieland building. He cannot testify as to who constructed the building. There's no way to connect the dots. He's simply looking at it and saying well, this looks like the same kind of damage. He has no way of testifying that he saw it before. He can't simply draw a conclusion it's this way after. If you live in Charleston and you got a wood fence or any kind of railing, it's a 99 percent chance every so many years you are going to have to replace it because of water damage or whatever. I don't know that you can draw the conclusion summarily that because that these pickets were being replaced that it was the same type of damage.

Now, if he had looked at it beforehand, done destructive testing or otherwise and could draw some link between the same builders and also the same responsibility in terms of observing the buildings, construction, responsibility making sure it was done to code or otherwise that would be different. But basically what he is saying -- what you're asking this Court to allow is for him to say I rode past a building, it looked like the same damage, I'm kind of sure it's the same damage, looked like the same damage to me, therefore it is.

That's a large leap over a chasm and I can't allow it. It is unduly prejudicial. The objection is sustained.

Now, we will resume in the morning at 9:30. If you have any other exhibits you want to mark I suggest you get with the court reporter to see what time you will need to get here that meets with her schedule to be able to accomplish that. And also please be ready in the morning to let me know what defense exhibits you can agree upon so we can go ahead and admit those as well. And we will resume Mr. Glick's testimony at 9:30.

Mr. Glick, during the break please be advised you should not discuss your testimony with anyone. And we will resume with your testimony in the morning at 9:30.

MR. HAYES: Your Honor, we have one witness that has to leave town. We wanted to call him first if we could.

THE COURT: If you all agree to it fine, if you all don't agree I can't accommodate you. It's their call. You made the choice.

MR. HAYES: Mr. Schneider.

MR. MANOS: Mr. Schneider?

(Off-the-record conference.)

MR. MANOS: We are not going to agree to that, Your Honor.

THE COURT: Did you not check with him before?

MR. HAYES: I did. He had a conference he had to go to.

THE COURT: Maybe you should have called him today before you got started.

MR. HAYES: Well, Your Honor, it would have been more difficult to start off with him.

THE COURT: But you knew he had a scheduling conflict. Now you are asking to interrupt a witness.

MR. HAYES: I will see if he can push whatever his thing is back or leave later or come back to town or whatever.

MR. MANOS: Your Honor, do we intend to be able to depose Mr. Glick at some later time?

THE COURT: You all need to work that out before he can ask questions about -- you need to decide whether you want to depose him or whether you just want to talk to him. I am trying to figure out what the real benefit is in deposing him really. You want to know the substance of his

opinions, don't you?

MR. MANOS: I do.

THE COURT: That might not take that long.

MR. HAYES: We would be happy to agree to tape recording or something along those lines if he wants to ask it.

THE COURT: That might go quicker.

MR. MANOS: That is not so much a problem for me. What I am trying to figure out, Your Honor, is the intention to finish Mr. Glick and then have him come back to give development opinions.

THE COURT: I don't know. I haven't gone that far. I don't know. I contemplated y'all getting it finished before his testimony was done.

MR. MANOS: I guess I will ask for a three-quarter page designation of what it is that he is going to testify.

THE COURT: You talk about that and have a kumbaya and figure out what you are going to do. Mr. Glick, if you can let them know what your schedule is so that they can accommodate you.

THE WITNESS: Yes, ma'am.

THE COURT: All right. Anything else

we need to take up before we adjourn for the evening from Plaintiff?

MR. HAYES: Nothing, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Have a good evening.

(These proceedings were adjourned at 5:02 p.m., January 23, 2017, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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 14th day of April, 2017 at Charleston, Charleston County, South Carolina.

Ruth C Weese

Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2013-CP-10-03326

WAVERLY AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC.,

PLAINTIFF,

VS.

JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC., ET AL.,

DEFENDANTS.

TRANSCRIPT OF RECORD

JANUARY 24, 2017
CHARLESTON, SC

VOLUME 2 OF 6

B E F O R E:

HONORABLE DEADRA JEFFERSON, JUDGE, AND A JURY.

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* *

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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(PLF. EXHS. 42 and 43 were marked for identification.)

(The following proceedings were held January 24, 2017, Charleston County, South Carolina, @ 9:44 a.m.)

THE COURT: Plaintiff's Exhibit 42 and 43 are agreed upon or contested?

MS. NOLAND: Those are the affidavits for videographers.

THE COURT: Shouldn't that be a court exhibit then? The videographers for what?

MS. NOLAND: The videographers for Mr. Glick's videos for the authentication.

THE COURT: What are the numbers of Mr. Glick's videos?

MS. NOLAND: No. 5 is Mr. Glick's video.

THE COURT: 5 did not come in so why did we mark their -- I guess what did you call those?

MS. NOLAND: Your Honor, they are affidavits from videographers that just --

THE COURT: You have to bring the videographers because they have a right to cross-examine them. You can't submit an affidavit

during a trial. You have to establish the foundation for the admission of the video. To some extent videos are self-authenticating. I have to cross that bridge when I come to it. I noticed it is not one that you all agreed upon, but even if it were to come in as a court's exhibit it would not come into evidence. You can't have testimony presented that way. What is No. 43?

MS NOLAND: No. 42 and 43 were both --

THE COURT: Same thing. I assume did y'all -- unless you all consented to it?

MR. MANOS: We weren't arguing about the authenticity, Your Honor, just simply obviously that Mr. Glick can testify that he was out there about the conditions. That's fine.

THE COURT: So then you're just waiting for them to ask the appropriate questions regarding the video.

MR. MANOS: Yes, ma'am.

THE COURT: So then there's no necessity for 42 or 43 because you are not challenging the authenticity.

MR. MANOS: Yes, Your Honor.

THE COURT: So then that's a moot issue. Were there any other defense exhibits?

Did you all over the evening, and I am referring to the Plaintiffs, have the opportunity to review the Defendant list such that you can tell the Court what exhibits you have agreed upon, if any?

MS. NOLAND: Yes, Your Honor. We did review the Defendant's exhibits and came to an agreement on certain ones.

THE COURT: Tell me the numbers.

MS. NOLAND: Your Honor, we agreed to Defense Exhibit 1, 2, 3, 8, 11, and 14 to the extent those are photographs.

THE COURT: What photographs -- 14 -- photographs need to be marked individually. They are never marked as a group.

MR. MANOS: It was just a packet of our experts photographs.

THE COURT: They need to be marked individually if he's going to be testifying to them because he should be able to make reference to each one of them and the record should be clear as to what he is talking about.

MR. MANOS: I intend to, Your Honor. I will send those to them.

THE COURT: That's 14 you said.

MR. MANOS: Yes, Your Honor.

THE COURT: So you then need to get the court reporter to mark them A, B and C, whatever method works for her.

MR. HAYES: Your Honor, we would need to do same with our packet of photographs.

THE COURT: They all have to be marked individually. The record needs to be clear as to what is being referred to. You can't -- you say -- I am using an example 14 and there are eight parts to 14. How would you know reading the record what you are referring to?

MR. HAYES: I guess we need to mark this then.

THE COURT: So then 14 with its subparts and what else have you all agreed upon?

MS. NOLAND: Your Honor, we were intending to put a packet of photographs --

THE COURT: What of his exhibits have you all agreed upon? I am referring to the Defendant.

MR. MANOS: Your Honor, can I correct something? We gave you bad information. 14 is actually just a single photo. We actually should have been referring to Defendant's Exhibit 34, 35,

36 and 37 --

THE COURT: We are getting a little ahead of ourselves. I need to know what the Plaintiffs have agreed on without objection. So you have agreed to 1 through 3, 8, 11 and 14. What else have you agreed to admission of?

MS. NOLAND: Your Honor, I believe that's all.

THE COURT: So 1, 2, 3, 8, 11 and 14 defense exhibits will be admitted without objection; is that correct, Mr. Manos?

MR. MANOS: Yes, Your Honor.

(DFT. EXH. 1, 2, 3, 8, 11 and 14 in evidence.)

THE COURT: Okay. Did you all work out the issues with your witness?

MR. HASELDEN: No, ma'am.

THE COURT: When you say no, ma'am, I need more clarity.

MR. HASELDEN: May I approach? This is an e-mail we received last night that says what Mr. Glick's was supposed to be testifying to.

THE COURT: I am talking about the witness you were talking about taking out of order.

MR. HASELDEN: Oh. Did you --

MR. HAYES: They did not agree to it so he is not going to be taken out of order.

THE COURT: So then Mr. Glick needs to retake the stand. I will remind him he is still under oath. Is there anything else we need to take up before we resume Mr. Glick's testimony?

MR. HASELDEN: Your Honor, that was the issue that I was going to address.

THE COURT: I'm going to take that up in camera. I haven't heard his testimony so I don't know what it is going to be. I don't know whether they can establish the appropriate foundation to bring him in in the context of being an expert in that field. My question may be overly simplistic. Don't you have an expert that is already going to testify to that?

MR. HAYES: Your Honor, we have Mr. Freeman who may testify as to that, also will be testifying about how corporations work and goes into a developer. Mr. --

THE COURT: Wouldn't he be able to tell what the industry standard is for a developer and whether that was breached?

MR. HAYES: Well, we believe he would, but at the same time Mr. Freeman and Mr. Glick have

two very different backgrounds as far as developing goes. As far as what a developer, Mr. Freeman speaks of what a developer's duties are, et cetera, but Mr. Freeman I don't believe has actually developed -- been a developer. He can speak more what the developer's duties are in South Carolina and how corporations work because as Your Honor knows there are a number of Wieland entities in here, and the jury needs to understand how they work together.

THE COURT: Okay. Well, I will take that up in camera. So before you ask any questions in that regard let me know that you have a matter of law so I can take it up outside the jury's presence so I can determine whether you can establish that he is, in fact, an expert in that area and we will go from there. All right. Plaintiff ready to proceed?

MR. HAYES: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, Your Honor.

MS. NOLAND: Your Honor, yesterday during the exhibit conference Mr. Manos did agree to stipulate as to the building codes that were in effect during the time of the construction of the

townhomes. And so we wanted to be able to pass that along to you so that Mr. Cave, the building code official, does not need to appear at the trial.

THE COURT: Okay. Is there anything else? Where is Mr. Glick? He needs to retake the stand. And also while they are getting the jury, I don't entertain speaking objections. You should be able to succinctly tell me what your objection is, whether it be relevance, bolstering, pitting. If you want to cite the rule that's fine as well, but I don't think extraneous conversation in the presence of the jury is appropriate. I don't want them misinterpreting anything the Court may say and give that undue influence in their fact finding.

If I need argument I will let you know that. Other than that I'll go ahead and rule on the objection.

MR. HAYES: Your Honor, when we get to that section how do you want me to handle it?

THE COURT: You need to say, Your Honor, I have a matter of law. Then I will handle it from there.

MR. HAYES: Okay.

(Thereupon, the jury entered the

courtroom at 10:01 a.m.)

THE BAILIFF: All jurors present.

THE COURT: Good morning, ladies and gentlemen. Hope that you all had a pleasant and restful evening. We are now going to resume testimony. You may proceed.

CONTINUED DIRECT EXAMINATION

BY MR. HAYES:

Q. Good morning, Mr. Glick.

A. Good morning.

Q. Mr. Glick, will you remind us very briefly what the construction defects you found out at Waverly were?

A. The construction defects fell into numerous categories. One is the improper siding installation. Second is the improper window door trim installation. That's where the trim was close to the caulk joints, could not be appropriate to keep the water out. Improper window selection. That's where I talked about one of the windows for half the project is an inappropriate window, cannot caulk it properly because it is not meant for this type of siding. The window installation itself, the improper brick step installation with the differences in heights, the picket fence without

the blocking and these picket fences on every single unit. Improper handrail and picket installation, the code violations for the nails and the treated wood. And improper painting of the step handrails. They painted the handrails too soon. They weren't dried out. Improper roof felt installation where the roof manufacturers call for all the shingles to have felt under them.

Q. When you say step handrails, did you find also issues on -- the same issue on top of the roofs that had second floor porches in the second floor porches?

A. Yes. That includes all the pickets, all the handrails on the entire project except for three buildings. Three of the buildings had PVC type handrail.

Q. Did you form an opinion -- did you form these opinions as to construction defect deficiencies with a reasonable degree of certainty in your field of expertise?

A. Yes, I have.

Q. As a result of these construction deficiencies did you have a scope of repair that you came up with?

A. Yes, sir. As I said earlier yesterday,

Russ Mease, structural engineer, building envelope expert as well, he worked with me on this project and we got together and we came up with a consensus on the scope of work to be repaired and how to repair it and put that in a report.

Q. Okay. And was that given to a gentleman named Mr. Gary Moore to come up with an estimate of what it would cost to fix the buildings out at Waverly?

A. Yes, sir.

Q. Okay. And based upon your experience in the field of construction and architect and what we have already been over with the court, is it -- have you found it more expensive to fix or repair a problem than it is to build it correctly the first time and can you elaborate?

A. Oh, absolutely. Especially given a project that's now ten years old so you have got cost differences if you just build this project exactly right the first time as opposed to the way they built it. That's compared to ten years ago, just increased construction costs alone, that will add quite a bit of money. Then on top of that the ability to repair a building, you have to take off the bad stuff before you put the new staff back on.

And then you got complications, you have existing site, landscaping, things of that nature so it is much more difficult, much more time consuming to rebuild and reclad a project. And what we are doing is recladding the building. I think we all heard in the opening statements that there was -- I thought it was a hyperbole that the building is going to be totally dismantled. That's not the case. Simply taking off the siding, handrails, taking out the windows, changing the roof shingles, it is the cladding of the buildings that's having 90 percent of the work. There is other structural issues with some beam, problems, things of that nature, some framing of the dormers, but over all it is a recladding of the project.

Q. And speaking of opening, did you hear Mr. Manos when he said that you had only touched, and I don't want to speak out of turn, it was three percent or five percent of the buildings you had only touched? Do you agree with that statement?

MR. MANOS: Object to the form.

THE COURT: Sustained. Rephrase.

BY MR. HAYES:

Q. Mr. Glick, in regards to the buildings do you feel that you did enough investigation of

the Waverly townhomes in order to render your opinions to a reasonable degree of certainty in your field of expertise?

A. Yes. And the reason I say that is I looked at the project extensively for three to four days. Two of those four days we did destructive test holes, 15 of them. And I touched six different buildings. So I made sure I had upper story, lower story, different building, different orientations. Then I went in the units as well. So in effect I touched -- when I use the word touched -- with interior reviews to see what was happening on the inside 26 units out of 105. And to me, every project is different, but I have to get to a point where I am comfortable that I can sit in front of you today and say within a reasonable degree of architectural certainty these problems exist everywhere and that's the point that I got to with my evaluation in my investigation.

Q. Did you ever formalize or write down your opinions?

A. Yes, I did.

Q. How so?

A. I completed a report which was sent to the owners.

Q. Myles, was there anything -- or Mr. Glick, is there anything that the owners could have done from a maintenance perspective to prevent this damage to the townhomes?

A. None whatsoever. Rails were rotting from the inside. What they did is tried to keep paint on, keep them together as long as possible. Simply a band aid to get to this point to replace them. They have to be replaced. They cannot be fixed, as well as the pickets.

Q. Based upon your investigation did you find that these defects were repetitive throughout the Waverly townhomes?

A. Yes, absolutely. That's where the non-destructive review comes in as well, spending time you go around a project, walking the roofs as we said earlier yesterday. You come to a comfort level as a forensic architect that the means and methods, meaning how the contractor put the buildings together, were the same everywhere. Every time I opened up a window was the exact same thing regardless of the window type and there were two different windows, but they put them in the same way, the wrong way.

Q. You mentioned yesterday briefly that

the building codes were there for the health and safety of the public, specifically those in South Carolina. What do you mean by that?

A. Well, the building code is the most minimum level that you can build a building at. So it's termed so that if you do these things, meaning put the flashing in the right places, caulk the joints between two dissimilar materials, meaning a window which in this case is vinyl and the wood trim, if you do all these things properly, put the right nails and treated wood that these buildings should last, and shouldn't affect the health, safety and welfare of the public to do these minimal levels.

And as we demonstrated yesterday, even the most minimal levels were violated and that's why these buildings will continue to have problems as time marches on. They are a time-related issue.

Q. Based opinion your investigation, let me ask you this: Did the general contractor, Wieland Corporation, have a duty to follow the building codes and build these buildings without construction defects?

A. Absolutely. It's a legal obligation both from the licensing of them. As general

contractors, they are licensed to follow the building code. The building permit even says by signing it I will follow the building code in effect at the time.

Q. Based upon your investigation at Waverly is it your opinion that the Wieland Corporation breached their duty in building these homes?

A. Yes.

Q. And as a result of that breach it is your opinion that the homeowners at Waverly have suffered damage in regards to repairs they are going to have to make out at their homes?

A. Absolutely.

Q. And are those damages or repairs outlined in your scope of repair and the problems that you found out there?

A. Yes, sir.

Q. Myles, in regards to paint, I'm going to ask you really quick how long should paint last if it is done correctly in this environment? We are talking about Charleston, South Carolina, or Mt. Pleasant where these homes are.

MR. MANOS: Objection, Your Honor.

THE COURT: Basis?

MR. MANOS: Lack of foundation.

THE COURT: Approach, please.

(Following proceedings were held at the bench.)

MR. MANOS: When you asked him the question in his deposition he just talked about the paint on his own house. I don't know what foundation there is.

THE COURT: You can impeach him with that. I think he can say how long paint will last based on having owned a house, how often you have to get it painted. I think you can impeach him on that. Goes to weight.

(End of sidebar conference.)

THE COURT: Overruled. Weight, not admissibility.

BY MR. HAYES:

Q. Mr. Glick, in Charleston, South Carolina, or Mt. Pleasant where these homes are, how long would you expect paint to last?

A. I think if it is prepared properly, the most important thing in any paint job is preparation. If it is prepared properly, and paint has been installed properly, it will vary depending on the paint. But typically, in this area as you

described in Mt. Pleasant, a paint job from a protection standpoint can last up to 15 years very easily. Now, from an aesthetics standpoint it may fade a little bit. But from a protection standpoint minimum 15 years. My own house I live here in Charleston, I have treated rails, I have absolutely no rot. I have HardiePlank siding, the same siding on my house that we are talking about here. Each one of those items have been on my house 12 years. I don't need to paint either one of them. They look fine.

Q. And in regards to the photograph you showed yesterday of the rotting wood and the bubbling paint, that does not have anything to do with maintenance of the paint or does it?

A. No, it's impossible to maintain what I call a sick building. You have got the inconsistencies and construction deficiencies in back of the siding which homeowners can't see. The only thing you can see is the caulk joint and because of the way it's built you can't maintain it because there is no joint there. And as far as the wood rotting you can't fix that because it is already set. It's like a snowball rolling down a hill. Just gets worse as time goes on. Gets

bigger and bigger.

Q. And you testified earlier that a general contractor of record is responsible for following the building code?

A. Absolutely, as well as the designer. Remember, Wieland Homes was the designer. They did the plans for these buildings. They built the buildings. They hired subcontractors. They managed the subcontractors. They bought the nails. They bought the materials.

Q. If a general contractor hires somebody else to supervise or they hire subcontractors does that somehow get rid of their duty under the building code?

A. Absolutely not. They are still responsible because they took out the building permit.

MR. HAYES: Your Honor, we have a point of law that we would like to take up with the Court if you don't mind.

THE COURT: Mr. Foreman, ladies and gentlemen, we have a matter of law we need to take up. During the break please do not discuss the case. Please leave your note pads in your seats. We appreciate your patience.

(Thereupon, the jury exited the courtroom at 10:15 a.m.)

THE COURT: You may proceed.

MR. HAYES: Your Honor, the next --

THE COURT: You need to ask him a question.

MR. HAYES: Okay. I apologize.

BY MR. HAYES:

Q. Mr. Glick, did you have occasion to do any -- regarding your work on this matter, Wieland townhomes, did you happen to do any research in regards to --

THE COURT: You need to start with establishing the foundation that he has the expertise, skills, training and experience as a developer so I can make an initial determination as to whether you can establish the foundation to bring him within Rule 702. He doesn't fall within 710 because it requires particularized knowledge to be a developer. So I need to know if you can establish that first before we get to any other things.

MR. HAYES: Your Honor --

THE COURT: Whether the defense is going to have any objections once you ask those

questions.

MR. HAYES: Your Honor, give me one moment, please.

THE COURT: Take your time.

MR. HAYES: Your Honor, under Mazel v. Glover for a court --

THE COURT: I didn't ask for any case law. I asked you to lay the foundation of this witness to be qualified as an expert as a developer. That is what the scope of the objection is. I am well familiar with the case law. If I need arguments I'll allow you to do that, but at this point I need to create a proffer regarding your client -- witness's qualifications to be qualified as an expert in the area of development.

MR. HAYES: Okay.

BY MR. HAYES:

Q. Mr. Glick, have you ever worked with developers before in the past?

A. Yes, I worked directly for developers, the Kiawah Island Company for seven years and the Sea Pines Company for one year.

Q. And do you -- when you say worked with, did you assist them in developing communities?

A. Yes, sir. I was the director of design

and construction with Kiawah Island Company the last three of seven years. The first four I was a design manager. I put the projects together. I held the focus groups. I created the designs. I performed the -- I completed pro formas, in other words, financial analysis. I presented that to the vice president of development and marketing. Those projects were approved and they are built to the betterment of the community and to the profitability of the developer. I did that continuously for seven years.

On my own after March of 1981 I started my architectural practice. Developers would hire me because of my knowledge as an architect. That was my marketing niche. As I said earlier, I worked for probably 50 developers over next the 15, 20 years because of my knowledge that I can assist them understanding the process.

The development business has not changed as I previously said in 30 years or 40 years or ever. The entitlement process has changed. People pay me to take them through the entitlement process whether it is this city or other cities because of my knowledge. The basic rule is very simple in development whether you

build a building, develop a piece of land, buy a building and renovate it, you want to make a profit.

You have to have the personality to take the risk financially. You evaluate that risk if the risk is there. You proceed whether you buy a house, redo it and sell it. I have done that four times now at Folly Beach and other areas. Whether you do two commercial projects, which I did downtown, sold it for a profit and I currently still own 489 and 493 which is probably a total of about 15,000 square feet, probably has a value of $5 million. I developed those projects. It was from nothing. So just because I pursue my architectural practice and my knowledge of forensics, that doesn't mean that I don't know the development business.

I am considering a project to develop an office building on the corner of Playground over on 61 right now. Talked to the real estate people, talked to a tenant. So it's ongoing, but I don't do it full time, but the principles haven't changed.

Q. Let's talk about multiple family or PUDs or HOA situation. Does a developer have a

different duty or a duty to hand over -- do they have a different duty in handing over a development to a PUD or multiple family situations than they do --

THE COURT: Are you about to get into his opinions about what the duty is?

MR. HAYES: Your Honor, I was asking him in regards to showing that he has education and experience.

THE COURT: I need you to stick to that because I need to give Mr. Manos the opportunity to cross-examine him and determine whether he still has an objection to his expertise before we get to any opinions.

BY MR. HAYES:

Q. Mr. Glick, have you had a lengthy career in what I will refer to as the development business?

A. Yes, I have.

Q. As you stated before?

A. Yes. As I said yesterday to these questions, I just said now 489 King has three units in it. Residential and retail below. A number of years ago I looked into making those condominiums and turning those over. So the need to look at

what is expected of me as a developer from a legal standpoint became on my radar screen. I recognized what my duties were if I pursued that because needless to say, I'm aware of a lot of litigation, condominiums, conversions through my experience.

Q. We have already gone over your extensive educational background. Is there any kind of specialized educational background that you are required to have to be a developer in South Carolina?

A. No, you don't need a degree. You just need a checkbook and enough guts to roll to dice quite frankly. There's no education. There's no license required, nothing of that nature. You don't have any continuing education that you have to do. None of that is required.

Q. Do you have technical and specialized knowledge in the area of development or developers that you believe would assist the trier of fact to understand the duties of a developer?

A. Yes.

MR. HAYES: Thank you, Your Honor.

THE COURT: Any questions for the witness regarding his expertise in the area of development?

MR. MANOS: Your Honor, by agreement Mr. Haselden was going to handle that.

THE COURT: Mr. Haselden, you may proceed.

MR. HASELDEN: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. HASELDEN:

Q. Mr. Glick, will you please name for me every single project that you were the lead developer on that involved a development of townhomes and a PUD? Every single one of them.

A. Townhomes? I developed the apartments on King Street. I didn't mention that yesterday.

Q. I will repeat my question. Can you name every single project you were involved in as a lead developer with respect to development of a townhome community with a PUD?

A. No. I could not do that, no, sir.

Q. Can you tell me every case you have testified in as an expert that involved the developer's role in the development of a townhome community that involved a PUD? Every case you've been qualified an as expert on in that area?

A. This would be a guess on my part, but in court relative to a PUD, maybe two or three as

opposed to knowing it was actually a PUD versus just a development project. Not all projects are part of PUDs.

Q. What cases were these and how long ago were they?

A. I have been in court 12 times and wow, would have to really look at my resume and go back and see. Some of them were commercial buildings from a condominium standpoint which I guess you could classify those as PUDs, that would be in court, Twelve Oaks was condominiums. Are you including deposition testimony as well?

Q. No, sir. I am asking how many times have you been qualified in a court of law to testify as to the developer's duty with respect to the development of a townhome project that involves PUD? Did Twelve Oaks involve that?

A. No. I have only been qualified once as a developer for the project I described yesterday.

Q. Tell me about that project again, please?

A. It's a multiple family condominium project that is right next to the Crab House on James Island. I forget the name of it. It's over near the water. It's a multiple story building. I

don't think they are townhouses per say, but they are flats. And it was -- I remember the lawyers involved. I worked with Mr. Buckley and Mr. Dupore. I think it was the early 80's.

Q. You'll agree with me that is not a townhome community that involves a PUD?

A. No. A townhome is just a definition of how the unit is structured. They are all residential units.

Q. And you offered testimony in that case as to what a developer should or shouldn't have done with respect to the development of that condominium building and the homeowners association? Is that what you offered testimony on?

A. Yes, sir, I did.

MR. HASELDEN: Your Honor, we take the position --

THE COURT: He needs to be able to have redirect, then I will hear argument. Any redirect?

REDIRECT EXAMINATION

BY MR. HAYES:

Q. So, Mr. Glick, you been qualified as an expert in development in a South Carolina court of law, correct?

A. Yes, sir.

Q. And since that time have you continued your education and/or experience in development since then? Have you continually been retained in cases, whether they went to trial or not, to give your opinion in regards to a developer's duties?

A. Yes, I have.

Q. Again, you feel you have technical specialized knowledge that would assist the jury in understanding what the developer's duties are in the State of South Carolina based upon your experience, correct?

A. Yes, sir.

MR. HAYES: Thank you, Your Honor.

THE COURT: Are there any exceptions to Mr. Glick being qualified as an expert in the area of development?

MR. HASELDEN: Absolutely, Your Honor. His testimony is clear that he has testified one time in a case 30 years ago. He was qualified as a expert on a project that is so dissimilar from this I don't think I have to bore Your Honor with my argument why it is so dissimilar. He has no background in the development of a townhome community. No experience with setting up HOA's and

he testified he had no knowledge as to --

THE COURT: What he is going to testify about setting up an HOA? What's going to be scope of the opinions you are seeking to elicit from him, Mr. Hayes?

MR. HASELDEN: Your Honor, they sent us an e-mail last night outlining that.

THE COURT: I will let him answer the question. Thank you.

MR. HAYES: Your Honor, he will testify in the State of South Carolina, it is his opinion that when a developer hands over a community with common areas that they have to hand them over in one of two ways. Either without building code violations and construction defects or with enough money to fix those building code violations and defects and Waverly has done neither -- not Waverly -- Wieland Corporation.

THE COURT: Isn't Professor Freeman going to testify to that?

MR. HAYES: Your Honor, he may testify to that, but --

THE COURT: Why wouldn't he testify to that if he is an expert in that area?

MR. HAYES: Well, I believe it blends

into what the testimony will be. It's also going to be to explain how a corporation works. We have got the Wieland Corporation, both the general contractor and the developer which increases we believe their duties.

THE COURT: There's an industry standard and somebody should be able to articulate that.

MR. HAYES: Yes, Your Honor. We agree. And also they have objected to Mr. Freeman's testimony -- unless they have changed, they have objected to Mr. Freeman's testimony as an expert in that area. And --

THE COURT: I have to cross that bridge when I come to it. I'm dealing with this right now.

MR. HAYES: Right, Your Honor. And if Mr. Glick is qualified as a developer and then we put up Mr. Freeman and they have an objection to it and we certainly could address it then. If --

THE COURT: My question becomes, Mr. Haselden, he said he worked as a developer on Kiawah Island. Those are certainly multiple units where he worked and was subordinate to the head developer, did all work as a developer. How could

it not be within the scope of his knowledge how that's supposed to be done? Aren't those multiple units?

MR. HASELDEN: He testified that he did development. He didn't testify --

THE COURT: He said he was the design manager. He organized the focus groups. He did the financial analysis. He knew what the entitlement process was and he submitted that to the head developer for approval.

MR. HASELDEN: None of which has to do with setting up HOA's, making sure the HOA is properly funded and making sure that the developer leaves the HOA as they have said they want him to testify to in good state when they hand over the board. None of that has anything to do with this.

THE COURT: Is that the standard?

MR. HASELDEN: That's the standard. As I said, they sent us an e-mail last night saying what he was going to testify to and used the word fiduciary duty. That is clearly outside of his province to get into that to begin with.

THE COURT: You are making argument right now. I have to cross that bridge, too. I need to deal with one issue at a time which is

whether he is qualified, then I can deal with the scope of the opinions.

MR. HASELDEN: Your Honor, it would be our position unless he has specifically been a developer, been involved in the development of a homeowners association and been involved in the process of turning it over and setting it up properly.

THE COURT: I don't think you have to do that. That's like saying that -- experts get educated a myriad of ways. They go to school, through their experience, through their training or otherwise. I don't think it's a prerequisite that you have actually done it to opine about it.

I think you have to establish that you have the requisite knowledge to opine as what the duty is and whether that duty has been breached. I don't think you have to have necessarily done it. There's lots of doctors that testify about things they have only done one time or never done, but they have gotten training to talk about what the standard is and whether it be breached or not based on their review of the record on a patient they have never seen. So I don't know that that's necessarily a valid sort of argument regarding his

ability to testify as to what an industry standard is.

MR. HASELDEN: Your Honor, I would agree with you on that. But what I would also point out is that Mr. Hayes is attempting to qualify Mr. Glick. The word homeowners association, setting it up, never came out of his mouth. That's not one of the things he had done in his past. That is exactly what they want him to offer opinions on.

THE COURT: But he has worked with many other developers and people who have done that and offered to give them advice about that. So I don't know that he absolutely had to have done it and I guess there is a deficit in your questioning, Mr. Hayes, regarding that if that is, in fact, the opinion you plan to elicit from him. I need to know if he any expertise in that area or whether he has ever done it.

MR. HAYES: Your Honor, in regards to what he will testify to, that's the duty of the developer, I can certainly ask Mr. Glick. Mr. Glick, have you ever -- may I?

THE COURT: Yes.

BY MR. HAYES:

Q. Mr. Glick, have you ever assisted or had any involvement in a development in which a homeowners association was involved?

A. Absolutely. The projects I designed with Kiawah and also the ones I didn't design, but I was responsible for, we had had legal counsel. We have the master deed documents drawn up. I would review the master deed documents. I'd even do the exhibits, the architectural exhibits to the master deeds. So regardless of the fact that I personally didn't do it, it was part of the development process. There were experts, meaning attorneys, available to us on a team, and they were part of the team and I reviewed all of that work to get the product to market.

Q. Do you believe because of that you have specialized knowledge and technical knowledge in regards to the forming of a HOA?

A. Absolutely. Each one of the projects I did had their own HOA and then Kiawah had already set up a master HOA called which is called KICA, Kiawah Island Community Association.

THE COURT: Any questions as a result of Mr. Hayes's questions?

CROSS-EXAMINATION

BY MR. HASELDEN:

Q. You did all this as an architect, correct?

A. Yes.

Q. You weren't doing it as a developer? You were doing all that work as a designer?

A. The way Kiawah worked was that --

Q. My question was --

A. We -- were individual developers of the parcels so I would come up with what the parcel highest and best use was. I would then work with marketing to test that theory. From that theory we hold focus groups. If focus groups were successful I would actually design the product. I would estimate the product. I would work with contractors and people on my staff. I had 13 people on my staff at that time, contractors and other architects. We used lawyers on the outside of the company to put together everything a developer would do.

So basically Kiawah Island Company was a wholly owned subsidiary of Kuwait Investment Company. They let us do what we needed to do to develop a project and prove that it was profitable to develop it.

Q. Now, I will ask my question again. You did all this work as a designer, did you not?

A. I did that work. I was an architect at the time and a designer, yes.

Q. Tell me about all the experience you have in actually setting up reserve funds for homeowners association, every single one of them.

A. Well, in each one of them there was no need to reserve funds because the projects were handed over in good condition.

Q. I will ask my question again. We seem to be having a communication issue. Name every single project you were involved in setting up a reserve fund for a homeowners association?

A. Again, those kind of issues would be taken care of by legal counsel outside as part of my team. I personally did not do that.

Q. So your answer is none, right?

MR. HASELDEN: Your Honor, I don't have any further questions. We still take the position he is not qualified.

THE COURT: Mr. Hayes, you may respond.

MR. HAYES: Your Honor, I believe that's all from us as far as that goes unless you want to hear argument on the law.

THE COURT: You need to respond to his objection.

MR. HAYES: Yes, Your Honor. The standard is, I know this Court knows, that he has any technical or special education or background in development. We believe he has shown that very extensive background in that. And as you know, the Court, and I apologize, I am having a hard time saying this one, Tezniare v. Professional Plastering Stucco, which was a case in 2014 regarding experts in a construction case in front of Judge Harrington, said that any defects to the extent there are any in the amount of education, experience, if any, go to the weight of the deposed expert's testimony and not his admissibility.

Mr. Glick has technical specialized knowledge that will assist the trier of facts to understand the duties of a developer and what transpired in this particular case. Otherwise, as Mr. Glick testified, there is no magic license that you need as a developer.

And I would also state and since the development is a team of people, not just a single person. And Mr. Glick has been a member of many of those teams. He has extensive knowledge. I

believe he complies with South Carolina case law as regard to what's required to be admitted as an expert. He has a degree in architecture. He has worked since 1981 as a forensic expert. He has since the 1980's been involved in the development. He has been qualified as -- in another court in regards to being a qualified expert in the area of development.

I believe going back to the Professional Plastering Stucco case, simply says there are a variety of ways a person may gain specialized knowledge. Our Supreme Court has recognized that a trial court's decision to refuse to qualify a person as an expert based solely on the failure to meet the licensing requirement arguably impairs the truth seeking functions of the court.

Now, as we have shown, there is no licensing requirement of a developer. I believe you will be hard pressed to find someone that has more experience and much less in Charleston, South Carolina, in regards to developments and working with or as a developer. If he couldn't be qualified as a developer I don't know who could.

THE COURT: Based on his education,

training and experience I'm qualifying him as an expert in the area of development. I think he has more than met the standard and threshold established by Rule 702. Any objections raised by the defense go to weight, not admissibility and they certainly will have the ability to cross-examine him regarding his individualized experience in certain areas which they have raised in argument. Are we ready to proceed from the Plaintiff?

MR. HAYES: Your Honor, the only thing that I would say is one of the next things that we will be going into in Mr. Glick's presentation is, if you can pull it up on the screen, please, is some representation from John Wieland Homes that he found during research regarding their quality and what the homeowners were going to get and the fact they did not get that. In addition to that, Your Honor --

THE COURT: Representations from where?

MR. HAYES: From John Wieland advertisements.

THE COURT: When were these advertisements placed and where were they?

MR. HAYES: That was placed on a

website back in 2007.

THE COURT: Do you have any objection?

MR. HASELDEN: Absolutely.

THE COURT: What's the basis of the objection?

MR. HASELDEN: Your Honor, there is no testimony in the record anybody relied on these representations. All Mr. Glick --

THE COURT: I think you got a problem with that. I think one of your homeowners has got to testify they read and they relied on it in buying a house. I think to sort of throw that out there and say these representations were made and that these individuals were relying on it, that because he found defects ergo somehow this was false, I think it's problematic. I would imagine your representative is going to testify maybe he relied on it. I don't know. But you need to have one of the homeowners, have him rely on it. There are lots of folks I do business with I have never seen their websites, don't care to. I can't say that they made some representation they were glorious at what they did and I relied on it. I think everybody in this courtroom can say that. I think to try to make that leap these people relied

on that is problematic.

MR. HAYES: Yes, Your Honor.

THE COURT: These buyers, however.

MR. HAYES: The next issue real quick is the exterminator letter that Mr. Glick has reviewed and looked at and, Your Honor, not testify --

THE COURT: He can say he relied on it and formulated an opinion, but he is not going to be able to publish that letter. It is hearsay and they are entitled to cross-examine a witness. An opinion witness, an expert witness can rely on hearsay. That doesn't give you carte blanch to publish that hearsay.

MR. HAYES: Okay.

THE COURT: They can say I relied on this. I relied on all these documents and this is how I used it in formulating my opinion, but he is not going to read the letter.

MR. HAYES: He --

THE COURT: You are going to have to call the witness.

MR. HAYES: What I was planning on doing, we are not going to show that, ask him if he read any letters from --

THE COURT: You can ask him what he relied on in formulating his opinion. Stay away from the leading.

MR. HAYES: Okay.

MR. MANOS: Your Honor, my only comment and question is Mr. Glick's opinions were final before he saw this letter. He just saw that letter recently.

THE COURT: You lost me.

MR. MANOS: This Palmetto Exterminators letter that Mr. Glick allegedly relied upon, he didn't see it until two weeks ago. His opinions --

THE COURT: Expert opinions change all the time. They sit in the courtroom and their opinions change. That's why people have their experts sit in on testimony. People testify one way in a deposition, sometimes they change it when they actually testify. Things happen in the interim that change opinions. He's not stuck with an opinion. He can change his opinion.

MR. MANOS: Can I make one more comment?

THE COURT: Sure.

MR. MANOS: I understand that he can change his opinion, but he is not changing his

opinion. He is just saying that after I said the buildings needed to be reclad two years ago and I still think that, that I received this letter where someone is talking about moisture and this confirms my opinions. And that --

THE COURT: He can say what he relied on in formulating his opinion; he cannot say what was in that letter.

MR. MANOS: Okay. Thank you, Your Honor.

THE COURT: It is hearsay. They have the right to cross-examine that witness, especially when you are talking about moisture levels. Your termite guy is more than qualified to testify about that. He has already testified about moisture levels. Really in some ways it's bolstering.

MR. HAYES: Well --

THE COURT: Get it out of the witness who is qualified to really testify to it firsthand, who did the measurements. If he wants to say that the foundation of my opinion in making my opinion, formulating my opinion I reviewed the following documents and this is my opinion, he can do that. But he doesn't get to -- there's case on point that says yeah, an expert can rely on hearsay, but they

don't get to publish that hearsay because they have the right to cross-examine the witness and the information that that person is providing. You are calling Mr. Schneider as a witness, aren't you?

MR. HAYES: We plan to.

THE COURT: Isn't that the termite guy?

MR. HAYES: Or put his deposition in as --

THE COURT: He is the one that did -- Mr. Glick has already testified as to moisture levels, the range of them and what problems moisture levels cause.

MR. HAYES: I was going to ask him if he relied on any other third parties other than Mr. Mease in regards to his opinion there are high moisture levels out at --

THE COURT: That's a leading question. You need to ask him what he relied on in formulating his opinion. He can say what he relied on, but I'm not going to let him publish that he relied on Mr. Schneider's moisture level readings to formulate an opinion because he formulated his opinion before that.

MR. HAYES: So don't bring it up.

THE COURT: It's bolstering. Stay away

from it.

MR. HAYES: I believe the last two things, and I think this will save us some time in bringing the jury in and out, is we have some demonstrative -- we have some rusted nails and rotted wood.

THE COURT: From the actual site?

MR. HAYES: Yes, from Mr. Glick.

THE COURT: When he was doing the destructive testing.

MR. HAYES: Yes, Your Honor.

THE COURT: I would imagine you have no objection.

MR. MANOS: If he can authenticate when he pulled it off and ask the right question that's fine.

THE COURT: Okay. Is there anything else we need to take up?

MR. HAYES: Yes, Your Honor. I was going to ask Mr. Glick based own his knowledge and experience does he have any other projects that have shown, not a Wieland project, it's just in order for him to explain what latent defects are.

THE COURT: He can explain what latent defects are without making reference to another

project. I guess I am trying to figure out how that's relevant to anything. What other project would he be referring to?

MR. HAYES: What was the name of that project?

THE WITNESS: Atrium Villas on Seabrook Island.

MR. HAYES: Just to show other conditions that occur in regards to his experience.

THE COURT: I think he can testify about that without saying where it is or whose it is or I guess I think it's a little confusing. When you start introducing things about other projects that are unrelated to this it has a tendency to I would think confuse the jury. He can opine about other things without making reference to another project.

MR. HAYES: Last but not least, Your Honor, is the video he took on January 14th.

THE COURT: They have already said they did not have a problem with the video as long as he can authenticate it as to place and time.

MR. MANOS: Yes, Your Honor.

THE COURT: That take care of everything?

MR. MANOS: Quickly, Your Honor, by agreement if counsel can make that agreement, Mr. Haselden would be able to cross-examine Mr. Glick on the development issue, or would that be a violation?

THE COURT: Either Mr. Haselden is going to cross him on everything or you are going to cross him on everything. You make a choice.

MR. MANOS: Yes, ma'am. Unless they agree. Do you have an objection?

MR. MCCARTY: We had agreed before. That's why I --

THE COURT: No. If you all agreed, I don't have a dog in the fight.

MR. MANOS: We agreed for purposes of the other hearing.

THE COURT: You all agree in general?

MR. MCCARTY: Give us just a second. Your Honor, we are fine.

THE COURT: If you all are fine I'm fine.

(Off-the-record conference.)

(Brief pause.)

THE COURT: If you are going to mark them, then you will get with the court reporter at

a break, that works.

MR. HAYES: One question I have as far as the ones that we have agreed to --

THE COURT: I have already admitted them into evidence.

MR. HAYES: We don't need to worry about that.

THE COURT: That's why I do it that way. Makes life easier. Eliminates a lot of questions.

MR. HAYES: Thank you.

THE COURT: Please bring in the jury.

(Thereupon, the jury entered the courtroom at 11:00 a.m.)

THE COURT: Thank you. You may be seated. Ladies and gentlemen, we appreciate your patience. We worked through a great deal of matters of law so we are hoping that that will eliminate us having to stop and start so please know we don't take your time for granted. I appreciate your patience as we work through those issues.

Mr. Hayes, you may proceed with questioning the witness.

BY MR. HAYES:

Q. Mr. Glick, have you ever worked as or with a developer?

A. Yes, I have.

Q. Do you have any experience in the development of an HOA or PUD?

A. Yes, I do work with developers directly as an agent for them as well as working for them as an architect since 1973.

Q. Would you name some of the projects that you have worked on as a developer?

A. The one that I have done myself?

Q. Yes, sir.

A. 247 Meeting Street which is an 8,000 square foot building. I sold CD Krantz Drapery Company. I converted it to a class A office space, 8,000 square feet. Ultimately sold it. It's on the corner of Wentworth and Meeting downtown. I then developed 489 and 493 King Street. 493 King Street is a 16,000 square foot building. 489 King Street is a brand new to look old historic image in terms of the architecture, has three residential units and a retail unit below with 20 parking places in the back. And the 493 King Street address is both office and retail first floor and

at the time I developed it it was a parish hall on the second floor.

Q. Have you ever been qualified in a court of law as an expert in development?

A. Yes, I have.

MR. HAYES: Your Honor, I would like to admit Mr. Glick as an expert in the field of development.

THE COURT: Admitted subject to previous matters of law. You may proceed.

BY MR. HAYES:

Q. In regards to Waverly, the townhomes we are here about, did you have occasion to form any opinions in regard to that?

A. Yes, I have.

Q. What, if any, duties does a developer have or did Wieland Corporation have in regards to Waverly townhomes?

A. In South Carolina a developer has a duty who develops a PUD, planned unit development, when they turn over the common elements, in this case would be the outside of the buildings, the grounds, things of that nature, drainage issue, roofs, to a POA, which is a property owners association, include repair. In other words, they

have a responsibility to either turn it over in good repair and not substandard so it needs to be in accordance with the code, in accordance with all good practices. If it is not they have an obligation to fund that association with enough money in reserves to pay for the correction of those items.

Q. Do you have an opinion as to whether Wieland Corporation breached that duty to Waverly townhomes?

A. Yes, I do.

Q. And as a result of that do you believe that they have been damaged?

A. Yes. I believe that Wieland has breached the duty in South Carolina as a developer and the owners have suffered damages and are continuing to suffer the damages.

Q. Would you explain to us briefly what -- how a property owners association common elements work, kind of how that works and the responsibilities as far as how that gets paid to be fixed or who is in charge of what, responsible for what?

A. Well, there's a homeowners association in this case and there are common elements and the

master deed sets out the common elements. And in this case common elements are the skin of the building, the roof, the parking areas, the road, things of that nature as opposed to the inside of the house. The insides are painted. Belong to the individuals. In this case also the windows belong to the individual, but they are part of the problem so you have a little crossover there.

The code violations that have been pointed out that have to be fixed because now they're aware of these code violations, so under the South Carolina disclosure laws that all has to be put out in the public when they are sold, have to be corrected. The owners have to pay for these corrections.

MR. HASELDEN: Your Honor --

THE COURT: Basis?

MR. HASELDEN: Relevance.

THE COURT: I'm going to give him a little latitude subject to connection. You need to connect it quickly. Overruled.

BY MR. HAYES:

Q. Will you explain to the Court why that is important to hand over the common elements in good condition.

A. Well, so that the owners don't have an expense that they would not expect.

Q. And you feel that the Wieland Corporation breached their duty to the homeowners in regards to their duties as a developer?

A. Based on what I found and I showed in the pictures, absolutely.

Q. That was the proximate cause of the damage?

A. Yes.

Q. And the same question as far as their duties as general contractor, did they breach those?

A. Yes, sir.

Q. That was the proximate cause of the damages?

A. Yes, sir.

Q. Mr. Glick, did you have any occasion while you were out at Waverly to preserve or take with you any physical evidence of the problems you saw out there?

A. Yes, sir. I took a handrail and I also collected some of the nails that were inappropriate to show the Court.

Q. Okay. Would you be so kind as to

identify this for the Court?

A. Yes. This is a top part, you put your hand on one of the units and the reason I saved this and didn't take 20 of them is because of the voluminous nature of the problem. So I asked for one railing to represent what's happening out there.

As you can see, the underside is rotted of the handrail where at the top it does look fine other than some splits. That's because the chemicals were trapped in the area of the inside and you can see the massive rust. The pickets would attach every so often, about six inches. You can see how rusted these nails are because they are the wrong nails.

So the chemical reaction with the nails that are inappropriate caused total destruction and that's what this represents. So this is the typical condition what's out there and will continue to occur on all the units.

The other sample that I brought is of the nails that I took out of 1469 that I described on the pictures yesterday which are not galvanized and they are rusting as well. This is what was supposedly holding the trim. Remember that trim is

holding hurricane shutters. So there's not much holding power here.

That's my blue tape on the back and on the nails as well as my handwriting. So those are mine.

Q. Okay. And so you collected those through your review and destructive testing out at Waverly, correct?

A. Yes, sir.

MR. HAYES: We would like to move this in as an exhibit.

THE COURT: Any objection?

MR. MANOS: No objection.

THE COURT: Marked and admitted without objection.

(PLF. EXH. 44 was marked for identification.)

(PLF. EXH. 44 in evidence.)

MR. HAYES: One moment, Your Honor.

(Brief pause.)

BY MR. HAYES:

Q. Mr. Glick, I'm going to hand you what's been marked as Plaintiff's Exhibit 4. Do you know what that is?

A. This is a copy of the 2003

International Building Code, International Building Code.

Q. And is that one of the documents you relied on in regards to your investigation? You have a copy?

A. I look at the International Building Code, but I specifically look at the International Residential Code which is the IRC which I have a copy of with me.

Q. I'm going to hand you what's been marked as Plaintiff's Exhibit 2. Do you recognize that?

A. Yes. That is my CV, the history of forensic cases that I have been involved with, yes, sir.

Q. And did you author that?

A. Yes, sir, I typed this up.

Q. And is that current?

A. It does not include the 2016 projects, but it is fairly current. Includes the 26 multi-family projects that are similar to Waverly on this.

MR. HAYES: Your Honor, I would like to move into evidence Exhibit 2.

MR. MANOS: Objection, Your Honor.

THE COURT: I will take it under advisement. Marked for ID only.

MR. HAYES: That's No. 2, ID only.

THE COURT: ID only.

BY MR. HAYES:

Q. Mr. Glick, hand you what's been marked as Plaintiff's Exhibit 3. Would you be so kind as to identify that for us?

A. This is the report of my findings after my days two of destructive testing and the one day of non-destructive testing. So it would be the first three visits of seven visits to the site.

Q. You authored the document?

A. Yes, sir, I typed it.

Q. That contains some of the opinions you have in regards to the Waverly townhomes?

A. Yes, sir.

MR. HAYES: Your Honor, we would like to move Plaintiff's Exhibit 3 into evidence.

MR. MANOS: Same objection, Your Honor.

THE COURT: Under advisement. Marked for ID only.

BY MR. HAYES:

Q. Myles, in regards to the developer, those opinions you just gave us, were those to a

reasonable degree of certainty in your field of expertise?

A. Yes, sir.

Q. Mr. Glick, did you have a chance to go out to the Waverly townhomes recently I believe?

A. Yes, I actually went out on September 9th, January 6th and also January 14th.

Q. In regards to the January 14th visit what did you do?

A. Well, after my January 6th visit and knowing the trial was coming up, I walked around the project in addition to making a specific site visit to unit 1469 to look at the staining on the inside that I showed earlier. And I was concerned that it had been two years since I really had been there. And I wanted to take some videos of what the conditions were and were continuing to indicate.

Q. Do you have that video with you today?

A. Yes, I do.

Q. Would you please show us the video.

THE COURT: Any objection?

MR. MANOS: No objection, Your Honor.

THE COURT: What number is that?

MR. HAYES: That is 5, I believe, Your

Honor.

THE COURT: No. 5 will be marked and admitted without objection and published without objection.

(PLF. EXH. 5 in evidence.)

THE WITNESS: This visit started out in the middle of the street and as you can see the building looks like any building would look at that distance. But as you get closer, things are different. You begin to see in this case the rot at the bottom of the post, on the stair, on the left side on the bottom. Then the video goes to the rail itself and you see all the air bubbles underneath where again moisture is trapped, just coming out, deteriorating the inside just like the sample I showed. Ultimately I said to the videographer I want you to look at the underside of the canopy as well because I noticed that again rot is coming from the inside.

So as we look at this, I took out a pen from my pocket and this is a structural beam holding up a roof. I am sticking my pen. This is a Bic pen, not a knife, seven inches into a beam that should be structurally sound into the rails as well at other units. That's the rail from the top.

There's no strength there.

This is another unit from the underside and that's a structural beam as well. This is the condition that this unit now is in as well. The pickets are just beginning to rot so it is a sequence of things happening because everything is wrong.

BY MR. HAYES:

Q. Is this the pen that you used?

A. That is the Bic pen.

Q. You were able to push that through a structural support?

A. Yes, sir.

Q. Mr. Glick, I'm going to hand you a packet of photographs that's been marked as Exhibit 6. They are being numbered A through whatever number it goes to. Would you take a minute to look at that.

A. (Witness complies with request.)
Yes, sir. I have looked at it.

Q. Are those photographs that you took?

A. Yes, sir.

MR. HAYES: Your Honor, we would like to move Exhibit 6 into evidence.

MR. MANOS: Without objection, Your

Honor.

THE COURT: Marked and admitted without objection.

(PLF. EXH. 6 in evidence.)

BY MR. HAYES:

Q. Mr. Glick, did you notice any drainage problems out there?

A. I am sorry?

Q. Did you notice any drainage problems out at the --

A. Yes. On numerous visits I noticed that drainage, in other words, water was puddling around the grating in the parking lots.

MR. HAYES: Mr. Glick, I appreciate your time. If you would be so kind to answer any questions opposing counsel may have.

THE WITNESS: Yes, sir.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. MANOS:

Q. Good morning, Mr. Glick. How are you, sir?

A. Good morning. I'm good. How are you?

Q. I'm doing okay. Mr. Glick, what is the purpose of a soffit vent?

A. Excuse me, a what?

Q. Purpose of a soffit vent, little plastic vent that we see in soffits?

A. Roofs usually contain air space, basically an attic, and need to be vented.

Q. And were you sticking your pen in that last photo that Mr. Hayes asked you right next to that soffit vent? They typically don't put soffit vents on a structural beam. You were actually sticking your pen into a vented area, correct?

A. You have to point out exactly what you are pointing to because there were beams in there.

Q. You weren't sticking your pen into the beam, Mr. Glick. There was a soffit vent sitting right there and you were sticking it into an air space? You were not sticking it into a structural beam; isn't that correct, sir?

A. Well, it was coming through the edge of the plywood.

Q. But you said it was structural beam.

A. Well, that's a structural beam, yes, sir.

Q. Okay. So you're an architect, right?

A. Yes, sir.

Q. And it's important to be precise in

your business, right?

A. It helps.

Q. With engineers as well, right?

A. Yes, sir.

Q. So I'm going to try to be precise with my questions. I would appreciate you being precise with your answers to the extent that you can. Now, may I use this, Your Honor?

THE COURT: Um-hmm.

BY MR. MANOS:

Q. I know it's a little sideways, but for the purpose of my question it will work, Mr. Glick. Can you turn around for a second and take a look at the board?

A. I have it on my screen.

Q. Do you recognize that as a document that Mr. Hayes put in front of you showing the various different observations that you made at Waverly, correct?

A. Yes, sir.

Q. What I want to do is I want to go through this document so the jury can better understand what it is you actually did out there before you came to your opinions. Mr. Glick, you recognize the general site plan on that document,

correct, the various different 105 townhomes that we have been talking about?

A. Yes, sir.

Q. And you have already testified at some length that your destructive tests occurred on October 1st and 2nd of 2014, correct?

A. Yes, sir.

Q. You did those destructive tests which you call 15 holes at seven units, correct?

A. They were 15 holes. I have to look at my report to see how many units. They represented 15 different conditions.

Q. But not 15 different units. You did it at seven units, right?

A. Yes, it was at least that.

Q. Without looking at your report you can recall that the vast majority of your test cuts were done at three units, correct?

A. I would have to look at it, but you have said that previously, yes, sir.

Q. And we can look at -- you remember doing five of your test cuts, test cuts 4 through 8 at 1453 Clancy depicted on there?

A. Correct.

Q. You remember doing three test cuts at

1037 Zinser, correct?

A. Correct.

Q. And you remember doing three test cuts at 3003 Treadwell, correct?

A. Correct, originally.

Q. And then you did one other test cut at the other four units that we see depicted on there with the addresses, correct?

A. Correct. This is based on the original report.

Q. Yes, sir. All of the blocks on this exhibit that don't have a mark on them you did not do a destructive test at on October 1st, 2014?

A. Correct.

Q. You did issue a report dated January 19th and let me ask this first. You listed on this document the interior observations that you made on October 1st and 2nd. Do you recall there being about nine units in which you did those in?

A. Yes, they were all September 9th as well the interior views, three of them I think.

Q. I am talking about back on October 1st and 2nd of 2014?

A. Yes.

Q. You did nine interior observations,

correct?

A. I have ten listed in my report.

Q. If you look at 2968 Treadwell, the first one access was not available at the time so you actually didn't get to go in that one?

A. Correct, so nine.

Q. On each one of those nine you indicated no indication of water intrusion at that time, you didn't find any water intrusion from your interior site visits on October 1st and 2nd, correct?

A. Right. In an effort to be exacting like you asked, none seen from the inside which doesn't mean it is not in the wall. Just hasn't come out so I did not see any at that time.

Q. I understand. You didn't take any test cuts in the interior in the wall to see if it was in the wall, correct?

A. No, those are just interior walkthroughs.

Q. So, again, my question was for the nine units you looked at on October 1st and 2nd, you didn't see any indications of water intrusion at that point in the interiors?

A. That's correct.

Q. After October 1st and 2nd you then

issued a report based on your seven test cuts in those nine interior units that all 105 units needed to be totally declad, correct?

A. Correct.

Q. And totally declad, maybe we have a little semantics, let's try to be precise, totally declad means removing the shingles off the roof and the felt underneath the shingles, correct?

A. Correct.

Q. It means removing over 1,000 windows that are out there on the 105 units out of their holes and replacing them?

A. Correct.

Q. It means taking off every piece of siding and trim at those buildings, correct?

A. Correct.

Q. It means taking off every brick of the interior steps on all the 105 units, correct?

A. Unless there are some that by chance were not in violation of the code. The contractor would make the call during the repair, but yes.

Q. And what we know about the bricks since we are talking about the bricks is that you made measurements of three units that you say weren't in code required tolerances, correct?

A. I documented three.

Q. Three of the 105?

A. I walked up many others. I documented those three.

Q. And the others that you walked up you said they felt the same to you?

A. Absolutely.

Q. So the basis of your opinion that 105 brick steps need to be ripped out and replaced is three that you measured and others that you walked up and they felt the same to you?

A. Yes, sir.

Q. Were you aware that there were multiple masons on this project over the five years these buildings were built?

A. I was aware that there were different phases. I don't have any documentation that there is multiple masons.

Q. Different subcontractors building things differently, correct?

A. Yes.

Q. You can't begin to suggest that all 105 brick steps are in violation of the code when you are only looked at three?

A. I marked three. I went up others.

They felt the same. You can feel the difference between six and eight inches.

Q. You can feel the difference between six and eight inches?

A. Absolutely.

Q. Did you take notes and you put that in your report that you felt the difference between six and eight inches on all these other ones that you walked up?

A. I documented the three. That was enough for me. I checked others to make sure it was pervasive. And then I moved on to another area of problems.

Q. The three out of 105 in your feeling becomes pervasive for 105 units and hundreds of thousands of dollars for these homeowners to rip these steps out?

A. That's not what I said. I said I measured and documented three. I walked up others, probably as many as 10 to 15.

Q. And they all felt the same?

A. Felt the same, therefore to me they are all built the same.

Q. All right. All of these other photos and the video that we saw from September of 2016

and January of 2017 which contains a lot of your red dots that Mr. Hayes showed all came after you had already reached your opinion that the entire project needed to be torn apart, correct?

A. Correct.

Q. Let's talk for a second about the nailing of the siding and the attachment of the windows. You are not an engineer, correct?

A. No, sir.

Q. You have not performed any wind load analysis to evaluate the holding condition of the nails at these units, correct?

A. No, sir.

Q. And there are specific window load analyses that can be done pursuant to ASC7 that engineers do as part of their expertise, correct?

A. The manufacturer did it when they came out with their instructions to architects and the contractor had to do it.

Q. You have not done a wind load analysis to know what the existing holding of the nails and the siding at the project is for those 105 units, correct?

A. Well, no, I have not.

Q. Thank you. Likewise, you haven't

evaluated the attachment of the windows out there?

A. Not from a scientific calculation standpoint, just from what is pretty obvious.

Q. You showed us some fasteners that have some corrosion on them, but you haven't done any project-wide survey to evaluate the attachment of over a thousand windows on 22 buildings and 105 units?

A. No, but every time I took a piece of trim off there was an improper fastener. So I am either lucky as could be or smart as could be.

Q. We know you're smart as could be, that's been very clear. I don't know how lucky you were. You stated in your testimony that a window could just pop out. You didn't have any basis for that? You didn't do any evaluation of how the window was attached? There's no scientific basis to say that the window could just pop out?

A. Well, in many journals they talk about one window giving rise to buildings imploding in force winds like a hurricane cane. The fasteners are rusted. They have deteriorated. At some point they will lose their structural capability to hold the window in. And they will be sucked out in a storm event.

Q. Where were you during Hurricane Matthew?

A. I was in Ladson at my sister-in-law's house.

Q. You weren't at Waverly?

A. No, I was not.

Q. You didn't go to Waverly within days after Hurricane Matthew, did you?

A. No. The first time I was there was September 9th. Hurricane Matthew was October 8th.

Q. Then you didn't go back until January 6th?

A. Correct.

Q. You don't have any firsthand knowledge observations of what occurred at Waverly during Hurricane Matthew?

A. I have firsthand knowledge by looking up the records and talking to the representatives at the National Weather Service who sent me the links which I have got in front of me that shows the wind pressures, the gusts, the constant wind pressure and the rainfall for all 24 hours.

Q. Those wind pressures that you testified about were actually at the airport, correct?

A. They only do two places, at the Mt.

Pleasant airport and at the international airport. To look off the coast, that wasn't particularly appropriate. The airport is extremely close to this project.

Q. If there actually is an issue with nailing of the siding, we all understand that you think there is, but if there is an issue, James Hardie who is the manufacturer of this siding specifically allows for adding nails to address that condition, correct?

A. They do that in bulletin No. 17. They also say in that bulletin that they don't recommend it. The preferred recommendation is dry nailing and it brings caution to the user exactly what I said earlier which was you may hit a blind nail and split the siding in two. You have nails everywhere. Just look at your oak floors or anyone's oak floors. And those are all blind nails. So just imagine nails everywhere in this environment with paint flaking off the metal. Just not going to stand up. Not a good solution and it is not a solution that these owners bought. There is a repair mechanism, I agree.

Q. Sir, the same James Hardie that manufactured the material says that if nails need

to be added it can be added, they actually had a technical bulletin that tells contractors that?

A. That's correct, if that's the only problem.

Q. All right. Contractors -- there are contractors out there that are more than willing to take the work to add nails and warrant that work, correct?

A. I'm sure there are some out there, but do the owners deserve that?

Q. Okay. We have talked a whole lot about handrails and pickets in this case. And as I said in my opening, we see the rotted rail. I understand there's rot on some of the rails and some on the pickets. But all of the handrails and all of the pickets are not rotted out there, correct?

A. They're in different stages of rot. Some are not rotted yet, but it looks like as time is going to continue ticking based on having been out there now over a period of two and-a-half years approximately, that they are ultimately going to rot. They have the wrong nails. And they painted them too quick. So it is a foregone conclusion you have four bald tires and one blows out on your car,

you keep riding on the other three? Some people would. I wouldn't. I would get all new tires.

Q. I'm -- let me try to ask a better question if I can. You keep using the word all and we know from your earlier testimony, we know from the evidence that actually over 15 percent of the units at Waverly have PVC composite railing, correct?

A. Those are the three buildings. I talked about all the wood handrails and wood pickets need to be replaced. Not the PVC. They are fine. I agree with you.

Q. Let's not use the -- let's be precise and not use the word all handrails, all pickets because we know that composite rail systems aren't going to rot for the next 20,000 years because plastic is going to stay there?

A. I appreciate clarifications and let me make it for the jury's sake all wood pickets and all wood handrails.

Q. So let's move those 15 aside and talk about the other whatever the math is, 90, and of those other 90 you haven't begun to look at even 15 percent of those to know whether those are rotted?

A. I don't know what percent I have looked, but every time I have been back, including the video, there's more and more and more. They weren't like that when I was there two years. So this is going to happen.

Q. It is your opinion it is?

A. If you have a disease and you don't take care of it it gets worse.

Q. Okay. Just so the jury is again clear for your testimony, let's talk about the windows for a second. You have looked at one unit in two and-a-half years that has indicated evidence of water intrusion in the interior in the drywall, 1469 Clancy?

A. One unit. There's three different windows in that unit that are now showing water coming through to the inside, yes, sir.

Q. These 105 units over 22 different buildings over five years by numerous subcontractors and one unit out of 105 has some water on a drywall on the interior?

A. That's the one I was told about.

Q. I understand.

A. The problem with those kind of projects is you have renters that don't care and you have

people with curtains, furniture and they don't even see it in their own house until they reach a point of wow, how did this happen. So I can't sit here and tell you that there are others because I have not seen them. But my experience tells me there's others.

Q. I understand what your experience tells you, but your eyes when you looked at the nine units after the buildings had been built for six, seven, eight years, the nine units you looked at in 2410, your eyes told you that there weren't any staining. You didn't see any evidence of water staining in those nine units?

A. That's correct.

Q. All right. Nevertheless, all the windows need to be ripped out of the holes even if they are under seven-foot porches, right?

A. Well, you're associating the windows being replaced with the leaks on the inside only. It's the installation of the flashing around the windows and WRB which is cut. To do all that properly you have to remove the windows.

Q. Actually --

A. It's important for the jury to understand that --

Q. Can I get an answer to my question?

THE COURT: Sir, please answer the question yes or no and then you may explain your answer. Restate the question.

BY MR. MANOS:

Q. I believe my question simply was that 1469, unit 1469 was the only unit that you saw staining on the drywall in out of the whole 105 units?

A. Correct.

Q. Let's talk about the drainage issues. Mr. Hayes asked you a question if you had seen any issues with drainage. You said you saw some puddling around some inland drain I think you said; is that correct?

A. Correct. Type of puddles that will not get to the drain because there are depressions at the drains.

Q. Apologize for interrupting. You are not a civil engineer, Mr. Glick?

A. I am sorry?

Q. You are not a civil engineer, correct?

A. No, sir, not by license.

Q. You have not done an analysis, project-wide analysis of the drainage at Waverly,

correct?

A. No, I just looked at the drain and it's higher than the asphalt so the water can't get there.

Q. Would you answer my question, please. You have not done a project-wide analysis of all the drainage at Waverly, correct?

A. I did a visual analysis, not a calculation analysis.

Q. You tell me which drain you're talking about that was too high or which unit on which day you looked at it?

A. I can't do that sitting here today. I can tell you the street. They don't have street names actually. They have backboards.

Q. You looked at one drain on one street that we don't know the name of today at trial and the whole drainage system at Waverly has got problems that needs fixing?

A. No, I looked at a number of drains in a number of parking areas. I am not saying the parking lots need to be done on the drainage system. I am simply saying in my report that approximately ten feet out from the drain it needs to be resloped so the water gets to the drain.

There is nothing complicated about that. It is not the whole drainage.

Q. Do you know if that work has already been done?

A. No, I don't.

Q. Did you go out to the site after we had ten inches of rain in two hours in Hurricane Matthew and see if there was any water around those drains that you are telling this jury about?

A. You asked me that question in my deposition last week and once again the National Hurricane Service does not indicate that amount of rain in two hours at the airport. So I don't know what the basis of your question is. But the information I found did not have that much rain in that location. May have had two miles away, eight miles away, I don't know. But there's no indication of ten inches of water on that site and the answer is no, I didn't go there at Hurricane Matthew. I went there on September 9th as I said.

Q. Regardless if it was ten inches of rain, five inches of rain, if there was a problem you would have seen your puddling within two hours after Matthew passed through, right, if you would have gone out there and taken the time?

A. Not necessarily. I mean depending on how the rain did fall. It's a matter of rain that stops that is over the lip. The water that's over the lip of the drain will get in. That's the depressions around the drain that sit.

Q. I understand. Let's talk about the shingle roofs if we can for a second. When you issued your report your recommendation was to trim back the shingles around the perimeter of these roofs?

MR. HAYES: Your Honor, I apologize. May we approach the bench.

(Sidebar conference.)

MR. HAYES: Your Honor, I want to bring to the Court's attention when Mr. Haselden laughs or shakes his head or anything like that it is nonverbal testimony to the jury. It can be disruptive and it's the same as him saying I don't believe that or yes or no or something like that. I just ask that he not do that.

THE COURT: I haven't noticed it. To the extent that you are doing that, I'm sure he won't do it any more.

MR. HASELDEN: Sure.

(End of sidebar conference.)

THE COURT: You may proceed.

BY MR. MANOS:

Q. Let's talk about the roofs for a second. In your report and your opinions, not Mr. Mease, but your opinion originally was that you needed to trim back the shingles around the perimeter of some of these roofs, and please correct me if I'm wrong, but generally your concern and the basis of that was that the top course of HardiePlank needs to be off, the trim needs to be off of the shingles? If I have that wrong tell me.

A. Yes. The HardiePlank installation instructions as well as the building code requires two inches distance between the lowest HardiePlank siding and a shingle roof.

Q. That was in your recommendation to correct that issue you trim back the shingles so many inches to address that issue, correct? Originally?

A. You have to take off every board horizontally because it is not a matter of trimming. It's not one board. It could be ten different boards. You have to cut back all the ends. You have to remove all of them.

Q. When you say remove all of them, we are

using the word all again. Let's be clear for the jury so they can understand what it is you are saying.

A. All the pieces of siding that hit the roof.

Q. You are not suggesting you have got to remove all the siding on the entire building?

A. Not for that problem, no.

Q. Okay. That's what I wanted to be clear about, that was your opinion. It wasn't until Mr. Mease went out and said that there were nails that were too deep or too shallow or sideways that you then adopted Mr. Mease's opinion to these homeowners and said that you have to rip off all the shingles and take the tar paper felt off, correct?

A. I think we are talking about two different things, counselor. You are talking about the edge of the shingles where I didn't find the felt paper. We are now talking the siding hitting the roof. So I understand what you're asking me. My initial recommendation was to remove about two feet of shingles to get to the areas. This is around the entire periphery of all the units, all the buildings, to make sure we have code compliant,

manufacturer compliant felt under the roof so that the plywood sheathing would not rot and take on damage.

Q. That's a method that you believe is a practical method, trimming back the shingles to accomplish that repair because you put it in your report?

A. It is somewhat practical assuming the shingles are not dried out and cracked. There is definitely going to be a color differentiation. You never match it. So because Mr. Mease walked the roofs --

Q. Your Honor --

A. -- he had --

THE COURT: He can explain his answer.

A. -- a recommendation and that's where the bigger recommendations came from.

Q. I understand Mr. Mease will be here to talk about the nailing. I just wanted to make sure I understood your opinion.

A. Right. I want to make sure you understood the siding problem is different than what I think you are really asking me.

Q. I do. Thank you for that clarification. Let's talk for a second about your

opinions regarding the development issues. When did John Wieland Homes turn control of the HOA over to the homeowners?

A. I don't have an exact date on that, but I would suspect it would be after 2009, maybe 2008.

Q. Suspect, but you are not sure?

A. I don't have the document in front of me to indicate the exact date, no.

Q. You haven't actually reviewed those documents, have you?

A. No, I have seen the master deed, absolutely.

Q. You have seen the master deed? Are you sure there was even a master deed in this case?

A. Well, whatever the deed documents are for this association. I may have used the wrong term.

Q. You don't have any evidence that Wieland knew at the time that any of these conditions that you say exist actually existed, correct, when they turned it over?

A. I have not seen any documents that indicate they knew about it. They should have known about it because they had supervision and responsibility to make sure it didn't happen.

Q. Let me ask my question again. You don't have any evidence that Wieland knew about conditions that you suggest existed when this HOA got turned over to the homeowners, correct?

A. No, sir. I have not seen any documents to indicate that.

Q. You don't have any knowledge of what the financial condition of the HOA was at the time of transfer, do you?

A. No, sir.

Q. So basically the whole basis of your whole testimony is because you as an architect say there are all these deficiencies out at Waverly and that the repair expert is going to say it is going to be $18 million or maybe it was 25 million before then at some point, that what Wieland should have done as a developer when it turned over control to the homeowners was to put a check for $18.5 million in the HOA account; is that what you are telling the jury?

A. No, I am telling this courtroom that none of those problems should have existed to begin with and we wouldn't be here.

Q. I understand your opinion about whether there are construction deficiencies or design

deficiencies, but we are talking about them as a developer. You suggested that I believe, I am paraphrasing, you suggested I believe to the Court and to the jury that Wieland had a duty to put enough money in the reserve account to address these deficiencies which would mean they would have had to have written a check for 18 and-a-half million?

A. Well, at the time --

Q. According to you all?

A. According to what you said and what I have not seen, if they weren't aware of it at the time there wouldn't be an issue how much. The issue of how much is now.

Q. I understand.

A. It is now that they are damaged to the tune of $18 million.

Q. I understand. If and when the homeowners decide to do some repairs, whatever it is they ultimately decide to do, whether they do some handrails, do some pickets, you would recommend to them to negotiate with contractors out there, right, rather than doing a bid process? You would recommend that they seek out four or five very experienced contractors in the area that are

experienced in doing water intrusion repairs rather than doing a bid process, correct?

A. Yes. Let me answer and explain the yes.

Q. Okay.

A. It's a negotiated recommendation as opposed to a design build -- design bid build. The negotiation process, however, does not eliminate bidding the project. What you are doing is negotiating and picking your general contractor. My recommendations also include as I stated at my deposition that this general contractor would be required to bid every major line item, shingles, windows, siding, whatever, brick, to three different subcontractors. So in essence other than self-performed work by the general contractor you are getting a competitive bid. The reason for in today's marketplace it is very hard to get a contractor to comit to a job with a proper supervising superintendent.

So my recommendation as an architect is to negotiate as opposed to just bid it because then you don't know what you're getting.

Q. Thank you.

A. So you are still a competitive bid

component to the negotiation in the examples I am currently doing as I am rebuilding five projects.

Q. I appreciate your amplification. I'm not sure the rest of this is responsive, Your Honor.

THE COURT: He is allowed to explain his answer.

Q. Okay. And in this negotiated bid process if you had to recommend to these homeowners contractors to do this type of work, the five or six in the area that you would recommend are Hill Construction, Trident Construction, Cooper River Contracting, a company by the name of Watkins Services, Inc., Procon and Bob Wiggins, correct?

A. Correct. We would recommend that the owners interview those contractors and understand the scope of the work that they will be bidding on because it is the scope of work that will determine the intensity of the price and the nature of the repair, yes.

Q. And of those contractors one of them that you would recommend is Watkins Services, Inc., the entity that is providing a repair estimate for the defense in this case, correct?

A. That's correct. They bid other

projects that we recommend. They do this for a living. They bid the scope of work that we have in our repair drawings.

Q. You would never recommend somebody to the Waverly clients, your Waverly clients, homeowners, that you don't have confidence in, correct?

A. Correct. I would bring that confidence up to date based on current projects that they are building and work loads.

Q. Interesting in that six that I listed I didn't hear you recommend Salem.

MR. MCCARTY: Objection, Your Honor.

THE COURT: Basis?

MR. MCCARTY: Not a question. He didn't ask a question. It is editorial.

BY MR. MANOS:

Q. In the six --

THE COURT: There is an objection. Rephrase the question.

BY MR. MANOS:

Q. Of the six companies that you listed that you would recommend to do the repairs out at Waverly that you say are necessary Salem is not one of them, correct?

A. My understanding is Salem is not in business. So they actually rebuilt under Trident Construction one of my projects downtown which was the Concord at Cumberland condominiums, but if they were in business they would probably be on the list. But I don't think they are in business anymore.

Q. Companies that aren't in business have a difficult time actually doing repairs, right?

A. That's why I wouldn't recommend somebody out of business.

Q. Makes perfect sense to me. I agree with you. I think that's all I have, Your Honor. Thank you, Mr. Glick.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MR. HAYES:

Q. Mr. Glick, do you need wind calculations to substantiate your opinion in regard to the fact that these windows were not installed correctly?

A. No, sir.

Q. Okay. And in regards to the question about the HardiePlank and the technical bulletin was it 17?

A. Yes, sir.

Q. I believe that's called face nailing blind?

A. They -- well, the only choice at this point if you don't take the siding down to correct the other issues of flashing, cut WRB, meaning the white paper, your drainage plane, all the problems I pointed out, the cut sheathing that has no structural capacity, if you just deal with a nailing problem they allow to face nail it.

Q. How do you fix the fact there is not proper gaps between the HardiePlank siding or there is not proper flashing?

MR. MANOS: Objection, leading, Your Honor.

THE COURT: Sustained, leading. Rephrase.

BY MR. HAYES:

Q. By just face nailing the HardiePlank will that fix the other issues?

A. No. All the issues I talked about will not be fixed at all so they are still in violation of the manufacturer's instructions and the building code. It will have to be divulged. The nailing only addresses a nailing issue. And as I said

yesterday and today, that nailing issue is extremely dangerous because you may hit a blind nail which you can't see and you may not hit a stud again because how are you going to find the studs if you don't get down to plywood? OSB, excuse me. So it's not a solution that as a repair architect I would recommend and that's what I am in a position of being is a repair architect most of the time as opposed to just issuing an opinion to lessen cost.

Q. Would you recommend -- in terms of the discussion of Watkins Services, would you recommend Watkins Services if they followed your repair scope?

A. Yes, sir.

Q. Would you recommend Watkins Services if they could not follow your repair scope?

A. Absolutely not. I wouldn't recommend anybody that wouldn't follow the repair code.

MR. HAYES: Thank you, Your Honor.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Sir, you are excused.

THE WITNESS: Thank you.

THE COURT: You're welcome. Mr. Foreman, ladies and gentlemen, we are going to advantage of this break in testimony to take a short morning recess. During the break please do not discuss the case and please leave your note pads in your seats. We should be about ten minutes.

(Thereupon, the jury exited the courtroom at 12:00 p.m.)

THE COURT: You may be seated. We will be at ease for ten minutes. Whose the next witness?

MS. NOLAND: Your Honor, Plaintiffs are going to call Mr. Russell Mease.

THE COURT: How long do you anticipate his testimony to be?

MS. NOLAND: Your Honor, I imagine he will be about an hour.

THE COURT: We will be at ease.

(A recess transpired.)

(PLF. EXH. 6A was marked for identification.)

THE COURT: Plaintiff ready to proceed?

MR. HAYES: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, Your Honor.

THE COURT: You can get the jury.

(Thereupon, the jury entered the courtroom at 12:20 p.m.)

THE COURT: You may be seated. You may call your next witness.

MS. NOLAND: Your Honor, Plaintiffs call Mr. Russell Mease to the stand.

THE COURT: Please swear the witness.

RUSSELL MEASE

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Russell Mease, R-U-S-S-E-L-L, M-E-A-S-E.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. NOLAND:

Q. Good morning, Mr. Mease. Could you please introduce yourself to the jury and tell them how you are familiar with the Hamlin townhomes?

A. Sure. Good afternoon. My name is Russell Mease. I am an engineer here in Charleston licensed in South Carolina. I was asked to help in

evaluation of the project that we have been discussing at Waverly.

Q. Mr. Mease, have you formed opinions regarding the Waverly townhomes?

A. I have.

Q. Before we get into any of your opinions, I would like to go through some of your education, training and experience. Could you please give the jury a brief overview of your education and work history?

A. Sure. I went to college at the Citadel. I graduated in 1985 with a degree in mathematics. I went into the active duty Air Force after graduation in '85 and served seven years on active duty. And returned to the Citadel and proceeded to get my engineering degree, bachelor of science in civil engineering. I graduated with honors in 1996.

My work history is I have been a practicing structural engineer. That's what I did directly out of school. Did a lot of design and a lot of heavy construction projects, primarily dealing with precast, prestress concrete parking decks, office buildings, those type of things. Then I had the opportunity to manage an engineering

firm here in Charleston primarily in the area of mechanical, electrical and plumbing engineering. And then in very early 2002 I went out on my own as a sole proprietor and formed my company RTM Engineering in 2004. I have been practicing primarily in forensic engineering for the last 15 to 16 years. And forensic engineering just to make sure you understand is the investigative work with regard to supporting these court proceedings.

Q. Are you licensed in South Carolina?

A. I am.

Q. And what license do you hold and when did you receive it?

A. I am a licensed professional engineer, received that in January of 2001.

Q. Have you continually held your license with the State of South Carolina?

A. Yes.

Q. Mr. Mease, you mentioned that you are a principal at RTM Engineering. Tell me about your company and your day-to-day operations?

A. Sure. The company is me. You are looking at the entire company. I'm self-employed. When I went on my own I was still doing some structural design work and I was asked to begin

some investigative work for some construction problems at buildings. Began that work and it has quickly taken over my entire practice. That's essentially the majority of what I do now. I do 85 percent of work in the investigative side. I still do a little bit of structural engineering. I still do some evaluations of buildings for sale, due diligence, evaluations of properties for buildings that are being sold.

Q. Would you say that you have a specialty of some sort within engineering and RTM Engineering?

A. Yes. Engineering is no different than any other profession similar to a medical doctor that specializes in some type of procedure or area. I have specialized in the forensic side of engineering which is an entire arm of engineering. Primarily I deal a lot with the exteriors of buildings. That's the primary failure mode that we see with most buildings is water intrusion and that is called the exterior envelope of the building.

So you hear that term quite often. That includes the roofs, the windows, the walls. I certainly still do evaluate structural issues. That is my background. But by and large, the

majority of the problems that we see with modern structures have to do with envelopes of the building.

Q. Can you provide the jury with an estimate of how many forensic investigations you have performed over the past 15 years?

A. I've done approximately 650 project evaluations of not only individual buildings, but similar to this, communities, condominium projects, commercial buildings, really the gamut of any type of vertical construction.

Q. On a monthly basis how often are you out on a project site looking at a building envelope?

A. That has varied over the years. I stayed active with the Air National Guard after I left the military and so I had deployments in certain years so it varied up and down, but I would say average around three or four a month.

Q. Are these investigations located in South Carolina?

A. Yes. I am only licensed in South Carolina. Fortunately or unfortunately, however you want to look at it, there is enough work for me to do. I do work in the area of Augusta through

near Greenville, Columbia, Myrtle Beach and south down into Charleston, Hilton Head area.

Q. Are you a member of any professional societies associated with engineering and construction?

A. Yes. I am a member of the American Society of Civil Engineers. I'm also a member of the Structural Engineers Institute and participate in building work here in Charleston as well. Mr. Glick mentioned that organization. It's a very good organization for what we do as far as looking at the envelopes of buildings.

Q. As part of the license that you have held since 2001, do you have to do any continuing education to keep current with that license?

A. Yes. The state requires you to do 15 hours a year to maintain our license.

Q. Mr. Mease, have you ever been qualified as an expert in a court of law?

A. Yes. One time in Colleton County it was a hearing. I was presented to the judge. There was no jury. But I was presented to the judge as an expert in construction and was allowed to testify in court.

Q. Has any court of law in the State of

South Carolina or otherwise failed to qualify you as an expert in court?

A. No.

Q. I'm going to hand you what's been premarked for identification as Plaintiff's Exhibit 18. Can you tell me if you recognize that document.

A. Yes. This is my curriculum vitae which essentially is my resume.

Q. And as a part of your regularly conducted business activities do you keep that document up to date?

A. Yes. Some people keep them very extensive with all the projects that they list. I don't go quite to that level, but it does give my background and experience.

Q. Did you author the document?

A. I did.

MS. NOLAND: Your Honor, we would like to admit Exhibit 18 into evidence.

MR. MANOS: Objection, Your Honor.

THE COURT: Please approach.

(Following proceedings were held at the bench.)

MS. NOLAND: It's his resume.

MR. MANOS: Why do you need that? It's cumulative.

THE COURT: It's marked for ID only. Sustained. Cumulative.

(Following proceedings were held in open court.)

THE COURT: ID only and the objection is sustained.

MS. NOLAND: Your Honor, pursuant to Rule 702 the Plaintiffs tender Mr. Russell Means as a qualified expert witness in the field of engineering construction and building envelope investigations.

THE COURT: Any objection or questions?

MR. MANOS: Without objection, Your Honor.

THE COURT: So admitted. You may proceed.

BY MS. NOLAND:

Q. Mr. Mease, I would like to talk to you about your involvement in this case. First of all, have you visited the Waverly townhomes in Mt. Pleasant?

A. I have.

Q. By way of background would you please

tell the jury how you first became involved in this matter?

A. Yes. And I believe Mr. Glick referred to this yesterday. He was engaged to lead this investigation of the property. I thanked him after work yesterday for calling me young and strong, but he asked for my help to do some of the more difficult tasks which would be the roofs, the attics and crawl spaces. So I engaged with him directly. In fact, I invoiced him for my time directly which I understand was reimbursed through the homeowners association later.

Q. Okay. That's correct. So you were engaged by Mr. Glick, but you believe it was on behalf of the homeowners in this case?

A. Certainly.

Q. Okay. Are you being compensated for your work in this case?

A. Yes.

Q. Okay. What is your hourly rate?

A. My investigative rate at the time I did this project was $150 per hour.

Q. And do you have an estimate of how much time you have actually spent working on making your opinions and conclusions?

A. Yes. If you add up everything which includes deposition, investigations, writing reports, those type of things, I have spent a little over 32 hours in Waverly on the site and a little over 60 hours overall total.

Q. And have you previously worked with Mr. Glick?

A. Yes, I have.

Q. You have testified that you performed investigations at Waverly. Could you please tell the jury how many buildings you have observed?

A. Yes. I have observed approximately 12 buildings, I believe.

Q. As part of your investigations were you asked to determine specific subcontractors that did work out at the Waverly townhomes?

A. No. It's an unfortunate the thing about the work that I do. Oftentimes I am asked to go look at a project. A project of this scale obviously there were more than one subcontractor working on the project. Unfortunately I don't have that information when I go out to evaluate the building so I have to choose based on my experience and selection to decide where to look. It would be nice to know who worked on what, I might be able to

pick and choose which buildings to go to, but I just don't have that information at the time I do my investigation.

Q. Do you have an opinion as far as the responsibility of the construction at Waverly as to the general contractor?

A. Yes. And I have testified to this many times. General contractors really have two responsibilities to their clients. Number one, they are responsible to make sure the personnel, the materials and the equipment are there to actually do the work and that the construction is done. The second part of their responsibility is quality control. They have tested and proven to the state that they are knowledgeable in the world of construction, and they understand construction, that they are there to oversee all of the construction to insure that it is a quality project and it does comply with the codes. So those are the two main responsibilities for the general contractor.

Q. Is that opinion held to a reasonable degree of certainty in your field of expertise?

A. Yes.

Q. Mr. Mease, I'm going to hand you what's

been premarked for identification as No. 19. Can you tell me if you recognize this document?

A. Yes, this is a copy of my report on the project and the one addendum that I added to the report.

Q. And did you draft that document?

A. I did.

Q. And do you typically prepare a report in your regularly conducted activity through RTM Engineering?

A. Yes. In each of those projects certainly everyone wants to know what my findings are. Usually there is a report.

Q. And those two reports contain certain opinions and conclusions that you have made with respect to this project?

A. Yes, it documents the deficiencies and the code references which align with those problems.

MS. NOLAND: Your Honor, we would like to submit Mr. Mease's report and addendum into evidence as Exhibit 19.

MR. MANOS: Objection.

THE COURT: Sustained. He is present. He needs to testify so he can be cross-examined.

You may proceed.

MS. NOLAND: Thank you, Your Honor.

THE COURT: He can use it to refresh his memory, however.

BY MS. NOLAND:

Q. Mr. Mease, have you prepared a visual presentation to help explain your observations and investigations at the Waverly townhomes?

A. I have.

Q. That visual aid has been marked for identification as Exhibit 19 for identification only. Would this exhibit help when explaining your process and conclusions to the jury?

A. Certainly. As we all know, a picture tells a thousand -- is worth a thousand words. I think it helps to understand the problems.

Q. You testified earlier that you reviewed the attics, the crawl spaces and the roofs; is that correct?

A. That's correct.

Q. And was your investigation out at Waverly focused on solely the things that Mr. Glick asked you to look at?

A. Yes. It was a clear division of responsibility. He asked me to look at certain

areas that he was not comfortable going to. You can think of the building from the bottom up. The crawl space, I went into the attics and then also I worked on the roofs.

Q. And what were your observations focused around with respect to the crawl spaces?

A. The crawl spaces originally did not appear to be a large problem at the project. I did not find very many repetitive deficiencies when I did my original evaluation. Later during a home inspection for the sale of one of the units that I did not observe there was some damage found in the crawl space to some structural beams. And as you can see on the slide they are called Glulam beams.

What that refers to is very simple. You will see in this area here these are two by fours. That's all they are. What you do is you stack them on top of each other and you glue them together or laminate them together to create a deeper structural element. It's a glued together beam. We did find some significant rot and damage to these beams because of the way they were placed.

Q. And as a result of the inspector's report what did you do?

A. It came to my attention through Mr.

Hayes, he gave me a call, said that they had found this problem. Unfortunately I was busy at the time and they wanted to try to understand the scale of the problem. So I suggested to him that the home inspector that found the beam be engaged to look some more so there were more evidence of that. Through that process it was determined that there was damage to these beams in two of the buildings specifically. One building had five units and each unit in that building, all five of them had damage to these beams. And then one unit in the other building also had some damage to a Glulam beam as well.

When I freed up my calendar I was able to go out myself and actually go into the home and see the damage myself, but it was mainly to verify the findings of the home inspector. His name was Kevin Westendorff.

Q. And as far as the Glulam beam is concerned, did you take photographs of the Glulam beams in the units that we're discussing?

A. Yes, I was -- I went into one crawl space, specifically 1088 Griswold. I went in to see the damage myself. I also took some videos of this as well which I will show you here in a

moment. As you can see in the photograph this is a knife. It's my pocketknife. And if you -- in this area you will see some of the damaged wood that's coming off the bottom of the beam. The most important thing in this photograph happens to be this tan wrap that I have my hand on.

The problem was created because this wrap was left on the beams when they were place in the crawl space. I did some research on this and came to find out that the beams themselves typically were shipped from the manufacturer with these wraps on them to protect them. Just a wrapping. It was important that these wraps be removed before they were placed in a crawl space because Charleston as, we all know, it is a wet environment. Under your home oftentimes the conditions become where things will condense, just like taking an iced tea glass and sitting it outside. Similar things occur under the crawl space of your house often.

This wrap, it allowed that condensation to form inside of the plastic and unfortunately it was trapped, it could not get out and as you can see that water trickled down to the bottom of this beam and was held against the wood like a diaper

would hold water. And it has caused these beams to rot from the bottom up. Just like a pack of shingles that on the roof you should take the wrapper off before you put the shingles on the roof. Same thing here. This wrapper should have been removed before it was placed under the home and because it was not it created this condition.

Q. Was this a proper construction method?

A. The beam was correct. Putting the beam where it was supposed to be is correct. The big problem is just not unwrapping it. It caused it to damage itself essentially.

Q. Should the contractor have known to unwrap this beam before placing it into the units?

A. Sure. Like any other product you need to take it out of the box before you use it.

Q. What do we see on this photograph?

A. This is just further evidence, more photographs of the beams that were damaged. These photographs were taken by Mr. Westendorff, but they are the same condition. You can see the wrap down at the bottom and you can also see the damage to the beam as well. I believe we have another picture of another -- yeah, another crawl space. This is an interesting picture because you can see

another beam on this side of the wrap nobody has cut away so that's the way they were installed. This wrap was cut away so you can see the damage that was behind it.

Q. And the dark area that's indicated on the photo, what is that?

A. Just deterioration in the wood. As we all know when things get wet in our environment they began to create microbial growth mold. So there's things growing on the beam. But again beams did show deterioration. Some of them were damaged to the point you can probe them with a knife or pick them apart with your hand.

Q. Mr. Mease, did you take any videos of this condition?

A. I did. I had a very specific purpose for this. These pictures look nice, but you have to realize where these beams are located. They are located under the home. Not the easiest place in the world get to. Certainly not the easiest place in the world to work. So I wanted to kind of show the difficulty and the amount of effort it was going to take to actually repair these beams. Now these beams have been damaged to the point that they need to be removed and replaced. You can't

fix this beam. It is not repairable. It needs to be pulled out and replaced.

Q. What do we see in the photograph on the screen at the moment?

A. If we look at this picture this is the actual access to the crawl space. On the back of each building there is a porch and this is the little opening that goes beneath the porch so you can get under the home. I measured these openings. They are about two feet tall by about 32 inches wide. And I think I have one more picture that gives a better scale of what we are talking about because I'm in the picture I think. Did we pull that one out? It is difficult for a guy my size to crawl through a two foot by 32 inch hole. And if you think about the beam itself, it's going to be difficult to physically move it through these openings.

Q. And the beam that you personally observed, do you have an idea the length of that beam?

A. Yes, it was 17 feet long. It sat on three different piers. The difficulty is how to support the weight that the beam is carrying so that you can take the beam out and put the beam

back in. It's not just a matter of pulling off a piece of siding on the wall. The building is not going to feel the effect of that. You begin to pull a large structural beam out from under a building, you have got to do a lot of work and effort to support everything so that it doesn't fall on you.

Q. And have you suggested as part of the scope of repair that these beams that have damage need to be replaced?

A. Absolutely.

Q. I believe the next slide is your video.

A. Okay. There is some commentary fairly self-explanatory so if you don't mind I'm going to let it run. You can kind of hear what I am saying. I will tell you at the beginning here I am at the entrance to the crawl space and actually I misspoke. There's no sound to go with this one. This is just showing you the access. So I am beneath the porch. You kind of saw the porch above me. There are two of those holes under the house and the back that are about 24 inches tall by 32 inches wide. I am sorry that the video is so shaky. It's hard to be under a house filming holding tape measures so I apologize for that. But

just to show you the area that we are going to be working in. You can see 24 inches tall and like I said, you measure across it is about 32 inches. I am lying on my back doing all this.

The next thing I will show you here is I take my flashlight and I shine it into the crawl space to show you where the beam is. The beam is at this pier; it's about halfway beneath the home. If you look closely on top of the pier you can kind of see the tan outline of that wrap as it comes across the pier there, but it's a significant distance into the building.

Q. Okay.

A. This is the video that actually has my commentary. What I have done now, I have actually crawled to the beam and I am looking at the beam so I'll let this play. You can hear my commentary.

(Video played.)

Sorry it's shaky. I am not Darth Vader's son. I am wearing a respirator. I am under the building. That's why it sounds like that. But it does give you an idea of the difficulty it's going to be in trying to repair these beams.

Q. The damage that we saw in your

photographs and in the video, what do you attribute that damage to?

A. Again, that is the condensation. It is occurring in your crawl space. It is cool, nice and cool under your house. That's okay except for a certain time of year and that's the summer. You'll hear the newscasters say our dew point today is very high 72, 74 degrees. That's those really muggy days. Under your house that temperature is easily reached. If it's below 74 degrees under your house the air just naturally condenses. It's going to create its own water. It's not water leaking from the roof, not water coming in from sides, it creates it out of the air. So by having these beams wrapped that condensation occurs and then it's just held up against the element.

Q. So without the wrap we wouldn't expect to see this type of damage?

A. Exactly. In fact, the other buildings in the community where the wrap was not found we did not see extensive damage in the other beams. So it is a cause and effect type of system.

Q. And are these beams a structural concern for the unit owners?

A. Yes. You don't buy a 14 inch deep

17-foot long beam unless you need it. So I have not been into the units to track the load path from the roof down to where this beam is, but no builder would put the beam in unless there is not some reason to have it there.

Q. Okay. I would like to now move up into the attic portion of your investigation. With respect to the attics what were the -- what was the major items that you looked at?

A. There were three specific things that I observed in the attics that were typical. First of all and most important is the firewalls. The second is how the windows were installed in the attic and then also some -- the installation on the duct work runs through the attic.

Q. Let's take the firewalls first. Could you please explain to the jury exactly what a firewall assembly is and why it is important?

A. Absolutely. Firewalls are life safety elements. They are there to protect human life. When you build townhomes you have common walls between the townhomes. The code requires us to separate those spaces in the case of a fire so that the tenants in one home that's adjacent to a home that's on fire has the time, the ability to escape

the building without being harmed.

So the firewalls are very, very important to human safety. And as I say all the time, if your smoke detector is probably like mine and the battery is dead and it's 2:00 in the morning and there's a fire next door, you will have no idea until things begin to occur.

The code requires us to have the rated wall between those two units so you have time to wake up, throw on your bathrobe and get out of the building.

Q. The current slide that is up you have referenced the 2013 code. Is this the specific section that you're referring to?

A. Yes. As you can see right there it says you have to have fire rated walls separating the units. It's been discussed about the codes. There are three codes that cover this construction project. Each of the references that I make in my report, this one included, it does not matter which code you look at, they say the same thing. So while the code does change with regard to this, all three codes say the same thing.

Q. And did you put together a demonstration of exactly how a firewall should be

constructed?

A. Yes. I wanted to make sure that you could kind of understand what we are talking about here. This is one of the drawings from the Waverly Plantation project from John Wieland Homes. This is a typical front elevation. If you look at this elevation there are front doors which indicate different units down the property. So each of these buildings have multiple homes in them. Well, the code requires us to locate firewalls between each townhome. These red lines depict where these would be located. They are just a common wall between the unit. And the very, very important part is they have to go from the ground all the way to the roof. They can't have any penetrations in them unless they are rated penetration. They are designed to withstand the fire. And you can't have these walls be interrupted.

Q. So in other words, between each unit you have to have a firewall that goes from the ground all the way through the roof?

A. Yes. It specifically says the foundation, but essentially you are talking about from the bottom of the building to the roof.

Q. Have you had an opportunity through

your work at RTM Engineering to observe the effect of an improperly installed firewall?

A. Yes, I have.

Q. Did you personally investigate conditions where you could testify regarding a discontinuing firewall and why it's important?

A. Yes. In fact, one project that I have looked at had very similar conditions to what I saw here at this property. And just so happens that after I investigated there was a fire in the townhome building. And so I got to see the actual result of an improperly installed firewall. The fire department was very quick in responding. The fire was pretty intense, but it only lasted about 20 minutes. Unfortunately, the firewalls between the adjacent unit and the unit that caught on fire had integrity issues. There were penetrations and holes in them. They were not complete and the smoke inhalation in the adjoining unit was rapid. Fortunately the fire department got the fire put out so it was able to be contained, but the two adjoining units had to be basically gutted and cleaned to get the smoke damage out of those.

Q. And you personally observed those firewall assemblies that you just discussed?

A. Yes, I saw them before the fire and then I saw the result and the problems after the fire as well.

Q. And were those similar to what you observed at out Waverly at Hamlin Planation?

A. Yes. In fact, these townhomes were in Hamlin Plantation. They were just around the corner from the property.

MR. MANOS: We have a matter of law, Your Honor.

(Following proceedings were held at the bench.)

MR. MANOS: They are bringing up Madison. They can't backdoor this. That's the other townhomes we made a motion on.

THE COURT: Why is it relevant?

MS. NOLAND: Your Honor, because it is the exact same issue.

THE COURT: They didn't build it.

MS. NOLAND: They did. And he is the expert on this.

THE COURT: I have to hear it.

(Thereupon, the sidebar conference ended.)

(Cell phone ringing.)

THE COURT: If anyone has a cell phone it needs to be turned off. The deputies will take it from you and it will not be returned to you. Not silenced, not vibrate, off.

Mr. Foreman, ladies and gentlemen, I have a matter of law I need to take up with the attorneys. During the break please don't discuss the case. Please leave your note pads -- actually it is lunchtime. I'm going to let you break for lunch until let's say 2:15. And I am guesstimating how long it is going to take for us to deal with this matter and for us to have lunch. So if you get back and we are a few minutes behind that schedule, know it is because we ran over. It is my intention to resume at 2:15. If you would abide by my earlier instructions without me repeating them to you I would appreciate it and come directly to your jury room at 2:15. Have a good lunch.

(Thereupon, the jury exited the courtroom at 1:01 p.m.)

THE COURT: Ask the questions that you are going to ask.

BY MS. NOLAND:

Q. Mr. Mease, you had an occasion to observe a discontinuous firewall, correct?

A. Yes, it was a firewall that was incomplete.

Q. And did the firewall -- what were your --

THE COURT: Close that door, please.

Q. Why is it important to have a continuous firewall?

A. Again, the integrity of the firewall is to protect the inhabitants of the adjoining units in case there is a fire in one of the units. It is a life safety concern.

Q. Have you had the opportunity for your work with RTM Engineering to observe the effects of an improperly installed firewall?

A. Yes.

Q. And what was that?

THE COURT: I don't think they had any objection to that.

MR. MANOS: I don't have any objection.

THE COURT: Cut to the heart which is the reference to this other.

BY MS. NOLAND:

Q. Did you personally investigate conditions of the firewall that you just discussed?

A. I did.

Q. And were those conditions that you observed similar or the same to those at Waverly at Hamlin Plantation?

A. Yes, they were very similar. The one difference is because of the fire I was able to take some of the walls apart below the attic which showed a pattern of problems with the firewall construction, but in the attics, yes, they were very similar.

Q. And at this other location where we have been discussing fire assemblies have you been hired as an expert to conduct investigations with respect to the firewall assembly?

A. Yes.

Q. And what is the name of that project?

A. It is Madison at Hamlin Plantation in the same community as the Waverly project.

Q. And was Madison at Hamlin Plantation also constructed by John Wieland Homes?

A. Yes, through the building permits, the plans that I have observed and also some of the walk-through checklists for transfer of ownership from the builder, they are all listed as John Wieland Homes; yes.

THE COURT: What's the objection?

MR. MANOS: Your Honor, it's based on it's irrelevant, it delays, it confuses, it inflames the passion of the jury. We are talking about he didn't take apart a wall at Waverly. None of this was put into his report or disclosed in the two times we deposed him and we made a motion in limine that Your Honor deferred to not bring up Madison and this is the backdoor way of trying to bring up Madison to inflame the prejudice of the jury that these buildings are going to burn down.

THE COURT: How is this relevant?

MS. NOLAND: Your Honor, we believe it is relevant because it's a neighboring project that was built by the same general contractor and developed by the same developer. It goes to show consistency. It goes to show that there's repetition. It is relevant to show reprehensible actions on behalf of Wieland. It goes towards the punitive damages. In addition, it's substantially similar. Mr. Mease has been hired in both cases. He's personally looked at the firewall assembly and can testify that it is the same builder and that it's the same conditions.

And, Your Honor, we believe under Magnolia North Property Owners Association v.

Heritage Communities that it's relevant and admissible to show past acts that are similar in nature to the conditions that we have at Waverly.

THE COURT: Anything further?

MR. MANOS: Yes, Your Honor. There has been no adjudication of the Madison case. It is in litigation. All it does is confuse the jury because then another expert has to come up and explain. Mr. Mease is providing conclusive opinions that they are the same without any basis, without undoing the walls. It's clearly prejudicial.

THE COURT: The Court finds that the testimony that the Plaintiffs are seeking to elicit is not relevant, that it is not probative, it is more prejudicial than probative. I agree with the defense. It is designed to inflame the jury, potentially has the effect of inflaming the jury. Because while these projects -- I guess I need to really go back to the facts of the case that the Plaintiffs cites. They are not the same as this case. You have several differences. One, you have a 30(b)(6) witness who admitted that not only did they know there were problems with their first project, but before they completed their first

project they knew there were similar problems with the second project.

In addition to that, their expert testified that every single problem they had with one project was similar across every development.

Here we have an isolated issue of a firewall. This witness was observing another unit in another development as a result of a fire. I am concerned about that because it gives the impression that somehow these other units could basically burn down.

The real thing that concerns me is there has not been established any nexus between these two properties and a nexus between all -- one incident of a firewall being done improperly which resulted in a fire does not create the nexus that is required to meet a relevance standard. In other words, it makes it more probable than not that they did the same thing. I am just concerned about the probative value of it being outweighed by the potential prejudicial effect, in other words, that it will appeal to the passions and prejudices of the jury. The Magnolia case, while it has some similarities, it is not on point. Factually it's very dissimilar. I agree with it in the admission

of the Magnolia case because it really comes to confirm admissions made by their own witness that they knew from the beginning that all of these projects had the exact same problems and they failed to do anything about it.

We will take a lunch break. We will resume at 2:15. Sir, during the break please don't discuss your testimony with anyone.

(A luncheon recess transpired.)

THE COURT: Plaintiff ready to proceed?

MS. NOLAND: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, Your Honor.

THE COURT: Please bring the jury.

(Thereupon, the jury entered the courtroom at 2:17 p.m.)

THE COURT: You may be seated. Ladies and gentlemen, hope you had a great lunch. It looks like the sun is coming out and it's a pretty day. So I hope you all had a chance to enjoy some of the sunshine. We are going to resume the witness's testimony. You may proceed.

MS. NOLAND: Thank you, Your Honor.

BY MS. NOLAND:

Q. Mr. Mease, when we left off, we were

talking about firewall assemblies and I would like to resume and talk about your first photograph up on the screen. Do you recognize this photograph?

A. Yes.

Q. Is it one that you took in your investigations?

A. Yes, it is.

Q. Could you please explain to the jury in this sequence of the next photographs what we are seeing and what you were taking a photo of?

A. Certainly. This gets a little technical, but it's not too hard to understand. We were talking about the firewalls before. We wanted to create a partition between the adjoining units. Where we are here in this photograph is I am in the attic. If you will notice this is the wall, common wall, of the two units. The way we can tell that is if you look below you see kind of a yellow colored wall. What that is is a product known as Dens walls which is essentially gypsum like you would see in a typical home, but it has a coating on it that has a fiberglass look to it. You also notice between them there are metal strips. These were there for a specific purpose. That ties the wall together and creates that rating system that

does not allow the fire to penetrate beyond this wall for a certain amount of time depending on the assembly.

The problem is if you will notice we talked before about the fact that firewall actually needs to go to the foundation all way to the roof. So if you look above the yellow you will see just plain old plywood that's above that. So the firewall stops too low in the wall. It should go all the way up to the roof. There's a very important reason for this. This beam that you see here is a step in the roof between two units. One roof is slightly higher than the other. The beam, while it's structurally required, the firewall has to protect not only the unit on this side of the firewall, but the other side of the firewall. The OSB framing above the firewall is unprotected. So what can happen is fire can burn through those materials and then get on to the roof of the adjacent building much too quickly because wood obviously burns very rapidly.

So if we go to the next photograph, you will see the same condition. We are looking at it from below. So you see the yellow firewall assembly, and then above that beam line again we

have unprotected flaming above. So this breaks the rule that's required by the code. This has to be a continuous system that goes all way up to the roof.

Now, if we go to the next photograph you'll see some of the firewalls were built out of typical drywall which is perfectly acceptable. I don't have a problem with that. It's just again how it is accomplished.

What I am looking at here, this is the ceiling of the second floor. I am in the attic. This is the common wall between the two units again. You will see that they have placed some gypsum and taped and mudded that wall too close to the seams to make it function. Problem is we go to the next photograph. They did not make the wall continuous. You can see my knife has been placed beneath the firewall at the ceiling so there's a joint there. So we have to remember this upper firewall needs to be continuous all the way down, so now we have interrupted it with the ceiling of the second floor. So that again is a violation of the code. Has to be one monolithic element. If we follow that further, we also found and it's little bit difficult to see, that certain framing members are installed in the firewall. But they're not

protected. You can see the wood showing through the drywall mud that's been placed on there. The drywall mud is for the gypsum. It doesn't do anything to protect the wood. That wood should also be encapsulated in the drywall just like the rest of the frame.

So there are penetrations in the firewall that are not protected. The next photograph will show you again a similar situation here where there's unprotected framing in the firewall. So all of these things just point to discontinuity in that firewall which is very, very important for it to perform as it is intended to perform.

One last thing having to do with the firewall assemblies. The code allows you to do one of two different methods to protect the roof. You can either run a parapet through the roof and you have seen buildings that have little parapets that stick up between elements of the building and that can protect it from fire.

The other is to use fire rated plywood on the roof so that it will prevent the fire from wrapping again over onto the adjacent unit and the code requires us to have that within four feet of

the firewall. So the first four feet.

If you look at this photograph, you see two different types of plywood. You have a lighter color up and a darker color below. The darker color is a fire rated plywood. It's just a specific product that you buy that has been tested so that it will resist fire..

Two problems. This upper section goes into that four-foot space. It can't be there. We need four feet of fire rated plywood. The second thing is this plumbing penetration is in that four-foot space. So again that cannot be there unless it is a rated assembly, some type of fancy protective boot that would go on the pipe to keep it as a fire rated element. Just to point out, my tape measure here only goes to 36 inches. So it is well within the four-foot range of the roof there.

The next photo I believe -- I am sorry. That was the last photo. So that kind of explains the issues with the penetrations, the lack of continuity and also the omissions in the roof sheathing as far as the fire rated plywood.

Q. And throughout your testimony you had your hand on a book that you brought with you; is that correct?

A. Yes.

Q. And what is that for the jury.

A. Just my copy of the code. It's the International Residential Code.

Q. That's the code that applies -- one of the codes that applies to the construction out at Waverly?

A. Yes. And again regardless of which version you look at for these conditions that I am describing, they are consistent.

Q. And we only looked at a few samplings of photos. Did you see these conditions throughout other attics at Waverly as opposed to just the photograph that you have taken for the jury's purposes?

A. Yes. In fact, it was exactly the same in each attic I went through. There was no variations between the attics. They were all accomplished in the same manner with the exception that some were the Dens glass product and some were the gypsum firewall product. So beyond materials they were all placed similarly.

Q. And the conditions that you have discussed and the opinions that you've formed, are these violations of the code?

A. Yes, they are.

Q. Should the general contractor have seen these violations?

A. Certainly.

Q. Did you have any other observations with regards to the attics?

A. I did. As I mentioned earlier, there were three conditions. The second condition had to do with the window installations. Because I was in the attic I could see the back sides of certain windows that were installed in the dormers that were only accessible in the attics. What I saw was the windows had been installed without any rough opening flashing. I will explain what that is.

The rough opening is just the hole in the wood. The studs, the header, the sheathing was all cut away and creates a hole so you can put a window in it. That's called the rough opening.

The code requires us to flash those rough openings to protect them. As Mr. Glick said with his work with the windows in the walls are not flashed properly, as you can well imagine the windows in the attic were also not flashed properly.

There is also another problem with the

windows I saw in the attic. They did not have headers. They did not have what we call keying jack studs which are the structural framing support elements to hold that window in the wall. Give it the strength that it needs to resist the wind load.

So if we go to the next photograph, this is a typical window installation. I would mention they placed these screens over the window I'm assuming trying to prevent bugs from getting into the attic or something. I'm not sure what they were about. But if you look at the top of the window here there's no header. In fact, they have actually just cut the structural framing for the trusses and cut a hole in the plywood and stuck a window in it. There is no framing around the sides. There's no framing at the head which is all required by code. Additionally, you see the white house wrap around the corners. They have just simply been pulled into the rough opening. They have not been lapped with any elements. They have not waterproofed the rough opening at the sill.

So essentially what it appears to have happened is the wall was built, some guy came with a saw, cut a hole in the side of the window. They turned the wrap in and stuck the window in and

nailed it which is improper structurally and also through the waterproofing.

Q. Did you pass this information along to Mr. Glick?

A. I did.

Q. Is it your understanding that it is in his scope of repair?

A. Yes, it's my understanding.

Q. Were there any other observations with respect to the attic?

A. Yes. One last thing, not the biggest thing in the world, but it's something we can all appreciate. That is the duct work in the attic. The South Carolina code of laws that were enforced at the time requires us to have R6 insulation on duct work that is in unconditioned space. So your attic certainly is an unconditioned space. There is no heating or cooling in your attic. By measuring the thickness of the insulation you can tell what R value is installed. Suffice it to say, most every one I measured was around an inch or a little bit less. It should have been somewhere between an inch and five eighths and over, two inches depending on which brand of insulation that you're using. It's not very exciting, but it

affects the performance of your air conditioning system. So you are having to cool these ducts and heat these ducts in the wintertime so it goes to the bottom line of the owners as to their electric bills. They are not installed properly. This is to show a measurement of the thickness of the duct work insulation.

Q. How many locations did you observe duct work insulation being too thin?

A. In each attic I observed all of the duct insulation was installed in a similar manner. I took 23 measurements. They were all within very close proximity to each other, all plus or minus three-quarters of an inch to an inch thick.

Q. So this was a repetitious condition out at Waverly?

A. Yes.

Q. And who would have the ultimate responsibility for the duct work insulation?

A. Well, certainly the installer of the mechanical systems is required to do this properly in accordance with the code of laws, but as with any project the general contractor always has the overreaching quality requirement for watching the work of the other subs.

I love to use the analogy that Ronald Reagan said. You can trust your subcontractors, but verify. So you want to make sure they are doing what they are supposed to do. But you do want to hire subs that you trust.

Q. Now, the next category that you are testifying about is roof assemblies?

A. Yes.

Q. And could you kind of explain what a roof assembly is for the jury?

A. This is some fancy word for roofs. Roof assemblies are any kind of covering that you put on the roofs, the shingles, metal roofing or membrane. The code calls them roof assemblies. In this case it was architectural shingles.

Q. And were you able to determine the manufacturer of those shingles?

A. Yes. Labeling on the shingles themselves showed that it was a CertainTeed product.

Q. Does the code speak to roof assemblies?

A. Absolutely. More importantly, the code said that whatever roofing product that you are going to use you have to install it the way the manufacturer said. That's very important because

the manufacturers have tested their products. So they have gone through the cost and effort to test their materials, prove it to the code council that yes, this product will perform in service, so we need to install it the way it was tested so that we will know that it will perform at that level. That's just a very simple thing and the code recognizes that by saying you need to follow the manufacturer's instructions.

Q. Did you, in fact, do any research to look at the CertainTeed instructions?

A. Yes, on many occasions throughout my career I have reviewed their installation requirements.

Q. What does the CertainTeed instructions state?

A. To understand you have to understand what I saw when I investigated the roofs and I physically went on the roofs. I lifted the shingles along their bottom edge so I could see the fasteners. Fasteners is fancy code word for nails. So the nails in the shingles. Every manufacturer of shingles has this diagram or something very, very similar to it. This is straight out of the CertainTeed installation instructions.

When you put the nail in it needs to go through the shingle and be tight to the face of the shingle. That's the highest strength you are going to get in holding the shingle to the roof. If you nail it in sideways, don't nail it far enough, and more importantly if you overdrive the nail you are going to affect the ability of the shingle to resist wind loading. In other words, when you really need it in a storm it's going to put the installation in question. It is easy to understand because if that head of the nail goes through -- I'm not sure how to do this, but this last diagram here, the head of the nail penetrates the top of the shingle, where you've essentially torn the shingle around the head of the nail. So naturally it's easy to understand that that shingle is not going to stay on the roof with the same intensity as it would if the nail was just flush with the shingle. You have damaged the shingle itself by putting it in that way.

The other interesting thing to note is if you go out and look at a package of shingles that are at the home store or delivered to a building that will have new roofing, the entire instruction set for that shingle is printed on

every package that shows up. So there's no real reason not to know what is appropriate.

The problem is I found when I evaluated the shingles on five different buildings I observed 77 percent of the nails that I observed were either angle driven, underdriven or predominantly they were overdriven and this comes from the fact that the installer had his nail gun turned up a little too high, too much pressure and he was putting the nails in too hard.

Q. Is there an easy way to insure that nails aren't overdriven?

A. Yes. Modern roofs are put on with nail guns. That makes sense. I have no problem with that. The problem is regulating that pressure so you put the nail in correctly. Most good roofers actually take a regulator which you can put together for less than ten bucks and you plug it into the bottom of your nail gun and there's a dial on it so when you are up on the roof and your hose goes all the way down to the tank that's way down on the ground if your nail going is in too hard you can adjust the pressure right there at your gun. Versus trying to holler down to the guy on the ground to turn it up or down you can regulate it

very easily where you're at. So there's no real reason not to put the nail in properly.

And if we go to the next slide I will show you some examples. You can see how the head of the nail here, the head of the nail penetrates the shingles beyond the surface. I have I think three pictures kind of show a representative sample of the same condition. You can see here that it has been driven into the shingle. I think there is one more. This is what I saw again in 77 percent of the locations I observed.

Q. And you didn't look at every shingle out at Waverly, did you?

A. No. This goes back to what Mr. Glick testified to earlier. He and I are charged as professionals to render an opinion to a reasonable degree of certainty in our fields. The way I like to describe it is I look at enough locations that I am comfortable in saying this is the condition at the property. As you mentioned before, I am being paid to do this work. I try to keep a reasonable level of effort for the homeowners association because for me to go out and look at every shingle and every roof would be an extremely expensive proposition. But I have done this enough to know

that the crews that are putting these shingles on if you start seeing it at 77 percent of the locations you're looking that's a consistent pattern. So I got to the point where I felt like I am comfortable enough in saying that to a degree of engineering certainty this is the way the roofs were installed.

Q. And in the installation of the shingles was it per the installation construction and the code?

A. No. Because it was not -- because the fasteners were installed in violation of the manufacturer's requirements, that makes it a code violation.

Q. Okay. And have we talked about the majority of your opinions with regard to the Waverly townhomes in this case?

A. Yes, for the areas I was charged to look at.

Q. Okay. And with respect to the shingles and the firewall assemblies, did you see those conditions throughout the Waverly townhome project?

A. Yes. In all areas I observed I saw similar deficiencies.

Q. And is there a certain entity or person

out at the site who is in charge of supervising the work that's being performed to construct these homes?

A. Certainly each sub usually has someone who is their foreman if you will that are in charge to a degree. But again as we mentioned before, the laws in South Carolina clearly state that the general contractor has the overall requirement for insuring compliance with the code.

MS. NOLAND: Beg the Court's indulgence.

THE COURT: Yes, ma'am.

(Off-the-record conference.)

BY MS. NOLAND:

Q. With respect to the duty that we have been discussing about supervision of the work taking place, do you believe through the work that you investigated and the opinions that you have formed that this duty was met to a reasonable degree of construction certainty?

A. No, certainly not. The repetitive nature of the deficiencies that I saw shows and proves a lack of oversight.

Q. And with respect to the beams and the fire assemblies and the shingles that we have

discussed, has that led to your opinion that these items need to be repaired?

A. Certainly. I opined in my report the shingles need to be replaced, the beams need to be replaced, the framing around the windows fascia needs to be installed because it is not there. And then also the weatherproofing requirements that go along with that, the insulation on the duct work needs to be improved so that it meets the code. And I believe those are the areas I discussed.

Q. Yes, sir. Are your opinions that you have testified to this jury, they would be to a reasonable degree of certainty in your field of expertise?

A. Yes.

MS. NOLAND: Thank you. That's all the questions, I will pass the witness.

THE WITNESS: Thank you.

CROSS-EXAMINATION

BY MR. MANOS:

Q. Good afternoon, Mr. Mease.

A. Good afternoon.

Q. We know that of the 22 buildings and 105 units that five of them, all in one building, had the brown paper wrap around the beams that we

talked about, right?

A. I believe that's correct, yes.

Q. And had you gone out as a forensic expert and looked in that building and saw those five units and then looked in two other buildings and didn't see the building wrap and came in in front of the jury and said I saw it in one out of three, so there must be 33 percent problems out at the 22 buildings, that wouldn't be accurate, would it?

A. In this case no. In fact, that was the opposite of what I actually saw in the crawl space I went into. I did not encounter these Glulam beams. They are a unique product in from what I gather two buildings. The predominant beam system in the community is either laminated veneer lumbar or paralaps. So it is a little unique in that this was a special product, special place that I didn't even encounter.

Q. And that's kind of the whole problem with extrapolation, isn't it? When you go in and you look at a 22 building complex for 105 units, look at a couple of units and then you make a project-wide conclusion without having looked at in the instance of the roof shingles 17 buildings?

A. No. It depends on the product that we are discussing. The roof shingles for example that you mentioned, you can tell that architectural shingles have been installed on all of the roofs. The Glulam beams were kind of again the special condition. They were an anomaly as far as the rest of the community goes.

Q. I understand that, Mr. Mease, but in order to do the five buildings that you looked at for shingles, you actually had to get up on the roof and pick up the shingles as you told us to look how the nails were fastened, correct?

A. Correct. But the shingles were all the shingles. The Glulam is a different product so I don't understand the comparison.

Q. Maybe I'm not being very clear. But there were 17 buildings for the shingles that you didn't get up on the roof and you didn't look to see how those were fastened so you don't have any idea how they were fastened. You are making an assumption that those buildings have similar conditions to the other five that you looked at?

A. Correct. As I said earlier, I have come to a point in which I am comfortable in making that supposition based on experience and the

consistency of the installation deficiencies that I saw to a reasonable degree of certainty.

Q. I understand. And those five buildings that you did look at, you don't know who the roofer was for those five roofs, correct?

A. That's correct.

Q. You don't know who the roofers were for the other 17, correct?

A. That's correct.

Q. And you don't know, you haven't taken the time to know exactly when those 22 buildings were built from 2005 to 2009, correct?

A. Well, we have some information on when they were constructed, but that was not again as I mentioned earlier how I decided to select certain buildings to look at. It was more of a random sampling. Based on the information I had at the time during my initial investigation there was no way for me to know who or how many roofers had been involved in the project.

Q. Right. Which goes back, again I will try to clarify, really doesn't matter what was in the crawl space. We agree obviously the Glulam that we see in the picture that have the wrap, the wrap shouldn't be there. I agree with you. That

needs to be fixed. My point was had you only looked at three buildings and saw a problem with three of them, you might have made the assumption that that must mean that 33 percent of the buildings are bad when we know, in fact, that's not the case, that it is only one of the 22 buildings?

A. Well, that would be difficult to say as well, but we had a mixture of products. That's kind of my point. The shingles are the shingles. They are the same throughout the community. In fact, they are easily identifiable because they are in the open. Unfortunately these beams in the crawl space, the only way to identify them is to get in the crawl space. So it's a different set of parameters than the shingles.

Q. I understand a different set of parameters. But the problem was not the Glulam itself, it was the building wrap around the Glulam, correct?

A. Yes --

Q. I am sorry, I didn't mean to interrupt you.

A. Those were the only beams that had the wrap.

Q. But had there been the brown wrap

around some other type of structural beam you would have had the same type of condensation situation and we would be talking about the same thing. Doesn't really matter the parameters, Glulam versus shingles. The problem was the wrap around the Glulam, right?

A. Yes. That's what created the problem.

Q. Okay. The majority of time that you're hired is you make observations and the purpose of it is to identify conditions that are problems at built construction, typically you do that for litigation?

A. Yes, that's the nature of a forensic engineer.

Q. You spend 80, 85 percent of your professional time doing that?

A. That's correct.

Q. And what you don't do as part of your practice is take it the next step further and actually design a repair typically. Typically you'll point out the condition that you see that has a problem, but you are not set up as a company to then do a design of a repair and then act as the repair engineer to make sure it gets fixed according to your repair; is that correct?

A. That's correct. It is simply a matter of my company. I am the company. It is just me. I don't have drafts people. I don't have a staff that can manage a big job like this. I certainly could do it if I wanted to take the time to do it. Just again like you said, my company is not set up to do that type of work, nor do I carry the insurance for that type of work.

Q. I understand. There are structural engineers around the state and in Charleston that will do a repair design to change out these Glulams that we talked about, correct?

A. Sure.

Q. And that's just again not something that you would do so in this case if and when the homeowners get that condition fixed, that's going to be done by someone else's repair?

A. Yes. Again, because of me being a single person company.

Q. And you have not evaluated the repair design or have you evaluated the repair design set forth by Scott Coffman of CSC that will be testifying for the Defendants?

A. I don't believe I have seen that, no.

Q. You don't have any testimony to share

with the jury whether you think his repair design will work, will not work or otherwise?

A. I am not able to say. I haven't seen it.

Q. All right. Let's talk about the firewalls for a second. If you believe that the firewalls were an emergency concern out at Waverly right now you would have sent a letter to the building official or told the homeowners they need to move out? Understand the question? I am not suggesting that you haven't pointed out your concerns and issues, but if it was an emergency or you thought that the homeowners were at risk you would have notified the building official or some other jurisdictional controlling authority that this problem exists, correct?

A. Well, I have related that to the homeowners association. The nature of the problem is that the firewalls are not complete I guess is a good way to say it. They do exist. It is a known concern, has been relayed to the HOA. It is not like a situation where there's an immediate collapse where say a beam was about to fall down and somebody's life would be in danger. So it is a life safety concern. But it doesn't rise I believe

to the level of an immediate repair.

Q. Right. And some of you may -- some of the jurors may know, others don't, when we use the word firewalls, firewalls are not something that causes a fire, they reduce the length of time that the firewalls can burn from unit to unit, correct?

A. Yes, they provide extra time for the adjoining non -- the unit that's not on fire to allow escape.

Q. And, again, have you had an opportunity to look at the scope of repairs submitted by the Defendants to address firewall conditions that they recognized like you?

A. Again, I have not reviewed any of the repair protocols from your side of the fence.

Q. Okay. Let's talk about the shingles for a second. They're 105 units, 22 buildings out there and you testified that you looked at five buildings, correct?

A. Yes.

Q. On those five buildings you looked at a total of 23 shingles, correct?

A. Yes.

Q. Not 23 shingles per building, but about five shingles per building give or take?

A. Well, actually I looked at six shingles per building primarily. There was a smaller building I looked at four. And then there was one building I was only able to look at one shingle.

Q. Okay. So 23 total shingles spread out over five buildings and you're an engineer and much better in that than I am, but in doing a calculation there was probably over 400,000 plus or minus nails out there on 22 buildings, does that sound ridiculously high to you?

A. I don't know. I have not done the math. There's a lot of nails in the community, yes.

Q. You looked at a total of 136 nails?

A. I believe that's correct, yes.

Q. So your 77 percent of the nails that are either overdriven, sidewise driven or underdriven, that is the basis of your 77 percent based on that 136 number, correct?

A. Yes, the nails that I observed.

Q. So it is not 77 percent of all of the nails on all the shingles on five buildings, it's 77 percent of the nails on 23 shingles, five or six shingles per building?

A. Correct. But I will say this: That

the consistency was amazing. The variation between the buildings as far as the nailing problems ranged only from about 72 percent to 80 percent. They were almost every roof, every shingle that I looked at they had the exact same number of fasteners issues. It was very consistent.

Q. And your concern with the nailing issues that you have raised are that if we have a potential wind event storm that you can have blow off of shingles?

A. Yes. And as I tell people all the time, if your roof is bad or your foundation is bad, really doesn't matter what's in between them. If the roof fails it can really create a lot of damage in the building.

Q. You don't have any evidence today for the ten years that these buildings have been in existence that, in fact, there has been any project-wide blow off of shingles, correct?

A. That's correct, but I really wouldn't expect there be to. We haven't had a significant storm since these buildings were built.

Q. Some experts may disagree with you, but I understand your opinion on that. But you also don't have any evidence that there has been any

project-wide leaking of the shingles that have been on those buildings for ten years, correct?

A. Well, no, but the leaking is not a concern with the nailing. Nailing has strictly to do with the attachment to the roof. It's a latent defect like Mr. Glick expressed earlier. It's something that is there. It is dormant until it is absolutely necessary. When we get a wind event and the roof peels off then it will become a serious condition and through my research the highest winds that I have seen since the project was built were around 30, 40 knots consistent and gusts of low 50s. That's the most we have seen which is nowhere close to the code required which is 110-mile an hour rating that the shingles should resist.

Q. I understand. There will be experts that disagree with you --

THE COURT: Please don't make any editorial comment. Don't pit the witnesses.

Q. Yes, Your Honor. I apologize. My question prior to that was you are not aware of any -- I understand the window and the leaks are two different things. You are not aware of any project-wide roof leaks?

A. No.

Q. So we have got ten-year old roofs that as far as you know have been performing to date, correct?

A. Yes, under the conditions they existed in.

Q. Mr. Mease, you spoke or testified a little bit about a general contractor's duty of oversight and I assume you were speaking of the onsite representative for the general contractor, be it a superintendent or a builder?

A. Well, yes, the general contractor pulls the permit. They have to have a license to do that. And by having that license pulling the permit you are agreeing to make sure that the buildings are built to code.

Q. And I appreciate that and let me try to clarify my question. The oversight that you are referring to by a general contractor, you would expect that to be performed by an employee of the general contractor, usually a superintendent or a project manager or builder, whatever they may call him or her. It's typically the position that's doing the onsite oversight, correct?

A. Yes, but my only hesitation is in my experience a lot of these foremen or supervisors,

if you will, they are not licensed contractors. That does not relieve the general contractor from his responsibility to make sure that they're done correctly. It goes back to that quality control aspect. If the person who is doing the oversight is not a licensed contractor I'm not sure that you can insure that the quality is going to be attained that's required by the code.

Q. Not suggesting that it relieves. What I was getting at is that for some of the issues that you brought up, the calibration of the nail guns pressures, the framing and the dormers 30 feet up, or the beam in the one crawl space area that we were talking about, those are not issues that you are expecting the general contractor superintendent to be looking over every nail, correct?

A. Not every nail, but again go back to the Reagan comparison, trust, but you have got to verify. I was able to get on the roof, look at the nails. I was able to get in the attic, look at the framing. It is not impossible and certainly if I am responsible for the construction of those buildings I want to insure that I am going to be able to say they are built correctly.

Q. I understand. Of -- you have looked at

a lot of multifamily buildings in your forensic career over the last five years in the coastal area?

A. Correct.

Q. And all of those projects that you have done as the lead engineer you have always come to the conclusion that they need to be entirely reclad, correct?

A. I get this question often, but the answer is typically yes, but again, by the time I get a phone call most of the time the ownership knows there's a problem and usually I am out there to verify, yes, there's a problem. So I don't get to look at a lot of shining examples of the construction. I usually get called when there is an issue.

Q. But in every instance when you finally make your recommendation, not only typically, but always you recommend a full reclad instead of some type of partial repair, correct?

A. Yes, that's generally the case. Again, as Mr. Glick said, these conditions cannot be repaired by just adding a nail. The flashings are wrong. Framing is wrong. Damage is in the walls. The only way to get to that is take the materials

off the wall so that you can do it. So while it sounds like a big deal, unfortunately it's the nature of the repair. That's what is required to do it.

MR. MANOS: Okay. Thank you, Mr. Mease.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MS. NOLAND:

Q. Mr. Mease, with the Glulam beams you have already testified that that was solely in two buildings; is that correct?

A. Yes.

Q. When you received information regarding the Glulam beams you did not extrapolate that out to the entire project, correct?

A. That's correct. And in saying that I didn't require every beam on the project to be replaced. I just said we needed to fix the ones that were bad. Unlike the roofs with the nails done incorrectly that was a consistent problem so, yes, we have to fix all of the roofs so I'm not sure what the comparison there was, but there's a difference.

Q. And as far as the shingles on the roof,

your testimony about the roofer and a nail gun, are you satisfied that with the number of shingles that you looked at that you can extrapolate that out based on a roofer using a roof gun -- sorry, a roof gun -- a nail gun?

A. Yes. Again, I look at a lot of roofs. This is not the first set of roofs I have looked at. I have looked at many, many, many roofs throughout my career. I recognize these problems and I do find the consistency that when you start checking them you and check multiple roofs you see the same pattern over and over again. I could have looked at ten more. I am very confident in saying that I would have found the same conditions because that's historically what I have experienced.

Q. May I approach?

THE COURT: Yes, ma'am.

BY MS. NOLAND:

Q. I'm going to hand you what's been marked as -- for identification as Plaintiff's Exhibit 20s through 20S. If you wouldn't mind looking at those photographs for me.

A. (Witness complies with request.)

Q. Let me know if you recognize them.

A. I do.

Q. And are these the photos that were used in your presentation?

A. Yes, there are I believe maybe one or two extra, but predominantly that's what in my presentation.

Q. And did you either take those photographs or rely on them in forming your opinions in this case?

A. Yes.

MS. NOLAND: Your Honor, we would like to move Exhibits 20 through 20S into evidence.

THE COURT: Any objections?

MR. MANOS: Without objection, Your Honor.

THE COURT: Marked and admitted without objection.

(PLF. EXH. 20-20S in evidence.)

BY MS. NOLAND:

Q. I'm going to hand you also a CD. It's been marked for identification as Exhibit 22. We looked at a video during your presentation, too. Is it your understanding that the video that we reviewed is also on that CD?

A. That's what I understand.

Q. You took that video yourself?

A. I did.

MS. NOLAND: Your Honor, we would like to move Exhibit 23 or -- 22 into evidence as well.

MR. MANOS: Without objection.

THE COURT: Marked and admitted without objection.

(PLF. EXH. 22 in evidence.)

MS. NOLAND: That's all the questions I have.

MR. MANOS: Recross, Your Honor? She brought up something.

THE COURT: Well, it is -- I will give you a little, not beyond redirect.

RECROSS-EXAMINATION

BY MR. MANOS:

Q. Thank you. Mr. Mease, you brought up a second building that had a Glulam issue in it?

A. Yes.

Q. That did not have building wrap in it, correct?

A. That's correct. From what Mr. Westendorff relayed to me that one had condensed without the wrap.

Q. And when we say that one had condensed, there was natural condensation in that crawl space,

correct?

A. Yes, as would be expected anywhere in Charleston.

Q. And it is not your opinion that the general contractor or any of the subcontractors did anything wrong that caused the natural condensation in the crawl space in the second Glulam, correct?

A. Not that I have information on, no.

Q. So there is one building with five units that had the building wrap in it that you hold the general contractor responsible for work that needs to be fixed?

A. Correct.

MR. MANOS: Thank you.

THE COURT: Any further questions?

MS. NOLAND: Not from the Plaintiff.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MS. NOLAND: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Sir, you are excused. Call your next witness.

MR. MCCARTY: Call Mr. Steve Denby to the stand.

STEVE DENBY

having been duly sworn, testifies as follows:

THE CLERK: Please state and spell your full name for the record.

THE WITNESS: Stephen Denby, D-E-N-B-Y.

DIRECT EXAMINATION

BY MR. MCCARTY:

Q. Good afternoon, Mr. Denby. Do you own one of the homes at Waverly place?

A. Yes, I do.

Q. I'm going to show you -- Your Honor, may I confer with counsel just for a second?

THE COURT: Sure.

MR. MCCARTY: I don't have an exhibit number on this.

THE COURT: What is it you are referring to?

MR. MCCARTY: I might have it. I do. No. 27. Title to the real estate.

THE COURT: Any exception?

MR. HASELDEN: No, Your Honor.

THE COURT: What number?

MR. MCCARTY: 27.

THE COURT: Plaintiff's 27 is marked and admitted without objection.

(PLF. EXH. 27 in evidence.)

BY MR. MCCARTY:

Q. Showing you Plaintiff's Exhibit 27, do you recognize what that is?

A. Yes. That's my deed, right, title.

Q. Is that the title to your home at Waverly Place?

A. Yes.

Q. How long have you owned that home at Waverly Place?

A. Since 2008.

Q. And what do you do for a living?

A. I'm retired.

Q. Have you ever served on the Waverly homeowners board?

A. Yes, I have. Actually I have served twice on the board of directors.

Q. When did you first serve generally?

A. Back in 2012, '13, in that area.

Q. Were you on the board leading up to the filing of this litigation?

A. Yes, I was.

Q. Would you please tell the jury what caused the board to consider litigation in this matter?

A. As I joined the board, we began to see a variety of problems developing. Homeowners were complaining, but what led up to us making that decision was that the flat roofs on 28 of the buildings were ponding and had some dips in them. And the water was leaking through from the roof down the columns.

Q. Did you bring these problems to the attention of John Wieland Homes?

MR. HASELDEN: Your Honor, I think we have a matter we need to take up with the Court.

(Off-the-record sidebar conference.)

THE COURT: Mr. Foreman, ladies and gentlemen, I have a brief matter of law to take up with the attorneys. I say brief. Poetic license on that. During the break please do not discuss the case. Please leave your note pads in your seats. We appreciate your patience.

(Thereupon, the jury exited the courtroom at 3:11 p.m.)

THE COURT: You can ask the questions.

BY MR. MCCARTY:

Q. I asked you before, you testified to the events leading up to this. You said it was the porches. And my question to you was did you bring

this to the attention of a Wieland representative?

A. Yes.

Q. What was his name?

A. Dennis Black.

Q. What did Mr. Black tell you when you told him you were having trouble with the porches?

A. Basically to go pound sand because they sold their company, they had no insurance and they weren't rotten in the beginning so we are not going to repair them.

Q. What did he tell you about the status of your warranties?

A. Said they had no responsibility for warranties since they sold the company.

Q. Your Honor --

THE COURT: No complaints were -- first of all, I need to know a date. I don't have any clue.

Q. Can you tell us the general date when this took place?

A. The general date was I want to say middle of '13.

Q. I am sorry, Your Honor. That's about as close as we can come on that.

THE COURT: No complaints on the

warranties were made before that?

Q. Well, let me ask you. Were there complaints made on the warranty before that?

A. Yes, there were.

THE COURT: When?

Q. Going back how long?

A. I can't answer that. I don't know.

MR. MCCARTY: That's all I have, Your Honor, except with the exception it's a statement by a party. He was still at Wieland.

THE COURT: I need to hear the basis of the objection. Do you still object?

MR. HASELDEN: Yes.

THE COURT: What's the basis of the objection?

MR. HASELDEN: Two grounds. First, it is hearsay. Mr. Black was an employee. He was not a director, officer, et cetera of Wieland. He was not authorized to speak for any of the Defendants in this case.

THE COURT: Well, I don't know because I don't have a clue. What did he do for Wieland?

MR. HASELDEN: Your Honor, more importantly, the assets of the Defendants in this case were sold to Wheelock in November of 2012.

Mr. Black worked for the successor company so any time in 2013 whatever he said goes to Wheelock, not the company that are Defendants in this case and therefore it is barred by the bifurcation order.

THE COURT: Response?

MR. MCCARTY: Your Honor, Mr. Black always represented himself to the board as a Wieland employee. His status had not changed out there until they went to -- he was in charge of responding to warranty complaints.

THE WITNESS: Exactly.

MR. MCCARTY: The assets sale purchase had nothing to do with anything. The owners weren't informed of that until it was in Wieland's best interest to do so.

THE COURT: Was he in charge of warranty?

MR. HASELDEN: After November of 2012 he worked for Wheelock.

THE COURT: Who did he work for before November '12?

MR. HASELDEN: John Wieland Homes of the Carolinas.

THE COURT: He worked for the predecessor.

MR. HASELDEN: Yes, ma'am.

THE COURT: Then he continued in the same capacity after the sale.

MR. HASELDEN: Yes, ma'am.

THE COURT: You got a little problem because you all agreed to bifurcate it. You can't bring in the successor in interest through this witness. You have an interesting situation which is not unusual. He worked for one company. Next company decided to keep him on in the same capacity. His statements would not be hearsay. It would be an admission, but it can only be against the person you worked for at the time. Can't be for the persons you worked for before unless you bring it within the time frame he was employed by that party.

So you have a time line problem. And you all agreed to the bifurcation which I think was appropriate because I really think it is way too much for a jury to try to digest. So you need to confine any testimony regarding any admissions against the Defendant who is the current Defendant in this case which is the John Wieland entity to the time frame in which the gentleman would have been employed by them and in charge of any warranty

service for them. Any reference to a sale, any reference to the successor not honoring the warranty is not relevant and you are bound by your bifurcation order. Y'all agreed to that for whatever reason. Again, I'm not criticizing because I think it was appropriate, but it's not hearsay. It is an admission, but admission against the other client, not this current Defendant.

MR. HAYES: Your Honor, may I confer with Mr. McCarty for a second?

THE COURT: Sure.

(Off-the-record conference.)

MR. MCCARTY: Your Honor --

THE COURT: Give me one second. I need to ask my deputy clerk something real quick.

(Off-the-record conference.)

THE COURT: All right.

MR. MCCARTY: Your Honor, I have one other thing. On a previously admitted exhibit, No. 32, this is an actual e-mail from Dennis Black dated 1-23-13. They have already agreed to this exhibit. And it talks about the roofs.

THE COURT: That doesn't change the evidentiary rules and it does not change the effect of your order. It was a consent order. It

bifurcated it. There's not going to be any discussion of the successor entity. It will be tried on another day. He made the admission, but it's against his new employer, not against his old one.

Now, if you have got some admissions he made before businesses changed hands I think it is free game, fair game. If he made any admissions about those warranties before the sale of this business, fair game. I don't know what No. 32 says. I don't know whether 32 -- it was admitted without objection. I don't know whether that was oversight. I can't speak to what that exhibit entails. I have no clue. I have never seen it. You did the exhibits. But as an evidentiary matter you have a bifurcation order which y'all consented to which precludes any mention of the successor interests or any interest attached to that successor in interest.

Mr. Black worked for two different companies. He only binds the people he was working for during the time frame he had an employment situation with them whether it was oral or written. I have no doubt he was a warranty person. It would make sense they would keep the same warranty person

for continuity. It's a smart business decision if he was for whatever reason, but any statement that he would have made while John Wieland owned these properties I think is fair game. But any inference regarding Wheelock which is their responsibility to have responded to the warranties after the sale is off limits.

MR. MCCARTY: What about the status as an agent of Wieland companies?

THE COURT: How can he be an agent when they didn't own the property anymore? They weren't coowners of the property. It changed hands. Now, all those other things about piercing the corporate veil, that's an issue for another day. You all agreed to bifurcate. Can't mix apples and oranges. Got to abide by what you agreed to.

Is there anything else we need to take up while the jury is out?

MR. HAYES: Your Honor, may I step out in the hallway for two seconds?

THE COURT: Sure.

(Off-the-record conference.)

THE WITNESS: Can I confer with our attorneys?

THE COURT: No, sir. I can't let you

talk to them in the middle of your testimony. Then the other side would say you contrived so I don't want to affect your credibility. Thank you.

(A recess transpired.)

THE COURT: Plaintiff ready to proceed?

MR. MCCARTY: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, ma'am.

THE COURT: All right. Bring the jury.

(Thereupon, the jury entered the courtroom at 3:30 p.m.)

THE COURT: You may be seated.

BY MR. MCCARTY:

Q. Mr. Denby?

A. Yes.

Q. While you were on the HOA board was any effort made to get Wieland to honor its warranties?

A. Yes.

Q. Was it successful?

A. No.

Q. What did you do after it wasn't successful? What did the board do? Take any action?

A. We asked the owners to file those claims and they did through our manager which

Wieland owned the --

MR. HASELDEN: Your Honor --

Q. I will withdraw the question. That's all right. With regard to -- did you all take any legal action after you didn't get any action on the warranties?

A. Yes.

Q. And what was that?

A. We hired you guys to come and litigate the case because they made it clear to us that they were not going to fix our roofs.

Q. Did you -- other than the attorneys did you hire experts?

A. We did.

Q. And did they give you an idea what was wrong with your buildings?

A. Yes.

Q. The people who have been testifying here today?

A. Yes.

Q. Are you currently serving on the homeowners board?

A. I am.

Q. What are your primary duties as president?

A. I'm president of the board now and my primary duties, of course, are to call meetings of the board, to set agendas for our meetings. The board of directors has a responsibility for the exterior of the buildings, maintaining those buildings and I interface with our manager, make sure that the lawns are mowed and so forth on behalf of the board. Make sure the gutters are cleaned, the buildings are in good working order.

Q. Mr. Denby, I'm going to hand you what's been marked as Plaintiff's Exhibit No. 28. Ask you if you recognize that?

A. Yes.

Q. What is that?

A. That's the declaration and covenants of the association.

Q. Does that contain the responsibility of the board?

A. It does.

Q. Prior to initiating the litigation was the board required to take any particular action with regards to the litigation?

A. Yes. The developers had put a clause in this document --

MR. HASELDEN: Objection, Your Honor.

THE COURT: You want to withdraw the question?

MR. MCCARTY: Yeah, I will withdraw the question.

THE COURT: Ladies and gentlemen, disregard the last question and last answer given. It has absolutely no consideration in your deliberations.

BY MR. MCCARTY:

Q. Do you recognize Exhibit No. 28?

A. Yes.

Q. And that's -- you have previously identified it as a covenants restriction; is that right?

A. Yes, I have.

Q. And, Your Honor, this has already been placed into evidence, already been agreed.

THE COURT: We don't have to go over this. Just identify the number of the exhibit.

MR. MCCARTY: Exhibit No. 28.

BY MR. MCCARTY:

Q. Other than the problems testified to here today, the last two days, Mr. Denby, what other problems, if any, are you experiencing at Waverly?

A. There seems to be ongoing problems. The beams were mentioned discovered.

Q. Other than those problems?

A. Well, we got a letter not too long ago from the exterminator --

MR. HASELDEN: Your Honor --

THE COURT: Sustained. You cannot testify, sir, to anything that someone told you. Hearsay.

BY MR. MCCARTY:

Q. Are you aware of any other problems other than what's been testified here to the last two days?

A. No.

Q. I will hand you what's been previously marked as Exhibit 29, ask you if you recognize that?

A. Yes.

Q. What is that?

A. That is the warranty that I received when I bought my home.

Q. What does that say on the front of it?

A. Said John Weiland 5/20 year, 5/20 warranty.

Q. Does that number have significance?

A. Yes. It's five years and 20 years various items mentioned.

MR. MCCARTY: Your Honor, this has already been entered into evidence. Beg the Court's indulgence for one moment.

THE COURT: Yes, sir.

(Off-the-record conference.)

BY MR. MCCARTY:

Q. Mr. Denby, were you a member or were you an owner at Waverly when the board was turned over from the developer?

A. Yes.

Q. Do you have any knowledge on your own of the status of the reserves of the board when it was turned over?

A. We got nothing.

Q. Thank you. Please answer any questions the other side has.

A. Okay.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. HASELDEN:

Q. Mr. Denby, isn't it true that when the board was turned over to the association in February of 2009 there was actually a $50,000

surplus in the reserve fund?

A. I don't believe that's correct.

Q. You don't believe that is correct?

A. No.

Q. All right. You have never lived in your unit, have you?

A. I have not.

Q. You have rented it out continuously since the day after you bought it?

A. That's correct.

Q. Have you ever had a time when you didn't have a tenant in that unit?

A. No. I had a few days in between tenants.

Q. Have your tenants ever said they had problems with your unit?

A. Yes.

Q. Like what?

A. Water draining into the storage unit ran in to the electrical system and into their materials that were stored in the storage area.

Q. Was that repaired?

A. By the homeowners association.

Q. Have you ever had any problem with the windows located at your unit?

A. I have not.

Q. Have you ever had any problem with your roof leaking?

A. Yes. That's where the leak came from. There's a stain in the upstairs bedroom where that same water during that same period of time came down through there.

Q. Do you remember being deposed in this case and talking about a water heater that had leaked?

A. Yes. That's relatively recent I had water -- the water heater didn't leak, but the hose which ran toward the pipe that ran to the water heater had kind of rotted off.

Q. So other than that have you had any problems with your unit over the entire time you have had it?

A. The leak and the --

Q. Storage unit and storage shed that leaked?

A. Well, yes, came from the roof though.

Q. Mr. Denby, other than those two items have you had any problems with your unit?

A. No.

Q. You have never had any of your tenants

move out because of any of the problems?

A. No, I have not.

Q. Are you the class representative?

A. I am.

Q. How many members are in the class?

A. The owners, 105.

Q. How many members opted out of this class litigation?

A. You know, we had to take a vote because of the requirement in the covenants that required a 2/3rds vote of the owners. We felt like that was a very high standard, but there were so many problems in the neighborhood that we got 86 votes out of 105 for moving ahead with litigation. Only two voted against it. And 17 we just didn't hear from.

MR. HASELDEN: Your Honor, I move to strike as not responsive to my question.

THE COURT: Well, the way you phrased the question -- approach. You are talking to a layperson. I asked you to approach.

(Off-the-record sidebar conference.)

THE COURT: You may proceed.

BY MR. HASELDEN:

Q. Since you were appointed the class representative and the class was certified do you

know how many people have said I don't want to participate in this class action?

A. There were only the two that voted against it.

Q. Not the vote. Since the class was certified last May, do you know how many people have said I don't want to participate in this class action?

A. I do not.

Q. How did the homeowners association go about picking your expert witnesses? The experts that have testified today, Mr. Glick and Mr. Mease, how did you go about picking those?

A. We depended on our attorneys to provide us experts.

Q. You didn't interview anybody else? You just relied on your attorneys to pick them?

A. I did not interview them.

MR. HASELDEN: Thank you, Mr. Denby. I appreciate your time.

THE COURT: Any redirect?

MR. MCCARTY: No further questions, Your Honor.

THE COURT: Sir, you may step down. You may call your next witness.

MR. MCCARTY: Plaintiffs call Gary Moore to the stand.

GARY MOORE

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your full name as well.

THE WITNESS: Gary, G-A-R-Y, Moore, M-O-O-R-E.

DIRECT EXAMINATION

BY MR. MCCARTY:

Q. Good morning, Mr. Moore.

A. Or afternoon.

Q. Good afternoon. Mr. Moore, would you please give the jury a brief overview of your work history and education?

A. The long version of that?

Q. Yes. I can ask you questions if you'd like. How about this. Where did you go to high school?

A. Well, basically I grew up in Virginia. Went to high school. From there I went to actually junior college. I played football there. Left my senior year due to family issues and did not finish. You want me to go through the work history?

Q. Where did you go to work after you left college?

A. Took a short job with Skyland Paint and Hardware actually and worked as a delivery guy for a while and then when he found out that I had a college education he put me in as the take off guy doing hardware and we had a paint facility, that sort of thing.

Q. Please tell the jury what a take off guy is?

A. Well, he asked me if I had any experience in the construction industry and actually I started out as a teenager framing houses. I was 20 years old. I knew how to frame it, build it. A bunch of my friends' dads were contractors or carpenters. You can imagine back in the day.

So as I was working in the store he asked me about where I went to school, have you done anything in construction and I explained how much I had done, been a carpenter and that sort of thing. He said can you take off doors and he gave me a set of plans and I sat down and told him how many doors there were and how windows there were.

So he said you are my estimator. So he

sent me off to Connecticut -- if anybody knows Stanley Hardware or those guys, I spent three weeks in their classes. I learned that process of take offs.

Q. Please tell the jury what an estimator is or what they do, how about that.

A. What we do is -- back in the day I spent the first 19 years of my career in the new construction industry. So I would have a set of plans and specs and we would sit down and I would dissect the specs. And specifications are basically an outline telling you what the products are going to be that you need to take off.

The plans, obviously everyone has seen a house plan. So what I would do is whatever product I was taking off, would count the number of windows, doors or whatever product I was working at and you take quantities off and you put them into a -- back then we had what we called white sheet, green sheet, just a special sheet of paper that had columns and rows and you would write down the product on the top of that how many you had, you take that off of each sheet and you would put it down.

Actually the great thing about that

white sheet that I had which I went to work for PPG Industries and at the time in the 70s they were in the glass replacement business.

I took that process and I formulated it in the 80s to computerized and that's the result of my estimate that I took that knowledge, that process, and put it into kind of a computer age tool. But estimating is trying to evaluate that. Evaluate the building. Then I moved on to being a general contractor getting into what I call the restoration business. We're a building envelope contractor. We don't build anything new. We just fix everything that's broken.

Q. After you left your initial job and you became an estimator what was your next employment?

A. PPG Industries manager.

Q. What is PPG Industries?

A. Pittsburgh Plate Gas.

Q. What do they do primarily?

A. Well, back then that local branch was in the store front glass replacement business, curtain wall windows.

Q. What did you do for them?

A. Immediately I came in and they didn't stick me in the field right away because I had a

broken leg from a motorcycle accident. But they stuck me with guys in the warehouse and kind of had to learn the business from the ground up. At that point I became known as a coordinator back then. The guys that would sell the work I would have to take their estimates and rebuild the project and put it in by the materials through the shop drawings, do all the submittals, dealing with the architects and getting that prepared to be installed.

Q. How long were you at PPG?

A. Roughly about four years.

Q. And what did you do after that?

A. Well, let me add one thing to that. The salesman that I was working with left probably within the first nine months that I was there. So there was nobody to take his place. They gave me that job. So what I had to do then, I had to go sell it, estimate it, project manage it and then see that it got put in there.

Q. After you left there what did you do next?

A. Went into the north. Went to the DC/Baltimore area, worked for General Glass. Basically curtain wall glass and glazing. If you

have seen outside of the beltway all the office buildings from the two stories to ten stories, I took off the glass, the doors, all that stuff and estimated that.

Q. What did you do after you left that job?

A. The general manager of that business went into business for himself and asked me to come with him. And so I moved in with him. Initially it was to go into business with him. Didn't work out well. And a friend of mine called me from the Greensboro area and said come back down south. That had been on and off for about seven years.

Q. What year was this?

A. That was one of the first -- my son was born, that was probably '83 around I moved down to Greensboro.

Q. What kind of job did you take?

A. I took a contractor manager job at Vince Wear and Glass and ran the contract department for less than a year. The district manager asked me to take on a branch so they gave me a branch manager's job in Charlotte. Place had never made money in the 13 years they had been there. So went in in three years and made money

for them and made some contacts in the Charlotte area and at the end of a three-year period went into business myself in glass glazing and maintained that business until about 1990. I want to say '90 because we hit a spurt in there, you guys remember the Southwestern Savings and Loan scandal. Basically shut down the southwest. All those guys moved to our area. You couldn't sell with any money if you wanted to.

Q. What did you do next?

A. So I closed that business down and went to work for a restoration contractor. We were doing a lot of parking decks in highrise buildings, caulking and coating those.

Q. What were your job duties?

A. As the estimator. So I knew very little about that side of the business. The intrigue I had with the engineers, I think the common goal that I had with them, I understand the curtain wall and the windows. I didn't understand the concrete side of it, all the coating, all that stuff. So what I provided was kind of I can go in and call on an engineer and try to get some of that work because I could talk about one thing that they liked was curtain wall takes in water, manages it

and gets it out. That's before people were talking about managing water within a wall. So I kind of got with them because of that.

Q. How long were you there?

A. I was there exactly four years.

Q. What did you do next?

A. I started at that time it was called Salem Contracting and Waterproofing.

Q. What is -- what was that company?

A. That was in 1995. I got my general contractor's license probably in '91. At that time as well during that time period I had North and South Carolina and Virginia as a general contractor.

Q. Were you licensed in all three states?

A. Was licensed in all three states. When I moved to Salem Contracting away from the company I was working with I was also licensed as a general contractor unlimited in West Virginia, Tennessee, in Florida.

What a lot of people in South Carolina don't have is an unlimited glazing license, that allows you to put in windows over $250,000.

Q. What type of licenses do you hold right now?

A. Today is North and South Carolina.

Q. What kind of licenses though?

A. Unlimited general contractors license and the glass and glazing.

Q. Have they ever been interrupted?

A. No.

Q. Have they ever been -- your license been suspended for any reason?

A. No. Never. Now, let me explain the other ones that I talked about. Now, because of what's happened in the last couple years we let those go just into limbo. I will eventually get those back. Usually there is a small test you have to take to requalify, but I will get those licenses back.

Q. What did -- you mentioned you operate Salem as your own company; is that correct?

A. Salem Contracting and Waterproofing is how it started.

Q. Then can you take us through the development of that company?

A. What happened there is a name change within about the first year because people kept calling me about waterproofing. I wanted to be a contractor and the building envelope and the

restoration. So I actually changed the name to eliminate some of those phone calls. But with that we operated on that name until 19 -- or 2010. And a company from the Baltimore area was looking for a contractor, a $450 million company --

Q. Before you get there tell the jury what Salem Contracting did up until 2010?

A. Salem Contracting did concrete repair and parking decks. We did historical masonry in Charleston all throughout the southeast, I worked from Detroit. I had a customer in ACA which is a hospital group out of Nashville if you guys know them. We did about four hospitals for them. Doing caulking, replacing windows, replacing brick. We did stucco repair. We did everything to the building envelope that would need repaired, water intrusion or structural damage.

Q. Now, Mr. Moore, you mentioned you did work in the low country in the Charleston area?

A. Well, I had an office here in Myrtle Beach.

Q. How many projects do you think -- while you were at Salem Contracting do you think you did here in the low country?

A. I mean we would do 50 or 60 projects of

all different sizes a year.

Q. What was -- how many people did you have working for you directly?

A. Probably average 55. We would get up to as much as 75.

Q. And can you give the jury an idea of some of the projects that you have worked on here in Charleston?

A. Probably will go in reverse. My last job here was Concord at Cumberland. If you guys know where the condo is right there on the corner, Right there at the corner of Concord and Cumberland. I did city hall. I did market hall. St. Phillips Grace Episcopal church. We did actually the water treatment plant that Myles spoke about. We did all the stucco and waterproofing on that particular job for him.

Q. Did you prepare preliminary estimates for those jobs?

A. I did the estimates for all those jobs, yes.

Q. And then you ended up doing the work on those jobs?

A. Yes.

Q. Please tell the jury -- let's take a

job, you mentioned Concord at Cumberland. Please walk the jury through what you did to prepare an estimate?

A. Well, actually originally I did the take off for Tom Carlson and then that job came back around with a contractor that I have dealt with, Trident Construction.

Q. You prepared the estimate?

A. Yes.

Q. What did that entail?

A. Well, we had set a plans and specs and we took off basically the entire skin as they had detailed at that time which was the bricks.

Q. Who did the plans and specs?

A. Myles.

Q. Myles is an architect?

A. That's correct.

Q. You took his plans and specs. What did you do with them?

A. Well, broke down the specifications, broke down the building components. Took this all off, in other words, typically take one item off at a time, and you coordinate that, the caulking, the brick, the stucco, windows and so you put it in a pattern on the estimate that I have and you take

those off and then calculate how that goes back together.

Q. You come up with a cost?

A. Yes.

Q. That's the end result; is that correct?

A. That's the end result.

Q. Tell us what happened to Salem.

A. What happened to Salem. My child.

Q. It is still in business?

A. No, I closed it probably -- I'd say probably, it was February or March of '16.

Q. Do you have another business other than that one that you are keeping open right now?

A. SCC is my consulting, litigation consulting business.

Q. What does SCC do?

A. SCC does the take offs or estimating for the construction company that I worked for. That was Salem. Now that's EBS, Exterior Building Services.

Q. What does Exterior Building Services do?

A. They are a general contractor. I hold the license. We have about 35 guys in the field and we specialize in exterior building components,

building skin construction.

Q. What type -- do you do multi-family units such as Waverly?

A. Yes, we do.

Q. And have you ever testified in court before?

A. I have, three times.

Q. And have you ever been qualified as an expert before?

A. I have, three times, in construction estimating.

Q. Were those courts in South Carolina?

A. Yes. They were Tennyson Row, Belle Hall and East Bridge.

Q. Are those the names of the projects?

A. Yes. It's actually One Belle Hall, I am sorry.

Q. And what area were you qualified as an expert?

A. Estimating and construction as a contractor.

Q. General contractor?

A. General contracting, yes.

Q. How long ago -- when was the last time you testified in a South Carolina court?

A. When I testified in court? One Belle Hall I believe was only about six weeks ago, four to six weeks ago.

Q. You mentioned now you are working and hold a general contractor license and you work in a company called EBS; is that correct?

A. That's correct.

Q. What are your job duties at EBS?

A. I'm an estimator and business developer.

Q. An estimator prepares estimates for jobs; is that correct?

A. That's correct.

Q. How big a job can you be asked to do?

A. Our individual single job is $8 million and our -- the last major job that we bid actually was East Bridge with Myles, developed that project and I believe that pricing was about in the $16 million range, somewhere in there.

Q. That's work -- you can do work that size as you sit here today?

A. We can do work that size, yes.

MR. MCCARTY: Your Honor, pursuant to Rule 702 I move to have Mr. Moore qualified as an expert in the areas of general contracting,

construction and construction estimation.

THE COURT: Any objection?

MR. MANOS: No objections to his qualifications.

THE COURT: So admitted without objection. You may proceed.

BY MR. MCCARTY:

Q. Mr. Moore, how did you get involved in Waverly?

A. To the best of my knowledge I think you called me or John called me, but I think it was Keith.

Q. And what did I ask you to do?

A. You asked me to meet out at the job site and to look at what Myles was doing and his crew, would I be interested in working with the homeowners to put an estimate together.

Q. And so subsequently what did you do?

A. Spent the day out there with him and watched what they did, destructive testing. I walked the project. And I think Myles and Russ kind of covered that. Walked the job, get a feel for what the facility looks like, the lay of the land, that sort of thing. So I will come back and forth, watch them take siding off, looking at the

windows. I walked the job and that was the first day that I spent out there.

Q. Now, you mentioned I contacted you. Who did you work for?

A. At that time particular time I owned Salem.

Q. Who were your clients at that point when I contacted you at Waverly?

A. Who were my clients?

Q. Who did you work for? Did you work for the Waverly HOA?

A. Yes, you asked me to work for them.

Q. And did you, in fact, prepare an estimate?

A. I did, sir.

Q. And what is the estimate for the repair of the Waverly complex?

A. The amount?

Q. Yes.

A. To get exactly I would have to read it off the bottom there, but I believe it's 18 -- I would have to --

Q. I'm going to show you what's been marked as Exhibits No. 36 and 37 for identification. Will that help refresh your

memory?

A. That and my glasses.

Q. So again my question is what is the amount of your estimate to do the repairs at Waverly?

A. That is -- I believe that's $18,493,996.23.

Q. Now, I want you to tell the Court what you consider or what goes into preparing an estimate for Waverly. In other words, what are the documents and what do you rely upon to prepare your estimate for Waverly?

A. Well, this is a little bit different than having plans and specs. What I get is an outline or scope of work from an engineer or a set of engineers, in this case an architect engineer. And they roughly write out their findings.

So what I have to do and what I have always done in the 26 cases that I have done in the last about ten years is I have to rely on and I will mention some of the engineers that y'all may or may not have heard of, the RIE's, the Stantecs, the Myles Glicks of the world. What I have done with them before, what the current codes are and what I perceive out of their scope, what I have to

do is I have to make it functional for what I think they are going to write in that drawing and in that specification.

So I have to project that and so what I do is I start taking it off in real life. I am looking at the windows, the lay of the land, how I have to scaffold it because I don't have everything itemized and specs about that thick.

Q. Not to get too -- I don't want to interrupt you, but what two documents did you rely upon initially?

A. Both of the professionals, Myles and Russell wrote scopes that I relied on.

Q. Now, I am trying to keep it clear for the jury. So then after you take those. And then what do you do next?

A. I take those and read those and that gives me an idea of their intent. And then I have to revisit the site, take whatever photos that I might feel necessary to help me do the take off. So it's -- but one thing -- might not be your question, but I am trying to answer is that what I have to do is rely on past history of what I have done in bidding the same type of job. I try to put that in here because if Myles does it, just East

Bridge, I quoted East Bridge, or I developed the litigation estimate for East Bridge. Then I went to Myles. He drew it up and put it to bid. We actually bid that.

Q. So are you saying you rely upon your experience for pricing?

A. Yes.

Q. And what else?

A. Well, the experience of knowing what to develop that pricing at, also have to evaluate how they might write the specs, codes and products. The change between liquid membranes and Tyvek, things like that that I know will be specified.

Q. For the jury's edification take us through how you came up with your numbers in Waverly?

A. For the roofing number?

Q. You can rely upon in your --

A. For that particular one, I have a subcontractor for roofing which was a little simpler, that I rely on him to give me the information of how much it will cost to take the roof off, the gutters, downspouts, the sheathing, and then I will get those square foot numbers from him. Because that's someone I will sub that work

to. We self perform. Not all the work depending on the size of the job. But when it goes out to -- when it gets too large for my forces then I will subcontract it.

Q. So tell us about the siding. How did you come up with the price on the siding?

A. Siding is the same way. I have got a good fellow in Georgia that does some of our work. I get unit pricing from him on current what's going on. I usually check with a couple of guys locally just to see what their pricing is. That's a sub that I would verify a price there. Just like landscaping. We did Highland Park. I know what the landscaping was we used.

Q. Does the same hold true with the roofing?

A. With the roofing? Yes. I have a person in Charlotte that does work here and in North Carolina and he's usually very competitive.

Q. And how long did it take you to come up with your estimate, the one that you are looking at right there.

A. Well, I mean --

Q. Talking about from the time you got hired until now?

A. Let me ask, are you talking about number of hours or days?

Q. Hours, days, you can choose.

A. Well, initially to put it together, probably took if I stay steady at it probably ten days.

Q. Does that include site visits?

A. Yes, counting the time in the field, yes.

Q. And once you come up with your estimate is that your final estimate?

A. Not necessarily. There are --

Q. Tell us about this case.

A. There were discussions along the way from what I initially thought to where it is now.

Q. Who were these discussions with?

A. With the professionals, the engineers and architects in this case, yes.

Q. And I have asked you about the roofs, the walls. What about the windows? What -- tell me how you came up with your prices on the windows?

A. Well, the windows obviously again start with a take off. Again that was several conversations with the engineer because that back and forth several times about what type of window

to put in, why, and a lot of those things. I don't know if we want to go into detail about that. That changed a couple of times. So the price went up and down, although I have a supplier. I have several suppliers that I use that will give me pricing.

Q. When you prepared this estimate were you as a company and the general contractor able to do this work?

A. Yes.

Q. Today as you sit here can your company that you work for, EBS, and you as general contractor, can you perform this work?

A. Yes.

MR. MCCARTY: Beg the Court's indulgence.

(Off-the-record conference.)

BY MR. MCCARTY:

Q. Back to the windows, are you removing and replacing all the windows in this project?

A. Yes.

Q. And why?

A. Because the professional engineer states that.

Q. Who is that, tell me?

A. Myles Glick.

Q. When you replace those windows do you replace them with like-kind product or do you replace them with an upgrade?

A. I am pricing with a like-kind product.

Q. Okay. The opinions that you have expressed here today, have those opinions been to a reasonable degree of certainty in your areas of expertise, that being construction, general contracting and construction estimation?

A. Yes, I do.

Q. Exhibit 35 that you looked at there, is that -- I am reading upside down. Is that number Exhibit 35, is that a summary of your estimate?

A. That is, yes.

MR. MCCARTY: Your Honor, I would like to move Exhibit 35 into evidence.

THE COURT: Any objection?

MR. MANOS: Beg your indulgence.

(Off-the-record conference.)

MR. MANOS: Objection, Your Honor.

THE COURT: Approach.

(Off-the-record sidebar conference.)

THE COURT: 35 is admitted without objection.

(PLF. EXH. 35 in evidence.)

BY MR. MCCARTY:

Q. I would like to hand you what's been previously marked as Exhibit 34. Do you recognize that document?

A. I do, yes.

Q. Did you author that document?

A. I did.

Q. What is it?

A. It is a resume of my background and some of the jobs that I have done.

Q. Is it current?

A. It is not.

Q. How out of date is it?

A. There is probably about half, there is 13 jobs or so on there. I have done I believe 25 or 26 projects.

MR. MCCARTY: No further questions, Your Honor.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. MANOS:

Q. Beg the Court's indulgence for a second.

(Brief pause.)

Good afternoon, Mr. Moore.

A. How are you?

Q. When did you complete this $18 million plus estimate that you have just testified to about?

A. That was probably Saturday, yes, sir.

Q. And prior to Saturday when you completed this estimate, the estimate you gave in this case before was about $25 million plus another two and-a-half for Glulams, correct?

A. I believe from the initial, that's correct.

Q. When you gave your original $25 and-a-half million estimate you hadn't talked to Mr. Glick or Mr. Mease, you had just seen their reports, correct?

A. For the most part that's correct, yes, sir.

Q. What occurred in the last week that caused you to drop seven and-a-half million dollars off the estimate?

A. One was the porches.

Q. Which porches?

A. Well, actually would affect all of the porches on the entire project and the methodology

of how Myles would like to do that. The other part would be -- which was a major part would be the windows.

Q. What about the windows?

A. That they are nonimpact windows.

Q. Meaning that if you go back and replace them, you can go back with nonimpact and in your prior estimate you priced more expensive windows?

A. I priced impact windows, yes, sir, I did.

Q. What else?

A. You and I discussed some scaffolding issues and sequencing. You and I discussed taxation on some subs. Lot of times on subs, we talked about this where I have got to carry -- pay taxes on their materials so what we decided to do is in that category let's be fair, take that out so we took that out.

Q. When you say you and I discussed, so the jury can understand what you are talking about, you are talking about when I and other lawyers deposed you in this case earlier?

A. During the deposition, yes, sir. I am sorry.

Q. What else?

A. There was -- this may have been prior to or during the deposition, but there was one line item where I picked up one extra building of windows as I was copying and pasting, how I do this estimate. I recopied a building and that was pointed out. So that's part of all this.

Q. You had estimated 23 buildings when there were only actually 22 buildings?

A. I recounted or as I was copying and pasting in our computer I recounted one and didn't realize it.

Q. Did you and Mr. Glick and Mr. Mease huddle up last week and go over all of the issues that I and other lawyers had pointed out in your deposition that were problematic in your estimate to reduce it by seven million?

A. I think we just started -- well, I started talking and said how are you going to do this. Are my thought processes like yours. And Myles said if he had -- talking about -- I can bring up the East Bridge case, how he wrote that. I said how would you write this up? This is what I am thinking. Is this what you would do. He said no, this is the way I would do it. I said okay. Then we're clear on that. I will be glad to revise

that so that's what I did.

Q. Fair. Why didn't you all go through that process the two years prior when you did your initial $25 million estimate?

MR. MCCARTY: Objection, relevance.

THE COURT: Please repeat the question.

BY MR. MANOS:

Q. I will withdraw it. What else dropped your estimate by seven and-a-half million dollars?

A. Well, as you see in my estimate and in other words, everything in this which was just picked up, it's an -- everything is linked. So when I pull out windows that reduces caulking. When I pull out something else it reduces. So it's cumulative, per diem is affected there, number of weeks, the staff, so that's probably that difference that mulls over into it so I can just take those 20 some windows out and push a button and will change it. I can change the cost of the windows and it will change those.

Q. Did you take out the 20 percent downtime for labor that you had in your $25 million estimate?

A. Absolutely not.

Q. You would leave that in?

A. Because that is a very important part of the construction industry that we debate quite often.

Q. We will talk about that. You dropped your engineering line item 15 percent, that was the three and-a-half million in the $25 million estimate, down to seven. Why did you do that?

A. That's correct. I asked Myles directly, I said if you had to do field work along with design what would your price be. And he said seven and-a-half percent.

Q. Your other estimate had 15 percent in it, right?

A. It did, absolutely.

Q. How long did it take you to ask Myles that question?

A. We were discussing all these other matters this past week and we brought that up. Prior to that I had talked to other engineers which they emphasize the field operations being there three days a week would go up to 11 to 15 percent and so that's what I had used.

Q. Do you now have an ownership interest in EBS?

A. I do not.

Q. And what has changed? Correct me if I'm wrong, but EBS didn't do this type of work when I deposed you back in May of 2016. When did they start doing this big of a job? That just happen in the last couple weeks when you huddled up with Mr. Glick and Mr. Moore?

MR. MCCARTY: Objection.

THE COURT: Watch the characterization. Rephrase the question. Sustained.

BY MR. MANOS:

Q. When did EBS start doing this large of a project that it did not do back in May of 2016?

A. I believe the intent of my answer to you and what I was trying to convey is and something that we need to be careful of, particularly in this marketplace, is getting too big too quick and being selective in our projects. And I think part of what I was saying there is we would look at this very closely, may not even want it because we have turned down Grove Park over on Daniel Island. We did bid East Bridge which was a $16 million project. We are capable of doing it.

One of the things I thought part of what you were saying is it was getting more personal would you do it, that sort of thing and I

was maybe a little confused by that. But in other words, no, I wouldn't do it because the company would or a sister company would, but not -- or we may collaborate with as we did on Cumberland with Trident and there's not a whole lot of mechanics in this marketplace. Not a whole lot of labor. You have got to be careful. A lot of time we will team up with a Trident or someone else or we will bond off good, reliable subs like they would do the siding or do the roof and get them to bond in and reduce it down to where our cap individual which would be $8 million.

Q. So the cap for EBS's bondability is $8 million?

A. That's correct.

Q. That's for a company that you don't have any ownership in?

A. I do not.

Q. A company that you are not an officer of, correct?

A. I am not an officer.

Q. And the $16 million project that you all just bid, what was that called again?

A. East Bridge.

Q. And did you partner with somebody to do

that?

A. PCG.

Q. Who is PCG?

A. Palmetto Construction Group.

Q. And Palmetto Construction Group was actually the lead contractor for that?

A. That's correct.

Q. And so Palmetto Construction Group actually contracted with East Bridge, correct?

A. Well, it was a bid situation. Actually I think the low bidder was someone else. I'm not even sure the project will go through or not.

Q. You didn't even get awarded, but in any event in the bidding process for the $16 million job so the jury can understand, the lead contractor was Palmetto Construction Group, not EBS, correct?

A. Yes, that would be correct.

Q. EBS doesn't have the financial capability to do a $16 million project, correct?

A. We have the capability of doing it and what we do is sub out the bonding to the other subs who are qualified. That brings our part down to where we do the job.

Q. Mr. Moore, I understand physically you can do the work, but financially EBS can't do the

work? They have to go out and find a lead contractor like Palmetto Group and that has the backing, that has the financials to do a project?

A. We are not financial -- we have a limited license. We are licensed to do it. We can break the bonding down to the position that we can be the lead on it.

Q. You didn't do that for East Bridge? You went to Palmetto Group in order for them to be the lead contractor, correct?

A. It would be no different than going to Trident because one of the reasons that we would do that is because we specialize in self performing the premier components of that which are mostly the waterproofing, the windows and getting it watertight so that's why we do that. Where you move -- many contractors do this. Many contractors are set up that way where they have a set bonding. But all the other bonding is set aside and that allows them to do a 20 million or 50 million. They collaborate. They just did the big museum downtown with a couple different contractors because one got in. That's everyday stuff.

Q. I understand. But you are the -- EBS is a smaller contractor, the specialty

subcontractor, that goes to the Palmetto groups of the world and goes to the Tridents of the world to be the lead contractor that would actually contract with the owners association?

A. That is one route, but not necessarily. I can do the job. I bond off my subs. EBS will be the lead contractor.

Q. Your line items that are contained in your Exhibit 35 for the $18 million estimate, did you take the line items from the various subs from your earlier estimate or are those new?

A. The subs remain the same. Of course, the windows changed because of the type of windows, but everything else is pretty much except for magnitude which changes percentages and that sort of thing, is relative with the original estimate.

Q. The original estimate being a $25 million estimate?

A. That's correct.

Q. Now, EBS is located here in Charleston?

A. That's correct.

Q. And your original $25 million estimate when you used a lot of line items, you prepared that estimate as if your former company Salem was actually going to perform the work, correct?

A. If I am understanding your question right, see if I can answer as I am perceiving it. We have two offices.

Q. Who is we?

A. EBS. We have Charlotte and Charleston. Any major job that we figure in this market in which I think is what you are talking about is we have per diem hotel or travel cost in that. Here again because of this market there is not the labor pool that you can draw from. Just look at the cranes out there right now. Most of those people are from Jacksonville, Raleigh, Virginia, wherever. It's a very small, tight market and it's hard to get the number of people. So we have to put that in there to protect ourselves to make sure that we can fill and have that cost covered.

Q. Try to ask it a different way. When you prepared your $25 million estimate the price that you were giving for $25 million was based on what Salem Group at the time would have performed the work, correct?

A. Well, started out Salem was the contractor that would back that, yes.

Q. EBS is not a continuation of Salem, is it? They're two different companies?

A. They're two different companies.

Q. You don't own EBS?

A. I do not.

Q. Salem is no longer around to do the work of the 25 million estimate that you used a bunch of the line items for, correct?

A. Stated literally you're correct.

Q. When you went from 25 million to 18 million did you knock out the 75 heating and air conditioning units that you included in your estimate?

A. I did.

Q. Why did you take that out?

A. Here again I think we did that originally in the first deposition that was brought up.

Q. What quantities were provided to you for your three or $400,000 line item for doing drainage work?

A. That was me measuring the areas which I stated in the estimate. I don't have that right in front of me, but --

Q. Did Mr. Glick provide you --

A. They were like 20 by 14 areas.

Q. Did Mr. Glick provide you any

quantities for that?

A. To be specific I'd have to look at the report, but it's simply brought out of the report. I'm not sure whether I measured that or sloped areas or not.

Q. When you first did the Glulams, you priced 25 different Glulams to be repaired?

A. That's correct.

Q. Why did you do that?

A. That was the instruction that I was given.

Q. By whom?

A. I'm not sure if that came through the engineers, but we discussed that with the attorneys. I'm not sure if that came from Russ or Myles or what, but that was the initial that were going to be 25.

Q. Somebody told you to price 25 Glulams the first go around?

A. That's correct.

Q. And the first go around you priced those about $2.4 million?

A. It was very expensive, yes.

Q. You dropped that down now to about 300,000, correct?

A. I was told there were only five.

Q. And what -- who provided you a repair design in order to price that one?

A. Really two things. One, we were just doing a shoring job. There's a job across the river on Johns Island that we were part of which was a similar repair. So what I did is I took that. Russell came to my office and we got up on the chalkboard and we detailed what we thought would work and that's how I ended up pricing it.

Q. You haven't been provided any type of design sealed by an engineer about how that work should be done?

A. No, sir.

Q. That's kind of your estimate of how you think it should be done based on what Russ showed you on that board?

A. I am taking it from two projects in the field, I am taking that logic and the shoring that we had to physically do and then Russ and I discussed it in my office and we drew it out and looked at the floor plan of the building and that's how we developed that, yes, sir.

Q. You agree that it is not your job as the repair estimator to expand the expert's scope,

correct? Experts, Mr. Glick, Mr. Mease, the consultant gives you a scope, your job as a repair estimator is not to expand it, you are just supposed to price it?

A. If I get a clear definitive direction I will price what the engineer asked me to price. When it's something that I am trying to rely on my background or industry standards for what I have done in the past then I will go with the best of my knowledge.

Q. Let's talk about this, let's talk about your markup in your estimate. You estimate profit and overhead, you have nine percent profit and 25 percent overhead, correct?

A. That's correct.

Q. And like all businesses that are trying to stay in business you need to make a profit, you pay the overhead?

A. We try, yes, sir.

Q. On top of that you put another 20 percent for labor cost, right?

A. No, sir.

Q. That's not accurate?

A. No, sir, that's not accurate. May I explain?

Q. Please tell me.

A. You are talking about the downtime.

Q. Yes, sir.

A. I am just saying the two professionals that I gave you at the deposition, I don't know if you called them or not. But we were actually at a seminar. I have done this for years. It is nothing new. I am not making it up recently, but basically here is what I have looked at throughout my career and which I have had industry standard professionals tell me actually was true.

A lot of small contractors go out of business because they're not considering what the experts say is actually 30 percent, what we call is 20 percent downtime. We work a ten-hour day. Now, when I do an estimate I do an estimate based on working on the wall. Picking up, putting this down. All of the time other than that is downtime. That could be anything from moving tools from one place to another. It could be getting instructions from your foreman or superintendent. It could be a safety meeting. It could be a JSA in the morning, but you physically don't put in your product except if we track this on trackers, eight hours a day physical working. Two hours. That where the 20

percent comes from.

Q. You add an extra 20 percent to account for those things that you just described for the jury?

A. No, we do not add to. We work eight hours and two hours of that are not driving a nail. It's picking the hammer up to drive the nail. So it is not added to, it's included in that ten hours.

Q. It's included at an additional 20 percent on top of the 25 percent overhead on top of the nine percent? It is included in your repairs?

A. I don't interpret it that way, I am sorry.

Q. All right. Did you take out the $221,000 for heating and air filters?

A. Yes, sir, we did.

Q. Took that out, too?

A. Yes, sir.

Q. You talked about small subcontractors or small contractors going out of business a second ago, right?

A. I did.

Q. Your big contract company after 20 plus

years went out of business as well, didn't it?

A. Yes, sir, it did.

Q. You agree that townhomes, condos, single family homes need to be maintained, correct?

A. I agree any building should be maintained.

Q. And part of that is repainting exteriors and caulking, correct?

A. That should be considered, yes, sir.

Q. And we deposed you last time and talked about it. It is your opinion that typically in this environment on the coast homeowners should strive to repaint their buildings every five to seven plus years, right? That's what you told me, right?

A. I believe that to be true.

Q. You don't believe they should be waiting for 15 years to repaint their buildings, recaulk them, correct? That's not very prudent, is it?

A. Well, I think in asking the question and the answer you got was how long would it last. I think that's an -- I will try to be quick. Part is the elevations. Part of it would be your maintenance and power washing, keeping it clean.

It would depend very much on the product that you are using. Using a top of the line product or inexpensive product you are not going to get the life out of it.

Q. You brought up power washing as part of Mr. Glick's repair scope. If you were to do that repair scope per your estimate you are going to remove all the siding, put the siding back, prime it and paint it with two coats?

A. That's correct.

Q. Are you still in this new $18 million estimate going to power wash the buildings after you paint them?

A. Yes, sir.

Q. You didn't take that out?

A. I did not.

Q. Have you reviewed Mr. Coffman's, CSC's, repair design for the Glulam issue?

A. I have not seen any of those.

MR. MCCARTY: Objection.

THE COURT: Basis?

MR. MCCARTY: Pitting.

THE COURT: Please approach.

(Off-the-record sidebar conference.)

THE COURT: Sustained. You may

proceed.

BY MR. MANOS:

Q. Mr. Moore, you gave some testimony regarding your licenses. I'm not sure I was clear. You currently have a general contractors license in North Carolina or it's expired and you're going to go back and get it at some point?

A. No, I have maintained North and South Carolina unlimited general contractors license along with glass and glazing unlimited license continually. What is in limbo right now, I have a lifetime license in the State of Virginia. What they do when you don't reissue it every year then what you do is you go in limbo state. So I have to go back and just take what is a business exam. West Virginia I had that for a while. Dropped that. Tennessee, I believe that's still maintained. Florida, I have to go back on line to reissue those licenses that I have there.

Q. Let me ask you about this North Carolina one so I can understand. Did you have two separate licenses? Did Salem have a license that you were the license holder for and you also had one individually?

A. As I understand the law, I'm not an

attorney by the way, is that a license is always held by an individual.

Q. Right.

A. They have to maintain to be -- I think by that statute is they have to maintain an office. The license holder has to have an office in that building of the person that they are working for, so that general contractor. Then the financial statement is from that company so the company is financially sound to be unlimited which there is a whole regulation to that, but the individual holds the license.

Q. That's what I wanted to ask you about. I appreciate the explanation. You have no knowledge of your five general contractor -- five licenses in North Carolina expiring in October of 2016?

A. No. That was renewed.

Q. That's not the case. Positive?

A. Cassie -- excuse me -- Kathryn Peterson to the best of my knowledge renewed those and as a matter of fact is in the process of renewing all of the others I have, so that was done this year.

MR. MANOS: May I have one minute, Your Honor?

THE COURT: Yes, sir.

MR. MANOS: Thank you.

(Off-the-record conference.)

BY MR. MANOS:

Q. Mr. Moore, the homeowners have not hired you to perform this $18 million repair estimate, correct? You haven't been hired to do the work for $18 and-a-half million at the project?

A. Hired to do the work? I am sorry. I thought you're saying hired to do the estimate. They have not hired me to do the work.

MR. MANOS: Thank you for your time, sir.

THE WITNESS: Yes, sir.

THE COURT: Any other questions?

MR. MCCARTY: None, Your Honor.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MR. MCCARTY: None.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Sir, you are excused.

THE WITNESS: Thank you, ma'am.

THE COURT: You're welcome. Mr. Foreman, ladies and gentlemen, we will take

advantage of this break and take our evening recess. During the break please do not discuss the case in any manner whatsoever. Please don't do any independent research on the internet. Please don't make comments on any social networking cites. Again we will resume at 9:30. Please come directly to the jury room. As soon as you all have arrived we will resume testimony. I hope you all have a great evening. Stack your notes an we will secure them during the recess.

(Thereupon, the jury exited the courtroom at 4:52 p.m.)

THE COURT: You may be seated. Is there anything before we adjourn for the afternoon from the Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. HASELDEN: Nothing, Your Honor.

THE COURT: Have a good evening. See you in the morning at 9:30.

(These proceedings were adjourned at 4:53 p.m., January 24, 2017, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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 14th day of April, 2017 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2013-CP-10-03326

WAVERLY AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC.,

PLAINTIFF,

vs.

JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC., ET AL.,

DEFENDANTS.

TRANSCRIPT OF RECORD

JANUARY 25, 2017
CHARLESTON, SC

VOLUME 3 OF 6

B E F O R E:

HONORABLE DEADRA JEFFERSON, JUDGE, AND A JURY.

A P P E A R A N C E S:

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I. KEITH MCCARTY, ESQUIRE
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Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

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(The following proceedings were held January 25, 2017, Charleston County, South Carolina, @ 9:40 a.m.)

(PLF. EXH. 26, was marked for identification.)

THE COURT: We have several jurors who are held up because of traffic. The bailiff just told me a train had several of the roadways blocked. It was taking 75 minutes to get into town. So our last juror just arrived. Is the Plaintiff ready to proceed?

MR. MCCARTY: We are.

THE COURT: Defense ready to proceed?

MR. MANOS: Your Honor, we have an administrative matter we would like to bring up. Our client needs to be in federal court at 10:00 for an unrelated matter and I don't know how Your Honor --

THE COURT: I won't stop court.

MR. MANOS: I understand that. I didn't know if you would make any comment to the jury.

THE COURT: No. I don't know that it really matters.

MR. MANOS: That's fine. I wanted to

let you know he will be back in about an hour.

THE COURT: I think that would just bring undue attention to the fact that he is not here.

MR. MANOS: We are ready to proceed, Your Honor. Your Honor, I think we do have a matter of law. Your Honor, Plaintiffs advised us that they are getting ready to call Mr. De Santis to the stand and we want to make a motion to exclude him. My understanding of Mr. De Santis's testimony for this morning is going to be based on the homeowners not being able to use the property owned. The two expert witnesses that had been called for Plaintiffs regarding the alleged defects did not put any testimony into the record or any evidence that the homeowners would have to move out of the houses. Neither Mr. Glick nor Mr. Mease did. And Mr. Moore did not bring up any testimony on direct or cross that in order for him to perform his repairs that the homeowners would have to move out.

So we believe based on Rules 401, 402 and 403 that there is nothing in evidence that Mr. De Santis can rely upon to offer his opinions that he would have based them on. So any of that

testimony would be not probative, not relevant, confusion, undue delay and it all should be excluded, Your Honor.

MS. NOLAND: Your Honor, actually Mr. De Santis did rely on discussions with --

THE COURT: First tell me who is Mr. De Santis.

MS. NOLAND: Mr. De Santis is the Plaintiff's expert on loss of use valuations.

THE COURT: What's his background?

MS. NOLAND: He is -- he owns a real estate company, also owns a consulting company that has been -- he has been admitted in multiple cases as an expert. The court of appeals recently in Pope in 2011 found that he was qualified to testify. He has an extensive background in rental rates, vacation rentals as well as his -- long-term rentals. He does this for a living. And he owns two businesses which easily both give him qualification, but he has spoken to Mr. Moore. I believe under 705 and 702 he is allowed to rely on information that's given him from other parties and Mr. Glick did testify, I believe, that these units needed to be repaired and that there would be a time span which they would be uninhabitable. But

based upon Mr. Moore, he has been deposed on the matter as well as communications between Mr. De Santis and Mr. Moore. Mr. De Santis is going to testify that he has been made aware that these units will be uninhabitable for a period of time. I believe that's in his requisite knowledge. He can base his opinions on things that are told to him outside of the courtroom.

THE COURT: What's the basis of his testimony? What is he relying on?

MS. NOLAND: He is relying on Mr. Moore's estimate and how long these units will be uninhabitable. Mr. Moore has testified that it would be approximately four months, maybe a little bit longer, that people will have to move out because they are going to be working on -- they would be working on four buildings at a time. And so Mr. De Santis has looked into the rental market in Mt. Pleasant specifically and will testify that for these homeowners to be able to -- to not have the value of their units for this amount of time it would cost this much.

THE COURT: Is it located in any of your experts testimony the exact amount of time, an estimate window of time these people will have to

be out of their residences for repair?

MS. NOLAND: Yes, ma'am.

THE COURT: Where is that located?

MS. NOLAND: His report bases his opinion on between five and six months. His expert report which has been marked for identification has provided he based his opinion on five to six months. He's looked back at his numbers and has provided a valuation of summary sheet that we will be putting into evidence as well that has his numbers.

THE COURT: Did he actually testify to that? His report did not come into evidence, did it?

MS. NOLAND: Mr. De Santis's?

THE COURT: Was that something you all agreed upon being admitted into evidence? I don't recall you moving it into evidence.

MS. NOLAND: Mr. De Santis's --

THE COURT: I am not talking about De Santis. I am talking about Mr. Glick who you say Mr. De Santis relied on in making this estimate on the window of time that would be necessary for them to be out of their residences for.

MS. NOLAND: Mr. Moore's summary sheet

does not indicate the time that it would take. But Mr. Glick testified that that would be period of approximately six months, that this project as a whole based on the scope of repair would take four years.

MR. MANOS: Your Honor, can I respond to that, please?

THE COURT: I need to let her finish.

MS. NOLAND: So it was testified to by Mr. Glick on Monday and Tuesday.

THE COURT: So what exactly is your expert going to say the amount of time is required for them to be out of their residences?

MS. NOLAND: Specifically he is going to testify that he ran his numbers on a time span of six months because --

THE COURT: Anything else beyond that would be speculative.

MS. NOLAND: Well, yes, but he has run numbers to indicate that if you did it on a four-month basis it would actually be higher because he would go into a vacation rental type.

THE COURT: I am a little confused. If I have to have my house repaired there should be a finite period of time estimated I have to be out of

my house. That's not speculative. You don't have to move out of your house to have your roof repaired. To have a joist under your house repaired, that's a whole different matter. I don't think you can live in a home while some of the undergirding foundation of your home is being repaired. So you can't give a general estimate of all 37 of the remaining Plaintiffs because they don't all have the same damages. They don't all have the same scope of repair.

So what I am trying to ascertain is how are you -- is he going to testify regarding loss of use if he is not going to deal with each one of these units? I don't think he can say everybody has to be out of the house for six months if only one of them needs the roof replaced. People get their roofs replaced every day. You don't have to leave your house to get your roof replaced.

MS. NOLAND: Your Honor, this is for the common areas and for the specific amount of time that these units will be uninhabitable and he has divided --

THE COURT: That still doesn't answer my question. I need to know what repair is it in a common area that is going to necessitate a

residence will be uninhabitable.

MS. NOLAND: The roofs, windows and siding.

THE COURT: You don't have to move out of your house to have the roof repaired. We were here while they were taking siding off the building, more specifically on my side where they took every brick off this building. Took the water barrier off and put it back and I never left my office.

I was here the whole time. The only time I had to leave was when they ripped out my office to the studs and took out the drywall because there were mold spores in there and I couldn't be in there which was for my health and safety. I have never heard somebody needs to move out because siding is being taken off. If that's the case any time people get siding on their house they'd have to leave their homes every time they have to get siding on their house.

MS. NOLAND: Your Honor, what about the time that an actual window is being taken out of every one of the openings?

THE COURT: I don't know. You need some testimony that goes beyond speculation as to

each unit and what repair is going to be required and how long they are going to have to be out of their house. I don't know how to answer the question. You have services all over Charleston that advertise replacing windows. They come in your house. In a day your windows are out and they are back in. People don't move. So I'm trying to figure out -- you can't just say for this entire development everybody is going to have to be out of their house for six months. Everybody's house does not need the same repair.

MS. NOLAND: Your Honor --

THE COURT: Or unit.

MS. NOLAND: It's our position that Mr. Moore did his cost estimate for all 22 buildings. And that with respect to those 22 buildings not all of them can be worked on at the same time so methodically he was going to work through each building and it's his best estimate that it would take --

THE COURT: You are telling me he is going to testify as to the scope of repair for each building and not to scope of repair, but based on each individual unit the amount of time each one of these individuals have to be out of their house?

MS. NOLAND: Your Honor, also in the Pope case, Mr. De Santis can testify regarding the commonality and the uniformity of the repairs that Mr. Gary Moore is going to be performing. His estimate and summary sheet that were put in yesterday cover all the windows. And they cover all the siding. And so we do have evidence in the record right now that these are project wide and so -- as well as the firewall assemblies that were and the shingles, so it is not just someone coming in and doing, you know, one window at a time. These --

THE COURT: I understand that. The services that I am talking about they come in the entire house and take all the windows out. Fifteen windows at a time. Take them out and put them back in the same day. I am trying to figure out what -- you cannot just generally say that all of these people are going to move out of their units. Because all of them do not have the same scope of repair. If my next-door neighbor's windows are being repaired and my roof is being repaired I don't have to move out of my house. I don't know where -- I am trying to figure out, the firewalls, people live in their house all the time while

renovations are being done. Just depends on your level of tolerance.

So I need something more definitive that rises above speculative testimony about what period of time. You can't say everybody will be out of their unit for six months. That's not reasonable to conclude. It is not all going to have the same scope of repair. He has already testified some peoples houses the load bearing joists under the house the wrapping was taken off and they don't have that problem. So apparently those folks don't have a foundation issue. But, of course, then you run into the issue where these units are joined together. But I don't think you are going to have to jack up every house to repair a joist. If you got an end unit, joist being replaced on this end unit is not going to replace the joist on the other end of the unit. That's not reasonable.

MR. MCCARTY: Your Honor, in order to do these repairs these are large buildings that contain a number of homes within them. In order to do these repairs as efficiently as possible a number of these repairs are going on at the same time. The roofs, the siding, the windows are

pulled out, the porches on the front are being pulled off and replaced with life safety issues. This building is not going to be able to be gone in and come out of by a human safely.

THE COURT: I understand that. What I am saying is you are telling me you are going to move everybody out of this complex for four months?

MR. MCCARTY: Yes. No, no, not everybody. Everybody in four buildings at a time out for four months. He will say --

THE COURT: Rotate it.

MR. MCCARTY: Yes, it will be staged around the project. But these are -- there's -- you have got dust, you have debris, you have got insurance problems with the contractors, you are going to have scaffolding on the side of these buildings to protect the people walking under. There is no way that -- it's not a home where you leave for work for the day and come back and you got new windows. This is a time project with a bunch of people out working on your house causing damage to the inside of your house, those type of things. It is not --

THE COURT: I understand that. Like I said, it depends on your level of tolerance.

People live through renovation every day.

MR. MCCARTY: I understand that, but in this case here the contractor is not going to be comfortable with them staying in there and putting them in danger.

THE COURT: I need to know what the foundation of his testimony is going to be. I need to make sure it rises above being speculative. I am listening intently. I didn't hear anybody say that the scope of his work was going to require those folks to be out of the house four to six months. Are you telling me there's a report he relied on that said that? There is a proposal that says that? That was not testified to.

MS. NOLAND: Your Honor, the deposition testimony in this case by Mr. Moore has been there will be a period of time that these units are uninhabitable and Mr. Glick testified as well there will be a six month --

THE COURT: Did they say what time it was uninhabitable?

MS. NOLAND: I believe so. I can --

THE COURT: I need more.

MR. MCCARTY: For a six-month period of time each set of units, Your Honor.

THE COURT: Yes, sir.

MR. MANOS: Thank you, Your Honor. The testimony by Mr. Glick at his deposition which was not testified to at trial, but in his deposition he said the only reason that the owners might have to be out of their house was because you might have to disconnect the meter banks because of rotted posts. That was the one photo they showed, Mr. Glick showed that meter bank and said about the electricity being a problem.

And that could be a three to five-week process. That was in his deposition. He said there was no other reason for the homeowners to move out and that was at line 131 through 34 -- page 131 through 134 lines 10 to 15 in his deposition.

Mr. Moore testified in his deposition that if Salem was going to do this work they would only do the work if everybody moved out. He didn't say that Mr. Glick told him everybody had to move out. He just said if I am going to do the work I want everybody to move out because I have these concerns and this is how I would sequence it. I would have cross-examined Mr. Moore on why -- all the issues that Your Honor brought up had it been

put in evidence, but it didn't get put into evidence, Your Honor. Mr. Glick didn't say anything about loss of use; Mr. Moore didn't say anything about loss of use.

THE COURT: I don't know that it has to be. I think if he -- if there are depositions that say that he relied on them.

MR. MANOS: He couldn't have relied on Mr. Glick's deposition because Mr. Glick didn't say it. So he's relying --

THE COURT: Mr. Glick said there was some period of time they have to be out.

MR. MANOS: He said possibly three to five weeks, so as an officer of the court that's what he said.

THE COURT: Did Mr. Moore's deposition say they would have to be out?

MR. MANOS: Mr. Moore said I won't do the work unless they're out. He didn't say --

MR. MCCARTY: Same thing.

MR. MANOS: It is not the same thing and certainly --

THE COURT: Don't talk to each other.

MR. MANOS: Certainly Mr. De Santis as a real estate agent can't talk about how long

construction takes, how long people --

THE COURT: Well, he can testify about the basis of an estimation he has made. I think it really probably is a weight issue, not an admissibility issue. I think all the things you raised are issues that go to his credibility that go to the foundation of his opinion and how he arrived at an opinion and I think you can more than adequately cross-examine him on those issues. The motion to exclude the testimony is denied. Ready to proceed?

MR. MANOS: Yes, Your Honor.

MR. MCCARTY: Yes, Your Honor.

THE COURT: Whose going to be your next witness?

MS. NOLAND: Your Honor, Francis De Santis.

THE COURT: How his is first name spelled?

MS. NOLAND: F-R-A-N-C-I-S.

THE COURT: Who will be your next witness after Mr. De Santis?

MR. MCCARTY: John Freeman, Professor John Freeman, Your Honor.

THE COURT: Then who will your next

witness after that?

MR. MCCARTY: We are still considering that at this point.

THE COURT: Well, I am asking for scheduling purposes. I need you to give me your best estimate who that will be.

MR. MCCARTY: We are considering calling Jeff Sills as the next witness.

THE COURT: All right.

(Whereupon, the jury entered the courtroom at 10:03 a.m.)

THE COURT: You may be seated. Good morning, ladies and gentlemen. I'm glad that everyone arrived safely. I understand there was some challenges with traffic today. But we are glad that everyone arrived without incident. We are now going to resume testimony. I would ask that you give counsel your undivided attention. You may call your next witness.

MS. NOLAND: Your Honor, we call Francis Bud De Santis to the stand.

THE COURT: Sir, if you would come to the stand and be sworn.

FRANCIS DE SANTIS

having been duly sworn, testifies as follows:

MR. HASELDEN: Your Honor, we would renew our objection.

THE COURT: I think you have already made a contemporaneous objection and it's been preserved.

THE CLERK: Give us your full name and spell your last name for the reporter.

THE WITNESS: Certainly. Full name is Francis, F-R-A-N-C-I-S, A, middle initial A, last name is two words, De Santis, D-E S-A-N-T-I-S. I go by Bud as a nickname.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. NOLAND:

Q. Good morning, Mr. De Santis.

A. Good morning.

Q. Please also introduce yourself to the jury for me.

A. I am sorry?

Q. Please also introduce yourself to the jury for me this morning.

A. Everybody calls me Bud. Last name is De Santis.

Q. And are you familiar with the Waverly at Hamlin Plantation townhomes?

A. Yes, ma'am.

Q. Briefly how are you involved in this case?

A. I was asked to prepare an estimate of the economic value for the loss of use under the premise that the dwellings would not be habitable during the time of repair and therefore what is the dollar value for that.

Q. And have you come to a conclusion on those numbers?

A. Yes, ma'am.

Q. Okay. Mr. De Santis, first we are going to go through a little bit of your education and background. Could you please give me a brief overview of your schooling and training?

A. Certainly. I have a bachelor's degree in chemical engineering from Villanova University, did graduate work at Catholic University of America and LSUNO. Worked for 28 years in the petroleum equipment, electronic equipment and financial services technology fields. And then some people say I saw the light and in 1995 I bought a company in Myrtle Beach with my oldest son and we have been practicing real estate and vacation rentals in Myrtle Beach for the last 22 years.

During that time there has been a lot of experience with regards to the rental market which is the reason why I am here.

As far as other things, I am licensed by the State of South Carolina to be a real estate agent if you will. But I am also the broker in charge at Atlantic Resort which is the name of the company. Atlantic Resort Group is our real estate and rental company.

The broker in charge is someone who is responsible to the state for the behavior of that company. So I am the buck stops me kind of person on the real estate side.

Q. So you mentioned your company Atlantic Resort Group.

A. Yes, ma'am.

Q. What does that company specifically do?

A. Atlantic Resort Group is a vacation rental and real estate sales company. And we manage or handle rentals for 150 condominiums, townhomes, homes in the area. Real estate sales can be anywhere. So I mean it's whatever they do. I stand you before, though, representing Atlantic Consulting Group which is a company of one person. It is me. And I have done consulting work for the

last 22 years. Ninety percent of that work has been in the area of loss of use.

Q. Okay. Is your knowledge with Atlantic Resort Group helpful in your consulting group business?

A. Very much. Particularly because for the last 22 years I am responsible for establishing the rental rates for the different types of facilities, whether they are townhomes or condos, whether they are one or two bedrooms or three or whatever. What time periods, what are the time periods for the prices to change and that is -- I do that with an emphasis on competitive analysis. So that I spend a fair amount of time studying the behavior of other real estate companies and other entities who are in the market renting because there is no one answer to a rental. So it's a lot of different people.

Q. And you mentioned being a broker in charge. What's the practical difference between that and just a real estate broker?

A. The broker in charge would be the one who is singly responsible for the behavior of the entire company no matter how many brokers there are or how many sales agents there are in the company.

It's compliance to the laws and regulations of the State of South Carolina. That's the reason for the broker in charge.

Q. And how long have you held the license of broker in charge?

A. Twenty-two years.

Q. As part of your licensing requirements do you have to do continuing education?

A. Yes, ma'am. We -- it's -- continuing education is in -- divided into two parts. One is what is called core or things that you absolutely have to do and then there's elective. That sum total is eight hours of continuing education every two years. That's been true for a number of years until January 1st of this year when the law changed and now that number has gone up.

Q. Are you a member of any professional societies?

A. I belong to the Coastal Carolina Association of Realtors, the National Association of Realtors, Vacation Rental Managers Association, things that are associated with that.

Q. And do you glean information from those societies as well that are -- that you rely on your opinions?

A. To some -- certainly knowledge of the industry as to what is happening in the industry is brought about by those contacts, those professional contacts.

Q. Through your 22 years of experience do you feel as if you have specialized in loss of use?

A. Yes. It was about -- I started with the first loss of use analysis some 14 years ago and during that time I have prepared over 40, nearly 50 loss of use analyses. I have been deposed some almost 30 times. In court several times. I have been affirmed by the state appeals court once. So it's -- the loss of use has been going on for quite a while.

Q. So you have been qualified in a court of law for South Carolina as a loss of use expert?

A. Yes, twice.

Q. Have you worked for other homeowner associations to determine loss of use in similar cases such as what we have at Waverly?

A. Yes. Certainly in the structure being there. The buildings could be different. The type of environment could be different. But the idea of calculating the rental equivalency or the rental amount for the loss of use has been true for many

homeowners associations. I have also worked for single family dwellings for single individuals, a variety of different organizations.

Q. And have you, in fact, been hired on behalf of the homeowners in the present case?

A. Yes, I was asked to prepare a loss of use analysis for the Waverly at Hamlin Plantation Townhome Association.

Q. And what is your hourly rate?

A. One hundred fifty dollars an hour with a maximum for homeowner associations at $1,500.

MS. NOLAND: Your Honor, pursuant to Rule 702 I am tendering Francis A. De Santis as a qualified expert witness in the field of loss of use.

THE COURT: Any exceptions or questions?

MR. HASELDEN: Subject to our prior objection.

THE COURT: I am talking about his expertise.

MR. HASELDEN: No, ma'am.

THE COURT: Admitted without objection. You may proceed.

BY MS. NOLAND:

Q. Mr. De Santis, please give the jury a little bit of your background, how you first became involved in this case.

A. In February of 2015 I received a request to consider doing a use loss of use analysis from counsel. And I conducted the research and the calculations in March of 2015 and subsequently have been in contact with them through that time to here now.

Q. And did you repair -- prepare a report on your findings?

A. Yes, I certainly did. And that was published in March of 2015.

Q. And based on that report and any information you have been given since that time, have you prepared a summary of your calculations?

A. Yes, ma'am.

Q. I'm going to hand you what's been premarked for identification as Plaintiff's Exhibit 26. Do you recognize this document?

A. Yes, ma'am.

Q. And --

A. It's the loss of use estimate in categories that I had prepared with information between then and now.

Q. And you prepared those calculations?
A. Yes, ma'am.
Q. And does that contain your ultimate conclusions in this matter?
A. Yes, the ultimate conclusion, if you will, the bottom line numbers that the value for the loss of use for these 93 townhomes is $1,758,120, 1.7 million and it is broken up into the different parts.
MS. NOLAND: And we would like to move Exhibit 26.
THE COURT: Did you show it to counsel?
MS. NOLAND: Yes.
THE COURT: Any exception to the document?
MR. HASELDEN: Yes, Your Honor.
THE COURT: Please approach.
(Off-the-record sidebar conference.)
THE COURT: What number was that again?
MS. NOLAND: 26.
THE COURT: Under advisement. You may proceed.
BY MS. NOLAND:
Q. As part of your preparation for this morning's testimony did you prepare a visual aid to

help explain to the jury some of these numbers and how you came to them?

A. Yes, ma'am.

Q. And would that help you?

A. Sure would.

Q. Go to the first slide, please. Mr. De Santis, would you please explain to the jury generally just what loss of use actually means?

A. The term loss of use is applied when you can't use your property through no fault of your own. As I understand it you have a fundamental right, we all have a fundamental right to use the property that we own. If you're precluded from it there's a loss of use.

The quantification for that generally in the industry or in record history is the rental value of the item that's lost. So if you dwell in a two bedroom apartment, if you will, the loss of use if you are precluded from being able to use your dwelling would be the rental of a two bedroom apartment that is functionally equivalent to yours.

So my work usually relates to identifying the different sizes and term of the uninhabitable. So when a unit or dwelling is uninhabitable how long and then what size is it.

And then go into the rental market and try to find examples of things that are equivalent both in size and in term.

The rental market itself is not singular. As you probably know if you rent anything, you can get different prices from different companies or you can -- there's no single solution to it. So it's a matter of looking at multiple locations that are offering things to rent, which could be real estate companies, it could be an individual, someone does a for rent by owner types of things, all kind of things go on. I try to come up with a number that represents what the industry would look at for that size and that term. So that's the rental value of the property.

Q. Now, have you spoken to Mr. Moore, Mr. Gary Moore, who we heard from yesterday about his estimate for the repair of these units?

MR. HASELDEN: Your Honor, we would object to any conversation he had with Mr. Moore.

THE COURT: I need the basis of the objection.

MR. HASELDEN: Hearsay.

THE COURT: Sustained. Hearsay. Rephrase.

THE COURT: He can't say what someone said to him.

BY MS. NOLAND:

Q. You drafted a report in this matter?

A. Yes, I created a report in March of 2015.

Q. Okay. And based on that report you gave that to the homeowners?

A. Yes, ma'am.

Q. And your report -- in your report how long did you say that the uninhabitable period would be for Waverly?

A. The length of time that something is uninhabitable is a piece of evidence that is given to me and in this case I received communication indicating that the dwellings would be unhabitable for between five and six months. And that's the basis on which the analysis was prepared and I have had a telephone conversation with the gentleman this morning --

MR. HASELDEN: Your Honor --

THE COURT: Basis?

MR. HASELDEN: Hearsay.

THE COURT: Sustained. Hearsay.

BY MS. NOLAND:

Q. Following the drafting of your report have you revised any of your reliance to alter those months?

A. I have not changed my report on that basis, no.

Q. Are you aware that these units will be uninhabitable for a certain period of time based on the construction estimate?

MR. HASELDEN: Your Honor --

THE COURT: Basis of the objection?

MR. HASELDEN: Foundation.

THE COURT: Pardon?

MR. HASELDEN: Foundation.

THE COURT: Approach.

(Off-the-record sidebar conference.)

THE COURT: You may rephrase the question.

BY MS. NOLAND:

Q. Have you relied on any opinions in this matter with respect to the time frame that these buildings may be uninhabitable?

A. Yes, ma'am, I received an e-mail indicating --

MR. HASELDEN: Your Honor --

THE COURT: Yes.

MR. HASELDEN: E-mail is the same thing as --

THE COURT: He can rely on hearsay. He can't say what was said. He can establish that as the foundation of his opinion. Overruled. Sir, you just cannot say what anyone said to you.

THE WITNESS: Yes, ma'am. So an e-mail -- I received an e-mail that gave me the starting point and that was the five to six month estimate.

BY MS. NOLAND:

Q. Okay. Mr. De Santis, what I would like to do now is kind of explain your process and how you come about finding a number to put on a monthly value.

A. Okay.

Q. If we go to the next slide.

A. This slide is a description of the many different price possibilities that could exist in the rental market. Let me start with the most essential. When someone says that there's a loss of use of a dwelling, it could be a whole lot of different types of things. It could be a recreational vehicle. Could be a condo. Could be a house. Lot of different types of dwellings. But within that context you'll notice over here on the

left-hand side there is vacation rental. Then there is long term. And in the rental market those are two very distinctly different types of rental rates. In the vacation rental you will see that you can have daily, weekly, monthly or quarterly, but fundamentally they are all furnished.

So whenever you go on a vacation you expect to go in a place that you can live in. There are -- in my knowledge there are no unfurnished vacation rentals. Down here on the long term, you'll notice that there is the -- six-month is a time period that I listed and then annual is the bottom line. Annual rentals represent a lease and they -- you engage in a contract to occupy and 99 percent of them are unfurnished.

So when you go to an apartment complex or to rent a condo normally they are empty for the purpose of a long-term lease.

Here in the market over the last ten years or so six-month rentals have become -- they are there, there are some. Annual rentals dominate, but there are some six months. That's the reason why I have listed it here.

There are very few who rent their home

on a six-month basis furnished. It's -- they are there, but there's very few. Normally if you want a furnished place to go to, you are going to be in a vacation rental.

And as a key element for understanding my opinion on this particular case because turns out I ended up selecting the six-month long term category for generating the number knowing that if it were to be less than six months it would go into the vacation rental and that would be much more expensive, much higher number. Vacation rentals unto themselves are seasonal. There's not a flat rate for every day of the year. It goes up and down with the season. You get some very high numbers and get some low numbers.

When you go long term usually like if you have done that yourself you are going to pay a flat fee for a month and that's the basis here for getting into the long term side.

But anyway that's -- you can get a number by getting into one of these categories which one is the right one, which one is the applicable one.

Q. So for purposes of your calculations and analysis at Waverly you chose to try to look

into the six-month category?

A. Yes, ma'am, the six-month furnished is the category because the dwellings at Waverly are already furnished. People are living in them or they have been -- I assume they are all furnished I should say. Therefore, the rental of a furnished alternate location was what is the basis.

Q. Now, as a part of your analysis did you go out to Waverly?

A. Yes, ma'am.

Q. Okay. What was the purpose of that?

A. To get a sense for the type of environment in which to place the rental types in the market. You would look at the environment as to the type of place it is. So that a campground is not the same as a residential kind of environment. So...

Q. Did you get an idea of the size and configuration of the units that are out at Waverly?

A. Yes. Well, that was the secondary reason for visiting is that almost half of my work usually deals with getting what are the sizes of the dwellings that are being examined because you can drive by any building. You don't know whether or not there is one bedroom or three bedrooms or

whatever. You don't know what's in there. And trying to find out what they are is one of the reasons for getting around trying to see how the buildings are structured, how they are put together. Not -- I said that incorrectly. I don't worry how they are put together. I meant how are they contained or how are the housing units contained in the dwellings.

Q. So once you determine a size by bedroom or square feet, you go into the rental market to --

A. Yes.

Q. -- estimate?

A. That's also an important point. The rental market operates on the basis of bedrooms as a criteria. You are going to find a two bedroom rate, three bedroom rate; you are going to find a four bedroom rate. It's almost insensitive to square footage. In other words, the difference between a three bedroom and another three bedroom in this market here in Charleston County, you know, three bedroom condo is going to be give or take within a thousand feet difference. It's not a lot of difference. You are not going to find a different rate because one had a hundred more square feet than the other.

In Waverly the situation was unusual in that there are three bedroom units that are very large, much larger than normal. And therefore I created or categorized them differently from the standard that you see in the market.

Q. What specifically were the types of townhomes that you saw at Waverly for example, two bedroom?

A. Oh, yes. I divided the Waverly unit into three categories. There are what I call the two bedroom standards, regular, normal two bedroom, two bath. There's a three bedroom regular which is three bedrooms, give or take 1,500 square feet in that, and then there's a third one I called the three bedroom large. And the three bedroom large square footage is in the 3,000 square feet range. 3,000 square feet would be a pretty large home so it's almost twice what a normal condo/apartment three bedroom would be.

In doing the research to try to find six-month furnished rentals of these three categories, I was able to find examples in the market of two bedroom standard furnished, and similarly with a three bedroom standard I would find a three bedroom standard rental furnished for

a six-month period. It was a three bedroom large that was the biggest challenge because there I could not find a 3,000 square foot home, apartment, condo furnished being available for rent for six months. That just -- I could not find it.

So the solution to that was to go into the unfurnished market which there is many more and I went into the houses. So with a 3,000 square foot home unfurnished that is renting annually for a six-month period and then go and find out what renting furniture and kitchenwares and what you would use to fill the place, put that rental value and put the two of them together. So unfurnished home and rental furniture and whatever, put that together.

Those -- that represents the three bedroom large. What you see here is the rates that I have found which includes utilities. And for the most part six-month rental is -- most of us encounter when you go in you're going to be paying your own electricity, you are going to be paying whether it's gas or whatever the fuel is, your phone, your television, your utilities that you would consume and that relates to these numbers.

So a two bedroom turned out to be

$2,125 a month. The three bedroom was 3,135, and then the three bedroom large taking the unfurnished plus the furniture rental came out to 4,328 per month.

Q. Specifically, we are talking about the two bedroom standard. Where did you draw your $2,000 a month rental number?

A. I was able to identify a two bedroom in the Charleston area, actually in Mt. Pleasant where they were renting it furnished for six months or actually was -- sorry, it was rented for a year furnished and I made the assumption in all of this that an owner today would accept the six-month rental and therefore the price or the value would be the annual rate but only for six months. That's an assumption on my part. I don't -- that's up to the individual person that owns the property that's being rented, but I was predicting that would happen.

Q. And for the comparable rental for the two bedroom was that actually at Waverly?

A. I believe the three bedroom standard was the one that was I actually found a place at Waverly that was the basis. So you can't get any better than that in terms of having a rent rate of

something that's in the same general vicinity of what you are looking for.

Q. Let's talk a little bit about the three bedroom large. You said for the two bedroom and the third bedroom you found furnished, but for the three bedroom you could only find unfurnished, correct?

A. That's correct.

Q. Now, how did you go about determining an amount to put on furnishings in the three bedroom large?

A. There are furniture rental companies that some of them are national. They operate around the country. If you were temporarily housed and you went to an unfurnished place like executive corporate stay kind of thing or you can rent furniture. You can also rent the housewares that you would need, cups and saucers and knifes and forks, things like that.

In choosing -- they generate packages to cover a wide range of individual desires for furniture. One example of the low end, low meaning low dollar value and small might be a college student whose on a budget and is looking for just basic essentials. Another is for one who wants the

highest end of luxury and therefore the rental would include everything down to artificial plants, that kind of stuff. I chose essentially a middle of the road kind of rental saying that these people, the model that we are using would be of people who are dwelling there now, that they are not going to have the television sitting on the floor. They are going to have to have a TV stand. So those things are included in the package.

And similarly with the housewares, although the usual essentials would be there to insure that you have a vacuum cleaner or an ironing board or things like that as well, but I did not take the high end. I took the middle of the road again under the premise that if they want to use a special coffee machine that's up to them. Just regular standard Mr. Coffee kind of thing is what was in the package. So they were middle of the road in the case of the furniture and the housewares.

Q. So not the most expensive package and not the most minimal package?

A. No, right.

Q. When you are calculating your loss of use, are there any other costs that go into your

number?

A. Well, there are many other costs that are considered. They may or may not go into the number. You know, one extreme of that would be to have if I were told that all personal property has to be removed. That has happened in my experience where a case where the construction company was going to do the work, refused to be responsible for any personal property so the basis was to remove everything, put it into storage and then bring it back. So those costs were added in that case. In this case I assumed and that's strictly me --

MR. HASELDEN: Your Honor --

THE WITNESS: -- that there is no personal property movement.

MR. HASELDEN: I will withdraw it. That's fine.

BY MS. NOLAND:

Q. In the present case we didn't look at moving costs associated?

A. No, no, I chose not to include it at all. I just assumed that everything would be kept in place and therefore that's an example of a cost that didn't get added. Example of costs that were added here are really only two. One is what is

called a departure clean and that would be of the dwelling that was worked on. Usually when the construction people are finished they will remove their equipment. In many cases they will sweep it clean, but for the returning occupant there needs to be a deeper clean to it. If there is any woodwork or anything like that, there is pine particles that are in cabinets, in the drawers and it's everywhere. And so my assumption was that under these this circumstance a construction clean would be warranted. I did not have any information to tell me it is or isn't. I just have my assumption.

Q. So as far as what the construction clean is, it would be a cleaning of the townhome before a unit owner moved back in?

A. Yes. Into the rentals and cupboards, take the plates out, all that, just clean everything and get the dust off the baseboards and all that. So a spring cleaning, if you will, something of that nature. That's in the dwelling that was worked on. The other category of cleaning is called a departure clean and that is whenever you rent anything anywhere the cleanliness, it has to be left clean for the tenant or person or

whatever. So the rentals that I referred to, the assumption is that the owner of that rental would require a cleaning, a traditional turnover clean, sanitary, just make sure that it is ready for the next. You don't clean every dish. You don't do that kind of stuff, you are just making it ready.

So those two things I added in this particular case. Other things like taxes were excluded because in the State of South Carolina if it's 90 or more consecutive days you do not have to pay any of the sales or combination taxes. So that's because that was a six-month assumption you can move that off. There's a variety of other things that I did not include here. These are the only things that I included in the Waverly project. And incidentally what you are seeing here on the first line is the two bedroom standard. By my count there are 33 of the townhomes that are in that size category.

The three bedroom standard. There are 35 of them. And in the three bedroom large there are 25 of them, so accounting for 93 townhomes in this study.

Q. Okay. And your loss of use analysis assumed kind of a common and uniform loss of use

over the entire Waverly project?

A. Yes. By selecting -- earlier on I said I went into the long-term rental relationships and when you go into there you get a flat rate and that's why these are -- these rates for these are quoted in dollars per month. Three times in my report I mention that if the length of time was shorter then the number would be higher, not lower.

And the reason for that is that you would have to go into the vacation rental groups from the annual cut in half versus the monthly, weekly and those numbers. Those numbers were all seasonal. So you get a weekly rate that might go from a thousand dollars a week in the winter to $3,000 a week in the summer. You get monthly rates that are only available in restricted months. Right now if you were to go down to the Isle of Palms you would be able to pick up what some people refer to as a snowbird rental. It's a January, February, March monthly kind of thing because there's not much there in terms of other demand. But by the time Easter rolls around, those shut down. You can't get them after that. And therefore in the months of April, May, June, July, August, September you would have to rent by week.

So the numbers would go up if you were to shrink the number of the amount of time. So the most favorable lowest loss of use value in my opinion is on the basis of the six-month rental even if it's not used. It's still much less than if you only estimated for what you are going to use.

Q. And, Mr. De Santis, is that to a reasonable degree of certainty in your field of expertise of loss of use?

A. Yes, definitely, definitely.

Q. Okay. I am going to hand you what's been marked and admitted as Plaintiff's Exhibit 30. Can you tell me if you recognize those documents.

A. They appear to be certificate of occupancies and looks like -- well, by the address these are all maybe a sheet per dwelling. There's -- the day it was issued and the name of the owner is John Wieland Homes, name of the builder John Wieland, but it does also show the square footage. These are very, very -- these are the same numbers that I have used square footage wise, yes, ma'am.

Q. Thank you. Mr. De Santis, you have talked a lot about your calculations and your conclusions. Your ultimate loss of value for the

Waverly townhomes, once again what was the number of that?

A. That's the $1.78 million.

Q. And as to your testimony today and your conclusions regarding this loss of value, are these to a reasonable degree of certainty in loss of use in your field of expertise?

A. Yes. Yes, ma'am. Definitely. And as I said before, I think that this is -- I can't say you can't any get lower, but you can take other assumptions that would drive this number to almost another hundred percent.

MS. NOLAND: Thank you. That's all the questions I have.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. HASELDEN:

Q. I would like to ask for the last slide you put back up on the board, please. Mr. De Santis, good morning. Andy Haselden, good to see you.

A. Good to see you, Andy.

Q. I'm a little confused. Maybe you can help me with this. I have been here since Monday. And I heard Mr. Glick, Mr. Mease and Mr. Moore all

testify. None of them said that the homeowners would have --

MR. MCCARTY: Objection, Your Honor, pitting.

THE COURT: Sustained. You are asking him to comment on the veracity of another witness. Rephrase the question.

BY MR. HASELDEN:

Q. Mr. De Santis, did you hear any of the Plaintiffs' expert witnesses say that any of the owners of the Waverly townhome would have --

MR. MCCARTY: Pitting.

THE COURT: Sustained. Rephrase. Still asking him to comment on another witness's testimony.

BY MR. HASELDEN:

Q. All right. What evidence in the record are you basing your opinion on that any of the owners at Waverly will have to move out during the repairs?

A. I received an e-mail.

Q. Your Honor --

THE COURT: He can say he received an e-mail. He can base his opinion on hearsay. He just can't say what was in it.

MR. HASELDEN: All right. Can I approach?

THE COURT: Um-hmm.

(Off-the-record sidebar conference.)

THE COURT: Rephrase the question.

BY MR. HASELDEN:

Q. I will withdraw that, Your Honor. I believe your testimony was you did not actually price the cost of moving the owners furniture out?

A. I did not include that at all.

Q. Can you tell us why you didn't factor that in?

A. I lacked any knowledge to tell me if it was or wasn't so I excluded it just for completion purposes. If I was later told then I would revise my estimate.

Q. In arriving at your opinion as to what's available in the Charleston market would you say there's a glut of apartments available in Charleston right now?

A. Well, in terms of going -- that vacation rental and long term concept you would look into that and I would say there are a large number because the market is large too, but there's a large number of unfurnished capacity available.

I had no difficulty whatsoever finding a three bedroom 3,000 square foot unfurnished annual rental. There's no difficulty whatsoever with that.

Q. How many Airbnb listings did you look in at arriving at your opinion?

A. One or two. Enough to convince me that it's not a contributor to the market that I am looking at. That they particularly have a smaller footprint. Smaller units, one bedrooms, typical things like that.

Q. Are you aware that there are thousands of Airbnb listings in Charleston as of today?

A. No, sir, I am not aware of that at all.

Q. You only looked at one or two?

A. I mean the database -- I can't imagine that there would be that much difference.

Q. Okay. Mr. De Santis, this is unit 1037 Zinser.

A. Okay.

Q. How long is that owner going to have to move out?

A. How long what?

Q. How long is that owner going to have to out of their house?

MR. MCCARTY: Objection, Your Honor, lack of foundation.

THE COURT: Overruled. Goes to the basis of weight of his opinion.

BY MR. HASELDEN:

Q. How long is that specific owner going to have to be out of his or her house?

A. Well, my calculation was based on a six-month annual rental. In other words, annual rental cut in half was that, so the economics are based on six months.

Q. I would like to ask you to put the slide back up. You have got a line that says construction cleans, correct?

A. Yes, sir.

Q. Are you aware that Mr. Moore already factored that into his repair cost?

A. Well, no and --

Q. You were not aware that Mr. Moore factored that in?

A. See, when -- Mr. Moore is an estimator; is that right? I mean if someone puts in cleaning at the end of a project normally what they do is make it such that their debris is removed and they may broom sweep it. May. So I enter from

experience that that is insufficient for moving back in. I know my wife wouldn't allow me to do that. So construction cleanings to me are to be done. If they are not done in this estimate then there needs to be done someplace else or by somebody else, but I would question as to whether or not they are actually taking all the stuff out of the drawers and cupboards and cleaning them and putting them back in. Most construction companies do not get into that level.

Q. Mr. De Santis, isn't it true that your number, your ultimate loss of use in the blue block entirely is based on the theory that the owner is going to have to move out for the repair?

A. Mine is uninhabitable. That's the term that I use all the time. It has to be uninhabitable. If it's not uninhabitable there is no loss of use.

Q. Okay. There's no loss of use if they do not have to move out, if they are not uninhabitable?

A. Yes.

Q. I would like you to take your finger, your right index finger, and on that screen in front of you mark through the number 1,758,120 at

the bottom. Mark through it.

A. (Witness complies with request.)

Q. If there is no loss of use that number is zero, not 1.7 million?

A. If they are habitable all the time then there can't be any loss of use.

Q. Okay.

MR. HASELDEN: Thank you for your time, Mr. De Santis.

THE COURT: Any redirect?

REDIRECT EXAMINATION

BY MS. NOLAND:

Q. Mr. De Santis, the opinions that you've expressed today with regards to your calculation of $1,758,120, and the opinions where you get to that number, are those all to a reasonable degree of certainty as an expert in the field of loss of use?

MR. HASELDEN: Your Honor --

THE COURT: Basis?

MR. HASELDEN: Asked and answered.

THE COURT: Overruled. Give you a little latitude. Sir, you may answer the question.

THE WITNESS: Yes, ma'am, it is.

MS. NOLAND: That's all the questions that I have.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MS. NOLAND: No, Your Honor.

THE COURT: From the defense?

MR. HASELDEN: No, ma'am.

THE COURT: Sir, you are excused. Call your next witness.

MR. HASELDEN: Your Honor, could we approach?

THE COURT: Yes.

(Off-the-record sidebar conference.)

THE COURT: Mr. Foreman, ladies and gentlemen, we have a matter to take up during this break. Please don't discuss the case. Please leave your note pads in your seats. We appreciate your patience.

(Thereupon, the jury exited the courtroom at 10:57 a.m.)

MR. HASELDEN: Ma'am, could we take a brief restroom break before we --

THE COURT: Yes. When you come back we will resume.

(A recess transpired.)

THE COURT: The next witness is Professor Freeman?

MR. HAYES: Yes, Your Honor. We would like to call him to the stand if we could.

THE COURT: Well, they have a motion.

MR. HASELDEN: We moved in limine and renew our motion now to exclude Professor Freeman's testimony.

THE COURT: I can't hear you.

MR. HASELDEN: We moved in limine and renew our objection contemporaneously to exclude Professor Freeman's testimony in its entirety.

THE COURT: Bear with me just one moment. What's the basis?

MR. HASELDEN: Your Honor, to start with, as of 24 hours ago Mr. Freeman's testimony on any duties owed by the developer became duplicative when Mr. Glick was allowed to testify to the duty of a developer under South Carolina law. So in that effect it's bolstering and redundant. Additionally, it's our understanding Mr. Freeman is going to rely on a restatement of law Section 620 which is not the law in South Carolina. The jury, Your Honor, is --

THE COURT: Is there an industry standard?

MR. HASELDEN: Your Honor, if there's

an industry standard I have never seen it listed as an industry standard. I've not seen it referred to in any cases in South Carolina.

THE COURT: That's not the issue. South Carolina has made clear distinction -- like I will give a good example. Diving boards. There is an industry standard that is not reflected in our state law. That doesn't mean an expert can't come in and testify you violated the standard of care with the diving board. There are industry standards that are not reflected in our law. That doesn't mean it is not an industry standard. Industry standards are nationwide. They may sometimes be reflected in ordinances. They may be reflected sometimes in statutes. They may be also reflected in case law interpreting those statutes and ordinances, but that does not negate it being a nationwide standard.

MR. HASELDEN: Yes, ma'am.

THE COURT: So my question is really simple, which is, is there an industry standard?

MR. HASELDEN: We believe the industry standard is what's the set forth in the Goddard case. The Goddard case says there may be a fiduciary relationship depending on the facts and

circumstances.

THE COURT: I'm certain Professor Freeman is very familiar with the Goddard case.

MR. HASELDEN: Yes, ma'am. That is -- you are the gatekeeper as far as the law and the question whether there is a fiduciary duty is for you to decide.

THE COURT: Well, it may be if there is conflicting testimony. May not be. I don't know.

MR. HASELDEN: Additionally, Your Honor, in getting to his opinion that a fiduciary duty has been breached by Wieland, in his deposition testimony Mr. Freeman was unable to articulate anything that the Wielands did that would not be barred by either the bifurcation order or it was based on rank speculation on his part.

THE COURT: Well, it's my understanding he is going to testify to more than that, isn't he?

MR. HASELDEN: That's what he testified to at his deposition. We asked him what all his opinions were. He said he was going to testify that there's breach of fiduciary duty and that there were unfair acts and the basis for all of those -- all of the alleged tortious conduct he is going to testify to are barred by --

THE COURT: Are you saying he is only going to testify as to the testimony of Wheelock?

MR. HASELDEN: It's my understanding he is going to testify to what he has testified in his deposition, the basis for the breach of fiduciary duty was that Wieland knew that these houses, the townhomes were not in good shape when they turned the board over and he based that on a November 16th, 2016, letter from a termite contractor that is not in evidence. I don't know how you base your opinion on what they knew in 2009 in 2016. I never could make the connection.

The other one was that he knew that the Wielands were toying with tinkering with money behind the scenes. He had no proof of it, but that's his opinion based on his review of other documents from other litigation. The other was --

THE COURT: What other litigation? Involving what?

MR. HASELDEN: There has been a contemporaneous case filed by Waverly within federal court where they are alleging basically the same cause of action they have got against Wheelock in the bifurcated action. So that may be proper in that case, but it's certainly not proper in this

case which is a construction case theoretically. We have kind of gone every which way but shotgun.

THE COURT: I don't think so. I think we are trying a construction case, at least that's what I am listening to.

MR. HASELDEN: That's what I would like to think.

THE COURT: Are we in different rooms?

MR. HASELDEN: No, ma'am.

THE COURT: We have been trying a construction case. Otherwise I have been hearing about windows and roofs and firewalls for no reason.

MR. HASELDEN: Your Honor, I don't think Mr. Freeman can offer any testimony as to those groups.

THE COURT: I don't think he has to. I think. I don't know. What are you calling him for?

MR. HAYES: Your Honor, we are submitting Professor John Freeman in the expert of the field of duties owed by developers in planned development.

THE COURT: Start over. I can't hear you. You need to talk a little slower.

MR. HAYES: We submitted Professor John Freeman as an expert in the field of duties owed by developers of planned unit developments from a business operational entity standpoint to the association to be informed and be interested enough to the home buyers who are entrusting their money to buy into the development. Does that conduct meet a certain standard.

Your Honor, we are not talking about Wheelock here. He is not going to talk about Wheelock here. It has nothing to do with his testimony here today.

THE COURT: Would you like to address his argument that he is going to use the restatement as a standard?

MR. HAYES: He is going to use the Goddard case and he may rely on the restatement. I think that's the industry standard. He thinks it's -- as a matter of fact, the restatement quotes Goddard as one of the cases it is based off of. And --

THE COURT: Do we have any cases in South Carolina that say they refuse to accept the restatement?

MR. HAYES: None to my knowledge, Your

Honor.

THE COURT: Do you have any case law that says that? The Supreme Court is usually very clear when they want to reject something. They will say it has been articulated in the briefs as support for this contention, the restatement. Like when we had that big argument in torts, restatement, whatever. The Supreme Court was very clear. They said there has been a lot of people, we could have gone this way, but today we specifically say South Carolina is not adopting that. I don't think that -- unless we have case law that says that, I don't think there's anything that precluded you from referring to what would be considered a respected treatise that reflects case law from across the country and what a legal theory -- what legal theory it may constitute. I think you may be able to argue that it doesn't apply in South Carolina, but unless -- they are pretty articulate. When they mean something they say it. I am not aware of any cases that have rejected the restatement.

MR. HASELDEN: I'm not either, Your Honor.

THE COURT: I am not aware of any

necessarily, but my brain is not exhaustive on the subject, but there may be some cases that cite the restatement. I'm not sure. Are there any that have been subject to appellate review?

MR. HASELDEN: I could not find any that cited that section of the restatement.

THE COURT: But does the restatement in fact cite Goddard? Does Goddard reflect what the restatement says?

MR. HASELDEN: There's a footnote in the restatement that cites Goddard.

THE COURT: For what proposition?

MR. HASELDEN: The proposition that a -- that the developer may owe a duty to the homeowners association in setting up the reserves and the corporation itself may have certain duties.

THE COURT: So in essence that become a weight issue as to his opinion, not an admissibility issue. Can't you cross-examine him?

MR. HASELDEN: Yes, ma'am.

THE COURT: I think that's really what it becomes. Mr. Hayes, be glad to hear from you. Is that your entire argument?

MR. HASELDEN: No, ma'am.

THE COURT: I need to hear the rest.

MR. HASELDEN: I still don't understand how we are going to talk about a business is set up -- what was it again? Read it to me again.

THE COURT: Duty owed to a developer -- by developer in a planned unit development, operational entity and conduct, whether it met the standard of care or not when it was transferred over. That's a synopsis.

MR. HASELDEN: That's exactly what Mr. Glick was allowed to testify to yesterday.

THE COURT: From a different perspective. But is there any other basis? I heard the basis, you said it was cumulative, bolstering and using the restatement and the industry standard is Goddard. There is no fiduciary relationship. And that is the basis of your objection?

MR. HASELDEN: Well, Your Honor, to the extent that he's relying on anything that he gleaned from certain federal court cases, they are under a confidentiality order.

THE COURT: Who is under?

MR. HASELDEN: Documents that Mr. Freeman produced to us pursuant to -- produced pursuant to a subpoena to him were taken off the

federal court website and they were clearly marked confidential at the time.

THE COURT: Then how did he have access?

MR. HASELDEN: I have no earthly idea, Your Honor.

THE COURT: Is he an expert in that case?

MR. HASELDEN: He says not. His testimony deposition was I am not.

THE COURT: I guess I am still trying to figure out if these all the same parties who is the party to the confidentiality agreement.

MR. HASELDEN: The Wieland family and some of these entities as well.

THE COURT: Who signed it?

MR. HASELDEN: That -- I am not an attorney in that case, but I do know what I saw when I saw his --

THE COURT: What documents does it cover?

MR. HASELDEN: It is certain memorandum that were filed in federal court.

THE COURT: Well, memorandum filed in federal court is not going to be confidential.

MR. HASELDEN: The asset transfer agreement that we have been talking about, affidavits regarding any contact with Wieland from the asset sale agreement. It is marked confidential filed in federal court.

MR. HAYES: Your Honor --

THE COURT: What else is -- a confidentiality agreement, the boilerplate language says it is not to be disclosed to the general public, but it can be used in court and in litigation. So I am trying to figure out what difference does it make. This litigation is in court. It doesn't -- confidentiality agreement does not preclude you from -- how else -- certainly you can't say asset transfer, the owners of these units shouldn't know about asset transfer. That sort of strains credulity. I'm a little confused what you are trying to articulate.

MR. HASELDEN: Bottom line is, Your Honor, I guess we have to hear what Professor Freeman testifies to. I think he is going to go far afield what was really going on at the time. He is going to offer a lot of supposition based on the issues that are not before the Court.

THE COURT: I don't know. I think you

have to make a contemporaneous objection.

MR. HASELDEN: I will, Your Honor.

MR. MANOS: Just for the record, Your Honor, can we incorporate all the arguments we made in our motion in limine that was already filed? I think Mr. Haselden --

THE COURT: There's a lot of volumes to all of this, but if you want me to consider it you need to articulate it because a motion in limine is beforehand, it is not final. And things develop differently at trial. So if there is some basis you need to make me aware of that so I can make a contemporaneous ruling.

MR. HASELDEN: Your Honor, obviously Mr. Freeman doesn't have any experience in the construction field so he can't articulate opinions.

THE COURT: He has a breadth of experience in the formation of corporations, correct?

MR. HASELDEN: Absolutely.

THE COURT: Mr. Hayes, would you like to respond?

MR. HAYES: Your Honor, I think we have stated our position.

THE COURT: Sorry?

MR. HAYES: Your Honor, I believe we stated our position as far as Mr. Freeman.

THE COURT: You need to address anything that he's raised.

MR. HAYES: Your Honor, we are not calling Mr. Freeman as an expert in construction. We are calling him as an expert in the formation of corporations, what their duties are as a developer when they are doing a planned unit development. Also from the standpoint of the association being formed and with regards to interested investors and homebuyers who entrusted their money to buy into the development. And there are duties and conduct and standards regarding the same.

THE COURT: Okay. It would appear that the objections that have been raised go to weight, not credibility. And I have not heard anything challenging Professor Freeman's underlying education, training or experience as an expert.

What I hear is the scope and what I hear the objection being to is nature of the testimony which everything I have heard at this point really goes to weight, not admissibility. Both Mr. Glick and Mr. Freeman as I understood it during the previous arguments will be testifying on

different perspectives about the duties of the developer. So it is not cumulative. It is not bolstering. And as regards to restatement, whether it substantiates an industry standard or not as well as the current applicable state law, you will have to make a contemporaneous objection regarding the scope of that testimony and I will rule on it contemporaneously. I haven't heard anything that would rise to the level of excluding his testimony. The motion is denied.

MR. HASELDEN: Thank you, Your Honor.

THE COURT: You are welcome. Ready to proceed?

MR. HAYES: Yes.

THE COURT: Defense ready to proceed?

MR. HASELDEN: Yes.

THE COURT: How long do you think his testimony will be? I am just asking because I need to plan.

MR. HAYES: I would think I hope to get him up and down in an hour.

THE COURT: Okay. Give me one second. I need to attend to something right quick.

(Brief pause.)

THE COURT: Is the Plaintiff ready to

proceed?

MR. HAYES: Yes.

THE COURT: Defense ready to proceed?

MR. MANOS: Yes, Your Honor.

THE COURT: Go ahead and have your witness there by the witness stand.

(Thereupon, the jury entered the courtroom at 11:54 a.m.)

THE COURT: You may be seated. Ladies and gentlemen, we appreciate your patience. The Plaintiff may proceed with your next witness.

MR. HAYES: Your Honor, the Plaintiffs call John Freeman to the stand.

THE COURT: Please swear the witness.

JOHN FREEMAN

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your last name for the record.

THE WITNESS: Full name is John Patrick Freeman, F-R-E-E-M-A-N.

DIRECT EXAMINATION

BY MR. HAYES:

Q. Mr. Freeman, will you give us your address for the record?

A. 2329 Wilmont Avenue, Columbia, South

Carolina.

Q. Do you mind describing your educational background?

A. No. Here it goes. I graduated from the University of Notre Dame in 1967 with a B.B.A. in accounting. I then went to law school at Notre Dame, got my JD degree as a lawyer or to be in 1970. I subsequently received an LLM, a masters in law, from the University of Pennsylvania in Philadelphia. Those are schools I went to.

Q. And what did you do after school?

A. After school first went to work for a law firm, large law firm in Cleveland, Ohio, called the Jones Day firm. And after working there for a couple years and then going to get my LLM, I came to South Carolina as a young professional at the newly created building for law school. We were just finishing it, expanding it in 1973.

And I worked there for 35 years as a faculty member rising through the ranks over a period of time as a law professor.

Q. You are talking about the law school up in Columbia, correct?

A. That's where I taught, yes, sir, in Columbia.

Q. And what was your rank within the law school when you retired?

A. I had a chair. I was a John T. Campbell Professor of Business and Professional Ethics. I'm now emeritus.

Q. Now, have you worked anywhere else?

A. Yes. I worked for the Securities and Exchange Commission summers when I was a young teacher. I worked as a law professor at the University of Texas in Austin, Texas. I worked as a law professor at Loyola Law School in Chicago. I was also worked as a lawyer in South Carolina and as I mentioned with the Jones Day firm which was in Ohio. I have worked as a consultant and an expert witness occasionally, too.

Q. When you were teaching what courses did you teach?

A. Taught two types of courses. I taught business courses and that would be business associations, corporations, agency and partnership. I taught business planning, corporate finance. I taught white collar crime and I taught legal accounting. Those were the business related courses that I taught over my career.

In the professional legal ethics area I

taught courses in legal ethics for many years to law students and also I taught them about professional malpractice.

Q. How long did you teach these courses?

A. The business and ethics was 35 years. Some years I might not teach one, but usually I was teaching both of them every year unless I was on sabbatical, which I was not on sabbatical very much.

Q. Did any of your courses cover standards or behavior of persons who organize and launch business projects?

A. Yes. Those people are called promoters, business promoters. And the corporations and business associations course covers the duties and responsibilities and obligations that are owed by people who set up business operations or business-type enterprises and I taught that for many years.

Q. Where did you teach that?

A. In Columbia and South Carolina students. I taught that in Texas and I taught that in Chicago, but I also taught it in South Carolina in the bar review course. When students have to pass the bar exam they take a special course that's

issued. That issue of promoter's duties, setting up businesses and what you are supposed to do and not do is something that you teach to students at that point in time.

Q. Because they have to be tested on it as part of the test?

A. Got to pass the test to become a lawyer. So it is not minor forget about it kind of thing. It is serious.

Q. In your experience as a teacher did you ever find that duties and responsibilities and standards and conduct applicable to business promoters commonly understood by your students?

A. Not when they come in, but at the time they left they were excepted to know about it or they are going to have trouble on the examination. That is a niche area that the average person doesn't know about and that's one reason it is tested both in law school and on the bar exam.

Q. How do the duties, responsibilities and standards applicable to business promotors relate to this case?

A. Well, it's recognized in South Carolina that the duties of developers of planned unit developments when they are setting up a planned

unit development which is a grouping of -- using real estate design to set up property units and in a compatible way in a defined area like Waverly, got a certain area, certain standards. What you are doing when you are setting that up is kind of creating an enterprise, creating sort of like a business enterprise just like a corporation that we're more familiar with.

And when you are setting up that enterprise you have certain responsibilities that you are supposed to undertake and when we in South Carolina try to decide or figure out what the standards were applicable to the developer setting up the enterprise, where people are investing by buying homes as opposed to buying stocks, the decision was made to look over to the promoter's obligations and kind of borrow those obligations and essentially hold the developer to those same standards.

Because there are two similar things. Over here people pay cash and give a stock in the company that's got a board of directors. Over here you are making the biggest investment that you are going to make buying a house or in the planned unit development and you own an interest as a member in

the homeowners association which has its own board of directors. So that there's a lot of similarity there. And essentially we borrowed from one area and transposed those duties over here. And of course the promoter area is something that we teach in law school to all our students.

Q. Did your teaching background give you the understanding needed to testify concerning a developer's standard of conduct and the extent to which those standards may have been breached?

A. Yes, it sure does.

Q. Do you rely on anything else in your background for insights to allow you to speak authoritatively about the standard of conduct for developers to the extent to which Wieland met that standard?

A. Yes, I do. I from starting in the 70's was involved in matters concerning developers starting with a big development in Florida which I worked on for years, over 3,000 hours, analyzing the developer's responsibilities. And if you're active in the legal community in South Carolina, somewhat active, over the years because of our kind of real estate and development orientation, particularly in the coastal areas, you're bound to

run into issues of developer's responsibilities.

I have been involved in numerous cases over the years either personally suing which I have done, sued a developer myself in a planned unit development. Made a noncompliant property owner tear down a building. Have had fights between developers of the same developer but different owners. Fights between creditors and the developer and where I have been on the creditor's side, other times when I have been on the developer's side. Construction cases such as this construction, numerous different aspects of this over the years leading up to today.

Q. And in regards to a planned unit development I think you covered that just a moment ago. But as far as your teaching, did your courses ever cover the standard of behavior for persons who are business managers or directors?

A. Oh, sure. That's the heart and soul of the corporations course. You also run into that when you are teaching about limited liability companies. It's also important in the security regulation course which I taught dealing with investment management.

Q. And did your courses ever cover the

obligations of business managers to supervise the workers on the jobs being done?

A. Another major area because so much of business life depends on getting things done right and supervising the work that's being done.

Q. Did your courses ever concern license requirements for people performing services for the public?

A. Yes. A lot of times, just to give some examples, lawyers have to have licenses. If you practice law without a license you are in trouble. You lose your license. Or you may have a license in South Carolina, but if you are practicing in North Carolina and if you don't have one you got problems. Spent a lot of time dealing with in the classroom and outside the classroom issues concerning broker dealers, stock brokers, investment advisers, licensed people and to some extent contractors as well.

Q. How long did you teach about the duties of people who start business operations or manage people in business operations including business promoters?

A. Thirty-five years.

Q. Have you received any awards or honors

where you were teaching?

A. I was voted best teacher four times at the law school and got other awards.

Q. Have you ever practiced in the area of duties owed by business managers from a supervisory standpoint?

A. Sure.

Q. What's one of the things have you done?

A. Been involved in litigation where people didn't monitor, did not check up, did not follow through and somebody paid a price and a lawsuit resulted.

Q. Have you ever testified as an expert about the obligations owed by business managers?

A. Many times.

Q. Can you describe that experience?

A. For instance, transaction you put together two companies. And you either overpay or underpay at the time of the transaction when there is a sale of assets transaction or merger transaction. Issues concerning business judgment by directors, by officers of a company. Been involved in many of those cases.

Q. Have you testified under oath as an expert about the supervisory obligations owed by

developers or contractors?

A. Yes, I have.

Q. Have you ever been asked to testify as an expert in either federal court or state government concerning behavior of business managers?

A. Yes, I have.

Q. Would you explain, please?

A. Well, for example, I testified on behalf of the Attorney General of South Carolina before the state wide grand jury and resulted in indictments and ultimately convictions of people who were running a scam, a large one. There's a major fraud in the upstate called the Home Gold Carolina Investors Fraud where various people went to prison and I helped in that case and testified in the case and two of the executives that testified went to prison.

Q. Professor Freeman, are you here to testify about what the law is?

A. No, that's for the Court to decide and instruct the jury. I'm not here to talk about -- tell the jury what the law is.

Q. Are you here today to express any legal conclusions?

A. No, I am here to only express my opinions about the facts in this case.

Q. Do you remember being deposed by Mr. Haselden in this case?

A. I do.

Q. Do you remember him asking you what you would be testifying to as an expert in this case?

A. Yes.

Q. What was your answer?

A. My answer was that I testify concerning business aspects of this case, the operational aspects of this case. The business significance of being a developer, I am looking at my testimony, page 35 and 36 of my deposition. And the duties that are owed and the discharge of those duties by Wieland as a developer owed to the homeowners association and its members. That's a thumbnail sketch of that.

Q. What are you here today to do?

A. I am here to tell the jury about my view concerning Wieland's discharge of its obligations that in my estimation it owed and the extent to which this caused injury to the property owners association and homeowners.

Q. Have you ever been qualified as an

expert in state or federal court?

A. Many times.

Q. Have you ever been provided as an expert in federal or state court before and not been qualified --

A. No.

Q. -- as an expert? Was that a no?

A. That's a no, N-O.

Q. What have you done to prepare yourself to testify in this case?

A. As well as I could I have reviewed the files, pleading, the positions that have been taken by the parties. I have reviewed the discovery. I have read depositions that are sworn testimony that people have given under oath, among those Mr. Glick's testimony, Mr. Mease's testimony, Mr. Moore's testimony. I have conversed with Mr. Peyser who was one of the named Plaintiffs and a homeowner. By converse I mean I interviewed him on the phone roughly half an hour, 45 minutes. Spoke with Mr. Sills who is another one of the homeowners, I have spoken as well with the gentleman who Stephen -- I forget his --

Q. Mr. Denby?

A. That's right. Who testified here and I

was here for his testimony and the followup testimony of Mr. Mease. I have conducted other research as well looking for factual information and I found it sufficient to give me confidence that the opinions that I will give today will be the very best, most honest opinions I can give.

Q. Is this preparation the sort of preparation common for experts of your type in cases such this?

A. It is.

MR. HAYES: Your Honor, at this time we would like to submit Professor John Freeman as an expert in the field of duties owed by the developers in a planned unit development from a business and operational entity standpoint to the association and the association be formalized and the interested investors and homebuyers who are entrusting their money to the --

THE COURT: I think that goes a little far what he will be qualified. I think you need to be more succinct.

MR. HAYES: Your Honor, we would like to qualify Mr. Freeman as an expert in the field of duties owed by developers in planned unit developments.

THE COURT: Any objection or questions as to expertise?

MR. HASELDEN: Not as to that, Your Honor.

THE COURT: Without objection so admitted. You may proceed.

MR. HAYES: Your Honor, also I would build into that in regards to helping the trier of fact understand --

THE COURT: I think you are going too far. You have recognized areas of expertise. Confine the rest of that to your questions. Proceed.

BY MR. HAYES:

Q. Professor Freeman, based upon your knowledge, study and background experience, please describe to the jury the type of duties that developers, PUDs, owe in putting together a PUD, the duties they owe?

A. My testimony is that the developers putting together a planned unit development such as Waverly owes three main types of duties which is a duty of reasonable care, skill, to see things are done right, to see that when the enterprise, being the planned unit development, the subdivision or

whatever is finished, that it is compliant with the specifications, compliant with the code, compliant with manufacturer's instructions, compliant with zoning and is built within the property standards.

So No. 1 is to get the job done right from a duty of care standpoint. Secondly, I believe that there's an obligation, and I say that there is an obligation to maintain proper records of what you are doing, what the standards are, what the plans are, the blueprints, so that if something goes awry after you have turned over the development to the property owners association and the homeowners, something goes wrong, and somebody has to be hired to fix it they can quickly zero in on what the specifications were, what the dimensions are, and address the problem efficiently and quickly and economically. So turning over proper records.

Third in my estimation is a duty to have disclosure, to disclose all material facts that you need to disclose so that the people who are buying and the homeowners association knows what it is dealing with when it takes over control. And included in that, included in the duty of care is to see that the property when it is turned over

is not substandard, but actually meets appropriate standards or if there's some deficiency that you inform people about these deficiencies and provide the money needed by the homeowners association which is taking over ownership to fix the deficiencies so it gets to the -- you know a proper baseline where the homeowners don't have to come out of pocket to fix something that was your responsibility.

Q. Professor Freeman, are you familiar with any scholarly writings that discuss developers duties in the context of PUDs such as Waverly?

A. Yes.

Q. Would you please be so kind as to tell the Court about that?

A. Yes.

MR. HASELDEN: Your Honor, I renew my objection.

THE COURT: The Court relies on its previous ruling. Overruled.

A. The standards that -- come from different sources. And in South Carolina we would look primarily to our accepted standards as they are published in the authoritative reports of decisions that have been made by our courts

concerning how to do things and what to do.

And there are decisions out there, just to mention two of them, the Goddard case, G-O-D-D-A-R-D, and the Dunes West case, two major decisions where our courts have set forth the standard of conduct for the developer.

There's also on a national level various authorities, but the one that I'm most impressed with and find most persuasive would be what's called the restatement third of property. And the restatement of property is put together by legal scholars on a national basis and they try to capture in their statements kind of what the overall standard is on a national scale for what you're expected to do, what you may be expected to do and they actually have a section that deals with it, Section 620 of the restatement third of property. It is called developers duties to the community.

And I have looked at that and I have taken that into account in fashioning my opinions as well as I relied on South Carolina authority as well as national authority which I find to be very, very consistent, fit together very well.

Q. Do you have a copy of the restatement

we can look at today?

A. Yes, I do. And I think that there's one that you can blow up to show what I am talking about.

MR. HASELDEN: Your Honor, we would object.

THE COURT: He can testify to it, but there's no purpose -- it is not going to be published. He can use it to refresh his memory to testify.

BY MR. HAYES:

Q. Can you testify as to what the restatement holds?

A. Yes. What I report to the jury is this: It says that until -- as long as a developer is in control, until the developer relinquishes control, which happened in this case in 2009, the developer owes duties to the association and its members to one, use reasonable care and prudence in managing and maintaining the common property. To me subsumed in that is the concept that you build, first of all, up to proper standards to begin with. That you do it right because how can you maintain -- use reasonable care in maintaining it if it is not up to snuff to start with?

Secondly, to maintain records and to account for the financial affairs of the association from its inception. This would be Item 4. I focus in on that because of the need what I said before, the need to have background, the need for when these people come in to run the property owners association and they are in charge of fixing everything. They should have an easy way to understand what it is that they are dealing with and to be able to show that to the rehab people or the people that are going to be doing the fix up. Here's a blueprint, check it out.

Then time and again in the restatement there's mention of the need to disclose all material facts and circumstances affecting the financial condition of the association. One of the things when you turn over the property the association is responsible for taking care of what it owns which in the townhome area is pretty much the exterior including the roof, porches of these buildings, the outside of these buildings. So the homeowners association should know up front what it has to deal with.

And I found it very significant that when the drafters, the people who wrote the

restatement, specified where they were getting these concepts from, they pointed to and quoted from South Carolina legal principles, South Carolina standard of conduct.

And one of the standards of conduct for a developer in South Carolina articulated by our court of appeals in 1993 in the Goddard case says that the developer is like a promoter of a corporation who should be expected to use good judgment and act in the utmost good faith to complete the formation of the organization. To me the utmost good faith in completing the formation of the organization means seeing that things are done right and are up to snuff really from day one. Or if they are not, at the time of the turnover at least let the people know what they are getting and give them the money that they're going to need to bring things up to snuff so that they again have a fair start.

And I mentioned also that in Goddard the -- and as you can tell from what I just read, that the duty is taken from the business law that I taught for many years. Those three things, using care, providing information in the form of background information, blueprint, that kind of

stuff, and then disclosing and providing the wherewithal if things are not up to snuff.

Q. Do you have any reason to believe that developers in South Carolina would not be obligated to act with reasonable care or follow code requirements or manufacturer's instructions or to disclose all material facts and circumstances about the property to the HOA members?

MR. HASELDEN: Object.

THE COURT: Sustained. Rephrase.

BY MR. HAYES:

Q. Do you believe that the developers in South Carolina have a duty to act with reasonable care?

THE COURT: Ask a direct question. What is the duty.

Q. What duties do you believe developers have in South Carolina?

A. Care and diligence and skill is owed. I also believe that they have a duty to provide information in the form of the historical information including who has been in charge of the building these things. The necessary documentation like blueprint specifications as I have testified. And if there's any defect or problems with the

property to be forthright and to disclose that and provide the cash needed to fix. Those are to me key duties that are owed.

Q. During your research and investigation do you know who was the developer at Waverly?

A. Yeah. My investigation shows very clearly who that was.

Q. Who was that developer?

A. Okay. The developer was Wieland, but let me give you some background. The complaint has listed a lot of names and people that were sued to include John Wieland Homes, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc., John Wieland Homes, Inc., and Builder Support Services of the Carolinas. So that's a lot of different John Wieland type entities. All boils down to one thing. Wieland. This is what Wieland wrote. To call all this Wieland and then they say Wieland was the developer and general contractor for the townhomes.

So all these entities you can look at as just being the Wieland Defendant and it is an admitted fact that it was the developer. It was a

contractor.

MR. HASELDEN: Your Honor, move to strike that answer.

THE COURT: You need to articulate a basis for the motion.

MR. HASELDEN: Assumes facts not in evidence, Your Honor.

THE COURT: Overruled. It is within the area of his expertise. The answer will stand. You may proceed.

BY MR. HAYES:

Q. In your research in what respect, if any, are the different roles played by Wieland in the Waverly development relevant to your opinions?

A. It's major and I would like to explain. May I?

Q. Yes.

A. The Wieland companies combined, and just call them Wieland, are admittedly the developer and the contractor. Also my investigation showed me that they also were the design professional. There was no outside architect. It was -- this was done by Wieland. The declarations or restrictions if you -- I think that's an exhibit in this case, which you will have

in the jury room, if you look at the top, those were written by Wieland. Wrap that went around the houses and some of these are townhomes in some of these instances had Wieland's name on it. So I take all this into account because sometimes if you have an independent architect, independent contractor, independent developer, like three different parties, one can act as a check on the other. If someone gets out of line, somebody can pipe up and say look, you got to tear that wall down. It's not according to the specifications. You got somebody watching your back. When somebody is doing everything there are -- there is no check against deficiencies. It's a conflicted situation. There are conflicts between these parties and there's a risk that quality suffers and, you know, there's a saying which most of us are familiar with, to whom much is given much is expected. Well, if you want all the responsibilities, you want to wear a lot of different hats, take on a lot of different duties, do it right. Do it properly. Because no one is watching you. You are in charge. Do it right. And I take that into account in evaluating Wieland's conduct.

Q. In the course of your investigation did

you gather any information about Wieland's efforts in quality control or warranty areas?

A. Yes, I gathered information.

Q. What was that?

A. That I didn't see any robust quality control at all. What I saw was --

MR. HASELDEN: Your Honor, objection.

THE COURT: Basis?

MR. HASELDEN: Foundation.

THE COURT: Please approach.

(Off-the-record sidebar conference.)

THE COURT: Sustained. Foundation. Rephrase.

BY MR. HAYES:

Q. Mr. -- Professor Freeman, would you tell us what information you looked at in regards -- what you are actually basing that -- what information you looked at or research or found in basing of your opinions on Wieland's efforts in the quality control warranty areas?

A. Yes. First of all, I read Mr. Glick's deposition and his testimony. I read Mr. Mease's deposition. I was here for Mr. Mease's part of his testimony yesterday afternoon. I read their reports that they prepared which showed quality

control problems. Also some indication from some testimony from a Wieland source that the quality -- what quality control meant is fixing problems that are brought to our attention. Which is not the same thing that I view as quality control which is preventing problems in the first place by supervising, policing to see things are done right so there's a whole heck of a lot less to fix down the road and so that's what I looked at and relied upon.

Q. And you came to an opinion?

A. Well, yes, that and I talked to Mr. Moore as well. I interviewed him and I interviewed some homeowners as well.

Q. What are you -- in regards to --

A. Let me just say there are other sources that I looked at that showed me severe quality control problems.

MR. HASELDEN: Your Honor, same objection, move to strike. Lack of foundation for the last statement.

THE COURT: Please approach.

(Off-the-record sidebar conference.)

BY MR. HAYES:

Q. What is the foundation for your

opinion, Professor Freeman?

A. Well, for one thing, in the course of my investigation I came across a letter written by a company that was withdrawing --.

MR. HASELDEN: Your Honor.

THE COURT: Sustained, hearsay. You need to state the foundation of the opinion, what you relied on in rendering your opinion.

BY MR. HAYES:

Q. Anything else -- did you rely on anything else in formulating your opinion?

A. My investigation into certain dealings by the Wieland company.

MR. HASELDEN: Your Honor --

THE COURT: Mr. Foreman, ladies and gentlemen, I have a brief matter of law to take up outside your presence. During the break please do not discuss the case. Please leave your note pads on your seats. We thank you for your patience.

(Thereupon, the jury exited the courtroom at 12:10 p.m.)

THE COURT: You can take your seats. I need to know what the foundation of the opinion is. That's too vague. Looked at the deposition, looked ar corporate records. I just looked is not going

to cut it.

MR. HAYES: I will ask him what depositions and what records, everything along those lines.

THE COURT: Yes.

MR. HASELDEN: That's fine, Your Honor.

THE COURT: Get the jury.

MR. HASELDEN: Your Honor, that's not going to be satisfactory.

THE COURT: Why not?

MR. HASELDEN: Because that is exactly the direction that I asked about before, warned of this is going to go into other cases, other litigation and matters that he is purely speculating on. There's no basis and facts that have been testified to in this court or any depositions in this case.

THE COURT: Go ahead and ask him the questions, Mr. Hayes, so I can hear them.

BY MR. HAYES:

Q. What is the foundation, what sources or what type of documents or testimony did you use in forming your opinions in regards to lack of quality control by Wieland in this matter?

A. I mentioned that letter. And I also

took into account testimony from Mr. Wieland and Robert Parker who was offering testimony on behalf of the Wieland entities.

Q. Did you also look at the testimony of any of the experts in this matter?

A. Yes, I mentioned that earlier that I considered what the experts say and I believe I listed them by name.

Q. Yes. I believe you said Myles Glick, Russ Mease?

A. And Mr. Moore.

Q. And you also --

A. I talked about the homeowners.

Q. Right. You also mentioned that you personally spoke with Mr. Peyser, Mr. Denby?

A. Yes.

Q. And Mr. Sills, correct?

A. Yes.

THE COURT: There needs to be clarity about what testimony he is referring to.

BY MR. HAYES:

Q. Any particular portion of the testimony or any particular --

THE COURT: He observed testimony from deposition? I'm confused.

THE WITNESS: No, the only testimony, Your Honor, that I have observed from here was the testimony that Mr. Mease gave yesterday afternoon. I did see all of that. Otherwise I read their deposition testimony in this case, plus I spoke with them interviewing them by phone to verify and support my opinions and learn.

THE COURT: I think he is clear he is not talking about something outside this litigation.

MR. HASELDEN: Yes, ma'am, he is. Mr. Parker and Mr. Wieland were never deposed in this case. They were deposed in the Madison case.

THE COURT: What is the Madison case?

MR. HASELDEN: It's another townhome community in Hamlin. It has not been adjudicated, still pending.

THE COURT: Not this townhome?

MR. HASELDEN: No, ma'am.

THE COURT: Is that correct?

MR. HAYES: That's correct.

THE COURT: So how would that be relevant?

MR. HAYES: Would you have the same opinions if you disregarded the testimony --

THE WITNESS: Same opinions. That's -- was additional support, but it was totally consistent with the opinions that I already held.

BY MR. HAYES:

Q. Will you disregard that particular -- those particular depositions?

A. Sure.

Q. For purposes of today?

THE COURT: He said he relied on Mr. Glick, Mr. Mease, Mr. Moore, the homeowners Peyser, Denby and Sills.

MR. HASELDEN: I don't have a problem with those.

THE COURT: So to that extent there's no objection, correct?

MR. HASELDEN: I would like to move to strike the last statement that he made. It was unresponsive to any question. He said I also formed opinions based on Wieland's conduct.

THE COURT: That's for me to make the decision. The jury is not here.

MR. HASELDEN: Well, I am asking that when they come back that you instruct them to disregard that comment by Professor Freeman because it is outside --

THE COURT: Which comment?

MR. HASELDEN: Could the court reporter read back the last thing Mr. Freeman said, the last statement, please?

(The Court Reporter read the record as requested.)

THE COURT: I don't think that's inappropriate. If he has talked to Glick that's dealings, that's interaction.

MR. HASELDEN: That's fine, Your Honor.

THE COURT: The request is denied.

MR. HAYES: What was the last question I asked, madam court reporter?

(The Court Reporter read the record as requested.)

THE COURT: All right. Ready to proceed?

MR. HASELDEN: We are, Your Honor.

THE COURT: Please bring in the jury.

(Thereupon, the jury entered the courtroom at 12:16 p.m.)

THE COURT: Thank you. You may resume testimony.

BY MR. HAYES:

Q. Professor Freeman, based on your

investigation have you formed any opinions in regards to Wieland in this matter?

A. Yes.

Q. And what are those opinions?

A. That Wieland did not discharge the duties that it owed to the homeowners association or its members as I have articulated those duties previously.

Q. Have you formed any opinion whether the Waverly project was handled with reasonable care by Wieland?

A. Yes.

MR. HASELDEN: Object, Your Honor.

THE COURT: Sustained to the form of the question. Leading, rephrase.

BY MR. HAYES:

Q. Do you have an opinion as to Wieland's handling of the project?

A. Yes, I have the opinion that they did not exercise proper care, skill, and diligence in developing the product -- project, that they did not properly supervise the project to prevent the types of shortcomings that have been the subject of testimony before this jury in this case.

Q. And, Professor Freeman, do you have any

opinion as to Wieland's maintenance of proper records?

A. Yes, I do.

Q. What is that opinion?

A. My opinion is that they didn't maintain proper records because time and again when I talked to the expert personnel and the homeowners who were involved in the property owners association they talked --

MR. HASELDEN: Your Honor --

THE COURT: What is the objection?

MR. HASELDEN: Hearsay.

THE COURT: Sustained, hearsay. He can rely on hearsay, but he can't restate what that hearsay was.

THE WITNESS: I was -- I will --

THE COURT: He will rephrase the question, Professor, and then you can answer.

BY MR. HAYES:

Q. What was your opinion?

A. My opinion is that based on my investigation proper information and materials was lacking.

Q. Do you have an opinion as to whether Wieland made a full factual disclosure to the HOA

regarding -- and homeowners regarding the Waverly project?

THE WITNESS: Yes.

MR. HASELDEN: Objection, overly broad.

THE COURT: Overruled.

BY MR. HAYES:

Q. What is that opinion?

A. My opinion is that there was not proper -- based on my investigation there was not proper disclosures, that instead unfairly information was being and was withheld from the homeowners leaving the homeowners deceived.

MR. HASELDEN: Your Honor --

THE COURT: Basis?

MR. HASELDEN: I object, move to strike. No foundation for that.

THE COURT: Basis of the objection?

MR. HASELDEN: Foundation.

THE COURT: Please approach.

(Off-the-record sidebar conference.)

THE COURT: The objection is overruled.

THE WITNESS: Withholding of information caused misunderstanding and deception and was prejudicial to the homeowners and that there was something else also improper in that my

understanding is that the homeowners thought they were getting valid warranties of a five year 20 year basis which warranties when presented for repair work are not being honored.

BY MR. HAYES:

Q. What, if any, opinion do you have in regards to the turnover of the Waverly project to the HOA?

A. That based on my investigation the turnover was improper because substandard property was turned over without adequate disclosure, without providing the funds needed to bring the properties up to an acceptable standard for the benefit of the owners, the homeowners.

Q. Do you have an opinion as to whether Wieland breached its duties to the homeowners?

A. Yes.

Q. Do you have any opinion as to whether the homeowners were damaged as a result of that breach of duty to the homeowners, the breach of duty to them?

A. I believe that there was a breach of duty and I believe that injury was suffered as others have testified to in this courtroom and I join that view.

Q. And you are also as you sit here today giving an opinion as to the duties of a corporation, correct?

A. I have given duties that are relevant to business, whether it's a corporation, LLC, a partnership or whatever, a business entity, in its dealings where it wears a developer hat and contractor hat in the real estate development area. That's the scope of my testimony here today.

Q. The opinions that you have expressed today, do you hold those to a reasonable degree of certainty as an expert in your field of expertise?

A. Yes.

MR. HAYES: One moment, Your Honor.

(Off-the-record conference.)

BY MR. HAYES:

Q. Mr. Freeman, in your opinion was the breach of duty to the homeowners a proximate cause of their damages?

A. In my estimation, yes.

MR. HAYES: Thank you, Your Honor. That's all I have.

THE COURT: Any cross-examination for the witness?

MR. HASELDEN: Yes, ma'am.

CROSS-EXAMINATION

BY MR. HASELDEN:

Q. Good afternoon.

A. Good afternoon, sir.

Q. How are you?

A. Fine. Thank you.

Q. You testified a few minutes ago that it was your opinion that the Wieland Corporation withheld information pertinent to the homeowners. What information did they withhold?

A. That there was no proper supervision, that there was no as far as I can tell follow through and followup over the subs, that they were not being watched when they needed to be as Mr. Mease testified, that there was no investigation to see if code had been complied with, manufacturer's instructions had been followed. That there was no efforts to be made -- no effort had been made to see if improper shortcuts leaving the homeowners at risk have been taken. And not a penny as far as I can tell in a reserve account was given to the homeowners which carried the implicit representation that everything was fine and hunky-dory with these townhomes which was dramatically untrue.

Q. Are you aware there was $50,000 in a reserve account when the homeowners association was turned over to the homeowners?

A. No. What I have heard is to the contrary, sir. What I have heard is that there was money, but it was for operating and not a penny for reserve account to handle any repairs.

Q. The source of your information that -- the information regarding supervision and code came from the Plaintiffs' experts?

A. Yes, sir.

Q. Okay. That information was created in 2013 and on?

A. Yes, sir, evaluating work that was done well before that.

Q. What evidence can you point to that in February of 2009 Wieland was aware of any problems with this project?

A. Was aware -- here is the evidence I would point to. You have an affirmative obligation if you are a developer to see that things are done right and that there's carefully placed and there is follow through and followup and the codes are honored, that manufacturer's instructions are followed. And either Wieland throughout this

process was sleepwalking or walking with its eyes wide shut and was not caring about what was happening or it was intentionally lying. Because my investigation and the experts of the Plaintiffs show serious problems which if the jury believes that tells me that Wieland knew, either knew that there were problems or was reckless in not knowing. Either way you get a grade of F.

Q. I will read a quote from the Goddard case. I want you to tell me if you agree with what it says.

"The trial court should be certain that any liability imposed upon the developer is limited to the cost that would have been required in 1987 to bring the common area up to standard. The Court should take into account the fact that the villa owner apparently agreed at one point to be responsible for the exterior maintenance of the villas."

Let's go back to the first sentence. That implied that the Court should look at what was known at the time the work was turned over to the homeowners. So I am asking this question again. Let's -- what evidence can you point to in the record, documents, testimony, historical records

that indicates that in February of 2009 Wieland was aware that there were problems with these townhomes?

A. Wieland was aware -- I rest on my prior testimony. Wieland through its people which is imputed to Wieland either knew or was reckless in not knowing that shortcuts were taken and basically a slap -- decent looking, nice veneer, but still slapped ash job had been done. That is what Wieland knew or was reckless in not knowing at the time. And that's what I focus on. And to say that Wieland had an obligation or there's an obligation to prove out and out absolute premeditated deliberate fraud is different from saying that the developer has an obligation to turn over the property in good repair, that's the test, or provide the money to fix it.

The property in my estimation based on what I have learned in working on this case is that the property in 2009 was not in good repair. And that the money to fix it was not provided either. That is F plus F, a flunking grade.

Q. I will ask the question a third time. What evidence, documents, testimony, historical records can you point to that documented what

Wieland knew in 2009 as far as conditions of these --

A. The simple fact that they turned over grossly unacceptable work. And --

Q. What evidence can you point to in 2009 that indicates that the work was substandard in 2009, not today.

A. The testimony relates to design or construction defects that were in existence from the time the nails were pounded, at the time the holes were cut improperly. And the time the party walls or the firewalls, rather, were not done properly. That's -- and that predates today. It predates 2013 and it goes back to the inception. That's what I point to. Somebody had to know that the job wasn't being done right and to say when it is done on Wieland's watch, when Wieland is the design professional, when the Wieland is the contractor, when Wieland is the developer, when Wieland is making the wrap around the houses, doing all the legal work, everything else, that it's not Wieland's responsibility to know what's going on, I simple don't buy that, sir.

Q. Mr. Freeman, did I ask if it was Wieland's responsibility or not?

THE COURT: Don't get adversarial with the witness. You need to ask him a question without editorial comment.

BY MR. HASELDEN:

Q. There are thousands of pages of documents in this case. Thousands. I have asked you to point to one document that indicates what Wieland knew in 2009, February of 2009, that indicates that Wieland knew there were problems with the project when they turned it over to the association. One document.

A. I rest on my prior testimony, sir.

Q. Good enough. Now, what is the basis for your opinion that Wieland deceived the homeowners?

A. Deceived?

Q. Yes.

A. Wieland had an obligation to build a home or townhomes that were built with the codes being complied with, manufacturer's instructions being followed. We have had expert testimony at length in this case that these things did not happen. This happened on Wieland's watch. Wieland was charged with knowledge of how these homes were being built. And you can deceive somebody because

you in a premeditated, deliberate, cold blooded way trick them. That's a form of deception. You can deceive somebody if you simply put something out there not knowing or caring whether it is good or bad. You represent that it is okay and you don't make any effort to find out. The testimony I am familiar with and the findings of qualified experts shows the job was done poorly on Wieland's watch. Wieland either knew it or was reckless in not knowing it. Either way, it is deceptive.

Q. Have you read the deposition of Skip Lewis, the defense expert?

A. No, sir, I have not read Mr. Lewis's --

Q. Skip Lewis?

A. No, sir.

Q. Have you read the reports of JR Watkins as far as the cost to fix this project?

A. No, I haven't, but I will say that if you got to fix the project that shows it wasn't done right in the first place.

Q. Thank you, Mr. Freeman. Have you read any of the defense experts' opinions that have been rendered?

A. Only snippets of testimony. I have not attempted to read every deposition that's been

taken by the Plaintiffs and I haven't read all of the defense witnesses depositions.

Q. Wouldn't be it incumbent upon you as the expert testifying as to Wieland's conduct to actually hear their side of the story?

A. You know something? I could have done that. I didn't think it was necessary because of the powerful things that I was hearing from the Plaintiffs' counsel and the persuasiveness of the Plaintiffs' experts reports.

Q. Powerful things you were hearing from the Plaintiffs' counsel?

A. I misspoke. I should have said experts, although I will say that the same thing is true of their counsel.

Q. Are you aware that a design professional actually was retained by Wieland to make sure that they were complying with local code requirements?

A. I am not aware of that. I would be very surprised to hear that frankly given what we are dealing with.

Q. You talked a lot about Section 6.2?

A. Yes, sir.

Q. What does Section 6.19 say?

A. I have to double check. I don't have it with me. I am sorry. 6.19 deals with developers duties of directors and officers -- 6.19, developers duties to create an association and turn over control.

Q. So let me make sure I understand this. What Wieland was supposed to do at the time they turned the association over to the homeowners was tell the homeowners we built a bad project, here is $18.5 million to fix it later on down the road? Is that what your testimony is?

A. My testimony is that Wieland was obligated to act in the utmost good faith to complete the formation of the organization, to turn over a property that met acceptable standards or failing that, was not substandard, met standards or failing that, provide the money to fix it, whatever that money to fix it, whatever that number would be.

Q. Right. I will ask my question again. Your testimony is that they were supposed to tell them when they turned it over to the board this property is substandard, here is $18.5 million to fix it somewhere down the road?

A. Whatever the correct number is it was

their obligation to put that number out there.

Q. We don't know what that number was in 2009, that's eight years ago?

A. I have not made that calculation.

Q. You are not a construction expert, are you?

A. I have not presented myself as such.

Q. You cannot begin to come up with a calculation, can you?

A. I haven't tried and wouldn't try.

MR. HASELDEN: Thank you, Mr. Freeman. I don't have any further questions.

THE COURT: Any redirect?

MR. HAYES: No, Your Honor.

THE COURT: Any objection to this witness being excused from the Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. HASELDEN: Absolutely not.

THE COURT: Professor, you are excused. Have a great day.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're welcome. Plaintiff may proceed.

MR. HAYES: Your Honor, may we have one

minute before we proceed?

(Off-the-record sidebar conference.)

THE COURT: Mr. Foreman, ladies and gentlemen, we are going to take a brief recess. During the break please do not discuss the case. Please leave your note pads in your seats. We appreciate your patience.

(Thereupon, the jury exited the courtroom at 12:38 p.m.)

THE COURT: We will be at ease for a few moments.

(Brief pause.)

MR. MCCARTY: Your Honor, subject to the admission of all exhibits that have been agreed to without objection, the Plaintiff rests.

THE COURT: We need to deal with some exhibits I took under advisement. I need to know what they are.

MR. MCCARTY: I think they are mostly CVs and reports.

THE COURT: I got them noted. I need to know what's No. 2. I said that was for ID only. I ruled on that. What's No. 3? I took Mr. Glick's report under advisement. Is there an objection to the admission of that document?

MR. MANOS: There is.

THE COURT: What's the basis of the objection?

MR. MANOS: Not testimony --

THE COURT: I can't hear you.

MR. MANOS: It is not testimony, Your Honor. He testified at trial, he was cross-examined on it. They shouldn't have his report back there which isn't testimony.

THE COURT: Are you seeking to have the report admitted?

MR. HAYES: Yes, Your Honor.

THE COURT: What's the basis of admitting the report?

MR. HAYES: He testified to it as --

THE COURT: They have heard it.

MR. HAYES: It's a report that he created. They have had a chance to cross him and ask him anything they wanted to about it. We think it should be admitted into evidence.

THE COURT: The objection is sustained. It will be ID only. He testified as to his report. He was adequately cross-examined. I am concerned about the jury giving such technical expertise undue weight in their lay responsibility in terms

of being the finders of the fact giving undue influence to certain portions of the report. He has testified to it. The objection is sustained. Mease's report, I assume that you all's objection to Mr. Mease report is the same?

MR. MANOS: Same objection, Your Honor.

THE COURT: I assume y'all have the same?

MR. HAYES: Same.

THE COURT: The objection is sustained. It will be ID only. No. 18 was the CV. That will remain ID for the same reason, it's cumulative and best evidence he testified. 19 is an addendum. 18 was the CV. I was inaccurate. He testified as to his qualifications. That will remain ID. No. 19 was his report. I have already ruled. That will remain ID as well. 20 through 22, those came in without objection.

MS. NOLAND: I believe 34 was Mr. Moore's CV. 35 --

THE COURT: Wait a minute.

MR. MCCARTY: I did not move that in.

THE COURT: I am only dealing with what I took under advisement. 36 and 37.

MR. MCCARTY: The report -- the summary

of his report was in without objection.

MR. MANOS: I don't believe so, Your Honor.

THE COURT: He objected.

MR. MCCARTY: One page summary?

MR. MANOS: Certainly did.

THE COURT: 36 is an Excel spreadsheet.

MR. MCCARTY: Okay. I apologize.

THE COURT: I have it marked as ID. There was an objection to it.

MR. MCCARTY: 35 is what I was talking about, I am sorry.

THE COURT: 35 is not an issue. I need 36 and 37. I have a line on my court reporter sheet as to 37 so I need to know what 37 is because I have marked that it was marked ID only. That was an objection. So I need to know what it is so our record can be accurate.

MR. MCCARTY: I think it might have been mismarked.

MS. NOLAND: 37 had been reserved as a place saver.

THE COURT: So when you asked -- there is only a 36, no 37? What were you referring to when the witness was testifying?

MR. MCCARTY: I was only referring to 35 and 36. 35 is a summary of his estimate and 36 is the actual work behind it. And Mr. Manos --

MR. MANOS: I thought I objected to both of them.

THE COURT: I have to go back and look. You had an objection to his estimate?

MR. MANOS: Falls under the same report. He testified to it. This was what was on the board, right?

MR. MCCARTY: Yes.

THE COURT: I don't have 35 written down which means it came in -- I think it came in without objection.

MR. MANOS: I certainly stand to be corrected.

THE COURT: I will rely on what the court reporter has in her record. I only wrote down what I took under -- I have certain notations what was contested to. I don't have 35 as being contested to. She has it marked as admitted. I had 36 and 37 marked. By apparently there was no 37.

MR. MCCARTY: I don't have a 37.

THE COURT: 36 was the spreadsheet.

What is that?

MR. MCCARTY: That's the information justifying his estimate.

THE COURT: I thought we decided that didn't need to be -- you tried to mark that as a court exhibit. Did you try to move that in?

MR. MCCARTY: I wanted to mark it as a court exhibit and you declined.

THE COURT: Because the court exhibit is for me I might use to make a decision. For what purpose would it be marked?

MR. MCCARTY: I didn't move it.

THE COURT: 36 just needs to remain ID then.

MR. MCCARTY: That is correct.

THE COURT: There is no 37. I have 35 came in without objection.

MR. MANOS: I missed that, Your Honor.

THE COURT: Why did you all object to the title coming in which is No. 26? There was an exception. 26, I took that under advisement. That was loss of use estimate or the loss of use report?

MS. NOLAND: Your Honor, it was the loss of use summary, just the one page with his calculations.

THE COURT: Was there an objection to that document?

MR. MANOS: Yes, Your Honor.

THE COURT: What's the basis of the objection?

MR. MANOS: Same thing. He testified to it. He was cross-examined on it.

THE COURT: Can you get that for me so I can see what it looks like?

MS. NOLAND: Yes.

THE COURT: He testified to this demonstratively. He testified to it. It will be marked for ID only. That's all I have. Everything else has already been dealt with.

MS. NOLAND: Your Honor, I have one housekeeping matter. We had originally marked for identification the International Residential Code as Exhibit 4. And what had been printed out was an International Business Building Code and by agreement we have agreed to swap those two out.

THE COURT: I was trying to figure out why would that be an exhibit? Isn't that something the Court instructs? Why would you give the building code to a jury?

MS. NOLAND: Your Honor --

THE COURT: It is up to y'all. How large is the document?

MS. NOLAND: It's in a notebook, but they can read it if they want.

THE COURT: You have agreed to swap that exhibit out?

MS. NOLAND: Yes, ma'am.

THE COURT: Is that correct?

MR. MANOS: Yes, Your Honor.

THE COURT: My notes reflect that covers all of the exhibits so now do I understand correctly Plaintiff has rested their case?

MR. MCCARTY: That's correct, Your Honor.

THE COURT: It is 1:00 so we are going to go to lunch. After lunch we will hear motions. How long do you all anticipate that will take?

MR. HASELDEN: Thirty minutes.

THE COURT: What's your estimate?

MR. HAYES: Your Honor, I don't believe -- well, probably take 30, 45 minutes.

THE COURT: Total?

MR. HAYES: Oh.

THE COURT: You want to talk to me for 30 minutes about a motion for directed verdict.

MR. HAYES: No, we may have a motion.

THE COURT: That would take a whole lot of creativity. Not that I would cut you off, but I was just trying to figure it out. Let's go to lunch. After lunch who is your next witness is going to be?

MR. MANOS: Mr. Lewis, Your Honor. He's our primary liability expert.

THE COURT: You said Mr. Lewis is your first witness?

MR. MANOS: Yes, Your Honor.

THE COURT: Then how long do you think he will be?

MR. MANOS: I would suspect about an hour and-a-half maybe.

THE COURT: He will take us through the rest of the afternoon is a safe bet?

MR. MANOS: With their cross I would assume so, Your Honor.

THE COURT: Do you have another witness just in case?

MR. MANOS: I have got Mr. Jason Greogorie who is on Millford Street which is about 15 minutes away on stand by.

THE COURT: I didn't even know we had a

Millford Street. Where is that?

MR. MANOS: It is up there past Romney Street off of Morrison.

THE COURT: That's interesting. So Mr. Lewis is your first witness. And then what was the name?

MR. MANOS: Jason Greogorie was the engineer that we sent out just to do data collection.

THE COURT: He is not on your list, is he?

MR. MANOS: I sent that to Plaintiff.

THE COURT: Just for voir dire purposes. We didn't voir dire the jury about him. What was his name?

MR. MANOS: Jason Greogorie.

THE COURT: That's a short witness you think you would be able to fit in if Mr. Lewis didn't take the whole afternoon.

MR. MANOS: Yes, Your Honor. He would go up for 15 or 20 minutes. He was the one that went back out last weekend and just --

THE COURT: Y'all agreed on.

MR. MANOS: Yes, ma'am.

THE COURT: Yes, sir.

MR. HAYES: Your Honor, just for clarification we agreed to let him go out.

THE COURT: I remember.

MR. HAYES: To get data for Mr. Lewis to rely upon, but not for Mr. Greogorie to express any opinions.

MR. MANOS: I don't intend to have --

THE COURT: I assume he would testify more like a chain sort of situation.

MR. MANOS: I took these photos.

THE COURT: Yes. I'm going to let the jury go until 2:45. We will break until 2:15 and then we will resume argument at 2:15. That gives us just shy of an hour for lunch. If you could get the jury, please, and time to argue the motions after lunch.

(Whereupon the jury entered the courtroom at 1:07 p.m.)

THE COURT: You may be seated. Plaintiff may proceed.

MR. MCCARTY: Plaintiff rests, Your Honor.

THE COURT: Mr. Foreman, ladies and gentlemen, the Plaintiffs have rested their case. There's a matter of law that I need to take up that

will probably take us close to 30 minutes. We all need to eat, you all need to eat. I'm going to let you go to lunch until 2:45. Return to the jury room at that time and we will resume testimony. During the break please do not discuss the case, do not do any independent research and please abide by all my other instructions regarding contact or any comments on social media.

As soon as you all have returned we should be able to resume promptly at 2:45. It's supposed to be a really pretty day. Have a good lunch. We will see you at 2:45. If you would leave your note pads on your seats we will secure them during the break.

(Thereupon, the jury exited the courtroom at 1:09 p.m.)

THE COURT: We will be at ease until 2:15. Please make sure the court reporter has all of the exhibits.

(A luncheon recess transpired.)

THE COURT: The Plaintiff has rested their case. Are there any motions?

MR. HASELDEN: Your Honor, we have several motions, the first of which is a directed verdict as to all causes of action. Shortly before

Your Honor came back on the bench Mr. McCarty indicated which causes of action they plan to go forward on.

THE COURT: Which are? Maybe that will help us. Mr. McCarty, what causes of action are you all proceeding on?

MR. MCCARTY: Negligence, gross negligence, breach of the implied warranties.

THE COURT: Gross negligence. That only applies in a tort claims case. I have never heard of that term. You want to use that as a descriptive?

MR. MCCARTY: That's what I will do. Sorry, Your Honor.

THE COURT: Breach of --

MR. MCCARTY: Breach of implied warranty or habitability, workmanlike service, good faith.

THE COURT: Isn't that all under the same umbrella?

MR. MCCARTY: Yes. Unfair trade practices, breach of fiduciary duty and negligent misrepresentation. We have also got an amalgamation of interest in there. I don't believe that's an actual cause of action.

THE COURT: I thought that only applied to Wieland.

MR. MCCARTY: I think it does.

THE COURT: So then it is -- you can't go forward on it. How are you going to go forward when the order specifically designates that?

MR. MCCARTY: We were planning just the Wieland entities that still exist in this case, Your Honor. The testimony of John Freeman talked about the Wieland entities that were here were all one.

THE COURT: I don't think it really matters. I am not doing separate verdict forms for each verdict.

MR. MCCARTY: So you are treating them as one.

THE COURT: That's how you all have been treating them. Are they trying to indicate they are separate entities? I assume you listed them all because that's how they operate and do business, but basically it's one entity.

MR. MCCARTY: Right.

THE COURT: Correct?

MR. HASELDEN: Yes.

THE COURT: I think that's a nonissue.

All right.

MR. HASELDEN: Your Honor, as to cause of action for negligence, viewed in the light most favorable to Plaintiffs there has been no showing of the four traditional elements of a tort action in this case sufficient to let it go to the jury. We think that --

THE COURT: Which element fails?

MR. HASELDEN: The element of damage, Your Honor.

THE COURT: How?

MR. HASELDEN: They have presented no testimony that -- they put up repair cost as to defective workmanship, not -- they have not put up sufficient evidence with respect to Mr. Moore's testimony to satisfy the burden of proof. Mr. Moore is not qualified to render a $18.5 million estimate. I think that's patently obviously from the testimony yesterday afternoon from the cross-examination as well there has been no testimony from the HOA as to any negligence with respect to areas of common property. There is a difference between common property and common responsibility. The HOA is a Plaintiff in this case and there has been no testimony as to any

damage to the common areas themselves.

So as far as negligence on the part of Wieland as it goes to the HOA, that goes away because they haven't met their burden of proof there. In a nutshell that's I believe probably my argument for negligence.

THE COURT: You need to make all your arguments.

MR. HASELDEN: As to the implied warranties, the implied warranty of habitability would not apply because my understanding in reading the case law is that it only applies to the original seller and as I understood it there were only about ten original purchasers left in this case. So there's about 90 some that the implied warranty of habitability would not apply to. The implied warranty of business for a particular purpose, there has been no testimony anybody in this case, any Plaintiff, as a matter of fact, only one Plaintiff testified, Mr. Denby, that anybody has been unable to use their home.

THE COURT: I don't think he said he is proceeding on that. He said workmanlike manner.

MR. HASELDEN: I thought he said purpose too.

MR. MCCARTY: Yes, I did say for a particular purpose, Your Honor.

THE COURT: Must have missed that and I was writing. You didn't say that. But if you are.

MR. HASELDEN: If they are, Your Honor, there has been no showing that anybody has been unable to use their home as a home which is what they bought it for and that was a particular purpose. Not one shred of evidence to that.

As to the South Carolina Unfair Trade Practices Act cause of action, the Waverly claim fails because it is brought under a representative capacity of the Waverly homeowners. The statute clearly nixes that. As to the individual --

THE COURT: What portion of the statute are you referring to that you say supports that proposition?

MR. HASELDEN: There's an exemption for in a representative capacity, I don't have the full statute with me, but I can certainly get it.

THE COURT: If you are relying on a statute you need to make me aware of what section you are relying on.

MR. HASELDEN: Your Honor, while we are waiting on someone to hand me up the statute, going

back to the negligence cause of action with respect to the HOA, they didn't put up any representative of the HOA. They only put Mr. Denby as a class representative. South Carolina Code of Laws Section 39-5-40 --

THE COURT: That's an old statute. I need to know what subsection you are relying on. There is 39-5-10, 39-5-40. Is there a certain 39-5-140? Is that the exception portion of the statute?

MR. HASELDEN: Yes, ma'am, I think so.

THE COURT: I am listening.

MR. HASELDEN: As it applies to the homeowners themselves, this has been brought as it applies to the HOA. We take the position that that is also being brought in a representative capacity, the HOA homeowners association on behalf of the owners themselves. Additionally, any homeowners who did not buy directly from Wieland are barred from making a UPTA claim under the case of Reynolds v. Riley which says the subsequent purchaser cannot maintain a cause of action for unfair trade against a developer or builder.

As to breach of fiduciary duty, we all listened on this side of the room very closely to

both the testimony of Mr. Glick and Professor Freeman and the questions asked of Mr. Freeman. The word "fiduciary" never came out of anybody's mouth. There has been absolutely no testimony of breach of fiduciary duty. He talked about a breach of duties which can go to negligence cause of action, but certainly there was no use of the word "fiduciary" in this courtroom.

Lastly, as to the negligent misrepresentation cause of action, there has been no testimony from any homeowner, no member of the class, no member of the homeowner association as to any misrepresentation. The only mention of the word misrepresentation came from Professor Freeman. There has been no testimony in the record as to any "misrepresentation" made by anybody, any of the Defendants to any of the Plaintiffs.

Your Honor, we would also move for a directed verdict as to the loss of use claim. Despite the point we made this morning about Mr. De Santis having to base his opinions on some expert testimony or some testimony that he was going -- they were going to have to be out, he still never elicited any testimony as to the basis for that knowledge, where it came from, any expert it came

from. At the close of their case there is absolutely not one shred of evidence where anybody has said in this case that they have to be out for six months. That goes directly to the loss of use. I don't know whether you want to hear the argument and --

THE COURT: You need to make full argument on everything you plan to proceed on because I plan to hear you once. I plan to hear him once. I plan to make a decision.

MR. HASELDEN: As to punitive damages, it would be our position there has been absolutely no evidence introduced of any willful, wanton, grossly negligent reckless conduct by a clear and convincing evidence that punitive damages are warranted in this case.

Your Honor, I think I have addressed all of the five causes of action they said they want to go forward on. Happy to explain any more, otherwise I will have a seat.

THE COURT: Who would like to respond?

MR. SANCHEZ: Your Honor, Jessie Sanchez for Plaintiff. Responding to the number of motions for directed verdict by Defendant put forth, I would just like to call attention to the

standard set forth by Rule 50(a). I would like to call attention, Your Honor, to Rule 50(a) and the standards set forth under Harvey v. Strickland. Under Harvey v. Strickland it stands that a motion fails if a Plaintiff's verdict is reasonably possible under the facts. I would submit to you that there is sufficient evidence on the record that -- for submission as to all of these causes of action to the jury.

As to the claims regarding the SCUTPA argument, I would first like to touch upon the fact that under SCUTPA and under South Carolina 39 -- Section 39-5-140, it states that any person who suffers an ascertainable loss of money or property, real or personal, as a result of the use of employment by another person of an unfair deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually but not in a representative capacity to recover actual damages.

Person is defined under South Carolina codes to include corporations and any other legal entity. The HOA as asserted in our complaint is a dually authorized South Carolina not profit corporation. It fulfills the personhood

requirement of SCUTPA. Contrary to what Defendants state both in their motions, written and verbal, SCUTPA does not require the Plaintiff to be an owner of a fee interest. It only requires them to have experience or suffer some ascertainable loss of money. In this instance --

THE COURT: What loss has the HOA sustained?

MR. SANCHEZ: At this point they have had to pay for repairs that have occurred on --

THE COURT: What testimony is there to that?

MR. SANCHEZ: I believe Mr. Glick testified as to the damages to the common elements.

THE COURT: Did he say how much it cost and how much the repairs cost that have already been done?

MR. SANCHEZ: He did not provide a cost as to repairs to that.

THE COURT: Then how do I know what the loss of the HOA is and it rises above speculation? You have to put a dollar figure on it. You can't say they have a loss. You have to quantify what they have spent to make repairs that entitles them to be reimbursed.

MR. SANCHEZ: I understand, Your Honor. I would point to the testimony of Mr. Moore who offered testimony as to cost of these repairs and what the HOA had spent.

THE COURT: I don't recall him testifying the HOA spent anything. I may have missed it. If I am wrong, I stand corrected.

MR. SANCHEZ: He listed the cost of repairs the HOA would have to spend in order to repair the common elements. These common elements include the exterior of all the buildings.

THE COURT: You're saying the only damages you would be -- you would not be seeking those for the homeowners. So what exactly is it that the homeowners are trying to recoup? It's one or the other.

MR. SANCHEZ: Well, I think that the HOA gets to recoup damages to those parts of the property that they are responsible for.

THE COURT: Which are?

MR. SANCHEZ: Which are the common elements which exists --

THE COURT: Which are?

MR. SANCHEZ: The exterior of the buildings including roofs, siding and other common

elements. Whereas --

THE COURT: So what is it then the owners are seeking?

MR. SANCHEZ: Loss of use and as well as damages.

THE COURT: What other damages?

MR. SANCHEZ: As Mr. Mease testified during his testimony, he pointed to a number of rotting beams underneath the homes. And these do not make -- these are not part necessarily of the common elements.

THE COURT: Did you present any evidence about each unit that has rotting beams?

MR. SANCHEZ: We did not present evidence as to each unit, but we presented --

THE COURT: I think you have to for those individual owners to be entitled to recoup, wouldn't they?

MR. SANCHEZ: Well, Your Honor, one of the things that we presented was the issue of the fire assemblies and the firewalls we think between these units.

THE COURT: I understand that, but you can't just talk about that generally and say without quantifying what it is to be fixed. You

can't say well, we want a million dollars to fix that and not specify how many of those firewalls have to be replaced. Who is to be compensated for it?

MR. SANCHEZ: I will say that for the elements such as the firewalls it would be the homeowners. For the common elements which are the roof, the exterior, the siding, the steps, those would be the HOA. I would indicate that the covenants are in evidence and the covenants set forth the descriptions as to what are the responsibility of the homeowners association.

THE COURT: I am clear about that. You still haven't answered my question. How many firewalls need to be replaced? How many beams? Which individual plaintiffs of the 37 who are remaining have to have that done? You don't get to say to the jury by the way, there's some with rotting beams and they have to be repaired, this is how much we estimate it is going to cost. You need to be specific, otherwise it is speculative.

MR. SANCHEZ: Your Honor, five beams need to be replaced. And as far as --

THE COURT: Who is going to be entitled to that? Does that go to the HOA?

MR. SANCHEZ: The individuals under whose homes they are, Your Honor.

THE COURT: How many firewalls?

MR. SANCHEZ: As far as firewalls I believe they testified that all the firewalls need to be replaced. I would bring to the Court's attention, Your Honor, that when testing was done throughout each of the buildings --

THE COURT: I remember what he said. Wasn't a need to take it all apart because he figured it was consistent all the way through.

MR. SANCHEZ: I understand, Your Honor. What I was going to say was that out of every single test that was performed, at least as far as the destructive testing that Mr. Glick performed, every single one of those tests came back demonstrating there was some form of construction defect. The seven tests that he performed 100 percent of them showed some level of construction defect for the home. So based on those tests that he did he thought the entire development, and his testimony which he provided here in court, there's enough evidence there for the -- to put forth for the jury to decide as to this question of fact.

Also, the windows need to be replaced,

exterior windows, any water damage that has been experienced as a result of these windows, all those have led to damages that need to be replaced by the homeowners. I would point out, Your Honor, that Mr. Mease testified that there was damage as to all of the common areas around the roofs, the fire assemblies and the windows for all buildings based on his studies.

I would also put forth Mr. Moore provided estimates what those repairs would cost, what it would cost to replace the windows and the siding and Mr. Glick provided testimony as to why all of this siding needs to be removed and all of the roofs. He mentioned there were the wrong types of nails were used, that the nails were rusted through, that the side boards were not sufficiently nailed to the sides of the buildings, that they did not go through any studs.

Mr. Mease's testimony as to the unwrapped beams which have resulted in rot and excess condensation underneath the homes. And I would put forth, Your Honor, that there is sufficient evidence, both physical evidence that's been provided through the course of this case and testimony, to satisfy the requirements for

surviving a motion for directed verdict which is that is it reasonably possible under the facts for Plaintiff to reach their verdict.

Under SCUTPA, Your Honor, I would also point out that under the case of the Estate of Carr v. Circle S Entertainment there are two prongs there which have to do with questions of fact, second one being whether an unfair deceptive act affected the public interest, the third whether the Plaintiff suffered monetary or property loss as a result of the Defendant's unfair deceptive practice.

There has been testimony put forth as to the duty that a developer owes both the homeowners and the homeowners association. That was put forth by Mr. Glick as well as by Professor Freeman. I will say there is evidence in the record relating to the potential for public harm that would justify a submission of this SCUPTA claim to the jury.

As to the question of negligence, Your Honor, I would just point out that I agree with defense counsel as to the requirements for proving negligence and the second and third requirements create a question of fact whether there was a

breach of that duty by negligent act or omission and damage proximately results from the breach. We had Professor Freeman testify as to the omission presented by the developers in failing to adequately build these buildings, the standards that they communicated to the homeowners that they would build them as well as I would also point out, Your Honor, that despite the fact that defense counsel claims that the HOA is acting in a representative capacity under SCUPTA, that it is not acting in a representative capacity, that if we look at the declarations the membership is not defined. Just because the members are -- the homeowners are members of the HOA does not mean that the HOA is acting in a representative capacity on their behalf. Just like any corporation might have shareholders, I could be a shareholder in an oil company, doesn't stop that company from building a pipeline through my house.

And in this case they did not act in a representative capacity and the responsibilities set forth in the declarations fall on the HOA. They do not fall on the individual homeowners to make these repairs.

I would also put forth, Your Honor,

that contrary to Defendant's assertion that there has been no testimony from the HOA I would put forth Mr. Denby testified that he is, in fact, president of the HOA. He testified as to his experiences as president of the HOA and as an individual homeowner in terms of pursuing Wieland Homes to fix the construction defects which are present at the townhomes.

Also, Mr. Moore was qualified to provide evidence as to negligence in this case. I would just point out that there are elements here that have been set forth as far as the breaches that have occurred that Wieland knew or should have known as to the defective siding, windows, doors, bricks, handrails, roofs, that it was completely preventable as Mr. Glick demonstrated with his testimony. There was moisture throughout the development at beams, handrails. There was rot throughout the homes. And this was both preventable and should have been remedied by John Wieland Homes.

I would also put forth that Professor Freeman testified as to the duty, fiduciary duty, owed by John Wieland Homes to the HOA to make sure that the common elements when they were handed over

to the HOA were in good repair and if they were not in good repair they have a duty to identify the issues with the buildings as well as provide enough reserves to fix any issues that may have come up prior to handing over to the HOA.

As far as -- just give me a moment, Your Honor. As far as the directed verdict on the habitability, I would just point to Holder v. Hasket which noted that liability is based not on fault, but the fact that the offender has put the house in the stream of commerce and has received a good price for it.

There is testimony here that the homes were built by Wieland, they were sold at a profit to Wieland Homes. And despite selling these homes in the stream of commerce and making a profit off of it, they did not deliver homes that met the industry standard, that they did not meet the installation requirements set forth by manufacturers and as a result they do not meet the building codes that are requirements for the buildings.

As far as the negligent misrepresentation, that misrepresentation can be -- could arise out of an act or omission. In this

instance, it arises out of both elements, first element being that it's a -- did not construct the homes to meet the expectations of the industry.

THE COURT: Isn't real estate a little different? Do you have any evidence that any of these were hidden before folks bought them, that they didn't exercise their own rights in having an inspection done or otherwise or that somehow they sought to hide any of these defects from them before purchase?

MR. SANCHEZ: Well, Your Honor, I would just --

THE COURT: Real estate has a whole different set of parameters. It's not like everything else.

MR. SANCHEZ: I would just point to the testimony Mr. Glick and Mr. Mease offered that these defects are latent and just because they are not readily --

THE COURT: One of your experts said he walked up on the roof and it was obvious that the nail gun had not been set appropriately. If you have your house inspected they look at everything. So I am trying to figure out what is it that you are saying that they actively -- in negligent

misrepresentation there has to be some action on the part of someone to actively deceive, to somehow obscure something that needs to be disclosed. That's what I am trying to figure out because all of these things just don't morph -- you don't morph a negligence action into a negligence misrepresentation action. They don't just morph. The case comes down to one real good theory and that's how I am going to instruct you all in a minute to figure out what your real good theory is because I think you all know there are only probably a couple of real good theories in this case that are supported by the facts that have been presented and the testimony that's been elicited. But I'm just not certain that there are really any elements that rise to the level of a negligent misrepresentation as contemplated by our case law.

MR. SANCHEZ: Well, Your Honor, I would point to -- addressing Your Honor's comments, I would point to the testimony that was provided regarding the facts that John Wieland Homes marketed these homes --

THE COURT: When you have a negligent misrepresentation you have to have made a representation, you have to have specialized

knowledge superior to the person you are dealing with, you have to believe they are going to rely on it and somehow you obscured a material fact that lured them basically into making a decision that was against their common sense. Something they could have not discovered on their own. It's a heightened duty, not just a negligence case where you say you omitted telling me something. It has a heightened standard.

MR. SANCHEZ: I understand.

THE COURT: I'm really at a loss as to how you meet those elements because you haven't produced any evidence, any statements that were made that they had superior knowledge to folks they were dealing with, that somehow they relied on these statements or somehow your clients' ability to make their own careful inquiry, that they were discouraged from doing that. Because I would imagine before they bought these homes just like anybody does they have home inspection if they are prudent. And I don't know whether some of these things showed in the home inspection. People buy houses as is. People buy houses and negotiate for defects. People will buy a house and say the inspector found a leak. He said it can be fixed

like this. And we will put a certain allowance of money in escrow for it to be fixed. I don't know because the record is really void of a lot of that kind of testimony as to what actually was known before the purchase of these residences, these townhomes, condos, however you want to characterize them.

But there has to be a statement that was made to support an action for negligent misrepresentation. Has to be a particularized statement, it has to be one that the person who made that thought you would rely on it, that you would forego your own rights to do your own investigation.

Really it's just a fancy legal way of saying you misled me to my detriment because my knowledge was superior and I hope -- because my knowledge was superior that you relied on it and you let me do it. That's about basically what a negligent misrepresentation cause is. I am at a loss as to any evidence in the record that would support any of the elements of negligent misrepresentation unless you can point me to some testimony that I have missed.

MR. SANCHEZ: In purchasing the home

the home came with the warranty and the homeowners --

THE COURT: Breach of warranty is not a negligent misrepresentation. That's just failure to honor a warranty. If I buy a warranty and you don't honor it, then I sue you on warranty. I say you breached basically the contract with me. You promised to fix things. You didn't do it. Now I am suing you. I want my money to fix it. I want any other actual losses that flow from that, whether it means I have to get out of my house while it's fixed because now it has exacerbated because you failed to fix it. Or I don't think the law contemplates attorneys fees, but I think certainly it will contemplate anything that will come in the nature of an actual -- of a loss contemplated by the elements of actual damages, really probably more like breach of contract or breach of warranty, but you can't morph a brief of warranty into a negligent misrepresentation. If you have a warranty you have a contract. You bought something. You gave somebody consideration for it. You're saying I paid you, you didn't honor it. It was a breach.

MR. SANCHEZ: Your Honor, I would just

as a last point on that topic point out that the homeowners association, and there is testimony to it I believe, that John Wieland Homes represented to the homeowners in putting these homes in commerce that they were built to the highest degree of quality and, in fact, they weren't and by qualifying their quality of their --

THE COURT: What evidence do you have in the record of those representations? Just because you put something on the market doesn't mean that you are warranting it's in excellent condition. People buy things under different conditions all the time. Lots of people sell their house as is. If you have a 60-year-old house you are not going to sell it with a warranty. You say I have lived in this house for 60 years. It worked for me, it might not work for you. I think you need to get an inspection. I am selling it as is. I don't have a clue. It was built before I was born. There are different market conditions that people sell homes. People buy damaged property all the time. People buy cars that don't work in the hope and expectation that they can fix it.

I have not heard -- simply by putting a house in commerce unless it is brand new are you

making a representation that it's a particular way. When you start putting houses in commerce owned by two or three folks that's a little different set of circumstances than when you have a brand new development and you are selling condos to people. You might be able to infer from it being brand new that I am representing to you that nobody has lived in it and there's nothing wrong with it. But once property started changing hands and other folks have lived in it, you can't really -- that's why you sell warranties. Stuff is built to break. You buy a warranty because you want it fixed. You anticipate because is it made by a human being it is fallible. The roof might leak. Foundation might shift.

MR. SANCHEZ: On that note regarding warranty, Your Honor, I would just point out that there is ample evidence on record of breach of warranties as far as John Wieland Homes goes and I would just point out as far as the implied warranty for workmanlike service, that that extends to subsequent purchasers. I would just point out the case of Fields v. J. Haynes Water. A subsequent purchaser may sue a professional builder on the implied warranty of workmanlike service despite the

lack of contractual privity. And as the record reflects, there is extensive testimony as well as physical evidence that has been presented as to the quality of the workmanlike services provided, everything ranging from the installation of the roof, installation of the siding, installation of the bricks, and the contractor's failure to meet the manufacturer's instructions. As a result of not meeting the manufacturer's instructions in addition they also breached the building code in building these portions of the building and that warranty does extend to subsequent purchasers of the home.

I would point out, Your Honor, that as far as the loss of use indicates, it is not so much the loss of use that the homeowners have experienced, but the loss of use that would be experienced were John Wieland Homes to repair or anyone, any contractor, to repair these homes as provided by testimony this morning and on testimony provided by Mr. Glick repairs -- to the extensive nature of this repair would cause the homeowners to have to leave their homes for four months at a time. Testimony was provided today as to why six months or an allotment for six months is a more

financially prudent allotment than allotting for four months. And that as a result of the defective construction that John Wieland Homes and the nature of the repairs that have to occur, including all things like scaffolding and replacement of windows, replacement of siding, replacement of roofs. If you are going to do it in an efficient manner that's going to happen in four to six-month increments over several years. If you have to do it all at once home by home that would result in the loss of use of the homes by the homeowners.

I would just point out that as provided by Professor Freeman there is evidence of reckless conduct that that is weight as to the issue of punitive damages and there's sufficient evidence on the record provided by Mr. Freeman's testimony as well as testimony provided by Mr. Glick as to the recklessness of John Wieland Homes' actions in building these homes, building homes that did not meet the code, that did not meet any manufacturers requirements, selling these homes to third parties for a profit, making the representations about the homes quality and so forth.

I would also lastly point out, Your Honor, that these are not just issues that have to

deal with windows and siding and roofs, but there are serious life safety issues that have to do with rot. There is plenty of testimony and physical evidence demonstrating that there is rot in these homes, that the firewalls are not properly installed. This poses a serious risk to life and safety of the occupants of these homes and that John Wieland Homes was reckless in disregarding both the manufacturer's instructions in building these homes and inadequately building these firewalls.

As far the SCUTPA claim as well I would point out as a last point that there has been question as to whether or not John Wieland Homes' actions have impacted public interest and there has certainly been testimony by Professor Freeman as to the impact that the actions taken by John Wieland Homes might have on the public at large and this is a question of fact that is published, sufficient evidence exists in the record for admission to the jury. For these reasons, Your Honor, we ask that you deny Defendant's motion for directed verdict.

THE COURT: Anything further from the defense?

MR. HASELDEN: Your Honor, very

briefly. Because you said the warranty --

THE COURT: I will always give you a chance to respond. I have some questions in my mind.

MR. HASELDEN: You're correct on the negligent misrepresentation. I agree with your point on that. As to --

THE COURT: My analysis. I don't have a point. I don't have a side.

MR. HASELDEN: Your Honor, I agree with your analysis on that. As to breach of fiduciary duty, we are pretty sure it never came out of anybody's mouth.

THE COURT: Let me ask a question. What evidence is there of a special relationship that would rise to the level of fiduciary other than the passing language in Goddard which actually is dissimilar to this case. A fiduciary relationship is different. Again, it has a heightened duty. I really haven't heard any testimony that they stood in any special relationship to these individuals. Especially when -- maybe to the folks -- well, roll that back. When they turned it over to the HOA maybe, but how did they have any responsibility to these

subsequent buyers there can be evidence of a special relationship that they would have relied upon?

MR. SANCHEZ: Well, Your Honor, I would just point out that the HOA is consistent. While the buyers might change, the HOA continues to be --

THE COURT: They might have -- I am really not totally convinced of that either, but I am just curious as to what evidence it is that you would portend has been put into the record that would support breach of fiduciary duty. Professor Freeman discussed a duty. He discussed what the duty is in terms of corporate entities and that it has a responsibility to make sure that when it transfers property that it is in good condition. That if it is not to make a disclosure and to sufficiently fund I will use escrow for lack of a better word so the repairs can be made. That's duty in breach. Fiduciary duty is a whole other ball of wax.

MR. SANCHEZ: Your Honor, I would point out while there was a duty for the developer to continue to preserve the fiduciary duty under Goddard as well as supported by the testimony by Professor Freeman that that fiduciary duty attached

when in this case John Wieland Homes was responsible and controlled the HOA. It was at that point that they controlled the HOA they were responsible for the common elements throughout all these homes which included exterior elements.

THE COURT: I'm clear about that. I asked you a different question. I asked you what fiduciary responsibilities would they have to these individual homeowners? I can discern no testimony to support that.

MR. SANCHEZ: I would just point out, Your Honor, Professor Freeman testified there were absolutely no reserves --

THE COURT: That's about the HOA. They own the common elements.

MR. SANCHEZ: The common elements include --

THE COURT: You are missing what I am asking you. What fiduciary responsibility would this developer have to the individual Plaintiffs? Fiduciary in nature.

MR. SANCHEZ: I would submit, Your Honor, that while the duty may not be -- while the duty might not be to the individual homeowners, it would certainly be to the HOA.

THE COURT: I am past that point. I am asking a very specific, pointed question. What evidence is there in the record that there was a fiduciary relationship established between these homeowners and a representative or individual capacity with the developer, the Defendant? Because I haven't heard any and I just want to make sure I didn't miss anything. Before I let counsel finish addressing the point I just need to know what testimony is there in the record to support that.

MR. SANCHEZ: I would just point out, Your Honor, there is testimony that the developer John Wieland Homes wasn't just in charge of the HOA, but also the general contractor.

THE COURT: They never met any of these individual buyers. What -- a fiduciary relationship is not just a relationship. It's a special relationship. It's a heightened duty. I haven't heard any testimony to meet the elements, the individual homeowners and the individual or representative capacity or had any fiduciary -- there was any fiduciary relationship established, much less one breached to them.

Now, the HOA may be a whole different

story. And the cases that you all cite really don't -- it says by analogy. It's a good analysis. But I am trying to sift through what's been presented and it is your burden of proof in the light most favorable to you, what evidence is there that a jury could discern that there was a fiduciary relationship established with these individual home buyers and the Defendants.

MR. MCCARTY: The testimony is the documents in support of the fact that Wieland sold these homes to these individual homeowners.

THE COURT: We have case law that says that's not enough to establish a fiduciary relationship, nor a mortgage or mortgagee. It is different.

MR. MCCARTY: This is not just a mortgage or a mortgagee, Your Honor. This is also a home builder, a general contractor. They are all one.

THE COURT: That's a contractual relationship, not a fiduciary relationship.

MR. MCCARTY: I think the combination of the developer, general contractor and --

THE COURT: Find me the case law the supports that. There is case law that says exactly

opposite. That you can't morph those relationships into a fiduciary relationship. A fiduciary is a heightened relationship that has very specific elements. The only reason it would apply to the HOA is because we have case law interpreting it that way. In other words, they have complete control of everything to the exclusion of anyone else's involvement. Therefore when they turned it over that these new folks or new entities that took it over had a right to rely on what was being represented to them. Because not only were they talking to them in an individual contractual capacity, they were saying we did this a certain way, you can rely on the way we did it and you can rely on the way we are turning this over to you.

That's different than individual homeowners. There's case law that talks about mortgagors. A lot of times in contracts sales specific performance people try to say that's a fiduciary relationship. I was in a position of trust and I have right to rely on it. Case law doesn't support that. It says you are in an adversarial relationship. Caveat emptor. I am buying something from you. It is your job to look after your own interest.

Now, it is different if I hide something from you. It is different if I actively seek out to deceive you. But the law says folk have equal bargaining positions. They are supposed to look out for their own interests. So it doesn't sort of make that leap into a fiduciary relationship because the law does not presume -- if I am buying your house from you that doesn't create a fiduciary relationship. My thought process should be that there is something you are hiding from me and I need to take care of my own interest. If I'm in a commercial transaction the law imposes upon me a duty to protect my own interests.

Now, the HOA is a different story. I haven't heard any testimony that would rise to the level -- that's why I asked the question -- of Wieland being in any kind of fiduciary relationship with buyers and subsequent buyers.

Normally when an HOA is turned over there is no sale involved when you are transferring from the developer to the HOA. The HOA doesn't get any consideration for that. Usually they transfer under the master deed. That is why I think fiduciary elements would apply to that.

When you start talking about a sale

between two people of equal bargaining position, the law says you should look out for your own interest. You don't have a right to rely on whatever representation with some exceptions. I am making a broad statement. But in terms of the elements of fiduciary duty, I'm not sure. That's why I asked the question. I asked it a very specific way. I haven't heard any testimony rise to the level of establishing a fiduciary relationship by a preponderance of the evidence between the Defendants and the individual Plaintiffs. Now, there might be some other things, I don't know that a fiduciary duty is one of them. So if there is some testimony that I missed, something that I did not hear, which it is possible because I'm human, I need you to bring it to my attention so I can make sure I can consider it.

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

THE COURT: Thank you, sir. You may continue.

MR. HASELDEN: Your Honor, the only other thing that I would point out is under the Unfair Trade Practices Act cause of action which the key is that potential for repetition. They

have been out of the business since 2012. There was no evidence of any potential for repetition. There certainly can't be repetition by a company that hasn't been in business in five years.

THE COURT: Is there any testimony about that in the record?

MR. HASELDEN: No, ma'am.

THE COURT: Then how can I consider it?

MR. HASELDEN: There is no evidence in the record as to any repetition whatsoever.

THE COURT: There is no testimony -- well, repetition can be one time. It doesn't have -- they don't have to prove it happened over and over again. One act can be capable of repetition. So my question is how can I make a decision if there is testimony in the record they are not in business?

MR. HASELDEN: Sure. I would still take the position that the class can make payment, and the HOA is also representative proof and any individuals who do not buy unless they bought directly from Wieland --

THE COURT: Do you have a case that interprets the statute that way?

MR. HASELDEN: The case that interprets

the statute as to homeowners that a cause of action cannot be maintained by a subsequent homeowner is Reynolds v. Ryland. I think it is 1998 maybe.

THE COURT: If I follow your logic every class action couldn't have an unfair trade practices action. That doesn't make sense. We got too many of them.

MR. HASELDEN: Your Honor, the statute clearly says --

THE COURT: I'm not sure that's what the statute says. The statute says may bring an action individually but not in a representative capacity to recover actual damages. And I need something that interprets what representative capacity means because if I follow your logic we would never have a class action. We got too many of them, federal and state court. So there must be something interpreting it that allows it. Because really wouldn't make sense to bring 37 people in here to testify about the same thing and the same condo development.

When you say a representative capacity, I don't think if you have a class action and you have a class representation that that person takes the place of all those individuals. They are all

still listed as individual Plaintiffs. That person simply speaks for that entire class. It doesn't mean that these people's rights are abrogated to the person who now stands in their shoes to sue for them, does it?

MR. HASELDEN: That's my understanding.

THE COURT: A class action abrogates the rights of individual Plaintiffs? They don't have a say anymore?

MR. HASELDEN: My understanding has always been once you go that route you concede to the class that are representing your interests.

THE COURT: You still have a say. I don't think a class is going to act unilaterally. I would imagine they are all on the same page or they would have opted out.

MR. HASELDEN: You may be right, Your Honor.

THE COURT: It's my understanding or you are going to have 10,000 people coming in here testifying to the same damage. Same set of events. If that were the case individual Defendants -- Plaintiffs would not be listed. And they wouldn't be able to recover.

MR. MANOS: Can I point one thing out,

Your Honor? This is off that subject, but Mr. Denby as the class representative did not provide any testimony that the beams in his unit which are not common elements were damaged. He also did not provide any testimony that his masonry stairs were damaged. Those --

THE COURT: I don't think he has to to be the individual. You just pick a class representative. That means in certain commonality we have the same damages. He testified, however, that there are common elements to his house that are going to have to be repaired I would imagine or he deferred to the testimony of the -- but I don't think if class representative, I don't think each one of them has to have the same identical injury for him to be the class representative.

MR. MANOS: Let me try to clarify what I was saying is that there are things that are not common elements which include the beams under the house, include the masonry stairs, include the windows, which there was no individual testimony to support any of that.

THE COURT: I don't know. What unit does he live in? I don't know -- one of the experts might have testified to the unit he lives

in. Do we know that? They identified it by number.

MR. MCCARTY: That's correct, Your Honor.

THE COURT: And the deed has been entered so I don't know. Does that reflect that's one of the units they tested? Can anybody answer that question for you?

MR. MCCARTY: I can't, Your Honor. I agree with you. It is commonality. It doesn't mean specifically there was one issue that is out there that is not shared by a class member. It defeats the class.

THE COURT: The purpose of a class action is we have a common element in terms of our injury. The commonality is the injury, not how it manifests itself. It is for judicial economy. Say like asbestos. You couldn't have a hundred thousand people come in and testify.

But still I would like that question answered because nobody ever connected the dots.

MR. MANOS: I think 1005 Zinser.

THE COURT: I am curious. I want to know what property that the expert testified to he did the testing on.

MR. HASELDEN: 1005 Zinser.

THE COURT: Spell that for the court reporter.

MR. HASELDEN: Z-I-N-S-E-R.

THE COURT: I always ask because the court reporter might ask me later and I would have no idea.

MR. SANCHEZ: Your Honor, may I address one point about the representative class?

THE COURT: Give me one second. I want to do one thing at a time. I am curious whether that's the unit.

MR. MANOS: I am actually --

THE COURT: What unit does it say?

MR. MANOS: Doesn't say.

THE COURT: It will have the description. Let me see. It would say in the description of property.

MR. MANOS: Calls it 166 Waverly Phase Four instead of the actual --

THE COURT: They didn't list a unit.

MR. MANOS: That's why I was looking to see if I can find out.

THE COURT: Isn't that a tax receipt on the front of it? Is that the recording stamp?

That doesn't say an address?

MR. MANOS: I may have another document that might clear this up.

THE COURT: Usually the bottom of the description will have the actual physical description or who it is to be mailed to.

MR. MCCARTY: Your Honor, I have information that Mr. Denby's was 1205 Zinser. But it wasn't one of the ones that was randomly tested.

THE COURT: It was not one of the units that the expert looked at.

MR. MCCARTY: That's correct.

THE COURT: Okay. Do we know whose unit it was?

MR. MCCARTY: Myles Glick has in his report the units that he looked at.

THE COURT: Okay. Let me let them make their full response and then I will let you respond. Can I just let the jury go? I think it is going to take longer than we anticipated and I don't think it is fair to have them siting and I may need some time to think.

MR. HASELDEN: That's fine, Your Honor.

THE COURT: Get the jury, then we will plan to start fresh in the morning with testimony.

(Thereupon, the jury entered the courtroom at 3:19 p.m.)

THE COURT: You may be seated. Ladies and gentlemen, the matters of law that the attorneys and I need to deal with are taking a little longer than I anticipated, probably the rest of the afternoon so I don't want you all sitting while we are working through this.

So I'm going to allow you to leave for the afternoon. I just need you to return in the morning at 9:30. At that time we will resume testimony and at that time as well I will hope to give you a better estimate as how much longer I think it will take the case to be tried so that you can plan accordingly. We have also made arrangements for you to park next door in the garage that is adjacent to this building so that you don't have to walk from Cumberland. My deputy clerk is getting the passes for you to put on your dashboard so if you can accommodate me by remaining in your jury room until she comes back to give you all those so you will be able to park next door in the morning instead of having to hike down the street. It is supposed to rain. So if you would wait for her so she can give those to you.

During the break please do not discuss the case. Please don't discuss it among yourselves or with anyone else. Don't do any independent research. I know there is a ton of stuff that is available on the internet. We tend to believe it is true because it's on the internet, but as the finders of fact in this case you are bound to decide the case according to the sworn testimony without any outside influences. So I would ask you to restrict yourselves from doing that. Also please don't make comments on any social network or have any contact with anyone in or about the courthouse. I would not want innocent conversation to be misinterpreted.

If you would stack your notebooks on the ledge for us as you leave and we will secure those during the recess. She is back. Y'all got hot pink passes. She will bring those to you in the jury room, then you will be free to go for the afternoon. We appreciate your patience. I know jury service is thankless. I know that some of this may seem a mystery to you, but again we take that for granted. We do this every day. So we know what to expect and I know that sometimes it might be frustrating for you. Please know we do

not take your time for granted. So I hope you all have a great afternoon and we will see in the morning at 9:30.

(Thereupon, the jury exited the courtroom at 3:21 p.m.)

THE COURT: Yes, sir. You may continue with the argument.

MR. HASELDEN: Your Honor, I am sorry.

THE COURT: Did you need time to read?

MR. HASELDEN: I am finding a case that talks about dismissing class action claims under SCUPTA.

THE COURT: Tell me the name of that case and I will be glad to look at it.

MR. HASELDEN: It's like -- it's tough to read. In re: Microsoft Corp antitrust litigation.

THE COURT: That's a South Carolina case?

MR. HASELDEN: 127 F. Supp 702.

THE COURT: I can't rely on a federal case. Their rules are a lot different than ours. They parallel, but it's different. I can't rely on a federal case, a district court case that hasn't been subject to Fourth District review. Our

Supreme Court has been silent on it.

MR. HASELDEN: Your Honor, I am also told --

THE COURT: I am willing to look at anything.

MR. HASELDEN: I'm told the case of Dema, D-E-M-A, v. Tenet Physician Services Hilton Head, 383 S.C. 115 also supports.

THE COURT: 383 15?

MR. HASELDEN: Yes, ma'am.

THE COURT: I will be glad to look at it.

MR. HASELDEN: Also supports that proposition. Your Honor, I have been told I was reading from the Tenet case that was citing other cases in other jurisdictions for the same proposition. I agree with your analysis and you can read that.

Additionally, Your Honor, as far as the individual homeowners go, the only one that testified was Mr. Denby. He didn't testify to any unfair acts, any potential for repetition, anything that would allow the homeowners themselves to maintain a cause of action for unfair trade practices on that. There's absolutely -- our

position is there is absolutely no way that that cause of action can be maintained by the homeowners themselves as well as the other case that I cited, Reynolds v. Ryland which takes out --

THE COURT: Do you have a case cite for that?

MR. HASELDEN: Yes, ma'am. We will have a cite for you. And I have to be honest. I have sort of -- I think we have made all the arguments. As well, Your Honor, it's very important Mr. Denby is president of the HOA now, not in 2009. That goes to whatever potential misrepresentation.

THE COURT: This was filed in '13 so apparently the HOA was turned over in '09.

MR. HASELDEN: Reynolds is 340 S.C. 331.

THE COURT: Thank you very much. Are you really proceeding on these affirmative defenses you have alleged? Are you abandoning any of these? You allege there was no standing.

MR. MANOS: I think there may be no standing by the class representative in certain parts of the action.

THE COURT: Didn't we resolve that in a

motion previously? He was taking somebody else's place, wasn't he? Because that person sold their unit, correct? Statute of limitations? I haven't heard any testimony about that. Comparative negligence? We have not gone to the defense. I got ahead of myself. I apologize. You all can ignore I said that. We will cross that bridge later.

MR. HASELDEN: Your Honor, as an aside, Mr. Manos and I did not prepare that answer.

THE COURT: The way I learn about cases is I have to start from the bottom. I get a file. Believe it or not, I read every single thing that is in there. Sometimes I get like information overload and until I start hearing the case it doesn't make sense to me and I appreciate you all being patient. You have lived with it. You know it much better than I ever will. So I start with pleadings and I determine what the cause of action is, what the defenses are and I just got a little ahead of myself. So it was -- some of it duplicated itself, but no worries. Was there anything further?

MR. SANCHEZ: Yes, Your Honor. As to the Defendant's point regarding whether the HOA was

acting as a representative capacity, I would just point out that if you look at the declarations which are included in there, the HOA is capable of making decisions that run contrary --

THE COURT: I don't think that's what he is saying. I think he is saying it can't apply to the individual class action. That there is case law that supports you cannot bring a SCUPTA action as a class action. That that's the representative capacity he was referring to. Am I accurate?

MR. HASELDEN: I actually argued both.

THE COURT: Go ahead.

MR. SANCHEZ: As far as how it applies to the HOA, Your Honor, I would just note that in the declarations, the HOA is capable of making decisions that run contrary to the interests of its members -- membership. It can authorize -- the declaration authorizes the HOA to remedy against individual owners for violations of the declarations. It also allows --

THE COURT: Wouldn't that be like a corporation filing an unfair trade practice act? That's basically what an HOA is.

MR. SANCHEZ: Well, I would just point out that it also includes the ability to assess the

individual homeowners. And a homeowner might not want to be --

THE COURT: HOA can't do it. HOA has a board, HOA has folks that come to meetings and vote.

MR. SANCHEZ: Right. Which my point is that the board member is not -- that the board is necessarily representative of the individual homeowners.

THE COURT: Then I missed the purpose of the HOA because there's no other reason except to benefit the homeowners and advance their interest and make sure those things that they have in common are protected.

MR. SANCHEZ: I would say, Your Honor, to benefit the owners and advance their interest is not necessarily to represent the owners. The same way that any corporation can file a SCUTPA claim.

THE COURT: I don't think -- I am just -- I am not aware of any circumstances where a corporation has filed an unfair trade practices act in South Carolina. I might be wrong. My knowledge is not exhaustive. I could have missed something.

MR. SANCHEZ: I just would point to 39-5-10, person extending to a corporation, in this

case the HOA is nonprofit.

THE COURT: We know a corporation is considered a person under the law. But I'm not certain -- I'm going to have to read these cases and see.

MR. SANCHEZ: I would point out that definition of a person is contained within SCUPTA itself.

THE COURT: What benefit would the HOA -- I don't think the HOA stands in the capacity as a person as you are representing it. The HOA in and of itself would have no reason to recover from another corporate entity for misleading practices. How are they affected individually by that?

MR. SANCHEZ: They are affected individually as far as declarations set forth the responsibilities of the --

THE COURT: That's your breach of fiduciary claim. I don't think that morphs into unfair trade. I think that's a strained interpretation.

MR. SANCHEZ: I would say from the perspective of not that it is an unfair trade practice, but I am getting to that. I am --

THE COURT: The purpose of an unfair

trade practice is a practice which is deceptive to the public that has the ability to be repeated. It says if somebody has done something that we don't want repeated, that we don't want perpetrated on the public. That's really the essence of an unfair trade practice claim. So what interest would a homeowners association have in that? It doesn't. An individual does. An individual says you did something that was unfair, you put it in commerce and it has the ability to be repeated and done to someone else. So it's a matter of public policy. Our lawmakers have said we want to preclude that. We want to stop it or to happen again. So we have this statutory creation, these are the elements. We don't want it to be perpetrated on the public again. I have to read the cases and see whether it supports your proposition or not.

MR. SANCHEZ: Your Honor, I would just point out that under the code, under the SCUTPA code, the HOA itself has suffered an ascertainable loss of money for property that it is responsible for, maintaining that property with its funds of which there were not sufficient funds there when the HOA was transferred over, when it was transferred over from John Wieland Homes. I would

also say that as far as the possibility for repetition that there is the possibility for repetition as far as that the developer continues to do this to other --

THE COURT: To other individuals.

MR. SANCHEZ: I would say to other HOAs as well.

THE COURT: You have got other causes of action that protect them from that. I don't think the Unfair Trade Practice Act was created for that. I will read it. But the other impediment, problem, issue that you have, I don't recall any testimony about what it cost the HOA to do these repairs. What they are out of pocket to have done repairs before this estimate of the additional repairs that today to be completed.

I'm going to simmer on it overnight, do some research this afternoon and we will resume in the morning at 9:30. Please make sure the court reporter has all of the exhibits. If you have any request for instructions that you've been looking at, don't do extra work, but if there is something that is outside of the ordinary that you want me to consider, I would ask you have that for me tomorrow morning.

MR. HAYES: Your Honor, I understand Mr. Jason Greogorie is here, he is going to I guess authenticate whatever document, photos he took, that's fine. If he is going to testify as to any opinion or anything like that --

THE COURT: I think he already said he wasn't.

MR. HAYES: If he does I would just like the opportunity to depose him tonight.

MR. MANOS: Happy to have him deposed, but my intention was to ask him why he went out there, because he was asked to go gather data, what he did, how did he gather it. I wasn't going to qualify him as an expert, but I was going to ask him his name and what he did for a living and who he works for.

THE COURT: Okay.

MR. HAYES: That's fine.

THE COURT: I would imagine is he here, you can ask him that yourself.

MR. HAYES: I wanted to make the Court aware beforehand.

MR. MANOS: You know what I would say? Based on this data I may have an opinion, but I am not going to ask Mr. Gregorie what his opinion is.

MR. HAYES: That's fine.

THE COURT: It was my recollection he said basically he was like a chain kind of witness, how it was collected, where it was kept, who it was transmitted to and the date it was collected. All right. You all have a good evening.

(These proceedings were adjourned at 3:36 p.m., January 25, 2017, Charleston County, South Carolina.)

CERTIFICATE OF REPORTER

I, Ruth C. Weese, Registered Diplomate Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate, and complete record.

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 14th day of April, 2017 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter