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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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 26, 2017 CHARLESTON, SC VOLUME 4 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
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ANDREW HASELDEN, ESQUIRE
THEODORE MANOS, ESQUIRE
Attorneys for the Defendants

* *

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

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(The following proceedings were held January 26, 2017, Charleston County, South Carolina, @ 9:35 a.m.)

THE COURT: I've considered the motion for directed verdict and considering the evidence in the light most favorable to the Plaintiff there are jury issues on the following causes of action: Negligence for the HOA and the class representative. I am directing a verdict on the breach of implied warranty of habitability, good faith and workmanlike manner, the Unfair Trade Practices Act and the breach of fiduciary duty for the individual homeowners only, but for the HOA that cause of action will remain. And a directed verdict on the negligent misrepresentation claim.

In the interest of time, I am not going to make findings for the record right now. I may well do a written order. I haven't decided whether I am going to do that or not. I may draft that myself or if necessary I may have defense counsel draft -- provide drafts of those orders for the Court. Is Plaintiff ready to proceed?

MR. HASELDEN: Your Honor, could you go back over that?

THE COURT: I will tell you what

remains. The negligent cause of action for the HOA and the class, the breach of fiduciary duty for the homeowners association. As I understood the pleadings, there was an Unfair Trade Practices cause of action and I directed a verdict on that for the HOA and the class members. There was a breach of implied warranty of fitness and habitability, I directed a verdict on that. There was a breach of implied warranty of fitness for a public purpose. Directed a verdict on that.

The negligence cause of action remains for the HOA and the class members. Oh, the warranty -- I skipped over something. The breach of contract on the warranty will remain for the individual class members because they did not have a warranty with the homeowners association or any kind of contract as I understand it; is that accurate? I haven't heard any testimony about that.

MR. HASELDEN: That's correct.

THE COURT: And the breach of fiduciary duty will remain for the homeowners association only.

MR. HASELDEN: It's just negligence as to the HOA and the class, breach of fiduciary duty

as to the HOA.

THE COURT: Yes. And the warranty.

MR. HASELDEN: Which warranty?

THE COURT: They brought a breach of contract on the warranty.

MR. HASELDEN: Yesterday they told us --

THE COURT: They were withdrawing that?

MR. HASELDEN: When they named the five causes of action we are proceeding on, breach of express warranty wasn't one of them.

THE COURT: I have looked at their pleadings. The warranty is in their pleadings.

MR. MCCARTY: I did not -- if I misrepresented that to you, Andy, I did not mean to do that. We wanted to keep that.

THE COURT: I didn't write down that they were withdrawing the warranty.

MR. HASELDEN: The five that they handed me, and I go will through my list, did not include the breach of express warranty.

THE COURT: If there is a phone on it needs to be turned off. It will be taken. Off, not vibrate.

The causes of action they are pleading

are unfair trade practices, breach of implied warranty of fitness of habitability, breach of implied warranty of fitness for a particular purpose, negligence, breach of contract regarding the warranty and breach of fiduciary duty. Those are the causes of action in their pleadings.

MR. HASELDEN: That's correct, Your Honor. But before we argued yesterday, because I was prepared to argue each and every cause of action, because there is about 14 in the Sills case, plus the six that are in the Waverly case, Mr. McCarty handed me a list. On the list were negligence, implied warranty, HOA -- Mr. McCarty handed me and we have argued extensively negligence and gross negligence, the implied warranty of habitability, workmanlike service, fitness for a particular purpose, unfair trade practices, breach of fiduciary responsibility and negligent misrepresentation. And then they threw in amalgamation which they conceded wasn't a cause of action. There was no mention of them proceeding on the express warranty theory. I would have argued that extensively yesterday.

THE COURT: I have a list of what you argued. I don't have any recollection of him

saying that they weren't proceeding on the warranty.

MR. HASELDEN: On the express warranty he specifically said -- all he --

THE COURT: Did you all admit into evidence a copy of the written warranty?

MR. MCCARTY: Yes.

MR. HASELDEN: There has been no testimony --

THE COURT: Doesn't have to be. You have a document in evidence that you conceded. It came into evidence.

MR. HASELDEN: Okay, Your Honor.

THE COURT: Do you want to add some argument on the express warranty? I will be glad to hear you.

MR. MCCARTY: I have one other question. They also discussed the loss of --

THE COURT: Mr. Haselden, if you throw a pad down, I tell you what. I'm a really accommodating person. There are a lot of things that DeeDee overlooks that Judge Jefferson can't. I don't ever want to experience your frustration. It's not a burden I plan to carry today. I got enough on my mind.

MR. HASELDEN: Your Honor, I apologize.

THE COURT: It's just unprofessional.

MR. HASELDEN: It's certainly not frustration with you.

THE COURT: I understand that. But you should never even let your opponent see you sweat. Ever. It takes your eye off the ball. It is your job to be objective. You don't have the luxury of getting frustrated.

So we are going to start over. Everybody take a deep breath. Okay?

MR. HASELDEN: Yes.

THE COURT: I plan to have a pleasant day. I always get up in a good mood. I plan to have a pleasant day. I figure any day on this side I get the chance to try to get it right.

MR. MCCARTY: He also discussed the loss of use.

THE COURT: He did. He argued that within the damages, however, on the damages cause of action it is not -- the loss of use is not a separate cause of action. That's an element of damages.

MR. MCCARTY: That's right.

THE COURT: Yes, sir.

MR. HASELDEN: Your Honor --

THE COURT: What exhibit number is the warranty?

MR. HASELDEN: I have no idea, Your Honor. I will find it for you.

MS. NOLAND: It should be Exhibit 29, Your Honor.

THE COURT: It came in without objection at the beginning of the trial.

MR. HASELDEN: I have it, Your Honor.

THE COURT: I don't need it. I didn't know what -- I looked at the numbers that had come in. I didn't remember which one was the warranty. The warranty came in evidence and anything that's in evidence they can argue.

Now, whether they didn't have anybody testify about it, you can argue that all day long.

MR. HASELDEN: Your Honor, Mr. Denby testified that that was the warranty. That was all he said. There has been no testimony as to any breach. There has been no testimony, no evidence whatsoever --

THE COURT: You can -- there is circumstantial evidence that they say this the -- well, yeah.

MR. HASELDEN: They have to put up the terms, the conditions, how that was breached. They did none of that and rested their case.

THE COURT: They attempted to have Mr. Denby say they refused to take care of the warranty. Is that your sole argument on directed verdict?

MR. HASELDEN: Yes, ma'am. I wasn't actually prepared to make one.

MR. MCCARTY: The only thing I would say is Mr. Denby did provide testimony at the end of the objection that they brought the warranty issues to Wieland to try to get that resolved and they did not get them resolved.

THE COURT: We did that in camera, did we not?

MR. MCCARTY: No, you did it on the record.

THE COURT: I'm going to go back and get the court reporter to read it back to me.

MR. MCCARTY: He also testified that the warranty was a 5 and 20-year warranty.

THE COURT: He did testify to that part of it.

MR. HASELDEN: Your Honor, his

testimony was they went to get Wieland to honor the warranty, not his individual warranty, but his testimony was they went and tried to get them to honor whatever warranties were applicable to the flat roofs.

THE COURT: I don't remember. I'm going to read it. I will see what it says. I will take that portion of the directed verdict under advisement.

So again that leaves us with the negligent causes of action as to the HOA and the class, the breach of fiduciary duty on the homeowners association only, and the breach of contract which is the warranty. That's it. Ready to proceed?

MR. MANOS: Yes, Your Honor.

THE COURT: Mr. Hayes, are you ready to proceed?

MR. HAYES: Yes, Your Honor. We are clear that he is not pulling that up on the screen or anything?

MR. MANOS: Correct.

THE COURT: Okay. Mr. Lewis.

MR. MANOS: Yes, Your Honor.

THE COURT: You may get the jury,

please.

(Whereupon the jury entered the courtroom at 9:47 a.m.)

THE COURT: You may be seated. Good morning, ladies and gentlemen. I hope everybody had a pleasant evening. It turns out that y'all getting to leave little early yesterday was fortuitous because the interstate was a madhouse yesterday with an overturned car and wrecks. So actually turned out pretty good and I am glad that everybody arrived this morning. Rain drops fell this morning so that always makes driving in Charleston a little hazardous. I am glad that you all arrived safely. We are now going to proceed with testimony. I would ask that you give counsel your attention. You may proceed.

MR. MANOS: Thank you, Your Honor. Call Skip Lewis to the stand.

LG LEWIS, JR.

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: My name is LG Lewis, Jr., L-E-W-I-S.

THE COURT: Could you tell us what the

LG stands for, sir?

THE WITNESS: I can. It's two surnames. The L stands for Littleton, the G stands for Glasgow. They are two old family names.

THE COURT: Appreciate it.

DIRECT EXAMINATION

BY MR. MANOS:

Q. Good morning, Mr. Lewis. How are you this morning?

A. I'm well. Thank you.

Q. Could you please give a brief educational background?

A. Educational background. Started in Lee County, South Carolina. Went from Lee County to Clemson University. I studied civil engineering at Clemson. Graduated in 1966 with a bachelor of science in civil engineering and in 1967 with a master of science in civil engineering. And since that time I have participated in numerous continuing professional development educational courses as a part of my obligation as a professional engineer.

Q. What is your current profession?

A. I am a licensed professional engineer, consulting engineer, design engineer. Basically I

manage an engineering company in Greenville, South Carolina.

Q. And which states are you licensed in?

A. State of original licensure was South Carolina. That was 1974. And since that time I am also -- I have also acquired licenses either by comity which is just recognition, or by oral examination in one state. And those include Florida, Georgia, Alabama, Mississippi, North Carolina, Virginia, Ohio, Illinois, sprinkling of other states in there. Those are the states that I practice in on kind of a more recurring basis.

Q. Didn't mean to give you a memory test this morning. I apologize. Let's go briefly through your work history. You said you graduated from Clemson in 1966 and then got your masters from Clemson in structural engineering in 1967. Briefly -- that's a long 40-year period from then until today. Briefly where did you start and how did you get to where you are today?

A. Well, interestingly I started in Charleston. My first employment engagement was with the U.S. Navy Department where I was part of the group that provided engineering maintenance and alteration services on the ballistic submarines and

attack submarines that came into Charleston for servicing. It was part of Admiral Rico's command. I worked there for I think five -- around five years.

In 1972 I left Charleston and went to Greenville to begin my career as a consulting engineer. I started at that time with a combination architectural and engineering company. I worked there for 15 years. I was executive vice president of the company when I left in 1987 to start the company that I am now with, which is H2L Consulting Engineers.

Q. Let's talk a little bit about what you have done from 1989 at H2L Engineers, kind of what you all do as a company, what you specifically do for the company.

A. H2L is a multi-disciplined, multi-service engineering firm and saying it briefly that means we provide civil, structural, electrical, mechanical engineering services. We design predominantly commercial and industrial facilities with a smattering of multiple family construction design. We provide the design services, administer the construction contracts, and basically just follow the job from inception

through at least a substantial completion of construction.

We also have a part of the company that would provide as you would recognize it forensic engineering services where we work with insurance companies, and with sometimes law firms in assessing what is wrong with buildings and how to fix what's wrong with buildings. And between the two divisions of H2L our book is generally close to 50/50 in each area. It will vary some from year to year, but it is remarkable how well balanced the two service areas of the company at least in terms of revenue are balanced.

Q. Mr. Lewis, you said in your forensic work you all assess and then provide recommendations for repairs; is that correct?

A. Yes, that is part of what we do.

Q. Do you also in cases actually stamp designs for contractors to perform those repairs?

A. We do.

Q. And tell the jury what that means? I used the word stamp. Everybody might not know what that means. What does that mean?

A. Okay. Well, the laws of South Carolina require for -- certainly for commercial projects

and even residential projects when the residential projects are prepared by a licensed professional that the plans and the specifications for that work be sealed by a licensed individual. And that is basically assuming responsible charge for the work that is represented by the plan and specifications that carry your seal. That's basically what it says. Says when we seal it we are responsible for the design and we're responsible for the design being properly done.

Q. And as part of your work in addition to sealing designs and taking responsibility do you ever perform construction administration? And explain to the jury, please, what I mean when I say -- what I mean when I say construction administration.

A. Well, I hope that he means what I mean when I say construction administration and that is defined -- actually defined by the standard form contract document prepared by the American Institute of Architects and prepared by the Engineers Joint Contract Documents Committee. And construction administration basically starts from the point in time when the construction contracts are signed and you move into the construction phase

and the design professionals, whether it is architect or an engineer, under the construction administration phases would be available to provide periodic visits to the construction site, to review the progress of that construction and be able to determine in general how the quality and the progress of the work is proceeding.

Construction administration also involves other things, too, like review and approvals of contractor submittals, the submittals that are made by the individual contractor, kind of fill in the blanks between what's depicted in general on the construction contract documents or the plans and specifications, and all of the other submittals that are required to actually put the total building assembly together such as window drop drawing submittals, cladding submittals, things of that nature that conform with the design professional specs, but which provide the details on the products that are selected to be installed on the project.

Q. Mr. Lewis, please tell the jury, and I know you have had a long career, but tell the jury some highlights of any professional affiliations or honors or societies that you're involved in within

your profession.

A. Well, I am a member of the National Society of Professional Engineers which has an affiliate organization called South Carolina Society of Professional Engineers. I have been a member of NSPE and SCSPE since roughly 1973 I would say. And I have gone through all of the title, officer ranks in the South Carolina Society. I have served for over 20 years on the NSPE national committee that works with the risk management insurance professionals, particularly those like CNA Insurance Company, insurance professionals that write errors and omissions insurance for engineers and I have been active on that committee for, as I said, over 20 years.

I am a member of the American Arbitration Association. And I sit on the Panel of Neutrals for complex construction cases. I have been a member and have chaired the National Construction Dispute Resolution Committee for the AAA. I have been on the board of directors for the AAA. I have been on the executive committee for the board of directors for the AAA.

Q. Mr. Lewis, how about -- if you mentioned I may have missed it, tell the jury a

little bit about your service on the South Carolina Board of Registration for Professional Engineers.

A. I was appointed by Carroll Campbell when he was governor to serve on the board. I served on that board for ten years.

Q. What does that board do?

A. That board is the organization under the State of South Carolina that is responsible for assessing the qualifications of engineers and land surveyors who apply for practice licenses in this state. A written examination is given. The South Carolina Board is a member of the National Council of Engineering and Surveying and we as a part of that when I was president back in the late 1990s, they prepared all the written examinations to be given in each of the 50 states and all of the territories of the U.S.

So that's my role with the state and the national licensing entities.

Q. Thank you, sir. Let's talk a little bit about some of the specific type of work where you have been a principal design professional or engineer in charge of various construction projects over your career. What are some of the types relevant to what we're here for in this litigation?

A. Well, this litigation involves what is referred to as multi-family construction. And I guess over the years some of my early projects were right down here in Charleston out in the Mt. Pleasant area back in the 1970's when the Department of Development and Golf Course Construction started out there with a developer by the name of First Hartford. It was a textile owner from the northeast who came into Charleston. We designed the apartment complexes for First Hartford. I sealed those drawings.

Since that time in terms of multi-family there have been a large number of apartment construction projects, some of them HUD projects, that were developed by the Douglas Company out of Greenville. My company does most, if not all, of the apartment complexes that are developed by the Powell Enterprises out of Florence, South Carolina, and various other apartment complexes that tend to be by entities that may build only one apartment complex, you may have multiple buildings, but they are not -- they don't want to continue a basis to develop apartments like the developers that I mentioned in the Douglas Company and Powell or others who do it

routinely.

Q. Let's talk a little bit over the past 20 years, tell us a little bit about your experience in doing forensic engineering and the type of projects that you have investigated and made recommendations on.

A. Well, I have been involved in forensic cases in terms of structural failures. I won't go into a lot of those, but one of the more notable ones was the pedestrian elevated bridge in Atlanta, Georgia. But a number of structural failures. The vast majority are not unlike what you're listening to today in terms of issues. It is basically building envelope issues with allegations of water infiltration in one way or another probably applying to 75 or 80 percent of the forensic cases that we're involved in.

And usually with those the typical menu of things that you have to work through in terms of what causes leaks and attachment of cladding to buildings and attachment of shingles to roofs and elements such as that.

Q. Mr. Lewis, how many times if you can give me a number or a range have you been qualified as an expert in state and federal court?

A. I don't have an exact count. I'm sure it's more than 25 and probably maybe less than 50.

Q. And qualified as an engineer?

A. Same thing. Generally when I am qualified as an expert, it's in a number of fields; they kind of umbrella the tenor of the testimony as a professional engineer, as a project engineer, other forms of engineering also.

Q. Construction and forensics as well?

A. As well, yes.

MR. MANOS: At this time, Your Honor, I would like to offer Mr. Lewis as an expert in the fields of engineering design, construction administration and forensics pursuant to Rule 702.

THE COURT: Any questions or objections?

MR. HAYES: No objection.

THE COURT: So admitted. You may proceed.

BY MR. MANOS:

Q. Mr. Lewis, let's discuss Waverly now if we can. Have you had an opportunity to personally go out to the site at Waverly?

A. Yes.

Q. And you've been out there on two

different occasions?

A. I have been out there at least on two occasions.

Q. And describe for the jury the general different purposes of your visits.

A. I was on the Waverly site during -- I think twice during the first six months of 2016. I was on site to review the contingents that are contained within two reports, one by the homeowners forensic architect and one by the homeowners forensic engineer. Basically reviewing the claims that were being made, observing the general quality of construction on the buildings and then in a general basis or sampling basis much as done by the Plaintiffs' experts, the findings that were listed in the various reports and then also trying to determine not only the relevance or extent of the findings, but to develop some basis for pricing the cost of what it may take to repair any conditions that were identified by the expert, Plaintiffs' expert, at least found by me and my company.

Q. As part of those visits did you also make observations personally of the destructive tests that were performed?

A. Some of them, yes.

Q. And in addition to your visits have you had an opportunity to review other consultant's photos? You already told us you reviewed some of the reports. Have you had an opportunity to review other consultant's photos in this case?

MR. HAYES: Your Honor, may we approach the bench?

THE COURT: Yes.

(Off-the-record sidebar conference.)

BY MR. MANOS:

Q. Mr. Lewis, as part of your evaluation of the conditions at Waverly did you have an opportunity to review Mr. Glick's photos, Myles Glick's, Plaintiffs' expert's photos?

A. Yes.

Q. Did you have an opportunity to review Russell Mease's photos?

A. Yes.

Q. Did you have an opportunity to review Gary Moore's, Plaintiffs repair estimators, photos?

A. Yes.

Q. Did you have an opportunity to review JR Watkins's photos, the Defendant's repair contractor?

A. I think so.

Q. And did you have an opportunity to review Mr. Gregorie's photos with ABS?

A. Yes.

Q. And without boring everybody, there are thousands of photos of these buildings that you had an opportunity to review, correct?

A. There are a lot of photos.

Q. Tell the jury what's the purpose, why did you take the time to review photos of other experts? Why didn't you just rely on your own?

A. Well, my objective when I look at any evidence, but particularly photographic evidence, is to gather as much information as may be available and accessible upon which to make decisions or recommendations. In my case I am making recommendations in repairs that would form the remedial work ultimately that the homeowners association will consider.

So I am looking to identify a fix that will satisfy the needs of the association and the residents in the communities, to fix at least what in my studies would indicate the real problems are on the site. So the more information that you can develop in order to do that in the most effective way, the more you're able to understand what exists

and address what I believe to be a responsible recommendation for remediation activities.

Q. What other types of materials do you review as an engineer when you're doing forensic evaluation? What are important?

A. Well, I would like to say I review all the materials that are available and accessible. Particularly for Waverly that would include not only the photographs and the reports of the various experts, but I am also looking for contemporaneous records that will give me an understanding of the materials that are selected, how they are applied. So I am looking for anything that establishes the record of construction and that would include contracts where they are available, and would review basically what is referred to as all of the documents that are produced during the period of the complaints. And I reviewed the complaint that is filed in the case also.

Q. Are homeowner complaints of any relevance to a forensic engineer in their investigation?

A. They are extremely relevant. Because without an understanding or a knowledge of what kind of complaints are being identified and

relayed, particularly to the property management group, it is difficult in some cases, particularly if you go into units and you don't find any evidence of damages of any kind, to know absolutely what the problems are. So, yes, those records are important.

Q. Have you been provided any project-wide surveys regarding the roofs?

A. No.

Q. Roof leaks?

A. Not in this case.

Q. Have you been provided any project-wide surveys of wall leaks in this case?

A. No.

Q. Any project-wide surveys of roof leaks?

A. No.

Q. I asked you what type of materials. How about what type of standards or technical information about the building itself is important to you when you're going through your process of evaluating a project and investigating?

A. Well, planning details are important. The building codes, particularly the building codes that are applicable at the time of construction, are important. And depending upon what the issues

are, some of the relevant standards may also be important. When I say relevant standards, for example, it's helpful to have installation instructions by the various product manufacturers. It's helpful to be able to refer to some of the recognized standards, some of which may even be referenced by the building codes that are published by such recognized entities as the ASTM, American Society of Testing and Materials and other such organizations that form basically a consensus standard on how something might be done.

Q. Do any of the documents, and particularly the code or industry standards in particular, do any of those have a perfection standard? Is the standard for construction perfection under the code?

A. No.

Q. What generally is the standard?

A. They go only to substantial compliance. That's the terminology that is used in the industry.

Q. Why is that in your opinion?

A. Because perfection is not often obtained. It's like any general standard. There are tolerances, plus and minus tolerances that are

recognized in construction. So perfection has to my knowledge never been established as the quote standard quote to be judged against. It is good to know, good to strive for, but substantial completion is the term that you will find in the -- at least in the standard form contracts.

Q. As a -- you testified earlier that you spent a large part of your career as a structural engineer and evaluating other things as a forensic engineer. Is rain and wind issues of any relevance to you when you do your investigations?

A. They are.

Q. And let's talk about wind for a second. What is relevant to you about wind and how wind interacts with buildings?

A. Well, the building codes actually provide design criteria for wind resistance. The structure that you design and construct is required by the code to be designed and built to standards in the Charleston area. Currently the wind speed standard is 130 miles per hour. So it's important first that the building structure be capable structurally to withstand the speed.

Beyond that, though, is the -- particularly when you are investigating building

envelope complaints, the relevance of wind and rain tell you some of the test periods in which the structure is being subjected to, but you would consider it to be out of the ordinary more extreme weather conditions. And those are important, particularly when you also have a record of homeowner complaints about leaks coming in you like to know the weather conditions when those complaints are made. And obviously the more rain you have and the more wind that is associated with that rain, the greater the test on the building in terms of its of ability to protect the interior spaces against the infiltration of water or rain.

Q. Mr. Lewis, over your 50-year career have you had an opportunity to evaluate structures that have experienced project-wide shingles blow off?

A. Yeah, I have seen that.

Q. Have you had an opportunity to evaluate buildings that have had siding blow off?

A. Yes, I have.

Q. What type of sources do engineers like yourself and Mr. Mease and others go to to determine --

MR. MCCARTY: Objection, Your Honor,

pitting.

THE COURT: I didn't hear the whole question. Restate the question.

BY MR. MANOS:

Q. What type of sources do you as an engineer, in your 50-year career as an engineer do you look to to determine to your satisfaction the climatological data for a location? What type of winds it experienced on a certain date? What type of rain? What are the go to sources?

THE COURT: The objection is overruled.

THE WITNESS: The primary sources that my firm and I use are the sources that basically are backed up by NOAA, the National Oceanographic and Atmospheric Administration, federal agency and they kind of feed information. There are a number of sources, most of which now are web based sources where you can go to and either obtain weather data without charge or if you want more detail with charge. Weather Underground is one of those sources. There are a number of them.

What we try to do is identify the weather stations that are in close proximity to where the project at issue may be located and obtain the wind and the rain and other data,

depending on what the claims are, from those that are fed from those weather stations into a more national source and you can pull that, retrieve that information where the stations are actually identified and you can get the distance from the project to the weather station.

BY MR. MANOS:

Q. And is rain and wind data of some use to you in your evaluation of projects such as Waverly when you are evaluating allegations of water intrusion?

A. They're important. I would not necessarily say they are the most important, but they are important. All the information that you can gather to make the judgments in your assessments is in my judgment important.

Q. They are at least a piece of the puzzle?

A. Yes.

Q. Have you had an opportunity to investigate the wind speeds experienced by the Waverly townhomes on October 8th when Hurricane Matthew came through?

A. Yes.

Q. What did you find out about the wind

speeds?

A. Okay. Wind speeds can be recorded in several different forms. Under the building code wind speed, wind speed that is used is referred to as the three second gust wind speed. So when I am looking for data that's generally the wind speed that I prefer to receive it in.

In this case in Hurricane Matthew the reported wind speed for a three second gust were in the range of 70 to 80 miles per hour.

Q. And have you had an opportunity to investigate the rainfall during Hurricane Matthew at the Waverly townhomes?

A. I did, yes.

Q. And what did you find out?

A. Based on the weather data that I saw which covered a span of about four days, the total rainfall I think was in the 8 to 10-inch range total rainfall. So it was a period of several days in which at least significant deposits of rainfall were experienced in Charleston along with a very high wind speed.

Q. And you're not, of course, suggesting to the jury that Hurricane Matthew was like Hurricane Hugo or some other much stronger

hurricane, correct?

A. No. In fact, Matthew was on the lower end of the scale.

Q. But in your opinion was Hurricane Matthew an unusual wind event for --

MR. MCCARTY: Objection, Your Honor, lack of foundation. I don't know that he --

THE COURT: You need to lay the appropriate foundation for his knowledge and expertise in that area that deals with meteorology.

BY MR. MANOS:

Q. Have you received -- reviewed or received any information about any project-wide shingle blow off at Waverly after Hurricane Matthew?

A. No.

Q. Have you received any information about any shingle blow off at Waverly after Matthew?

A. No.

Q. Have you received any information about any multiple project-wide leaks at Waverly after Hurricane Matthew?

A. No, other than the very -- one area that I think it was identified in a supplemental report by Mr. Glick.

Q. As a -- let's move away from rain and wind and talk about something else. As a project engineer have you been involved in projects that contain -- where homes have had significant defects?

A. Have had significant what?

Q. Defects?

A. Oh, yeah. I have seen homes with significant defects.

Q. Have you seen any significant structural defects?

A. Yes, I have seen homes with significant structural defects.

Q. And have you seen multi-family apartment complexes or multi-family townhomes in your career with significant defects?

A. Yes.

Q. In your experience over your 50 years have you had an opportunity to review data about the marketability, saleability of those homes with defects?

MR. MCCARTY: Objection, Your Honor. Lack of foundation.

THE COURT: Please repeat the question.

MR. MCCARTY: And relevance.

THE COURT: I need to hear him repeat the question.

MR. MANOS: I will withdraw it, Your Honor.

THE COURT: The question is withdrawn. You may proceed.

MR. MANOS: I will ask it a different way.

BY MR. MANOS:

Q. As part of your evaluation of all the information is the saleability of homes a relevant piece of the puzzle?

MR. MCCARTY: Same objection, Your Honor. He is not a real estate agent.

THE COURT: No speaking objections.

MR. MCCARTY: Lack of foundation.

THE COURT: Approach.

(Off-the-record sidebar conference.)

THE COURT: Sustained. Foundation.

BY MR. MANOS:

Q. All right. Mr. Lewis, let's talk about your opinions, but first generally do you agree with the proposition that the 105 townhomes need to be completely declad?

A. No.

Q. I would like to discuss some of the conditions with you that are alleged to be deficient and the first condition -- well, before we do that let's -- you testified earlier that you've looked at a number of photos in this case and I'm going to pull out and put up a couple of photos.

What I would like you to do very briefly is acquaint the jury with the different types of townhomes that are actually out at Waverly. We have been talking about 105 townhomes for the last three days and I'm not sure they are exactly clear about what exists out there. If you could tell them based on your evaluation the different types. I'm going to put one photo up which you can describe the various types.

A. Okay.

MR. HAYES: Your Honor, may we approach?

THE COURT: Yes.

(Off-the-record sidebar conference.)

THE COURT: Proceed.

BY MR. MANOS:

Q. Mr. Lewis, before we -- can you again just briefly describe for the jury the type of

buildings that we have out at Waverly and why that's relevant to your investigation?

A. All right. Well, let me start first by saying this is individual townhouse units. At Waverly I think it's a total of six basic floor plans that exist. The largest home being on the two level, two stories, runs about 3,500 square feet. That's the Forsythia model. The Forsythia model is something like 30 feet across the front. There are other models, all of which the -- all of the other models are much smaller than the Forsythia model. The smallest models being 18 to 20 feet wide from sidewall to sidewall. So there are six basic plans. But the elevations of those plans, particularly the front elevations, vary a lot within each plan.

The -- some of the exterior elevations include roofs with no dormer. They include roofs with one dormer or roofs with two dormers. Some of the elevations include porches on the front of the unit. Porches that extend all the way across or approximately all the way across the front elevation at the entry level. Some of the elevations basically have very small porches at the entry level, porches no more than about five feet

wide, some porches up to 20 feet wide or the full width of the unit. Some of the elevations have decks at the second level. Some of those decks are all the way across the unit and some other model selections the decks are only in front of a couple of windows. There may be two decks that are more like five by seven each as opposed to say seven feet by 20 feet. There are some units with no decks at all on the second level.

So there is also a difference in the roof lines. Some of the fronts of the units have gable roofs where you see like in this picture, you see the little bend in the gable portion of the roof. On other models the roofs slope from the ridge which runs down the middle of the units to the front wall and into the back wall so that you don't see any gables on the front elevation.

So you have got those mixture that provide a great deal of variety in the architectural treatments of the townhouses at Waverly.

THE COURT: Could you please make sure you refer to the number of the exhibit.

A. If I might, there are also 22 buildings at Waverly. Not all of the buildings have the same

number of townhouses within the building itself. Just over half of the buildings at Waverly either have five or six townhouses in each of those buildings. Some are five townhouses, some are six townhouses.

There are some fewer number of townhouses out there that may have only four townhouses or three townhouses or even two townhouses. So there's that mixture and more predicated by the shape of the infrastructure where the street changes and curves and you have cul-du-sacs and those kind of things. So you have a diversity of building sizes and number of townhouse units per building and you have tremendous diversity in the architectural treatment of particularly front elevations of these houses.

Q. Thank you, Mr. Lewis. Mr. Lewis, I'm going to put a photo on the board that is Exhibit 6 and it is HHHH, Your Honor.

THE COURT: That's fine. I just need the record to be clear.

BY MR. MANOS:

Q. Mr. Lewis, what are we generally looking at in that photo?

A. Okay. Here we are talking about -- is

it showing up?

THE COURT: You can write on the screen.

A. Mine is not on. Anyway --

Q. Mr. Lewis, hold on one second.

THE COURT: We are going to fix the technology. It should be on.

A. Good to have an IT expert available.

Q. Mr. Lewis, where are we on the building here? What are we looking at?

A. This is a window head condition. And what you see at the top of this window is self-adhering flashing. And there are some contentions that that self-adhering flashing is improper because it is in reversed lap condition. And that means that water which would come down the face of the Tyvek, if water were to track down the face of the Tyvek it could potentially get behind the self-adhering flashing and into the system, the wall system of the house.

Q. Is there any standards that apply to the installation of this component of construction we see on this photo?

A. It is ASTM. I referenced ASTM a few moments ago. The ASTM standards address this very

specific issue.

Q. Let me go ahead and I'm going to hand something to counsel while you're doing that.

A. And the bottom line is that the ASTM, the methods for applying self-adhering flashing is exactly as you see it in this photograph. It calls for self-adhering flashing to be adhered to the base piece which in most cases is the nailing flanges of the windows and then extended up and over and across the face of the weather resistant barrier which in this photograph is the Tyvek that you see.

The standards say it is important for the self-adhering flashing to be properly and firmly applied which means you have to develop that seal. There's a mastic seal between the back of the self-adhering flashing and the surface to which the flashing is applied. In this case the Tyvek. That seal has to provide a continuous barrier to water infiltration behind it. But the protocol of the method for installation of self-adhering flashing at window heads by its very definition results in what is claimed here to be a reverse lap that is improper. This is one of those cases where you have a reverse lap that is proper.

Q. What does ASTM stand for? What is that?

A. That's the American Society for Testing and Materials.

Q. What relevance does ASTM have to the construction industry and this condition specifically?

A. Well, ASTM is a very important provider of industry standards to the construction industry. Some of their standards have actually been incorporated into the building code and are referenced standards. Most of their standards which number in the thousands of standards, if not ten thousands of standards, are voluntary standards that are available for the construction trades. They show good and generally acceptable practice protocols, but they are not standards that have been what I refer to as codified or incorporated into the building codes. But there are ASTM standards for just about every type of imaginable building product from manufacturing of products to installation of the products.

Q. Based on all of your review of when you were out there doing your destructive test and review all of the photos and your opinion did you

make any observations of water that intruded into the Waverly buildings based on the condition we see on the screen?

A. I went into the interiors of a number of units. I would say a small number compared to all of the townhouses there are on the project. But in my review -- in my own review of interior inspections, in my reviews of the reports of the other experts in this case, I am not aware of a single instance where water infiltration at the hedge of the windows have been identified by anyone. I am not aware of any finding of damage behind the flashing at the hedge of any windows on any unit in any report that I have reviewed.

Q. How old are these buildings, approximately? There is 105, do you know?

A. Sorry?

Q. How old are these buildings, approximately?

A. They are approximately eight to ten years old. I think the construction period ranged from about 2006 to somewhere around 2009.

Q. And tell the jury generally what type of conditions construction goes through in cycles if you will. Poorly phrased question. Do you

understand what I am asking?

A. Well, I am thinking maybe I will probably try to answer that in two ways. One is during the actual construction process and then the process the buildings go through after the construction process. But during the construction process building is most vulnerable to damage because it is not fully assembled. And you may get the framing up, particularly a wood frame residence, you may get all your framing and your floor sheeting down and the rain comes and you don't have a roof on yet. Or you may have the roof on and the windows and other cladding elements and the front walls are not in yet.

Generally the weather barrier material will be on. You got the building in the dry, but not all of the final products that make the building completely weathertight. So you go through a number of weather conditions related to rain, weather conditions related to wind, and weather conditions related to heat and cold. All of that during the construction process of a building. So it is at its most vulnerable stage then.

After the building is completed and the

siding is on, the windows are in, the sealants have been applied around the windows, the shingles are on the roof, you still have what is referred to as changing conditions within a building. A building will breathe. And there are very minor movements that occur within, very minor movements that occur with changes in thermal conditions, the weather temperature as summer conditions. You'll have -- on my calculations along the front walls of these buildings movements of that nature tend to be less than 1/16th of an inch. So almost imperceptible.

So once the building construction is completed and the envelope, the exterior envelope is in place, those weather movements do not create significant movements at all on the building. But the walls tend to allow vapor to move in and out which you typically want in most buildings.

So there is -- there are again minor expansions and contractions, again much, much less, in the 32nds of an inch or less range, very, very incremental range, those types of movements. But there are no -- barring any, you know, impact damage, sometimes you'll see where an automobile veers off the street and hits a house. But absent those kind of damages, you really don't get

significant movements in the houses such as this simply because you have got stiffening walls in this case every 20 to 25 feet along the length of the front of the house. And you have got wall sheathing and other components that provide stiffness in the lateral direction from one end of the first townhouse to the far of the last townhouse. So the houses tend to be very stiff in nature and well developed to resist extreme wind conditions which is one of your primary goals in the construction of the house.

Q. Mr. Lewis, based on your experience if there was an inadequacy in the installation of the flashing that we see in the photo on the board would you have expected to see a manifestation after eight to ten years of that condition existing?

A. If there was a condition at this location that was allowing moisture behind the Tyvek material in some manner you would expect to see as a minimum damage deteriorating sheathing after the period of time that this house has been. Just think of the weather cycles you have gone through between heat and cold and wet and dry. You have gone through a lot of weather cycles over an

eight to ten-year period. You are going to have at least two extreme weather changes every year. So, yes, I would expect to see damage behind the weather bearing materials if there was a problem in the serviceability of the assembly.

Q. We were just talking about the condition at the head. I'm going to put up Exhibit 6EE which if you will tell the jury, Mr. Lewis, we are now looking at what location of the window?

A. This is the seal of the window, the bottom of the window.

THE COURT: I need you to approach.

MR. MANOS: This is 6EE, Your Honor.

BY MR. MANOS:

Q. And, Mr. Lewis, what, if anything, is different about the testimony you gave about the head to the sill?

A. Well, let me start here. Again, I'll just put my finger out and I'll draw my circle. This is again the use of self-adhering flashing at the sill of the window and the -- and I think the contention here is that this is a second example of a reverse weather lap.

The actual movement of water across the

plane here is in a normal weather lapped capacity. So this is not a reverse lap. And, again, going back to your ASTM standards for the application of self-adhering, that standard would call for self-adhering flashing which in this case is the Polyguard strip that you see below the window sill, could be affixed in here to again the nailing flange of the window. And you see here the self-adhering flashing. You probably -- you may not know that there is somewhere right along this plane right in here is the -- would be the bottom of the nailing flange on the window.

So you can see that the self-adhering flashing is carried up and above and would be adhered against the weather flange. And the only place that what may be interpreted to be a reverse weather lap condition would occur would be at the very top of this self-adhering flashing which is behind the -- what is referred to, I think you may have heard the Plaintiffs' expert talk about a jay mold or brick mold around the window frame. That's -- this is toward the bottom of your brick mold. It actually turns and goes up behind it and then you have got an inch between the back of the brick mold and the outboard side of the nailing flange.

This self-adhering flashing goes up above the bottom of the brick mold into the top of the flange.

Q. Mr. Lewis, have you in your review of all of the photos and during your investigation and your destructive test that you observed, have you observed any deteriorated sheathing or framing as a result in your opinion of the condition we see in 6EE?

A. No, no. There's no damage behind the -- there's no damage to the sheathing behind the weather barrier material and the OSB and I can assure you if there were damage you would see a picture of it.

Q. And as I asked you before at the head based on this building being eight to ten years old would you have expected to see damage on the sheathing under the sill had it been a problem at this location?

A. Yes.

Q. Let's move on if we can to a second condition. To illustrate for the jury I'm going to put up 6M as in Mary. Tell me, Mr. Lewis, do I need to flip that further? Is that the right way for us to be -- I want to make sure I had it

situated.

A. Yes. I think that's correct.

Q. Tell me what condition we're looking at here.

A. Okay. Just to kind of help all of us get oriented, what I am circling up here is the head of the window. You see the top of the window sash and you see the head of the window frame up here at the top. And this area in here is where the trim that surrounds the windows is installed. It's been removed in this photograph, but you have wood trim that surrounds the window frames and that's located here. And again, you have self-adhering flashing behind the wood trim. And here the flashing -- there's a point to the flashing and then there has been some disturbance, peeling back. We refer to it as peeling the onion and that's kind of the process you go through when you do a forensic investigation. You remove the trim, you review the siding, you expose the weather barrier material and the flashing behind that. You peel that back and you look at the sheathing and the abutment or adjacent materials to see whether or not there is a cause and effect and you're looking for damage. You're looking for damage and

then you look for the source and the cause of that damage to establish the causal connection. And here you can see again there's no damage in any of the exposed areas of that photograph.

Q. Based on your investigation and evaluation of all the documents do you have an opinion as to whether any of the windows at Waverly need to be removed and replaced?

A. I have seen no evidence at all that any windows at this project would need to be removed and reinstalled or removed and replaced.

Q. And there are how many types of windows out at the project?

A. Well, there are two basic products.

Q. Products?

A. That are on the project and you probably heard reference to them. YKK is one of the products. I think Phillips is the second window product. I think the experts for the Plaintiffs seem to have a problem with the YKK windows because of the frame design that was selected for these windows, that being the combination J channel and brick molds profile that was used. All windows on the Waverly project are solid vinyl windows which means that the frames of

the windows and the nailing flanges of the windows are fusion welded. They are all seamed together. So there's -- the vinyl product tends to be with respect to the assembly, particularly of the nailing flanges, what I refer to as hermetically sealed or continuous sealed that would not allow the penetration of moisture through those components.

Q. Do you have any opinion as to whether based on your investigation of the YKK window product, do you have any opinion why it was adequate for use on this project with HardiePlank as a siding?

A. I am very much satisfied that the YKK windows and the Phillip windows were appropriate product selections for the construction at Waverly.

Q. Let's talk briefly about sealants if we can around the windows. Tell the jury the different types of sealants that are used in the industry to seal or caulk around windows and penetrations, et cetera.

A. Well, there's a great of variety of sealant materials that are available for use, most of which today are referred to as elastomeric sealant and then there are various types of

sealant, geometric shapes that are used around window parameters. Where significant building movement is anticipated, I think the sealant design that you may have heard from Mr. Glick is an appropriate sealant design. Because those joints tend to be in the range of 3/8th of an inch to a half inch wide when they are made and this accommodates movement with the sealants that are available today. That means they can accommodate expansion and contractions and torsional or flectional movements in the building twice the width of the joint so you can accommodate movement at those joints in the range of, you know, three-quarters of an inch without overstressing the sealant or impairing the design.

You don't have those kind of movements in a townhouse, typical townhouse residential construction. I mentioned a few moments ago based on my calculations the thermal expansion and contractions along the front of these houses where you have got windows penetrating the walls tends to range less than 1/16th of an inch in both extreme of conditions. When I say extreme conditions, that makes assumptions that the siding is installed at temperatures below freezing and then in the summer

heat gets up to 120 degrees. That is a very conservative analysis because that is -- typically the materials are installed plus or minus 60 degree or warmer weather and you might have a 60 degree extreme in movement, temperature movement, from the summer to winter one way or the other.

Q. Mr. Lewis, let's bring it back down to some of us that are not construction experts in the room if we can. And what I was trying to inquire about, thank you for the explanation, is are there different types of sealants and applications of sealants in the industry that are acceptable to you? You went into the one Mr. Glick talked about which is an engineered caulk joint. That's perfectly acceptable and a good way to do it, right?

A. There are many other alternatives.

Q. What are some of those other alternatives?

A. Well, with relevance to the construction at Waverly the alternative is what's referred to as a fillet sealant design. If you are familiar with the welding industry when you talk about a fillet weld, the profile of a fillet sealant joint is essentially the same profile as a

fillet weld, metal to metal. In this case the fillet seal is from vinyl window to wood trim.

Q. I'm going to put up Exhibit 6 and it looks like five Ls as in Larry. What are we looking at in this picture, Mr. Lewis?

A. Okay. Again, kind of looking within the circle we go from the window sash that you see here to the window frame which you see here to the sealant joint which you see here to the wood trim. And if you notice in this photograph, the face of the wood trim protrudes further out than the face of the window frame. And that's why you want to use a fillet joint configuration at this location. Because the movements are small and because of the different planes in which you are affecting your seal.

And this seal right here, I am sorry, right in here, is an eighth seal. I don't think -- just looking at the photographs I would suspect that there has been no replacement of sealant material since the houses were built. And sealant joints typically have a relatively short life cycle or life span depending upon temperature extremes and the product in as little as three to four years. So you see some failure. This sealant

failure here is what would be referred to as a cohesive failure. You see the split kind of down the middle of the sealant material.

Q. Let me ask you a question if I may. The building code that these buildings were subject to, does it say you can only use an engineered caulk joint?

A. No. That would be considered a designer's choice.

Q. A designer could have chosen to use an engineered caulk joint, correct?

A. Correct.

Q. Could have a designer in the industry chosen to use a fillet joint that we see in the photo?

A. Yes.

Q. Is the fillet joint we see in the photo, is that a common application practice in the Charleston area?

A. Yes.

Q. Did you observe any evidence of damage to the sheathing or framing based on the condition of the sealants around the windows at Waverly?

A. No.

Q. Let's move on if we can to the

installation of the siding.

THE COURT: I'm going to interrupt. Mr. Foreman, ladies and gentlemen, I'm going to give you a brief break. During this break please do not discuss the case and please leave your notes in your seats.

(Thereupon, the jury exited the courtroom at 11:05 a.m.)

THE COURT: Sir, you can walk around. Just don't discuss your testimony with anyone.

(DFT. EXH. 34-37 were marked for identification.)

(A recess transpired.)

(DFT. EXH. 39 was marked for identification.)

THE COURT: You may be seated. Ladies and gentlemen, we are going to now resume testimony and we are going to try to do something about the temperature. I thought it was just me, but it's always warm in here. We are going to try and work on that. You may continue.

BY MR. MANOS:

Q. Mr. Lewis, let's talk briefly about the attachment of the installation and attachment of the HardiePlank siding at Waverly if we can. Can

you tell the jury generally how the siding should have been installed and pursuant to what standards?

A. Well, like most products there's more than one way to skin a cat. In this case the siding material was a product manufactured by James Hardie called HardiePlank siding. And the HardiePlank instructions give you again several ways in which their product can be installed.

Q. Let me interrupt you for a second. I'm going to put Exhibit 11B on the board. If you want me to flip the page, just prompt me, please. Is that the James HardiePlank instructions you're discussing with the jury right now?

A. It is. Let me see. This is an instruction that came out in 2008. I don't know that -- I haven't had a chance to read everything on this particular one. The James Hardie instructions that I reviewed are dated 2005 which is more contemporaneous with the siding that was constructed at Waverly.

Q. Let me hand --

A. There may be a different -- I haven't made a comparison.

Q. Let me hand you a copy of those, just mark this ID if you will, please.

(DFT EXH. 40 was marked for identification.)

BY MR. MANOS:

Q. This is a copy of the instructions from 2005 that you reviewed and evaluated as part of your evaluation at Waverly?

A. These are the instructions, yes.

Q. You can proceed and tell the jury how --

A. Okay.

Q. -- installation was supposed to occur.

A. These instructions are dated December 2005. And there are two pages. On the first page the section general requirements HardiePlank, and I am quoting, "HardiePlank lap siding can be installed over braced wood or steel studs spaced a maximum of 24 inches on the center or directly to minimum 7/16th inch thick OSB sheathing."

What this is saying is on one end of the spectrum you don't even have to have sheathing. You can install it directly to studs. On the other end -- of course you have to have a weather barrier behind it, but you can install it directly to studs. On the other end of the spectrum you can

install it directly to sheathing without having to engage the studs.

And that's important in the installation of HardiePlank or any siding that is going on top of sheathing and studs and going on top of weather barrier material that covers the sheathing. Because particularly once the weather barrier material goes on and you staple the weather barrier material in place, you don't really know where the studs are. So it is important to have a recognition that when you are installing your siding you may not always and only randomly may you be installing the nails into the studs themselves.

So two purposes of this December 5 instruction. One is to just confirm that the installation of the lap siding on the townhouses at Waverly where the fasteners are directly into the sheathing and not into the studs is a protocol that is specifically approved and recommended by HardiePlank.

The second thing on this installation sheet is it gives you two options for treating the butt joints in the left side. When I say butt joint I'm talking about the end to end joints on a continuous run of left siding pieces; your left

siding is going to be in the range of ten feet long. So if your wall area that you are covering is 20 feet or 30 feet you are going to have at least two or three sections of HardiePlank siding.

Option one under the December 2005 instructions referred to as joint treatment calls for inserting a piece of felt behind the lap siding where the butt joints occur. Option two says that you butt the joints without the felt piece behind the joints. Because it makes sense you got weather barrier material behind the joint. So you have two options in the installation of your HardiePlank siding. Into the studs, into the sheathing, flash the butt joints, don't flash the butt joints. Both of those are generally accepted and recommended installation protocols for the type of siding that is installed at Waverly townhomes.

Q. Mr. Lewis, based on your observation of all the experts photos in this case and your personal observations of destructive tests and your opinion to a reasonable degree of engineering certainty, is there a project-wide all 22 building wide HardiePlank installation deficiency? Is that HardiePlank installed improperly and does it need to be torn off?

A. I have found no location -- there's some place -- let me back up. There are some places where the spacing of the fasteners would even exceed 24 inches which is maximum spacing that you would see on the December 5 installation protocols. So I can't say that there are absolutely no problems with the HardiePlank siding. But there are no problems that warrant its removal and replacement. And there are no problems with the installation protocol that was used. Spacing in some areas is problematic. I am addressing that in some of the things we will go over later, but there's no reason to even remove any of the HardiePlank siding that I have seen.

Q. Let's talk briefly about the roof shingles. You have had an opportunity to survey the roof shingles in this case, correct?

A. Yes, I surveyed.

Q. And you had an opportunity to review photos from the experts including Mr. Mease's photos, correct?

A. Yes, I have reviewed those also.

Q. Based on your evaluation of the shingle manufacturer's instructions and all of the photos and your surveys in your opinion is there any

reason to remove and replace the shingles on all 22 buildings?

A. No.

Q. And why not?

A. That -- it's my opinion there is no need to remove shingles on any of the buildings. And the reason that there is no need to remove them is there has been no demonstrable problem that has surfaced with any of the shingles. And you're roughly -- if they are typical building shingles you are close to 50 percent life cycle stage of these shingles or maybe slightly beyond some of the other buildings. So the shingles on the townhouse buildings are doing exactly what they are expected to do under the terms of the building code.

In my survey, and I will tell you, my personal survey of the roof shingles was from the ground, but it was at each and every one of the 22 buildings. And what the first thing that I am looking for is some evidence of displacement of the roof shingles. Displacement caused by wind, sometimes maybe caused by people being on the roof. But displacement of the shingles that would indicate some performance anomaly. And if there is evidence of displacement of roof shingles or if

there is evidence of water stains on the underside of the roof in the attics, then it warrants further investigation.

I found no such evidence in any -- none of the attics that I went into, and none of the roofs that I surveyed. So my conclusion is that these roofs are performing as they are intended and expected to perform and been doing a good job doing so. No evidence of water infiltration through the shingles. No evidence of displacement of any of the shingles.

Q. To the extent that there have been some roof repairs in the past is that out of the ordinary for a ten-year old project? Do roof sometimes leak?

A. No. No. That wouldn't be unusual. That's not an indication that the roofs as a whole are not performing exactly as they are supposed to perform.

Q. Have you reviewed or been provided any evidence of project-wide shingle blow off after Hurricane Matthew?

A. I have seen no evidence at all of shingle blow off.

Q. Have you reviewed or been provided any

evidence of any of the siding blowing off after Hurricane Matthew?

A. I have seen absolutely no evidence on any building of any siding being blown off.

Q. I asked you when we started or around when we started whether construction, if it is perfect, if it's a perfect standard; do you recall that?

A. I do.

Q. You are not suggesting to the jury that Wieland and its subcontractors were perfect out there, correct?

A. No.

Q. There are some issues and some conditions that exist that you are actually recommending need to be addressed, correct?

A. There are some conditions on the townhouse site that I do believe need to be addressed and we did address them.

Q. You have prepared a presentation to try to illustrate what you recommended to the jury, correct?

A. Yes.

Q. Let's pull that up, slide one. Just generally what are we looking at? What was the

purpose of slide one, Mr. Lewis?

A. Side one is just to provide an overview of the project. You'll see here the 22 buildings that comprise the townhouses at Waverly. And the building -- when you see building types, these basically refer to the number of townhouse units in each building. And just to make it clear, I believe numbers that you see on here are H2L's. These are numbers that we put on the building. These are not necessarily the building numbers that the developer used in sequencing the construction.

Q. Thank you for that clarification. Slide two, please. What were you illustrating with page four?

A. I think there are two major things to recognize in this particular slide. The first is kind of taking for example, this building right here and you'll see the red line. You see the red title which represents the building, then the red line. Particularly the interior red lines, those would be indicative of a common property line. And it's along those lines that we have tenant separation walls, walls that provide part of the fire resistant rating separations that you have between adjacent dwelling units.

The other purpose for this particular slide relates to the little red dots that you see in the buildings. Those red dots are the townhouse dwellings where destructive tests were performed by the experts for the Plaintiff. Those are just to give you some sense of the townhouse units that were invasively inspected and the number of destructive tests that occurred at the townhouse units that were selected for destructive investigation.

Q. Next slide, please. Next slide. What are we looking at here, Mr. Lewis?

A. All right. I mentioned a minute ago this project is not without some elements of deficiencies and that slide is to illustrate one of those elements that was identified, a failure to extend the underlaminate below the shingles all the way to the edges of the roof, the ridges, the eaves of the roofs and the breaks of the roof. And this is just to indicate where at least we have proposed that the roofs be inspected and if the underlaminate does not extend all to the way to the eaves to the roofs that they go in and install the underlaminate which could be a contractor's option in the form of felt to match what is there, weather

lap or it could be a self-adhering flashing that would be with what is there.

Q. Just explain to the jury as simply as you can how that -- what it is you are actually doing there, the contractor would be doing there.

A. Here they would be removing along the eave of the shingle, they would be removing probably two layers of roofing shingles and along the ridges they would either be rolling back or removing one ply as you go up the ridge and inserting the underlaminate material below the existing underlaminate material out to the edge of the roof and then putting in replacement shingles to return it to its original appearance.

Q. And once such a repair is performed in those locations would that satisfy you as an engineer that it would address that condition to the extent it exists at Waverly?

A. Yes, it would.

Q. And based on your review and evaluation of all the experts photos in this case of the roof edge conditions, have you seen any project-wide damage or deterioration to the roof edges?

A. Again, I have seen no evidence of any damage to roof sheathing as a result of the failure

to extend the underlaminate to the edge. This is -- it is not what you want to occur with construction, but you have toe boards. There are safety provisions that are used by roofers when they are working on steep slope roofs and high above the ground. Toe boards is one of those. I suspect what happened here is toe boards were installed, the underlaminate went down, and when the toe boards were later removed the underlaminate was not extended to the edge. But it has resulted in no impairment in the performance of the roof system and it has resulted in no damage that I have seen in any of the materials that I have reviewed.

Q. And briefly --

A. Damage to the shingles.

Q. Briefly, some of the jurors may not know what a toe board is. If you can just do a little blue line about what you're talking about what the purpose of that is?

A. Probably the best thing right here is where the red lines occur along the eaves of the roof, and occasionally you might even see it up the side of the roof. But these are locations where a two by four typically is nailed into the roof sheathing and they provide a stop for tools to drop

when you are working on the roof or if a worker is on the roof and it's damp and start sliding or something. It's intended to be a safety mechanism to prevent fall of the worker and fall of the equipment that the worker may be using.

Q. Next slide, please. Again, this is the same repair, just at a different dwelling unit; is that correct?

A. Yes. The first line was a copy of the building elevation print. This is a photograph basically showing the same type of repairs, just lets you compare an elevation -- planned elevation view against an actual photograph of a building that is on site.

Q. Next slide, please. Anything more to add for this? Is it the same issue?

A. No. This is a different issue. This is the issue where the complaint is shingle edges that extend further beyond the edge of the roof than the manufacturer's recommended installation. And this may be a shingle that extends an inch and-a-half beyond the edge of the roof sheathing so that the shingle itself has no support below it and if it gets hot, particularly in the summer months, and the materials of the roof shingles become more

pliable, and they can bend, they can flex and that ultimately leads to or could lead to cracks along the edges of the shingles themselves.

So the -- what we are calling for here is the contractor to go in and just cut the edge of the shingles back to the manufacturer's recommended three-quarters of an inch overhang to prevent the occurrence of the flex cracks at some later time.

Q. Next slide, please. Anything different?

A. Same slide, again just a difference between the planned elevation and the actual photograph of the real life condition.

Q. Next slide. What are we looking at here, Mr. Lewis?

A. This is a situation relating to step flashing. Step flashings are used around chimneys which is not an issue on this project and it is used where you have got different elevations in the roof surface themselves. Here you have a roof that abuts a side wall. And in those locations you use step flashing because of the elevation differences as you go up the roof. That's all this is, is just calling for an inspection at these locations and if there is by chance a deficiency in the installation

of the step flashing, that they go in and install it. You see it in all 22 buildings as needed. So that's telling you that each of the buildings will be inspected and each of the buildings that does not have step flashing in place will receive step flashing. I'm not aware of any location where there is missing step flashing. There may be some places out there.

Q. Next slide, please.

A. Same thing, actual photograph of a building that shows the locations where step flashing would be installed if it is not already there.

Q. Next slide.

A. Same thing, kick out flashing. Kick out flashing is just a small piece of metal, kind of like step flashing, but it occurs where the rake of the roofs meets the eave of the roof and abuts the adjacent building. You want to divert the water that is tracking and move it away from the lower wall down here where the pencil is sticking. And that kick out flashing does exactly what the name implies. It takes the water and kicks it. In this case it would kick it toward us and away from the wall of the lower building -- the lower wall

section of the adjacent building.

Q. Next slide. What are we looking here, Mr. Lewis?

A. This particular slide again we are looking at an elevation. You will see here this particular elevation view has what's referred to as flat porch roofs on two units in the middle. This happens to be -- looks like a six unit building, with this being a unit, this being a unit, this being a unit, this being a unit, this being a unit, this being a unit and this being a unit.

What you see here is this is an example of two dwelling units with no porches at all and a picture of 24 dwelling units that have in essence full width porch and there is showing here that we will go in and inspect. We found no damages. So I don't think that when we do inspect that we are going to find any conditions of a material nature. But anyway, this depicts what is anticipated in terms of allowance for the contractor to go in and inspect the membrane, the deck membranes on those porches and repair and replace those membranes if there are problems there. And as sheathing -- the reason it says roof sheathing here is because these are actually roofs of the porch rather than

exterior decks for use by the townhouse owners.

Q. Next slide.

A. Here we have got photographs. Again, surprisingly coordinates very well with the planned elevation saying the same thing.

Q. Mr. Lewis, you actually made your recommendation as to what work needs to be performed out at Waverly some time ago, many months ago, correct?

A. Yes.

Q. Since then have you had an opportunity to review and evaluate any photos that are closer in time recently that have been taken?

A. Well, we have more information now than we had obviously in the summer of 2016. And after Hurricane Matthew came and went, and even coming into January 2017, further inspections have been done both by the Plaintiff and at least some of the Defendants. And in January the Defendants were allowed to go back on the site and do further investigations. And one thing that is important in those investigations are the number of porch roofs and porches themselves that were inspected to form a basis for the estimate that we used in the earlier cost statements.

And what we found is that the discovery of particularly damaged handrails and pickets and things like that on the roofs, and you've probably seen reference to there's a pencil, there's a pencil, all of these are indications that we are concerned about preserving treated wood, handrails or guardrails that exist on this site and which have shown some form of decay, deterioration.

Based on the inspections that were done in 2017 the indications are that about 33 percent of the units that have these porches on them have sections of handrails or guardrail that show deterioration. Keep in mind that these sections of handrails are like six-foot sections. So across a 20-foot wide roof once you discount for the post and the insets, all of those, you will get about three sections of guardrails on the front edge and one section of guardrail on the two ends of the porches. So it is not every section -- in the townhouses where decay was found it is not every section.

Q. Are there townhouses where no decay was found based on your investigation of the photos and observations?

A. That was the majority. The majority of

the locations showed no failure at all and I guess what I was getting to, the litany of discussion I had was that when we get to the end of the line, I think the findings on that track very well and very conservatively with the estimates that were made in midsummer in terms of repairs to be recommended to the association.

Q. And are you able to give an opinion one way or the other whether some of the damage we have seen to the railings and some of the pickets were a construction defect versus a maintenance issue? Can you tell that eight to ten years later?

A. I don't think you can tell absolutely. Although I don't think that I have a great deal of difference with the Plaintiffs' experts in what is the most likely cause of the locations where deterioration occurs. We have a disagreement on I guess the future ramifications of all of that, but the root cause probably goes back to the manufacturing of the rails themselves, not so much the installation of the rails or the work that you see on the project site by the various general contractor or trade contractors doing this work.

Q. Get the next slide, please.

A. This is a plan that again kind of shows

you the difference in elevations that we were talking about earlier. Where if you look at these units on the end of the buildings there are no porches at all. I mean there are basically no flat dents, that's what I meant to say, no guardrails at all on these particular elevations, only this center section that you see here.

And here is showing a repair that reflects what we were talking about earlier at the head of the window where we are going in and correcting what is alleged to be a reverse lapping situation. And the reason that I have recommended this is not because of the presence or the absence of self-adhering flashing, but because of the integration of the head trim and other elements to make sure we have all of that properly done. It is not the result of finding any damages at all, but out of an abundance of caution we are addressing these what we call unprotected window heads.

Q. Next slide, please.

A. Same thing. Photograph versus planned elevations.

Q. Next slide.

A. Here we are talking about going in and repairing any damage that might be discovered at

the dormer windows and we do have evidence that at least at one dormer window there is some amount of damage right at the sidewall intersection with the front wall of the dormer, that front left corner, for example, where some water had gotten in there and created a little mischievous action with the sheathing.

Q. That's what we are looking at right there, correct?

THE COURT: What number is that?

Q. Six?

A. No, this is not that photograph.

Q. But it is a dormer condition, right?

A. This is a condition -- well, let me see if I can --

THE COURT: Is that 6?

MR. MANOS: 65W. I interrupted you. Go ahead.

THE WITNESS: I don't know. That might have been the soffit view, but in any case at the dormer, and I am talking about where there was damage found, would have been on this side of the dormer, but where you see the red lines intersecting the window frame in front of the dormer. These homes have a wide divergence of the

number of dormers on the roofs. Some have no dormers, some have only one, some have only two. Some have three. So there's a difference and we have priced recommendations here which I think is a higher number than were being encountered, but 40 dormers for this repair technique would obviously be available to be employed.

BY MR. MANOS:

Q. Next slide, please.

A. Same thing, but a photograph that shows in this case on the rear wall locations of dormers.

Q. Next slide. Mr. Lewis, you've had a chance to look at a number of the brick steps at the site, correct?

A. Yes, I have.

Q. And there were some that were pointed out to not be within the code tolerances, correct?

A. I think there have been one or two sets of steps that have been identified as exceed where the riser height of the steps exceed what the code permits, yes.

Q. And did you look at others that in your opinion were not a problem?

A. There you go. Stop right there. I'm sorry. What was the question?

Q. Did you look at other steps at the 105 units that were not a problem in your opinion?

A. Yes, I looked at a lot of steps that were not problematic. One thing that will help you, let me point this out, particularly if these kind of photographs are in evidence, if you look at what's called the tread brick which is these brick elements right along here, the brick formed the tread of the steps, then you see just below the tread of the steps the one brick unit and then below that you see the tread brick for the following step.

One way to get a sense for the riser heights is to look at the combination of brick thicknesses that go from one tread to the next tread, that little elevation view that you see at each step where they are uniform and consistent. They're code compliant. I think -- I know I saw one photograph in the files that were produced to us from the Plaintiffs that showed a difference in riser height and you can see that difference very plainly in the thickness of the brick compared to the adjacent steps and the tread -- riser height in those steps. So that when you go through the various photographs focus on the uniformity or

nonuniformity of the height differences between the treads of the brick steps.

Q. When you were out at the site, Mr. Lewis, in April or May of 2016 you took these photos Exhibit 34 we see here; is that correct?

A. Yes, looks like it.

Q. And you also took Exhibit 36?

A. I did, yes.

MR. MANOS: And I would like to move these into evidence.

THE COURT: Any objection? Those --

MR. HAYES: No objection.

THE COURT: Marked and admitted without objection. 36 and what?

MR. MANOS: One is 34, and is 36.

THE COURT: 34 and 36 are admitted without objection. You may proceed.

(DFT. EXH. 34 and 36 in evidence.)

BY MR. MANOS:

Q. Like Mr. Glick you took a whole bunch of photos as well. Those would all be representative samples of the photos, correct?

A. Yes.

Q. Despite the fact that you didn't see any project-wide problem with the bricks how many

are you suggesting be removed and replaced?

A. We suggest that the recommendation includes again the contractor measuring to determine where compliance does not exist and to replace those steps in total where the compliance would not occur.

Q. You have actually recommended 50 sets of 105, almost 50 percent?

A. That's right.

Q. Forty-eight plus percent?

A. That's correct.

Q. Is there any indication that you have seen anything or been provided anything to suggest to you that 50 percent of the steps actually need to be replaced out there?

A. Not as I sit here today.

Q. Next slide, please. You have got an exhibit here with a rail?

A. There is a handrail, guardrail replacement. And it shows you where we have porches, what I call the small porches. These porches typically average about around 35 to 50 square feet per porch roof. They would have guardrails around them, too. Decorative. They are not -- these upper level porches and decorative

rail areas are not used for entertainment or used by the homeowner. These were all windows that face on to those.

Q. So based on your investigation of all the photos you had made recommendations of quantities of handrails that should be replaced in your opinion, correct?

A. Yes.

Q. Next slide. Let's talk very briefly about the entry step rails to the extent they're a little bit different in your recommendations.

A. Right. Again, what we found more recently is that at the -- what I refer to as handrails are the rails that go from the sidewalk up to the porch. Once we get on the porch the rails on the porch and the rails on the deck above the porch are considered guardrails or decorative guardrails.

What we have found more recently is that the stairwells, the handrails at the stairs, have -- the areas of deterioration on those rails are more with the trim boards that are attached to the preservative treated six by six wood posts that actually anchor and carry the loads of the rails. So it's a trim material more than the rails

themselves, the fabricated rails, and it is not the post themselves that are deteriorating. It's the trim at the base of one or two posts at the bottom of the brick steps.

Q. However, we have seen photos and there is evidence of some rails out at Waverly with rot, correct?

A. That failure rate on the post, I think there like 31, somewhere around 31 townhouses that were inspected, so a good sampling of townhouse. The trim failure at the bottom of the post was about ten percent. So three or four out of those 31 townhouses had evidence of deterioration. There's some deterioration on the handrails, too. We probably have photographs of those.

Q. You have recommended 75 percent of the handrails be replaced?

A. That sounds like the right quantification.

Q. Next slide, please. What are we looking at here?

A. These are the separation walls or the party walls and this is a diagram of two townhouse dwelling units. And if you remember, we were talking earlier about the common property line

between the townhouses. That would be there at -- that black line there is the property line. And that wall along the property line is required to have a fire resistant rating. The plan for these townhomes provided the builders two options. And we did find that there were some areas where the fire resistant rating of the walls were not continuous and they basically are limited to attic areas and they for the most part are limited to the distance from the top of the low roof to the underside of the high roof.

So in those locations the fix plan is to remedy the deficiencies that exist, to install, to create the fire resistant rating, make it contiguous and to carry that rating out four feet which is required by the code, four feet to each side of the tenant separation walls. That's what you see. The red lines in here indicate the horizontal fire resistant material. It is applied to the underside of the roof decks and the black line as you see would be the location of the material, the fire resistant rated material which is a fire resistant gypsum board that would go in in the uncompleted sections between the two roof elevations.

Q. The next three slides are illustrations of what you are directing the contractor to repair?

A. Yes. That would be an illustration. You see the red line going up under the sheathing, the roof sheathing, would be where the materials would be replaced.

Q. Next slide. Another illustration what you're directing the contractor to do to address that condition?

A. Yes.

Q. Next slide. That's just showing it from the exterior?

A. Right. Showing basically the elevation view where the repairs are basically needed.

Q. Next slide. What are we looking at here, Mr. Lewis?

A. A small number of the dormers appeared to at least have what might be interpreted to be some framing -- lack of sufficient framing around the window openings and this again is the framing information provided on the builder's drawings and at least the places that I inspected were in compliance with the drawings, but there may be and apparently are some locations where the framing deficiencies exist and this is the repair allowance

to address those conditions.

Q. And we didn't say it when we started, but the 15 DU, DU's are dwelling units?

A. Yes, I am sorry. Those are dwelling units. A dwelling unit and a townhouse are one in the same.

Q. Next slide.

A. Same repair, but showing it to you on the building elevation photograph.

Q. Next slide. Go to the next slide.

A. Go back.

Q. I apologize. I skipped one back to --

A. This is to address the -- I think the recommendation from one of the Plaintiffs' experts to address cupping a specific townhouse unit. This is what that is intended to do. And that is the joist spacing is a little bit wider than 16 inches. Some of the joists in these buildings by design are at 19.1 inches and the framing or the framing suppliers did those designs and there is a module joist framing system that is at that spacing. Just doesn't work real well when you add insulation. It is cut to 16 inch.

Q. That's one unit where you all are doing some work with insulation?

A. Yes, it was.

Q. When you were talking about cupping you were talking about wood floor?

A. Yes.

Q. Next slide. And so after you have done, the contractor has done the work that you recommended. Last slide. What are we doing here, Mr. Lewis?

A. This is going in after everything has been -- all the repairs are completed, go in with the siding. You heard me say earlier the nails facing on some of the lap siding was a bit excessive. Not a problem with the nails going into sheathing. But the spacing of the nails becomes more problematic, particularly in high wind areas. So here after everything is completed we go in and we reattach from the outside the lap siding to the sheathing and we have done the calculations and the pull out strength and all that of to get the nail spacings identified. And we are going in replacing it, nailing it, stainless steel nails, and painting, painting all of the exteriors of these houses.

Once the nails are in the siding gets replaced. So it's giving them a new look to the

exterior.

Q. Are you confident to a reasonable degree of engineering certainty that if the repairs were performed that you recommended that you would be satisfied with the conditions out at Waverly?

A. The answer to that is yes, I am.

Q. Have you had an opportunity to discuss your scope of work with Mr. Watkins?

A. I did.

Q. And who is Mr. Watkins for the jury's knowledge?

A. JR Watkins is the now owner of Watkins Services which is a construction company out of Myrtle Beach. We have been working with Watkins Services for probably 25 or 30 years. They are -- one of their specialities is going in and repairing conditions in distressed buildings and Waverly would be a typical type project for Watkins Services. They also do cost estimates of what it would take to do wall work that their men would be doing and their subcontractors would be doing. So we use Watkins Services on a fairly regular basis to help us price the work to be done and then actually do the work if they are selected to do it.

Q. Are you confident that Mr. Watkins

understands the scope of work that you've suggested here and he can perform it? His company can perform it?

MR. MCCARTY: Objection, Your Honor.

THE COURT: Basis?

MR. MCCARTY: Bolstering.

THE COURT: Overruled.

MR. MCCARTY: He is asking --

THE COURT: I don't need you to speak. You have stated the basis. I have overruled it. You may answer the question, sir.

BY MR. MANOS:

Q. Are you confident Mr. Watkins understands based on y'all discussions, are you confident that he understood what you were recommending?

A. Well, he indicated to me he understands it and I take him at his word. He should. He does it every day.

MR. MANOS: Mr. Lewis, I thank you for your time. I pass the witness, Your Honor.

THE COURT: Ladies and gentlemen, you have been sitting for an hour. I am going to give you a brief restroom break. During the break please do not discuss the case and please leave

your note pads in your seats. As soon as you are done refreshing yourselves let the bailiff know and we will resume with the cross-examination of the witness.

(Thereupon, the jury exited the courtroom at 12:21 p.m.)

(A recess transpired.)

(Thereupon, the jury entered the courtroom at 12:31 p.m.)

THE COURT: We will resume cross-examination. You may proceed when you are ready.

CROSS-EXAMINATION

BY MR. HAYES:

Q. Mr. Lewis, good afternoon.

A. Good afternoon.

Q. Do I understand you right that you have testified that you have not been on any of these roofs?

A. I have not physically been on the top of any of the roofs, right.

Q. So everything you have observed you have observed from the ground level, right, grass?

A. From the grass or from the second deck roofs.

Q. Okay. Let's bring up Exhibit 21. Mr. Lewis, were you here during Mr. Mease's testimony?

A. No, I was not.

Q. Have you ever looked at the CertainTeed shingle installation?

A. I have.

Q. Can you take a moment and look at the screen. Does that diagram look familiar to you?

A. Yes, I would say it does.

Q. Do you agree that if a nail is crooked, underdriven or overdriven on the roof shingle that is not installed correctly?

A. I would say that if a nail is crooked, that it is underdriven or overdriven it would not be installed as reflected on this particular figure one.

Q. Is that -- you believe that's a violation of the building code?

A. Well, I guess the way I would answer that is no, I don't think it's a violation of the building code and I don't believe it's a violation of the building code for these reasons: The building code is an interpretive document. Building code provides in the end what a building

is supposed to be in its performance. And the building code would require substantial compliance. Substantial compliance does not mean that each and every nail that is driven into a roof shingle is according to Figure 1 a proper nail configuration.

So I would consider substantial compliance one in which the shingles of the roof are attached in such a way that it maintains the integrity of the membrane and that they resist the forces which would tend to displace them. And every indication after all of these years of service is that the shingles on this roof are doing exactly that.

Q. Does the building code state to follow manufacturer's instructions?

A. I am sorry, what?

Q. Does the building code state to follow manufacturer's instructions?

A. In some places in the code it does, yes. I don't interpret that to require again in the 450,000 nails that have been driven into the roofs into the shingles at Waverly are going to be exactly as reflected as a proper nailing installation in Figure 1.

Q. Are you a building code official?

A. Pardon?
Q. Are you a building code official?
A. Am I building --
Q. Building code official?
A. No, I'm not a building code official.
Q. How many overdriven nails have you seen personally at Waverly?
A. Overdriven?
Q. Yes, sir.
A. None.
Q. How many have you seen that were correctly driven?
A. None. It would not be possible I don't think to see those without going onto the roof.
Q. Can you pull up slide No. 31 in the Glick photos, please. Mr. Lewis, will you take a look at that photo.
A. (Witness complies with request.) Yes.
THE COURT: You need to identify what number that is.
BY MR. HAYES:
Q. That is slide No. 31, destructive test number 1, unit 1037 Zinser. Is that showing the self-adhering flashing you were talking about earlier underneath the window?

A. Yes, it is.

Q. And you have discussed some of your scope of repair. In your scope of repair do you have any repair for any problems below any windows?

A. I will have to go back and look at my scope. I don't think so. I think we limited them to the head conditions. Can you blow -- is there a way to blow this exhibit up so I can look at in a little closer detail?

Q. Most certainly.

A. All right. That's a good example. Can you go towards the end, move it toward the end where we have a --

Q. Previous slide?

A. If you look kind -- if you would blow that area up. Let's take a look at it. All right. This has been disturbed to some extent, but you can see the material has been cut. But let's look at the sill and the wood behind the onion skin, behind the flashing. Look at the wood along the side of the window jamb. Again, this is a condition that has no indication at all of water intrusion, certainly no evidence of damage. So I think this is a good example photograph.

Q. Would you go to slide 40, please? Do

you see the rusted fasteners in that photo?

A. Yes, I see some corrosion around the fasteners which I would expect to find even without water infiltration.

Q. So you have no type of repair for the rusted fasteners in the people's home at Waverly, correct?

A. Right, right. The rusted fastener is going to stay. Its service is still good. And as I mentioned earlier, you have vapor that is moving back and forth from the outside to the inside, from the inside to the outside. And nails and staples and places like that are areas where condensation of your vapor movement occur. This is not an indication of a defective installation. In my judgment it is not an indication of a defective installation.

Q. You are not having any repairs done to that, correct?

A. I am not. You are correct, I am not repairing that condition.

Q. If you will go to slide 139, please. If you will look at 139. I believe you referred to that as mischievous activity during your --

A. I believe I did.

Q. Did you also call it rot?

A. Probably did. I don't think I disputed the comment on the photograph here.

Q. If you will go to No. 162, please. Hard to see, I understand, but this was a photo taken on the inside underneath the window. Do you agree with me that is showing evidence of water intrusion?

A. Well, I see evidence of a water -- what I would consider to be a water stain on the drywall, yes.

Q. In your experience is that indicative of water getting in?

A. Well, let me talk about that for just a second if I because I think --

Q. Can you answer the question first?

A. Yes, it is indicative that water infiltration may be occurring. It is not confirmation that water infiltration is occurring. And there's not enough information here to make that determination. And you cannot make that determination without digging deeper into the process. We talk about causal connection.

And to determine what is causing the stain on this drywall you have to go behind the

drywall. You have to go behind the window trim at the sill of the window and you have to inspect and determine what the path of the moisture content is. You may have noticed in one of the slides that was put up just a little bit earlier where you had what looked like an antenna cable or a cable that came from the outside was going into the inside of the house where the window sash was located. You have got any number of potential causal elements that can create a water stain. The key is determining what that connection is, what the path of the moisture is. And you cannot do that by finding a water stain on a wall without digging deeper to determine the source or cause of that stain.

Q. Mr. Lewis, how many test cuts did you do out there?

A. At Waverly?

Q. Yes, sir.

A. We did some above the flat roofs. I think that was probably the only location. There was no evidence or reports of water infiltration into the interior of the unit when I was on site.

Q. Let me ask you this: Do you have any knowledge of any moisture intrusion in the roof systems?

A. In what?

Q. In the roof system?

A. No, I don't.

Q. I think earlier you testified that you had seen -- withdraw that. Let's move to 172, please. Look at 172; that's a rusted nail in the trim. Do you find that to be acceptable?

A. I don't find to this to be unacceptable. I don't find it to be pristine by any means. But to extract a nail that has been in a piece of wood trim for multiple years, particularly preserved and treated wood trim, without any corrosive or everything on it, would be quite unusual. The key is even looking at this nail, is the cross-section that remains to resist any withdrawal forces, collateral forces that the nail is applied to. I would not consider this particular nail that I am looking at to be indicative of a nail that has in any way impaired the structural performance of the purpose for the attachment of the nail.

Q. So that's okay in your opinion? That fastener is okay?

A. That fastener is serviceable, yes.

Q. Let's go to No. 33. I believe you used

this photo in your direct testimony and you said that this was an acceptable way to flash the window, correct?

A. Yes, it is an acceptable way of flashing the window.

Q. Go to No. 34, please. Did you also see the photos that followed that regarding the 26 percent moisture content below it?

A. I see that, yes, the photograph.

Q. Do you think that that is acceptable?

A. Well, maybe, maybe not. It doesn't mean it is unacceptable.

Q. Let me ask you this: Have you ever used a moisture meter before?

A. On a few occasions, yes, maybe in 50 years.

Q. At what level is it unacceptable? What moisture level is unacceptable?

A. If you are reading wood content without any distractions and the meter is properly calibrated, it becomes somewhat questionable around the 20 percent range. The things that you don't know while looking at this photograph is what natural occurrences may have occurred that put the moisture into the wood. And you don't know, at

least I don't know by looking at it, what interferences may exist.

When I say interferences I am talking about the probe of the meter that go through other materials that have an effect on the currents that travel. The moisture meter readings are based on electrical currents that flow through the wood. And so it is calibrated for wood and if you have got a probe going through flashing materials or anything, got any kind of metal content in it, even if it's a metal fiber or contacts or nails or anything like that, you can get an erroneous reading. But it would not be unusual to see moisture content in wood at an elevated level at any particular point in time.

What you don't see in this photograph, what you need to look for is evidence of damage, evidence of deterioration, evidence of rot, evidence that something is not performing as it is intended to perform. That's what you look for.

Q. Kind of like the mischievous activities we talked about earlier?

A. That's a good example. Back when we had mischievous activity you saw a little bit of damage.

Q. That mischievous activity that rot refers to, did it happen like this, did it take a little bit of time?

A. It takes time, but it doesn't take a lot of time.

Q. You came up with a scope of repair for this building, right?

A. Yes, I did.

Q. And that scope of repair involved doing work to the roofs, kick out flashing, the front porch roofs, the window heads, the dormers, the porch guardrails, the step handrails, the firewalls, the framing windows and bad insulation in the crawl space, correct?

A. I believe that covers most of the areas. Keep in mind it is not every dwelling unit and every location on every dwelling unit, but yes, that is a good overview I think of the totality of the recommended remediation that we developed.

Q. It is your recommendation that those areas need to be fixed and addressed, correct?

A. They be what?

Q. Fixed and addressed, correct?

A. Well, I don't necessarily say fixed. I would say there are certainly areas where the

conditions need to be enhanced, but again, without any evidence of damage it is hard for me to sit here and say these are conditions that need to be fixed.

Q. You can't sit here today and say that the conditions don't need to be fixed, either, can you?

A. I think here we have tried to address the areas where we believe the contractors and the trade contractors broke off the work without completing everything that was intended to be done. The roof repairs are probably the best example of that.

Q. So, again, is it your recommendation that these repairs at the very least that you recommended be done? These areas I just read to you?

A. Well, if I were meeting with the homeowners, I would say you look at what H2L is recommending and we will -- homeowners association would fix those relative few areas I think that really do need to be fixed. And the areas perhaps such as roof shingles, I would put the money in an escrow account. That's what I would do.

Q. Well, Mr. Lewis, I would like to turn

your attention back to when your deposition was taken back in August.

A. Sure.

Q. In 2016. If you would be so kind as to play that clip.

MR. MANOS: Is there a question? Objection, Your Honor.

THE COURT: Basis?

MR. MANOS: I don't know that's a proper impeachment. He hasn't asked a question.

THE COURT: Approach.

(Off-the-record sidebar conference.)

THE COURT: Sustained. Rephrase.

BY MR. HAYES:

Q. I will ask you again, the scope of repairs you just outlined, is that what needs to be repaired at Waverly?

A. Well, yes. If you are going to use my deposition may I have a copy of what you are going to be referring to?

Q. Sure. I'd like the jury to be able to see it also, Your Honor.

THE COURT: Ask him -- follow the form of the rules. Ask the question, give him the opportunity to admit or deny and then you may

impeach the witness.

BY MR. HAYES:

Q. Back when you were deposed in August did you admit that these repairs needed to be done? Did you recommend these repairs be done?

A. Yeah. I am still recommending they be done. I am just telling you that if I were on the board of directors of the association what I would do. But as an engineer I have recommended the repairs that are reflected in my repair scope or remediation scope.

Q. Okay.

A. Did you want me to address anything in --

Q. No, I think you have answered it now.

MR. HAYES: No further questions, Your Honor.

THE COURT: Any redirect of the witness?

MR. MANOS: No, Your Honor.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. MANOS: None, Your Honor.

THE COURT: Sir, you are excused.

Mr. Foreman, ladies and gentlemen, we are going to take advantage of the break in testimony to take your lunch recess. During the break please don't discuss the case among yourselves or with anyone else. Please don't have any contact with anyone in or about the courthouse when you return. And please don't do any independent research on the internet or make any comments on any social media sites. If you will leave your note pads in your seats we will secure them during the break. We will resume at 2:15. As soon as everyone arrives back in the jury room we will resume testimony. Have a great lunch.

(Thereupon, the jury exited the courtroom at 12:53 p.m.)

THE COURT: You may be seated. Is there anything before we break for lunch from the Plaintiff?

MR. HAYES: No, ma'am.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Who is the next witness going to be? Mr. Gregorie?

MR. MANOS: Either will be Mr. Coffman

or Mr. Watkins, but I need to get on the phone to make sure Mr. Watkins is around.

THE COURT: Okay. Have a good lunch. See you all at 2:15. Please make sure the court reporter has all of the exhibits.

(DFT. EXH. 38 was marked for identification.)

(A luncheon recess transpired.)

THE COURT: Who is the next witness?

MR. MANOS: JR Watkins, Your Honor.

THE COURT: After Mr. Watkins how many more witnesses does the defense have?

MR. HASELDEN: At least four, maybe five.

THE COURT: Are there going to be any rebuttal witnesses?

MR. HAYES: Yes, ma'am.

THE COURT: How many?

MR. HAYES: Right now we have one planned.

THE COURT: Okay. Plaintiff ready?

MR. HAYES: Yes.

THE COURT: Defense ready?

MR. MANOS: Yes, ma'am.

THE COURT: Please bring the jury.

(Thereupon the jury entered the courtroom at 2:24 p.m.)

THE COURT: You may call your next witness.

MR. MANOS: Defendants call JR Watkins.

STEVE WATKINS

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your last name.

THE WITNESS: Steve Wayne Watkins, II, S-T-E-V-E, W-A-Y-N-E, W-A-T-K-I-N-S.

DIRECT EXAMINATION

BY MR. MANOS:

Q. Mr. Watkins, what do they call you?

A. To my face JR.

Q. Why are you a JR?

A. I'm actually a second, but technically I'm a junior named after my father.

Q. What do you do for a living?

A. General contractor.

Q. Are you licensed?

A. Yes.

Q. What is your license?

A. Unlimited general contractor in North

and South Carolina.

Q. Where do you reside?

A. Myrtle Beach, South Carolina.

Q. What's your company's name?

A. Watkins Services, Incorporated.

Q. Where do you live?

A. In Myrtle Beach.

Q. Your office is also in Myrtle Beach?

A. Yes, sir.

Q. Tell us a little bit about your education before you started working?

A. Well, I started working for my father as a teenager framing houses, doing commercial roofing, residential roofing. Went to technical school, Horry County Georgetown Tech for a year and-a-half, went to Coastal Carolina for a year and-a-half. By my primary education is taking buildings apart and putting them back together.

Q. How old are you?

A. Forty-six.

Q. When did you actually start hitting nails and taking siding apart and everything else?

A. Around 15.

Q. And you did that for who?

A. For my father and my grandfather.

Q. In what capacity? What did your father and grandfather do?

A. They were house framers, roofers, like I said, commercial and residential roofing. We did some highrise waterproofing in the wintertime, things like that.

Q. And when did you start working full time for your father?

A. I worked full time in the summers until I graduated high school and I started working full time after I graduated high school, but I would take some time off in the spring and fall to go to school.

Q. What year did you graduate high school?

A. 1988.

Q. And once you graduated high school and started working full time for your father what was that company and what did the company do?

A. We had two companies, Watkins Commercial Roofing and Watkins Waterproofing. And, of course, the waterproofing company did highrise waterproofing primarily in the wintertime. The roofing, we roofed all year long, mainly in the summertime, but as we started getting more and more into taking buildings apart and putting them back

together, rebuilding condos, townhomes, my dad decided to morph both those companies into one. We would -- my dad loved house building, so he would try to build at least one house a year.

Q. And let's talk about your specific roles and duties for the company from 1988. Take me up, take the jury up, explain to them kind of what you did for the company from '88 up?

A. Even before '88 we had to -- I had to hand drive shingles until we got our first nail gun when I was 19. That was a big deal. Like I said, we took work. We were a small company so we took whatever work was available. If we sold a couple of roof jobs what that's we would do. My dad would make a huge effort in the summertime to sell waterproofing jobs for the winter for the waterproofing part of our company. We sprayed polyurethane foam. We put down --

Q. When you say waterproofing, what do you mean?

A. Like drop in swing stages on buildings and, you know, basically changing caulk joints, washing the building, prepping it to recoat, things like that.

Q. You personally, tell the jury, please,

after '88 what were you personally doing for your dad's company?

A. Well, I had -- it doesn't look like it now, but I had to actually physically work like I said installing shingles. We did modified roofing, stand in seams, polyurethane foam; we sprayed a lot of that for a period of time. We did a lot of roof repairs, lot of specially commercial roofs. You know, some of the smaller towns, some of the mills and stuff, they would try to refurbish and we had to go back in and do reframing the roofs, things like that. But physically installed hard stucco, brick, whatever job we sold that's the work that we had to do.

And one of the things I learned was I did a lot of the flashing. My grandpa taught me how to install flashing, drip edges, head flashing over windows, pan flashing over windows and doors, things like that. He was a craftsman and he passed that on to me and I actually -- there was a couple guys that have worked for our company, one guy in particular, for 35 years. We kind of learned at the same time.

Q. When did you start -- explain to the jury when did you start undertaking the role

estimating jobs so you could figure out how to price them for the company?

A. Well, I wanted to do more in the company. My dad -- I had learned how to do so many things my dad didn't want me moving into another part of the company. And we didn't get along for a couple years because I wanted to move up and so I finally -- we weren't getting along and it really bothered me so I left the company for a year and-a-half from I think it was 1998 to 2000. Went to North Carolina, started working of all places for a bank. My dad knew somebody in the bank that got me an entry level job and so things were working out there. I guess my dad stared missing me because he came up to see me and I'd just been promoted to a floor manager of a call center. I was very proud. I wanted to show him look, I can do other things. And he came up and he -- I am sorry. I get emotional talking about my dad.

Q. For the jury's --

A. He passed four years ago so it's still fresh. Anyway he asked me to come back to work for him and I did.

Q. You went back to work and when did you start doing more estimating of jobs?

A. When I first came back to the company they were -- we had just started Kingston Plantation. We were basically taking all of the condos out there apart and putting them back together and we also were still doing a lot roofing and he needed me to run the roofing part of the company. So I started doing that.

And the managers that he had out at Kingston, he couldn't get completely satisfied with them so he finally put me in charge of Kingston Plantation. I finished the job up, did a few more jobs, got more experience at pricing the repair projects and helping him put bids together and when he started the consultancy part of business my dad did this. He testified in court and put cost estimates together and things like that originally and he asked me to come help him and I am sorry I am long winded, but anyway that's how I morphed into doing cost estimating with him and then when I got too busy in the field we promoted an employee to help him with that.

Q. Briefly explain to the jury what goes into estimating, what factors you look to, sources?

A. Well, the first thing we do is when we are given a scope of repair we build a basic

estimate. Almost like you build a house. We get our scopes, we build the estimate in the spreadsheets. We put the line items in. We try to make them almost verbatim as to the scope of what we call bidding instructions that we are given. And then we do our takeoffs, find out how much of that work needs to be done, whether it is prescribed to us or whether we have to do takeoffs and try to figure out how many pieces of step flashing or whatever we have to put in. And then we plug that in using numbers that I use all the time, numbers that I use every day, every week to bid projects, numbers that I bid projects on.

Q. Where do you get those numbers?

A. We call them historical numbers. We adjust them every couple of years up and down based on material cost, things like that, but our subcontractors have -- like our roofing sub, he has standard pricing that he gives us and every couple years may go up five bucks a square or something like that. The other subs, we use painting subcontractors, stucco subs. They may gradually increase their prices, but we take the prices that they give us that we use on bids and we plug them into our cost estimates. We look at our cost

estimates like they are bids.

Q. Tell the jury if you will some -- just a variety of the projects over the last five years that you have been involved in actually performing estimates for and Watkins Service performing repairs?

A. A cost estimate that we prepare for a case and then we actually go do the work?

Q. Not a case, just jobs that y'all have actually performed which you would have had to have done an estimate for and then actually gone in and done the repairs?

A. We've done several. We have been fortunate here in the last few years. We average around five million gross a year. We do all types of buildings. Vinyl side, a lot of times we have vinyl siding, reclads; we have to pull windows or flashing in place. We have brick we repair. A lot of times on brick we will do the face of the wall because flashing is not put improperly. Stucco. Lot of repainting, things like that, HardiePlank, lot of HardiePlank.

Q. Any specific projects in the area that you are currently working on?

A. Yes. Working on one on James Island,

Mira Vista. We are working on -- I have got a house on Jasper Street, as you know, a small house that I am working on. I have a job in the upstate that actually when I am done testifying I have to drive up there tonight. Up in Seneca townhomes that we're taking cedar off and putting Hardie back, stone veneer cladding, we are taking that off and putting it back.

Q. What is your present position with Watkins Services?

A. I'm the CEO.

Q. How long have you been a licensed general contractor?

A. Going on 17 years.

MR. MANOS: And let's move -- strike that for a second. At this time I would like to qualify Mr. Watkins as an expert in general contracting and estimating.

THE COURT: Any objection or questions?

MR. MCCARTY: No objection, Your Honor.

THE COURT: So admitted without objection. You may proceed.

BY MR. MANOS:

Q. Mr. Watkins, have you had an opportunity to go out to the Waverly site?

A. Yes, sir.

Q. In what capacity did you do that? What did you do when you went out there?

A. We actually helped perform destructive tests. I went out there and walked around and looked at tests, made sure our tests cuts looked okay. That was back in I think May of last year. I remember going back on the site about two or three weeks later just to -- I can't remember exactly when -- I think we had just gotten a scope and just turned our estimate in. I can't remember. I went out there to kind of walk it through a little bit.

Q. Are you familiar with the townhomes at Waverly?

A. Yes, sir.

Q. The elevations?

A. Yes, sir. And I went back out, I think I was deposed two or three weeks ago. I went out the end of the week, I can't remember the exact dates, and spent a couple hours out there just re-walking through my estimate and making sure that I understood, make sure that it was as accurate as possible.

Q. And you have had an opportunity to

review various photos from Mr. Lewis, Skip Lewis?

A. Yes, I had seen photos.

Q. Of Waverly and the conditions that are present?

A. Yes, sir.

Q. And you have received a copy of Mr. Lewis, H2L's, scope of work?

A. Yes, sir.

Q. That he is recommending and you have prepared an estimate?

A. Yes, sir.

Q. I'm going to hand you Exhibit 38. Mr. Watkins, is that an estimate that you prepared to perform the scope of work recommended by H2L and Mr. Lewis?

A. Yes.

Q. And was that -- does that repair amount express your opinions to a reasonable degree of certainty as a professional general contractor estimator?

A. I am sorry, Teddy. I didn't understand the question.

Q. Let me ask it this way: Does the total amount in Exhibit 38 express what you believe it would cost to perform H2L's recommendations and

scope of repair?

A. Yes, sir.

Q. And, in fact, would you perform the scope of repair by H2L for the amount in Exhibit 38?

A. Yes, sir.

Q. Assuming you are hired you would be willing to perform it for that amount?

A. Yes, sir.

MR. MANOS: I want to go through -- at this time I would like to enter Exhibit 38 into evidence.

MR. MCCARTY: Objection, Your Honor.

THE COURT: Approach.

(Off-the-record sidebar conference.)

BY MR. MANOS:

Q. Mr. Watkins, have you had an opportunity to look at Mr. Lewis's scope of repair?

A. Yes.

Q. Next slide. Next slide. Next slide. Next slide. Next slide. Mr. Watkins, looking at the slide on your -- in front of you, can you make sure that your estimate includes that scope of repair? Can you point out to the jury the line item contained in your estimate that addresses that

scope of repair?

A. Yes. The line item in Section 1, 1.01, inspect roof edges and install felt as needed.

Q. Next slide. Next slide. You can take a look at that slide and point out to the jury your line item that addressed that repair, please.

A. It's actually covered in 1.01 also because we are accessing the same area. But it's line item 1.04, but there's no dollar amount. The note says it is covered in 1.01.

Q. Thank you. Next line. Tell the jury your repair estimate. Address the next slide, please.

A. It's also in section 1.02. It reads install step flashing where needed.

Q. Next slide, please. Tell the jury where that's addressed in your estimate, please.

A. Right below that line item, item 1.03, install kick out flashing where needed.

Q. Next slide, please. You can explain to the jury where this is contained in your estimate, please.

A. It's two line items. The first line item is 1.06, remove, replace flat roof membrane and 1.07, remove, replace deck sheathing.

Q. Next slide, please. Explain to the jury where this line item is contained in your repair estimate, please.

A. This is actually two line items also. 3.06, remove, replace siding above exposed windows and 3.07, fix flashing above exposed windows.

Q. Next slide, please. Tell the jury where you're doing the dormer work in your estimate?

A. This is these -- there's four line items. In Section 3, 3.14 through 3.17. Point 3.14 is inspect siding, wallet dormers. 3.15 is remove, replace siding at dormers. 3.16 is remove, replace sheathing. And 3.17 is remove, reset window at dorm.

Q. Just so we don't lose things let me make sure I didn't give you -- get the next slide, please. Are you addressing the brick steps, please?

A. This is just for the brick steps or treads and it is line items 3.08 which is survey all steps. So we are surveying all the steps at all the units, the front entry steps. 3.09 is replace tread.

Q. What are you assuming the amount to be?

A. That is for 50 sets of 300 treads. We have an allowance to do that work.

Q. Next slide, please. Tell the jury where you are addressing this scope in your estimate, please?

A. It's in Section 3, line items 3.12 and 3.13. 3.12 is inspect flat roof decorative handrails. 3.13 is remove, replace decorative handrails.

Q. Next slide, please. Next slide, please. Tell the jury where you're addressing fire assembly issues, please.

A. Does he have multiple slides of the attic work or just one slide?

Q. It does.

A. I have a section, Section 2 that has eight items in it. They are all attic work and it all has to do with rehabbing or beefing up the fireproofing that's either there or missing.

Q. Those are --

A. I am sorry, except for line items 2.01 through 2.06.

Q. Next slide, please. Where are you addressing the header repairs?

A. That is also in Section 2 line

item 2.07 which is inspect framing and all dormers, windows and 2.08, an allowance for dormer window frame.

Q. Next slide, please. You have a line item to address the one unit Batt insulation?

A. Section 4 there is a two line item section. It is specifically for this unit. And it is to remove, replace insulation in the crawl space under the unit. There's an allowance for any potential barrier damage.

Q. And assuming you got the job after you do all of the work that we just we went through, the last thing you would do? Next slide, please, would be what?

A. Skip has prescribed us to -- sorry, to add face nails to all the exposed lap siding Hardie and to pressure wash it and apply two coats of paint.

Q. And you have a line item in your estimate for that?

A. It's in Section 3, line items 3.01, 02 and 03.

Q. Have you had an opportunity to discuss with Mr. Lewis what it was he was intending for you to perform?

A. Yes, sir.

Q. Do you feel like you understood his scope?

A. Yes, sir.

Q. Your repair estimate also includes an item for a glue beam repair; is that correct?

A. Yes, sir.

Q. Explain very briefly for the jury what you are replacing in that section?

A. It's one building, I believe it is building nine. The engineers who come up after me can probably explain better than I can, but there is a Glulam that runs down from front to back in two locations, one is a long location, one is a shorter location. There's load bearing walls that bear there. I don't know the exact deficiency that's there, but there is -- I don't know if there is rot or paper left on the Glulam, whatever, the support is deficient. The Glulam is either rotted or they think there's a potential problem there. Anyway, we are going to install a post at the footer that holds up the two Glulams and we are going to install two parallams on either side of that. Bisect those parallams blocking to carry the load of the load bearing wall, bypass the existing

Glulam and transfer it down to the footer of the pier. There's two sections that run parallel and Scott Coffman, the engineer, prescribed that we sandwich, actually install one parallam beam and then remove the bad beam that is there and add plies as we need to to get the proper load.

Q. And have you had an opportunity to speak with Mr. Coffman about his design for the Glulam repair?

A. Yes.

Q. Do you feel like you are comfortable in understanding what his design is?

A. Yes.

Q. Do you believe that the line items in your estimate will be enough money to perform those repairs?

A. Yes, sir.

Q. You will be willing to perform those repairs for the price in your estimate?

A. Yes, sir.

Q. In addition to all the specific line items what other type of costs are in your estimate?

A. We have a general requirement section at the beginning and that has the expenses for -- I

will have a project manager and a project superintendent. And these are basic charges that we have on our jobs based on our experience. Utility expenses, general tools and requirements or materials. We will have an -- I have got a price for two of these. We have the containers that we will bring out so we can lock up our tools and materials every night off site. Dumpster charge, things like that. I actually also I have a man lift out there for all 16 months of the project. And portolets and there's also a landscaping allowance of $500 a building in case we stomp on a bush, we mess up irrigation lining.

Q. You've got expenses in your estimate for licensing and permits for the town of Mt. Pleasant?

A. Yes, sir. At the very bottom of our estimate we have a line for permits and licensing. It's a percentage. 1.25 percent. I have ten percent overhead.

Q. What's that for?

A. Pays for my office staff, insurances, taxes, you know.

Q. Got some profit in there so you can stay in business?

A. Yes, sir. I have ten percent profit. Hopefully that ten percent overhead covers all my overhead and I have a ten percent profit. Also have a 15 percent contingency.

Q. What's that? What's the purpose of a 15 percent contingency?

A. I typically will put in, especially in a cost estimate, the standard is ten percent that we use. In case there's something latent, something unforeseen, if we are going to make a repair in an area and nobody noticed or understood there was something else affected by that, there's -- I can come up with 200 examples. I had a ten percent contingency normally to take care of those things. A lot of times that contingency can get turned into if I am awarded the project, that's like a latent damage fund if we see anything we can bill out of it. On this repair I call this a targeted repair scope. It's specific to certain things on the buildings. So I have got a 15, I feel more comfortable putting a 15 percent contingency in my estimate to take care of some things that maybe are unknown or unknown to Skip that we may find there while we are doing work.

Q. The amount of that contingency?

A. $299,016.64.

Q. And do you have a line item for painting?

A. Right. This doesn't go to us, but I include as standard unless I am asked to remove it or change it an A&E fee of seven and-a-half percent to pay for the design of the project, maybe the CA, the contracting administration work that's done throughout the project.

Q. And what is the total cost that you have estimated to perform H2L's scope of repair?

A. $2,865,576.17.

Q. And correct me if I'm wrong, you were deposed in October of -- October-ish of this year. There was one mistake on the estimate regarding the dormers; is that accurate?

A. Yes.

Q. And you had to add an additional $20,000 to the estimate?

A. Actually it's 21,000 before markup. Line item -- can I explain?

Q. Please.

A. Line item 2.08, Skip Lewis had asked us to fix 30 shed dormers and 30 what I call doghouse dormers, the gable dormers. My estimate, and I

didn't catch it before we turned this estimate in. He thought that that was -- was listed double. It was a cut and paste error. So we only priced 30 dormers, we should have priced 60 dormers. So I had to double -- I need to double this line item to make this estimate accurate.

Q. I am going to hand you what we marked as Exhibit 39 that corrects that line item.

(DFT. EXH. 41 was marked for identification.)

(Off-the-record sidebar conference.)

THE COURT: ID only.

BY MR. MANOS:

Q. Mr. Watkins, I have just handed you Exhibit 41. Does that contain all of the same line items but with the correction of the additional $20,000 for the dormer issue that we just discussed?

A. Yes, sir.

Q. So what is the total of Exhibit 41?

A. After 2.08 line item has been corrected, the total for the estimate is $2,895,763.67.

Q. And would you perform Mr. Lewis's repair that he has recommended for that amount

contained in Exhibit 41?

A. Yes, sir.

MR. MANOS: I would like to enter 41 into evidence.

MR. MCCARTY: Object, Your Honor.

THE COURT: Which exhibit are your referring to?

MR. MANOS: 41.

THE COURT: I already said it is marked for ID only and I told you why. Ask him another set of questions. It is marked for ID only.

BY MR. MANOS:

Q. Mr. Watkins, the Exhibit 38 that has the $2,865,000 number, that was the repair estimate that you did and published in October of 2016?

A. Yes.

Q. At your deposition you had to correct one item on it?

A. Yes, sir. When I was preparing for the deposition when I was walking through Skip's scope I noticed -- I felt like we were short there. I called my estimator. He agreed that we had made a mistake. So when I was talking with him I told him I needed to add that to make sure make the estimate was correct.

Q. So for the total estimate you would do Mr. Lewis's recommended repair for $2,895,763.67?

A. Yes, sir, I would.

Q. And this is an estimate that you prepared?

A. With help of my estimator, yes, sir.

Q. With your company?

A. Yes, my company, yes, sir.

Q. It expresses your opinion to a reasonable degree within your profession as a general contractor and estimator?

A. I consider it a bid. When we -- the best way I can explain it, when we estimate these projects I consider the scope of work as we are receiving bidding instructions on a project. I am using the numbers that we use on bids, historical numbers in these projects. I joke about this all the time. The reason why I suffer through processes like this is I am trying to get work. This is how I try to sell work for my company.

Q. Have you done these type of repairs at other locations, Myrtle Beach, Charleston? You do these repairs regularly?

A. Yes, sir.

Q. Based on the repairs that Mr. Lewis has

specified can you perform these repairs without the occupants having to move out?

A. At this point in time based on the scope that I have been given and walking through all the repair procedures I don't see any reason why the owners at this time would have to vacate the townhomes.

MR. MANOS: One second, Your Honor.

(Off-the-record conference.)

BY MR. MANOS:

Q. Are all of the opinions that you have expressed been to a reasonable degree of certainty as a professional general contractor, Mr. Watkins? All the opinions that you have given, you have done them as a general contractor in a professional capacity and you're certain about them?

A. Yes. I try not to give too many opinions, but yes, sir.

MR. MANOS: I would like to enter 41 into evidence which is his repair --

THE COURT: I told you I marked it for ID only. I will deal with it later.

MR. MANOS: Okay. I will pass the witness, Your Honor.

THE COURT: Any cross-examination of

the witness?

MR. MCCARTY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. MCCARTY:

Q. Good afternoon, JR.

A. How are you doing, Keith?

Q. I want to go over the last exhibit that you have. Have you got it with you?

A. No, sir.

Q. All right. I'm going to ask you things and you can just say yes if you want to. 1.01 on your exhibit says inspect roof edges, install felt as needed; is that correct?

A. That is correct.

Q. 1.05, inspect all flat roofs; is that correct?

A. That is correct.

Q. 2.04 says inspect attic walls; is that correct?

A. That's correct.

Q. 2.07 says inspect framing and all dormer windows; is that correct?

A. That's correct.

Q. 3.10 says inspect handrails at entry steps; is that correct?

A. That's correct.

Q. 3.1 says inspect flat roof and defective handrails; is that correct?

A. Yes, sir.

Q. 3.14 says inspect siding wall at dormers; is that correct?

A. Yes, sir.

Q. And going back up, 3.08 says survey all steps. Is that the same thing as inspect all steps?

A. Yes, sir.

Q. I noticed on 3.09 you're saying replace treads?

A. Yes, sir.

Q. On the steps. The tread is where you step, right?

A. Yes, sir.

Q. So you are replacing that piece -- if these are bad, you are replacing that piece of that stair only, right?

A. Yes, sir. What we -- I felt it was easier for me to price -- Skip asked us to look at 50 sets. Most of the sets out there have six steps, some have fewer, but we felt like that was a good average so we just multiplied 50 sets times

six treads.

Q. One last thing on that. At 3.17 it says remove and reset windows at the dormers; is that correct?

A. That is correct.

Q. JR, Mr. Watkins, I am sorry, you gave your deposition to me on January 10th of this year; is that correct?

A. That is correct.

Q. During the deposition you told me that you specialize in severe damage repair of multi-family complexes?

A. That's correct.

Q. And in this case here when we took your deposition you prepared three or four different estimates on this job, haven't you?

A. Yes, sir.

Q. And that's not out of the ordinary for these type of jobs, is it?

A. No, sir.

Q. Reason being because things change, requirements change, questions from attorneys and everybody else changes; is that correct?

A. That's correct. Sometimes the scopes go up and down.

Q. In this case that's what happened? Your scope went up and down?

A. Yes, sir.

Q. As a matter of fact, you found $21,000?

A. I apologize for that.

Q. Mathematical error, so you had to add $21,000 to your scope?

A. Yes, sir.

Q. Now, I believe you got hired on this job to price Mr. Lewis's scope of work; is that correct?

A. Yes, sir.

Q. And talking about scopes, scopes change also? I think Mr. Lewis gave you one or two different scopes; isn't that right?

A. I'm not sure if it came from Skip. I know that there was a scope that we priced for mediation. It was last year I think or earlier last year. I can't remember where it came from. I assume Skip, but I don't want to say for sure that it was Skip's scope, but we did price a scope for mediation.

Q. You have already testified here today, I'm not going to dwell on it, when you price a scope of work, you use that scope, use your

experience and you use historic data from other job, come up with your price?

A. Yes, sir.

Q. You testified you visited the Waverly job site two or three times?

A. Yes, sir.

Q. And you weren't present at the destructive test? You just went to check it out?

A. That's correct.

Q. During your visit have you checked to see if Mr. Lewis's scope fixes all the problems at Waverly?

A. No, sir.

Q. You have described this in your testimony as a targeted repair; is that correct?

A. That is correct.

Q. So you only warrant what you fix?

A. That's correct.

Q. If there is another problem out there that you don't touch you don't warrant it, do you?

A. I do not.

Q. Your company basically is in the business to make repairs; is that right?

A. That is right.

Q. To buildings that need repairs?

A. Yes, sir.

Q. And this is repaired -- you consider this to be a repair job, don't you?

A. Yes, sir.

Q. Your estimate says 16 months to finish the buildings?

A. That is correct.

Q. The work you do out there will be according to applicable building codes at the time; isn't that right?

A. It all depends what we are doing. If we are prescribed to do -- to bring the building up to the code that it was built and we go to the building department and they say we think that's fair and we will allow you to do that, then we could. But sometimes if we touch something, especially if it's an egress issue, if we touch it a lot of times they will make us -- I don't have no idea if this bears on this case or not, they will make us bring it up to the current code.

Q. That's correct, thank you. The work you do on jobs like this, you sub out a lot of this work to subcontractors, don't you?

A. Yes, sir.

Q. But you are the contractor so you are

responsible for the quality of their work, aren't you?

A. That is correct.

Q. For instance, getting back to basically your view on this, if you are asked to do a partial repair on a wall, say for instance you are asked to take care of some corner trim on a wall and paint that wall, you're not going to accept ownership of everything on that wall, are you?

A. No, sir.

Q. And you are not going to have anything to do with the rest of the stuff on that wall, are you?

A. No, sir, just specifically like with the paint. If I apply the paint and there's a problem with the paint or the sealing joints, I definitely ought to come back to take care of that.

Q. You are not going to warranty that, are you?

A. I will warranty my work.

Q. But the work you don't touch?

A. Correct.

Q. You don't take ownership of it in other words?

A. That's correct.

Q. Did you take a look at Mr. Glick's scope and price that out?

A. No, sir.

Q. Just one moment. I think that's all I have.

THE COURT: Any redirect?

MR. MANOS: Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. MANOS:

Q. Mr. Watkins, Mr. McCarty asked you a couple questions about you having various items of inspection in your repair estimate; do you recall those?

A. Yes, sir.

Q. One of the ones he pointed out was inspect roof edges and that says install felt as needed at 1.01; is that correct?

A. That is correct.

Q. What's the amount by that line item for inspecting?

A. The price? $119,133, that also includes -- that's work we do all the time. That's something that we see on buildings all the time. So we will lift the shingles up along the perimeter and if we do see some short felt then we will

remove the start, the first couple courses and tuck some felt underneath there and do what we need to do. That does include -- the $119,133 includes inspecting all of the perimeter, the eaves and the rakes and making any repairs that we see need to be made.

Q. And, again, after you inspect the handrails in 3.10 how much are you spending in 3.11 to remove and replace the handrails?

A. $40,500.

Q. So you are not inspecting a bunch of stuff out there and not doing anything, you are actually inspecting it to figure out what it is you're going to repair, correct?

A. Correct. Yes.

Q. Thank you.

MR. MCCARTY: I have one question if I might.

THE COURT: Limit it to redirect.

RECROSS-EXAMINATION

BY MR. MCCARTY:

Q. On the same document. Right-hand corner, two words up there. Would you read those for me.

A. Preliminary draft.

Q. Thank you.

THE COURT: Any further questions?

MR. MANOS: No, Your Honor.

THE COURT: Any objection -- Mr. Foreman, ladies and gentlemen, I need to take up a very brief matter of law. During the break please do not discuss the case. Please leave your note pads in your seats. You can take them out in the hallway. This will only take a second.

(Thereupon, the jury exited the courtroom at 3:14 p.m.)

THE COURT: I need to know what the difference is between 38 and 41, why you need both of them.

MR. MANOS: Your Honor, that was just an error on my part. 38 was his original estimate at his deposition. He made an error on one line.

THE COURT: 41 corrects 38?

MR. MANOS: Yes, Your Honor.

THE COURT: So why don't you just substitute 41?

MR. MANOS: I would love to do that.

THE COURT: I am not doing both of them. One or the other.

MR. MANOS: Thank you, Your Honor.

THE COURT: Now 41 becomes 38 since 38 had an inaccuracy in it. Bring the jury back.

(Whereupon the jury entered the courtroom at 3:15 p.m.)

THE COURT: You may be seated. 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. Thank you. Call your next witness.

MR. MANOS: Mr. Coffman.

SCOTT COFFMAN

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your full name.

THE WITNESS: My name is Scott Dean Coffman, S-C-O-T-T, D-E-A-N, C-O-F-F-M-A-N.

DIRECT EXAMINATION

BY MR. MANOS:

Q. Mr. Coffman, what is your profession, sir?

A. I'm a licensed professional engineer.

Q. Where are you licensed?

A. I am licensed in the State of South Carolina and among other states.

Q. And how many years have you been a professional engineer in South Carolina?

A. I got my South Carolina license in 1985.

Q. Has your licensed ever been revoked or suspended or anything?

A. It has not.

Q. And what has been your focus in the professional engineering field?

A. Structural design.

Q. And where did you graduate from college?

A. Purdue University.

Q. What was your degree?

A. Bachelor of science in civil engineering with a structural focus.

Q. And you graduated from Purdue in 1980?

A. December of 1980, that is correct.

Q. And briefly what did you do for work after you graduated with your degree?

A. My focus was predominantly engineered wood components and design and manufacturing.

Q. And what did your duties entail for

that company?

A. It was predominantly the design of structural wood components to use in residential and light commercial buildings.

Q. And have you had an opportunity over the years to actually perform structural design of structures, buildings?

A. I have. I have done some churches as well as some office buildings.

Q. Have you ever actually been a structural engineer of record?

A. On those particular cases I would have been the engineer -- structural engineer of record.

Q. What is that? Explain what that means to the jury.

A. Structural engineer of record, I would have designed the entire building from the foundations all the way to the roof. And then I would have been responsible for the performance of that building during the life of the building.

Q. When you say you would be responsible for it you mean what?

A. I mean that the design of the building would perform under the appropriate design load specified by the code, whether it be seismic, wind,

gravity loads, you walking on the floor; I made sure that the floor would hold you up.

Q. And approximately what years were you structural engineer of record for when you were designing those buildings?

A. I did a few of those buildings around 2005 to 2009, I believe.

Q. And those were subject to what type of codes?

A. At that time the codes would have been International Building Code.

Q. And where do you presently work?

A. I work for Construction Science and Engineering and their main office is West Minster, South Carolina.

Q. And what are your various duties at SCE?

A. We are a forensic engineering firm that basically does building investigation, then we will recommend scopes of repair as you have already heard about today. We will also actually do the design work for the repair and then on some occasions we may be asked to perform construction administration services.

Q. And you used the word we a couple of

times. You personally, do you investigate structures?

A. Yes.

Q. And over your 35 plus year career as a professional engineer have you recommended structural repairs?

A. I have, especially to individual wood building components.

Q. Have you actually designed repairs of wood structures over your 30 year career?

A. I have.

Q. Have you had an opportunity to do the contract administration to make sure that those repairs that you designed were adequately performed?

A. I would go out if asked to review the repair work to make sure it was performed by the contractor according to my documents.

Q. So is it a fair characterization for me to say that you have been a focusing structural engineer for the past 30 years of your career?

A. That is a true statement.

MR. MANOS: At this time I would like to offer Mr. Coffman as an expert in the area of structural engineering and forensic structural

engineering, Your Honor.

THE COURT: Any objection or questions?

MS. NOLAND: No objection.

THE COURT: Without objection so admitted. You may proceed.

BY MR. MANOS:

Q. Mr. Coffman, briefly we have already heard a little bit about this or a lot about this from Mr. Mease. Briefly tell the jury what a Glulam is.

A. A Glulam beam is an engineered wood beam that is made up of generally a stack of two by four's that are glued together to get an appropriate depth.

Q. And what is the Glulam's purpose?

A. As a beam purpose it is usually installed in buildings to support individual framing members such as floor joists or ceiling joist refractors.

Q. Have you had an opportunity to personally go out to Waverly?

A. I have.

Q. And what was your purpose when you went out there?

A. The purpose I was asked to go out with

respect to the Glulam issue was to look at the beams in the crawl space areas of each building to determine if there was damage that would need repaired to the beams.

Q. How many buildings are there at Waverly?

A. There are 22 buildings.

Q. How many units?

A. One hundred five units, I believe.

Q. And when you went out to Waverly how many crawl spaces did you actually go into?

A. I went to 16 crawl spaces.

Q. And how many different buildings?

A. In ten different buildings.

Q. And what were your -- what did you observe in your 16 units that you went into?

A. I observed the Glulam beams in what we would call building nine with the -- which would corollate to addresses I believe 1080 through 1096 Griswold to have decay damage to them. And I went into all five of those particular crawl spaces in that building. The other buildings I went into either had glue laminated beams or laminated veneer lumbar beams which did not display any signs of decay or rot.

Q. And the beams in building nine, what was common about all of those beams?

A. Those beams had two things in common. They were glue laminated beams and they also had wrapping that were left in place on the beams.

Q. Is it your opinion the Glulam beams in building nine need to be repaired?

A. Yes, sir. They need to be repaired.

Q. Okay. And have you designed a repair for those beams?

A. I have designed a repair for those beams in each one of those units.

Q. And, again, there is five units in building nine?

A. There are five units.

Q. Do your best to describe it to the lay people including me in the room as to what your design entails for those Glulam beam?

A. The Glulam beam is what we call raised which means the floor joists hang into the side of the beam. My repair is to come in and place new beams immediately underneath the floor joist to support them. That way the section, the Glulam beams that are damaged can be removed and we could put additional framing where that beam is

perpendicular across the new joists in order to support the wall framing above.

Q. And have you had -- strike that. Are you confident to a reasonable degree of engineering certainty that your design if implemented will correct the Glulam issues in building nine at those five units?

A. I am.

Q. And you're willing to seal a design if hired by the homeowners?

A. I would be willing to sign and seal the design, yes, sir.

Q. Again, tell the jury what it means to sign and seal?

A. It is to affix the seal the State of South Carolina has issued to me as a licensed professional engineer indicating that I am taking responsibility for that design to perform in supporting those loads in that particular application.

Q. Have you had an opportunity to discuss your design for the Glulam beam repair with Mr. Watkins?

A. I have.

Q. And are you comfortable that he

understood what your design was trying to specify?

A. I believe he understands what needs to be done yes, sir.

Q. Are you comfortable that Mr. Watkins can perform that repair?

A. I believe he can.

Q. Mr. Coffman, have all the opinions you have given been given to a reasonable degree of engineering certainty within your profession as an structural engineer?

A. They have.

MR. MANOS: Thank you, Mr. Coffman.

THE COURT: Any questions for the witness?

MS. NOLAND: Yes, Your Honor.

CROSS-EXAMINATION

BY MS. NOLAND:

Q. Good afternoon. How are you today?

A. I'm doing well.

Q. You repaired or you prepared a scope of repair for the Glulam beams in building number nine, correct?

A. That is correct.

Q. Now, if you look at the screen do you recognize that area of 1084 Griswold?

A. That appears to be one of the Glulams framing left to right that is showing damage.

Q. And you admit that there is significant rot in that picture, correct?

A. Yes.

Q. And what we see hanging down, is that the wrap that you say was left on the beams?

A. Yes. That would be the paper wrap that had been cut away prior to me visiting the site to expose the damage.

Q. And if you look over to the right of the photo, is that another beam coming in parallel to the one that takes up the majority of the screen?

A. It's another beam. It's coming in perpendicular that is also wrapped.

Q. Okay. And did you yourself go under and see 1084 Griswold?

A. I believe I went into all five units, yes, ma'am.

Q. Did you try to remove any of the wrap that's on any beams that were presently wrapped completely?

A. I did cut into some of the wrap that had not previously been disturbed in some of the

other beams, yes, ma'am.

Q. Did you completely unwrap the beam that we see up at 1084?

A. I did not completely unwrap any beam.

Q. Did you count the number of beams under in each unit that were wrapped?

A. When you say each unit, do you mean in building nine?

Q. Yes.

A. I did not count every beam that was wrapped in the buildings, no, ma'am.

Q. So what you have given to Mr. Watkins as your scope of repair, he doesn't have a number of beams that actually need to be repaired under building nine?

A. I believe he does. I basically had in my scope of repair that the beam that was running front to rear needed to be replaced and there was two beams that were running left to right. Those needed to be replaced. And there may have even been a small section of beam toward the rear that was running front to rear that needs to be replaced. My scope included replacing all of the beams in building No. 9.

Q. All of the beams?

A. All of the beams.

Q. Okay. Are these Glulam beams what you would call structural?

A. Yes, ma'am, they are a structural component.

Q. And I have a copy of your scope of repair and it's got some of my notes on it. But you recommend that the qualified contractor who does your repairs follow applicable building codes and accepted industry standards; is that correct?

A. That would be normal, yes, ma'am.

Q. We want people to follow the building code, right?

A. Yes, ma'am.

MS. NOLAND: That's all the questions I have.

THE COURT: Any redirect?

MR. MANOS: No, Your Honor.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MS. NOLAND: No.

THE COURT: From the defense?

MR. MANOS: We call Jason --

THE COURT: Any objection to him being excused.

MR. MANOS: No, Your Honor.

THE COURT: Sir, you are excused. Call your next witness.

MR. MANOS: We would call Jason Gregorie to the stand, Your Honor.

MR. HAYES: Your Honor, may we approach?

THE COURT: Yes.

(Off-the-record sidebar conference.)

JASON GREGORIE

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your full name.

THE WITNESS: Jason Dale Gregorie, J-A-S-O-N, D-A-L-E, G-R-E-G-O-R-I-E.

DIRECT EXAMINATION

BY MR. MANOS:

Q. Good afternoon. How are you, sir?

A. Doing well. Thank you.

Q. What do you do for a living?

A. I'm a licensed professional engineer practicing in civil and structural engineering.

Q. And who do you work for?

A. I work for Applied Building Sciences, Incorporated here in Charleston.

Q. Did you have an opportunity to go out to the Waverly townhomes recently?

A. Yes, I did. I was there just this past Friday. I believe that was January 20th.

Q. And were you asked to go out there to collect some data?

A. Yes, sir. It was my understanding that Mr. Lewis needed some additional field data collected. He wasn't able to make it that day so I was asked to go out there and make some additional observations.

Q. What specific conditions did you make observations of?

A. So I was -- had two primary tasks of observations to make. One was there was a set of five units, the five units were indicated in the videos shown by Mr. Glick so I was asked to go to those five units and make observations of the rails and some of the wood frame components around the porches on those five units.

The other primary task that I had was to observe all of the membrane coatings on the decks. Those would have been decks that didn't have roofs over them. So I took a ladder and put a ladder up and we took a few photos and made

observations of all of the membranes on the decks.

Q. And did you personally take photos out at the site while you were there on January 20th?

A. Yes, sir. So I was there. I took photos and observations. Another coworker of mine, Parker Shields, he is also a professional engineer, was also there working in tandem with me. We worked together. We communicated and worked on each unit together. He helped me with the ladder and he took some photos initially and then I took the majority of the photos for the second half of the time that we were there on the site.

Q. And I'm going to show you a couple photos and if you will just tell me if they accurately depict the conditions as you photographed them on January 20th.

(DFT. EXH. 42-46 were marked for identification.)

BY MR. MANOS:

Q. Where are we on the building here?

A. This would be a unit that has brick front steps.

Q. And is that your hand?

A. Yes. That's my hand and what I am doing here is this would have been one of the five

units that were shown in the Glick video and so really the data that I was collecting is qualitative data using my eyesight and my hands. So made visual observations and then touched all of the pickets, felt the pickets, I squeezed the pickets. I shook the handrails with my hands and this is my hand in the photo.

What I did is we manually probed with our hands a hundred percent of the rail system pickets on the five units that were in the Glick videos. This would be one of them and my hand there depicts the process of what we did on each of the pickets.

Q. Did you provide that information to Mr. Mr. Lewis after you did it?

A. Yes, sir. After we did it I had one phone conversation and one in person meeting with Mr. Lewis where I described this process and I described to him what I was seeing, what I was feeling with my hands as we inspected these buildings. I have also exchanged at least two emails of summary notes to Mr. Lewis as well.

MR. MANOS: I would like to move Exhibit 42 into evidence.

THE COURT: Any objection?

MR. MCCARTY: No objection, Your Honor.

THE COURT: Without objection marked and admitted 42.

(DFT. EXH. 42 in evidence.)

BY MR. MANOS:

Q. Does Exhibit 42 accurately depict the conditions of what you photographed on your site visit on June 20th?

A. Yes, sir. This would just be an overview photo of what appears to be a wood based rail system.

Q. And was that one of the units that you -- the process that you just described for us in your earlier testimony that you grabbed the pickets and touched them?

A. If it was one of the five that was shown in the Glick videos then, yes, we would have grabbed with our hands all of the pickets on the first floor.

MR. MANOS: I would like to move Exhibit 43 into evidence.

THE COURT: Any objection?

MR. HAYES: No, Your Honor.

THE COURT: Marked and admitted without objection.

(DFT. EXH. 43 in evidence.)

BY MR. MANOS:

Q. Does Exhibit 44 accurately depict the conditions of what you photographed on January 20th during your site visit?

A. Yes, sir. One of the other tasks that we were asked was to photograph what we call composite rails, so rail systems that are nonwood and so this is what we would call a composite rail system. The pickets there which are decorative are nonwood. They feel different. You can push on them or grab them and they don't feel as rigid or hard as wood. It's akin to a very dense foam would be a way to describe them.

MR. MANOS: I would move Exhibit 44 into evidence.

THE COURT: Any objection?

MR. MCCARTY: No.

THE COURT: Without objection.

(DFT. EXH. 44 in evidence.)

BY MR. MANOS:

Q. What is Exhibit 45?

A. This would be a second story deck membrane and we put a ladder up each on one. In order to do that you place the ladder on either the

front or the side of the deck. Climb up the ladder, we have to grab the rails in order to lean over the deck. This would be what I would describe as the typical gray colored existing membrane coating which was most common and this in my opinion would be --

Q. Don't give an opinion.

A. Excuse me, would be a typical example of what we saw.

Q. Does this photograph accurately depict what you photographed on January 20th of the conditions that day?

A. Yes, sir.

MR. MANOS: Move 45 into evidence.

THE COURT: Any objection?

MR. MCCARTY: No.

THE COURT: Without objection.

(DFT. EXH. 45 in evidence.)

BY MR. MANOS:

Q. Does Exhibit 46 accurately depict the conditions of what you photographed during your site visit on January 20th?

A. Yes, sir, it does.

Q. What are we looking at in Exhibit 46?

A. This is an overview. This would have

been another deck that we placed a ladder on and observed. Without having the tabulation of my notes right in front of me I don't know if I identified this as a wood base rail system or a composite rail system.

Q. Let me hand you your notes and tell me if this refreshes your memory of the data observation you made regarding unit 1453.

A. So based on this exhibit which is Exhibit 38 that's my handwriting on it. This is something I discussed with Mr. Lewis. This is a rail system that I identified as having no visual evidence of wood decay.

Q. And you said this document are notes that you took contemporaneously with your site observations on January 20th?

A. Yes, sir. I would have taken this photograph on just this past Friday, January 20th.

Q. And these notes that you took simply record your observations of what you saw with your eyes, whether they be pickets or the rails that had decay or didn't have decay?

A. That is correct.

MR. MANOS: I would like to move what we will mark as Exhibit 47 for court ID, Your

Honor, subject to Plaintiff's objection.

THE COURT: It would be marked as a court exhibit I assume.

MR. MANOS: I apologize.

THE COURT: Any objection to 47?

MR. HAYES: Yes.

THE COURT: Approach.

MR. MCCARTY: Your Honor, we don't -- sorry.

(Off-the-record sidebar conference.)

THE COURT: 47 is ID only. The witness can use it to refresh his recollection. It won't come into evidence.

(DFT EXH. 47 was marked for identification.)

BY MR. MANOS:

Q. Summarize the three items of data that you collected and --

MR. MCCARTY: Objection, Your Honor.

THE COURT: I don't know what the answer is going to be. Finish the question.

BY MR. MANOS:

Q. I will try to ask it a different way. What are three types of data that you provided to Mr. Lewis?

A. Three types of data I provided were one, I went to the five units shown in the Glick videos and I described to Mr. Lewis what I saw. So my visual observation in relation to the rail systems. I manually probed all of the pickets with my hands or Parker Shields, my coworker, probed the pickets with his hands on those five units. I relayed the sensation of touch and what it felt like to Mr. Lewis. That was one set. The other set was the photographs and visual observations of the deck membranes, the deck membrane coatings. And then the third piece of data that we collected as identification of which units had composite or portions of composite rail systems.

Q. And how many units did you identify having the composite rail systems?

A. I believe we identified 15 units had a portion or a full rail system as a composite.

Q. Thank you, Mr. Gregorie.

A. You are welcome.

THE COURT: Any questions for the witness?

MR. HAYES: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. HAYES:

Q. Good afternoon, Mr. Gregorie.
A. Good afternoon.
Q. Please cue the Glick video. Would you turn your attention to the video.
A. (Witness complies with request.)
Q. Go ahead and play it, please.
(Video played.)
MR. MANOS: Is there a question, Your Honor?
MR. HAYES: There will be after he has looked at it.
(Video played.)
BY MR. HAYES:
Q. Mr. Gregorie, did you manually probe any of those areas with your hands depicted in the video?
A. No, sir. It was limited to the -- what we manually probed within the pickets and also -- well, I should say yes, sir, I have because on some of them we did probe or grab the top handrail system.
Q. Again, did you manually probe those shown in the video?
A. There was one video, I believe 2995 Treadwell or one of those where the rail was loose

and I did probe that one with my hand and identified that rail system as being loose at the base of the post.

MR. HAYES: I just asked him whether he had probed it with his hand.

THE COURT: It was responsive. If you want to ask a followup question you can.

MR. HAYES: Thank you, Mr. Gregorie.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. MANOS:

Q. In your notes that you provided to Mr. Lewis you noted a number of units that had decay?

A. Yes, sir, I did.

Q. Thank you.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Sir, you are excused. Mr. Foreman, ladies and gentlemen, we are going to give you a short restroom break. During the break please do not discuss the case. Please leave your

note pads in your seats.

(Thereupon, the jury exited the courtroom at 3:52 p.m.)

THE COURT: You may be seated. The next witness will be who?

MR. HASELDEN: Ryan Butler.

THE COURT: And how long will his testimony be?

MR. HASELDEN: Thirty minutes at most I would expect.

THE COURT: Is that your last witness or do you have other witnesses?

MR. HASELDEN: We have one more coming, Scott Parker. There is an issue as to the --

THE COURT: Will that be your last witness?

MR. MANOS: We may have one other issue. We have an Exhibit 32 deed of the sale of these units that are public records self-authenticating. If we need to we can call somebody from the RMC office.

THE COURT: Is there any contest of ownership?

MR. MANOS: I think it's relevant to --

THE COURT: Not my question. My

question is is there any contest about whether they own this property?

MR. MANOS: I'm not sure which of the Plaintiffs actually own it. There are a number of Plaintiffs on the captions that have since sold and there have been 31 of them changed hands over the last few years.

THE COURT: I got 37 Plaintiffs left. You are telling me in that list some of them don't own their properties?

MR. MANOS: I'm not sure, Your Honor.

THE COURT: I would suggest you sort that out before we approach. You admit evidence to address an issue. If there is no issue, if there is no ownership -- if there is no issue about ownership there is no putting 30 deeds in the records.

MR. MANOS: Can I state the reason I want to put them in?

THE COURT: Sure.

MR. MANOS: Professor Freeman testified at length that the owners have a duty to disclose under South Carolina law all these deficiencies and that there were all these problems and the project was riddled with all these problems and I think the

fact that from 2015 and 2016 while the prior owners were disclosing all of these defects, Your Honor, 31, 30 plus percent of these units sold and changed hands.

THE COURT: You are going to have to call the witnesses who sold and exchanged the property. Putting the deed in is not going to suffice to support that. The reason you would put in these deeds is to prove that these folks own property and they have standing. If there's no contest about them owning the property you are not going to be able to summarily just admit deeds because they are public records and then ergo argue to the jury that the property has changed hands. If you want to do that you need to get you a real estate person who could testify to all of that or get another witness who can present that information or you can call one of their parties and ask them if they sold their property. Or you all can enter a stipulation about the sales of the property, I don't know, but I don't see the point in entering a bunch of deeds the jury is not going to understand.

MR. MANOS: I don't disagree with you, Your Honor. Under Rule 1006 --

THE COURT: I already know the deeds are self-authenticating. They are public record. We are dealing with relevance. I'm past that point.

MR. MANOS: No, I was going to quote the rule for summaries. I have done a summary that that just simply shows the 31 properties have sold, Your Honor.

THE COURT: If y'all can agree to that. I don't know what the time frame is you are talking about. I have no idea.

MR. MANOS: 2015 and 2016.

THE COURT: You have to call witnesses. You don't get to do just a summary of the sales of the sale property and then present it to a jury, then make an argument that's unsupported by testimony.

MR. MANOS: Thank you, Your Honor.

THE COURT: We will be at ease until the jury is done refreshing themselves.

MR. MANOS: Is there any possibility of Your Honor taking judicial notice?

THE COURT: No. There is another way to do that. I suggest you figure it out.

MR. MANOS: Thank you, Your Honor.

(A recess transpired.)

THE COURT: Plaintiff ready to proceed?

MR. HAYES: Yes, Your Honor.

THE COURT: Defense ready to proceed?

MR. MANOS: Bring one quick thing up. Plaintiffs agreed to allow us to put in Exhibit 46 if that's okay.

THE COURT: That's fine as long you all agree.

MR. MANOS: I wanted to make a notation just purely to protect the record regarding the rule we were talking about.

THE COURT: You are not getting the deeds in. I have heard the argument. The deeds in and of themselves are not relevant. Let me tell me you why. You cannot draw from property changing hands that somehow it proves the point you want to prove, it doesn't. There are many things that affect the sales of property. People may have sold their property at a loss. They may have sold it at a deficit. They may have sold it as is. A deed does not tell you all of that. A deed simply says property is transferred -- a deed only shows that it was transferred for whatever. I didn't say you couldn't get the information in. I said you just

can't get it in in the way you want to try to get it in.

MR. MANOS: I am not trying to annoy you, may I cite the rule purely for the record?

THE COURT: You already cited it and there is nothing to present for the record because you haven't presented any witnesses to elicit the testimony.

MR. MANOS: Yes, Your Honor.

THE COURT: So you don't have any basis.

MR. MANOS: Yes, ma'am.

THE COURT: And I have heard the argument. I have ruled.

MR. MANOS: Yes, ma'am.

THE COURT: All right.

MR. HASELDEN: Ryan Butler.

(Thereupon the jury entered the courtroom at 4:11 p.m.)

THE COURT: You may be seated. Call your next witness.

MR. HASELDEN: Wieland calls Ryan Butler.

THE COURT: Please swear the witness.

RYAN BUTLER

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your full name.

THE WITNESS: George Ryan Butler, G-E-O-R-G-E, R-Y-A-N, B-U-T-L-E-R.

DIRECT EXAMINATION

BY MR. HASELDEN:

Q. You go by Ryan?

A. Yes.

Q. Will you tell the jury where you are from?

A. I live here in South Carolina, from New Jersey.

Q. How long have you been in South Carolina?

A. Since 2005.

Q. Where did you go to college?

A. Went to Bowling Green State University in Ohio.

Q. Did you get a degree from Bowling Green?

A. Yes.

Q. What was your degree in?

A. It was a bachelors of science in construction management.

Q. After you got out of college what did you do for a living?

A. I went to work for John Wieland Homes right out of school.

Q. Where?

A. In Atlanta.

Q. What was your job when you first went to work with John Wieland Homes?

A. My title was a finish manager. Worked on the back end of houses before they closed just punching them out and cleaning them up, so forth.

Q. You held several jobs with Wieland; is that correct?

A. Yes. Finish manager, quality manager which was -- I did warranties for them. I was an associate builder with them, a builder with them, project manager, area manager and VP of construction.

Q. And is VP of construction what brought you to Charleston?

A. Yes.

Q. What job -- tell the jury what the job of vice president of construction entails?

A. Vice president of construction I was involved in basically which homes in the planning

of the neighborhoods, what type of floor plans would go on which lots, talked about price points, worked with sales agents. I did report back to the corporate office on the number of homes going to start each year, each month, got involved in some warranty claims from time to time when it got elevated. And held builder meetings, talked about what's going on in the neighborhood with the neighborhood managers and project managers and builders in those neighborhoods.

Q. Back when you were a builder did you get actually involved in the construction of townhomes?

A. Yes.

Q. Fast forward back to when you're vice president of construction. Who worked under you, directly under you?

A. Neighborhood managers and builders report to them. So my -- I guess the direct reports were neighborhood managers.

Q. As the VP of construction are you familiar with Waverly?

A. Yes.

Q. The townhomes specifically?

A. Yes.

Q. What is your experience -- what's the basis of your knowledge about Waverly townhomes?

A. It was a good neighborhood for us.

Q. Specifically when you came to Charleston was Waverly under construction?

A. Waverly was -- it had started. The first three or four buildings were ready to go into drywall when I moved here in 2005.

Q. You were still vice president of construction when the project ended, correct?

A. Yes.

Q. Who actually did the work on the buildings? Who actually drove the nails, swung the hammers?

A. Subcontractors.

Q. And who made sure the subs did their job?

A. The builders.

Q. And who took care -- who watched or coordinated the builders to make sure everything was getting done?

A. The builders reported to the neighborhood manager.

Q. Mr. Butler, as the vice president of construction for Wieland with respect to the

Waverly project what did you expect as far as quality from the subcontractors?

A. Excellent quality.

Q. Why?

A. Because that's what you -- that's what we need to build. That's what we are selling and need to do the right thing.

Q. Were the subcontractors trades as we call them, were they required to comply with building codes?

A. Yes.

Q. How about the scopes of work that were provided them by Wieland?

A. Yes.

Q. How about any manufacturer's instructions that were applicable to what was being installed or what was being built?

A. Yes. That was outlined in the scope of work.

Q. They were required to follow industry standards as well?

A. Yes.

Q. Did Wieland have a mechanism for making sure that subs -- for dealing with subs if there was an issue with quality of their work?

A. Yes. They would be asked to remedy any issues that we saw. And if not they were replaced.

Q. Who was the neighborhood manager in charge of watching, coordinating the builders at Waverly?

A. Scott Parker.

Q. Now, are you generally aware of when the homeowners association was turned over to the actual owners by Wieland?

A. No.

Q. I will represent to you it was 2009. Are you aware of any complaints by any homeowners or any party of major construction defects that was brought to Wieland's attention prior to February of 2009?

A. The only thing I remember, and I was not involved in it, was the -- I know we went back and we did some flat roofs on some of the townhomes, but that's all I know about.

Q. You couldn't say whether that was pre-2009?

A. I don't recall.

Q. Ryan, what's your understanding why you are here today?

A. I feel that the people at Waverly and

their experts feel there's some severe construction defect in the townhomes.

Q. Do you agree with that?

A. No, I don't.

Q. Why?

A. I don't think -- I don't think it's -- from what I have seen it's severe damage.

Q. Okay. Here's the question the jury really wants to know and what you're about to get asked anyway so I will just cut to the chase. If you had the builders coordinate the subs and you had a neighborhood manager coordinate the builders under Mr. Parker, how did these mistakes happen? How did these issues with the building the experts say need to be addressed, how did those happen?

A. Well, it's -- you know, people are hired to do their job. It starts with the subcontractors assigning the scope of work and understanding what we expect from them, the builder overseeing the neighborhood manager to oversee that as well. I just -- I feel construction is not perfect and I think stuff happens from time to time and, you know, not intentionally, but things, you know, don't go perfect and might have some issues.

Q. And you're a licensed residential

contractor?

A. Yes.

Q. Have you ever built a perfect building?

A. I have not.

MR. HASELDEN: I don't have any further questions. Thank you, sir.

THE COURT: Any questions for the witness?

MR. MCCARTY: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. MCCARTY:

Q. Mr. Butler, what do you do now for a living?

A. I'm a home builder.

Q. No longer work with Wieland?

A. No longer work with Wieland.

Q. How long has it been since you worked --

MR. HASELDEN: Your Honor?

THE COURT: Basis.

MR. HASELDEN: Gets into the bifurcation.

THE COURT: No, it doesn't.

MR. HASELDEN: Could we approach?

THE COURT: Yes.

(Off-the-record sidebar conference.)

THE COURT: Overruled, proceed.

BY MR. MCCARTY:

Q. When did you leave Wieland?

A. I left January 2013.

Q. When was the last time you were at the Waverly project?

A. I don't know exact time, but it was probably within the last week or two weeks before I left.

Q. 2013 then?

A. Probably.

Q. Do you have your own company now?

A. I do.

Q. What's the name of that company?

A. Shelter.

Q. What do they do?

A. Custom home building.

Q. You mentioned several job titles at Wieland while you were there. The builder, were they employees of Wieland?

A. Yes.

Q. And they were in charge of supervising the subs?

A. Yes.

Q. And those builders, they had a certain building or buildings that they were in charge of, is that correct, in a project?

A. Correct.

Q. And they had goals, they had a timeline or goals to meet to get those buildings done within a certain time, didn't they?

A. Yes.

Q. And if they got those buildings done within a certain time or beforehand they got paid a bonus, didn't they?

A. They did get paid a bonus, but it wasn't -- there was several factors involved in the bonus and cycle time is what they called it was a small percentage of it.

Q. You mentioned that you worked with sales agents in your position when you were up here working with Waverly; is that correct?

A. Yes.

Q. And the sales agents were Wieland employees also?

A. Yes.

Q. And they were selling the units to the individual owners?

A. Yes.

Q. You mentioned you also did warranty work, too; is that correct?

A. In Atlanta, yes.

Q. What did you do there for -- in that division?

A. Just answer service calls.

Q. Are you familiar with the John Wieland warranty?

A. Pretty familiar with it.

Q. It's called 5/20, right?

A. I believe it was -- it used to be 5/10 and I think it was 5/20.

Q. The 5/20 talks about the terms and certain things are warranted five years and 20 years; is that correct?

A. Um-hmm.

Q. Just one moment.

(Off-the-record conference.)

MR. MCCARTY: Nothing further, Your Honor.

THE COURT: Any redirect?

MR. HASELDEN: Very brief.

REDIRECT EXAMINATION

BY MR. HASELDEN:

Q. Ryan, you were asked what went into the

builders bonus structure and you testified that cycle time was a small factor?

A. Yes.

Q. What was the biggest factor?

A. Customer satisfaction.

MR. HASELDEN: Thank you. I don't have any further questions.

THE COURT: Any objection to the witness being excused from the Plaintiff?

MR. MCCARTY: No.

THE COURT: From the defense?

MR. HASELDEN: No.

THE COURT: Sir, you are excused. You may call your next witness.

MR. HASELDEN: Defense calls Scott Parker.

SCOTT PARKER

having been duly sworn, testifies as follows:

THE CLERK: Please state your full name and spell your full name.

THE WITNESS: Scott Parker, S-C-O-T-T, P-A-R-K-E-R.

DIRECT EXAMINATION

BY MR. HASELDEN:

Q. Mr. Parker, would you introduce

yourself to the jury as soon as you get a cup of water.

A. Yes. My name is Scott Parker.

Q. Where are you from?

A. I am from Virginia.

Q. How long have you lived in South Carolina?

A. I have lived here in Mt. Pleasant since February 2006.

Q. I hope I didn't insult you by saying Charleston if that's an issue. Where did you go to college?

A. I went to Radford University in Virginia.

Q. What did you do after college?

A. After college I moved back to eastern Virginia and worked for an industrial and commercial construction company for about nine years.

Q. And what did you do after that?

A. After that that kind of sent me to Atlanta for a short bit of time. I met a couple John of Wieland employees who encouraged me to apply at John Wieland which I did and I hired on with John Wieland in September of 2003.

Q. What was your original position with John Wieland?

A. I started with John Wieland as a builder assistant.

Q. What's a builder assistant do?

A. A builder assistant basically shadows various members of the building team giving them the opportunity to mentor the builder assistant, just learn the ways of the company and how to conduct business in the field.

Q. Did you eventually move up?

A. I did. I was only a builder assistant two months and then I became a builder.

Q. And now you are in Charleston. How did that happen?

A. I was a builder for about a year and-a-half in Atlanta and there was an opportunity for me to move to Charleston to become a neighborhood manager so that's what I did and that was in February of 2006.

Q. And what neighborhood were you assigned to as a neighborhood manager?

A. To Waverly townhomes specifically.

Q. And Mr. Butler who just testified, he was your superior?

A. That is correct.

Q. So you were the next guy down? You were the guy that actually deals with the builders themselves?

A. That's correct.

Q. What was expected of the builders as far as you were concerned? When you were the neighborhood manager what did you expect?

A. The builders, they had -- they were tasked with multiple things, but primarily the subcontractors, both from a scheduling aspect as well as a quality control aspect.

Q. You heard Mr. Butler say if there was problem with the subs what the process would be to deal with it. Can you expand on that any?

A. Yes. Some of our subs were local subs, some were national accounts, most of the subcontractors were local though and if there was a problem with either scheduling issues or with some sort of compliance problem then I would typically get involved and have a sitdown with them.

Q. You heard my questions to Mr. Butler about what was expected of the subcontractors with respect to compliance of building code?

A. Yes.

Q. And manufacturer's instruction. Do you agree with his testimony on that?

A. Absolutely. They were bound by our trade agreements and our subcontractors vendor agreements and our scope of work which all tied back to both local codes and manufacturer's instructions.

Q. Now, neighborhood manager sounds like a guy that sits behind a desk all day. Is that what you did?

A. No. I spent a little bit of time behind the desk, but I was in the field every day.

Q. For the jury's education what does in the field mean?

A. On site, inside the homes.

Q. So you were actually inside the townhomes as they are being constructed?

A. That is correct.

Q. Are you aware prior to 2009 of anyone ever raising any concerns about construction of the townhomes at Waverly?

A. I'm not.

Q. Are you aware in general prior to finding out about the lawsuit about any concerns of major construction deficiencies?

A. The only thing that I heard anything about at any point in time were the low angle roofs. Other than that I heard nothing else.

Q. That's what we call the flat roofs?

A. That's correct.

Q. Now, we are here because the Waverly folks have -- do you understand why we are here? You heard Mr. Butler?

A. It's my understanding that the Waverly HOA and the Waverly homeowners feel like there's significant construction defects in the homes.

Q. You were there?

A. Yes.

Q. You were on the ground in the field as you said in the buildings. Do you believe there's serious construction deficiencies at Waverly based on your --

A. I do not.

Q. What leads you to believe that?

A. We had pretty specific scopes of work. I felt like we had good subs. We have very high expectations of our subs. We watched things very closely.

Q. You heard Mr. Butler get asked about the bonus structure. Were the builders pushed to

get these units up and ready and sold?

A. We did have set guidelines on our cycle time, but our cycle time was in the six to seven month range, which is very average for industry standards. And there was no incentive to ever beat that. So all we ask is that they basically do what we are asking them to do. Their bonus was broken down primarily by customer satisfaction and then also on their cycle time, but they also had a large salary so bonuses in general were not a big percentage of their overall income.

MR. HASELDEN: Thank you, Mr. Parker. I appreciation your time. Answer any questions the Plaintiffs' lawyer has.

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. HAYES:

Q. Good afternoon, Mr. Parker.

A. Good afternoon.

Q. You said cycle time. Do you remember being deposed back on June 6th, 2016 by Mr. McCarty?

A. I do.

Q. In that time frame you were asked about the cycle time. You testified a moment ago it was

about six to seven months to complete a house from the very beginning to the very end?

A. That's correct.

Q. Were you here earlier when JR Watkins testified it would take 16 months to fix these buildings?

A. I was not.

Q. Were you here earlier this week when Myles Glick testified on behalf of the Plaintiffs in regard to his investigation and findings on these buildings?

A. I was not.

Q. Now, if they didn't make the six to seven month cycle time and there was not a good reason, these builders would get docked, right, the paycheck would get docked?

A. It's not that they would get docked, they just wouldn't be eligible for that portion of their bonus, but they wouldn't be docked.

Q. Do you remember when you testified, maybe docked isn't the right word, they would lose a portion of that bonus?

A. Right.

Q. Who was responsible for the quality of the subcontractors work out at Waverly?

A. Well, the subcontractors are always responsible for their own work and then the builders were tasked with the quality control of the subcontractors.

Q. And the builders were John Wieland, right?

A. The builders were John Wieland employees, yes.

MR. HAYES: Thank you.

THE COURT: Any redirect?

MR. HASELDEN: No.

THE COURT: Any objection to the witness being excused?

MR. HAYES: No.

MR. HASELDEN: No.

THE COURT: Sir, you are excused. Counsel approach a moment.

(Off-the-record sidebar conference.)

THE COURT: Defense may proceed.

MR. HASELDEN: Your Honor, at this time the defense rests.

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, the defense has rested their case. There's some matters of law that I need to take up with them that I anticipate will take us

through the remainder of the afternoon. So I'm going to allow you all to leave for the evening.

During this break please do not discuss the case, do not do any independent research on the internet. Please don't make any comments on the internet and also please don't have contact with anybody in or about the courthouse.

We will resume in the morning at 9:30. And if you would stack your pads up as you have done we will secure them for the recess and tomorrow I will give you a better idea on our scheduling. Thank you for your patience. Have a great afternoon.

(Thereupon, the jury exited the courtroom at 4:34 p.m.)

THE COURT: The defense has rested. Are there any motions?

MR. HASELDEN: Yes, Your Honor. Defense would renew our motion for directed verdict as to the cause of actions that survived into the defense case, negligence as to the HOA claims and the class claims.

THE COURT: You lost me. What now?

MR. HASELDEN: I believe Your Honor said that the cause of actions to survive the first

one was negligence with respect to the HOA claims and class action claims.

THE COURT: Yes. Those are two separate sets of damages.

MR. HASELDEN: Right. We were --

THE COURT: With a distinction of who the money goes to for the repairs.

MR. HASELDEN: We are renewing our motion for directed verdict as to that. Testimony of Mr. Lewis was that there were no violations of the building code and taking his testimony in the light most favorable to the Plaintiffs it is our position that the jury could never reach a verdict on negligence in favor of the Plaintiffs.

As to the breach of fiduciary duty with the HOA, again, there's been no evidence presented. Again, the word "fiduciary" was never mentioned by anyone in the trial. The claims -- the one that survived as I understand it was breach of fiduciary duty to the homeowners association. As to the HOA there was no testimony as to any personal relationship between Wieland and the homeowners association. Further, there's no testimony as to any breach and the evidence. The only evidence in the in as to what Wieland knew at the time of the

board was turned over in 2009 was rank speculation on the part of Professor Freeman. You heard witnesses from Wieland who testified unequivocally there was no knowledge on Wieland's part in 2009 as to any major construction deficiencies.

Your Honor, I would renew my motion as to the breach of express warranty claim. There is still no evidence it succeeds. The only person that testified that there was an express warranty would be Mr. Denby. No other homeowners testified as to their warranty. The only warranty that was put in evidence was the one given to Mr. Denby himself. That warranty does not extend to the homeowners association for the other members of the class. And Mr. Denby's testimony in and of itself was that they made other warranty claims to Wieland. I don't think they are entitled to it. The only person would have been Mr. Denby under that warranty and they offered no testimony whatsoever that he tendered any warranty claim under that specific warranty that's in evidence that was rejected by Wieland. That's our motion at this time, Your Honor.

THE COURT: Would you like to respond?

MR. MCCARTY: Your Honor, we stand upon

the argument that we made yesterday. We would also add that fiduciary duty was mentioned and that not only did Mr. Denby provide testimony regarding it, Mr. Butler has testified to it himself. Mr. Denby is the class representative. He's perfectly capable of making a warranty claim on behalf of class members.

THE COURT: The motion for directed verdict on negligence is denied. All the things that were raised by the defense are credibility issues and factual issues to be determined by a jury.

As in regard to the HOA fiduciary duty claim, there was no evidence presented in the defense case, although the motion is renewed, but there's more than ample testimony in what Professor Freeman presented to go to the jury. All of the arguments go to weight and factual determinations to be made by a jury, credibility issues of the witnesses.

As to the express warranty, the warranty document itself has already been admitted into the record and there's sufficient testimony to support that and create a factual issue as well. Therefore, all motions raised by the defense are

denied. Do you have any request for instructions you want me to consider?

MS. NOLAND: Your Honor, Plaintiffs would like to move for a directed verdict.

THE COURT: I am sorry. You may proceed.

MS. NOLAND: Your Honor, we've heard both sides, from the Plaintiffs and the Defendants. Mr. Manos stood up and in his opening he admitted that Wieland was the general contractor, the builder, that there were problems out there and they needed to be fixed.

We then heard from Myles Glick who testified about duty, breach, causation and then damages with Mr. Moore and then Mr. Lewis testified today that there were problems out there that need to be fixed. Mr. Watkins put up his scope of repair. It's uncontroverted that there has been duty breached, causation, damages and the only thing that needs to go to the jury is the amount of damages.

The Pope v. Heritage Communities, Inc. case, 395 S.C. 404 is a court of appeals case wherein Judge Newman was affirmed. The trial court granted appellant's motion for directed verdict

from a negligence claims finding it is clear that the conduct for negligence claim was instructed and that it is based on the testimony as well as the representation of counsel. It would not be proper to allow counsel to represent to the jury that appellants are responsible and intend to engage in repairs on the one hand and on the other hand argue as a matter of law they are not responsible. More importantly than that, the witnesses all acknowledge defects in the construction.

Your Honor, under Pope v. Heritage, we believe that we have concessions from counsel. We have heard from the witnesses on Plaintiffs' side. We also heard from the witnesses on the Defendant's side and everybody said there is something wrong. It doesn't matter that they did not acknowledge all the defects. It just matters that they acknowledged certain defects.

THE COURT: That's the only motion?

MS. NOLAND: Yes, Your Honor.

THE COURT: Would you like to respond?

MR. MANOS: Briefly, Your Honor. I was very careful never to use the words that Wieland breached any duties, that Wieland was responsible for breaching codes.

THE COURT: Did you have to? Your witness said there are problems, they need to be fixed and just the cost of fixing them, there's a differential and how it is to be addressed. They say they need to move out and basically start over. Your witnesses say no, really isn't that big a fix. There are some things wrong. They can be fixed easily, they don't have to move out. They say it cost this much to fix it, you say it cost that much to fix. So is there any question about liability or is it really just the issue of damages?

MR. MANOS: I am just -- Your Honor, I would not concede liability for a directed verdict motion because we were very careful to make sure --

THE COURT: What are you going to argue in closing? Are you going to say your clients aren't responsible but they are willing to fix it? I don't think you can do that. In for a pound, in for a penny. I don't think you get to hedge that. That's like saying in an auto accident, yeah, I rear ended you, but I'm not liable. You are liable. So what you are really arguing about is the fact that I agree they went to the ER, but I don't think they should pay the chiropractor bill. That doesn't mean you aren't liable, means you are

arguing about the amount.

MR. MANOS: I understand, Your Honor. Mr. Lewis carefully testified that construction was not perfect. He testified that codes were not breached and --

THE COURT: I don't think it matters whether codes were breached or not. When you say there is some damage out there why would you fix it if you didn't feel it was your responsibility?

MR. MANOS: We obviously aren't being hired to fix it and won't unless there was a judgment entered against us.

THE COURT: That's hedging the question. People don't agree to do things until they feel they are responsible for doing it. Otherwise you would say you caused it. You do it yourself. That's a lot of money to say I will fix something if I didn't cause. Clearly the homeowners didn't build the firewall. They can't fix it. They didn't climb roofs and do the shingles. They didn't make the felt short.

MR. MANOS: They didn't replace their Sealoflex after seven years on flat decks when they could have.

THE COURT: They're not claiming

damages to decks.

MR. MANOS: They absolutely are.

THE COURT: Well, that isn't the real -- if it was it was about that much. It wasn't much. They are talking about the roofs, the firewalls and these windows and flashing. That's their main crux of the damages in this case and the other big element is the loss of use. In other words, moving out and the steps and the rails, moving out while these repairs are accomplished. But I listen very intently.

Sometimes I think people don't think I am listening because my head is down. I keep it down deliberately. Because jurors look at a judge's face and they try to read my face and see if I react to testimony, if somehow I'm assenting to something that's been said or not. I keep a blank face deliberately because legitimately I don't have a position. I really don't care who prevails or doesn't. The most unconscious action on my face could send a message I'm not intending to send. But believe me, I hear everything. I see a whole lot more than you all think I see.

But the point is I listened very intently to your argument. I listened to your

experts. And they said there are problems. On cross they acknowledged there are problems. The only distinction is how the problems are going to be fixed and how much it cost. They say the problems are more extensive than your expert. Your expert basically just says these are common, everyday problems you have with construction. No construction is perfect. I don't think you have to breach a construction standard to be held in negligence. That's just a barometer of duty. You have common law duties.

MR. MANOS: We would take the position, Your Honor, that it's a fact question for the jury to decide if Wieland breached any of those duties and in the light most favorable to Wieland there is a possibility that this jury --

THE COURT: You are not going to build up an argument you didn't breach it but you are going to fix it.

MR. MANOS: I wasn't arguing that we were going to fix it. I was arguing that if you fixed --

THE COURT: That's not what your experts said. Your experts said there are problems and they need to be fixed. This is how we should

fix it. He didn't hedge it and say well, you know, there really isn't any damage, but just on the otherwise chance these people feel there is damage this is the alternative. That's not how he testified. He said I went there out. Your other expert said I crawled under all these five buildings and there is damages and I would be willing to sign off this is how it needs to be fixed and it's a lot less destructive than how the other side is saying it needs to be fixed. They didn't qualify their testimony in that way. They said there are problems and they need to be fixed and that they are not unusual problems, that these happen in construction and it is our responsibility as a builder basically to fix them.

So I don't think you can just -- you didn't present it that way. You didn't present it like well, nothing is wrong, but just in case it doesn't cost that much to fix it. That's almost to me that's an oxymoron when someone says they rear ended somebody going 45 miles an hour. I think they might be hurt, but not by me. You either did it or you didn't. That's not the way you argued it.

MR. MANOS: I guess --

THE COURT: And frankly I don't know how it really prejudices you because really you probably come out better saying there's a problem and we want to fix it differently. It is up to you.

MR. MANOS: Can I consult with co-counsel, please?

THE COURT: Sure.

MR. MANOS: Let me be clear while I am consulting are you asking me to --

THE COURT: I am not asking you to do anything. You do what you want to do. It's your client. You got to do what you think is best.

MR. MANOS: I understand that. One second, Your Honor.

(Off-the-record conference.)

MR. MANOS: Your Honor, briefly. In addition to my prior arguments, South Carolina law does not hold a general contractor strictly liable for the construction and there is certainly a factual dispute over whether --

THE COURT: They are not arguing strict liability. They are saying you made admission in your opening and you can't argue against what you have already admitted and what your witnesses have

testified to. That by virtue of the way they testified they eliminated any question of fact. They're not arguing strict liability.

MR. MANOS: I disagree that in my opening I made any admissions --

THE COURT: Your opening isn't evidence. I am really pointing to what your expert said.

MR. MANOS: And I appreciate that, Your Honor. If you are going to --

THE COURT: I don't know what I am going to do. I am going to think about it.

MR. MANOS: The only thing else that I would say is that the evidence is that subcontractors did the work, that Wieland had various coordinating supervisors and that there are conditions out there that need to be addressed. Whether those conditions are because the building didn't get painted after five to seven years, whether -- I'm not sure what those conditions are. I understand Mr. Glick said those conditions are because codes weren't followed and general contractor is responsible for the codes.

Mr. Lewis said that codes were not breached. Industry standards were not breached.

All of our repair estimate was was showing what it would cost to price to address issues out there, not by violations of building code, not violations of industry standards, not violations of manufacturer's specs, Your Honor. I think there's clearly a factual issue on that.

THE COURT: Anything further from the Plaintiff?

MS. NOLAND: Your Honor, only that there's negligence per se when a building code has been adopted by the Town of Mt. Pleasant and violations are shown. And that Mr. Manos's opening also said that JR Watkins was licensed and he will do this work and that there are conditions that need to be addressed. We admit problems, which areas and what it cost.

THE COURT: Any further motions for directed verdict from the Plaintiff?

MR. MCCARTY: No, Your Honor.

THE COURT: I will take the matter under advisement and let you know what I think in the morning. Now, how many rebuttal witnesses does the Plaintiff have?

MR. HAYES: Two at most probably. If I can consult with my colleague, might be one.

THE COURT: How long do you think that will take?

MR. HAYES: An hour maybe at the most. I would think an hour including cross, but then again I am speculating.

THE COURT: How long do you think your closing arguments will be?

MR. MCCARTY: Fifteen minutes maximum for me, Your Honor.

THE COURT: Open and close?

MR. MCCARTY: I will have rebuttal. I won't talk more than 15 minutes I don't think.

THE COURT: I need you to be honest. How long.

MR. MCCARTY: I will say 30 minutes. How about that?

MR. HASELDEN: Your Honor, I will try to get it in under two hours. I am kidding. I don't think that it would take me any longer than 15 minutes. I am not --

THE COURT: Every time a lawyer tells me 15 minutes it's an hour.

MR. HASELDEN: Your Honor, I don't think there is an attorney in this room that will tell you I have ever done anything for an hour.

Twenty to hedge a bet.

THE COURT: All right. So, Mr. McCarty, you are going to talk for seven and-a-half minutes?

MR. MCCARTY: Your Honor, I said 30 minutes.

THE COURT: Okay. Then 15 and 15? We will see if we can get it finished tomorrow. I am just not -- the only thing is I have to take their lunch orders when they come. We will see how it goes. I don't know how long charge conference is going to take. If we can close and charge before lunch that's what we will do, but if not we will do it on Monday.

Do you have any request for instructions that you want me to consider?

MR. MANOS: Your Honor, can I put mine on a jump drive and give it to the Court?

THE COURT: How many pages is it? If you want it in the record you have to bring it.

MR. MANOS: Can I print it and bring it first thing in morning?

THE COURT: If you want me to really give it some consideration you need to give -- well, bring it in the morning. We will see.

MR. MANOS: I can get it delivered tonight.

THE COURT: You can bring it in the morning.

MR. HAYES: Will we be allowed to do the same?

THE COURT: That's fine. Then if I need time to think we will have to play it by ear and see how it goes. Anything before we break for the evening from the Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. MANOS: Your Honor, are we entitled to know the rebuttal witnesses?

THE COURT: Not necessarily. But if they want to be nice and tell you; I think they said they have to think about it.

(These proceedings were adjourned at 5:00 p.m., January 26, 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.,	)	TRANSCRIPT OF RECORD
PLAINTIFF,	)	
VS.	)	JANUARY 27, 2017 CHARLESTON, SC
JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC., ET AL.,	)	VOLUME 5 OF 6
DEFENDANTS.	)	

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

* *

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

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(The following proceedings were held January 27, 2017, Charleston County, South Carolina, @ 9:50 a.m.)

THE COURT: One of our jurors overslept this morning. It is going to take him about an hour to get here. So when the clerk called him -- that's why we are delayed in getting downstairs. I apologize. We were trying to locate him. Our phone call was what alerted him that he had missed his alarm. So I just told him to get here, not to rush and get in an accident or anything, but he understood we are waiting for him to get here as soon as he could. But I don't want him getting all rattled having a car accident or something. So we will have to wait for him to arrive before we can resume testimony.

Did you all decide how many rebuttal witnesses you have?

MR. HAYES: Your Honor, we did. That's zero.

THE COURT: Oh, really. Okay.

MR. HASELDEN: Your Honor, would you like us to pass up the requested charges?

THE COURT: Let me finish what I am doing. Are there any request for instructions from

the Plaintiff?

MR. HAYES: Yes, Your Honor, there are. Would you like me to approach?

THE COURT: Yes, sir.

MR. HAYES: There is a couple more that they are frantically, I apologize, trying to print off. They had to change a couple of names on it. Here is some of the ones --

THE COURT: Is your number on them?

MR. HAYES: I will be happy to do so.

THE COURT: That will be helpful.

MR. HAYES: One, two, three, four, five.

THE COURT: Yes. You had two sets in your hands. What are you referring to?

MR. HAYES: Well, they are all the same. One is some of the charges that were used in the Magnolia North case that's been upheld by the Supreme Court. And there's some other ones here.

THE COURT: Number them for me.

MR. HAYES: I will.

THE COURT: Did you have any requests for instructions?

MR. HASELDEN: I do, Your Honor.

THE COURT: Are yours numbered?

MR. HASELDEN: They are.

THE COURT: I assume you all have given each other copies?

MR. HAYES: We just have this one just now. We will get a copy to the Defendants, Your Honor.

THE COURT: I have been handed 30 requests for instruction from the Plaintiff and 27 from the defense. This is my first time seeing either set of instructions and I need time to review them before we can have a charge conference. And then I really -- have you all had an opportunity to review these instructions?

MR. HASELDEN: We just got handed them.

THE COURT: The simple answer is you have not had a chance to look. How long did you all need to do that?

MR. MANOS: Thirty minutes, 20 minutes.

THE COURT: I might need a little more time than that because I got to read each one. I got to check the precedent you cited for each one of them. So realistically I think you need an hour to do that. So that takes us to 11:15. We have the charge conference which I think considering just how we have been progressing that's going to

take I would think an hour. Don't you all think?

MR. HAYES: I will defer to Your Honor.

THE COURT: Did you all plan not to talk? That's the only way a charge conference will take 20 minutes. It will take me 20 minutes. So the only way it will 20 minutes is if you said nothing and agreed on everything. I don't foresee that happening.

MR. MANOS: I do not.

MR. HASELDEN: I would take that bet.

THE COURT: I think it might take longer than that, but I'm trying to be realistic about time. I am not trying to make you feel stressed about it. I just think you need to have realistic expectations how long it will take you to do something. Because you only get to do it one time and you need to do it right. Because once you give the charge you can't take it back. You can try, just ain't the same. I'm a great believer in doing it right the first time, having everybody on the same page and knowing what is it the Court will instruct so you can tailor your argument in that regard.

That takes us to 12:15. So we wouldn't do closing and charging until lunch which puts it

like 2:00. I will have the jury come back at like 2:00 or 2:15 and then by the time we were done, I conservatively think my instructions are going to take about 35, maybe even 40 minutes depending on how much -- what you have asked me to include. Then that would put us at 4:00 before they start deliberating.

Do you really want a jury deliberating that late on a Friday afternoon? I don't think that's a good idea. You know they want to go home. So I am thinking that what we should do is spend today doing charge conference, verdict forms and close and charging on Monday morning. What is your all's thoughts?

MR. HAYES: We think that's a good idea.

THE COURT: You okay with that?

MR. HASELDEN: Sure.

THE COURT: Okay.

(Off-the-record conference.)

THE COURT: That is what I am thinking. Then we won't have to feel rushed and I won't have to feel rushed and frankly there is a little part of the testimony I need to have the court reporter send me a digital copy of so I can listen to it

again.

We will take a break until about 11:00 and then resume with charge conference and verdict forms and all that. That gives you time to sit here and read and gives me time to read and then print the verdict forms and everything so you can look at them and then we will go from there. Is that good for everybody?

MR. HAYES: Yes.

THE COURT: If you can get the jury for me, please.

(Thereupon the jury entered the courtroom at 10:20 a.m.)

THE COURT: Good morning, ladies and gentlemen. We appreciate your patience. We have been trying to work through some things and after consultation with counsel, both of the Plaintiff and the Defendant have rested their cases. This next part of the process is closing argument and instructions. But there are some matters of law that we have to work through before we can begin that process. We anticipate that it is going to take us the rest of the morning to do that which would mean we would not start closing argument and instruction until after lunch and by the time we

finish that it's like 4:00 and we think that's unreasonable to make you kind of feel like you are being held hostage at the courthouse that late in the afternoon. We try to do closing argument and instruction when we are concluding a case like now so that you won't feel like you're in a pressure cooker and you don't have the adequate time to consider the evidence and the arguments and the law.

So what we are going to do out of an abundance of caution because we really don't -- we anticipate how long it will take, but I don't want to send you all out and say come back at a certain time and we are still not done and then still have us on the back end of that process.

So what we are going to do is adjourn for the day. We are going to stay here and work through what we need to work -- everything we need to work through so that on Monday morning we can start fresh with closing arguments and instructions. And then that way we are going to order your lunches so we already have those orders. We will place those. They will arrive by noon on Monday so you don't have to worry about lunch on Monday because we will provide that. And they can

still park next door Monday and you will still have your same parking spaces. They will handle that for you. You will park next door.

You all have been incredibly patient with us. You have been diligent. You have been attentive and you have been very patient and we appreciate it. I know it might seem that we should be able to do a lot of these things before court starts, but it is just the nature of the process, nature of the beast as they would say. And we are used to it. Again, you are not. But I try to explain as much as I can so that -- I do better when people explain to me what's going on so that I can anticipate what's happening so I don't have to guess about it.

So to the best of our ability I have tried to explain the process to you so that you know really how very valuable you are to us.

So during this break it is absolutely essential that you remain impartial, that you decide no issue about this case until you have heard closing argument and instruction. I know it might seem simple to discuss what you have heard, but to do that even though it may seem innocent requires you to process the information that you

have heard and draw conclusions based upon it. And that's what we call deliberation. So we need for you to refrain from doing any of that and again as tempting as it is and as much as we like to believe what we read on the internet is accurate and correct, please refrain from reading anything on the internet, doing any independent research, looking at any mapping sites, things like that that provide you with information outside of the evidence because as the jurors in this case you are sworn to decide this case according to the testimony that you have heard and the other evidence that has been introduced.

So I will greatly appreciate it if you would abide by those instructions. Also when you return to the courthouse on Monday you will return directly to your jury room. As soon as all 14 of you have arrived we will then conclude with closing argument and instruction.

And again during the weekend I would appreciate it if you would not make any comments on any social networking sites. You would be amazed. We have something called jury coordinator. You would be amazed people are who not on jury duty who call us and let us know what you post on line. I

think to myself do they work? How do you have time to be like posting on the internet? How would you know somebody is on jury duty? It happens and so that's why we give that instruction because someone might say I have jury duty and somebody will call us and say that you said that on a social networking site. So it is just best to refrain from it so that we don't have to go through a process called voir dire to make sure you are still fair and impartial as a juror. You have a wonderful day. It's supposed to still be cold but sunny. If you will leave your note pads on the banister we will secure those during the recess and we will see you Monday morning at 9:30.

(Thereupon, the jury exited the courtroom at 10:25 a.m.)

THE COURT: We will be at ease. You all review the charges that have been handed up and I'm going to do the same thing and let's plan on reconvening in this courtroom at 11:00.

(A recess transpired.)

MS. NOLAND: Your Honor, prior to the charge conference Plaintiffs have one brief matter of law to take up.

THE COURT: Like what?

MS. NOLAND: Directed verdict on breach of fiduciary duty and breach of contract.

THE COURT: Haven't you all already made your motions?

MS. NOLAND: We specifically spoke to just the negligence claim. We just wanted to put one short little thing on the record.

THE COURT: I don't understand what you're asking me to do. Haven't you made your full argument on the directed verdict?

MS. NOLAND: We only moved for directed verdict on negligence yesterday afternoon and when we decided not to put our rebuttal witnesses on this morning, we wanted to move briefly on the matter on the record for directed verdict on the breach of contract and the breach of fiduciary duty.

(COURT'S EXH. 1-2 were marked for identification.)

THE COURT: Any exceptions from the defense?

MR. HASELDEN: To making the motion now?

THE COURT: Um-hmm.

MR. HASELDEN: Absolutely.

THE COURT: Basis?

MR. HASELDEN: Your Honor asked specifically yesterday whether they had any other motions and they said no.

THE COURT: He has a point. Would you like to respond?

MS. NOLAND: Yes, Your Honor. Under Rule 50(a) it permits the Plaintiff to move for directed verdict at the close of all evidence.

THE COURT: Which was yesterday. And which you did make the motions, correct, after which I took them under advisement; is that correct?

MS. NOLAND: Your Honor, we had thought that we were possibly going to put a rebuttal witness up today.

THE COURT: Are the rules constrained by your tactical decisions?

MS. NOLAND: No, Your Honor.

THE COURT: The close of evidence was yesterday.

MS. NOLAND: Your Honor, I would submit that the evidence was not fully closed until --

THE COURT: It was fully closed yesterday. The only way it wouldn't have been

fully closed is if you put up a rebuttal witness. You are required to make a motion at the close of their evidence. You would only renew the motions at the close of your evidence.

MS. NOLAND: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MCCARTY: Your Honor, I have one housekeeping matter. Exhibit No. 35 that's already been admitted into evidence --

THE COURT: Wait one second before you start talking. I am trying to remember to do something.

(Brief pause.)

MR. MCCARTY: It was a copy that was hard to read. I made it a clean copy of the exact same thing, showed it to counsel and they agreed.

THE COURT: You agreed to substitute? That's fine. Mr. Haselden, how is the defense prejudiced by Plaintiff making an additional motion since we haven't closed and charged yet, nor done the charge conference.

MR. HASELDEN: How is the Defendant prejudiced by that? Simply that we are -- weren't aware that we were going to be arguing today, probably would have looked into it a little more if

we were.

THE COURT: It's about the warranty I would imagine? What else is it?

MS. NOLAND: Your Honor, it would be to the breach of fiduciary duty and the breach of contract as to warranty.

THE COURT: I am going to allow them to make the argument. If you need additional time to argue it I will give you that. But I'm not inclined to grant it if that gives you any consolation. I think there is more than adequate evidence in the record regarding fiduciary duty and whether there was a contract and whether there was notice given on the warranty. So if that brings some closure to that matter. But you may make your motion.

MS. NOLAND: Very briefly. Plaintiff moves for breach -- or moves for directed verdict on breach of fiduciary duty. We offered testimony from Professor Freeman that John Wieland owed a fiduciary to the HOA and they breached the duty by not delivering the common elements in good repair, not having any money in reserve, only in operating, and we introduced declarations and the covenants into evidence. In addition, Mr. Glick testified

that John Wieland owed a duty to the HOA and it breached that duty.

In Defendant's case they did not provide any testimony or evidence supporting their contention that John Wieland did not owe this duty to the HOA. As to the breach of contract as to the warranty, Defendants also did not provide any testimony or evidence supporting their position that the warranty had not been breached. Plaintiffs, however, put the warranty into evidence and had Mr. Denby testified that John Wieland did not honor that warranty. Your Honor, that's it.

MR. HASELDEN: I made these arguments yesterday for directed verdict on those causes of action and you pointed out there were questions of fact on them and denying. But I do want to point out there is absolutely no evidence. I asked Mr. Freeman, I asked Mr. Denby, I asked Mr. Glick, I asked anybody that was up there that I thought would answer the question what was the condition of the property when it was turned over in 2009. None of them could answer the question. I asked Mr. Freeman three times and he rambled on twice and the third time said I will stand on my previous answer which was not responsive anyway.

So it's our position there is evidence that's a question of fact that goes to the jury as to breach of fiduciary duty. As to the warranty, there seems to be some confusion as to whether Mr. Denby's own personal warranty extends to the class or to the HOA, which it does not.

THE COURT: Whose warranty is in evidence?

MR. HASELDEN: Mr. Denby's, his own.

THE COURT: Is there any real contest that y'all didn't give the warranty to everybody at that complex?

MR. HASELDEN: Your Honor, there's --

THE COURT: That weren't sold with the property?

MR. HASELDEN: That's correct, Your Honor, but those are different than the implied warranties to all the property. Whether or not Mr. Denby who had a contractual relationship under that warranty right there made any claims to Weiland under that warranty that were denied, he testified -- he did not testify to any of that.

As to whether he made claims as to the implied warranty, I will concede that he said we made claims, yes. I don't know who "we" is. He

ain't a we. That is his personal warranty. If the other homeowners want to show up and say yes, this is my warranty, that's a contractual claim. That is not something that a class representative can maintain on behalf of all the other homeowners. That's personal to him and personal to his relationship with Weiland as original purchaser. He cannot get around it by saying we put in one warranty, that goes to everybody. That is not the way the warranty works.

THE COURT: Would you all like to respond?

MR. MCCARTY: Your Honor, I think the testimony of Mr. Denby, and I think this is some of the testimony you were planning on listening to, basically asked him if when he was on the HOA board if he --

THE COURT: I wasn't going to listen to Mr. Denby's testimony.

MR. MCCARTY: Sorry.

THE COURT: I heard him.

MR. MCCARTY: He testified warranty claims were brought to the attention of Weiland and were they honored? He said -- his testimony was no, they were not. He is class representative now

and if he can't make claims on behalf of everybody in the class, that's the actual purpose of the class. So I think his warranty claim extends to every member of the class. The warranty is the same that went to the sale of these units.

THE COURT: I guess the question really becomes whether you all concede, because there's no point in giving a whole bunch of instructions about what a contract is, how it was entered into, all that, because clearly there was a warranty sold with these properties. And so I really came into this thinking you all were going to stipulate that the warranty existed. The only issue remaining was whether the notice was given and whether it was breached.

I need to know I guess whether, in fact, that's the case, whether you are making a good faith argument these warranties did not exist because the issue really isn't warranty. The issue is whether the warranty was breached. The issue is whether they gave him notice on the warranty which is a factual issue.

MR. HASELDEN: Your Honor, it is our position that is probably correct as it goes to the implied warranties. As far as any express, there

was never any express warranty or a contract with the HOA.

THE COURT: I am not talking about the HOA. I am talking about these individuals.

MR. HASELDEN: There's no evidence that --

THE COURT: You can't have an express warranty with the HOA. That's a moot point. I am talking about whether there is an express warranty between every individual remaining Plaintiff and whether in good faith you are telling me they did not have a warranty agreement with your client.

MR. HASELDEN: No, they did.

THE COURT: The only issue that remains is whether they gave notice and whether there was a breach.

MR. HASELDEN: Exactly.

THE COURT: Which is a factual issue. And if you say there are deficiencies in their witness then that's what you argue to the jury.

MR. HASELDEN: I will.

THE COURT: Not for me to sort that out. I am not the finder of fact. So as I heard the evidence that's the issue. Now, whether they didn't question enough, that's on them. It is not

for me to decide whether the testimony was sufficient or not.

MR. MANOS: Your Honor, can I add one thing? These units were sold between 2005 and 2009 and the written warranties which were issued to each individual owner when they actually purchased from Weiland are different. They weren't -- they did not all get the same warranty. Some of them may have gotten the 2005 version. Some of them may have gotten the 2007 version. No evidence was brought out on that so that's why Mr. Denby's personal warranty to his personal unit can't be something that he says is similarly situated and is for every homeowner, Your Honor.

THE COURT: Are you telling me that difference -- these '05 and '09 warranties didn't warrant these common areas and things that were to be fixed?

MR. HASELDEN: No, ma'am.

THE COURT: What does the warranty cover?

MR. MANOS: Structure.

MR. HASELDEN: That warranty is Mr. Denby's own personal structure. Has nothing to do with the common area.

THE COURT: I misstated. I am talking about the stuff that would be wrong that each individual homeowner could claim was wrong with their property. In other words, these five folks that say beams are rotting under their house. Are you telling me that the warranty that's in evidence is different than their warranty and it would not be covered?

MR. MANOS: I am telling you that there were changes to the warranty to the individual homeowners. I can't site the chapter and verse exactly what changed, but it was a 5/20 structural warranty for major structural defects, didn't have anything to do with the flat roof water intrusion.

THE COURT: I am not talking about that. We are talking about rotting beams under a condo. Are you telling me the '05 trough '09 warranty excludes those things?

MR. MANOS: No, I am not telling you that.

THE COURT: That's the only thing the individual homeowners can claim is loss of use and repair for structures that are not covered.

MR. MANOS: Okay.

THE COURT: By common elements, which I

understand there are five condos that have rotting beams. You had two people that testified. Your folks said we can do it that way, his folks said you can fix it this way.

MR. MANOS: I understand. Yes, Your Honor.

THE COURT: So then we are back to the warranty exists. The only issue is whether notice was given appropriately, put your people on notice that the warranty should be honored and whether there was a breach. That's a factual issue. If you say there are deficits in their testimony that's your job to bring that out to the jury. If it not for me decide who is correct or not, not my province, right?

MR. MANOS: Yes, Your Honor.

MR. HASELDEN: Thank you, Your Honor.

THE COURT: In regard to the motion for directed verdict regarding the warranty, what was it again, breach of fiduciary duty and warranty, all those factual issues are to be determined by the jury. The motions are denied.

Now, as I understand it, the only remaining causes of action are for negligence which would be a builder's negligence for breach of the

express warranties which in the pleadings that is entitled breach of contracts specifically referencing the express warranty and breach of fiduciary duty. Those are the only things that were left that were pled after the granting of the directed verdict on the Unfair Trade Practices and breach of implied warranty of fitness and habitability and breach of implied warranty and fitness for a particular purpose, correct?

MR. HASELDEN: That is correct, Your Honor.

THE COURT: Mr. Hayes; is that correct?

MR. HAYES: Except for the negligence cause of action.

THE COURT: I said that.

MR. HAYES: I am sorry.

THE COURT: That's builder negligence. It is not just straight specific. Specific duties that builders owe, couch it in the terms of the negligence theory.

I will give the jury a general instruction regarding their responsibility and my responsibility, how they are to judge witness credibility and believability. I will give the jury a general instruction regarding expert witness

testimony. At the beginning of the instruction there is some boilerplate language that I use which talks about disregarding any testimony ordered stricken from the record, only considering the proper evidence that is before them, any stipulations that may have been made.

I will explain to them a stipulation is an agreement between the parties and requires no further proof. I will give a general instruction on expert witness testimony. I will also instruct that there is no distinction between a corporation and an individual, that they are entitled to the same treatment as an individual and the same fairness, fair and impartial consideration as an individual.

I will then give a general instruction that a corporation can only act through it agents or employees, therefore a corporation is responsible for any negligent acts or omissions of its agents or employees while they are acting within the scope of their employment. Usually what parties do at this point is they would stipulate that the Weiland entities are corporations and they are bound by any acts or omissions by their agents instead of me having to go through a whole

instruction about agency theory which is really unnecessary. I don't think there's any contention that the people that worked with you all weren't your agents and employees.

I will then give a general instruction that they are bound to follow the law as I instruct it. They are not to set arbitrary standards as to what the law is or what the law should be. I will give them a general instruction on the burden of proof which will use the scales, the traditional set of scales as an example, explain to them what the preponderance of the evidence is.

I will then instruct them on builder's negligence and I decided to use Judge Anderson's book for guidance because I think it's a good, direct explanation of the applicable law in terms of builder negligence and that is Section 111 which deals with the elements of negligent construction. And basically it's just the standard that is the ordinary person standard which is once they undertook -- once someone undertakes to build something that they should do it as a reasonable and in a reasonable and skillful manner, that they have a duty to use due care, that to establish negligent construction the Plaintiff must prove

four essential elements; there was an undertaking to construct the building; that the Defendant was negligent or careless or reckless; willful and wanton in the performance of that construction, in other words, that he did not perform it in a good workmanlike manner; that the negligence or carelessness was the proximate cause of the damages and any resulting damage; that the Plaintiff must prove the Defendant was negligent or careless in some aspect of the construction which he agreed to do. Otherwise you would have to be required to find against the Plaintiffs.

And then the degree of care which the Defendant is called upon is what any person or entity of ordinary reason and prudence would exercise under the same or similar conditions in constructing the house or building in question. And any failure to do that by the Defendant's agents, servants or employees while acting in the course and scope of their employment in the construction of the building would constitute negligence or carelessness. Then if you all wanted I could amplify the instruction by adding a definition of proximate cause if you all request that. Is there any request for that from the

Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: I will also instruct 112 which is builder's negligence, violation of building code and 113 which is the legal duty to act commensurate with existing industry standards. And also 114, which deals with duty on builder to refrain from constructing housing he knows or should know would pose serious risk of physical harm. Also 115, which is duty of planning, coordinating and supervising the work. And 116, which is damages, which is the general measure of damages is the difference in the value of the building or house had it been properly constructed and the value of the house or building in its defective condition.

Then the other elements of the cost of repairs, depreciation, the value of the house used during the time in which the Plaintiff would necessarily be deprived of its use which we call loss of use. And incidental damages and consequential damages which I think I would probably -- I didn't realize until I read that out

loud just now, I probably need to add something and I have something that defines incidental and consequential damages. It is basically an actual damages instruction which is put that person close or near the position that they were in before the injury occurred.

MR. HASELDEN: There was no evidence as to depreciation.

THE COURT: I understand that. And you can -- they can only consider what's before them so they can't give a depreciation figure. I wouldn't allow them to argue it. I thought about redacting that language from the instruction. Is there any exception from the Plaintiff?

MR. MCCARTY: No, Your Honor. We are not arguing diminished value so if you want to take that out.

THE COURT: I think I will. I will instruct the general measure of damages in this case that may be shown by the Plaintiffs are such things as the cost of repairs and loss of use and incidental and consequential damages. But the only thing that based on the evidence they would be able to argue would be the repair and the loss of use.

I am going to use my standard charge on

punitive damages. I will get to that in a moment. I will then instruct as to what -- and as regards to negligence, I will instruct that both Plaintiffs are pursuing that because they are claiming common areas need to be repaired which belong to the HOA so they would be compensated for that and then they would be limited to only arguing in terms of the damages that would be responsible, in other words, the rotting beams. They say there are only five people that that happened to. So they would be limited in that regard and then the loss of use they claim everybody will have to move out, but that will be for you to argue. They don't have to because that's what your expert said.

Now, then moving on to breach of fiduciary duty, I'm going to use Anderson 171 which is the fiduciary duty definition and 172 which is disclosure of information. And then I will define what a breach would be. And then the damages on the breach of fiduciary duty which is one standing -- 179, one standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. In a breach of fiduciary duty case the Plaintiff is entitled to damages for harm

caused by the breach of the fiduciary duty owed to him or her. Damages for breach of fiduciary duty are those proximately resulting from the wrongful conduct of the Defendant.

And then I will -- what I had I was going to -- once I go through all of this I was going to tell you all I was crafting it, I came upstairs, what I planned to do on the express warranty because all the express warranty language we have deals with product liability. Really our charge is more -- there is no case law on it when it deals with an express written warranty on a house. All the case law really deals with is breach of express warranty in a product liability context.

But what I was going to do is basically what I think is expected is to give a general breach of contract because it's a contract kind of an explanation. And so what I had planned to do is simply indicate that you all had stipulated that there was an express written warranty in effect, and then explain what a breach of that is. And then damages that flow from the breach of express warranty, but that express warranty would only apply to those people that you claim had damages to

something other than the common elements of this property, which as I understand you have said is only five people.

MR. MANOS: Does Your Honor need the unit numbers?

THE COURT: No. You need to hold them to their responsibility. I won't instruct anything on the facts. That would imply that I am saying that there was a breach.

MR. MANOS: I got you.

THE COURT: That's for all you to argue. I am just saying in terms of argument I need them to be clear they can't argue that everybody is entitled to a breach because they indicated that there were only five units that had this damage under it which is the beam, supporting beam, because all of the other testimony goes to common elements, roofs, porches, railings, firewalls, all of those are common elements owned by the HOA. So you can't argue -- they don't have a duty to repair those things because they are common elements. They can't argue there was breach of warranty on that. Certainly there is no written warranty with the HOA. So their sole claim is only this fiduciary responsibility because they claim

that they were negligent in building it and they breached their fiduciary duty in turning it over to us. But at some point the Plaintiffs are going to have to elect, they can't have a double recovery, it's either a negligence, they failed to do it right and they owe us damages to fix it or they breached their fiduciary duty to us and they failed to tell us that they knew it had problems and they failed to leave enough funding to fix the problem. You don't get compensated twice for the same injury. Doesn't work that way. So at some point in time they are going to have to elect which recovery they want to pursue once we see what happens.

So that breach of warranty would only apply to those limited amount of people who claim under this class to have damages to other than common areas of these townhomes. Well -- I don't want the jury to be under the impression they can award punitive damages on everything. So I'm going to move the punitive damage instruction to the end of the negligence claim so that there's no confusion. That's the only claim that would be applicable to.

And so backtrack I guess a little. I

would give the standard punitive damage instruction which deals with the clear and convincing standard, the definition of willful, wanton and reckless behavior as well as define negligence per se and that while that is evidence of reckless, willful, wanton it is not conclusive. Then the other elements of punitive damages which I think we all know and I won't go back through.

Then I would just give a general instruction on the burden of proof -- general burden of proof on damages. Is there any exception to charging mitigation of damages from the Plaintiff?

MR. HAYES: Your Honor, I don't think there was any testimony in the record.

THE COURT: I am just asking because they asked it.

MR. HAYES: Yes, Your Honor, we would object to it because there has been no evidence about anything about mitigation of damages.

THE COURT: What evidence is there they failed to mitigate their damages?

MR. MANOS: I think generally, Your Honor, that our expert to the extent that there are issues out there, they can be addressed for

$2.9 million, not --

THE COURT: That's not a failure to mitigate. A failure to mitigate says there is a damage and you failed to fix it and by failing to fix it and take reasonable efforts to fix it it got worse.

MR. MANOS: Then also goes to maintenance issues that were brought up where they didn't -- as far as things that weren't painted and railings that rotted that could have been based on maintenance. It's thin, Your Honor, but it is there.

THE COURT: Who testified to that?

MR. MANOS: Mr. Lewis responded generally thinly to that issue.

THE COURT: You have to -- it is your burden on mitigation. They don't have a burden. It's an affirmative burden on you to prove they failed to mitigate. So you have to have a witness that said these things existed and not only did they exist, you failed to repair them when you could have repaired them the year before and by failing to do it you made it worse so now the cost to fix it is more and I shouldn't have to bear the burden to fix. Which is different than saying it's

broken, they say it cost this much to fix it, we can do it for less.

MR. MANOS: I will generally point to, and I will sit down very quickly, is that Mr. Lewis testified that there were sealants that should have been replaced that haven't been replaced which would certainly raise a circumstantial inference for the jury to say that damages that occurred out there occurred because the sealants were not appropriately maintained.

THE COURT: You are saying the HOA failed to do its duty in calking windows?

MR. MANOS: Absolutely. So it may be thin, but it is there and circumstantial and the jury should be able to decide rather than not having it.

THE COURT: Do you remember when he said that? My clerk and I don't remember when he said that.

MR. MANOS: A photo in his direct, actually one of Mr. Glick's photos showing the sealants and he discussed the sealants being old and having a cohesion failure and needing to be replaced. In his opinion sealants in this area can be replaced anywhere from five to eight years or

something like that to that effect.

THE COURT: Did he say they failed to do it? That that exacerbated the damages to the condo?

MR. MANOS: I am not going to suggest to Your Honor --

THE COURT: I think it has to rise to that level. I think you have to say that they had a duty as the HOA to maintain these common areas and every five to seven years they should have replaced this caulking, they should have had the building painted and by failing to do that it made the damages greater.

MR. MANOS: Point one other thing out?

THE COURT: Sure.

MR. MANOS: The restrictive covenants are in place. They charge the HOA with maintaining the common elements. Those were admitted without objections so we should be able to argue --

THE COURT: I didn't say they didn't have a duty to maintain. But you have to go beyond that. You have to say they failed to do it and ergo our damages are greater.

MR. MANOS: I guess my point would be Mr. Lewis said there were sealants on here that

were cracking, they were old, should have been replaced and people that were charged with replacing them are in evidence under the HOA restrictive covenants so we should be able to argue that.

THE COURT: I don't recall him saying that. But again I'm not positive. Yes, sir.

MR. HAYES: Your Honor, he never testified to that. He just pointed to some caulking and there was no evidence by any witness that said that the HOA or the homeowners failed to maintain their buildings. There is no evidence in the record by anybody that the HOA or the homeowners should have mitigated the damage in any way. There's no evidence of anything of that in the record. They could have elicited that testimony, but nobody ever said it. It would call for speculation on the jury. I think it is confusing. They could have put in. They never had anybody testify to that.

MR. MANOS: We would disagree with his characterization.

THE COURT: I'm going to go back and listen to it. I don't recall him ever saying that. He made a glancing reference to some caulking, but

he didn't connect the dots.

MR. MANOS: I understand.

THE COURT: I may instruct it. I don't know. I am going to think about it because it is your burden to prove by a preponderance of the evidence that they failed to do it. So I don't know. I will think about it.

MR. HASELDEN: Your Honor, it's been pointed out Mr. Lewis did say that when it comes to certain issues he can't tell whether it is because of original construction or lack of maintenance.

THE COURT: I will listen to it. Then I will give a general instruction regarding them being fair and impartial. I will also -- actually before that I'm going to give them a general instruction regarding multiple causes of action and I will tell them that the case has several different causes of action against the Defendants.

Then I will specify what those causes of action are and then I will instruct them that each one of them has separate and distinct elements, they have to decide each one separately on the evidence and the law applicable to it uninfluenced by their decision as to any other cause of action. And they can find a verdict for

or against the Plaintiffs or the Defendant on any or all of the causes of action.

I'm going to instruct them that if they should decide to award damages for any of the causes of action that they are to award the full measure of damages as they deem appropriate, if any, for each one separately. They should not make any attempt to apportion anything, that that's a matter of law for the Court and they will be asked to write a separate verdict. Because I have had problems with that in the past. Several causes and Plaintiffs ask for a certain amount of money and instead of them considering each cause of action they try to apportion that amount over the verdict forms and then after I have discharged the jury somebody wants me to have the jury come back and ask them questions. I figure it is better to head that off at the front end.

I will give them some language about being fair and impartial, then I will explain to them the forms of the verdict. Now, as regard to the Plaintiff's request for instructions No. 1 I will use my standard instruction, also that proposed instruction includes in appropriate comments on the fact which I would never instruct

which is a continued No. 1.

No. 2 I will use my standard language on stipulation. If you want to refer to any stipulations you may, that's fine, but I will not be publishing any stipulations because you all failed to do that in either of your cases in chief or in cross-examination. And the other thing that you all are referring to as a stipulation are exhibits that you entered into the record without objection. There's a difference.

So I am not going to be publishing any stipulations. You all should have done that in your cases. Generally when you publish a stipulation it's reduced to writing when you agree to an exhibit. That really isn't a stipulation. That just means you have agreed to it. It has come in and either one of you can argue it in any context that you feel appropriate.

I have denied the motion for directed verdict on negligence so I will not be instructing No. 3. Not instructing No. 4. It's an inappropriate charge on the facts because in essence it is telling me to tell the jury that Wieland has breached its fiduciary duty. It's not a neutral statement of the law.

No. 5 is inapplicable because I have denied the directed verdict on breach of fiduciary duty. No. 6 is cumulative to the Court's instruction on negligence of the builder as well as No. 7. You can argue all of those things, but I will use my standard instruction on builder negligence as well as No. 8. And you can argue No. 9, that's more argument than a statement of law. I'm going to instruct a corporation is responsible for the acts of its agents and employees. That language is also encompassed in the general instruction on builder negligence.

No. 10 is request for instruction from Judge Anderson that I am already going to use. No. 11 I think is cumulative as it talks in the general nature of negligence as well as No. 12 and 13. All of that language is already encompassed in the instructions that I am going to give on builder negligence. As well as No. 15, No. 16, No. 17, and No. 18 and to the extent that they really are all cumulative to one another.

No. 19, I may include an instruction that deals with negligence per se that indicates that violation of the statute could constitute evidence of negligence, but I think that's already

in here. We talk about building codes. Let me make sure that I'm accurate. 112 says cause of action of negligence will be available where a violation of a building code violates a legal duty for which a builder can be held liable for proximate cause. I could include the negligence per se language in there which simply says that it is evidence of negligence -- violation of -- really a violation of statute or common law duty is negligence per se. I have instructed ordinances before in the past and instructed that that's evidence of negligence. Is there any exception to instructing the negligence per se?

MR. MANOS: There is, Your Honor. I think under the South Carolina case law it should be just what Your Honor said, that a violation of a statute is evidence of negligence per se as opposed to --

THE COURT: That's what I would instruct.

MR. MANOS: Okay.

THE COURT: You don't have a problem with that.

MR. MANOS: Not evidence of.

THE COURT: Yes, it could be evidence

of negligence and the negligence per se instruction says should you find there was a violation that is evidence of negligence and you can hold the person accountable under a negligence theory.

MR. MANOS: Yes, Your Honor.

THE COURT: The additional language on punitive damages just says that it's evidence of willful, reckless and willful conduct. That's for the jury to sort out, but it is not necessarily evidence that they were -- that punitive damages should apply. I didn't artfully paraphrase that.

MR. HAYES: I believe I can do research over the weekend. I believe the law recently changed in regards to the damage where it used to be if you find punitive damages you have a duty to come back with damages.

THE COURT: There was a different standard of proof. You can come back with negligence and never come back with damages.

MR. HAYES: I apologize.

THE COURT: I understand.

MR. HAYES: I was trying to say there used to be a charge where it says if you do find that there have been -- needs to be punitive damages then you have a duty to come back with a

number and I think the statute has now changed where it says that is an incorrect charge. I apologize.

THE COURT: I won't say anything about numbers. The only thing I will is say if you find actual damages are appropriate then you may consider whether punitive damages are appropriate. It is a whole different burden of proof, stronger burden of proof, it's by clear and convincing evidence. Some of the things you can consider in determining whether there is clear and convincing evidence is whether there is willful, wanton conduct which is evidence of reckless, willful and wanton which is a violation of the statute, could constitute that it is evidence of, but it is not determinative of.

Then you go to other elements of punitive damages and there are some deficits because you all have not put in any evidence of their ability to pay which really to some extent is you fail to meet some of the elements of punitive damages so I don't even know that it would actually -- once the jury considers it I'm not certain -- because one of the things they have to consider is the ability to pay. There has been no evidence put

in the record of their net worth or otherwise. But that's for them to argue as a deficit of punitive damages. But I'm not aware of any changes -- I guess I am confused what you are saying.

MR. HAYES: I will withdraw my comments if I can clarify later.

THE COURT: If you can find something for me to read, it's so voluminous sometimes that I read what I need to at the moment so I may -- if it's not anything important to me at the moment I may not give it more than a glance.

MR. HAYES: I will clarify.

THE COURT: 20 is cumulative to 19 which is negligence per se. 21 is cumulative to 19 and 20 which is negligence per se. That would be an inappropriate comment. I am not going to give any more consideration to a building code than anything else. If you want to argue that that's fine, but I am not going to instruct that. That comes under the ambit of negligence per se in any event. I believe the statute that you cite merely delegates the duty of passing building codes to local municipalities. I don't think they really say.

MS. NOLAND: Your Honor, I know the

Kincaid case that's cited for requested charge 22 that they did find that building code adopted by --

THE COURT: It's negligence per se. I hadn't gotten to 22 yet. I am just saying 21.

MS. NOLAND: I apologize.

THE COURT: 22 is negligence per se. I'm going to use my standard instruction on negligence per se. 23 is damages. I will use my standard instruction on damages. 24 I'm going to use my standard instruction on damages. 25 I'm going to use my standard instruction that I said I was going to supplement the definition of consequential which is just a definition of actual damages which is put that person in the same position that they would have been had the incident not happened. But they are limited to what they can claim which is really loss of use and any damages these individual parties sustained that were not a part of the common area, HOA, to those areas that are common areas to repair them. 26 is cumulative to 25 and contained within my standard instruction on actual damages. 27 is depreciation which is the same requested charge from Judge Anderson where I redacted the language about depreciation. 28 I will use my standard

instruction on punitive damages which is 28, 29 and 30. Your instructions have been marked as a court exhibit.

The Defendant's request for instruction, on No. 1 I will use my standard instruction. No. 2 I use my standard instruction. No. 3, use my standard instruction. Is there any exception to instructing direct and circumstantial evidence from the Plaintiff?

MR. MCCARTY: Your Honor, that looks to be more a --

THE COURT: I would never use their instruction. I need to know if is there an objection to the concept of instructing direct and circumstantial evidence.

MR. MCCARTY: No.

THE COURT: I will use my standard instruction on direct and circumstantial evidence. No. 5 I have already talked about how stipulation instructions will be handled. No. 6 I will use my standard instruction on burden of proof as well as No. 7 which I haven't taken judicial notice of any fact so that would not be applicable.

No. 8 is preponderance of the evidence. I will use my standard instruction as well as No. 9

on credibility of witnesses and 10, expert witness testimony as well as No. 11. I will use my standard instruction. No. 12 is argument of counsel, I will use my standard instruction. Breach of fiduciary duty looks like it comes straight from Anderson which is No. 13. I will use Anderson's definition of breach of fiduciary duty which is 13. 14 is breach of implied warranty, workmanlike service, that was not pled. So I will not be instructing. I didn't have that on my list of items to instruct.

There is no separate cause of action for breach of implied warranties of workmanlike service. So do you want to withdraw that instruction or do you want the Court to instruct?

MR. HASELDEN: We withdraw it.

THE COURT: 15 is elements of negligent construction. I will use the standard instruction that I have already gone over which is that would be 15, 16, 17, 18, 19. Then we come to 20 which is comparative negligence which I haven't heard any evidence. Do you want to withdraw that as well?

MR. MANOS: One second, Your Honor. Your Honor, just incorporate my arguments on the mitigation of damages.

THE COURT: Mitigation is different than comparative negligence. Comparative negligence you have to establish they had a duty, in other words, they had a duty in building these premises and they had a duty in the construction of them. That's the only way comparative negligence would be applicable. They had a duty to your client, they breached that duty and damages flow from it. You can't establish that. Comparative negligence is just negligence flipped backwards.

In other words, you become the Plaintiff and they become the Defendant and you have to prove by a preponderance of the evidence they had a duty and they breached that duty. I have not heard any evidence of that.

MR. MANOS: Okay, Your Honor.

THE COURT: I assume there is no exception from the Plaintiff?

MR. HAYES: None, Your Honor.

THE COURT: No. 20 would be inapplicable and I will not instruct comparative negligence as there has been no evidence nor has the Plaintiff -- Defendant met their burden of proof regarding establishing comparative negligence. No. 21 is breach of the express

warranty. And I might incorporate some of this language into 21 within the language that I have told you all I'm crafting regarding express warranty which is similar to some of the language that we have in our charge books that really deal with -- all of our charges really are in the nature of product liability. Even in Judge Anderson's book they only deal with products liability. It doesn't have any language on breach of express warranty.

I think probably the assumption is that you really rely on contract law when you talk about breach of an express warranty. I might use that language. I might incorporate it somewhere. Is there any exception from the Plaintiff?

MS. NOLAND: No, Your Honor.

THE COURT: I think 22 is an inappropriate statement on the facts. I'm going to instruct them on liability and damages and I think it goes without saying that you can't have damages without liability. No. 23 is cumulative. I will use my standard instruction on ascertaining damages. They don't have to prove to a mathematical certainly, but they have to prove some element of their damages. 24 basically is almost

the same statement that Plaintiffs made and I have already indicated that I will use my standard instruction defining consequential damages are actual damages and what that means. I would have instructed them to have to prove their claims by a preponderance of the evidence, so that would be cumulative. Sort of an unnecessary statement to say that again. I will use my standard instruction on mitigation which is 25 which I also think that's a duplicate of one that was already submitted. No. 26 I will use my standard.

Is there any exceptions to the charges proposed from the Plaintiff?

MS. NOLAND: Your Honor, did you decide to enter Defendant's requested charge 25? The duty to mitigate damages?

THE COURT: Yes, I am probably going to instruct mitigation. I am telling you on a worst case scenario I'm going to instruct it, but I am going to use my standard instruction on mitigation if I instruct it. I've got to go back and see if he actually said it. My recollection is that he made a passing reference to the caulking in relation to some other things, but I don't want to go on my memory. I will go back and listen to it.

Any other exceptions or clarifications?

MS. NOLAND: No.

THE COURT: From the defense?

MR. MANOS: No exceptions. If I could just ask Your Honor, not to burden you with more, but you also if you are listening to some evidence about mitigation, I asked Mr. Moore questions about the duty of painting the unit after five to seven years.

THE COURT: You asked him how long a paint job would last. I don't know that you put it in terms of duty.

MR. MANOS: I certainly --

THE COURT: You asked him how long a paint job would last in Charleston. Which surprised me because if my paint lasts 15 years God bless his heart. I don't even live on the water. But I just think it wasn't in the context of them having a duty. It was more they were talking about -- you asked him how long. I don't think it was in the context of mitigation.

MR. MANOS: What I was just referring to was actually going to ask our repair estimator Mr. Moore what he would recommend because he was a general contractor. He says should be painted

probably every to five to seven years.

THE COURT: Somebody else said --

MR. MANOS: That was Mr. Glick.

THE COURT: I wish it was every 15 years.

MS. NOLAND: Your Honor, Plaintiff would submit that no evidence was put into the record that it wasn't painted or that it wasn't caulked.

THE COURT: I'm going to have to listen to it. It was a lot of testimony. As good as I would like to think my memory is, like when I go to a store and I think something is a shade of green and when I come home it's 20 shades different. I need to listen to it.

If you all give me a moment to look at the verdict forms because I haven't yet. And then I will print them so you all can look at them. The other thing I wanted to ask is do you all want all of these individual Plaintiffs listed that still remain or do you all want to just -- I guess you have. We will remove all the folks who are no longer there. But it wouldn't list all of the Plaintiffs which is about 37 of them. And we would name all of the Wieland entities. You all go to

the restroom.

(Brief pause.)

THE COURT: We need to do a little bit of scribner's work on these verdict forms because we need to redact all of the Plaintiffs who have settled out and then we need to make sure they are accurate. So I will just tell you and then I will let you see them physically on Monday. It will take us a few minutes to get it figured out, but in general there will be a verdict form for the individual class Plaintiffs as to the negligence and it will simply read we the jury unanimously find for the Plaintiffs in the amount of blank dollars actual damages or we the jury unanimously find for the Plaintiffs in the amount of blank dollars actual damages and punitive damages or we the jury unanimously find for the Defendants with a place for them to sign and date the verdict form.

Then likewise for the warranty it will say as to the cause of action for breach of warranty we the jury unanimously find for Plaintiffs in the amount of blank dollars actual damages or we the jury unanimously find for the Defendants. And then for the HOA to simply read as to the negligence cause of action we the jury

unanimously find for the Plaintiff in the amount of blank dollars actual damages or the option for actual and punitive or for the Defendants. Then for the cause of action on breach of the fiduciary duty it will read the same as to the cause of action for breach of fiduciary duty. We unanimously find for the Plaintiff in the amount of blank dollars actual damages or we find for the Defendant again with a place for the foreperson to sign and date each form with instructions to notify the bailiff they have reached a unanimous verdict.

Is there any exceptions to the forms of the verdict as I have published them to you? Anything I need to include that has not been included from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. HASELDEN: Your Honor, could we have a few minutes?

THE COURT: Tell me what it is you are concerned about. I don't know any other way it would read. Because you have to have separate forms for separate causes of action. They are not combined because you have separate elements of damages. They can only be compensated as an HOA

for common elements. Plaintiffs can only be compensated for loss of use and for these individual condos and then it's a class action so you can't separate them out. Then only the breach of fiduciary duty would be applicable to the HOA. Tell me what your consternation is so I can address it.

MR. HASELDEN: I guess there needs to be some reference to the class warranty claim only goes to five particular --

THE COURT: No, they are going to argue that. They are limited in argument. By ergo they can only award damages to that. Loss of use. So either -- and it's not a situation where -- they are either going to believe their version of it or they are going to believe your version of it or they are going to split the baby and give some amount -- decide that it might be a little less or might be a little more. So the loss of use figure is a definite figure. You all say there is no loss of use at all. And the amount to fix under the houses is a finite figure. Either they are going to believe that some portion of it or no portion of it is due to those individuals. So there's no real mystery about that. So really the issue you are

concerned about is how they argue it. They certainly can't argue all 200 some people are entitled to have the beams under house fixed.

MR. MANOS: May I look at something?

THE COURT: Sure.

(Off-the-record conference.)

MR. MANOS: Your Honor, let me preface this with may go to argument, I'm not sure, but I want to bring it to Your Honor's attention if it has any effect on the verdict forms or otherwise on the charges to the jury.

I am relatively confident that Mr. Moore did not give any testimony on the cost of the repair to the Glulam beams under the five units and I don't believe that --

THE COURT: The other gentleman did, though.

MR. MANOS: I know our client didn't.

THE COURT: Oh, yeah. Wait a minute.

MR. MCCARTY: Mr. Mease.

THE COURT: I thought Mr. Mease did.

MR. MANOS: Not as to liability, Your Honor. Mr. Mease certainly talked about it as to liability. I am talking about as to cost of repair.

THE COURT: I'm not sure that's accurate. He is jumping up so go ahead and finish what you are saying.

MR. MANOS: If I am wrong I apologize for delaying this matter, but I am relatively confident, I don't think Mr. Moore included a line item for Glulam repair in the repair estimate which is Exhibit 35. If I am wrong, Keith, correct me.

MR. MCCARTY: Your Honor, on the exhibit that's in evidence which is the summary of his repairs on line item No. 12 and No. 13 you have the trolly system and the five floor beams. The trolly system is to put them in.

MR. MANOS: Sorry to waste the Court's time.

THE COURT: I thought he did. I just --

MR. MANOS: Sorry.

MR. MCCARTY: There are a lot of lines.

THE COURT: Okay. So we are fine with the verdict forms. Of course I'm going to let you see them. I just don't want you waiting here while we are fiddling with them. Not a good use of time and I'm hungry. It's 1:30.

Is there anything else before we break

for the day from the Plaintiff?

MR. MCCARTY: No.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: If you all could go over the exhibits with the court reporter before you leave. Again I know everybody is hungry. Better safe than sorry. Make sure that every exhibit, that she has them before you all leave. Then have a great evening. I will see you in the morning at 9:30.

(These proceedings were adjourned at 1:38 p.m., January 27, 2015, 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 30, 2017
CHARLESTON, SC

VOLUME 6 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
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Attorneys for the Defendants

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

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(The following proceedings were held January 30, 2017, Charleston County, South Carolina, @ 9:41 a.m.)

THE COURT: Before we begin can you tell me again the building codes that you all stipulated to were in effect at the time of the building of Waverly?

MS. NOLAND: Your Honor, the 2000, 2003 and 2006 codes.

THE COURT: Tell me again.

MS. NOLAND: 2000, 2003 and 2006 International Residential codes.

THE COURT: Now, as I understand it the Plaintiff now wishes to withdraw some of its causes of action; is that correct?

MS. NOLAND: Yes, Your Honor, that's correct.

THE COURT: Which causes of action are those?

MS. NOLAND: We are going to withdraw the breach of contract as it relates to the homeowners.

THE COURT: You are talking about the warranties?

MS. NOLAND: Yes, ma'am. And the

breach of the fiduciary duty as it relates to the HOA; therefore, we would be proceeding with regards to the negligence claims on --

THE COURT: The HOA and the owners only?

MS. NOLAND: Yes, Your Honor.

THE COURT: If you will just give me a moment I realized -- I don't know whether it was red ink or something got on one of the verdict forms. I need to have it reprinted so I appreciate the patience. If you could, however, indulge me for a moment and make sure that -- I'm going to give you each the same sheet of paper, if -- Mr. Denby's name is S-T-E-P-H-E-N.

MR. MCCARTY: Correct.

THE COURT: And we need to correct that as well. I'm going to write that in so just excuse my handwriting, but I need to make sure that these are the correct remaining individual Defendants -- I mean Plaintiffs, rather, I apologize. If you could indulge me by giving one of those to counsel. I had a list and I need to make sure that my list is accurate.

(Brief pause.)

MR. MCCARTY: Your Honor, I have my --

THE COURT: Did you strike through who still was not remaining?

MR. MCCARTY: Yes.

THE COURT: You can just give it to my law clerk. Why don't y'all reconcile before you do that and give her one. That was the -- those were the people that we had left after that was given to us at jury selection and I apologize. We really should have verified that on Friday instead of waiting until now to do that.

(Off-the-record conference.)

MR. MCCARTY: May we approach, Your Honor?

THE COURT: Yes. As long as you all agree we don't have to discuss anything. Just give it to my law clerk. Do you have a joint list?

MR. MCCARTY: We both agreed.

MR. HASELDEN: I may want to show her.

THE COURT: That's fine.

(Off-the-record conference.)

THE COURT: I removed all language from the instructions that related to fiduciary duty as well as breach of express warranty. So I will then only instruct the jury as to the elements of builder negligence, and I am going to instruct

within the -- I believe we had mentioned that on Friday, but I just need to make sure that you all were clear that I am going to be defining proximate cause. I don't think I can just leave that term out there without defining it for the jury which, of course, we know is legal cause and foreseeability. Well, causation and legal cause which boils down to the definitions of both of those terms.

And I will also instruct on the general duty of the builder of the general contractor to exercise. I think we already discussed this on Friday. I want to be clear I had made it clear on their duty to supervise and that the general contractor is responsible for the negligence of the subcontractors if it could be proven that they failed to supervise the construction of the project and that that was a proximate cause of the damages.

I will also after thinking about it a little bit more instruct regarding stipulation and that's why I asked regarding which building codes you all had stipulated to and I will instruct them that a stipulation is an agreement, that it requires no further proof and that you all have stipulated that the 2000, 2003 and 2006 building

codes were the codes that govern the construction of the Waverly at Hamlin Plantation buildings.

Mr. Hayes, over the weekend my clerk and I both researched the last advance sheets for the last year and we were not able to discern any change in the elements of punitive damages; therefore, I will instruct punitive damages as I indicated during the charge conference. I think I told you all I was going to charge duty to mitigate, and I still will instruct even though some of the causes of action have been withdrawn. I am going to instruct there are multiple causes of action meaning the difference between a HOA and the class representatives and they are not to make any attempt to apportion damages. Are there any exceptions to those addendums or clarifications from the Plaintiff?

MS. NOLAND: No, Your Honor.

THE COURT: From the defense?

MR. HASELDEN: No, Your Honor.

THE COURT: Now, did you make sure all the exhibits were in place? I assume you all did that on Friday?

MR. HAYES: Yes, Your Honor.

THE COURT: And in the interest of

time, since my law clerk needs to redact a lot of names from the verdict forms, what I will do is we will push ahead with arguments and then we will take a break and I will let you look at the verdict forms before I show them to the jury. Is there any exception from the Plaintiff?

MR. HAYES: None, Your Honor.

THE COURT: From the defense?

MR. MANOS: None, Your Honor.

THE COURT: Is Plaintiff ready to proceed?

MR. HAYES: Yes Your Honor.

THE COURT: Defense ready to proceed?

MR. HASELDEN: Yes, ma'am.

THE COURT: Have you tested all the technology to make sure you didn't need any help with anything?

MR. HASELDEN: Test this real quickly. Perfect, yes, ma'am.

THE COURT: Good to go. And it is Monday so we had a couple of late jurors so they should all be settled by now. All right. I assume the Defendants didn't have any exception to the causes of action that were withdrawn?

MR. HASELDEN: No, Your Honor.

THE COURT: I realize I neglected to ask the question. I needed to make the record clear.

(Thereupon the jury entered the courtroom at 10:02 a.m.)

THE COURT: You may be seated. Good morning, ladies and gentlemen. Hope everybody had a pleasant morning thus far and had a good weekend. As I indicated on Thursday, both the Plaintiff and the defense have rested their cases. We have now reached the stage where we will have closing argument and instruction. I have ordered your lunch and so we anticipate and I have asked the clerk to have that here by noon. I just tell you that for your planning purposes. I will take appropriate breaks as necessary during the process. I would ask that you give counsel your undivided attention. You may proceed.

MR. MCCARTY: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MCCARTY: Good morning, ladies and gentlemen. Talked to you seven days ago, right? Been a while, thanks. We appreciate it. Counsel, both sides appreciate this. This is a part of this that is not fun and we understand that and we

appreciate your attention and appreciate the seriousness that you bring to this trial.

I was getting ready for this thing trying to figure out how I wanted to approach it and came across a quote Winston Churchill made about one of his political adversaries. He said you can always count on that gentleman to do the right thing after he has exhausted every other possibility. And I thought that's exactly what we have here today with John Wieland. John Wieland had the opportunity to build these homes correctly in the first place. If they had done so we wouldn't be here. Once they were informed of these problems if they would have fixed them we wouldn't be here. After suit was filed almost four years ago if they would have fixed them at that point we wouldn't be here.

Between that four-year-period and up to today, they had the chance to do the right thing, and they chose not to do it. Now that their fate is in your hands they open up their trial by saying look, we are not perfect, we made some mistakes out there, but it's not that bad. We don't want you to hit us too bad. In other words, we don't want to fix homes. We want to patch them.

My client's position has never changed. They want Wieland to do the right thing, give them what they paid for.

Up there at the Waverly project as you can see it is a huge project. There are 22 buildings in that project. It's like a small college campus. Those buildings house up to five families. There's 105 separate homes in those units. We're talking a big construction project here. And it's a big project that's going to require a big fix.

Remember what I told you five days ago, John Wieland Homes bought the land to put these houses on, they designed them, they built them, they hired the subcontractors to do some work on it and supervised those subcontractors. And then after they finished the homes, after they finished the homes, they sold them to our homeowners. You heard one of their employees testify yesterday he said this was a good project for us. I would argue to you that a good project for them means they made money on it.

I also told you that you would hear from experts that the homeowners had to hire. And you did, you heard from Myles Glick, Russ Mease,

Gary Moore. Myles and Russ told you what was wrong with these buildings. They went over them. They figured out what was wrong with them. They touched a lot of buildings. These are the homes they inspected. They did not cut holes in all these because it is expensive and number two, they did not have to. But they went over and they inspected all of the homes there. Gary Moore, the contractor and the estimator, told you how much it was going to cost to fix these homes. And Mr. De Santis told you how much money it was going to cost the homeowners to have to move out of their home for that four-month-period to get this construction done.

You heard testimony about obvious defects that were easy to see and latent defects that you couldn't see. I'm going to show you some pictures here now that you have seen earlier this week. I want to take a look at them one more time as we go through them.

Would you start them. This is a home completed in 2006. These are the defects that we find on it now. There's the famous pen that you see. I am actually taking notes with it today. Run through these quickly. This is 2852 Treadwell,

completed 2007.

(Displaying pictures.)

Next home. There are the problems with it. Life safety issues, siding, windows and door trim, window selection, insulation, water intrusion, the brick steps, the picket fences, the entry steps, the roof felt, the HVAC duct installation, support beams and numerous building code violations. The moisture readings. Six different areas high moisture content in every one of them. It's not an accident. Glulam beams that you saw and heard so much about rotting out from under the home in the one building. Here you see again rotting wood on front of these homes. These are life safety issues. Someone comes to your home, puts their hand on the rail you have got a problem.

The firewalls. Life safety issue. These things can't -- firewall has to be correct. That's not something that you can patch, not something that you want to take a chance on because people when fires break out if they break out when people are asleep then bad things happen. It is not something to play around with and it is not something to patch. Go ahead.

The rusting nails. Myles testified that these were the wrong kind of nails. They were the less expensive nails. They were reactive with the wood they are in and cause corrosion and cause rust and cause deterioration that you see there. Building code violations all the way through. Failing trim. Not taking the time to not cut through the vapor barrier. That's -- there is no excuse for that.

Move forward. There's some of the rot and deterioration that you see. This is some of the problems that have seeped into the buildings that are coming in. Here's the pen again.

(Displaying pictures.)

All right. That's good right there. Hold it with that last one. Myles Glick told you the major code violations that existed on these buildings. It is the responsibility of Weiland to insure these buildings were built correctly and how they failed to do so. He testified as to the progressive nature of these problems. They are getting worse over time. He says you can't have a sick building. In this case the building cannot be maintained. Remember his words. If you have a disease and you don't cure it it will only get

worse. These buildings will only get worse. Russ Mease told us about the life safety issues with the homes, the violation of state statute and various codes.

Remember what he said about the supervision of subcontractors? You got to keep an eye on it. He quoted President Reagan. He said trust but verify. That's what a general contractor is there do to. That's what Wieland was there to do because they are taking these houses after they have built them and they are selling them to homeowners.

Gary Moore told you how much it was going to take to fix the problem at Waverly, the difficulty involved. I would argue to you that it is much harder to fix a building than it is to build it from the ground up. Bud De Santis presented uncontroverted testimony the cost the homeowners would incur should they have to move out of their home.

Finally, Professor Freeman testified extensively about the responsibilities that Weiland had to their homeowners. The Defendant's case. Three words. Not that bad. You heard Mr. Lewis talk to you. He says really nothing wrong with

these buildings, but they still need millions of dollars of repairs. Remember his testimony where there was no moisture problems in the house, then when we showed him moisture readings he said well, that moisture meter may not have been working for that 40 percent, 38 percent, 43 percent, 34 percent. I submit to you that the moisture meter was probably working good. There is moisture in these homes.

Mr. Lewis's testimony. I don't remember seeing any test cuts that he did. The reverse lapping he talked about, there was actually no problem but still needed to be fixed. As far as he could tell from looking at the ground, the shingles have no problems other than just on the edges. Ladies and gentlemen, you have spent as much time on those roofs as Mr. Lewis has.

The siding can be nailed up without putting it into the studs. I submit to you, argue to you that one thing that he is ignoring when he said that is we live in a hurricane zone.

Let's look at some of the product on these buildings. Rotten wood and the rusty nails. These are fine according to Mr. Lewis. Remember how he described them? He said rot is not rot. It

is mischievous activity. He said that problem areas that need to be fixed don't need to be fixed, they need to be enhanced. He said the building code was advisory. Just a guideline. Finally he said these nails are just fine. That they are performing.

Finally, he blames some of the projects on the subcontractors for not finishing their work, obviously forgetting that John Wieland has to supervise these subcontractors. In the end, however, he described fixes for roofs, the attics, exterior walls, dormer on the stairs.

Now let's talk about the testimony of Mr. Watkins. I will tell you right now Mr. Watkins is a good contractor. He does work all over the place; he's reputable just like Mr. Moore.

But what his testimony -- his testimony is important for what he will not fix and he will not touch. What he will not say and what he will do. Remember he testified to you that this is a targeted repair. I submit to you a targeted repair is the same thing as a patch.

He refuses to warrant anything he does not touch and it is clear that he will not be touching everything. If you take the testimony of

Mr. Lewis regarding his scope of work and the testimony of Mr. Watkins regarding his estimate, what you basically have when you look at it is just a promise to go out there and take a look at the place and do something in the future. He testified no less than nine times, his estimate includes the word inspection. He testified that the top of his estimate says preliminary draft. Not a draft, preliminary draft. Decision to kind of start work.

Even if you take his repairs at face value, they are nothing more than a patch. They're not the correctly built homes that the Waverly homeowners thought they were getting. Patch roofs, patch stairs. The homeowners don't have the luxury of the future. Today is their only chance. This is the only chance they get to make Weiland do what is right. They have no second bite at the apple. They can't come back into court and ask you to give them more money. This is it.

When you get back to the jury room you've got to balance the experts. Who do we believe, the defense experts or the Plaintiffs' experts? I will submit to you one important difference in the experts. The experts for the Waverly homeowners are responsible to the Waverly

homeowners for telling them what is wrong with their buildings and how much it is going to cost to fix it. They have the responsibility for that. The defense experts don't have a responsibility to anyone.

Finally, the Defendant's case, you heard two former Weiland employees who testified about the high quality standard of Wieland and then proceeded to blame the problems on the subcontractors that they supervised. But they also let you in on the truth. Wieland employees could earn bonuses by getting the buildings done on or ahead of schedule. They said wait a minute. Customer satisfaction was tantamount, but think about that testimony. Think about what that tells you. Russ Mease showed you the crawl spaces, the Glulam beams, the firewalls, window installation. General contractor Gary Moore told us the repair scope is $18,493,000. It is a lot of money. But as I told you the start of this thing, this is a huge project. It is 23 buildings, 23 big buildings. There's 105 families that live in this project. That's what it is going to take. Like we said, we can't come back and ask for more money. We have to make sure this is right.

The exhibit that you will take back with you into the jury room for the estimate to fix for the homeowners, for Mr. Moore the one thing you won't see on it, inspections. You see line items, repairs actually need to be done, decisions that actually need to be made.

Bud De Santis, loss of use estimate, you have to move out of your townhome, your home for four months. This is what it is going to cost. The individual homeowners have to bear that cost. That's part of the class action. Total amount of the actual damages we have is $20,252,000 and change. That's what it will take to fix it. That's what we are asking you to take a look at today and decide if that's fair.

You have heard testimony today or last week that Wieland has been reckless in its dealing with its homeowners. You have heard they violated state statutes and building codes. If you decide this type of conduct needs to be addressed, then the message to send to the Defendant that this behavior is not acceptable, the judge is going to instruct you that you are able to award punitive damages in excess of this amount if you desire.

We ask that you do one thing.

Recognize what's going on here. Give great consideration to what you have heard. Make Wieland do what they should have done in the first place which is sell these people quality homes. Thank you.

THE COURT: You may proceed when you are ready.

MR. HASELDEN: Please the Court. My wife and I have a five-year-old daughter named Harper. She is actually five and a third she reminded me yesterday. And as anybody who has a child knows you spend a lot of time teaching them right from wrong. My daughter has been watching dad come to work on weekends, not be there to play with her, and we have done the best job we could to explain what was going on. And for a five-and-third-year-old she has a pretty good grasp on what's going on. Friday night at the dinner table she looked up at me with big blue eyes and she says daddy, who is right, your team or the other team?

Ladies and gentlemen of the jury, it would have been wrong of us to come in and tell you there's absolutely nothing wrong at Waverly. The day Mr. Parker hired Mr. Manos, myself and Mr.

Novack I knew I was going to come in here and tell you that.

Pictures are obvious. There are some issues that need to be addressed. It would have been wrong of us to not hire somebody with the experience of Skip Lewis to come in here and tell you what actually needs to be fixed, how to fix it and what he would recommend to fix this work. Mr. Coffman, the same, came in very targeted. I was at the house. I saw the beams. It's what needs to be done. It would have been wrong of us not to bring in JR Watkins, the guy that does this every single day of his life, and most importantly he was one of Mr. Glick's picks for someone to come in and do this work. Not Mr. Moore, no, our repair contractor, JR Watkins.

It is wrong to say that Weiland has delayed four years because of this litigation. You sat here for a week and you have heard there's a major difference in philosophies of what needs to be done at these townhomes between Plaintiffs' attorneys and Weiland. It's wrong to say that these townhomes need to be stripped to their core and reclad to the tune of $176,000 per unit. It's $176,000 worth of shingles, brick steps, windows

and siding.

My late mother used to have a saying that went like this: Don't throw the baby out with the bath water. Everybody's mother or grandmother said the same thing I'm sure at some point in your life.

What Mr. Glick wants to do is throw the baby out with the bath water, the bathtub, the sink, the entire bathroom, maybe the entire house. Mr. Glick says these are sick buildings, but they have never not been occupied since the day they were built and they continue to sell.

Let's talk about the site. Mr. Glick says all the siding has to come off. Millions of dollars worth of siding. Why? He gave you two reasons. The siding is not nailed into -- the siding is not supposed to be nailed into the sheathing behind it. In other words, you can't add nails to it.

Ladies and gentlemen, the company that brought HardiePlank to the market, James Hardie Company, they invested millions, maybe a billion dollars, in the last 30 years developing this product bringing it to market continuing to refine. And they say two things. What are they? You can

nail it to the sheathing and you can add nails. Do we really believe that James Hardie Company would put that out there if they wouldn't stand behind that? That's the manufacturer, the distributor of the product, but Mr. Glick says let's tear it all off. I don't care what James Hardie says, we got to tear it all off. Got to. Why? Because it might blow off. It's been 11 years in some cases. Eleven years. Did you hear any witness say that any siding had blown off? Not one.

Now, I don't know what Mr. Glick lived through, but I didn't vacate for five days because of a little wind. I left because of a hurricane. I drove back on Sunday the back way because 26 was clogged and I drove through Holly Hill, Goose Creek, that way and I saw massive trees uprooted. I saw houses with the roofs blown off and I saw storefronts blown in.

So I don't know what Mr. Glick lived through. The National Weather Service called it a hurricane. The guy on TV standing in the middle of a flood downtown said it was a hurricane. I lived through a hurricane. None of the siding came off. Not one piece, never heard a word about it, not a bit.

Let's talk about steps. Mr. Glick says here are pictures of the steps. Look, they're out of tolerance. I measured three and I walked up some others. They felt the same. What? That's an expert? I walked up and they felt the same. We showed you a set that was perfect, pristine, but Mr. Glick says let's tear them all off. They felt the same, tear them off, 105 sets of steps.

The windows. Not one person came in here and said they had a window leak. One window out of 105 units out a thousand windows that are in these units. There is some leak beneath it. Mr. Glick didn't do any investigation to find out why was it leaking. But Mr. Glick says oh, no, we got to take all these windows out. All of them. There goes the baby with the bath water again.

Mr. Mease, nice guy. Liked him. Enjoyed his testimony. Mr. Mease says we got to tear all the roofs off. Why, Mr. Mease? Because I saw 23 shingles I didn't like the way they were nailed. Twenty-three. Let's see. There is probably 50,000 shingles on these buildings. Twenty-three. And at the end of testimony of Mr. Mease it was like talking to my daughter again. Harper, did you break that? Yes, dad, but. I

asked him point blank. I said Mr. Mease, isn't it true that 100 percent of the cases you work on, the projects you work on you recommend a total reclad? And how did Mr. Mease answer the question? Yes, but. Then we get to Mr. Moore. Day before the case started Mr. Moore lowered his estimate from 28 million to 18 million. The day before. Why? He is not getting the job. He can't do the job. His company cannot do the job. His company would have to have a little help from friends. Actually, they need a lot of help from their friends because they can't do the job at all.

Mr. Moore's estimate includes various layers that when Mr. Manos asked him about layers of management, layers of profit, layers of overhead, when you add them all up it comes to 54 percent markup, 54 percent.

Here's one issue that describes the difference between Mr. Moore's calculations and ours. The Glulams. Not disputing they're there. Mr. Coffman said they are there, they need to be fixed. He told you how to fix them. Mr. Moore said it is going to cost $331,000 to fix the Glulams on those five units. Mr. Watkins, 110,000. Mr. Watkins does this every day. He's a

hand-picked guy by Myles Glick, their expert. $110,000.

Kind of makes you wonder what else in Mr. Moore's estimate is jacked up? And I use the word jacked up because that's what it is. And, again, Mr. Moore said $175,000 per unit. Don't have a power point. There it is. There is the number. $176,000 per unit. That buys a lot of windows, buys a lot of brick steps, buys a lot of siding that doesn't need to come off. Buys a lot of roofs that have done their job for 11 years. No shingles blew off ever. Not one scrap of testimony about it.

Then we get to Mr. De Santis and Mr. De Santis admitted candidly that if the homeowners don't have to move out his testimony is about as useful as a milk bucket under a bull. He said if they don't have to move out there is no number. I made a mark through it.

What's really key about that is that the Plaintiffs, none of their experts said these people had to move out, much less for six months, none of them.

And I cannot walk off without talking about Mr. Freeman for a minute. God love him. Mr.

Freeman said he wants to tell you how bad it was, just awful. I asked him three times, Mr. Freeman, point to one piece of evidence that proves that Wieland knew in 2009 when they turned the board over that it was anything wrong with these buildings. Three times I asked him. He did not answer it at all.

But importantly when I said, Mr. Freeman, don't you think it would have been important, you as an expert, as an expert, to have read some of the Weiland people's point of view on this? And his answer was no, I got all the information I needed from Plaintiffs' attorneys. I submit to you that the Plaintiffs' repair scope is excessive, what needs to be done in their estimation is excessive. And I submit to you that Mr. Moore's estimate just isn't correct. He can't do the job. He is really high on everything. You will get a chance to review his estimate. But they want 175,000 for siding that doesn't need to come off according to the manufacturer, windows that don't leak, roofs that don't leak and brick steps that don't feel right to Mr. Glick. Those numbers are being driven by people trying to make money off this litigation.

Now, let's look at Weiland experts. Mr. Lewis came up here. He didn't say he was patching anything. I saw red everywhere on all those areas that actually need to be addressed. He didn't sugarcoat it. He didn't come up here and say, oh, this is all cosmetic. He said we are going to touch the railings that need to be fixed, 75 percent of them. Touch the brick steps, he estimated maybe 50 percent. He said 50 percent of the handrails. Fifty percent of the flat roofs, touch the roof edges. And he said all that despite the fact there's not evidence of system-wide failure at Waverly of these elements. Mr. Coffman gets up, like I said, very pointed. This is what I saw. I crawled under there. This is what needs to be done. Let's fix it.

Then we get to Mr. Watkins. Mr. Watkins said I do this every day. I am doing it over in Mira Vista. I can do this job. My company will sign a contract tomorrow. We will fix what needs to be fixed. We will stand behind it. He says this work can be done for $2.89 million. Remember, Mr. Glick didn't say Mr. Moore's company could do the work. He said JR Watkins. Said by name. We asked him twice.

It is very important to remember what Mr. Watkins said was I will do the work and these people won't have to move out. Think about that. People get new siding, new roofs, new windows every day and they don't move out, much less for six months. Goes on every single day. Going on somewhere in Charleston today.

We put up Mr. Butler and Mr. Parker. They don't work for Wieland anymore. They don't. They came here because they wanted to because they believe in what they did and what they built at Waverly. What they told you was we didn't see any problems. No one raised any issues to us. We are very proud of what we did there. Yes, builders got bonuses if they met cycle time. They weren't punished if they didn't. But more importantly, the majority of what they were bonused for was customer satisfaction. That was what drove the construction at Waverly.

Here's what I really wish. I wish that on Thursday when we put our experts up Mr. Lewis, Mr. Coffman, JR Watkins and the two representatives from Weiland, the former employees, I wish there would have been one homeowner here to hear any of it. They don't get to hear it from Mr. Lewis, Mr.

Coffman or JR Watkins. They weren't here. Not one. Throughout the trial there has been one homeowner here and he doesn't even own this unit anymore. There's 105 units. One homeowner the entire week.

I'm going to sit down and Keith will get up and talk to you again. And then the judge is going to instruct on the law. And then the case is going to be in your hands.

What I will ask you to do similar to what Keith asked is consider evidence in this case, consider the motives of the witnesses and who testified here this week, use your common sense and follow the law and I am pretty sure if you do all that at the end of the day you will do the right thing. And the right thing is not $175,000 per unit for siding that does not to be fixed, for roofs that are doing their job, windows that are not doing their jobs, brick steps, some of which don't feel right to Mr. Glick.

And I tell you quite frankly I hope to get to go home tonight and tell Harper that dad's team was right. Thank you very much.

THE COURT: You may proceed.

MR. MCCARTY: Remember what I said

Weiland's response is? Not that bad? That's what you heard. It is not that bad. I have to address one thing right away. That is the homeowners, former homeowners, have been in and out of this courtroom all week. Might take a little bit of umbrage with Mr. Haselden's assertion they weren't here. They have been in and out all week. I am sorry that counsel didn't see them, but they were here.

With regard to trying make money off this lawsuit, I can't find any way that makes any sense that a large group of homeowners would get together and decide to institute litigation and hire and pay for experts and wait four years to try to make money off a lawsuit when there were all of these funds, if we collect any, have to go to the fixing of these homes. No profit to be made. Has to go to fix it.

Some of the stuff Mr. Haselden told you, I think you probably heard testimony different. I don't remember hearing words saying he couldn't do the job. He's a licensed general contractor. I remember him saying I would probably collect together a company or two to finish the job. That's not unusual. Any time you have got a

large job you see two or three contractors out there.

Secondly, with regards to Mr. Watkins qualifications, they are good. So are Mr. Moore's. Again, I think the comments were a little bit skewed. Mr. Glick said sure, he would consider Mr. Watkins to do this job. He never said he would not consider. Mr. Moore worked in and around the area. He testified to that.

With regards to the HardiePlank, the windows, again, not that bad. Fact of the matter is all the windows were put in incorrectly. Pictures don't lie. That's where moisture is getting around the windows. You pull the window out and put it back in, doesn't work. Doesn't work. You have got to replace them. And frankly, the whole basis of this case is that's not what they bought. That's not what the homeowners bought. They bought a new home. They bought something that was supposed to be built correctly. Not a patch job. Not a fix job.

You heard testimony regarding the supervision cost and the estimate. I submit to you had there been supervision done by Wieland on this job we wouldn't be here today. If they had looked

at their stuff there wouldn't be any problems.

If what needs to be done needed to be done when this suit was filed, why was it not done? Why has Weiland not admitted that they need to fix these things and gone forward? My dad was a -- he fought in World War II. He was in the Army Air Corps and he was the in flight engineer on a bomber over Germany. The in flight engineer had to fix things that went wrong in flight. It was part of the job.

And so one day I was somewhere watching a movie, one of these movies where all the pilots come to this big room and there's a big map up and they are telling them where they are to fly. So I jokingly said hey, dad, where were you sitting in that room. He said I wasn't in that room. I said what do you mean? I was out on the plane. I had to make sure that everything was right on that plane. I said you had ground crew, you had people that took care of that stuff. He said no, no. He said look, I had to take ownership of that plane. I had a responsibility to people to make sure that plane was right.

That's what we are asking Weiland to do here, take ownership of this. Admit finally after

all this time that you need to make these houses right, you need to give these homeowners what they thought they were buying in the first place. Take a look at the damages, listen to the testimony. Remember I told you this is not an easy job that you've got. Justice is hard. Use your common sense, come to a fair result. Thank you.

THE COURT: Mr. Foreman, ladies and gentlemen, I'm going to give you a brief restroom break before I begin instructions. During the break please do not discuss the case. Please leave your note pads on your seats. As soon as you are done with refreshing yourselves please let the bailiffs know and we will resume with instruction.

(Thereupon, the jury exited the courtroom at 10:41 a.m.)

THE COURT: You may be seated. If you can approach, I had the corrected first page of the verdict form printed so you can look at it. Just double check and make sure those are the remaining party Plaintiffs. After you have done that you can look at the verdict forms themselves.

MR. HASELDEN: I think we are in agreement with that, Your Honor.

THE COURT: You can hold on to that.

You will have an opportunity to review that. Are those the correct remaining Plaintiffs?

MR. HAYES: Yes, Your Honor.

MR. HASELDEN: Yes, Your Honor.

THE COURT: Now, I hate to ask you to come up again. I need y'all to look at the verdict forms and see if there are any exceptions to the form of the verdict.

(Off-the-record conference.)

THE COURT: Any exceptions to the form of the verdict from the Plaintiff?

MR. MCCARTY: None.

THE COURT: From the defense?

MR. HASELDEN: No, Your Honor.

THE COURT: Okay. I'm thinking the jury will probably take another five minutes, so you might want to use this as well.

(A recess transpired.)

MS. NOLAND: Your Honor, Mr. Manos and I agreed with Exhibit 14 that is in evidence that we would just put in photos and it looks like there's a portion of an inspection report. I believe Defendants have agreed to --

MR. MANOS: Happy to take it out.

THE COURT: Let the court reporter know

what needs to be done.

MS. NOLAND: Thank you. As well, Your Honor, we were under the impression that Mr. Watkins's estimate which is Defendant's Exhibit 41 was just marked for identification. But we wanted to check with your records on that.

MR. MANOS: That was the one we substituted, Your Honor, from 38 to 41.

THE COURT: The corrected one came in evidence. Yours came in evidence.

MS. NOLAND: Thank you, Your Honor.

THE COURT: As I recall, there were two of them. One was corrected. One wasn't and I gave him the option of using 38 or the corrected one, not both. So it's my understanding 38 came ID only and then --

MR. MANOS: 41 came in.

THE COURT: Then 41 came in, then y'all's -- likewise your estimate came in as well.

MR. MCCARTY: That's right, Your Honor.

THE COURT: Anything else before I bring in the jury?

(Thereupon, the jury entered the courtroom at 10:55 a.m.)

THE COURT: You may be seated. Mr.

Foreman, members of the jury, you have heard the evidence and the closing arguments of both parties. I will now explain to you the law which applies to this case.

The Waverly at Hamlin Plantation Townhome Association, Inc. as well as Stephen Denby who is the individual and class representative for a list of Plaintiffs who are residents at Waverly at Hamlin Plantation townhomes are the Plaintiffs and they have brought an action against the Weiland entities, the Defendants. In bringing this lawsuit the Plaintiffs claim that the Defendants should compensate them for their injuries.

Under our Constitution and code of laws only you the jury can make the findings of fact in this case. I am not permitted to indicate to you how I might feel about the testimony and evidence which has been presented. And throughout this trial it has been my intention to be fair and impartial toward each of the parties involved as well as their counsel.

The Constitution of our state does not allow a trial judge to have any opinion about the facts of the case, so please do not intimate or infer anything that I have said during the progress

of this trial in ruling upon the admissibility of evidence or otherwise that I have any opinion about the facts. The Constitution does not allow me to have any opinion about the facts.

To determine the facts in this case you will have to evaluate the credibility which is simply a legal term meaning the believability of each witness who has testified in this case. Some of the things you may consider as you decide whether or not to believe a witness's testimony about a particular matter include what was the manner and appearance of the witness who testified, was he or she straightforward or hesitant in answering, was the testimony of a witness consistent or inconsistent, how did the witness come to know the facts that he or she testified to or what was his or her ability to know these facts, is there some reason a witness would want to give testimony which would help or hurt one side or the other. In other words, was the witness biased or prejudice. Was the testimony of a witness strengthened or weakened by other testimony or evidence.

I further instruct you that in determining the question of the credibility or

believability of witnesses who testified you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony and reject the remaining part of the testimony of that same witness. If you have a good and sound reason you may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety.

Ladies and gentlemen, you can believe as much or as little of each witness's testimony as you think proper. And you may believe the testimony of a single witness again as I have instructed against that of many witnesses or just the opposite. Of course you do not determine the facts by counting the number of witnesses presented by each side.

Of course there is no way to weigh evidence except through the exercise of your good common sense and judgment. It is entirely a mental process and the evidence you should give the most weight to is that which convinces you of its truth regardless of from whom or what source it has come. Our rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions.

An exception to this rule exists for witnesses we call expert witnesses. A witness who by their education, training and experience has become an expert in some art, science, profession or calling may state an opinion as to the relevant and material matters in which the witness claims to be an expert and may also state the reasons given for that opinion.

You should consider any expert opinion received in evidence in this case like any other evidence. Give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education, training and experience or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted.

I instruct you, ladies and gentlemen, that in our courts no distinction is made between a corporation and an individual. A corporation is a

person in the eyes of the law. A corporation is entitled to the same fair and impartial consideration and to justice by the same legal standards as an individual. For purposes of this litigation the John Wieland Home entities as well as Waverly at Hamlin Plantation Townhome Association, Inc. are individuals in the eyes of the law. I further instruct you that a corporation can only act through its agents or employees. Therefore, a corporation is responsible for any negligent acts or omissions of its agents or employees while they are acting within the scope of their employment. I further instruct you that the parties have stipulated that the Wieland entities as well as Waverly at Hamlin Plantation Townhome Association, Inc. are both bound by the acts and omissions of their agents and employees.

This action, ladies and gentlemen, was brought by the Waverly at Hamlin Plantation Townhome Association, Inc. or as referred to as the HOA by the board of directors of the homeowners association and Stephen Denby individually and as a class representative of each of the individually listed Plaintiffs.

This lawsuit seeks damages for repairs

including any other related costs incidental to their townhomes. The Plaintiffs have asserted negligence claims against the Defendants. The John Wieland Home entities were the general contractors, developers and sellers for the construction of the Waverly at Hamlin Plantation townhomes. Therefore, all Defendants shall be treated as one entity in this case for the purposes of determining any liability.

The same constitution and laws, ladies and gentlemen, which designate or make you the finders of the facts as I have just explained also makes me the instructor of the law. You must accept the law as I instruct it. If I am wrong there is another place and time for that error to be corrected, but for this case you must apply the law as I instruct it. And this means, ladies and gentlemen, that you should not be concerned with what you may think the law should be, but only with what I instruct you the law actually is.

Mr. Foreman, members of the jury, the Plaintiffs have the burden of proving their claims in this case. They must meet this burden by proving their claims by the greater weight of the evidence or the preponderance of the evidence.

Again, using my earlier instruction which is an example which is the 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.

A preponderance of the evidence means evidence which as a whole shows that the fact or facts sought to be proven are more probable than not. A preponderance of the evidence is determined by the greater weight of all of the evidence presented.

I further instruct you, ladies and gentlemen, that there are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who claims to have actual knowledge of the facts, what we will commonly refer to as an eyewitness. It is

evidence which immediately establishes the main fact to be proven.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation. It is proof that does not actually establish the fact in question, but that asserts or describes something else from which you may either reasonably infer the truth of the fact or at least reasonably infer an increase in the probability that the fact is true.

For circumstantial evidence to be sufficient to warrant the finding of a fact the circumstances must lead to that fact with reasonable certainty. The facts and circumstances should be considered in light of ordinary experience and common sense. The existence of a fact cannot be based on speculation, surmise or conjecture. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of

circumstantial evidence than of direct evidence.

The Plaintiffs in this case allege that the Defendants negligently constructed the Waverly at Hamlin Plantation townhomes. Negligence is the failure to exercise the degree of care which a person or entity of ordinary reason and prudence would exercise under the similar circumstances as exist in this case. Carelessness and negligence means the same thing.

I instruct you, ladies and gentlemen, that the Plaintiffs have alleged and contend that construction or building work was undertaken by the Defendants under an arrangement and agreement with the owner of the property at the time. One who undertakes and agrees to construct buildings is liable for any damage proximately resulting from the negligence or unskilled manner in which he constructs the building. In this regard the Defendant owes the duty to exercise and use due care in the construction of the building in the work undertaken by the Defendant.

To establish negligent construction the Plaintiffs must prove four essential elements. First, that there was an undertaking to construct a building by the Defendants; next, that the

Defendants were negligent or careless or reckless, willful and wanton in the performance of that construction work, or stated another way that they did not perform the work in a good workmanlike manner; next, that the negligence or careless or reckless, willfulness and wantonness of the Defendant in performing that construction work was the proximate cause of any damages sustained by the Plaintiff; and finally, that the resulting damage must be shown, in other words, that the Plaintiffs must establish that they were damaged as a proximate result of the Defendants' negligence.

It is incumbent upon the Plaintiff to prove the Defendant was negligent or careless or reckless, willful and wanton in some aspect of the construction work which he agreed to do. Otherwise you would be required to find against the Plaintiffs. The degree of care which the Defendant is called upon to exercise in this case is that degree of care which a person or entity of ordinary reason and prudence would exercise under similar circumstances and conditions in constructing a building of the kind in question. Any failure to exercise due care on the part of the Defendant, his agents, servants or employees acting in the course

and scope of their employment in the construction of the building would constitute negligence or carelessness. If such negligence or carelessness on the part of the Defendants did exist, which is a fact for you the jury to determine, your next question would be is the negligence or carelessness of the Defendant a proximate result of the damages sustained by the Plaintiff.

I instruct you that negligence is not actionable unless it proximately causes the Plaintiffs damages. Proximate cause is the efficient or direct cause of damages. Proximate cause requires proof of both causation and fact and legal cause. Causation and fact is proven by establishing the Plaintiffs' damages would not have occurred but for the Defendant's negligence. Legal cause is proven by establishing foreseeability. Foreseeability is not determined from hindsight, but rather from the Defendant's perspective at the time of the complained act. I further instruct you that a general contractor has a duty to exercise a degree of care reasonably expected in the industry in constructions and supervising the construction of the underlying project. A general contractor has a duty to supervise the construction of the

underlying project; however, he is not automatically responsible for the negligence of the subcontractors that worked on the same project.

The Plaintiff must still prove that the general contractor breached its duty to exercise reasonable care in supervising the construction of the project and that the alleged breach was the proximate cause of the Plaintiffs' damages.

I further instruct you that a cause of action in negligence will be available where a violation of a building code violates a legal duty for which a builder can be held liable for proximately caused languages -- losses -- I am sorry.

Ladies and gentlemen, I instruct you that there have been what we call stipulations entered into in this case. A stipulation is an agreement between the parties and it requires no further proof. I further instruct you that in this case the parties have stipulated that the 2000, 2003 and 2006 standard building codes were the codes that governed the construction of the Waverly at Hamlin Plantation Townhome buildings.

I further instruct you, ladies and gentlemen, that a violation of any provision of

common law statute or ordinance is negligence as a matter of law.

This means that proof of such violation is in itself proof of negligence. So that should you find a violation, your only concern would be whether the violation proximately caused the injury and damages. I further instruct you, ladies and gentlemen, that there is a legal duty to undertake construction that is commensurate with existing industry standards. I further instruct you that even if a building code or industry standard does not apply, public policy demands the imposition of a legal duty on a builder to refrain from constructing housing that he knows or should know will pose serious risk of physical harm. This duty extends to all foreseeable parties. Building a house or building that one knows or should know will later be sold to a party or to an innocent buyer is the act tantamount to placing that house into the stream of commerce. Any builder who violates the duty to refrain from constructing defective housing should justly be held accountable for the losses that his alleged breach caused.

Although a person may have no obligation or duty to another, once he undertakes

to perform a certain task such as the construction of a house or building, he is charged with the duty of properly planning, coordinating and supervising the work. If he fails in the performance of these duties he may be held liable for any damages or injuries to persons which proximately result from such failure.

Ladies and gentlemen, the general measure of damages in this case that may be shown by the Plaintiffs are such things as follows: The cost of repairs, the value of the house used during the time in which the Plaintiffs were necessarily deprived of its use known in the law as loss of use. Rental costs may be shown in reference to that particular matter as well as incidental and consequential damages. Those are terms that are simply -- that simply mean in the law actual damages. Actual damages are designed to compensate the injured party, that is, to put them as close as possible in the same position that they were in before the negligent act or omissions. In other words, actual damages are the actual losses and expenses which the Plaintiff is alleged to have suffered because of the Defendant's alleged negligence.

Ladies and gentlemen, the Plaintiff bears the burden of proving their damages by the greater weight or the preponderance of the evidence. But this does not mean that they must prove them to a mathematical certainty or produce evidence of the precise amount of damages alleged to have been suffered.

However, the amount of damages, if any, cannot be left to speculation or guesswork. The evidence presented must be such as to allow you the jury to determine the amount of damages, if any, with reasonable certainty and accuracy. Rather, the evidence put forth by the Plaintiffs should be such as to enable you the jury to determine what amount of damages, if any, is fair, just and reasonable.

I instruct you, ladies and gentlemen, a party who has suffered injury or damages from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages caused by the Defendant's alleged negligence. The test is whether the Plaintiffs have done what an ordinarily reasonably prudent person would have done under like circumstances.

If the Plaintiff used reasonable care

and diligence to reduce the losses, the Plaintiff may recover the full amount. However, the injured party is not required to unreasonably exert himself or incur substantial expense in an effort to mitigate damages. If the Plaintiff has done so then you would -- if the Plaintiff has not done so, then you would reduce the damages accordingly. I instruct you that the party who claims damages should have been minimized has the burden of proving they could have been avoided or reduced.

If you the jury should award actual damages in this case you may also consider an award of punitive damages. Punitive damages are intended to punish the wrongdoer for his extraordinary and outrageous misconduct and to serve as a deterrent to others and to the Defendant. Punitive damages are awarded to punish, deter and vindicate the rights of the Plaintiffs when the conduct of the Defendants is willful, wanton or reckless. Willful, wanton and reckless are words used to describe a conscious failure to use reasonable care. In other words, while a negligent person is one who acts carelessly, a person whose behavior is reckless, willful and wanton is not only careless in their actions, but also is aware they are being

careless.

I further instruct you that a violation -- while a violation of a provision of statute, ordinance or the common law is negligence as a matter of law, violation of a statute, ordinance or the common law is not by itself recklessness, willfulness or wantonness; however, it may constitute evidence of recklessness, wilfulness or wantonness, and you may consider such violation along with all the other facts and circumstances surrounding the event to determine whether the Defendants were reckless, willful or wanton. I further instruct you to support an award of punitive damages the Plaintiff must prove by clear and convincing evidence that the conduct complained of included a consciousness of wrongdoing at the time of the conduct. Clear and convincing is a legal term meaning more than just a preponderance of the evidence.

Clear and convincing proof leaves no substantial doubt in your mind. It is proof that establishes in your mind not only that the proposition at issue is probable, but that it is highly probable. Punitive damages are awarded for the benefit and the public interest, for the

benefit of society and in the public interest, not as compensatory or actual damages, but in addition to such damages.

Before awarding punitive damages you must consider and weigh all four elements which may be pertinent to the facts of this case. You must first consider the relationship between any punitive damages award and the harm caused. Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the Defendant's awareness of the conduct's wrongfulness, the existence of similar past conduct, the duration of the conduct, and any concealment; thus, any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused including the compensatory damage award made by you.

Secondly, any penalty imposed should take into account the mitigating factor, any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.

Next, you should consider whether the award of and the amount of any punitive damages

award may deprive the Defendant of any profits derived from the improper conduct and whether the ill gotten profits should be properly awarded to the Plaintiffs.

And, finally, any award of punitive damages must be limited to punishment and to this end the Defendant's ability to pay any punitive damages award should be considered.

Ladies and gentlemen, there are two different causes of action against the Defendant and they are a negligence cause of action brought on behalf of the homeowners association and a negligence cause of action brought on behalf of the individual townhome owner. Each has a separate and -- each is a separate and distinct cause of action. You must decide each cause of action separately on the evidence and the law applicable to it uninfluenced by your decision as to any other cause of action. A verdict may be found for or against the Plaintiffs or the Defendants on any or all of the causes of action

Ladies and gentlemen, if you should decide to award damages for any of these causes of action you should award the full measure of damages you deem appropriate applicable to it, if any, for

each cause of action separately. You should not make any attempt to apportion or divide damages, if any, among the causes of action. Again, if you find damages are appropriate, if any, you are to award the full measure of damages uninfluenced by each decision on each cause of action. And you will write a separate verdict for each cause of action.

Ladies and gentlemen, you have been selected as fair and impartial jurors sworn to impartially try the facts of this case. And when you comply with your oath to do so then no one will have the right to criticize your verdict and you will have fully discharged your duty as jurors in this case. You should not be influenced by opinions or expression of opinions which you may have heard outside of the evidence of this case. But by your oath you are sworn to decide this case according to the testimony that you have from the lips of the sworn witnesses and other evidence that has been introduced.

They're several possible verdicts for each cause of action and I will go through those with you. You don't have to try to write those down. There's no significance whatsoever to the

order in which I state the potential verdicts. However, ladies and gentlemen, your verdicts must be unanimous, which means all 12 of you must agree in order to reach a verdict in this case.

I further instruct you that your verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not found in the evidence of this case. Once the jury has reached a unanimous verdict it is your responsibility, Mr. Foreman, to fill out the verdict form, to sign and date the form, knock on the door, advise the bailiffs that the jury has reached a unanimous verdict. Likewise, if the jury has any questions during deliberations it is your responsibility to write out those questions, to sign and date the form and again knock on the door and advise the bailiffs that the jury has a question.

Ladies and gentlemen, I will advise you that if you have any questions during deliberations there will be a delay in our response and that is because there's a process we have to follow in answering your questions. So know if you have a question there will be a delay and that is because we are following that process.

I would also instruct you that the foreperson does not have any greater vote or voice than any individual juror. It is purely an administrative function and that person is selected randomly. I wish there was a scientific process to it, but we just select a foreperson randomly so that a cross-section of the community is adequately represented. But again I emphasize that person does not have any greater vote or voice than you. It is purely administrative. We need someone to write out questions and fill out the verdict form.

Again, ladies and gentlemen, your verdict must be unanimous in order for all of you to reach a verdict in this case. Because the captions are long I am not going to read all of them in the interest of time. I will abbreviate them. But the first deals with the homeowners association against the Weiland entities and that verdict form gives the following options: As to the negligence cause of action we the jury unanimously find for the Plaintiffs in the amount of blank dollars actual damages or we the jury unanimously find for the Plaintiffs in the amount of blank dollars actual damages and punitive damages or we the jury unanimously find for the

Defendants.

And on the individual class members again in the interest of time and the breadth of those names I will not read all of them, but it is Mr. Denby as the individual and class representative for the individual Plaintiffs against the John Wieland entities and the options are as follows as to the negligence cause of action: We the jury unanimously find for the Plaintiffs in the amount of blank dollars actual damages, or we the jury unanimously find for Plaintiffs in the amount of blank dollars actual damages and punitive damages or we the jury unanimously find for the Defendants.

Again, there's absolutely no significance whatsoever to the order in which we state these potential verdicts. It is that one must be stated first. Again, your verdicts must be unanimous.

Ladies and gentlemen, I'm going to ask that you return to your jury room. Do not yet begin your deliberations. There's some brief matters of law that I need to take up with the attorneys to make sure that I do not have to correct an explanation of the law or give an

additional instruction on the law. If there are no further instructions we will send in your note pads, verdict forms and the evidence and at that time we will excuse the alternates and you will be allowed to begin your deliberations.

Again, your lunch is scheduled to arrive at 12:00. And I believe the people we are using are prompt so once the lunch arrives the bailiffs will bring it along with your drinks. If anybody wants air while you are deliberating that is more than permissible, just let the bailiffs know, but you cannot deliberate when any of your members are not in the jury room. So if anybody wants to get air after eating let the bailiffs know and we certainly we will accommodate you.

Again, do not yet begin your deliberations. Please leave your note pads in your seats and we appreciate your patience.

(Thereupon, the jury exited the courtroom at 11:25 a.m.)

THE COURT: Any exceptions from the Plaintiff?

MR. HAYES: None.

THE COURT: From the defense?

MR. MANOS: None, Your Honor.

THE COURT: Can you just double check for me one more time and make sure all the evidence is there before the bailiffs take it. You can get the notebooks except the alternates. Then you can come get the verdict forms, Mr. Bailiff.

MR. MANOS: We are withdrawing Exhibit 14.

THE COURT: You are withdrawing defense No. 14.

MR. MANOS: Yes, ma'am.

THE COURT: Any exception from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: It will be withdrawn. I need you to bring out the alternates so we can excuse them and then begin the jury deliberations.

(Alternates brought to the courtroom at 11:33 a.m.)

THE COURT: You may be seated. We thank you for your time and your attention to this case. We know that being an alternate may seem thankless, but it is such a vital role in this process, especially in a case of this length if any of the other jurors were to become ill or otherwise incapacitated we would need you to step in and

become a part of the main panel. You are welcome to stay with us if you'd like. We ask you at least remain until noon when your lunch will arrive. The least we can do is feed you. We will put you in a separate room and you can stay and eat. Again, you are welcome to stay with us while the jury deliberates if you would like to as well. If not, you will be excused for the remainder of your jury service. If you need a work excuse you can get those on the first floor of the clerk's office on the circuit side. Any of the deputy clerks can give you a work excuse, otherwise we will mail those to you along with your check. You're welcome to discuss the case, but I would ask that you not until the jury has been dismissed. Sometime lawyers will contact you to get feedback on how they can do things better. That's why we call it the practice of law.

So it might not be unusual if you are contacted. Again, you can discuss the case if you like, but you are not required to. So if someone should exceed what you feel comfortable with please make us aware of it so that we can take the appropriate action to protect your privacy. If you want to destroy your notes you are welcome to,

otherwise we will do that for you. Our bailiffs do it. You are welcome to keep them if you would like. Again, we thank you for your time and attention and your service. It has been greatly appreciated. We are going to put you in one of the multipurpose rooms. It's 11:35. Usually they are kind of early so I am hoping they will get here in the next ten minutes or so. So if you'd like to stay let us know that. We will allow you to remain in that multipurpose room until the jury has concluded its deliberations. Otherwise you are excused with the Court's profound thanks. I hope you have a great day. I will turn you over to the hands of our capable bailiffs.

(Alternates excused.)

THE COURT: You can take your seats. The record should reflect the jury began deliberations at 11:34. I would ask that you all hang around for me until the jury's lunch arrives after which I will give you a lunch break. And I will also at that time give you a time to return. If you can give us your cell phone numbers that would be greatly appreciated so that in the event that we need to reach you during the lunch recess. But I will ask that you all hang around until I

excuse you for lunch. And then I can give you a time when we are all to be back. We will be at ease. I will come back before the lunch recess and let you know when the break for the luncheon recess is. We will be at ease.

(Thereupon, the jury began deliberating at 11:35 a.m.)

(Thereupon, the following proceedings were had at 12:56 p.m.)

(COURT'S EXH. 3 marked for identification.)

THE COURT: The jury has asked several questions, one of which is need a projector. I had the clerk get clarity what they were asking. They wanted to bring the Elmo. I had her advise them that was not a possibility. They next asked for clarification as to how to award between the two verdict forms, A, Waverly at Hamlin Plantation Townhome Association, and B, Stephen Denby, individually as class representative list of homeowners. The only thing I can do is reinstruct them that they are separate causes of action with two separate theories and if they feel damages are appropriate they should award the full measure of damages they feel appropriate as to each individual

cause of action. Is there any exception from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. HASELDEN: I don't think so, Your Honor.

THE COURT: Well, I need you to be more definitive than that.

MR. MANOS: If that's all you can tell.

THE COURT: The problem is you all have a great deficit in that you did not argue damages to the jury in either of your closing arguments. That leaves that chasm there for them to try to leap over. Nobody argued about the individual damages that would be due to the homeowners association and then those that would be due to the individual Plaintiffs. You left it to their common sense based on what they heard, but you forgot they are not lawyers and you have to talk to them like they are not lawyers. And nobody did. I expected that question. But then I get the luxury of being objective. So I suspect what they are asking is more a factual question in the nature of argument and I can't answer it. Basically to answer it any more specifically I would have to say only damages

deal with the envelope, the common areas, blah, blah, blah would be due. And then only loss of use and whatever else would be due to the individual Plaintiffs. But that's a factual issue that really is left to argument and should have been addressed by y'all. So I can't address it any more than what I indicated. Otherwise it would be an impermissible comment on the facts. So with that explanation is there any exceptions from the defense?

MR. MANOS: No exception, Your Honor.

THE COURT: Okay. Please bring in the jury. They do have a laptop in there with the ability to put the technology up on the screen, but we can't put the Elmo in there. We don't have that capacity.

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

THE COURT: Ladies and gentlemen, the first note which is the first part of the note that you need a projector, I had the clerk get clarity as to what you were asking for. And I had her advise you that we don't have the capacity to put an Elmo in the jury room; however, if there are any pieces of technology that you have that you need to

play there is a laptop in there that is connected as such that you will be able to view it as a jury if you need to. That technology is available to you.

The second portion of your note is clarification how to award between the two verdict forms A, Waverly at Hamlin Plantation Townhome Association; and B, Stephen Denby individually and as the class representative with the list of homeowners.

In that regard I'm going to reinstruct you that each of these verdict forms represent two separate causes of action. One represents those being claimed by the homeowners association and one by the individual Plaintiffs. There are two separate causes of action based on negligence. If you feel that damages are appropriate on one, both or either, you have to award what has been presented in terms of your fact finding province the full measure of damages on each of these separate causes of action. You are not to make any attempt to apportion what you feel is appropriate between the two causes of action.

I think a better -- if I can best describe it, it would be as if you were in two

separate courtrooms hearing two separate cases. The two are not interdependent on one another. As I have explained, you can find for or against the Plaintiffs or the Defendants on one, both, either or none. So they're not interconnected such that they are interdependent on one another. You are to consider each one separately and independently based on the facts as you find them from the evidence that you have heard and to make a decision for damages, if any, as you find it appropriate.

So again, you must make a decision that is separate uninfluenced by your decision based on the law as I have instructed it and the evidence as it has been presented. I hope that has provided the clarity. If it hasn't let me know and I will be glad to attempt to further instruct you or clarify any previous instructions. With that you are excused to continue your deliberations.

(Thereupon, the jury exited the courtroom at 1:03 p.m.)

THE COURT: Any exceptions from the Plaintiff?

MR. HAYES: None.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Thank you guys. Hopefully -- we will stay at ease. I will let you know I have had the note marked as a court exhibit.

(Thereupon, the jury continued deliberating at 1:04 p.m.)

(The following proceedings were had at 1:30 p.m. outside the presence of the jury.)

THE COURT: I just realized that the foreman did not date and sign the first note so I'm going to have the bailiff have him do that and bring it back to us. The second note asked for a calculator which I had the deputy clerk provide to them. And the other part of the note asked to review Gary Moore's testimony, copy of transcript. That note is signed but not dated so I have to have the bailiff have the foreperson to date this note. It will be marked as a court's exhibit. My response will be as follows: Mr. Foreman, ladies and gentlemen of the jury, our technology does not allow us to immediately produce a transcript of the proceedings; however, we can replay the testimony for you. If you desire to have the testimony replayed please advise the bailiff and we will accommodate your request. Any exceptions from the

Plaintiff?

MR. HAYES: No.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Okay. Likewise this will been marked as a court exhibit. They will be instructed to hold on to this note along with the evidence. I suggest you que up Mr. Moore's testimony. If they ask for the testimony I'm going to be sending the court reporter and the bailiff into the jury room for the purposes of replaying the testimony. And then we will -- they won't be allowed to deliberate while that's going on. Anything from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor. We will be at ease.

(COURT'S EXH. 4 marked for identification.)

(Thereupon, the jury continued deliberating at 1:33 p.m. and reached a verdict at 3:14 p.m.)

THE COURT: The jury has reached a verdict. Is there anything before we bring in the

jury from the Plaintiff?

MR. HAYES: No, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

(Thereupon, the jury entered the courtroom at 3:34 p.m.)

THE COURT: You may be seated. Mr. Foreman, has the jury reached a verdict?

THE FOREMAN: Yes, Your Honor.

THE COURT: If you can give the verdict forms to the bailiff.

(Handing.)

THE COURT: Madam clerk, if you would publish the verdicts, please.

THE CLERK: In the State of South Carolina, County of Charleston, Court of Common Pleas, case number 2013-CP-10-03326. Waverly at Hamlin Plantation Townhome Association, Inc. versus John Wieland Homes Neighborhood of the Carolinas, Inc. as successor by John Wieland Homes Neighborhoods of South Carolina, Inc., John Wieland Homes, Charleston, Inc., John Wieland, Inc.

As to the negligence cause of action we the jury unanimously find for the Plaintiff in the amount of $7 million actual damages. Signed by the

foreperson. We the jury unanimously find for the Plaintiff in the amount of $200,000 in actual damages, also signed by the foreperson.

THE COURT: That is for the individual Plaintiffs in the class action against the Wieland entities.

THE CLERK: Yes, ma'am. Should I read the --

THE COURT: No. Ladies and gentlemen, if this is your verdict please raise your right hand. You may put your right hands down. Is there any request to poll the jury from the Plaintiff?

MR. HAYES: None, Your Honor.

THE COURT: From the defense?

MR. MANOS: No, Your Honor.

THE COURT: Mr. Foreperson, ladies and gentlemen, you have been incredibly patient with us during what I am certain has been a taxing process for you. I would encourage you if you have the time, which I doubt most people do, to come and watch this process from the other side of the courtroom so that you can see all the things that you missed so that you can truly know that and how we very much value your time. Again, there are many parts of this process that we insulate you

from so that your impartiality as jurors can be maintained.

I hope that jury service has been educational for you. I hope you know how very valuable you are to us. We are one of the busiest trial circuits in the state. South Carolina has one of the largest case filings per capita per judge at over 5,000 per judge which is tremendous compared to other states. We have about 51 circuit judges who rotate throughout the state and hear both civil, criminal cases as well as appeals from the probate court, magistrates court and zoning. So we hear cases in both jury and nonjury capacity. But the bulk of what we do we would not be able to do without your willingness to serve as jurors.

If you need a work excuse you can get those today on the first floor on the circuit side of the clerk's office. And any of the attendants can give you a work excuse, otherwise we will mail those to you along with your checks. You're welcome to discuss this case if you would like. You don't have to discuss the case if you don't want to. Sometimes lawyers will reach out to you to get a common sense perspective on the case. So if someone should attempt to speak with you, you

are welcome to do so. By the same token you do not have to speak with anyone if you don't desire to. Hopefully you have a wonderful rest of the week. Hopefully it is going to warm up. And you're excused with the Court's profound thanks.

I will hear post-trial motions in a moment.

(Thereupon, the jury exited the courtroom at 3:37 p.m.)

THE COURT: Any post-trial motions from the Plaintiff?

MR. HAYES: None, Your Honor.

THE COURT: Any from the defense?

MR. HASELDEN: Your Honor, we would ask for ten days to file any post-trial motions.

THE COURT: I prefer to hear motions at the close of the case. It will never be more fresh than it is now. You can move on this dispositively as you would desire.

Also, before we go any further, I'm going to need whether it be Mr. Manos or Mr. Haselden to provide me with a proposed order on the directed verdict motions which were granted.

MR. MANOS: Certainly, Your Honor.

THE COURT: Thank you. Send it to me

in word format to DJeffersonsc@sccourts.org and copy counsel. Yes, sir, you may proceed.

MR. NOVACK: Justin Novack on behalf of the Defendants, Your Honor. The Defendants post-trial motions are encapsulated in what I have handed up and which I will file with the clerk of court once we break from these proceedings.

But in general to go over them, we would move under 50, 52, 59 and 60 --

THE COURT: Some of them in No. 1 are moot, aren't they?

MR. NOVACK: Yes, Your Honor. And I must apologize, going through I prepared these before I knew what would go to the jury and what would not.

The first motion is a motion for judgment not withstanding the verdict pursuant to Rule 50 on the grounds previously advanced at trial and the Defendant's motion for directed verdict as to Plaintiffs' negligence cause of action and that is both applicable to both the HOA Plaintiffs and the class Plaintiffs.

As Your Honor has pointed out, neither the breach of express warranty or the breach of fiduciary duty cause of action did go to the jury

so those are moot, Your Honor. Also --

THE COURT: No. 3 is moot as the jury did not bring back a motion on punitive damages.

MR. NOVACK: Yes, Your Honor. That is correct as well. And would you like me to address these motions --

THE COURT: I charged mitigation and damages so that's moot as well.

MR. NOVACK: Yes, Your Honor.

THE COURT: Which is No. 4. You may proceed.

MR. NOVACK: Yes. There was a --

THE COURT: No. 6 is moot as well because there were no punitive damages so there is no need for a post-trial review and if there were I would have done one and I would have done it in writing in the nature of an order.

MR. NOVACK: Yes, Your Honor.

THE COURT: The rest of them look boilerplate. That leaves No. 1, No. 2, No. 3, 4 and 6 are moot.

MR. NOVACK: Correct, Your Honor. Would you like me to address these orally or is the writing sufficient?

THE COURT: The writing is sufficient

unless you want to supplement it.

MR. NOVACK: No, Your Honor. What we are going to argue is encapsulated in the written motion.

THE COURT: I can write on this?

MR. NOVACK: I have an extra copy as well.

THE COURT: Shucks. It has your handwriting and original signature on it. You got another?

MR. NOVACK: I do have another one.

THE COURT: That's the one you need to file.

THE COURT: Okay.

MR. NOVACK: Just out of habit I like to have one for signature and one for you.

THE COURT: That's fine. I wanted to make sure that wasn't your only copy before I continued to destroy it.

MR. NOVACK: It is not, Your Honor. Thank you very much.

THE COURT: Would the Plaintiff like to respond?

MS. NOLAND: Your Honor, in ruling on a motion for judgment not withstanding a verdict, the

Court must review the evidence and inferences that can reasonably be drawn therefrom in the light most favorable to the nonmoving party and the Court may not disturb the factual findings unless a review of the record discloses no evidence which reasonably supports them.

Based on our arguments that we have presented in response to the directed verdict that Defendants put forth at the close of Plaintiffs' case and also at the close of their case, we would like to stand on those arguments. And in addition, we believe that there has been ample evidence that went towards the jury so that they could believe or not believe any of the witnesses that were placed in front of them for testimony. There is evidence of duty of each of the Weiland Defendants to the homeowners. We showed a breach of that duty and causation and damages and they chose to bring back a verdict in the middle of both of our estimates.

Your Honor, regarding loss of use, it's a measure of damages that's been well documented as far as available to Plaintiffs in the situation of an uninhabitable time frame for the homeowners and based on the extensive damages that would be repaired under our scope of repair as well as the

Defendants experts time span they could have drawn from that that there would be time that the homeowners would be without the use of their homes. Your Honor, sorry, this is the first time I have seen this.

THE COURT: Take your time.

MS. NOLAND: As to the remitter, we believe that should not be taken into account as the jury certainly could have -- certainly did have a calculator back there to look at all of the damages which were placed in front of them and come up with a reasonable amount that they thought would make the HOA whole as well as the homeowners. And that there was no indication that the jury based anything on speculation and that they weighed that evidence that was put before them.

In closing, we believe the record discloses no evidence which reasonably would not support the verdict that the jury rendered in this case.

THE COURT: Anything further?

MS. NOLAND: Not from the Plaintiff.

THE COURT: From the defense anything further?

MR. NOVACK: No, Your Honor. Thank

you.

THE COURT: Welcome.

The only time a verdict should be reversed is if there is no evidence which reasonably supports the verdict. Clearly there is more than ample evidence to reasonably support the verdict in this case. I would find for the record that the verdict is not excessive, nor does it appear that it is based on passion, caprice or some other motive outside of the evidence of this case.

It is clearly within the ambit of the evidence that was presented and taking each motion as raised, that being the renewal of the motion for directed verdict as regards to negligence, there is more than ample evidence in the record of duty and breach as well as damages flowing from that breach to support not only a verdict for the HOA, but it appears that clearly in the nature of the verdict that was awarded to the HOA, it clearly includes the common areas and the verdict regarding the individual homeowners. It really -- when you rely on your common sense clearly can only refer to some loss of use as it clearly didn't consider any other or maybe a miniscule amount of the other damages that the Plaintiffs contend that individual

Plaintiffs suffered in this case as it is very remotely shy of what was requested in this case in the course of the testimony that was elicited from the expert witnesses. The remaining portion of No. 1 is moot as to breach of express warranty. The breach of fiduciary duty are all withdrawn as causes of action. As regards to No. 2, which is loss of use, there's more than ample evidence in the record. We have two competing experts, one saying that the damage to be remediated required that the parties move from the residence, one saying that it did not require them to move.

The loss of use figure that was sought by the Plaintiffs was over a million dollars and in fact it was $1.758 million and the jury returned a verdict of $200,000 which gives me -- does not give me any pause and I am clear that they gave careful consideration and due consideration of that issue in their fact finding province.

Motion 3 and 4 are moot. No. 5 deals with failing to charge the affirmative defense, comparative negligence. I stand by my earlier ruling and I went back and listened and reviewed the testimony. There's absolutely no evidence in the record to support an instruction on comparative

negligence. There was no testimony that elicited a reciprocal duty on behalf of the homeowners association or the individual Plaintiffs and -- nor that any duty was breached and that is an affirmative burden of proof that is required of the Defendants to establish in their case, that being there was a duty required or that the Plaintiffs owed a duty to them and that that duty was breached thereby resulting in damages and the record is absolutely void of any evidence in that regard and the Court stands by its previous ruling.

In regards to No. 7 which is a new trial for remitter, there is absolutely no grounds to reduce the verdict. There's no evidence that the verdict is excessive or liberal and that it is based on something outside the evidence in this case. The homeowners and HOA were seeking two and-a-half times the amount that the jury awarded. And there is more than sufficient factual testimony in the record to support an award of $7 million.

No. 8 which deals with -- really is cumulative to No. 7. Really restates the same issue which is that it is based on whim, passion. There is absolutely no evidence of that in the record and if there is any evidence to support a

jury's verdict it should be sustained and I so find that there is, that it meets that standard.

No. 9 is without merit. Clearly there is testimony in the record consistent, more than ample testimony consistent in the record to support the verdict. No. 10, that is based on speculation and is without merit. There is more than sufficient testimony in the nature of the expert witnesses to support the jury's verdict. And I instructed them that they could give whatever weight they deemed that testimony appropriate, that if they felt it was without foundational support they could disregard it entirely and clearly they had what would be best characterized as the dueling experts. Looks like they drew the line somewhere in the middle in terms of what they chose to believe and what they chose to give credibility and weight to and what they chose not to.

There's no support that the verdict is against the greater weight of the evidence. There's more than ample evidence to support the jury's verdict. There's no support and without merit argument that is it against the applicable law. No. 13 is an incomplete sentence so I don't know what the grounds for that would have been.

MR. NOVACK: No. 13 is withdrawn, Your Honor.

THE COURT: No. 14 is overly broad, it would have to be more specific in nature. There were contemporaneous motions dealing with the admissibility of evidence and I ruled contemporaneously on those objections and I will stand by those contemporaneous rulings.

No. 15 likewise is overly broad. If there was an objection made it was -- would have been ruled on contemporaneously and preserved contemporaneously and the Court would have ruled accordingly at that time.

Therefore having found no basis of a motion for a new trial or to remit the verdict, the motions are denied. We will enter Form 4s on the judgments and you all can go forward as you desire.

Now, sometime I will be in touch. I have to go to Horry County tomorrow. I will be there all week. I will return to Charleston the following week. I may be in touch during the week depending on my schedule. We will be in touch to schedule the remaining portion of the case, that being the cross-claims unless you all indicate to my staff that you no longer wish to pursue them and

we will go from there. Have a great day.

There's some indication about the wood. Is there any exception to taking a picture of that instead of the clerk's office having to keep that wood in the evidence locker?

MR. HAYES: Not from the Plaintiff.

MR. MANOS: We don't have a problem.

THE COURT: You all coordinate with the clerk regarding that, okay? Y'all have a good week.

(These proceedings were concluded at 3:53 p.m., January 30, 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

2014-CP-10-04035

WAVERLY AT HAMLIN PLANTATION TOWNHOME ASSOCIATION, INC.,

PLAINTIFF,

VS.

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

DEFENDANTS.

TRANSCRIPT OF RECORD

FEBRUARY 9, 2017
CHARLESTON, SC

B E F O R E:

HONORABLE DEADRA JEFFERSON, JUDGE

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

JOHN HAYES, ESQUIRE
I. KEITH MCCARTY, ESQUIRE
Attorneys for the Plaintiff

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

* *

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

(The following proceedings were held February 9, 2017, Charleston County, South Carolina, @ 10:32 a.m.)

THE COURT: This is case number 2013-CP-10-3326 and 2014-CP-10-4035, Waverly at Hamlin Plantation Townhome Association versus John Wieland and Stephen Denby on behalf of the class representative versus John Wieland.

We had a jury trial in this matter which resulted in a verdict of two million -- seven million, I am sorry, and 200,000 respectively on behalf of the HOA and homeowners. Subsequent to trial it came to the Court's attention that the issue of setoff needed to be resolved. I instructed the parties to reach an agreement regarding the amount of the settlement funds that had been received or were either subject to class approval and to review those numbers and come to an agreement as to the amount of setoff and the allocation of setoff.

After several phone conversations with the parties it has become abundantly clear to the Court that they cannot reach an agreement on those funds, and -- well, I don't know there's a disagreement on the allocation, but I think there's

certainly a disagreement on the amount of setoff.

As a result a hearing was set for today. Who is appearing on behalf of the Plaintiff?

MR. MCCARTY: Keith McCarty and John Hayes, Your Honor.

THE COURT: And who is appearing on behalf of the Defendant?

MR. MANOS: Teddy Manos and Andy Haselden, Your Honor.

THE COURT: I will be glad to hear from the Plaintiff and then I will hear from the Defendants.

MR. MCCARTY: Your Honor, it's the Defendants' motion, but I'll go ahead and talk.

THE COURT: Well, I don't know that it really matters whose motion it is. The issue is there is a setoff and we need to determine what the amount is and how it's to be allocated.

MR. MCCARTY: Your Honor, the numbers submitted to you by the Plaintiff, the 2.1 number, was arrived at regarding the actual amounts settled for in -- with the subcontractors. We anticipate that the setoff will accurately reflect that amount.

We received a motion from the Defendant that had a much higher amount on it, $434,000, and when I called them and inquired as to the difference, they said that we had agreed to that as part of the settlement with one of the subcontractors in exchange for $500. We don't have any -- we never agreed to that. We don't have any recollection of having agreed to that. We have seen no documentation or anything that mentions a $434,000 enhanced setoff. All the other setoffs are dollar for dollar setoffs and what we expect to collect from the settling Defendants and the enhanced setoff is not mentioned. There has been no money changed hands. The release has been submitted to us for review. It was done after trial, but it was not --

THE COURT: When you say release, what release are you referring to? I would imagine there is several releases.

MR. MCCARTY: There is a proposed release that's at issue here for the $500 for Mora Construction in that -- and that's been submitted to us. It hasn't been executed yet. We are still reviewing releases and getting them taken care of. No money has changed hands and I have been told on

two occasions by defense counsel Mr. Thomas, who I believe is here today, that they will not submit any money until a fully executed release is received.

Your Honor, we think this travels -- this issue travels under 43(k). There's no signed documents. There's no terms and conditions which are specifically asked for that have been agreed upon. The only thing that we can tell is there was a brief recitation in court that the parties quote had settled, but there were no terms, no conditions or anything like that that were introduced in court. And we specifically disagree that we would have ever agreed to an enhanced setoff for $434,000 in exchange for $500.

THE COURT: Did you all provide the Court with by virtue of e-mail a list of each individual subcontractors and the amount of those settlement funds?

MR. MCCARTY: We did, Your Honor.

THE COURT: Do you have an extra copy of that by any chance?

MR. MCCARTY: I don't have that with me, Your Honor, but I can get it for you.

THE COURT: Don't worry about it. We

can print one. Anything further, Mr. McCarty?

MR. MCCARTY: Not at this time.

THE COURT: Mr. Manos, be glad to hear from either you or Mr. Haselden.

MR. MANOS: Thank you, Your Honor.

THE COURT: You're welcome.

MR. MANOS: When I came into court this morning I handed Mr. Hayes and Mr. McCarty a copy of an affidavit that I prepared for myself in support of Wieland's motion to enforce setoff and reduce the judgment which was filed on February the 3rd, 2017. And I'd like to hand it up to Your Honor if I may.

THE COURT: I guess I am trying to figure out what would be the purpose of you making yourself a witness and providing an affidavit and do you actually think that's wise? Because you are then going down the road being disqualified to try the case.

MR. MANOS: Your Honor --

THE COURT: I don't think you need to file an affidavit when you make representations as to what took place as an attorney in this case operating on behalf of your client.

MR. MANOS: I will make the

representations on the record then, Your Honor.

THE COURT: I just, you know, it's my job to look down the road and the next motion is going to be to disqualify you because now you are a witness, right?

MR. MANOS: I don't know. Maybe there will be a motion to disqualify me, Your Honor.

THE COURT: I think if you filed an affidavit you become a witness and it is problematic.

MR. MANOS: Okay.

THE COURT: I just throw that out for you to think about.

MR. MANOS: Well, I have already caused myself a problem then.

THE COURT: You filed it?

MR. MANOS: I filed it 30 minutes ago.

THE COURT: Well, you may proceed. I don't know that it was necessary.

MR. MANOS: I understand. I have learned a lot of things in this case and that may be another one. But I can't undo it.

THE COURT: I wouldn't lose any sleep over it.

MR. MANOS: Okay. Your Honor, it's our

-- it's Wieland's position that this does fall under 43(k) and we believe that under the provision in 43(k) that a written stipulation by counsel was agreed upon and it is evidenced by multiple e-mails.

THE COURT: What written stipulation is there? Stipulations have a specific format that they take on. A stipulation is a term of art. It isn't just people sending each other letters.

MR. MANOS: Okay.

THE COURT: I think we all know what a stipulation is.

MR. MANOS: Well --

THE COURT: I'm not aware of any provision in the rules that e-mail is a stipulation.

MR. MANOS: From my perspective, Your Honor, and I understand the parties stipulated that the --

THE COURT: Was the word "stipulate" used in the e-mails?

MR. MANOS: No, Your Honor, it was just that we agreed. But the parties agreed to have --

THE COURT: Who said we agree?

MR. MANOS: Can I hand up the affidavit

to you?

THE COURT: Do you have an e-mail?

MR. MANOS: I do. They are attached as an exhibit. (Handing.)

THE COURT: Thank you, sir.

MR. MANOS: Yes, ma'am.

THE COURT: You may continue.

MR. MANOS: Your Honor, all of the settlements in this case that add up to two million 119,000 with other Defendants were for substantive dollar amounts, 250,000, 184,000, a million 250,000 and so on.

And as Mr. McCarty represented to the Court, we got a dollar for dollar setoff for those settlements. That's entirely accurate and we don't dispute that. As to Mr. Martin's client who was Benjamin Mora who was one of two masons on the project that did approximately 59 percent of the 105 set of steps out at the project, Plaintiff's repair estimator estimated that cost to be $735,000 to fix.

On January 11th after we finished Bud De Santis's, Plaintiff's expert, on loss of use depo at Mr. Hayes's office, Mr. Hayes and Mr. McCarty asked us to release our cross-claims

against Mr. -- against Benjamin Mora, the mason, for $500 to which we said we are not doing that for $500, our client is exposed for almost $400,000 of the $735,000. We are absolutely not going to do that for $500. We have no reason to. They are the specialty trade, we think we can certainly share that exposure with them, if not push off most of the exposure on them since they were the ones that built the steps.

Mr. Hayes and Mr. McCarty said okay. What about maybe doing an enhanced setoff. And I said well, I will go talk to co-counsel about that. Within a couple of hours I then started the e-mail chain that's in front of you and said, "Keith, how do we value Benjamin Mora's portion of the 735,000?"

And I sent Mr. McCarty an e-mail which is in Exhibit A and I said, "Keith, per our conversation of today my notes reflect Curt," that's referring to Mr. Martin's, Benjamin Mora, client, "I think the below came from Pritchard and Glen Elliot who were lawyers for other masons, that Benjamin Mora installed brick steps on 62 of the 105 units, 59 percent. And the other mason installed exterior brick steps on 43 of the

105 units, 41 percent. Moore, who was Plaintiff's expert, estimated the replacement of all the masonry step at the project totaling 735,000 before markup for profit and overhead."

I put, "So 59 percent times 735,000 equals 433,650. Let me know what you're thinking." To Keith. "Thanks."

Keith responded to me and copied Mr. Martin and said, "Gentlemen, assuming Curt agrees with those numbers that is fine with me. Keith."

That same day, Curt wrote back to Keith responding to him, "I just talked to Teddy about this. The numbers look right to me. Thus assuming Weiland and Plaintiff fully release all claims, that means Plaintiff is going to release theirs against Benjamin Mora and Wieland is going to release the cross-claims, we are settled for $500. Keith and Teddy, please confirm that response to this e-mail. And, Keith, you know the drill with National Fire. No settlement check will be issued until they receive a fully executed release which I will be happy to get to you. Thanks, Curt."

Keith then responded to that e-mail. "All good from my end, Curt. Remember to avoid any confidentiality or indemnity language in the

release."

That was on Wednesday, January 11th. We then on Tuesday, January 17th after jury qualification represented in open court to Your Honor that we were releasing, both Plaintiff and Wieland, were both releasing their claims against Benjamin Mora, and Wieland was obviously doing that based on this $433,650 enhanced offset that we had talked about, e-mailed about and agreed upon in a tri-party agreement.

THE COURT: Why wouldn't you reduce it to writing?

MR. MANOS: My -- it is my position that it was reduced to writing by these e-mails, Your Honor.

THE COURT: Our rules do not reflect or acknowledge e-mails. There's three specific ways you have to do things. Why didn't you reduce it to a stipulation that was signed and filed? Why didn't you immediately reduce it to a consent order?

MR. MANOS: I didn't. I understand.

THE COURT: I am just asking a question generally. Is there a reason you all did not do that?

MR. MANOS: I didn't think I had to. That's my mistake, Your Honor.

THE COURT: Anything further, Mr. Manos?

MR. MANOS: There has not been any case law after the 2009 amendment that has specifically ruled upon whether the language in 43(k) that talks about entering it on the record unless made in open court which I think we had in this situation.

THE COURT: How is it in open court?

MR. MANOS: In open court in front of Your Honor on Tuesday January 17th both Plaintiffs' counsel and Weiland's counsel represented to the Court that we had -- that we were dismissing our claims against --

THE COURT: Were you specific in its terms?

MR. MANOS: I did not use the number 433,650, Your Honor. And I would -- just in support of our position I would like to site to the case of Byrd v. Livingston that I think supports our position. That's at 398 S.C. 237 and I would like to hand that up to Your Honor.

THE COURT: I don't need it. Is that B-E-R-D?

MR. MANOS: B-Y-R-D.

THE COURT: Versus Livingston?

MR. MANOS: Yes, Your Honor. The other argument for the record, alternatively, Your Honor, is that I'm not positive that 43(k) applies to the agreement between Plaintiffs and Wieland for the enhanced offset. I certainly think that it applies to Benjamin Mora and the Plaintiff.

THE COURT: I think that's an interesting argument. Our Supreme Court has been clear that 43(k) applies to all agreements if you're seeking to enforce it. And unless you find case law that tells me otherwise, our Supreme Court has been adamant and that's why they have made the rule clear so that courts don't have to sift through what you meant or didn't mean, what you agreed to, what you didn't agree to.

It is one of those things where you transfer yourself from puffing and what's the word that I am looking for, negotiating to reducing it to clarity as to what you agreed on. Because it's not our job to decide who said what. It's just like a contract. Until it is reduced to writing or at least you have some oral terms that are clear and specific, you know, it's not for me to decide

what you meant or didn't mean. I'm not going to try to interpret your words and your e-mail chain. That's -- you know, I understand that people do business that way. I'm not a big fan of it.

I think people's words mean certain things to certain people. Sometimes I think people think I'm funny because I don't allow my law clerks to do it. I think that if you have 20 e-mails and you could have had one phone call and everybody would be clear what you are talking about because words mean different things to different people.

And you leave these e-mail threads with an interpretation what you think somebody else meant and then you go on with your day. I understand because of the ease that's how people operate with one another. But I don't know that it's the most wise or expeditious way to do it. Eventually you still got to pick up the telephone. You still have to reduce something from the context of we were discussing this to finalizing it.

But I think the Supreme Court has been very clear about 43(k) and it came from a culmination of a lot of situations like this where people said they meant this, I meant that.

MR. MANOS: And thank you and I

understand, Your Honor. The only last thing that I would say is part of my affidavit, after the trial was over Mr. Martin sent the proposed release that was the same release that we were using for all the other settlements and, of course, Mr. Martin's specifically included the $433,650 language in the proposed release and in his e-mails specifically noted to Mr. McCarty attaching the same e-mails that I attached noting this is what our agreement was.

THE COURT: Mr. McCarty didn't sign it, right?

MR. MANOS: No, I agree. Thank you, Your Honor.

THE COURT: Did he indicate to you why he didn't sign it?

MR. MANOS: I won't -- well, I will certainly answer any --

THE COURT: I said did Mr. McCarty indicate to you why he didn't sign it? I'm going to ask him the same question.

MR. MANOS: Mr. McCarty said he did not remember that occurring. I didn't know what y'all are talking about. He said something to the effect of I thought it was your cross-claims and I said

Keith, how could it possibly have been my cross-claims when the e-mails specifically say in the whole thing was that we were both releasing our claims to let Benjamin Mora out of the case and then we probably said some things to each other that would be better left unsaid in this courtroom.

THE COURT: Okay.

MR. MANOS: Thank you, Your Honor.

MR. HASELDEN: Your Honor, one point. Just for the record, the case that Mr. Manos brought up, Byrd v. Livingston, at the end of it the Court says we find no error for the determination the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intend to be bound by the agreement. One of the things that court looked at specifically were e-mails that were exchanged by the parties.

THE COURT: I understand that, but there's no provision in our rules of civil procedure for doing business by e-mail and doing agreements by e-mail. We have a rule and the purpose of the rule is to provide clarity so everybody is clear as to what they have agreed on. I think that's just an acknowledgement that people

do business by e-mail. But until the rules are changed and it says you can have an agreement by e-mail, you do it at your own risk. Yes, sir.

MR. MANOS: Your Honor, it's in my affidavit just so the record can be clear if it needs to be for later, as I noted in my affidavit Wieland would take the position that it was prejudiced by having to proceed to trial without Benjamin Mora being a Defendant.

THE COURT: I have already bifurcated that. I am not taking up anything that I have already decided. I have already heard motions on that. He's not prejudiced because if they haven't settled out and I accept these cross-claims they will be right in there with you.

MR. MANOS: I understand. Okay.

THE COURT: So you will have an opportunity to proceed against them if you need to. You haven't been prejudiced. I bifurcated the claims. I didn't extinguish them.

MR. HASELDEN: Your Honor, their claim wasn't settled. They had a direct claim by the Plaintiffs. Mr. Martin's settlement was contingent on us releasing our cross-claims.

THE COURT: I haven't listened to the

transcript yet. I didn't have a chance because the court reporter was in a murder trial and she really was quite kind in providing me with her digital recording which she went above and beyond the call of duty to accommodate me. So I have to listen to them. I really don't know what was said. But at this point we have not been able to discern anything was said other than they were dismissed and there -- if you all said on the record they were dismissed and you didn't put any terms with that, that's on you because then they are dismissed and they are entitled to allotment.

MR. MANOS: I agree with you, Your Honor.

THE COURT: Mr. McCarty, anything further?

MR. MCCARTY: I did file a memorandum, Your Honor. If I might approach I'll hand it to you. It basically encompasses the law that I have talked about in my argument and the applicability of 43(k).

THE COURT: Thank you.

MR. MCCARTY: With regard to the discussion about the e-mails, he was talking about one thing, I was obviously talking about another.

We weren't in agreement on that. None of the e-mails you will see even mention the term enhanced setoff. So I thought they were trying to calculate things for their pending cross-claims because they had recently taken the position that they were not going to release cross-claims. So that's all I can tell you, Your Honor. It was just we were talking past each other. There was no agreement.

MR. MANOS: Just for the record, Your Honor, I'm an idiot for the record.

THE COURT: Well, I say that to myself at least once a day. We're all human. We make mistakes. I think if we make at least one a day we are doing good. All right.

I am going to take the opportunity to review everything that was submitted because, of course, I didn't have the benefit of the memorandum or the e-mail chain and again I have not had -- we had several hearings, all of which have digital recordings. I think you all may have ordered some of the transcripts. The court reporter has started on some of them, but she didn't -- I don't think she has made a whole lot of headway at this point because she has been in trial all week and probably I would imagine will be in trial next week as well.

So I don't know when those actually will be completed, but we are going to listen to the recordings and see exactly what was said because I don't want to rely on my memory. I want to see exactly so I can have some point of reference as to actually what happened. And we will go from there.

Of course, that goes without saying that any setoff is subject to the fairness hearing which is scheduled for when?

MR. MCCARTY: February 28th, Your Honor.

THE COURT: With Judge Young, correct?

MR. MCCARTY: That's correct.

THE COURT: But I think it's safe to say that there's -- I don't think there's really going to be an issue with that.

For the record, I have had my law clerk print a redacted table of what was presented to us pursuant to the e-mail which simply lists the Defendants which have previously approved settlements. And I don't think there can be any question that they are entitled to the setoff from all these previously approved settlements because you have already received this money.

MR. MCCARTY: We don't have any

argument with that, Your Honor.

THE COURT: The only ones, these are the larger amounts, of course, which is the 1.25 from JMC, the 250,000 from Mühler, 125 from RDT and 184, and when I say 184 I mean 184,000, those are the outstanding settlements that have not yet been approved by and subject to the fairness hearing. But I think you all would agree, Mr. Manos, that you are entitled to the setoff of these amounts that have already been approved, correct?

MR. MANOS: Two million 119?

THE COURT: I don't know. I'm not good at math. I had a copy made for you.

MR. MANOS: The numbers that Mr. Hayes and Mr. McCarty submitted yesterday which I think total 2.1, 119,000 we agree with. The only dispute was the 433,650.

THE COURT: Okay. So what I am going to do because I need to go ahead and enter an order on the judgment because it was entered -- I am losing track of time. It's been almost two weeks since the verdict came back and I need to have it in the record so y'all can -- that's an interesting question when your appeal time would run, from the verdict or me doing a Form 4. I don't know. But

nevertheless I'm going to go ahead and do a Form 4 that enters the judgment and gives credit on the previously approved settlements. I probably will add in some language about a further setoff being the subject of an additional motion and if the order needs to be -- the order -- we anticipate the order will need to be amended at some point after the disposition of the motion and then we will go from there.

Is there anything else we need to talk about before we adjourn this hearing? From the Plaintiff?

MR. MCCARTY: Your Honor, one thing.

THE COURT: Yes, sir.

MR. MCCARTY: On the table I gave you, we talked about it briefly yesterday, we had put $211,000 in our apportionment. Do you want us to resubmit that table or move that?

THE COURT: I don't know. I think you just --

MR. MCCARTY: I don't have any objection to it.

THE COURT: How much of these -- I don't think these figures come up to -- that's 100,000, 70,000, 15,000, wait one second.

MR. MCCARTY: We will resubmit it if you'd like.

THE COURT: I don't necessarily need you to. I can tell you how much has already been subject to the setoff and then you all can tell me how you want it allocated. The amount that's already been approved only comes up to $220,000. So if you want to at this point allocate 200,000 to the homeowners claim and 20,000 to the HOA claim you can do that if you would like.

MR. MCCARTY: I would prefer not to do it that way. I was wanting to keep the amounts with the settlement yet to be approved, but it looks like that's going to create --

THE COURT: What do you mean?

MR. MCCARTY: The $1.19 million.

THE COURT: It doesn't really make any appreciable difference.

MR. MCCARTY: No, it really doesn't.

THE COURT: Because they are only contesting that $434,000. The one that is approved or I guess you all don't contest the JMC amount, correct?

MR. MANOS: No, Your Honor.

THE COURT: And you don't contest the

Muhler amount, correct?

MR. MANOS: No.

THE COURT: And you don't contest RDT or Sanchez Brothers?

MR. MANOS: No, Your Honor.

THE COURT: So then I guess I could -- because y'all didn't include this contested amount at all in this list you gave me.

MR. MCCARTY: We did not, Your Honor.

THE COURT: So what I could do is allocate 200,000 to the homeowners claim and then what would the math be on that? One million, I would have to shift $11,900 over to this other column.

MR. MCCARTY: That's correct.

THE COURT: And do the allocation that way. Is there any exception from the Defendant in handling it that way?

MR. MANOS: No, Your Honor.

THE COURT: Okay. Anything further, Mr. Manos or Mr. Haselden?

MR. MANOS: No.

THE COURT: You all have a good day. I appreciate you all accommodating my schedule.

(These proceedings were concluded at

11:00 a.m., February 9, 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 2nd day of May, 2017 at Charleston, Charleston County, South Carolina.

Ruth C. Weese

Ruth C. Weese
Registered Diplomate
Reporter

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Jeffery Sills as Class Representative, et al.,
☒ Plaintiff

v.

John Wieland Homes And Neighborhoods, Inc., Et Al.,
☐ Defendant.

CASE NO.
2014-CP-10-4335

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
John C. Hayes, Iv, Esquire, Bar No. 69740 Address: 180 Meeting Street, Suite 300 Charleston, SC 29401 phone: 843-805-7003 fax: 843-573-7388 e-mail: jhayes@hayeslaw.org other:	Andrew E. Haselden, Esquire, Bar No. Address: 215 East Bay Street, Suite 303 Charleston, SC 29401 phone: 843-216-6940 fax: e-mail: ahaselden@hnblaw.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Plaintiffs' Motion to Substitute Class Representative
Estimated Time Needed:20 mins. Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ March 18, 2016
Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

SCCA/233 (11-03)

☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO: 2014-CP-10-4335
Jeffrey Sills 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 A. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash,	)	**PLAINTIFFS' MOTION TO SUBSTITUTE CLASS REPRESENTATIVE**
Plaintiff,	)	
vs.	)	
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., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John	)	

FILED
2016 MAR 21 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT

Wieland Homes and Neighborhoods, Inc., Barr 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-Southeast Group, LLC, a/k/a Builders Firstsource –Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora ak/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,	)
Defendants.	)

COME NOW the Plaintiffs, by and through their undersigned counsel, and move before this Honorable Court, for an Order to Substitute Class Representative.

Jeffrey Sills was named as Class Representative, however, subsequent to the filing of the Complaint, Jeffrey Sills has independently had developments in his personal life that make it difficult for him to perform his responsibilities in this class action law suit. Jeffrey Sills wishes to have another class member substituted as class representative in this action, as the position has become unduly burdensome for him due to the recent changes in his personal life.

Plaintiffs file this motion, respectfully requesting that this Court substitute Edward Peyser as Class Representative in this matter. Mr. Peyser is already a named Plaintiff in this matter.

I. SUBSTITUTION OF THE CLASS REPRESENTATIVE IS APPROPRIATE

Under Rule 23, the Court's class certification order may be amended at any time prior to a decision on the merits. "Once a class complaint is filed, but certainly following certification, Rule 23 is designed to assure that the rights of absent class members are not prejudiced by the voluntary actions of the representative plaintiff." *Newberg on Class Actions* §2:17 (5th ed. 2014). Even in circumstances where a class representative's claims have been lacking—for example, their claim has become moot—courts have permitted substitution of a new class representative. *In re Thornburgh*, 869 F.2d 1503, 1509–10 (D.C. Cir. 1989) (citing Newberg on Class Actions) (internal citations omitted). "Such action is especially appropriate where the events causing mootness have only individual rather than classwide impact." *Id.*

Here, the class has not been certified to date and the Class Representative wishes to step down for personal reasons which affect only him, rather than anything that affects the class as a whole. Therefore, substitution is appropriate.

II. EDWARD PEYSER IS QUALIFIED TO BE APPOINTED AS CLASS REPRESENTATIVE

Edward Peyser is similarly situated to Jeffrey Sills. He owns property at Waverly and is familiar with the claims on behalf of him and others similarly situated. Like the other members in the class, he owns property in Waverly.

Edward Peyser meets the requirement of a class representative.

1. Typicality is Satisfied

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." SCRCP 23(a)(3). Here, Plaintiff Edward Peyser

asserts claims that are typical of those of the class. The named plaintiff, together will all class members, own property at Waverly. All of the class members, including Peyser, assert the identical claim: that they are entitled to damages as a result of defective construction.

2. Adequacy of Representation is Satisfied

The proposed Class Representative and Class Counsel must "fairly and adequately protect the interests of the class." SCRCP 23(a)(4). As indicated above, Peyser has already been involved in this case and is very familiar with the lawsuit and the issues giving rise to the claims. Since he was contacted to be substituted as class representative, he has conveyed a willingness and ability to protect the interests of the class.

III. CONCLUSION

Each of the factors required for class certification remain unchanged. For these reasons, and those discussed above, Plaintiffs respectfully request that Edward Peyser be substituted as Class Representative.

[Signature Page to Follow]

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFFS

March 18, 2016
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO: 2014-CP-10-4335
Jeffrey Sills 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 A. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash,	)	**CERTIFICATION OF SERVICE**
Plaintiff,	)	
vs.	)	
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., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John	)	

FILED
2016 MAR 21 PM 3:36
JULIE J. ARMSTRONG
CLERK OF COURT

Wieland Homes and Neighborhoods, Inc., Barr 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-Southeast Group, LLC, a/k/a Builders Firstsource –Atlantic Group, LLC, DBC Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.; Jesus Mora ak/a J. Mora Brick & Block Mason, LLC; Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a ROT Contracting, LLC,	)
Defendants.	)

The undersigned hereby certifies that on the 18 day of March 2016, a true and correct copy of the forgoing *Plaintiffs' Motion To Substitute Class Representative* was served upon all parties and/or their respective counsel of record by placing the same in the U.S. Mail and/or email with sufficient postage affixed and addressed as follows:

Andrew E. Haselden Howser, Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29401 ahaselden@hnblaw.com ***Attorneys for Third-Party Defendants 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., and Builder Support Services of the Carolinas, Inc.***	Jonathan J. Anderson, Esquire Curt Martin, Esquire Anderson Reynolds & Stephens, LLC 37 ½ Broad Street Charleston, SC 29401 cmartin@arslawsc.com janderson@arslawsc.com and E. Glenn Elliott Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. 181 East Evans St., Suite 409 Florence, SC 29506 ege@aikenbridges.com

	Attorneys for Benjamin Mora d/b/a Mora Construction and Benjamin Mora Construction, LLC
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Patrick T. Morrissey Clawson & Staubes, LLC 126 Seven Farms Drive, Suite 200 Charleston, SC 29492 pmorrissey@clawsonandstaubes.com ***Attorneys for Eli, Inc.***	Laura E. Paton, Esquire R. Michael Ethridge, Esquire Carlock Copeland & Stair, LLP 40 Calhoun St., Suite 400 Charleston, SC 29401 lpaton@carlockcopeland.com methridge@carlockcopeland.com and David D. Ashley Watson Law Group 64 Ashley Avenue Charleston, SC. 29401 dashley@watsonlawgroup.com ***Attorneys for Latitude Construction Services, LLC***
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Stephen P. Hughes, Esquire Kimberly Hopkinson, Esquire Andrew Yoho, Esquire Howell Gibson & Hughes, P.A. 25 Rue Du Bois Beaufort, SC 29907 sphughes@hghpa.com khopkinson@hghpa.com	Peter Gunnar Nistad McAngus Goudelock & Courie, LLC Post Office Box 650007 Mt. Pleasant, SC 29465 gunnar.nistad@mgclaw.com ***Attorney for The Muhler Company, Inc.***

ayoho@hghpa.com ***Attorneys for Builder's Firstsource, Inc. a/k/a Builders Firstsource-Southeast Group, LLC, a/k/a Builders Firstsource –Atlantic Group, LLC***	
Thomas B. Pritchard Elizabeth F. Fulton Pritchard Law Group, LLC P.O. Box 630 Charleston, SC 29402 tpritchard@pritchardlawgroup.com liz@pritchardlawgroup.com and C. Reed Teague John E. Rogers, II The Ward Law Firm, P.A. 233 South Pine Street Spartanburg, SC 29302 jrogers@wardfirm.com rteague@wardfirm.com ***Counsel for Jesus Mora a/k/a J. Mora Brick & Block Mason, LLC***	Jared H. Garraux Richardson Plowden & Robinson, P.A. 1900 Barnwell Street (29201) P.O. Drawer 7788 Columbia, SC 29202 jgarraux@richardsonplowden.com ***Attorney for Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC***

Hayes Law Firm, LLC

Jena M. Lingle
Paralegal to John C. Hayes, IV and
Mary-Margaret F. Noland

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Jeffery Sills, Individually and as Class Representative, et al.,
☐ Plaintiffs,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,
☒ Defendants.

CASE NO. 2014-CP-10-4335

MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorneys:
John C. Hayes, IV, Esquire Hayes Law Firm 180 Meeting Street, Suite 330 Charleston, SC 29401 Phone: 843-805-7003 jhayes@hayeslaw.org	Andrew E. Haselden, Esquire Justin P. Novak, Esquire Howser, Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29464 Phone: 843.216.6940 ahaselden@hnblaw.com jnovak@hnblaw.com Theodore L. Manos, Esquire Robertson Hollingsworth Manos & Rahn, LLC 550 King Street, Suite 300 Charleston, SC 29403 Phone: 843.723.6470 tlm@roblaw.net

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Enforce Setoff and Reduce Judgment
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

February 2, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 FEB -3 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that Defendant 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. ("Defendant"), by and through the undersigned counsel, will move before The Honorable Deadra L. Jefferson on the tenth (10th) day after service hereof or at a time and place to be designated by the Court for an Order, pursuant to S.C.

Code § 15-38-50, for an order enforcing a setoff arising from the settlements of joint tortfeasors and reducing the judgment. *See Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct. App. 1999).

The above-captioned matters were tried before The Honorable Deadra L. Jefferson from January 20, 2017, through January 27, 2017. On January 27, 2017, the jury returned verdicts in favor of Plaintiff Waverly at Hamlin Plantation Townhome Association, Inc. in the amount of Seven Million and 00/100 Dollars ($7,000,000.00) and in favor Plaintiffs Jeffrey Sills, et al., in the amount of Two Hundred Thousand and 00/100 Dollars ($200,000.00). The only causes of action submitted to the jury sounded in negligence. Plaintiffs have entered into various agreements and releases with joint tortfeasors, which provide a total setoff in the amount of Two Million Five Hundred Fifty Two Thousand Six Hundred Fifty and 00/100 Dollars ($2,552,650.00). As a result, Defendant is entitled as a matter of law to a setoff from the total verdict of Two Million Five Hundred Fifty Two Thousand Six Hundred Fifty and 00/100 Dollars ($2,552,650.00). S.C. Code § 15-38-50; *see also Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct. App. 1999).

For the above stated reasons, Defendant moves this Court for an order enforcing the above-referenced setoff and reducing the judgment to Four Million Six Hundred Forty Seven Thousand Three Hundred Fifty and 00/100 Dollars ($4,647,350.00).

[Separate Signature Page Follows]

Respectfully submitted:

Andrew E. Haselden
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Attorneys for Defendants 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.

February 2, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.

Defendants.

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Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

CERTIFICATE OF SERVICE

FILED
2017 FEB -3 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

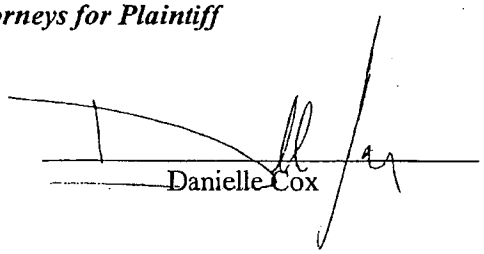
CASE NO.: 2014-CP-10-4335

I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I served the foregoing filed copy of ***Defendant's Motion to Enforce Setoff and Reduce Judgment*** *in* the above-captioned matters, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, and/or email with sufficient postage affixed and addressed as follows:

John C. Hayes, IV, Esquire
Hayes Law Firm
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and

Keith McCarty, Esquire
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Charleston, SC 29407
ikeithmccarty@gmail.com
Attorneys for Plaintiff



Danielle Cox

February 2, 2017

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Waverly at Hamlin Plantation Townhome Association, Inc.,
☐Plaintiffs,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,
☒Defendants.

CASE NO. 2013-CP-10-3326

MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: John C. Hayes, IV, Esquire Hayes Law Firm 180 Meeting Street, Suite 330 Charleston, SC 29401 Phone: 843-805-7003 jhayes@hayeslaw.org.com	Defendant's Attorney: Andrew E. Haselden, Esquire Justin P. Novak, Esquire Howser, Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29464 Phone: 843.216.6940 ahaselden@hnblaw.com jnovak@hnblaw.com Theodore L. Manos, Esquire Robertson Hollingsworth Manos & Rahn, LLC 550 King Street, Suite 300 Charleston, SC 29403 Phone: 843.723.6470 tlm@roblaw.net

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☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

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☒ Written motion attached
☐ Form Motion --

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

February 2, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
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☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

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John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

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IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 FEB -3 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEASE TAKE NOTICE that Defendant 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. ("Defendant"), by and through the undersigned counsel, will move before The Honorable Deadra L. Jefferson on the tenth (10th) day after service hereof or at a time and place to be designated by the Court for an Order, pursuant to S.C.

Code § 15-38-50, for an order enforcing a setoff arising from the settlements of joint tortfeasors and reducing the judgment. *See Ellis v. Oliver*, 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct. App. 1999).

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For the above stated reasons, Defendant moves this Court for an order enforcing the above-referenced setoff and reducing the judgment to Four Million Six Hundred Forty Seven Thousand Three Hundred Fifty and 00/100 Dollars ($4,647,350.00).

[Separate Signature Page Follows]

Respectfully submitted:

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Attorneys for Defendants 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.

February 2, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.

Defendants.

Jeffrey Sills, Individually and as Class Representative, et al.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

FILED
2017 FEB -3 PM 2:14
JULIE J. ARMSTRONG
CLERK OF COURT
BY

CERTIFICATE OF SERVICE

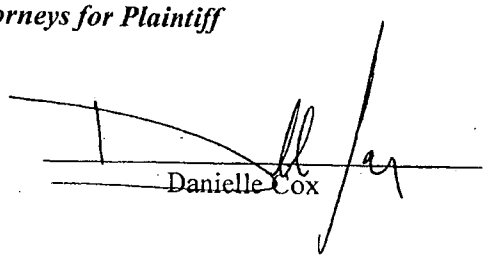
CASE NO.: 2014-CP-10-4335

I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I served the foregoing filed copy of ***Defendant's Motion to Enforce Setoff and Reduce Judgment*** *in* the above-captioned matters, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, and/or email with sufficient postage affixed and addressed as follows:

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Attorneys for Plaintiff



February 2, 2017

Charleston, South Carolina

14-CP-10-4335

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiff,

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., and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc.,

Defendants.

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, Builder's Firstsource, Inc. a/k/a Builders First-Source-Southeast Group, LLC a/k/a Builders Firstrsource-Atlantic Group, LLC, DBA Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-3326

AFFIDAVIT OF THEODORE L. MANOS IN SUPPORT OF JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.'S MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT FILED ON FEBRUARY 3, 2017

FILED
2017 FEB -9 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez 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.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-~~4336~~ 4335

Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitemire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle, Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesene, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle,

Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48),	)
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 John Wieland Homes and Neighborhoods, Inc., 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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio and Richard Ditullio a/k/a RDT Contracting, LLC,	)
Defendants.	)

Personally appeared before me, Theodore L. Manos, who upon oath, states and deposes as follows:

1. My name is Theodore L. Manos and I am over 18 years of age and of sound mind.

2. I am a member of Robertson Hollingsworth Manos & Rahn, LLC and represent John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. ("Wieland") in the above-captioned litigation.

3. Following the deposition of Bud DeSantis on January 11, 2017, Plaintiffs' counsel, John Hayes, IV and I. Keith McCarty and I and my co-counsel, Andrew E. Haselden, discussed the potential for settling Plaintiff's claims and Wieland's cross-claims against Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC ("Mora").

4. Specifically, Plaintiffs' counsel requested that Wieland release its cross-claims in consideration for Mora paying Plaintiffs $500.00. Wieland's counsel rejected Plaintiffs' counsel's request and countered by requesting a full issue release as to Wieland's exposure to the masonry step repair which was delineated in Plaintiffs' repair estimate at $735,000 prior to markup for profit and overhead. Wieland was seeking a full issue release because by Plaintiffs settling with Mora, all of the masons on the job would have been released due to the prior settlement with the other mason.

5. Plaintiffs' counsel rejected Wieland's counter and suggested that it would be willing to provide Wieland with a release as to Mora's masonry work.

6. I informed Plaintiffs' counsel that I would discuss their proposal with my co-counsel and respond to them.

7. That afternoon I spoke with Mr. McCarty regarding how t value Mora's portion of the masonry work based on it being one of two masons at Waverly townhomes.

8. That same afternoon on January 11, 2017 at 3:35 p.m., I sent an e-mail to Mr. McCarty with a copy to Curtis B. Martin, counsel for Mora, notifying them that my records reflected that Mora installed sixty two (62) of the one hundred and five (105) sets of masonry steps at Waverly which represented 59% of the total steps. I further noted that Plaintiffs' repair estimate included a total of $735,000.00 to replace all 105 of the masonry steps before markup for profit and overhead. In my email I included the calculation of 59% x $735,000 = $433,650.00. I closed my email with a request for Plaintiffs' counsel's response.

9. Mr. McCarty responded to me with an email that same day at 4:14 p.m. with a copy to Mr. Martin noting "Gentlemen, assuming Curt agrees with the numbers, that is fine with me".

10. Mr. Martin responded to Mr. McCarty's email that afternoon at 4:24 p.m. with a copy to me advising Mr. McCarty that he had spoken with me "about this and the numbers look right to me. Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled $500. Keith and Teddy, please confirm by response to this email".

11. Mr. McCarty responded to Mr. Martin's email that same afternoon at 4:31 p.m. with a copy to me stating "All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release".

12. Attached hereto as Exhibit "A" is the email chain set forth in paragraphs 8–11.

13. On Tuesday, January 17, 2017, following Jury Qualification, Plaintiffs' counsel and Wieland's counsel notified the Honorable Deadra L. Jefferson in open court and on the record that Plaintiffs and Wieland had settled with Mora by agreement.

14. Wieland's agreement to release its cross-claims against Mora were solely based on the tri-party agreement among Plaintiffs, Wieland and Mora which provided Wieland with a $433,650.00 setoff against any judgment that Plaintiffs may be awarded at trial. Had such set-off not been agreed upon, Wieland would not have released its cross-claims against Mora, but instead would have argued to the jury that Mora as the trade expert was primarily responsible for the alleged deficiencies in the masonry step work as described above, thereby reducing Wieland's potential exposure on this substantial $735,000.00 issue.

15. On Wednesday, February 1, 2017, after the trial had ended, Mr. Martin sent Mr. McCarty and I an email noting "[a]s to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed release". Attached hereto as Exhibit "B" is Mr. Martin's email, along with the proposed release containing the $433,650.00 set-off language in Article II, which is attached hereto as Exhibit "C".

FURTHER AFFIANT SAYETH NOT.

Theodore L. Manos

SWORN TO AND SUBSCRIBED BEFORE ME

This, the 9th day of February, 2017
Notary Public for: South Carolina

My commission expires: 9-2-2022

Elissa Jones

From: Teddy Manos
Sent: Thursday, February 9, 2017 9:35 AM
To: Elissa Jones
Subject: Fwd: Waverly v. Wieland SCRE 408 confidential settlement communications

Sent from my T-Mobile 4G LTE device

------ Original message------
From: keith mccarty
Date: Wed, Jan 11, 2017 4:31 PM
To: Curt Martin;
Cc: Teddy Manos;
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release. Keith

On Wed, Jan 11, 2017 at 4:24 PM, Curt Martin <cmartin@arslawsc.com> wrote:

Keith,
I just talked to Teddy about this; the numbers look right to me.
Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled for $500. Keith and Teddy, please confirm by response to this email.
And Keith, you know the drill with National Fire - no settlement check will be issued until they've received a fully-executed release, which I'll be happy to get to you by the end of the week.
Thanks, guys
--Curt

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Wednesday, January 11, 2017 4:14:49 PM
To: Teddy Manos
Cc: Curt Martin
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

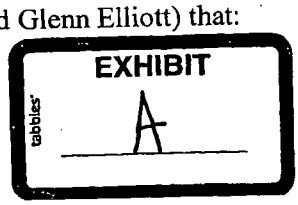
Gentlemen, assuming Curt agrees with the numbers, that is fine with me. Keith

On Wed, Jan 11, 2017 at 3:35 PM, Teddy Manos <tlm@roblaw.net> wrote:

Keith –

Per our conversation –

My notes reflect (Curt please confirm - I think the below came from Pritchard and Glenn Elliott) that:



Curt's client installed: exterior bricks steps on 62 of the 105 units.(59%).

Pritchard's client installed: exterior brick steps on 43 of the 105 units (41%).

Moore estimated the replacement of all masonry steps at the Project totaling $735K before mark-up.

So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

Theodore L. Manos, Esq. – Member

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

550 King Street, Suite 300

Charleston, SC 29403

Office (843) 723-6470

Mobile (843) 345-8992

Facsimile (843) 853-9045

tlm@roblaw.net

PLEASE NOTE OUR NEW NAME AND ADDRESS

--
I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282
This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

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From: Curt Martin [mailto:cmartin@arslawsc.com]
Sent: Wednesday, February 1, 2017 2:32 PM
To: keith mccarty <ikeithmccarty@gmail.com>
Cc: Teddy Manos <tlm@roblaw.net>
Subject: RE: Waverly v. Wieland SCRE 408 confidential settlement communications

Keith and Teddy,
I understand things are all wrapped up with trial; I stuck my head in a couple times last week – good job all around, and I'm sure you're both happy to have it done.
As to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed Release. Please let me know if you have any proposed changes, etc. – just please use Track Changes such that we're all on the same page.
If you're OK with the Release as-is, please get your signature pages to me, and I'll circulate a fully-executed copy.
As I mentioned in my email below, Keith, I can't order the settlement check without the fully-executed Release.
Thanks, guys.

Curt Martin
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
Post Office Box 87
Charleston, South Carolina 29401
843.723.0185 telephone
843.405.0313 facsimile
cmartin@arslawsc.com
Confidentiality Notice
This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843.723.0185) or reply to this e-mail and delete all copies of this message.

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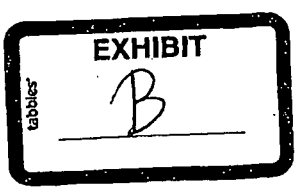
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So 59% x $735,000 = $433,650

Let me know what you are thinking.

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Teddy

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement" or the "Settlement Agreement") is made and entered into as of this ___ day of _____, 2017, by and between Waverly at Hamlin Plantation Townhome Association, Inc., in its corporate capacity and Edward Peyser, individually and on behalf of the Individual Owners[1] (collectively the "Association"), 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., Builder Support Services of the Carolinas, Inc. and John Wieland Homes and Neighborhoods, Inc. (collectively "Wieland"), and Benjamin Mora Construction, LLC ("Mora"). The Association, Wieland, and Mora are hereinafter collectively referred to as the "Settling Parties."

RECITALS

WHEREAS, the Association is a corporation lawfully doing business in the State of South Carolina and is the entity charged with and responsible for maintenance, repair, and upkeep of the common areas and limited common areas, as well as exterior and related elements of the condominium units and property known as Waverly at Hamlin Plantation Townhomes, located in Charleston County, South Carolina (the "Property").

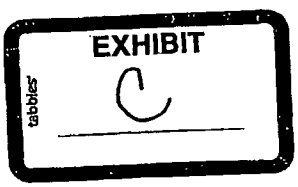
WHEREAS, the Association affirms that it is the sole proper party, whether by right or by assignment from individual condominium unit owners or the developer to bring this action and execute this settlement as to all claims for damages to any and all structures, common areas, limited common areas, unit interiors and lots located at the Property; and

WHEREAS, Edward Peyser is a citizen of South Carolina, who has been identified as the Class Representative for a purported class of all individual townhome owners at the Property and affirms ownership of any claims for loss of use or any other claims not owned by the Association related to the subject matter of the collective lawsuits filed.

WHEREAS, Mora performed certain construction work including installation of brick steps, fireplaces, and block work at the Property as a subcontractor to Wieland pursuant to job cost details and other documents with Wieland, the General Contractor for construction of the Property; and

WHEREAS, these actions relate to alleged construction defects and deficiencies at the Property and is the subject of litigation now pending in the Court of Common Pleas for Charleston County, South Carolina in a case styled *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.*, Case Number 2013-CP-10-03326 (the "Action"); and *Jeffrey Sills, Individually and as Class*

1 Edward Peyser was appointed as class representative pursuant to Judge Roger M. Young, Sr.'s Order Granting Plaintiffs' Motion for Class Certification filed on May 4, 2016.



Representative, et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., Case Number 2014-CP-10-4335 (the "Class Action"); and

WHEREAS, Mora denies any and all claims of wrongdoing or impropriety in its actions in this matter; and

WHEREAS, the Settling Parties have agreed to resolve all matters between them as set forth below.

ARTICLE I
INCORPORATION OF RECITALS

The foregoing Recitals are incorporated and made a part of this Settlement Agreement, provided, however, in the event of a conflict between the recitals and the provisions of the foregoing Articles, the provisions of the Articles shall control.

ARTICLE II
PAYMENT

For and in consideration of the payment of Five Hundred ($500.00) Dollars, by or on behalf of Mora, and other good and valuable consideration, the sufficiency of which is hereby acknowledged (the "**Settlement Amount**"), the Association, on behalf of itself and on behalf of the individual owners of units at the Property, and Wieland, agree to release Mora from any and all liability related to the Project as set forth in Article III. Payments to the Association shall be made payable to "Hayes Law Firm as Attorney for Waverly at Hamlin Plantation Association" and delivered to the Association counsel John C. Hayes, Esquire, within thirty (30) business days after this fully-executed Agreement is received by National Fire & Marine, an insurer for Mora. Additionally, in consideration of the Agreement hereto of Wieland, Plaintiffs (the Association and the class members) shall grant Wieland a credit or offset against damages/judgment in the amount of Four Hundred Thirty Three Thousand Six Hundred Fifty and 00/100 ($433,650.00) Dollars.

ARTICLE III

RELEASES

1. In consideration of the Settlement Amounts and of the promises and releases set forth herein, the Association and Wieland do for themselves, and their respective successors, heirs, assigns, subsidiary organizations, affiliates, purchasers, unit owners, partners, attorneys, agents, and any other entity or person who could claim by or through them, hereby, knowingly and voluntarily, remises, releases, acquits, satisfies, and forever discharge Mora, National Fire & Marine Insurance Company (collectively "Settling Defendant"), their respective successors, predecessors, heirs, assigns, subsidiary organizations, affiliates, purchasers, insurers, partners, members, shareholders, officers, attorneys, employees, and agents from any and all manner of warranties, representations, covenants, promises, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands, and causes of action of any nature whatsoever, whether at law or in equity, either now accrued or hereafter maturing whether known or unknown, which the Association and Wieland now have or hereafter can, shall, or may have by reason of any matter, cause or thing as to the Settling Defendants only. This Release as to the insurance carrier National Fire & Marine Insurance Company is limited to its involvement as the carrier for Mora only, including but not limited to a release of the policies for Mora for the claims brought in this suit by Plaintiffs and Wieland, as well as any claims as an additional insured. Nothing herewith shall release the identified carriers to the extent they have policies of insurance for other Defendants.

The Association and Wieland agree to dismiss with prejudice all claims against Mora in the Action and the Class Action, including those claims it has taken by assignment from unit owners. The Association agrees to execute and file, or cause to be executed and filed, pleadings in order to effectuate this full and complete settlement agreement and release as to Mora.

ARTICLE IV
ACKNOWLEDGEMENT AND WAIVER

1. It is agreed and understood by the Settling Parties that they are not required to settle this matter at this time, and that they could continue to investigate with respect to the matter involved in the suit, but that they voluntarily choose to finally resolve the matter at this time by entering into this settlement. The Settling Parties, in deciding to enter into this Agreement, are not relying on any representations, statements, actions, disclosures of information, discovery responses, deposition testimony or failures to disclose information by Settling Parties, or their representatives, or their attorneys. Settling Parties further agree, warrant and represent that their decision to settle this matter is final and will not be affected, altered or changed by documentation, discovery or other information of any type whatsoever that may be revealed, disclosed or learned in the future.

2. Settling Parties expressly waive and assume the risk of any and all claims for damages and/or damages which exist as of this date, or which may arise in the future, but which they do not now know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect their decision to enter into this agreement. Settling Parties each acknowledge and understand that they may have suffered damages, or may suffer damages, that are unknown to them at the present time. These issues were considered in the course of negotiations leading to this agreement and Settling Parties determined this Agreement to reflect fair and adequate compensation with due regard for such future possibilities.

ARTICLE V
MISCELLANEOUS

1. Costs and Expenses. Each party is responsible for its own attorneys' fees and

costs associated with the Action and Class Action through the date of execution of this agreement.

2. Construction. This Settlement Agreement shall not be construed more strongly for or against any party solely by reason of who was more responsible for the drafting of this Agreement.

3. Successors and Assigns. All covenants and agreements contained in this Settlement Agreement shall bind and inure to the benefit of the parties hereto, their legal representatives, successors, and assigns.

4. Further Assurances. The parties hereto agree that they will cooperate with each other and will execute and deliver, or cause to be executed and delivered, all such other instruments, and will take all such other actions, as any party hereto may reasonably request from time to time in order to effectuate the provisions and purposes hereof.

5. Modifications. Neither this Settlement Agreement nor any provision hereof may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge, or termination is sought and by any party who would be affected thereby.

6. Governing Law. This Settlement Agreement will be interpreted and construed under the internal laws of the State of South Carolina, regardless of the domicile of any party, and will be deemed for those purposes to have been made, executed, and performed in South Carolina.

7. Time of the Essence. Time is of the essence in this Settlement Agreement and each provision of this Settlement Agreement.

8. Legal Fees. In the event of a breach by any party of its obligations under this

Agreement, the prevailing party in any action or proceeding in any court in connection therewith shall be entitled to recover from such other party its costs and expenses, including reasonable legal fees, expenses and associated court costs.

9. Notices. All notices, demands, requests, consents, or other communications required or permitted to be given hereunder (collectively, a "Notice") shall be in writing and shall be given to the party at its regular mail address (or at such other mail address that a party may hereafter designate by sending written notice thereof to the other parties pursuant to the terms of this Section).

10. Entire Agreement. This instrument constitutes the entire and final agreement among the parties and there are no agreements, understandings, warranties, or representations among the parties except as set forth in this Settlement Agreement.

11. Invalidity. If any clause or provision of this Settlement Agreement is determined to be illegal, invalid, or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Settlement Agreement will not be affected thereby.

12. Counterparts. This Settlement Agreement may be executed in counterparts, each of which will be deemed an original document, but all of which will collectively constitute a single document. This document will not be binding on or constitute evidence of a contract between the parties until such time as this document has been executed by each party and a copy thereof delivered to each other party to this Settlement Agreement.

SIGNATURE PAGES TO FOLLOW

IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this _____ day of _____, 2017.

WAVERLY AT HAMLIN PLANTATION
TOWNHOME ASSOCIATION, INC.

By_____(SEAL)

Its:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that they executed the foregoing instrument as their own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

IN WITNESS WHEREOF, the undersigned have hereunto set his hand and seal as of this _____ day of _____, 2017.

EDWARD PEYSER, INDIVIDUALLY AND AS CLASS REPRESENTATIVE

By_____(SEAL)

Print:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

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Notary Public for _____
My Commission expires: _____

SETTLEMENT AGREEMENT AND RELEASE

Waverly at Hamlin Plantation Townhome Association, Inc.
vs.
John Wieland Homes and Neighborhoods of the Carolinas, Inc., et. al.
Case No: 2013-CP-10-03326

_____(SEAL)
John C. Hayes, IV
Mary Margaret Noland

_____(SEAL)
I. Keith McCarty

Attorneys for Plaintiffs

This as of the day and year first above written.

SETTLEMENT AGREEMENT AND RELEASE
Waverly at Hamlin Plantation Townhome Association, Inc.
vs.
John Wieland Homes and Neighborhoods of the Carolinas, Inc., et. al.
Case No: 2013-CP-10-03326

_____(SEAL)
Theodore L. Manos
Andrew E. Haselden

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et al

Dated: _____

_____(SEAL)
Curt Martin

Attorney for Benjamin Mora Construction, LLC

Dated: _____

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiff,

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., and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc.,

Defendants.

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, Builder's Firstsource, Inc. a/k/a Builders First-Source-Southeast Group, LLC a/k/a Builders Firstrsource-Atlantic Group, LLC, DBA Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-3326

AFFIDAVIT OF THEODORE L. MANOS IN SUPPORT OF JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.'S MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT FILED ON FEBRUARY 3, 2017

FILED
2017 FEB -9 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez 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.	)	
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-10-4336
Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitemire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle, Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesene, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle,	)	

Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48),

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 John Wieland Homes and Neighborhoods, Inc., 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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio and Richard Ditullio a/k/a RDT Contracting, LLC,

Defendants.

Personally appeared before me, Theodore L. Manos, who upon oath, states and deposes as follows:

1. My name is Theodore L. Manos and I am over 18 years of age and of sound mind.

2. I am a member of Robertson Hollingsworth Manos & Rahn, LLC and represent John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. ("Wieland") in the above-captioned litigation.

3. Following the deposition of Bud DeSantis on January 11, 2017, Plaintiffs' counsel, John Hayes, IV and I. Keith McCarty and I and my co-counsel, Andrew E. Haselden, discussed the potential for settling Plaintiff's claims and Wieland's cross-claims against Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC ("Mora").

4. Specifically, Plaintiffs' counsel requested that Wieland release its cross-claims in consideration for Mora paying Plaintiffs $500.00. Wieland's counsel rejected Plaintiffs' counsel's request and countered by requesting a full issue release as to Wieland's exposure to the masonry step repair which was delineated in Plaintiffs' repair estimate at $735,000 prior to markup for profit and overhead. Wieland was seeking a full issue release because by Plaintiffs settling with Mora, all of the masons on the job would have been released due to the prior settlement with the other mason.

5. Plaintiffs' counsel rejected Wieland's counter and suggested that it would be willing to provide Wieland with a release as to Mora's masonry work.

6. I informed Plaintiffs' counsel that I would discuss their proposal with my co-counsel and respond to them.

7. That afternoon I spoke with Mr. McCarty regarding how t value Mora's portion of the masonry work based on it being one of two masons at Waverly townhomes.

8. That same afternoon on January 11, 2017 at 3:35 p.m., I sent an e-mail to Mr. McCarty with a copy to Curtis B. Martin, counsel for Mora, notifying them that my records reflected that Mora installed sixty two (62) of the one hundred and five (105) sets of masonry steps at Waverly which represented 59% of the total steps. I further noted that Plaintiffs' repair estimate included a total of $735,000.00 to replace all 105 of the masonry steps before markup for profit and overhead. In my email I included the calculation of 59% x $735,000 = $433,650.00. I closed my email with a request for Plaintiffs' counsel's response.

9. Mr. McCarty responded to me with an email that same day at 4:14 p.m. with a copy to Mr. Martin noting "Gentlemen, assuming Curt agrees with the numbers, that is fine with me".

10. Mr. Martin responded to Mr. McCarty's email that afternoon at 4:24 p.m. with a copy to me advising Mr. McCarty that he had spoken with me "about this and the numbers look right to me. Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled $500. Keith and Teddy, please confirm by response to this email".

11. Mr. McCarty responded to Mr. Martin's email that same afternoon at 4:31 p.m. with a copy to me stating "All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release".

12. Attached hereto as Exhibit "A" is the email chain set forth in paragraphs 8–11.

13. On Tuesday, January 17, 2017, following Jury Qualification, Plaintiffs' counsel and Wieland's counsel notified the Honorable Deadra L. Jefferson in open court and on the record that Plaintiffs and Wieland had settled with Mora by agreement.

14. Wieland's agreement to release its cross-claims against Mora were solely based on the tri-party agreement among Plaintiffs, Wieland and Mora which provided Wieland with a $433,650.00 setoff against any judgment that Plaintiffs may be awarded at trial. Had such set-off not been agreed upon, Wieland would not have released its cross-claims against Mora, but instead would have argued to the jury that Mora as the trade expert was primarily responsible for the alleged deficiencies in the masonry step work as described above, thereby reducing Wieland's potential exposure on this substantial $735,000.00 issue.

15. On Wednesday, February 1, 2017, after the trial had ended, Mr. Martin sent Mr. McCarty and I an email noting "[a]s to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed release". Attached hereto as Exhibit "B" is Mr. Martin's email, along with the proposed release containing the $433,650.00 set-off language in Article II, which is attached hereto as Exhibit "C".

FURTHER AFFIANT SAYETH NOT.

Theodore L. Manos

SWORN TO AND SUBSCRIBED BEFORE ME

This, the 9th day of February, 2017
Notary Public for: South Carolina

My commission expires: 9-2-2022

Elissa Jones

From: Teddy Manos
Sent: Thursday, February 9, 2017 9:35 AM
To: Elissa Jones
Subject: Fwd: Waverly v. Wieland SCRE 408 confidential settlement communications

Sent from my T-Mobile 4G LTE device

------ Original message------
From: keith mccarty
Date: Wed, Jan 11, 2017 4:31 PM
To: Curt Martin;
Cc: Teddy Manos;
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release. Keith

On Wed, Jan 11, 2017 at 4:24 PM, Curt Martin <cmartin@arslawsc.com> wrote:

Keith,
I just talked to Teddy about this; the numbers look right to me.
Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled for $500. Keith and Teddy, please confirm by response to this email.
And Keith, you know the drill with National Fire - no settlement check will be issued until they've received a fully-executed release, which I'll be happy to get to you by the end of the week.
Thanks, guys
--Curt

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Wednesday, January 11, 2017 4:14:49 PM
To: Teddy Manos
Cc: Curt Martin
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

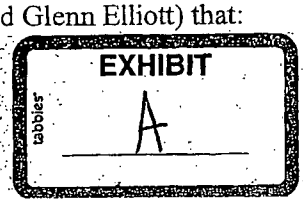
Gentlemen, assuming Curt agrees with the numbers, that is fine with me. Keith

On Wed, Jan 11, 2017 at 3:35 PM, Teddy Manos <tlm@roblaw.net> wrote:

Keith –

Per our conversation –

My notes reflect (Curt please confirm - I think the below came from Pritchard and Glenn Elliott) that:



Curt's client installed: exterior bricks steps on 62 of the 105 units (59%).

Pritchard's client installed: exterior brick steps on 43 of the 105 units (41%).

Moore estimated the replacement of all masonry steps at the Project totaling $735K before mark-up.

So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

Theodore L. Manos, Esq. – Member

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

550 King Street, Suite 300

Charleston, SC 29403

Office (843) 723-6470

Mobile (843) 345-8992

Facsimile (843) 853-9045

tlm@roblaw.net

PLEASE NOTE OUR NEW NAME AND ADDRESS

--
I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282
This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

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From: Curt Martin [mailto:cmartin@arslawsc.com]
Sent: Wednesday, February 1, 2017 2:32 PM
To: keith mccarty <ikeithmccarty@gmail.com>
Cc: Teddy Manos <tlm@roblaw.net>
Subject: RE: Waverly v. Wieland SCRE 408 confidential settlement communications

Keith and Teddy,
I understand things are all wrapped up with trial; I stuck my head in a couple times last week – good job all around, and I'm sure you're both happy to have it done.
As to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed Release. Please let me know if you have any proposed changes, etc. – just please use Track Changes such that we're all on the same page.
If you're OK with the Release as-is, please get your signature pages to me, and I'll circulate a fully-executed copy.
As I mentioned in my email below, Keith, I can't order the settlement check without the fully-executed Release.
Thanks, guys.

Curt Martin
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
Post Office Box 87
Charleston, South Carolina 29401
843.723.0185 telephone
843.405.0313 facsimile
cmartin@arslawsc.com
Confidentiality Notice
This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843.723.0185) or reply to this e-mail and delete all copies of this message.

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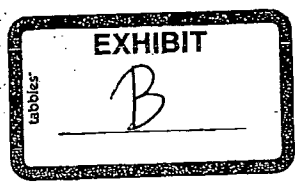
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So 59% x $735,000 = $433,650

Let me know what you are thinking.

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Teddy

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement" or the "Settlement Agreement") is made and entered into as of this ___ day of _____, 2017, by and between Waverly at Hamlin Plantation Townhome Association, Inc., in its corporate capacity and Edward Peyser, individually and on behalf of the Individual Owners[1] (collectively the "Association"), 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., Builder Support Services of the Carolinas, Inc. and John Wieland Homes and Neighborhoods, Inc. (collectively "Wieland"), and Benjamin Mora Construction, LLC ("Mora"). The Association, Wieland, and Mora are hereinafter collectively referred to as the "Settling Parties."

RECITALS

WHEREAS, the Association is a corporation lawfully doing business in the State of South Carolina and is the entity charged with and responsible for maintenance, repair, and upkeep of the common areas and limited common areas, as well as exterior and related elements of the condominium units and property known as Waverly at Hamlin Plantation Townhomes, located in Charleston County, South Carolina (the "Property").

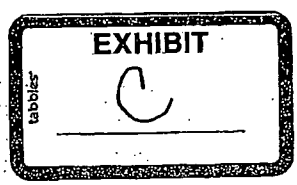
WHEREAS, the Association affirms that it is the sole proper party, whether by right or by assignment from individual condominium unit owners or the developer to bring this action and execute this settlement as to all claims for damages to any and all structures, common areas, limited common areas, unit interiors and lots located at the Property; and

WHEREAS, Edward Peyser is a citizen of South Carolina, who has been identified as the Class Representative for a purported class of all individual townhome owners at the Property and affirms ownership of any claims for loss of use or any other claims not owned by the Association related to the subject matter of the collective lawsuits filed.

WHEREAS, Mora performed certain construction work including installation of brick steps, fireplaces, and block work at the Property as a subcontractor to Wieland pursuant to job cost details and other documents with Wieland, the General Contractor for construction of the Property; and

WHEREAS, these actions relate to alleged construction defects and deficiencies at the Property and is the subject of litigation now pending in the Court of Common Pleas for Charleston County, South Carolina in a case styled *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.*, Case Number 2013-CP-10-03326 (the "Action"); and *Jeffrey Sills, Individually and as Class*

1 Edward Peyser was appointed as class representative pursuant to Judge Roger M. Young, Sr.'s Order Granting Plaintiffs' Motion for Class Certification filed on May 4, 2016.



Representative, et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., Case Number 2014-CP-10-4335 (the "Class Action"); and

WHEREAS, Mora denies any and all claims of wrongdoing or impropriety in its actions in this matter; and

WHEREAS, the Settling Parties have agreed to resolve all matters between them as set forth below.

ARTICLE I
INCORPORATION OF RECITALS

The foregoing Recitals are incorporated and made a part of this Settlement Agreement, provided, however, in the event of a conflict between the recitals and the provisions of the foregoing Articles, the provisions of the Articles shall control.

ARTICLE II
PAYMENT

For and in consideration of the payment of Five Hundred ($500.00) Dollars, by or on behalf of Mora, and other good and valuable consideration, the sufficiency of which is hereby acknowledged (the "**Settlement Amount**"), the Association, on behalf of itself and on behalf of the individual owners of units at the Property, and Wieland, agree to release Mora from any and all liability related to the Project as set forth in Article III. Payments to the Association shall be made payable to "Hayes Law Firm as Attorney for Waverly at Hamlin Plantation Association" and delivered to the Association counsel John C. Hayes, Esquire, within thirty (30) business days after this fully-executed Agreement is received by National Fire & Marine, an insurer for Mora. Additionally, in consideration of the Agreement hereto of Wieland, Plaintiffs (the Association and the class members) shall grant Wieland a credit or offset against damages/judgment in the amount of Four Hundred Thirty Three Thousand Six Hundred Fifty and 00/100 ($433,650.00) Dollars.

ARTICLE III

RELEASES

1. In consideration of the Settlement Amounts and of the promises and releases set forth herein, the Association and Wieland do for themselves, and their respective successors, heirs, assigns, subsidiary organizations, affiliates, purchasers, unit owners, partners, attorneys, agents, and any other entity or person who could claim by or through them, hereby, knowingly and voluntarily, remises, releases, acquits, satisfies, and forever discharge Mora, National Fire & Marine Insurance Company (collectively "Settling Defendant"), their respective successors, predecessors, heirs, assigns, subsidiary organizations, affiliates, purchasers, insurers, partners, members, shareholders, officers, attorneys, employees, and agents from any and all manner of warranties, representations, covenants, promises, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands, and causes of action of any nature whatsoever, whether at law or in equity, either now accrued or hereafter maturing whether known or unknown, which the Association and Wieland now have or hereafter can, shall, or may have by reason of any matter, cause or thing as to the Settling Defendants only. This Release as to the insurance carrier National Fire & Marine Insurance Company is limited to its involvement as the carrier for Mora only, including but not limited to a release of the policies for Mora for the claims brought in this suit by Plaintiffs and Wieland, as well as any claims as an additional insured. Nothing herewith shall release the identified carriers to the extent they have policies of insurance for other Defendants.

The Association and Wieland agree to dismiss with prejudice all claims against Mora in the Action and the Class Action, including those claims it has taken by assignment from unit owners. The Association agrees to execute and file, or cause to be executed and filed, pleadings in order to effectuate this full and complete settlement agreement and release as to Mora.

ARTICLE IV
ACKNOWLEDGEMENT AND WAIVER

1. It is agreed and understood by the Settling Parties that they are not required to settle this matter at this time, and that they could continue to investigate with respect to the matter involved in the suit, but that they voluntarily choose to finally resolve the matter at this time by entering into this settlement. The Settling Parties, in deciding to enter into this Agreement, are not relying on any representations, statements, actions, disclosures of information, discovery responses, deposition testimony or failures to disclose information by Settling Parties, or their representatives, or their attorneys. Settling Parties further agree, warrant and represent that their decision to settle this matter is final and will not be affected, altered or changed by documentation, discovery or other information of any type whatsoever that may be revealed, disclosed or learned in the future.

2. Settling Parties expressly waive and assume the risk of any and all claims for damages and/or damages which exist as of this date, or which may arise in the future, but which they do not now know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect their decision to enter into this agreement. Settling Parties each acknowledge and understand that they may have suffered damages, or may suffer damages, that are unknown to them at the present time. These issues were considered in the course of negotiations leading to this agreement and Settling Parties determined this Agreement to reflect fair and adequate compensation with due regard for such future possibilities.

ARTICLE V
MISCELLANEOUS

1. Costs and Expenses. Each party is responsible for its own attorneys' fees and

costs associated with the Action and Class Action through the date of execution of this agreement.

2. Construction. This Settlement Agreement shall not be construed more strongly for or against any party solely by reason of who was more responsible for the drafting of this Agreement.

3. Successors and Assigns. All covenants and agreements contained in this Settlement Agreement shall bind and inure to the benefit of the parties hereto, their legal representatives, successors, and assigns.

4. Further Assurances. The parties hereto agree that they will cooperate with each other and will execute and deliver, or cause to be executed and delivered, all such other instruments, and will take all such other actions, as any party hereto may reasonably request from time to time in order to effectuate the provisions and purposes hereof.

5. Modifications. Neither this Settlement Agreement nor any provision hereof may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge, or termination is sought and by any party who would be affected thereby.

6. Governing Law. This Settlement Agreement will be interpreted and construed under the internal laws of the State of South Carolina, regardless of the domicile of any party, and will be deemed for those purposes to have been made, executed, and performed in South Carolina.

7. Time of the Essence. Time is of the essence in this Settlement Agreement and each provision of this Settlement Agreement.

8. Legal Fees. In the event of a breach by any party of its obligations under this

Agreement, the prevailing party in any action or proceeding in any court in connection therewith shall be entitled to recover from such other party its costs and expenses, including reasonable legal fees, expenses and associated court costs.

9. Notices. All notices, demands, requests, consents, or other communications required or permitted to be given hereunder (collectively, a "Notice") shall be in writing and shall be given to the party at its regular mail address (or at such other mail address that a party may hereafter designate by sending written notice thereof to the other parties pursuant to the terms of this Section).

10. Entire Agreement. This instrument constitutes the entire and final agreement among the parties and there are no agreements, understandings, warranties, or representations among the parties except as set forth in this Settlement Agreement.

11. Invalidity. If any clause or provision of this Settlement Agreement is determined to be illegal, invalid, or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Settlement Agreement will not be affected thereby.

12. Counterparts. This Settlement Agreement may be executed in counterparts, each of which will be deemed an original document, but all of which will collectively constitute a single document. This document will not be binding on or constitute evidence of a contract between the parties until such time as this document has been executed by each party and a copy thereof delivered to each other party to this Settlement Agreement.

SIGNATURE PAGES TO FOLLOW

IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this _____ day of _____, 2017.

WAVERLY AT HAMLIN PLANTATION
TOWNHOME ASSOCIATION, INC.

By_____(SEAL)

Its:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that they executed the foregoing instrument as their own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

IN WITNESS WHEREOF, the undersigned have hereunto set his hand and seal as of this _____ day of _____, 2017.

EDWARD PEYSER, INDIVIDUALLY AND AS CLASS REPRESENTATIVE

By_____(SEAL)

Print:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that he executed the foregoing instrument as his own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

_____(SEAL)
John C. Hayes, IV
Mary Margaret Noland

_____(SEAL)
I. Keith McCarty

Attorneys for Plaintiffs

This as of the day and year first above written.

_____(SEAL)
Theodore L. Manos
Andrew E. Haselden

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et al

Dated: _____

SETTLEMENT AGREEMENT AND RELEASE
Waverly at Hamlin Plantation Townhome Association, Inc.
vs.
John Wieland Homes and Neighborhoods of the Carolinas, Inc., et. al.
Case No: 2013-CP-10-03326

_____(SEAL)
Curt Martin

Attorney for Benjamin Mora Construction, LLC

Dated: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Waverly at Hamlin Plantation)
Townhome Association, Inc.,)
)
Plaintiffs,)
)
VS.)
)
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.)
and Wheelock Street Capital, LLC d/b/a)
John Wieland Homes and Neighborhoods,)
Inc. Barr Construction, Inc.; Benjamin)
Morad/b/a Mora Construction, a/k/a)
Benjamin Mora Construction, LLC;)
Builder's 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 Sanchez Brothers)
Painting; Latitude Construction Services,)
LLC; The Muhler Company, Inc.; Paul)
M. Vasquez; Richard Ditullio; Richard)
Ditullio a/k/a RDT Contracting, LLC,)
)
Defendants.)
)
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-3326

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO WIELAND'S REQUEST FOR AN ENHANCED SET-OFF

FILED
2017 FEB -9 AM 9:43
JULIE J. ARMSTRONG
CLERK OF COURT

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-4335

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 Gillespie, Jared D. Overcash, and James and Susie Lesesne, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnston, Kathryn Howle, Dorthy Newman, Nicholas and Debora Yost, Stephen Denby, Colin and Phyllis Braybrooks, Helen and Bob Harman, Rose Minton, and Stephen and Merifaith Perdue and John and Jane Does (1-48),

Plaintiffs,

-vs-

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., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. Barr 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 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 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 Sanchez Brothers Painting; Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, Richard Ditullio a/k/a RDT Contracting, LLC,

Defendants.

Plaintiffs hereby submit this Memorandum in Opposition to Wieland's Request for an Enhanced Set-Off.

SUMMARY OF ARGUMENT

For the reasons set forth below, the Court should deny Wieland's Request for an Enhanced Set-Off of Four Hundred Thirty Three Thousand Six Hundred Fifty and 00/100 Dollars ($433,650.00):

(1) There is no agreement signed by any parties; therefore, Defendant's argument fails to comply with SCRCP, Rule 43(k).

(2) The Memo does not meet the requirements of Rule 23(c), SCRCP which requires Court approval for any settlement of a class action, as well as notice of the proposed dismissal to all members of the class.

(3) There was no meeting of the minds based on statements by both parties.

(4) No Settlement Agreements, Releases, or Stipulations of Dismissal have been executed by Plaintiffs or the Wieland Defendants at this time or as of February 8, 2017.

FACTUAL BACKGROUND

This is a defective construction suit by the Waverly at Hamlin Plantation Townhome Association, Inc. ("Waverly") and some of its members, including Jeffrey Sills, individually and on behalf of others similarly situated. Waverly consists of one hundred and five (105) properties, and related facilities and amenities in the Hamlin Plantation neighborhood located at the end of Rifle Range Road in Mt. Pleasant. Upon information and belief, the houses were constructed between 2006 and 2010. Plaintiffs' architects, engineers, and others have determined and documented construction defects exist that have resulted in water intrusion, component and structural degradation, and extensive consequential damages. Additionally, there are other unsuitable and/or improperly installed components.

STANDARD OF REVIEW

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. *Rock Smith Chevrolet, Inc. v. Smith,* 309 S.C. 91, 419 S.E.2d 841 (Ct.App.1992).

The "words of a statute" as well as the Rules of Civil Procedure "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." State v. Muldrow, 348 SC 264,268 (2002); Maxwell v. Genez, 356 SC 617, 620 (2003).

The South Carolina Supreme Court has held that Rule 43(k) applies to settlement Agreements. See *Widewater Square Assocs. v. Opening Break of America, Inc.*, 319 S.C. 243, 460 S.E.2d 396 (1995); *Ashfort Corp. v. Palmetto Constr. Group, Inc.*, 318 S.C. 492, 458 S.E.2d 533 (1995).

The present Motion to Enforce Settlement may be analyzed, and Motion denied, under two separate and alternate rules: Rule 43(k) of the SC Rules of Civil Procedure and Rule 23(c) of the SC Rules of Civil Procedure.

The plain language of Rule 43(k), SCRCP provides as follows:

> No agreement between counsel affecting the proceedings in an action 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**. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.
>
> (Emphasis added).

Rule 23(c) states: (a) class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The South Carolina courts have consistently through the years ruled that in order for a settlement to be enforced, an agreement must strictly adhere to Rule 43(k), SCRCP. Further the Supreme Court has found that an agreement may be rescinded prior to meeting the requirements of Rule 43(k). *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 636–38, 627 S.E.2d 724, 725–26 (2006). In *Farnsworth*, the plaintiff, through a letter by her attorney, offered to release Davis from all liability in a breach of contract and negligence cause of action. *Id.* at 636, 627 S.E.2d at 725. Davis' attorney accepted the offer by signing the letter. *Id.* After Plaintiff rescinded, Defendant moved to compel settlement and the Court granted such motion. The Supreme Court reversed the trial court's order to enforce settlement finding as follows: "Rule 43(k) provides that '[n]o agreement ... shall be binding unless' one of the three conditions listed [in the Rule] is met. In other words, an agreement is non-binding until a condition is satisfied. Until a party is bound, she is entitled to withdraw her assent." *Id.* at 637, 627 S.E.2d at 725 (internal quotations omitted); See also *Price v. Investors Title Ins. Co*, 2011 WL 11735003 (Ct. App. 2011)

(citing to *Farnsworth* case and allowing revocation of settlement agreement prior to compliance with Rule 43(k) requirements).

ARGUMENT

Wieland argues that the disputed discussions between Teddy Manos and Keith McCarty are a settlement agreement and this Court should compel enforcement by the Plaintiffs. Plaintiffs request that this Court deny Wieland's Request based on the reasoning set forth in Sections 1-7 below.

(1) Wieland's Request should be denied based on the fact that no document exists that complies with the dual signing requirements of Rule 43(k), SCRCP.

Rule 43(k) allows for agreements between counsel to be binding under three scenarios, however, two of the scenarios require that the settlement be noted and entered on the record. No recorded settlement of any terms, as advocated by Wieland, have been entered onto the record in these matters. As a third option, Rule 43(k) allows an agreement to be binding if an agreement is "reduced to **writing and signed by the parties and their counsel**." (Emphasis added). The signature of the party to the agreement is a requirement under the plain language of the Rule 43(k).

(2) The Court has not approved a dismissal or compromise between Wieland and the Plaintiffs under SCRCP, Rule 23(c).

An Order Granting Plaintiffs Motion for Class Certification has been entered in the Class case as of May 4, 2016. Rule 23(c), SCRCP requires as follows: "(a) class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Therefore for a Settlement Agreement to be upheld and enforced, the agreement must first be notice must be sent to all members of the class, at which point, the Court may finally approve.

(3) There was no meeting of the minds, and therefore, no contract for settlement between the Plaintiffs and Wieland. By the argument of Wieland and Plaintiffs, it is clear there was no meeting of the minds.

(4) No Settlement Agreements, Releases, or Stipulations of Dismissal have been executed by Plaintiffs or Defendants at this time.

In order to have a contract, there must be offer, acceptance and consideration.

A critical and basic requirement of contract law in South Carolina is consideration, which is lacking in this matter. All of the above, evidences the lack of an agreement and the state of disagreement currently.

CONCLUSION

Based on the foregoing memorandum, the Plaintiffs respectfully request that the Court deny Wieland's Request for An Enhanced Set-Off. This memorandum may be supplemented with oral argument, other documentation, and/or otherwise as the Court shall allow.

[Signature Page to Follow]

Respectfully Submitted,

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and

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ATTORNEYS FOR PLAINTIFFS

February 9th, 2017
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

Jeffery Sills, Individually and as Class Representative, et al.,
☐ Plaintiffs,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,
☒ Defendants.

CASE NO: 2014-CP-10-4335

MOTION INFORMATION FORM AND COVER SHEET

Plaintiff's Attorneys:	Defendant's Attorneys:
John C. Hayes, IV, Esquire Hayes Law Firm 180 Meeting Street, Suite 330 Charleston, SC 29401 Phone: 843-805-7003 jhayes@hayeslaw.org Keith McCarty, Esquire McCarty Law Firm, PC 1212 Wappoo Road Charleston, SC 29407 Phone: 843-793-1272 ikeithmccarty@gmail.com	Andrew E. Haselden, Esquire Justin P. Novak, Esquire Howser, Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29464 Phone: 843.216.6940 ahaselden@hnblaw.com jnovak@hnblaw.com Theodore L. Manos, Esquire Robertson Hollingsworth Manos & Rahn, LLC 550 King Street, Suite 300 Charleston, SC 29403 Phone: 843.723.6470 tlm@roblaw.net

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCP, Motion
Estimated Time Needed: 15 minutes
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 10, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: Date Filed:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

RULE 59, *SCRCP*, MOTION ON BEHALF OF DEFENDANTS 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.

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 MAR 10 AM 11:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: JOHN HAYES, ESQUIRE, AND KEITH McCARTY, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND THE PLAINTIFFS:

PLEASE TAKE NOTICE that Defendant 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. ("JWH"), by and through the undersigned counsel, will move before this Honorable Court on the tenth

(10th) day after service hereof or at such time and place as is convenient, for an Order granting JWH's motion, pursuant to Rule 59, *SCRCP*, to alter or amend the Court's *Supplemental Order Denying Defendant John Weiland Homes' Motion to Enforce Enhanced Set-off* filed on March 3, 2017 (attached as Exhibit "A") in the above-captioned matters for the following reasons:

1.) The Court erred in finding that JWH's claim for an enhanced set-off (hereinafter "CES") as "the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as 'Mora')." As evidenced by the Affidavit of Theodore L. Manos In Support of John Wieland Homes and Neighborhoods of the Carolinas Inc.'s Motion to Enforce Setoff and Reduce Judgment filed on February 3, 2017 ("Manos Affidavit") and the accompanying email correspondence in the record and submitted to the Court, the CES arises from a negotiated agreement amongst JWH, Plaintiffs and Mora.[1]

2.) The Court erred in finding that counsel for Mora was not present in Court on February 9, 2017. Counsel for Mora was present in the courtroom, although perhaps not recognized by the Court.

3.) The Court erred in determining that Rule 43(k), *SCRCP*, renders the agreement amongst JWH, Plaintiffs, and Mora unenforceable. As evidenced by the Manos Affidavit, the parties memorialized the agreement in writing, *i.e.*, by e-mail.[2] From the plain language of the writing, Plaintiffs' consent to the agreement is clear and unequivocal. The

---

[1] Mora does not contest the enforceability of the negotiated settlement or JWH's claim for enhanced set-off.

[2] *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), indicates that electronic communication may serve as evidence of agreement by the parties.

parties also announced and noted on the record the settlement agreement in open court on January 17, 2017. Moreover, the subsequent conduct of the parties and attorneys established that the parties had a meeting of the minds and intended to be bound by the agreement as determined from the surrounding circumstances, which included JWH and Plaintiffs proceeding with trial without Mora or Mora's counsel.[3]

4.) The Court erred in deferring to unfounded assertions made by I. Keith McCarty, Esquire ("McCarty"), which were demonstrably not credible in light of the contrary evidence in the record, *i.e.*, McCarty's written agreement as to the CES.

5.) The Court erred in finding that McCarty's later refusal to execute the settlement agreement, ***WHICH CLEARLY RECOGNIZED THE AGREEMENT AS TO THE CES***, as repudiation of the agreement. Such an interpretation ignores McCarty's prior assent to the settlement terms, and rewards Plaintiffs for its counsel's behavior which can only reasonably be interpreted (in the light most favorable to Plaintiffs) as an unfair, post-trial effort to minimize the impact of a previously agreed upon offset where Plaintiffs were hoping for a much larger judgment than the $7,200,000 awarded based on their $20,200,000 claim. Moreover, such an interpretation severely and unfairly prejudices JWH and rewards McCarty's conduct.[4]

6.) The Court erred in determining that *Byrd v. Livingston* does not apply to this matter because the agreement as to the CES did not comply with Rule 43(k) because *Byrd* does not reference Rule 43(k).

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[3] *See Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) (holding that subsequent conduct of the parties and attorneys can establish that the parties had a meeting of the minds and intended to be bound by a settlement agreement).

[4] It should be noted that Plaintiffs previously attempted to renege on a settlement entered into with other parties to this lawsuit despite memorializing an agreement reached at mediation. That issue required the intervention of the Court and resulted in the settlement being deemed effective over Plaintiffs' objections.

7.) The Court erred in determining that the agreement in question is governed solely by Rule 43(k). The plain and unequivocal settlement agreement and CES terms amongst the parties should be governed by the common-law rules applicable to contract law. The Court's March 3rd, 2017 Order fails to address this argument, which was raised to the Court during the hearing on February 9, 2017.

Counsel for JWH hereby asserts that any attempt to resolve this matter with Plaintiffs' counsel, pursuant to Rule 11, *SCRCP*, prior to the filing of this motion would serve no useful purpose. This motion is based upon the pleadings and other filings made in these matters, representations previously made to the Court, the *South Carolina Rules of Civil Procedure*, any applicable jurisprudence, any memorandum of law submitted in support of the motion, and any such other matters as may be acceptable to the court.

[Separate Signature Page Follows]

Respectfully submitted:



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Attorneys for Defendant 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.

March 9, 2017

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2013-CP-10-03326
	)	
Waverly at Hamlin Plantation Townhome Association, Inc.	)	
	)	
Plaintiff,	)	
	)	
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.,	)	**SUPPLEMENTAL ORDER DENYING DEFENDANT JOHN WIELAND HOMES' MOTION TO ENFORCE ENHANCED SET-OFF**
	)	
Defendants,	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-04335
	)	
Stephen Denby, Individually and as Class Representative, Marie Labarowski, Stephanie Adili, Marc and Brandy Lynn Russell Robinson, Jessica, Baucom, Nancy S. Coleman, Linda Glitz, Maryann Walsh, Patty Whitmire, Donald L. Tomasella and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, William and Carolyn Barone, William Abel, Dean and Conny Mason, Paul and Patricia Waters, R. Robinson, Jr., Lisa Roeck, Elizabeth Jackson, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne	)	

FILED
2017 MAR -3 AM 9:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Walker, Darlene and Richard Gleeson, Robert and Michell Bagrie, Russell Johnston, Kathryn Howle, Dorothy Newman, Nicholas and Debora Yost, Helen and Bob Harmon Estate of Rose Minton, Stephen and Merifaith Perdue 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., Defendants,	)

Presiding Judge:	Hon. Deadra L. Jefferson
Counsel for Plaintiff:	John Hayes, IV, Esq. I. Keith McCarty, Esq. Mary Margaret Noland, Esq.
Counsel for John Wieland Homes:	Theodore Manos, Esq. Andrew Haselden, Esq.
Counsel for JMC Construction:	Andrew Cole, Esq.
Counsel for Sanchez Brothers Painting:	Sarah Fragale, Esq.
Counsel for The Muhler Company:	Peter Gunnar Nistad, Esq.
Date of Hearing:	January17, 2016
Court Reporter:	Phyllis Norton

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment, filed February 3, 2017. A hearing was held on February 9, 2017. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. Curtis Martin, Esquire representing Defendant Benjamin Mora was not present at the hearing.

"Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

After hearing from all parties present, the parties stipulated, without objection, that the Defendants were entitled to a set-off in the amount of $2,119,000.00[1] to the combined jury verdict of $7,200,000.00[2]. Therefore, Judgment was entered against the Defendants in the amount of $5,081,000.00 for the Plaintiffs Waverly at Hamlin Plantation Townhome Association and no judgment for the Plaintiffs in the class action companion suit. Accordingly, a Form 4 was signed and entered for both cases on February 9, 2017 issuing the judgment with the agreed upon set-off. This Supplemental Order addresses the gravamen of Defendant John Wieland Homes' Motion. Defendant John Wieland Homes' contends that they are entitled to an enhanced set-off in the amount of $434,000.00.[3] They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as "Benjamin Mora").

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992). With regards to agreements between parties, SCRCP Rule 43(k) states that:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed

[1] The settlement funds totaling $2,119,000.00 are as follows: Jesus Mora; $100,000.00; Benjamin Mora Construction; $70,000.00; Barr Construction; $15,000.00; Latitude Construction; $50,000.00; AC Construction; $67,500.00; and Builders First Source; $7,500.00. Additionally, the set-off encompasses the outstanding settlements pending class action approval. These additional settlements are as follows: JMC Construction; $1,250,000.00; The Muhler Company; $250,000.00; RDT; $125,000.00; and Sanchez Brothers Painting; $184,000.00. The combined settlements from the various Defendants totals to the applied set-off of $2,119,000.00. Cross-claims by Defendant John Wieland Homes are still pending for the following parties: JMC Construction, The Muhler Company, and Sanchez Brothers Painting. These claims were bifurcated and will be tried separately.

[2] This judgment reflects the total verdict from the combined cases. In the class action suit, the jury returned a verdict in favor of the Plaintiffs in the amount of $200,000 actual damages. The jury reached a verdict of $7,000,000.00 actual damages for Plaintiff Waverly at Hamlin Plantation Townhome Association. By consent of counsel, the set-off was applied as follows: $200,000.00 towards the class action suit resulting in no judgment and $1,919,000.00 applied towards the judgment for Plaintiff Waverly at Hamlin Plantation Townhome Association resulting in a judgment of $5,081,000.00.

[3] The alleged enhanced set-off of $434,000.00 does not include the already approved settlement of $70,000.00 between Plaintiffs and Defendant Benjamin Mora.

> 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. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP 43. SCRCP Rule 43(k) allows for agreements between counsel to be binding under four scenarios. However, three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, SCRCP Rule 43(k) allows an agreement to be binding if an agreement is "reduced to writing and signed by the parties and their counsel." The signature of the party to the agreement is a requirement under the plain language of SCRCP Rule 43(k). Further, South Carolina courts have consistently throughout the years ruled that in order for a settlement to be enforced an agreement must strictly adhere to SCRCP Rule 43(k).

Defendant John Wieland Homes' Motion for an Enhanced Set-Off in the amount of $434,000.00 fails for several reasons. First, Defendant John Wieland Homes' request must be denied because no documentation of the alleged set-off complies with the requirements of SCRCP Rule 43(k). Defendant John Wieland Homes urges this Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement. However, e-mail correspondence as evidence of a negotiated settlement do not meet any of the four scenarios mandated by SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

In the alternative, Defendant John Wieland Homes argues that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with SCRCP Rule 43(k). In further support of their argument, Defendant John Wieland Homes contends that on Tuesday, January 17, 2017, Plaintiffs' counsel and Defendant John Wieland Homes' counsel notified the Court, on the record, that Plaintiffs and Defendant John Wieland Homes had settled with Defendant Benjamin Mora. However, after reviewing the record from both January 17, 2017 and January 23, 2017, this Court cannot discern

from the record that a settlement agreement was ever articulated between Plaintiffs, Defendant Benjamin Mora, and Defendant John Wieland Homes.

Further, even if a conversation mentioning the alleged settlement agreement were made on the record, it still would not comply with SCRCP 43(k) because all parties needed for the agreement to be enforceable were not present. In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by SCRCP Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. Accordingly, on January 17, 2017 and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. As such, there is no way the alleged settlement agreement could have been binding and enforceable based upon SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, Defendant John Wieland Homes' cites Byrd v. Livingston, as being analogous to the present situation. See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In Byrd, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. Id. at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an "Agreement in Principle" which stated that the agreement will be supplemented by a more formal and detailed written agreement. Id. However, the subsequent agreement was never signed. Id. The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute

a formal settlement document. Id. On appeal, the Court of Appeals affirmed the trial court's decision stating, "[w]e find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement." Id. at 243, 727 S.E.2d at 624.

The present case is not analogous to Byrd v. Livingston, as Defendant John Wieland Homes suggests. In Byrd, there was a clear meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with SCRCP Rule 43(k). The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. Defendant John Wieland Homes' Attorney Theodore Manos presented this release for Plaintiff's Attorney I. Keith McCarty's review and signature. Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. At the hearing, Attorney McCarty indicated to the Court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant Benjamin Mora. This is made evident by Attorney McCarty's refusal to sign the release. As such, because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from that of Byrd v. Livingston. Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, it is of importance to note that on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the Court that his client, JMC Construction, had settled with the Plaintiffs. He indicated to the Court that this settlement agreement was memorialized in writing

and noted on the record, thus complying with SCRCP Rule 43(k). At that time, this Court stressed to all parties the importance of SCRCP Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. This Court read the rule verbatim into the record to assure that the parties had fully complied with the requirements of SCRCP Rule 43(k) concerning the settlement.

Accordingly, it is hereby ordered, adjudged, and decreed, that Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment is denied as to the enhanced setoff of $434,000.00.

IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 1, 2017
Charleston, South Carolina
At Chambers

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation Townhome Association, Inc.,)

Plaintiff,)

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., and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc.,)

Defendants.)

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, Builder's Firstsource, Inc. a/k/a Builders First-Source-Southeast Group, LLC a/k/a Builders Firstrsource-Atlantic Group, LLC, DBA Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-3326

AFFIDAVIT OF THEODORE L. MANOS IN SUPPORT OF JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.'S MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT FILED ON FEBRUARY 3, 2017

FILED
2017 FEB -9 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez 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.	)	
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2014-CP-10-4336
Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitemire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle, Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesene, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle,	)	

Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48),	)
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 John Wieland Homes and Neighborhoods, Inc., 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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio and Richard Ditullio a/k/a RDT Contracting, LLC,	)
Defendants.	)

Personally appeared before me, Theodore L. Manos, who upon oath, states and deposes as follows:

1. My name is Theodore L. Manos and I am over 18 years of age and of sound mind.

2. I am a member of Robertson Hollingsworth Manos & Rahn, LLC and represent John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. ("Wieland") in the above-captioned litigation.

3. Following the deposition of Bud DeSantis on January 11, 2017, Plaintiffs' counsel, John Hayes, IV and I. Keith McCarty and I and my co-counsel, Andrew E. Haselden, discussed the potential for settling Plaintiff's claims and Wieland's cross-claims against Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC ("Mora").

4. Specifically, Plaintiffs' counsel requested that Wieland release its cross-claims in consideration for Mora paying Plaintiffs $500.00. Wieland's counsel rejected Plaintiffs' counsel's request and countered by requesting a full issue release as to Wieland's exposure to the masonry step repair which was delineated in Plaintiffs' repair estimate at $735,000 prior to markup for profit and overhead. Wieland was seeking a full issue release because by Plaintiffs settling with Mora, all of the masons on the job would have been released due to the prior settlement with the other mason.

5. Plaintiffs' counsel rejected Wieland's counter and suggested that it would be willing to provide Wieland with a release as to Mora's masonry work.

6. I informed Plaintiffs' counsel that I would discuss their proposal with my co-counsel and respond to them.

7. That afternoon I spoke with Mr. McCarty regarding how t value Mora's portion of the masonry work based on it being one of two masons at Waverly townhomes.

8. That same afternoon on January 11, 2017 at 3:35 p.m., I sent an e-mail to Mr. McCarty with a copy to Curtis B. Martin, counsel for Mora, notifying them that my records reflected that Mora installed sixty two (62) of the one hundred and five (105) sets of masonry steps at Waverly which represented 59% of the total steps. I further noted that Plaintiffs' repair estimate included a total of $735,000.00 to replace all 105 of the masonry steps before markup for profit and overhead. In my email I included the calculation of 59% x $735,000 = $433,650.00. I closed my email with a request for Plaintiffs' counsel's response.

9. Mr. McCarty responded to me with an email that same day at 4:14 p.m. with a copy to Mr. Martin noting "Gentlemen, assuming Curt agrees with the numbers, that is fine with me".

10. Mr. Martin responded to Mr. McCarty's email that afternoon at 4:24 p.m. with a copy to me advising Mr. McCarty that he had spoken with me "about this and the numbers look right to me. Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled $500. Keith and Teddy, please confirm by response to this email".

11. Mr. McCarty responded to Mr. Martin's email that same afternoon at 4:31 p.m. with a copy to me stating "All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release".

12. Attached hereto as Exhibit "A" is the email chain set forth in paragraphs 8–11.

13. On Tuesday, January 17, 2017, following Jury Qualification, Plaintiffs' counsel and Wieland's counsel notified the Honorable Deadra L. Jefferson in open court and on the record that Plaintiffs and Wieland had settled with Mora by agreement.

14. Wieland's agreement to release its cross-claims against Mora were solely based on the tri-party agreement among Plaintiffs, Wieland and Mora which provided Wieland with a $433,650.00 setoff against any judgment that Plaintiffs may be awarded at trial. Had such set-off not been agreed upon, Wieland would not have released its cross-claims against Mora, but instead would have argued to the jury that Mora as the trade expert was primarily responsible for the alleged deficiencies in the masonry step work as described above, thereby reducing Wieland's potential exposure on this substantial $735,000.00 issue.

15. On Wednesday, February 1, 2017, after the trial had ended, Mr. Martin sent Mr. McCarty and I an email noting "[a]s to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed release". Attached hereto as Exhibit "B" is Mr. Martin's email, along with the proposed release containing the $433,650.00 set-off language in Article II, which is attached hereto as Exhibit "C".

FURTHER AFFIANT SAYETH NOT.

Theodore L. Manos

SWORN TO AND SUBSCRIBED BEFORE ME

This, the 9th day of February, 2017
Notary Public for: South Carolina

My commission expires: 9-2-2022

Elissa Jones

From: Teddy Manos
Sent: Thursday, February 9, 2017 9:35 AM
To: Elissa Jones
Subject: Fwd: Waverly v. Wieland SCRE 408 confidential settlement communications

Sent from my T-Mobile 4G LTE device

------ Original message------
From: keith mccarty
Date: Wed, Jan 11, 2017 4:31 PM
To: Curt Martin;
Cc: Teddy Manos;
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release. Keith

On Wed, Jan 11, 2017 at 4:24 PM, Curt Martin <cmartin@arslawsc.com> wrote:

Keith,
I just talked to Teddy about this; the numbers look right to me.
Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled for $500. Keith and Teddy, please confirm by response to this email.
And Keith, you know the drill with National Fire - no settlement check will be issued until they've received a fully-executed release, which I'll be happy to get to you by the end of the week.
Thanks, guys
--Curt

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Wednesday, January 11, 2017 4:14:49 PM
To: Teddy Manos
Cc: Curt Martin
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

Gentlemen, assuming Curt agrees with the numbers, that is fine with me. Keith

On Wed, Jan 11, 2017 at 3:35 PM, Teddy Manos <tlm@roblaw.net> wrote:

Keith –

Per our conversation –

My notes reflect (Curt please confirm - I think the below came from Pritchard and Glenn Elliott) that:

EXHIBIT
tabbies
A

Curt's client installed: exterior bricks steps on 62 of the 105 units (59%).

Pritchard's client installed: exterior brick steps on 43 of the 105 units (41%).

Moore estimated the replacement of all masonry steps at the Project totaling $735K before mark-up.

So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

Theodore L. Manos, Esq. – Member

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

550 King Street, Suite 300

Charleston, SC 29403

Office (843) 723-6470

Mobile (843) 345-8992

Facsimile (843) 853-9045

tlm@roblaw.net

PLEASE NOTE OUR NEW NAME AND ADDRESS

--
I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282
This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

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From: Curt Martin [mailto:cmartin@arslawsc.com]
Sent: Wednesday, February 1, 2017 2:32 PM
To: keith mccarty <ikeithmccarty@gmail.com>
Cc: Teddy Manos <tlm@roblaw.net>
Subject: RE: Waverly v. Wieland SCRE 408 confidential settlement communications

Keith and Teddy,
I understand things are all wrapped up with trial; I stuck my head in a couple times last week – good job all around, and I'm sure you're both happy to have it done.
As to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed Release. Please let me know if you have any proposed changes, etc. – just please use Track Changes such that we're all on the same page.
If you're OK with the Release as-is, please get your signature pages to me, and I'll circulate a fully-executed copy.
As I mentioned in my email below, Keith, I can't order the settlement check without the fully-executed Release.
Thanks, guys.

Curt Martin
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
Post Office Box 87
Charleston, South Carolina 29401
843.723.0185 telephone
843.405.0313 facsimile
cmartin@arslawsc.com
Confidentiality Notice
This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843.723.0185) or reply to this e-mail and delete all copies of this message.

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Sent: Wednesday, January 11, 2017 4:31 PM
To: Curt Martin
Cc: Teddy Manos
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

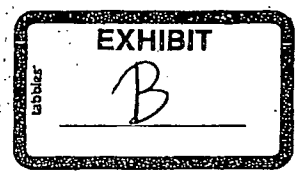
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Keith –



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So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement" or the "Settlement Agreement") is made and entered into as of this ___ day of _____, 2017, by and between Waverly at Hamlin Plantation Townhome Association, Inc., in its corporate capacity and Edward Peyser, individually and on behalf of the Individual Owners[1] (collectively the "Association"), 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., Builder Support Services of the Carolinas, Inc. and John Wieland Homes and Neighborhoods, Inc. (collectively "Wieland"), and Benjamin Mora Construction, LLC ("Mora"). The Association, Wieland, and Mora are hereinafter collectively referred to as the "Settling Parties."

RECITALS

WHEREAS, the Association is a corporation lawfully doing business in the State of South Carolina and is the entity charged with and responsible for maintenance, repair, and upkeep of the common areas and limited common areas, as well as exterior and related elements of the condominium units and property known as Waverly at Hamlin Plantation Townhomes, located in Charleston County, South Carolina (the "Property").

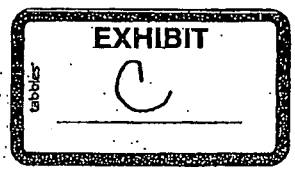
WHEREAS, the Association affirms that it is the sole proper party, whether by right or by assignment from individual condominium unit owners or the developer to bring this action and execute this settlement as to all claims for damages to any and all structures, common areas, limited common areas, unit interiors and lots located at the Property; and

WHEREAS, Edward Peyser is a citizen of South Carolina, who has been identified as the Class Representative for a purported class of all individual townhome owners at the Property and affirms ownership of any claims for loss of use or any other claims not owned by the Association related to the subject matter of the collective lawsuits filed.

WHEREAS, Mora performed certain construction work including installation of brick steps, fireplaces, and block work at the Property as a subcontractor to Wieland pursuant to job cost details and other documents with Wieland, the General Contractor for construction of the Property; and

WHEREAS, these actions relate to alleged construction defects and deficiencies at the Property and is the subject of litigation now pending in the Court of Common Pleas for Charleston County, South Carolina in a case styled *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.*, Case Number 2013-CP-10-03326 (the "Action"); and *Jeffrey Sills, Individually and as Class*

1 Edward Peyser was appointed as class representative pursuant to Judge Roger M. Young, Sr.'s Order Granting Plaintiffs' Motion for Class Certification filed on May 4, 2016.



Representative, et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., Case Number 2014-CP-10-4335 (the "Class Action"); and

WHEREAS, Mora denies any and all claims of wrongdoing or impropriety in its actions in this matter; and

WHEREAS, the Settling Parties have agreed to resolve all matters between them as set forth below.

ARTICLE I
INCORPORATION OF RECITALS

The foregoing Recitals are incorporated and made a part of this Settlement Agreement, provided, however, in the event of a conflict between the recitals and the provisions of the foregoing Articles, the provisions of the Articles shall control.

ARTICLE II
PAYMENT

For and in consideration of the payment of Five Hundred ($500.00) Dollars, by or on behalf of Mora, and other good and valuable consideration, the sufficiency of which is hereby acknowledged (the "**Settlement Amount**"), the Association, on behalf of itself and on behalf of the individual owners of units at the Property, and Wieland, agree to release Mora from any and all liability related to the Project as set forth in Article III. Payments to the Association shall be made payable to "Hayes Law Firm as Attorney for Waverly at Hamlin Plantation Association" and delivered to the Association counsel John C. Hayes, Esquire, within thirty (30) business days after this fully-executed Agreement is received by National Fire & Marine, an insurer for Mora. Additionally, in consideration of the Agreement hereto of Wieland, Plaintiffs (the Association and the class members) shall grant Wieland a credit or offset against damages/judgment in the amount of Four Hundred Thirty Three Thousand Six Hundred Fifty and 00/100 ($433,650.00) Dollars.

ARTICLE III

RELEASES

1. In consideration of the Settlement Amounts and of the promises and releases set forth herein, the Association and Wieland do for themselves, and their respective successors, heirs, assigns, subsidiary organizations, affiliates, purchasers, unit owners, partners, attorneys, agents, and any other entity or person who could claim by or through them, hereby, knowingly and voluntarily, remises, releases, acquits, satisfies, and forever discharge Mora, National Fire & Marine Insurance Company (collectively "Settling Defendant"), their respective successors, predecessors, heirs, assigns, subsidiary organizations, affiliates, purchasers, insurers, partners, members, shareholders, officers, attorneys, employees, and agents from any and all manner of warranties, representations, covenants, promises, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands, and causes of action of any nature whatsoever, whether at law or in equity, either now accrued or hereafter maturing whether known or unknown, which the Association and Wieland now have or hereafter can, shall, or may have by reason of any matter, cause or thing as to the Settling Defendants only. This Release as to the insurance carrier National Fire & Marine Insurance Company is limited to its involvement as the carrier for Mora only, including but not limited to a release of the policies for Mora for the claims brought in this suit by Plaintiffs and Wieland, as well as any claims as an additional insured. Nothing herewith shall release the identified carriers to the extent they have policies of insurance for other Defendants.

The Association and Wieland agree to dismiss with prejudice all claims against Mora in the Action and the Class Action, including those claims it has taken by assignment from unit owners. The Association agrees to execute and file, or cause to be executed and filed, pleadings in order to effectuate this full and complete settlement agreement and release as to Mora.

ARTICLE IV
ACKNOWLEDGEMENT AND WAIVER

1. It is agreed and understood by the Settling Parties that they are not required to settle this matter at this time, and that they could continue to investigate with respect to the matter involved in the suit, but that they voluntarily choose to finally resolve the matter at this time by entering into this settlement. The Settling Parties, in deciding to enter into this Agreement, are not relying on any representations, statements, actions, disclosures of information, discovery responses, deposition testimony or failures to disclose information by Settling Parties, or their representatives, or their attorneys. Settling Parties further agree, warrant and represent that their decision to settle this matter is final and will not be affected, altered or changed by documentation, discovery or other information of any type whatsoever that may be revealed, disclosed or learned in the future.

2. Settling Parties expressly waive and assume the risk of any and all claims for damages and/or damages which exist as of this date, or which may arise in the future, but which they do not now know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect their decision to enter into this agreement. Settling Parties each acknowledge and understand that they may have suffered damages, or may suffer damages, that are unknown to them at the present time. These issues were considered in the course of negotiations leading to this agreement and Settling Parties determined this Agreement to reflect fair and adequate compensation with due regard for such future possibilities.

ARTICLE V
MISCELLANEOUS

1. Costs and Expenses. Each party is responsible for its own attorneys' fees and

costs associated with the Action and Class Action through the date of execution of this agreement.

2. Construction. This Settlement Agreement shall not be construed more strongly for or against any party solely by reason of who was more responsible for the drafting of this Agreement.

3. Successors and Assigns. All covenants and agreements contained in this Settlement Agreement shall bind and inure to the benefit of the parties hereto, their legal representatives, successors, and assigns.

4. Further Assurances. The parties hereto agree that they will cooperate with each other and will execute and deliver, or cause to be executed and delivered, all such other instruments, and will take all such other actions, as any party hereto may reasonably request from time to time in order to effectuate the provisions and purposes hereof.

5. Modifications. Neither this Settlement Agreement nor any provision hereof may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge, or termination is sought and by any party who would be affected thereby.

6. Governing Law. This Settlement Agreement will be interpreted and construed under the internal laws of the State of South Carolina, regardless of the domicile of any party, and will be deemed for those purposes to have been made, executed, and performed in South Carolina.

7. Time of the Essence. Time is of the essence in this Settlement Agreement and each provision of this Settlement Agreement.

8. Legal Fees. In the event of a breach by any party of its obligations under this

Agreement, the prevailing party in any action or proceeding in any court in connection therewith shall be entitled to recover from such other party its costs and expenses, including reasonable legal fees, expenses and associated court costs.

9. Notices. All notices, demands, requests, consents, or other communications required or permitted to be given hereunder (collectively, a "Notice") shall be in writing and shall be given to the party at its regular mail address (or at such other mail address that a party may hereafter designate by sending written notice thereof to the other parties pursuant to the terms of this Section).

10. Entire Agreement. This instrument constitutes the entire and final agreement among the parties and there are no agreements, understandings, warranties, or representations among the parties except as set forth in this Settlement Agreement.

11. Invalidity. If any clause or provision of this Settlement Agreement is determined to be illegal, invalid, or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Settlement Agreement will not be affected thereby.

12. Counterparts. This Settlement Agreement may be executed in counterparts, each of which will be deemed an original document, but all of which will collectively constitute a single document. This document will not be binding on or constitute evidence of a contract between the parties until such time as this document has been executed by each party and a copy thereof delivered to each other party to this Settlement Agreement.

SIGNATURE PAGES TO FOLLOW

IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this _____ day of _____, 2017.

WAVERLY AT HAMLIN PLANTATION
TOWNHOME ASSOCIATION, INC.

By_____(SEAL)

Its:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that they executed the foregoing instrument as their own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

IN WITNESS WHEREOF, the undersigned have hereunto set his hand and seal as of this _____ day of _____, 2017.

EDWARD PEYSER, INDIVIDUALLY AND AS CLASS REPRESENTATIVE

By_____(SEAL)

Print:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that he executed the foregoing instrument as his own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

_____(SEAL)
John C. Hayes, IV
Mary Margaret Noland

_____(SEAL)
I. Keith McCarty

Attorneys for Plaintiffs

This as of the day and year first above written.

_____(SEAL)
Theodore L. Manos
Andrew E. Haselden

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et al

Dated: _____

_____(SEAL)
Curt Martin

Attorney for Benjamin Mora Construction, LLC

Dated: _____

EXHIBIT C

398 S.C. 237
Court of Appeals of South Carolina.

Forest BYRD, Appellant,
v.
Judy LIVINGSTON and TIAA Timberlands, II, LLC, Respondents.

No. 4973.
|
Heard April 24, 2012.
|
Decided May 16, 2012.
|
Rehearing Denied June 22, 2012.
|
Certiorari Denied May 7, 2014.

Synopsis

Background: Purchaser filed suit against vendor and easement holder asserting various claims arising out of vendor's alleged concealment of easement granted to holder that ran over subject property. Vendor and easement holder filed motion to enforce settlement agreement that resolved all claims. The Circuit Court, Newberry County, Frank R. Addy, Jr., Circuit Court Judge, granted motion to enforce settlement, and purchaser appealed.

Holdings: The Court of Appeals, Short, J., held that:

[1] three-word reference to parcel of property owned by purchaser's son in settlement agreement did not excuse purchaser's obligations under agreement, and

[2] son's ratification of agreement was not condition precedent to purchaser's obligations under agreement.

Affirmed.

West Headnotes (6)

[1] **Compromise and Settlement**
⇐ Nature and Requisites

In South Carolina jurisprudence, settlement agreements are viewed as contracts.

Cases that cite this headnote

[2] **Contracts**
⇐ Questions for Jury

An action to construe a contract is an action at law.

Cases that cite this headnote

[3] **Compromise and Settlement**
⇐ Making and Form of Agreement

Three-word reference to parcel of property owned by purchaser's son in settlement agreement resolving and releasing purchaser's claims against vendor and easement holder arising out of purchase agreement, did not excuse purchaser's obligations under settlement agreement; purchaser's subsequent conduct indicated intent to be bound by settlement agreement, in that attorneys' e-mails demonstrated that purchaser's attorney believed settlement to be binding but had apparently run into problems getting purchaser to sign documents, purchaser's attorney asked to be relieved as his counsel, counsel's lack of compliance with scheduling order in case strongly indicated that everyone believed case to be settled, purchaser's attorney withdrew pending motion, parties obtained and recorded new survey as contemplated by agreement, and purchaser paid his one-third share of cost of survey as contemplated by agreement.

Cases that cite this headnote

[4] **Compromise and Settlement**
⇐ Conditions

Release
⇐ Operation and effect in general

Three-word reference to parcel of property owned by purchaser's son in agreement to settle purchaser's claims against vendor and easement holder arising out of purchase did not indicate that son's ratification

of agreement was condition precedent to purchaser's performance obligations to release all claims; there was no condition precedent to be found in three words referencing son's parcel, purchaser's duties with respect to agreement were not conditional, either expressly or impliedly, and inclusion of his son's property was not essential to agreement.

Cases that cite this headnote

[5] **Contracts**
What are conditions precedent in general

A "condition precedent" to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.

1 Cases that cite this headnote

[6] **Contracts**
Conditions Precedent in General

The question of whether a provision in a contract constitutes a condition precedent to performance is a question of construction dependent on the intent of the parties to be gathered from the language they employ.

1 Cases that cite this headnote

Attorneys and Law Firms

**621 B. Michael Brackett, of Columbia, for Appellant.

Blaney A. Coskrey, III, of Columbia, and Timothy D. Savidge, of Prosperity, for Respondents.

Opinion

SHORT, J.

*239 Forrest Byrd (Byrd) appeals from the trial court's order finding an agreement to settle a lawsuit relating to a land purchase was enforceable. Byrd argues the court erred in: (1) finding his son was not a party to the agreement; (2) concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the agreement; (3) not applying the law of joint contracts to the motion to enforce the agreement; (4) finding the agreement did not contain a condition precedent; and (5) ruling the agreement's provision that included his son was severable from the remainder of the agreement. We affirm.

*240 FACTS

Byrd entered into a contract to purchase property from Judy Livingston (Livingston) in May 2007, after being the winning bidder at a private auction. Byrd paid the full purchase price, and Livingston executed and delivered a general warranty deed for the property to Byrd in July 2007. Two days prior to executing the deed, Livingston executed and delivered a sixty-six-foot right-of-way easement over and across the subject property to TIAA Timberland, II, LLC (TIAA). This easement was recorded a little more than two hours after Byrd's deed was recorded. Byrd filed a complaint on September 10, 2008, against Livingston and TIAA, asserting five causes of action: (1) quiet title; (2) reformation; (3) breach of contract; (4) breach of contract accompanied by a fraudulent act; and (5) fraud or negligent misrepresentation. Byrd alleged Livingston concealed the right-of-way, and he accepted the deed based on her representations that Newberry County zoning ordinances required the right-of-way. TIAA filed an answer denying the allegations and counterclaimed, seeking "a declaratory judgment that it has an easement, express, implied by prior use, implied by necessity, and/or a prescriptive easement over [Byrd's] property." Livingston also filed an answer, denying all allegations. Following pretrial discovery, Byrd, Livingston, and TIAA attended a mediation conference on November 23, 2009, which resulted in all three parties signing an "Agreement in Principle" (Agreement). [1] The Agreement stated, "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties"; however, the Settlement Agreement was never signed.

On February 19, 2010, Livingston and TIAA (Respondents) filed a motion to enforce the Agreement. Byrd filed a motion in opposition. A hearing on the motion was held on June 30, 2010. Byrd asserted that because his son would not execute *241 the proposed Settlement Agreement, he himself was no longer bound by the Agreement and was unwilling to execute

the Settlement Agreement. Respondents argued the November 23, 2009 Agreement was a valid, enforceable, stand-alone contract. The trial court issued its order on July 30, 2010, finding the Agreement enforceable against Byrd, Livingston, and TIAA, and ordering the parties to prepare and execute a formal settlement document embodying the terms of the Agreement. Byrd filed a Rule 59(e), SCRCP, motion for reconsideration, which the court denied. This appeal followed.

STANDARD OF REVIEW

[1] [2] "In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009); *see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n.* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement ****622** agreement is a matter of contract law); *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct.App.2007) (stating a release agreement is a contract and contract principles of law should be used to determine what the parties intended); *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986) (applying the general rules of contract construction to a settlement agreement). An action to construe a contract is an action at law. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct.App.2008). In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, this court is free to decide questions of law with no particular deference to the trial court. *Silver*, 376 S.C. at 590, 658 S.E.2d at 542.

LAW/ANALYSIS

[3] I. Byrd argues the trial court erred in finding his son was not a party to the Settlement Agreement. We disagree.

Byrd maintains that because the November 23, 2009 Agreement referenced his son's parcel as well as his own, his son ***242** was intended to be a necessary party to a final agreement, and because his son did not sign the Settlement Agreement, he himself is not bound by the Agreement. The court found the Agreement was not enforceable as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement. The Agreement's three-word reference to Byrd's son's property was included in one of its paragraphs:

> 25# easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock—express grant superceding [sic] and canceling the 66# grant, son's parcel included.

The trial court noted that in Byrd's son's affidavit, he stated:

> I am not, and never have been, a party to the legal action [between Byrd, Livingston, and TIAA].... I did not attend, and was not represented at, the mediation conference ... held on or about November 23, 2009. My father spoke to me about the mediation after the fact and explained to me the Agreement in Principal [sic] that was the product of the mediation. I was not involved in the negotiation of the terms of the Agreement in Principal [sic]; I did not authorize anyone to speak for me or to act on my behalf with respect to the Agreement in Principal [sic]; and I did not sign the Agreement in Principal [sic].... I do not agree with the terms of the Agreement in Principal [sic], and I will not sign either the Agreement in Principal [sic] or a more formal and detailed written settlement agreement based on the terms of the Agreement in Principal [sic].

The court found the record contained no evidence warranting a finding that Byrd acted with actual or apparent authority by including his son in the Agreement. The court also found nothing in the record to contradict

his son's sworn statement. The Agreement stated "[t]he undersigned parties ... have reached an agreement in principle" and was signed by Byrd, Livingston, and TIAA's agent. It further stated, "[l]itigation dismissed, mutual releases among all parties." We find the evidence supports the court's determination that Byrd's son was not a party to the Agreement, the Agreement ***243** was not binding as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement.

II. Byrd next argues the trial court erred in concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the Agreement. We disagree.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Patricia Grand Hotel, LLC v. MacGuire Enters., Inc.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct.App.2007). "The ****623** 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." *Wright v. Trask*, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct.App.1997).

Byrd argues the subsequent conduct of the parties to the Agreement demonstrated the intended and understood involvement of Byrd's son, and asserts as proof that his son was identified in the proposed Settlement Agreement as a party to the Agreement. However, the trial court found the subsequent actions of the attorneys show the parties' intent to settle the case: (1) the attorneys' emails "demonstrate[d] that Byrd's attorney believed the settlement to be binding but had apparently run into problems getting his own client to sign the documents," and Byrd's attorney asked to be relieved as his counsel; (2) "counsel's lack of compliance with the Scheduling Order in the case also strongly indicates that everyone believed the case to be settled"; (3) Byrd's attorney withdrew a pending motion; (4) the parties obtained and recorded a new survey as contemplated by the November 23, 2009 Agreement; and (5) Byrd paid his one-third share of the cost of the survey ***244** as contemplated by the November 23, 2009 Agreement. Therefore, the court found it was "impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound." We find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement.

[4] III. Byrd also argues the trial court erred finding the Agreement did not contain a condition precedent. We disagree.

[5] [6] "A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.' " *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (quoting *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* (internal quotation marks omitted).

Byrd claims the three words used in the Agreement referencing Byrd's son's property created a condition precedent that required Byrd's son to ratify the Agreement and sign the more formal and detailed Settlement Agreement to follow. Byrd argues the alleged condition precedent was not satisfied; therefore, his performance under the Agreement is excused. However, the trial court found there was no condition precedent to be found in the three words in the Agreement referencing his son's parcel. Further, the court found "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly," and the inclusion of his son's property was "not so essential to the Agreement as to constitute a condition precedent or to excuse [Byrd's] non-performance under the Agreement." The court continued:

> [Byrd] should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his son expresses a desire to not join

> the [settlement agreement]. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a *245 person who is not a party to the Agreement.... The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

**624 We find no error in the trial court's ruling that the Agreement did not contain a condition precedent to his alleged obligation with respect to a final settlement agreement.

IV. As to the remaining issues, we adopt the trial court's order. *See Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

All Citations

398 S.C. 237, 727 S.E.2d 620

Footnotes

1 During discovery, Byrd's son purchased a tract of land adjacent to Byrd's parcel. The purchase on July 31, 2009, was almost ten months after Byrd had filed his complaint against Livingston and TIAA. The dirt road, the subject of Byrd's lawsuit, crosses his son's property before it crosses Byrd's property; therefore, the easement also burdens his son's property. Byrd did not move to add his son as a party to the litigation when his son purchased his land.

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Waverly at Hamlin Plantation Townhome Association, Inc., *Plaintiffs,* vs. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., *Defendants.*	IN THE COURT OF COMMON PLEAS C/A No.: 2013-CP-10-3326 **RULE 59, *SCRCP*, MOTION ON BEHALF OF DEFENDANTS 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.**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Jeffrey Sills, et al., *Plaintiff,* vs. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., *Defendants.*	IN THE COURT OF COMMON PLEAS C/A No.: 2014-CP-10-4335

TO: JOHN HAYES, ESQUIRE, AND KEITH McCARTY, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND THE PLAINTIFFS:

PLEASE TAKE NOTICE that Defendant 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. ("JWH"), by and through the undersigned counsel, will move before this Honorable Court on the tenth

(10th) day after service hereof or at such time and place as is convenient, for an Order granting JWH's motion, pursuant to Rule 59, *SCRCP*, to alter or amend the Court's *Supplemental Order Denying Defendant John Weiland Homes' Motion to Enforce Enhanced Set-off* filed on March 3, 2017 (attached as Exhibit "A") in the above-captioned matters for the following reasons:

1.) The Court erred in finding that JWH's claim for an enhanced set-off (hereinafter "CES") as "the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as 'Mora')." As evidenced by the Affidavit of Theodore L. Manos In Support of John Wieland Homes and Neighborhoods of the Carolinas Inc.'s Motion to Enforce Setoff and Reduce Judgment filed on February 3, 2017 ("Manos Affidavit") and the accompanying email correspondence in the record and submitted to the Court, the CES arises from a negotiated agreement amongst JWH, Plaintiffs and Mora.[1]

2.) The Court erred in finding that counsel for Mora was not present in Court on February 9, 2017. Counsel for Mora was present in the courtroom, although perhaps not recognized by the Court.

3.) The Court erred in determining that Rule 43(k), *SCRCP*, renders the agreement amongst JWH, Plaintiffs, and Mora unenforceable. As evidenced by the Manos Affidavit, the parties memorialized the agreement in writing, *i.e.*, by e-mail.[2] From the plain language of the writing, Plaintiffs' consent to the agreement is clear and unequivocal. The

---

[1] Mora does not contest the enforceability of the negotiated settlement or JWH's claim for enhanced set-off.

[2] *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), indicates that electronic communication may serve as evidence of agreement by the parties.

parties also announced and noted on the record the settlement agreement in open court on January 17, 2017. Moreover, the subsequent conduct of the parties and attorneys established that the parties had a meeting of the minds and intended to be bound by the agreement as determined from the surrounding circumstances, which included JWH and Plaintiffs proceeding with trial without Mora or Mora's counsel.[3]

4.) The Court erred in deferring to unfounded assertions made by I. Keith McCarty, Esquire ("McCarty"), which were demonstrably not credible in light of the contrary evidence in the record, *i.e.*, McCarty's written agreement as to the CES.

5.) The Court erred in finding that McCarty's later refusal to execute the settlement agreement, ***WHICH CLEARLY RECOGNIZED THE AGREEMENT AS TO THE CES***, as repudiation of the agreement. Such an interpretation ignores McCarty's prior assent to the settlement terms, and rewards Plaintiffs for its counsel's behavior which can only reasonably be interpreted (in the light most favorable to Plaintiffs) as an unfair, post-trial effort to minimize the impact of a previously agreed upon offset where Plaintiffs were hoping for a much larger judgment than the $7,200,000 awarded based on their $20,200,000 claim. Moreover, such an interpretation severely and unfairly prejudices JWH and rewards McCarty's conduct.[4]

6.) The Court erred in determining that Byrd v. Livingston does not apply to this matter because the agreement as to the CES did not comply with Rule 43(k) because Byrd does not reference Rule 43(k).

---

[3] See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) (holding that subsequent conduct of the parties and attorneys can establish that the parties had a meeting of the minds and intended to be bound by a settlement agreement).

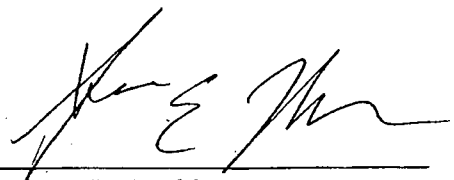
[4] It should be noted that Plaintiffs previously attempted to renege on a settlement entered into with other parties to this lawsuit despite memorializing an agreement reached at mediation. That issue required the intervention of the Court and resulted in the settlement being deemed effective over Plaintiffs' objections.

7.) The Court erred in determining that the agreement in question is governed solely by Rule 43(k). The plain and unequivocal settlement agreement and CES terms amongst the parties should be governed by the common-law rules applicable to contract law. The Court's March 3rd, 2017 Order fails to address this argument, which was raised to the Court during the hearing on February 9, 2017.

Counsel for JWH hereby asserts that any attempt to resolve this matter with Plaintiffs' counsel, pursuant to Rule 11, *SCRCP*, prior to the filing of this motion would serve no useful purpose. This motion is based upon the pleadings and other filings made in these matters, representations previously made to the Court, the *South Carolina Rules of Civil Procedure*, any applicable jurisprudence, any memorandum of law submitted in support of the motion, and any such other matters as may be acceptable to the court.

[Separate Signature Page Follows]

Respectfully submitted:



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Attorneys for Defendant 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.

March 9, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.

Defendants.

Jeffrey Sills, Individually and as Class Representative, et al.,

Plaintiffs,

vs.

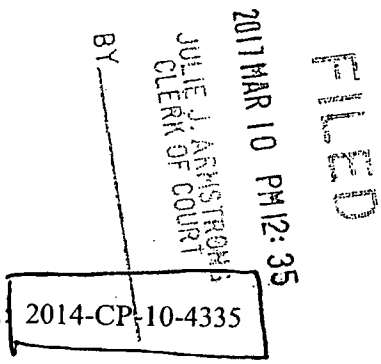
John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

CERTIFICATE OF SERVICE



I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I served the foregoing filed copy of ***Rule 59, SCRCP, Motion on Behalf of Defendant 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*** *in* the above-captioned matters, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, and/or email with sufficient postage affixed and addressed as follows:

John C. Hayes, IV, Esquire
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Curtis Brent Martin
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The Honorable Deadra L. Jefferson
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Charleston, SC 29401-2236
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Danielle Cox

March 10, 2017

Charleston, South Carolina

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Andrew E. Haselden<
George V. Hanna, IV*
Michal Cooper Jones
Kyliene L. Keesley^
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March 10, 2017

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

RE: ***Jeffrey Sills et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc. et al.***
Civil Action No.: *2014-CP-10-4335*

Waverly at Hamlin Plantation Townhome Assoc. Inc., et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc. et al.
Civil Action No.: *2013-CP-10-3326*
Our Matter No.: *605-002*

Dear Ms. Armstrong:

Please find enclosed for filing the original and one (1) copy of the ***Rule 59, SCRCP, Motion on Behalf of Defendant 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.*** in each the above-referenced matters. Please file the originals and return the clocked-in copies in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving the trial judge and all counsel of record with the same.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Regards,

Andrew E. Haselden

JNOV/khm
Enclosures
cc: The Honorable Deadra L. Jefferson (w/encls. via email)
All Counsel of Record (w/encls. via email)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation Townhome Association, Inc., ☐Plaintiffs,) CASE NO. 2013-CP-10-3326

v.) **MOTION INFORMATION FORM AND COVER SHEET**

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., ☒Defendants.)

Plaintiff's Attorneys:	Defendant's Attorneys:
John C. Hayes, IV, Esquire Hayes Law Firm 180 Meeting Street, Suite 330 Charleston, SC 29401 Phone: 843-805-7003 jhayes@hayeslaw.org Keith McCarty, Esquire McCarty Law Firm, PC 1212 Wappoo Road Charleston, SC 29407 Phone: 843-793-1272 ikeithmccarty@gmail.com	Andrew E. Haselden, Esquire Justin P. Novak, Esquire Howser, Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29464 Phone: 843.216.6940 ahaselden@hnblaw.com jnovak@hnblaw.com Theodore L. Manos, Esquire Robertson Hollingsworth Manos & Rahn, LLC 550 King Street, Suite 300 Charleston, SC 29403 Phone: 843.723.6470 tlm@roblaw.net

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59, SCRCP, Motion
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — March 10, 2017 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, et al.,

Plaintiff,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-10-3326

RULE 59, *SCRCP*, MOTION ON BEHALF OF DEFENDANTS 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.

IN THE COURT OF COMMON PLEAS

C/A No.: 2014-CP-10-4335

FILED
2017 MAR 10 AM 11:28
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

TO: ***JOHN HAYES, ESQUIRE, AND KEITH McCARTY, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND THE PLAINTIFFS:***

PLEASE TAKE NOTICE that Defendant 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. ("JWH"), by and through the undersigned counsel, will move before this Honorable Court on the tenth

(10th) day after service hereof or at such time and place as is convenient, for an Order granting JWH's motion, pursuant to Rule 59, *SCRCP*, to alter or amend the Court's *Supplemental Order Denying Defendant John Weiland Homes' Motion to Enforce Enhanced Set-off* filed on March 3, 2017 (attached as Exhibit "A") in the above-captioned matters for the following reasons:

1.) The Court erred in finding that JWH's claim for an enhanced set-off (hereinafter "CES") as "the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as 'Mora')." As evidenced by the Affidavit of Theodore L. Manos In Support of John Wieland Homes and Neighborhoods of the Carolinas Inc.'s Motion to Enforce Setoff and Reduce Judgment filed on February 3, 2017 ("Manos Affidavit") and the accompanying email correspondence in the record and submitted to the Court, the CES arises from a negotiated agreement amongst JWH, Plaintiffs and Mora.[1]

2.) The Court erred in finding that counsel for Mora was not present in Court on February 9, 2017. Counsel for Mora was present in the courtroom, although perhaps not recognized by the Court.

3.) The Court erred in determining that Rule 43(k), *SCRCP*, renders the agreement amongst JWH, Plaintiffs, and Mora unenforceable. As evidenced by the Manos Affidavit, the parties memorialized the agreement in writing, *i.e.*, by e-mail.[2] From the plain language of the writing, Plaintiffs' consent to the agreement is clear and unequivocal. The

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[1] Mora does not contest the enforceability of the negotiated settlement or JWH's claim for enhanced set-off.

[2] *Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012), indicates that electronic communication may serve as evidence of agreement by the parties.

parties also announced and noted on the record the settlement agreement in open court on January 17, 2017. Moreover, the subsequent conduct of the parties and attorneys established that the parties had a meeting of the minds and intended to be bound by the agreement as determined from the surrounding circumstances, which included JWH and Plaintiffs proceeding with trial without Mora or Mora's counsel.[3]

4.) The Court erred in deferring to unfounded assertions made by I. Keith McCarty, Esquire ("McCarty"), which were demonstrably not credible in light of the contrary evidence in the record, *i.e.*, McCarty's written agreement as to the CES.

5.) The Court erred in finding that McCarty's later refusal to execute the settlement agreement, ***WHICH CLEARLY RECOGNIZED THE AGREEMENT AS TO THE CES,*** as repudiation of the agreement. Such an interpretation ignores McCarty's prior assent to the settlement terms, and rewards Plaintiffs for its counsel's behavior which can only reasonably be interpreted (in the light most favorable to Plaintiffs) as an unfair, post-trial effort to minimize the impact of a previously agreed upon offset where Plaintiffs were hoping for a much larger judgment than the $7,200,000 awarded based on their $20,200,000 claim. Moreover, such an interpretation severely and unfairly prejudices JWH and rewards McCarty's conduct.[4]

6.) The Court erred in determining that *Byrd v. Livingston* does not apply to this matter because the agreement as to the CES did not comply with Rule 43(k) because *Byrd* does not reference Rule 43(k).

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[3] *See Byrd v. Livingston*, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012) (holding that subsequent conduct of the parties and attorneys can establish that the parties had a meeting of the minds and intended to be bound by a settlement agreement).

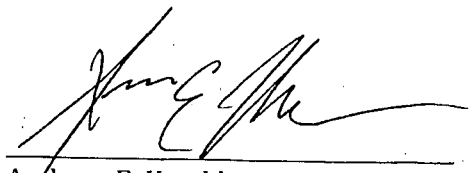
[4] It should be noted that Plaintiffs previously attempted to renege on a settlement entered into with other parties to this lawsuit despite memorializing an agreement reached at mediation. That issue required the intervention of the Court and resulted in the settlement being deemed effective over Plaintiffs' objections.

7.) The Court erred in determining that the agreement in question is governed solely by Rule 43(k). The plain and unequivocal settlement agreement and CES terms amongst the parties should be governed by the common-law rules applicable to contract law. The Court's March 3rd, 2017 Order fails to address this argument, which was raised to the Court during the hearing on February 9, 2017.

Counsel for JWH hereby asserts that any attempt to resolve this matter with Plaintiffs' counsel, pursuant to Rule 11, *SCRCP*, prior to the filing of this motion would serve no useful purpose. This motion is based upon the pleadings and other filings made in these matters, representations previously made to the Court, the *South Carolina Rules of Civil Procedure*, any applicable jurisprudence, any memorandum of law submitted in support of the motion, and any such other matters as may be acceptable to the court.

[Separate Signature Page Follows]

Respectfully submitted:



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Attorneys for Defendant 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.

March 9, 2017

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2013-CP-10-03326
	)	
Waverly at Hamlin Plantation Townhome Association, Inc.	)	
	)	
Plaintiff,	)	
	)	
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.,	)	**SUPPLEMENTAL ORDER DENYING DEFENDANT JOHN WIELAND HOMES' MOTION TO ENFORCE ENHANCED SET-OFF**
	)	
Defendants,	)	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2014-CP-10-04335
	)	
Stephen Denby, Individually and as Class Representative, Marie Labarowski, Stephanie Adili, Marc and Brandy Lynn Russell Robinson, Jessica, Baucom, Nancy S. Coleman, Linda Glitz, Maryann Walsh, Patty Whitmire, Donald L. Tomasella and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, William and Carolyn Barone, William Abel, Dean and Conny Mason, Paul and Patricia Waters, R. Robinson, Jr., Lisa Roeck, Elizabeth Jackson, Joe and Anita Brittain, Gilbert J. Hager and Kelly Hager Holmes, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne	)	

FILED
2017 MAR -3 AM 9:46
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Walker, Darlene and Richard Gleeson, Robert and Michell Bagrie, Russell Johnston, Kathryn Howle, Dorothy Newman, Nicholas and Debora Yost, Helen and Bob Harmon Estate of Rose Minton, Stephen and Merifaith Perdue 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., Defendants,	)

Presiding Judge:	Hon. Deadra L. Jefferson
Counsel for Plaintiff:	John Hayes, IV, Esq. I. Keith McCarty, Esq. Mary Margaret Noland, Esq.
Counsel for John Wieland Homes:	Theodore Manos, Esq. Andrew Haselden, Esq.
Counsel for JMC Construction:	Andrew Cole, Esq.
Counsel for Sanchez Brothers Painting:	Sarah Fragale, Esq.
Counsel for The Muhler Company:	Peter Gunnar Nistad, Esq.
Date of Hearing:	January17, 2016
Court Reporter:	Phyllis Norton

THIS MATTER came before the Court on Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment, filed February 3, 2017. A hearing was held on February 9, 2017. Present at the hearing were John Hayes, Esquire and I. Keith McCarty, Esquire, representing the Plaintiff, and Theodore Manos, Esquire and Andrew Haselden, Esquire, representing Defendant John Wieland Homes. Curtis Martin, Esquire representing Defendant Benjamin Mora was not present at the hearing.

"Before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury; when the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law." Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (Ct. App. 2012).

After hearing from all parties present, the parties stipulated, without objection, that the Defendants were entitled to a set-off in the amount of $2,119,000.00[1] to the combined jury verdict of $7,200,000.00[2]. Therefore, Judgment was entered against the Defendants in the amount of $5,081,000.00 for the Plaintiffs Waverly at Hamlin Plantation Townhome Association and no judgment for the Plaintiffs in the class action companion suit. Accordingly, a Form 4 was signed and entered for both cases on February 9, 2017 issuing the judgment with the agreed upon set-off. This Supplemental Order addresses the gravamen of Defendant John Wieland Homes' Motion. Defendant John Wieland Homes' contends that they are entitled to an enhanced set-off in the amount of $434,000.00.[3] They maintain this is the result of an alleged settlement with Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC (hereinafter referred to as "Benjamin Mora").

A trial court has inherent jurisdiction to enforce settlement agreements entered before it, and the inherent power to refuse to enforce settlements. Rock Smith Chevrolet, Inc. v. Smith, 309 S.C. 91, 419 S.E.2d 841 (Ct. App. 1992). With regards to agreements between parties, SCRCP Rule 43(k) states that:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed

[1] The settlement funds totaling $2,119,000.00 are as follows: Jesus Mora; $100,000.00; Benjamin Mora Construction; $70,000.00; Barr Construction; $15,000.00; Latitude Construction; $50,000.00; AC Construction; $67,500.00; and Builders First Source; $7,500.00. Additionally, the set-off encompasses the outstanding settlements pending class action approval. These additional settlements are as follows: JMC Construction; $1,250,000.00; The Muhler Company; $250,000.00; RDT; $125,000.00; and Sanchez Brothers Painting; $184,000.00. The combined settlements from the various Defendants totals to the applied set-off of $2,119,000.00. Cross-claims by Defendant John Wieland Homes are still pending for the following parties: JMC Construction, The Muhler Company, and Sanchez Brothers Painting. These claims were bifurcated and will be tried separately.

[2] This judgment reflects the total verdict from the combined cases. In the class action suit, the jury returned a verdict in favor of the Plaintiffs in the amount of $200,000 actual damages. The jury reached a verdict of $7,000,000.00 actual damages for Plaintiff Waverly at Hamlin Plantation Townhome Association. By consent of counsel, the set-off was applied as follows: $200,000.00 towards the class action suit resulting in no judgment and $1,919,000.00 applied towards the judgment for Plaintiff Waverly at Hamlin Plantation Townhome Association resulting in a judgment of $5,081,000.00.

[3] The alleged enhanced set-off of $434,000.00 does not include the already approved settlement of $70,000.00 between Plaintiffs and Defendant Benjamin Mora.

> 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. Settlement agreements shall be handled in accordance with Rule 41.1, SCRCP.

SCRCP 43. SCRCP Rule 43(k) allows for agreements between counsel to be binding under four scenarios. However, three of the scenarios require that the agreement be noted and entered on the record. As a fourth option, SCRCP Rule 43(k) allows an agreement to be binding if an agreement is "reduced to writing and signed by the parties and their counsel." The signature of the party to the agreement is a requirement under the plain language of SCRCP Rule 43(k). Further, South Carolina courts have consistently throughout the years ruled that in order for a settlement to be enforced an agreement must strictly adhere to SCRCP Rule 43(k).

Defendant John Wieland Homes' Motion for an Enhanced Set-Off in the amount of $434,000.00 fails for several reasons. First, Defendant John Wieland Homes' request must be denied because no documentation of the alleged set-off complies with the requirements of SCRCP Rule 43(k). Defendant John Wieland Homes urges this Court to accept a chain of e-mail correspondence as evidence of the alleged negotiated settlement. However, e-mail correspondence as evidence of a negotiated settlement do not meet any of the four scenarios mandated by SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

In the alternative, Defendant John Wieland Homes argues that the alleged Benjamin Mora settlement agreement concerning the enhanced set-off was memorialized, in open court on the record, and thus complies with SCRCP Rule 43(k). In further support of their argument, Defendant John Wieland Homes contends that on Tuesday, January 17, 2017, Plaintiffs' counsel and Defendant John Wieland Homes' counsel notified the Court, on the record, that Plaintiffs and Defendant John Wieland Homes had settled with Defendant Benjamin Mora. However, after reviewing the record from both January 17, 2017 and January 23, 2017, this Court cannot discern

from the record that a settlement agreement was ever articulated between Plaintiffs, Defendant Benjamin Mora, and Defendant John Wieland Homes.

Further, even if a conversation mentioning the alleged settlement agreement were made on the record, it still would not comply with SCRCP 43(k) because all parties needed for the agreement to be enforceable were not present. In order for the alleged settlement agreement to have been made enforceable on the record, all parties would have had to be present, indicate their intention to enter into the alleged settlement agreement, and meet one of the scenarios contemplated by SCRCP Rule 43(k). This would require Defendant Benjamin Mora and/or its counsel, Curtis B. Martin, Esquire, to be present as it was to be a party to this alleged settlement agreement. Accordingly, on January 17, 2017 and January 23, 2017, neither Defendant Benjamin Mora nor his counsel were present. In fact, Defendant Benjamin Mora did not make an appearance at any time throughout the proceedings even though his counsel received notice of the proceedings. As such, there is no way the alleged settlement agreement could have been binding and enforceable based upon SCRCP Rule 43(k). Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, Defendant John Wieland Homes' cites Byrd v. Livingston, as being analogous to the present situation. See Byrd v. Livingston, 398 S.C. 237, 727 S.E.2d 620 (Ct. App. 2012). In Byrd, the plaintiff entered into a contract with the defendant to purchase property after winning the bid at a live auction. Id. at 240, 727 S.E.2d at 621. Litigation ensued over the purchase property, and following pretrial discovery, the parties attended a mediation and signed an "Agreement in Principle" which stated that the agreement will be supplemented by a more formal and detailed written agreement. Id. However, the subsequent agreement was never signed. Id. The trial court found the agreement enforceable against the parties and ordered the parties to prepare and execute

5 of 7

a formal settlement document. Id. On appeal, the Court of Appeals affirmed the trial court's decision stating, "[w]e find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement." Id. at 243, 727 S.E.2d at 624.

The present case is not analogous to Byrd v. Livingston, as Defendant John Wieland Homes suggests. In Byrd, there was a clear meeting of the minds that was formalized in a writing. In the present case, there is no written agreement in the record that complies with SCRCP Rule 43(k). The alleged written agreement at issue is a proposed settlement agreement releasing the claims against Defendant Benjamin Mora. Defendant John Wieland Homes' Attorney Theodore Manos presented this release for Plaintiff's Attorney I. Keith McCarty's review and signature. Even after Attorney McCarty received the proposed written settlement agreement, he refused to sign it because he did not believe it was meant for his client. At the hearing, Attorney McCarty indicated to the Court that although he had received the release, he thought the release concerned only Defendant John Wieland Homes and Defendant Benjamin Mora. This is made evident by Attorney McCarty's refusal to sign the release. As such, because there is no written agreement by counsel, there is no evidence in the record to indicate that there was a meeting of the minds between the parties. If anything, Attorney McCarty's confusion surrounding the proposed release agreement as well as his refusal to sign the release evidences a lack of a meeting of the minds and distinguishes the present case from that of Byrd v. Livingston. Accordingly, Defendant John Wieland Homes' motion fails on this ground.

Finally, it is of importance to note that on January 23, 2017, counsel for JMC Construction, Andrew Cole, Esq., indicated to the Court that his client, JMC Construction, had settled with the Plaintiffs. He indicated to the Court that this settlement agreement was memorialized in writing

and noted on the record, thus complying with SCRCP Rule 43(k). At that time, this Court stressed to all parties the importance of SCRCP Rule 43(k) and made clear that unless there was strict compliance, agreements would not be binding. This Court read the rule verbatim into the record to assure that the parties had fully complied with the requirements of SCRCP Rule 43(k) concerning the settlement.

Accordingly, it is hereby ordered, adjudged, and decreed, that Defendant John Wieland Homes' Motion to Enforce Setoff and Reduce Judgment is denied as to the enhanced setoff of $434,000.00.

IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

March 1, 2017
Charleston, South Carolina
At Chambers

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiff,

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., and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc.,

Defendants.

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, Builder's Firstsource, Inc. a/k/a Builders First-Source-Southeast Group, LLC a/k/a Builders Firstrsource-Atlantic Group, LLC, DBA Construction Services, LLC, Gerardo Rosette Sanchez a/k/a GR Painting, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc., Jesus Mora a/k/a J.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2013-CP-10-3326

AFFIDAVIT OF THEODORE L. MANOS IN SUPPORT OF JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.'S MOTION TO ENFORCE SETOFF AND REDUCE JUDGMENT FILED ON FEBRUARY 3, 2017

FILED
2017 FEB -9 AM 10:14
JULIE J. ARMSTRONG
CLERK OF COURT

Mora Brick & Block Mason, LLC, Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez 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.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO.: 2014-CP-10-4336

Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitemire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle, Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesene, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle,

Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48),	)
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 John Wieland Homes and Neighborhoods, Inc., 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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio and Richard Ditullio a/k/a RDT Contracting, LLC,	)
Defendants.	)

Personally appeared before me, Theodore L. Manos, who upon oath, states and deposes as follows:

1. My name is Theodore L. Manos and I am over 18 years of age and of sound mind.

2. I am a member of Robertson Hollingsworth Manos & Rahn, LLC and represent John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al. ("Wieland") in the above-captioned litigation.

3. Following the deposition of Bud DeSantis on January 11, 2017, Plaintiffs' counsel, John Hayes, IV and I. Keith McCarty and I and my co-counsel, Andrew E. Haselden, discussed the potential for settling Plaintiff's claims and Wieland's cross-claims against Defendant Benjamin Mora d/b/a Mora Construction a/k/a Benjamin Mora Construction, LLC ("Mora").

4. Specifically, Plaintiffs' counsel requested that Wieland release its cross-claims in consideration for Mora paying Plaintiffs $500.00. Wieland's counsel rejected Plaintiffs' counsel's request and countered by requesting a full issue release as to Wieland's exposure to the masonry step repair which was delineated in Plaintiffs' repair estimate at $735,000 prior to markup for profit and overhead. Wieland was seeking a full issue release because by Plaintiffs settling with Mora, all of the masons on the job would have been released due to the prior settlement with the other mason.

5. Plaintiffs' counsel rejected Wieland's counter and suggested that it would be willing to provide Wieland with a release as to Mora's masonry work.

6. I informed Plaintiffs' counsel that I would discuss their proposal with my co-counsel and respond to them.

7. That afternoon I spoke with Mr. McCarty regarding how t value Mora's portion of the masonry work based on it being one of two masons at Waverly townhomes.

8. That same afternoon on January 11, 2017 at 3:35 p.m., I sent an e-mail to Mr. McCarty with a copy to Curtis B. Martin, counsel for Mora, notifying them that my records reflected that Mora installed sixty two (62) of the one hundred and five (105) sets of masonry steps at Waverly which represented 59% of the total steps. I further noted that Plaintiffs' repair estimate included a total of $735,000.00 to replace all 105 of the masonry steps before markup for profit and overhead. In my email I included the calculation of 59% x $735,000 = $433,650.00. I closed my email with a request for Plaintiffs' counsel's response.

9. Mr. McCarty responded to me with an email that same day at 4:14 p.m. with a copy to Mr. Martin noting "Gentlemen, assuming Curt agrees with the numbers, that is fine with me".

10. Mr. Martin responded to Mr. McCarty's email that afternoon at 4:24 p.m. with a copy to me advising Mr. McCarty that he had spoken with me "about this and the numbers look right to me. Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled $500. Keith and Teddy, please confirm by response to this email".

11. Mr. McCarty responded to Mr. Martin's email that same afternoon at 4:31 p.m. with a copy to me stating "All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release".

12. Attached hereto as Exhibit "A" is the email chain set forth in paragraphs 8–11.

13. On Tuesday, January 17, 2017, following Jury Qualification, Plaintiffs' counsel and Wieland's counsel notified the Honorable Deadra L. Jefferson in open court and on the record that Plaintiffs and Wieland had settled with Mora by agreement.

14. Wieland's agreement to release its cross-claims against Mora were solely based on the tri-party agreement among Plaintiffs, Wieland and Mora which provided Wieland with a $433,650.00 setoff against any judgment that Plaintiffs may be awarded at trial. Had such set-off not been agreed upon, Wieland would not have released its cross-claims against Mora, but instead would have argued to the jury that Mora as the trade expert was primarily responsible for the alleged deficiencies in the masonry step work as described above, thereby reducing Wieland's potential exposure on this substantial $735,000.00 issue.

15. On Wednesday, February 1, 2017, after the trial had ended, Mr. Martin sent Mr. McCarty and I an email noting "[a]s to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed release". Attached hereto as Exhibit "B" is Mr. Martin's email, along with the proposed release containing the $433,650.00 set-off language in Article II, which is attached hereto as Exhibit "C".

FURTHER AFFIANT SAYETH NOT.

Theodore L. Manos

SWORN TO AND SUBSCRIBED BEFORE ME

This, the 9th day of February, 2017
Notary Public for: South Carolina

My commission expires: 9-2-2022

Elissa Jones

From: Teddy Manos
Sent: Thursday, February 9, 2017 9:35 AM
To: Elissa Jones
Subject: Fwd: Waverly v. Wieland SCRE 408 confidential settlement communications

Sent from my T-Mobile 4G LTE device

------ Original message------
From: keith mccarty
Date: Wed, Jan 11, 2017 4:31 PM
To: Curt Martin;
Cc: Teddy Manos;
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

All good from my end. Curt, remember to avoid any confidentiality or indemnity language in the release. Keith

On Wed, Jan 11, 2017 at 4:24 PM, Curt Martin <cmartin@arslawsc.com> wrote:

Keith,
I just talked to Teddy about this; the numbers look right to me.
Thus, assuming Wieland and Plaintiffs fully release all claims, we're settled for $500. Keith and Teddy, please confirm by response to this email.
And Keith, you know the drill with National Fire - no settlement check will be issued until they've received a fully-executed release, which I'll be happy to get to you by the end of the week.
Thanks, guys
--Curt

From: keith mccarty <ikeithmccarty@gmail.com>
Sent: Wednesday, January 11, 2017 4:14:49 PM
To: Teddy Manos
Cc: Curt Martin
Subject: Re: Waverly v. Wieland SCRE 408 confidential settlement communications

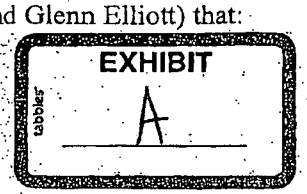
Gentlemen, assuming Curt agrees with the numbers, that is fine with me. Keith

On Wed, Jan 11, 2017 at 3:35 PM, Teddy Manos <tlm@roblaw.net> wrote:

Keith –

Per our conversation –

My notes reflect (Curt please confirm - I think the below came from Pritchard and Glenn Elliott) that:



Curt's client installed: exterior bricks steps on 62 of the 105 units (59%).

Pritchard's client installed: exterior brick steps on 43 of the 105 units (41%).

Moore estimated the replacement of all masonry steps at the Project totaling $735K before mark-up.

So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

Theodore L. Manos, Esq. – Member

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

550 King Street, Suite 300

Charleston, SC 29403

Office (843) 723-6470

Mobile (843) 345-8992

Facsimile (843) 853-9045

tlm@roblaw.net

PLEASE NOTE OUR NEW NAME AND ADDRESS

--
I. Keith McCarty
McCarty Law Firm, PC
1212 Wappoo Road (29407)
P.O. Box 30055
Charleston, South Carolina 29417
Phone: 843-793-1272
Fax : 843-793-1282
This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately, and do not forward this message to any other person.

--
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From: Curt Martin [mailto:cmartin@arslawsc.com]
Sent: Wednesday, February 1, 2017 2:32 PM
To: keith mccarty <ikeithmccarty@gmail.com>
Cc: Teddy Manos <tlm@roblaw.net>
Subject: RE: Waverly v. Wieland SCRE 408 confidential settlement communications

Keith and Teddy,
I understand things are all wrapped up with trial; I stuck my head in a couple times last week – good job all around, and I'm sure you're both happy to have it done.
As to Mora's settlement, and based on the figures agreed upon in the emails below, I've attached the proposed Release. Please let me know if you have any proposed changes, etc. – just please use Track Changes such that we're all on the same page.
If you're OK with the Release as-is, please get your signature pages to me, and I'll circulate a fully-executed copy.
As I mentioned in my email below, Keith, I can't order the settlement check without the fully-executed Release.
Thanks, guys.

Curt Martin
Anderson Reynolds & Stephens, LLC
37 1/2 Broad Street
Post Office Box 87
Charleston, South Carolina 29401
843.723.0185 telephone
843.405.0313 facsimile
cmartin@arslawsc.com
Confidentiality Notice
This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (843.723.0185) or reply to this e-mail and delete all copies of this message.

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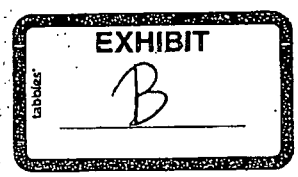
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So 59% x $735,000 = $433,650

Let me know what you are thinking.

Thanks,

Teddy

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SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Agreement" or the "Settlement Agreement") is made and entered into as of this ___ day of _____, 2017, by and between Waverly at Hamlin Plantation Townhome Association, Inc., in its corporate capacity and Edward Peyser, individually and on behalf of the Individual Owners[1] (collectively the "Association"), 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., Builder Support Services of the Carolinas, Inc. and John Wieland Homes and Neighborhoods, Inc. (collectively "Wieland"), and Benjamin Mora Construction, LLC ("Mora"). The Association, Wieland, and Mora are hereinafter collectively referred to as the "Settling Parties."

RECITALS

WHEREAS, the Association is a corporation lawfully doing business in the State of South Carolina and is the entity charged with and responsible for maintenance, repair, and upkeep of the common areas and limited common areas, as well as exterior and related elements of the condominium units and property known as Waverly at Hamlin Plantation Townhomes, located in Charleston County, South Carolina (the "Property").

WHEREAS, the Association affirms that it is the sole proper party, whether by right or by assignment from individual condominium unit owners or the developer to bring this action and execute this settlement as to all claims for damages to any and all structures, common areas, limited common areas, unit interiors and lots located at the Property; and

WHEREAS, Edward Peyser is a citizen of South Carolina, who has been identified as the Class Representative for a purported class of all individual townhome owners at the Property and affirms ownership of any claims for loss of use or any other claims not owned by the Association related to the subject matter of the collective lawsuits filed.

WHEREAS, Mora performed certain construction work including installation of brick steps, fireplaces, and block work at the Property as a subcontractor to Wieland pursuant to job cost details and other documents with Wieland, the General Contractor for construction of the Property; and

WHEREAS, these actions relate to alleged construction defects and deficiencies at the Property and is the subject of litigation now pending in the Court of Common Pleas for Charleston County, South Carolina in a case styled *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.*, Case Number 2013-CP-10-03326 (the "Action"); and *Jeffrey Sills, Individually and as Class*

1 Edward Peyser was appointed as class representative pursuant to Judge Roger M. Young, Sr.'s Order Granting Plaintiffs' Motion for Class Certification filed on May 4, 2016.

EXHIBIT C

Representative, et al. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., Case Number 2014-CP-10-4335 (the "Class Action"); and

WHEREAS, Mora denies any and all claims of wrongdoing or impropriety in its actions in this matter; and

WHEREAS, the Settling Parties have agreed to resolve all matters between them as set forth below.

ARTICLE I
INCORPORATION OF RECITALS

The foregoing Recitals are incorporated and made a part of this Settlement Agreement, provided, however, in the event of a conflict between the recitals and the provisions of the foregoing Articles, the provisions of the Articles shall control.

ARTICLE II
PAYMENT

For and in consideration of the payment of Five Hundred ($500.00) Dollars, by or on behalf of Mora, and other good and valuable consideration, the sufficiency of which is hereby acknowledged (the "**Settlement Amount**"), the Association, on behalf of itself and on behalf of the individual owners of units at the Property, and Wieland, agree to release Mora from any and all liability related to the Project as set forth in Article III. Payments to the Association shall be made payable to "Hayes Law Firm as Attorney for Waverly at Hamlin Plantation Association" and delivered to the Association counsel John C. Hayes, Esquire, within thirty (30) business days after this fully-executed Agreement is received by National Fire & Marine, an insurer for Mora. Additionally, in consideration of the Agreement hereto of Wieland, Plaintiffs (the Association and the class members) shall grant Wieland a credit or offset against damages/judgment in the amount of Four Hundred Thirty Three Thousand Six Hundred Fifty and 00/100 ($433,650.00) Dollars.

ARTICLE III

RELEASES

1. In consideration of the Settlement Amounts and of the promises and releases set forth herein, the Association and Wieland do for themselves, and their respective successors, heirs, assigns, subsidiary organizations, affiliates, purchasers, unit owners, partners, attorneys, agents, and any other entity or person who could claim by or through them, hereby, knowingly and voluntarily, remises, releases, acquits, satisfies, and forever discharge Mora, National Fire & Marine Insurance Company (collectively "Settling Defendant"), their respective successors, predecessors, heirs, assigns, subsidiary organizations, affiliates, purchasers, insurers, partners, members, shareholders, officers, attorneys, employees, and agents from any and all manner of warranties, representations, covenants, promises, controversies, agreements, liabilities, obligations, expenses, damages, judgments, executions, actions, claims, demands, and causes of action of any nature whatsoever, whether at law or in equity, either now accrued or hereafter maturing whether known or unknown, which the Association and Wieland now have or hereafter can, shall, or may have by reason of any matter, cause or thing as to the Settling Defendants only. This Release as to the insurance carrier National Fire & Marine Insurance Company is limited to its involvement as the carrier for Mora only, including but not limited to a release of the policies for Mora for the claims brought in this suit by Plaintiffs and Wieland, as well as any claims as an additional insured. Nothing herewith shall release the identified carriers to the extent they have policies of insurance for other Defendants.

The Association and Wieland agree to dismiss with prejudice all claims against Mora in the Action and the Class Action, including those claims it has taken by assignment from unit owners. The Association agrees to execute and file, or cause to be executed and filed, pleadings in order to effectuate this full and complete settlement agreement and release as to Mora.

ARTICLE IV
ACKNOWLEDGEMENT AND WAIVER

1. It is agreed and understood by the Settling Parties that they are not required to settle this matter at this time, and that they could continue to investigate with respect to the matter involved in the suit, but that they voluntarily choose to finally resolve the matter at this time by entering into this settlement. The Settling Parties, in deciding to enter into this Agreement, are not relying on any representations, statements, actions, disclosures of information, discovery responses, deposition testimony or failures to disclose information by Settling Parties, or their representatives, or their attorneys. Settling Parties further agree, warrant and represent that their decision to settle this matter is final and will not be affected, altered or changed by documentation, discovery or other information of any type whatsoever that may be revealed, disclosed or learned in the future.

2. Settling Parties expressly waive and assume the risk of any and all claims for damages and/or damages which exist as of this date, or which may arise in the future, but which they do not now know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect their decision to enter into this agreement. Settling Parties each acknowledge and understand that they may have suffered damages, or may suffer damages, that are unknown to them at the present time. These issues were considered in the course of negotiations leading to this agreement and Settling Parties determined this Agreement to reflect fair and adequate compensation with due regard for such future possibilities.

ARTICLE V
MISCELLANEOUS

1. Costs and Expenses. Each party is responsible for its own attorneys' fees and

costs associated with the Action and Class Action through the date of execution of this agreement.

2. Construction. This Settlement Agreement shall not be construed more strongly for or against any party solely by reason of who was more responsible for the drafting of this Agreement.

3. Successors and Assigns. All covenants and agreements contained in this Settlement Agreement shall bind and inure to the benefit of the parties hereto, their legal representatives, successors, and assigns.

4. Further Assurances. The parties hereto agree that they will cooperate with each other and will execute and deliver, or cause to be executed and delivered, all such other instruments, and will take all such other actions, as any party hereto may reasonably request from time to time in order to effectuate the provisions and purposes hereof.

5. Modifications. Neither this Settlement Agreement nor any provision hereof may be changed, waived, discharged, or terminated orally, but only by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge, or termination is sought and by any party who would be affected thereby.

6. Governing Law. This Settlement Agreement will be interpreted and construed under the internal laws of the State of South Carolina, regardless of the domicile of any party, and will be deemed for those purposes to have been made, executed, and performed in South Carolina.

7. Time of the Essence. Time is of the essence in this Settlement Agreement and each provision of this Settlement Agreement.

8. Legal Fees. In the event of a breach by any party of its obligations under this

Agreement, the prevailing party in any action or proceeding in any court in connection therewith shall be entitled to recover from such other party its costs and expenses, including reasonable legal fees, expenses and associated court costs.

9. Notices. All notices, demands, requests, consents, or other communications required or permitted to be given hereunder (collectively, a "Notice") shall be in writing and shall be given to the party at its regular mail address (or at such other mail address that a party may hereafter designate by sending written notice thereof to the other parties pursuant to the terms of this Section).

10. Entire Agreement. This instrument constitutes the entire and final agreement among the parties and there are no agreements, understandings, warranties, or representations among the parties except as set forth in this Settlement Agreement.

11. Invalidity. If any clause or provision of this Settlement Agreement is determined to be illegal, invalid, or unenforceable under any present or future law by the final judgment of a court of competent jurisdiction, the remainder of this Settlement Agreement will not be affected thereby.

12. Counterparts. This Settlement Agreement may be executed in counterparts, each of which will be deemed an original document, but all of which will collectively constitute a single document. This document will not be binding on or constitute evidence of a contract between the parties until such time as this document has been executed by each party and a copy thereof delivered to each other party to this Settlement Agreement.

SIGNATURE PAGES TO FOLLOW

IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals as of this _____ day of _____, 2017.

WAVERLY AT HAMLIN PLANTATION
TOWNHOME ASSOCIATION, INC.

By_____(SEAL)

Its:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that they executed the foregoing instrument as their own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

IN WITNESS WHEREOF, the undersigned have hereunto set his hand and seal as of this _____ day of _____, 2017.

EDWARD PEYSER, INDIVIDUALLY AND AS CLASS REPRESENTATIVE

By_____(SEAL)

Print:_____(SEAL)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, _____, to me known or properly identified as the same, who acknowledged that he executed the foregoing instrument as his own free act and deed for the purposes therein expressed.

_____(SEAL)
Notary Public for _____
My Commission expires: _____

_____(SEAL)
John C. Hayes, IV
Mary Margaret Noland

_____(SEAL)
I. Keith McCarty

Attorneys for Plaintiffs

This as of the day and year first above written.

_____(SEAL)
Theodore L. Manos
Andrew E. Haselden

Attorneys for John Wieland Homes and
Neighborhoods of the Carolinas, Inc., et al

Dated: _____

SETTLEMENT AGREEMENT AND RELEASE
Waverly at Hamlin Plantation Townhome Association, Inc.
vs.
John Wieland Homes and Neighborhoods of the Carolinas, Inc., et. al.
Case No: 2013-CP-10-03326

_____(SEAL)
Curt Martin

Attorney for Benjamin Mora Construction, LLC

Dated: _____

EXHIBIT C

398 S.C. 237
Court of Appeals of South Carolina.

Forest BYRD, Appellant,
v.
Judy LIVINGSTON and TIAA Timberlands, II, LLC, Respondents.

No. 4973.
|
Heard April 24, 2012.
|
Decided May 16, 2012.
|
Rehearing Denied June 22, 2012.
|
Certiorari Denied May 7, 2014.

Synopsis

Background: Purchaser filed suit against vendor and easement holder asserting various claims arising out of vendor's alleged concealment of easement granted to holder that ran over subject property. Vendor and easement holder filed motion to enforce settlement agreement that resolved all claims. The Circuit Court, Newberry County, Frank R. Addy, Jr., Circuit Court Judge, granted motion to enforce settlement, and purchaser appealed.

Holdings: The Court of Appeals, Short, J., held that:

[1] three-word reference to parcel of property owned by purchaser's son in settlement agreement did not excuse purchaser's obligations under agreement, and

[2] son's ratification of agreement was not condition precedent to purchaser's obligations under agreement.

Affirmed.

West Headnotes (6)

[1] **Compromise and Settlement**
⇦ Nature and Requisites

In South Carolina jurisprudence, settlement agreements are viewed as contracts.

Cases that cite this headnote

[2] **Contracts**
⇦ Questions for Jury

An action to construe a contract is an action at law.

Cases that cite this headnote

[3] **Compromise and Settlement**
⇦ Making and Form of Agreement

Three-word reference to parcel of property owned by purchaser's son in settlement agreement resolving and releasing purchaser's claims against vendor and easement holder arising out of purchase agreement, did not excuse purchaser's obligations under settlement agreement; purchaser's subsequent conduct indicated intent to be bound by settlement agreement, in that attorneys' e-mails demonstrated that purchaser's attorney believed settlement to be binding but had apparently run into problems getting purchaser to sign documents, purchaser's attorney asked to be relieved as his counsel, counsel's lack of compliance with scheduling order in case strongly indicated that everyone believed case to be settled, purchaser's attorney withdrew pending motion, parties obtained and recorded new survey as contemplated by agreement, and purchaser paid his one-third share of cost of survey as contemplated by agreement.

Cases that cite this headnote

[4] **Compromise and Settlement**
⇦ Conditions

Release
⇦ Operation and effect in general

Three-word reference to parcel of property owned by purchaser's son in agreement to settle purchaser's claims against vendor and easement holder arising out of purchase did not indicate that son's ratification

of agreement was condition precedent to purchaser's performance obligations to release all claims; there was no condition precedent to be found in three words referencing son's parcel, purchaser's duties with respect to agreement were not conditional, either expressly or impliedly, and inclusion of his son's property was not essential to agreement.

Cases that cite this headnote

[5] **Contracts**
What are conditions precedent in general

A "condition precedent" to a contract is any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.

1 Cases that cite this headnote

[6] **Contracts**
Conditions Precedent in General

The question of whether a provision in a contract constitutes a condition precedent to performance is a question of construction dependent on the intent of the parties to be gathered from the language they employ.

1 Cases that cite this headnote

Attorneys and Law Firms

**621 B. Michael Brackett, of Columbia, for Appellant.

Blaney A. Coskrey, III, of Columbia, and Timothy D. Savidge, of Prosperity, for Respondents.

Opinion

SHORT, J.

*239 Forrest Byrd (Byrd) appeals from the trial court's order finding an agreement to settle a lawsuit relating to a land purchase was enforceable. Byrd argues the court erred in: (1) finding his son was not a party to the agreement; (2) concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the agreement; (3) not applying the law of joint contracts to the motion to enforce the agreement; (4) finding the agreement did not contain a condition precedent; and (5) ruling the agreement's provision that included his son was severable from the remainder of the agreement. We affirm.

*240 FACTS

Byrd entered into a contract to purchase property from Judy Livingston (Livingston) in May 2007, after being the winning bidder at a private auction. Byrd paid the full purchase price, and Livingston executed and delivered a general warranty deed for the property to Byrd in July 2007. Two days prior to executing the deed, Livingston executed and delivered a sixty-six-foot right-of-way easement over and across the subject property to TIAA Timberland, II, LLC (TIAA). This easement was recorded a little more than two hours after Byrd's deed was recorded. Byrd filed a complaint on September 10, 2008, against Livingston and TIAA, asserting five causes of action: (1) quiet title; (2) reformation; (3) breach of contract; (4) breach of contract accompanied by a fraudulent act; and (5) fraud or negligent misrepresentation. Byrd alleged Livingston concealed the right-of-way, and he accepted the deed based on her representations that Newberry County zoning ordinances required the right-of-way. TIAA filed an answer denying the allegations and counterclaimed, seeking "a declaratory judgment that it has an easement, express, implied by prior use, implied by necessity, and/or a prescriptive easement over [Byrd's] property." Livingston also filed an answer, denying all allegations. Following pretrial discovery, Byrd, Livingston, and TIAA attended a mediation conference on November 23, 2009, which resulted in all three parties signing an "Agreement in Principle" (Agreement).[1] The Agreement stated, "this agreement will be supplanted by a more formal and detailed written Settlement Agreement setting forth the agreement between the parties"; however, the Settlement Agreement was never signed.

On February 19, 2010, Livingston and TIAA (Respondents) filed a motion to enforce the Agreement. Byrd filed a motion in opposition. A hearing on the motion was held on June 30, 2010. Byrd asserted that because his son would not execute *241 the proposed Settlement Agreement, he himself was no longer bound by the Agreement and was unwilling to execute

the Settlement Agreement. Respondents argued the November 23, 2009 Agreement was a valid, enforceable, stand-alone contract. The trial court issued its order on July 30, 2010, finding the Agreement enforceable against Byrd, Livingston, and TIAA, and ordering the parties to prepare and execute a formal settlement document embodying the terms of the Agreement. Byrd filed a Rule 59(e), SCRCP, motion for reconsideration, which the court denied. This appeal followed.

STANDARD OF REVIEW

[1] [2] "In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct.App.2009); *see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement ****622** agreement is a matter of contract law); *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct.App.2007) (stating a release agreement is a contract and contract principles of law should be used to determine what the parties intended); *Matton v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986) (applying the general rules of contract construction to a settlement agreement). An action to construe a contract is an action at law. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541 (Ct.App.2008). In an action at law, on appeal of a case tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, this court is free to decide questions of law with no particular deference to the trial court. *Silver*, 376 S.C. at 590, 658 S.E.2d at 542.

LAW/ANALYSIS

[3] I. Byrd argues the trial court erred in finding his son was not a party to the Settlement Agreement. We disagree.

Byrd maintains that because the November 23, 2009 Agreement referenced his son's parcel as well as his own, his son ***242** was intended to be a necessary party to a final agreement, and because his son did not sign the Settlement Agreement, he himself is not bound by the Agreement. The court found the Agreement was not enforceable as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement. The Agreement's three-word reference to Byrd's son's property was included in one of its paragraphs:

> 25# easement (measured equally from center of the existing road) for purposes of ingress and egress, runs with land, subject to verification of feasibility by TIAA/Hancock—express grant superceding [sic] and canceling the 66# grant, son's parcel included.

The trial court noted that in Byrd's son's affidavit, he stated:

> I am not, and never have been, a party to the legal action [between Byrd, Livingston, and TIAA].... I did not attend, and was not represented at, the mediation conference ... held on or about November 23, 2009. My father spoke to me about the mediation after the fact and explained to me the Agreement in Principal [sic] that was the product of the mediation. I was not involved in the negotiation of the terms of the Agreement in Principal [sic]; I did not authorize anyone to speak for me or to act on my behalf with respect to the Agreement in Principal [sic]; and I did not sign the Agreement in Principal [sic].... I do not agree with the terms of the Agreement in Principal [sic], and I will not sign either the Agreement in Principal [sic] or a more formal and detailed written settlement agreement based on the terms of the Agreement in Principal [sic].

The court found the record contained no evidence warranting a finding that Byrd acted with actual or apparent authority by including his son in the Agreement. The court also found nothing in the record to contradict

his son's sworn statement. The Agreement stated "[t]he undersigned parties ... have reached an agreement in principle" and was signed by Byrd, Livingston, and TIAA's agent. It further stated, "[l]itigation dismissed, mutual releases among all parties." We find the evidence supports the court's determination that Byrd's son was not a party to the Agreement, the Agreement *243 was not binding as to Byrd's son, and the inclusion of the three-word reference to Byrd's son's property does not release Byrd himself from the Agreement.

II. Byrd next argues the trial court erred in concluding the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds on all terms of the Agreement. We disagree.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Patricia Grand Hotel, LLC v. MacGuire Enters., Inc.*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct.App.2007). "The **623 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." *Wright v. Trask*, 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct.App.1997).

Byrd argues the subsequent conduct of the parties to the Agreement demonstrated the intended and understood involvement of Byrd's son, and asserts as proof that his son was identified in the proposed Settlement Agreement as a party to the Agreement. However, the trial court found the subsequent actions of the attorneys show the parties' intent to settle the case: (1) the attorneys' emails "demonstrate[d] that Byrd's attorney believed the settlement to be binding but had apparently run into problems getting his own client to sign the documents," and Byrd's attorney asked to be relieved as his counsel; (2) "counsel's lack of compliance with the Scheduling Order in the case also strongly indicates that everyone believed the case to be settled"; (3) Byrd's attorney withdrew a pending motion; (4) the parties obtained and recorded a new survey as contemplated by the November 23, 2009 Agreement; and (5) Byrd paid his one-third share of the cost of the survey *244 as contemplated by the November 23, 2009 Agreement. Therefore, the court found it was "impossible to reconcile these actions by Byrd and his attorney with Byrd's current position that he did not intend to be bound." We find no error with the court's determination that the subsequent conduct of the parties and attorneys established the parties had a meeting of the minds and intended to be bound by the Agreement.

[4] III. Byrd also argues the trial court erred finding the Agreement did not contain a condition precedent. We disagree.

[5] [6] "A condition precedent to a contract is 'any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate performance arises.' " *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 449, 613 S.E.2d 802, 805 (Ct.App.2005) (quoting *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct.App.1994)). "The question of whether a provision in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* (internal quotation marks omitted).

Byrd claims the three words used in the Agreement referencing Byrd's son's property created a condition precedent that required Byrd's son to ratify the Agreement and sign the more formal and detailed Settlement Agreement to follow. Byrd argues the alleged condition precedent was not satisfied; therefore, his performance under the Agreement is excused. However, the trial court found there was no condition precedent to be found in the three words in the Agreement referencing his son's parcel. Further, the court found "Byrd's duties with respect to the Agreement are not conditional, either expressly or impliedly," and the inclusion of his son's property was "not so essential to the Agreement as to constitute a condition precedent or to excuse [Byrd's] non-performance under the Agreement." The court continued:

> [Byrd] should not be rewarded for asking that a term be included in the Agreement and then seek to avoid the Agreement once his son expresses a desire to not join

> the [settlement agreement]. In short, the Agreement cannot be read to excuse compliance due to the non-cooperation of a *245 person who is not a party to the Agreement.... The law does not and should not sanction a party's own request that a term be included, only to later argue that its very inclusion renders an agreement unenforceable.

**624 We find no error in the trial court's ruling that the Agreement did not contain a condition precedent to his alleged obligation with respect to a final settlement agreement.

IV. As to the remaining issues, we adopt the trial court's order. *See Grosshuesch v. Cramer*, 367 S.C. 1, 6, 623 S.E.2d 833, 835 (2005) (adopting the reasoning set forth in the trial court's order as to some of the issues on appeal).

AFFIRMED.

FEW, C.J., and HUFF, J., concur.

All Citations

398 S.C. 237, 727 S.E.2d 620

Footnotes

1 During discovery, Byrd's son purchased a tract of land adjacent to Byrd's parcel. The purchase on July 31, 2009, was almost ten months after Byrd had filed his complaint against Livingston and TIAA. The dirt road, the subject of Byrd's lawsuit, crosses his son's property before it crosses Byrd's property; therefore, the easement also burdens his son's property. Byrd did not move to add his son as a party to the litigation when his son purchased his land.

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO.: 2013-CP-10-3326

Waverly at Hamlin Plantation Townhome Association, Inc.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.

Defendants.

COPY

CERTIFICATE OF SERVICE

Jeffrey Sills, Individually and as Class Representative, et al.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

CASE NO.: 2014-CP-10-4335

FILED
2017 MAR 10 PM 12:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY_____

I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I served the foregoing filed copy of ***Rule 59, SCRCP, Motion on Behalf of Defendant 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*** *in* the above-captioned matters, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, and/or email with sufficient postage affixed and addressed as follows:

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Danielle Cox

March 10, 2017

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON)
)
Jeffery Sills, Individually and as Class Representative, et al.,) CASE NO. 2014-CP-10-4335
☐Plaintiffs,)
)
v.) **MOTION INFORMATION FORM**
) **AND COVER SHEET**
John Wieland Homes and Neighborhoods)
of the Carolinas, Inc., et al.,)
☒Defendants.)
)

Plaintiff's Attorney:	Defendant's Attorneys:
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☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motions in Limine
Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached
☐ Form Motion --

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — January 13, 2017 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by:

☐ MOTION FEE COLLECTED:
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (1/2003)

FILED
2017 JAN 13 PM 3:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

14-CP-10-4335

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Waverly at Hamlin Plantation Townhome Association, Inc., *Plaintiffs,* vs. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., *Defendants.*	IN THE COURT OF COMMON PLEAS C/A No.: 2013-CP-10-3326 **MOTIONS IN LIMINE ON BEHALF OF DEFENDANTS 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.**
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Jeffrey Sills, et al., *Plaintiff,* vs. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al., *Defendants.*	IN THE COURT OF COMMON PLEAS C/A No.: 2014-CP-10-4335 **MOTIONS IN LIMINE ON BEHALF OF DEFENDANTS 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.**

TO: ***JOHN HAYES, ESQUIRE, AND KEITH McCARTY, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND THE PLAINTIFFS:***

PLEASE TAKE NOTICE that Defendant 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. ("Defendants"), by and through the undersigned counsel, will argue before the Presiding Judge of the Court of Common Pleas at a time and place to be designated by the Court for an Order, *inter alia*, determining that the following evidence is inadmissible and may not be offered or referred to during the trial of this matter:

1. ***Motion to Exclude, or in the Alternative to Limit, Any Testimony or Evidence Proffered by Witness Gary Moore.*** Defendants anticipate that Moore will proffer opinion testimony addressing the cost of performing repairs others opine are necessary to correct alleged design and/or construction defects arising from original construction of the subject townhomes. Moore, however, cannot testify to a reasonable degree of certainty that his estimate of the scope of repairs set forth by Plaintiffs' liability experts is reliable or accurate. (Moore Dep. pp. 360, 370-72, 379) In fact, Moore admits that he is not able to perform such work. (Moore Dep. p. 155, ll. 15-21) As a result, any such testimony proffered by Moore would be speculative conjecture and should be excluded. Rule 702 and 703, SCRE; *See also Watson v. Ford*, 389 SC 434, 449 (2010); *Whisenant v. James Island Corp.*, 27 S.C. 10, 13, 281 S.E.2d 794, 796 (1981).

2. ***Motion to Exclude Any Testimony or Evidence Proffered by Witness Gary Moore and/or Salem Services Group, LLC, Addressing Claims for Damages Constituting Betterment.*** Defendants anticipate that Moore and/or Salem Services will proffer testimony addressing the cost of replacing windows with impact glass, which is a different and more expensive product than the non-impact glass windows used in original construction of the subject townhomes. As Plaintiffs' witness Myles Glick, AIA, who prepared Plaintiffs' scope of repair, has admitted that using non-impact glass windows are an appropriate remedy, any testimony or evidence proffered by Moore or Salem Services addressing impact glass windows would constitute an unrecoverable enhancement to the subject townhomes and unjust enrichment to Plaintiffs. *See generally St. Joseph Hospital v. Corbetta Constr. Co., Inc.*, 21 Ill.App.3d, 316 N.E.2d 51 (Ill. App. Ct. 1974). As a result, any such testimony or evidence is irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Any such evidence also should be excluded on the grounds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to Defendants and will create undue delay, waste of time, and serve to confuse the issues and mislead the jury. Rule 403, SCRE.

3. ***Motion to Exclude Any Testimony or Evidence Addressing Claims for Damages Arising from Diminution in the Value of the Subject Townhomes.*** As Plaintiffs have failed to proffer any evidence in support of allegations of permanent injury to real property, any testimony or evidence addressing claims for damages arising

from diminution in the value of the subject townhomes should be excluded. *New & New v. Max G. Crosby Construction Co., Inc.*, No. 2004-UP-282, 2004 WL 6307901, at *2-3 (S.C. Ct. App. April 27, 2004); *see, e.g., Chestnut v. AVX Corporation*, 413 S.C. 224, 776 S.E.2d 82 (2015). Moreover, South Carolina courts do not permit recovery of stigma damages. *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 569, 183 S.E.2d 438, 443 (1971) ("'[I]njury to the reputation of . . . property has been held not to be a proper element of damages[.]'"). As a result, any such testimony or evidence is irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Any such evidence also should be excluded on the grounds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to Defendants and will create undue delay, waste of time, and the needless presentation of cumulative evidence. Rule 403, SCRE.

4. ***Motion to Exclude Any Testimony or Evidence Addressing Claims for Damages Asserted by Former-Owners or Non-Class Members.*** On May 3, 2016, The Honorable Roger M. Young, Sr. executed an Order certifying the following class in this matter with certain exclusions: "All persons and entities that are members of The Waverly at Hamlin Plantation Townhome Association." (Or. Granting Pls'. Mot. for Class Certification, May 3, 2016) Certain individuals listed on the case caption, however, have been dismissed from this litigation and/or have sold their townhomes. Edward Peyser, for example, sold his townhome for a profit on September 9, 2016. (Peyser Dep. p. 357, ll. 2-10; p. 361, ll. 7-15) Similarly, Plaintiffs dismissed the original purchasers listed as Plaintiffs from this litigation. (Tr. of Hearing on May 3, 2016 at 4-5) Accordingly, any testimony or evidence proffered by such individuals should be excluded on the grounds that such individuals are no longer members of the class and cannot assert causes of actions for damages. Rules 401, 402, 602 SCRE. As a result, any such testimony or evidence is irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Any such evidence also should be excluded on the grounds that the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to Defendants and will create undue delay, waste of time, and the needless presentation of cumulative evidence. Rule 403, SCRE.

5. ***Motion to Exclude, or in the Alternative to Limit, Any Testimony or Evidence Proffered by Witness John Freeman.*** Defendants anticipate that Freeman will proffer testimony about construction defects and developer's responsibilities to homeowners associations in planned unit developments. Freeman, however, has no specialized knowledge, skill, experience, training, or education in these areas; therefore, any such testimony proffered by Freeman should be excluded. Rule 702, SCRE. Moreover, Freeman admits relying upon the opinions of others for his opinion that construction defects exist at the subject properties. As any such testimony proffered by Freeman does not address facts or data but, rather, opinions and inferences, any such testimony would result in undue delay, waste of time, and the needless presentation of cumulative evidence, Rule 403, SCRE. Furthermore, any such testimony should be excluded as improper bolstering. *See State v. McKerley*,

397 S.C. 461, 725 S.E.2d 139 (2012). Freeman also relies on Restatement (Third) of Property: Servitudes § 6.20 in opining regarding whether JWH breached any duties to Plaintiffs as a developer. South Carolina, however, has not adopted the Restatement (Third) of Property: Servitudes. As any testimony addressing duties owed based upon an unadopted Restatement section would be impermissible expert testimony on an issue of law, any such testimony should be excluded. Rule 702, SCRE; Rule 704, SCRE; *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). In addition, Freeman will likely also proffer testimony addressing meanings of terms as defined in the Restatement, which would constitute impermissible interpretations of law that are solely within the province of the Court. Accordingly, any such testimony should be excluded. Rule 702, SCRE; Rule 704, SCRE; *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003); *Pope v. Corley*, 2013 WL 8116301, at *2 n.4 (S.C. Com. Pl. May 20, 2013); *Defeo v. Cmty. Servs. Assocs., Inc.*, No. 2007-UP-357, 2007 WL 8327948, at *2 (S.C. Ct. App. July 24, 2007). Moreover, as the case has been bifurcated, any testimony proffered by Freeman addressing transactions or asset purchase agreements between JWH, Wheelock, and/or Pulte Group, Inc. should be excluded from the portion of trial reserved for the allegations of construction defects and the alleged resulting damages, Rule 401, SCRE; Rule 402, SCRE.

6. ***Motion to Exclude Any Testimony, Evidence, or Argument Addressing Any Temporary Structures Built During the Course of the Construction of the Subject Townhomes.*** Defendants anticipate that Plaintiffs intend to proffer as evidence photographs, documents, testimony, and/or argument addressing the quality of construction of sales office trailers and other temporary structures built during construction of the subject townhomes. As these structures were built for temporary use only by Defendants, any testimony, evidence, or argument addressing the construction of these structures would be irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Moreover, any such testimony, evidence, or argument would serve only to appeal to the passions or prejudices of the jury, *see Branham v. Ford Motor Co.*, 390 S.C. 203, 234 701 S.E.2d 5, 21 (2010), and any probative value would be substantially outweighed by the danger of unfair prejudice to Defendants. In addition, the introduction of such evidence would create undue delay, waste of time, and serve to confuse the issues and mislead the jury. Rule 403, SCRE.

7. ***Motion to Exclude from Opening Statements Any Testimony or Evidence Proffered During Any Deposition.*** Defendants anticipate that Plaintiffs intend to publish to the jury during opening statements excerpts from certain deposition testimony, including video-taped depositions. As any such testimony will not have been introduced into evidence, Plaintiffs should be prohibited from making any such publication. Rule 103(c), SCRE; Rule 32(a), SCRCP. Furthermore, the Court must address any objections to such testimony prior to publication to the jury, which is impractical during opening statements. Rule 102, 103, 402, 403, 611(a), SCRE, Rule 30(h)(8)-(9), 32(b), SCRCP. In the event that the Court rules that such testimony may be published to the jury during opening statements, such introduction must

include any other part which ought in fairness to be considered contemporaneously. Rule 106, SCRE.

8. ***Motion to Exclude Any Testimony, Evidence, or Argument Addressing Sofa Superstore, Inc.*** Defendants anticipate that Plaintiffs may proffer testimony or argue that construction defects alleged at the subject townhomes are comparable to construction defects alleged in various wrongful death actions asserted against Sofa Superstore, Inc. Any such testimony or argument would be irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Moreover, any such testimony, evidence, or argument would serve only to appeal to the passions or prejudices of the jury, *see Branham v. Ford Motor Co.*, 390 S.C. 203, 234 701 S.E.2d 5, 21 (2010), and any probative value would be substantially outweighed by the danger of unfair prejudice to Defendants. In addition, the introduction of such evidence would create undue delay, waste of time, and serve to confuse the issues and mislead the jury. Rule 403, SCRE.

9. ***Motion to Exclude Any Testimony or Evidence Addressing the Madison Neighborhood or*** **Madison at Hamlin Plantation Townhome Association, Inc. et al. v. John Wieland Homes, Inc.** Defendants anticipate that Plaintiffs may proffer testimony or argue that construction defects alleged at the subject townhomes are comparable to construction defects alleged in *Madison at Hamlin Plantation Townhome Association, Inc. et al. v. John Wieland Homes, Inc.* Any such testimony or argument would be irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Moreover, any such testimony, evidence, or argument would serve only to appeal to the passions or prejudices of the jury, *see Branham v. Ford Motor Co.*, 390 S.C. 203, 234 701 S.E.2d 5, 21 (2010), and any probative value would be substantially outweighed by the danger of unfair prejudice to Defendants. In addition, the introduction of such evidence would create undue delay, waste of time, and serve to confuse the issues and mislead the jury. Rule 403, SCRE.

10. ***Motion to Exclude Any Testimony, Evidence, or Argument Addressing Any Transaction Involving Wieland, Wheelock, Residential Partners, and/or Pulte Group, Inc.*** Defendants anticipate that Plaintiffs intend to proffer testimony, evidence, and argument addressing the transfer of certain assets from Defendants to other entities. As a Consent Order of Bifurcation eliminates from consideration by the fact-finder during the first phase of any trial any testimony or evidence addressing whether Plaintiffs can hold others liable for any damages arising from alleged construction defects at the subject townhomes, any such testimony, evidence, or argument would be irrelevant and, even if found relevant, would not be probative of any material fact and should be excluded. Rules 401, 402, SCRE. Moreover, any such testimony, evidence, or argument would serve only to appeal to the passions or prejudices of the jury, *see Branham v. Ford Motor Co.*, 390 S.C. 203, 234 701 S.E.2d 5, 21 (2010), and any probative value would be substantially outweighed by the danger of unfair prejudice to Defendants. In addition, the

introduction of such evidence would create undue delay, waste of time, and serve to confuse the issues and mislead the jury. Rule 403, SCRE.

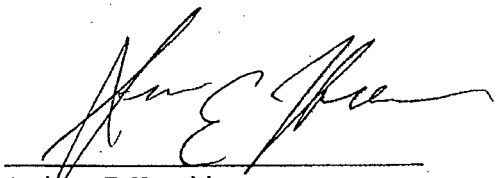
11. ***Motion to Exclude Any Testimony or Evidence Proffered by Bert Snyder and/or Palmetto Exterminators.*** On January 9, 2017, Plaintiffs served Plaintiffs' Twenty Seventh Supplemental Discovery Response to All, which for the first time identified as a witness Bert I. Snyder of Palmetto Exterminators, Inc. and included correspondence from Palmetto Exterminators, Inc. to Waverly Homeowners' Association dated November 16, 2016. As this witness was first identified and the document first produced a mere seven days prior to the scheduled trial of this matter, Defendants will not have a fair opportunity to examine, address, or conduct discovery regarding the issues raised in any proffered testimony or other evidence prior to trial. As a result, any such testimony or evidence should be excluded. Rule 102, SCRE; Rule 37, SCRCP.

12. ***Motion to Exclude Any Testimony or Evidence Addressing Any Site Inspection Conducted by Myles Glick, AIA, on or about January 6, 2017.*** On January 9, 2017, Plaintiffs served Plaintiffs' Twenty Eighth Supplemental Discovery Response to All, which included notes and photographs created by expert witness Myles Glick on January 6, 2017. As this documentation first identified and produced a mere seven days prior to the scheduled trial of this matter, Defendants will not have a fair opportunity to examine, address, or conduct discovery regarding any proffered testimony or other evidence addressing the issues raised in this documentation prior to trial. As a result, any such testimony or evidence should be excluded. Rule 102, SCRE; Rule 37, SCRCP.

This Motion is further based upon the pleadings, the discovery responses of the parties, and the depositions taken in this case.

[Separate Signature Page Follows]

Respectfully submitted:



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January 13, 2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Jeffrey Sills, Individually and as Class Representative, et al.,

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al.,

Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO.: 2014-CP-10-4335

CERTIFICATE OF SERVICE

FILED
2017 JAN 13 PM 3:30
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I, the undersigned employee of Howser, Newman & Besley, L.L.C., do hereby certify that I served the foregoing filed copy of ***Motions in Limine on Behalf of Defendants 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.*** in the above-captioned matter, by causing a copy of the same to be personally deposited in a United States Postal Service mail box, and/or email with sufficient postage affixed and addressed as follows:

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Kristen H. Miller

Kristen H. Miller

January 13, 2017

Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Waverly at Hamlin Plantation Townhome Association, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., et al.,	)	
	)	
Defendants.	)	
	)	
AND	)	
	)	
Jeffrey Sills as Class Representative, et al.,	)	C/A NO.: 2014-CP-10-4335
	)	
Plaintiffs,	)	
	)	
vs.	)	**THE MUHLER COMPANY, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AS TO WIELAND'S CROSS-CLAIMS**
	)	
John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

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2017 JAN 17 AM 9:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Defendant The Muhler Company, Inc (hereinafter "Muhler") respectfully submits this Memorandum of Law in Support of its Motion for Summary Judgment as to the Cross-Claims filed by 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. and Builders Support Services of the Carolinas, Inc.

(collectively hereinafter "Wieland") in their answers to the complaints in the above captioned cases for lead Plaintiffs John Sills and Waverly at Hamlin Plantation Townhome Association, Inc.

STATEMENT OF FACTS

This lawsuit arises from the construction of the Waverly at Hamlin Plantation townhomes, located in Mount Pleasant, South Carolina ("subject property"). The subject property consists of 105 units, in twenty-two (22) multi-family buildings. Muhler was hired by an entity that identified itself as John Wieland Homes and Neighborhoods to supply and install windows and doors at the subject property. Muhler did not supply and install all the windows and doors at the project. Instead, John Wieland began to purchase windows from another entity that was somehow related to John Wieland during the middle of the project. In addition, John Wieland hired Muhler's installer subcontractor to work directly for John Wieland for the installation of the windows that were purchased from the John Wieland supplier entity.

In 2013 and 2014, the Plaintiffs in the above captioned cases filed Complaints against John Wieland and various subcontractors alleging construction defects. Wieland filed answers to the various Complaints and Amended Complaints and alleged cross claims against Muhler in those pleadings. The cross claims against Muhler included causes of action for Negligence, Breach of Contract, Breach of Warranty, and Indemnity. Muhler contends that it is entitled to Summary Judgment on the claims for Negligence, Breach of Contract, Breach of Warranty, and Contractual Indemnity.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the "pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law."Rule 56(c), SCRCP. "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.'" *Baughman v. American Tel. and Tel Co.*, 306 S.C. 101, 116 (1991), quoting *Celotex Corp., v. Catrelt,* 477 U.S. 317, 322-23 (1986).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton v Sherer,* 377 S.C. 185, 197-98 (Ct. App. 2008). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Rife v. Hitachi Constr. Mach. Co., Ltd.,* 363 S.C. 209,214 (Ct. App. 2005). Materials used to refute a motion for summary judgment must be those which would be admissible at trial. *Hall v. Fedor,* 349 S.C. 169, 175 (Ct.App. 2002).

II. WIELAND'S CROSS-CLAIMS FOR NEGLIGENCE, BREACH OF CONTRACT, AND BREACH OF WARRANTY ARE PROPERLY CLASSIFIED AS EQUITABLE INDEMNITY CLAIMS

Wieland alleges causes of action against Muhler for negligence, breach of contract,

and breach of warranty. "The character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). The Court of Appeals recently addressed a similar situation in *Stoneledge at Lake Keowee Owners' Association, Inc. v. Clear View Construction LLC*, 413 S.C. 615 (Ct. App. 2015) and *Stoneledge at Lake Keowee Owners' Association, Inc. v. Builders First Source*, 413 S.C. 630 (Ct. App. 2015). In those cases, the Court of Appeals found that cross-claims for negligence, breach of contract and breach of warranty should be treated as claims for equitable indemnity when the potential liability for those claims arises solely from the cross-claim plaintiff's potential liability to the plaintiff. Id.

Weiland's claims against Muhler for negligence, breach of contract, and breach of warranty are all based upon the allegation that Wieland will suffer damages as a result of the claims made by the Plaintiffs in these cases. Wieland's claim for negligence alleges the following:

> 63. Upon information and belief, Wieland is entitled to judgment for actual damages collectively or individually against the Subcontractor Defendants in the Amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as fees and costs incurred in the investigation, defense and settlement of this claim.

See, Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Sucessor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc. and Builders Support Services of the Carolinas, Inc.'s Answer to the Amended Complaint and Cross Claims in the Waverly action (hereinafter, "Wieland's Waverly Cross Claim"), at p. 14. Wieland's claim for Breach of

Warranty alleges the following:

> 68. As a result of these breaches of warranties, Weiland has incurred damages in the amount of money it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, plus the cost of investigating and defending this claim.

See, Wieland's Cross Claim at p. 15. Finally, Wieland's claim for Breach of Contract alleges the following:

> 76. As a result of these breaches of contract, Wieland has incurred damage in the amount of any money it is adjudged to owe Plaintiffs, or which it paid Plaintiffs in settlement of Plaintiffs' claims, plus the costs of investigating and defending this claim.

See, Wieland's Cross Claim at p. 17.

Likewise, in the companion class action case, Wieland's claim for negligence alleges the following:

> 86. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

See, Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. as Sucessor by Statutory Merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., John Wieland Homes of Charleston, Inc. and Builders Support Services of the Carolinas, Inc.'s Answer to the Complaint and Cross Claims Cross Claim in the Sills Action(hereinafter, "Wieland's Sills Cross Claim"), at p. 17-18. Wieland's claim for Breach of Warranty in the Sills Action alleges:

> 92. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it pays Plaintiffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

See, Wieland's Sills Cross Claim at p. 19. Finally, Wieland's claim for Breach of Contract

in the Sills Action alleges:

> 100. Upon information and belief, Wieland is entitled to judgment against the Subcontractor Defendants in the amount of any monies it is adjudged to owe Plaintiffs, or which it paid Plaintffs in settlement of Plaintiffs' claims, as well as costs and fees incurred in the investigation, defense and settlement of this claim.

See, Wieland's Sills Cross Claim at p. 20-21. Each of these causes of action alleges damages that only arise as a consequence of the Plaintiff's suit against Wieland.

Based on the foregoing, Muhler is entitled to summary judgment on Wieland's claims for Negligence, Breach of Contract and Breach of Warranty.

III. WEILAND'S CLAIM FOR CONTRACTUAL INDEMNITY FAIL BECAUSE OF THE LACK OF AN ENFORCEABLE CONTRACT

Wieland's claim for contractual indemnity fails because an enforceable contract does not exist between the parties. Upon information and belief, Weiland will contend that a Trade Contractor Application and Agreement Form filled out by Muhler creates a contractual indemnification obligation. That Form is attached hereto as Exhibit "A" and referred to as the "Trade Application". South Carolina requires that there be a "meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989). Furthermore, essential or indispendable terms of a contract include price, time and place. *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 409 S.E.2d 568 (1978). Exhibit "A" does not prove a meeting of the minds for any work performed at Waverly.

First, the Trade Application is dated March 12, 2002, three years prior to Muhler's work at Waverly. Second, Muhler's trade is identified as "home improvement." Muhler sold and installed windows for new construction at Waverly. Home improvement implies

renovations to existing buildings, another part of Muhler's general line of work, but not a service supplied to the Waverly project. Third, the Trade Application calls for the identification of the neighborhood in which the work will be performed but that space is blank on Exhibit "A". Wieland developed and constructed numerous housing projects throughout the Charleston area. The identification of the project is necessary because of the diversity of Wieland's portfolio in Charleston. Fourth, the Trade Application identifies John Wieland Homes and Neighborhoods, Inc. and Affiliated Companies as the contracting party. John Wieland Homes and Neighborhoods, Inc. is not a party to this lawsuit. Even if the named parties are affiliated to John Wieland Homes and Neighborhoods, Inc., the extension of the Trade Agreement to the named parties is a modification of the contract that would require a whole new contract to make the indemnification provisions enforceable or it is a failure of Wieland to clearly identify those necessary facts which Muhler has a right to know. See, *Player v. Chandler* 299 S.C. 101, 382 S.E.2d 891 (1989). Finally, the Trade Application was never signed by Wieland and returned to Muhler. Thus, Muhler is left in the dark as to whether the Trade Application applies to any or all of its work. The sum total of these points necessitates the conclusion that the Trade Application does not establish a meeting of the minds between Wieland and Muhler.

Based upon the foregoing, Defendant Muhler is entitled to summary judgment on Wieldand's claim for contractual indemnity.

IV. WEILAND'S CLAIM FOR CONTRACTUAL INDEMNITY FAILS BECAUSE IT ADMITS THAT MUHLER DID NOT CAUSE ANY OF THE PLAINTIFFS DAMAGES

The Plaintiffs general allege construction defects are causing damages to the

buildings at Waverly. Those alleged defects include allegations that are related to the windows. While Muhler supplied and installed some of the windows at Waverly, its scope of work is not implicated in all of the allegations related to the windows. The only allegations that relate to Muhler's work are those that contend that the sill flashing was reverse lapped. The purported contract states that the "The Trade Contractor shall be responsible to Wieland for the acts and omissions of Trade Contractor's employees, of subcontractors and their agents and employees, and of other persons performing portions of any of the Trade Contractor's work for Wieland." Generally, that language only requires Muhler to indemnify Wieland if Muhler has done something wrong.

Wieland admits, however, that Muhler has done nothing wrong. Wieland hired L. Glasgow "Skip" Lewis, Jr. as an expert. Mr. Lewis investigated the buildings and developed a scope of repair that is attached hereto as Exhibit "B". On page 2 of that exhibit, Mr. Lewis states "[n]o repair [is] required at window sill." That conclusion is not surprising because the purported contract states that Wieland will inspect the work of the Trade Contractor to determine if the work is "satisfactory and in accordance with the applicable building codes, industry standards and Scope of Work . . . ." Exhibit B, at p 2, paragraph 4. Pricing and Payment. Mr. Lewis also confirms his opinion in his deposition taken by the Plaintiffs on August 23, 2016 when he testified:

> Q. The terminology that plaintiff's counsel was using calling it reverse lapped sounds like a really scary term, but basically what he's saying is you have the sticky tape on the outside of the flange and on the outside of the building wrap, correct?
> A. That is correct.
> Q. And you're saying to me that the way that's installed was a known and was a proper way to install that particular component?
> A. Yes, that is what I'm saying.

Exhibit "C", Depostion of Lewis, at p. 69, l. 5-14. Thus, even if the Trade Application is found to be a contract, Wieland has admitted that Muhler has done nothing wrong. Under the plain terms of the Trade Application, Muhler is not required to indemnify Wieland.

Based upon the foregoing, Muhler is entitled to summary judgment on Wieland's claim for contractual indemnity.

V. MUHLER RESERVES THE RIGHT TO JOIN IN ARGUMENTS BY OTHER DEFENDANTS AND TO ARGUE SUMMARY JUDGMENT ON WIELAND'S CLAIM FOR EQUITABLE INDEMNITY

The boilerplate form that is the Trade Contractor Application & Agreement Form was used by Wieland with Defendants JMC Construction and Sanchez Brothers Painting. A different form was used for Defendant Paul Vasquez that includes much but not all of the indispensable information that is omitted from the Muhler version. To the extent that JMC and Sanchez make arguments that are applicable to Muhler's case, Muhler reserves the right to join in those arguments and/or to make those same arguments in a subsequent Motion for Summary Judgment.

Furthermore, Muhler reserves the right to argue that it is entitled to summary judgment on Wieland's claim for equitable indemnity at a time when that argument is ripe for consideration by the Court.

CONCLUSION

Based upon the forgoing, Muhler respectfully requests that the Court grant its Motion for Summary Judgment and dismiss Wieland's claims for Negligence, Breach of Contact, Breach of Warranty, and Contractual Indemnity with prejudice.

GALLIVAN, WHITE & BOYD, P.A.

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(843) 735-7600

ATTORNEYS FOR THE MUHLER COMPANY, INC.

Charleston, South Carolina

January 17, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Waverly at Hamlin Plantation Townhome Association, Inc.,	)	C/A NO.:
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., et al.,	)	
	)	
Defendants.	)	
	)	
AND	)	
	)	
Jeffrey Sills as Class Representative, et al.,	)	C/A NO.: 2014-CP-10-4335
	)	
Plaintiffs,	)	
	)	
vs.	)	**CERTIFICATE OF SERVICE**
	)	
John Wieland Homes and Neighborhoods of the Carolinas, Inc. as successor by statutory merger to John Wieland Homes and Neighborhoods of South Carolina, Inc., et al.,	)	
	)	
Defendants.	)	

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2017 JAN 17 AM 9:25
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I, Shannon M. Skelly, of Gallivan White & Boyd, P.A. do hereby certify that I sent via electronic transmission a true and accurate copy of ***The Muhler Company, Inc.'s Memorandum of Law in Support of its Motion for Summary Judgment as to Wieland Defendants' Cross-Claims*** in the foregoing action to counsel of record and, upon request, mailed, postage prepaid, a true and accurate copy of same to counsel of record as follows:

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Attorneys for Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting

Shannon M. Skelly
Paralegal

January 17, 2017

JOHN WIELAND HOMES AND NEIGHBORHOODS, INC.
AND AFFILIATED COMPANIES
TRADE CONTRACTOR APPLICATION & AGREEMENT FORM

This Trade Contractor Agreement ("Agreement") is made and entered into as of the 12 day of MARCH 2002 by and between John Wieland Homes and Neighborhoods, Inc. ("Wieland") and _____ ("Trade Contractor").

This form MUST be returned to the Accounting Department PRIOR TO or WITH YOUR FIRST DRAW REQUEST. Failure to return this form COMPLETED INTO ENTIRETY will result in a delayed payment. A complete W-9 form MUST be turned in with this application BEFORE the Trade Contractor can begin work.

NAME THE MUHLER CO INC. TRADE HOME IMPROVEMENT
COMPANY NAME _____ NEIGHBORHOOD _____
MAILING ADDRESS 6425 FAIN STREET
CITY N. CHARLESTON STATE SC ZIP 29406
BUSINESS PHONE (843) 572-9727 SOCIAL SECURITY # _____
HOME PHONE ( ) _____ or FEDERAL ID # 57-1095596

If answering YES to either of the questions below, the Vice President of Human Resources must be notified.

YES ___ NO ✓ 1. HAVE YOU EVER BEEN EMPLOYED BY JOHN WIELAND HOMES AND NEIGHBORHOODS OR ITS AFFILIATED COMPANIES?
YES ___ NO ✓ 2. ARE YOU RELATED TO ANYONE EMPLOYED BY JOHN WIELAND HOMES AND NEIGHBORHOODS OR ITS AFFILIATED COMPANIES?
IF YES, PLEASE PROVIDE NAME: _____

If you answer YES to either of the questions below, a copy of your insurance certificate MUST be sent prior to or with your first draw. Trade Contractors who do not provide an insurance certificate will be automatically placed in Wieland's Worker's Compensation Program and the insurance premium will be deducted from payments.

YES ✓ NO ___ 1. DO YOU HAVE WORKERS' COMPENSATION INSURANCE COVERAGE?
YES ✓ NO ___ 2. DO YOU HAVE LIABILITY INSURANCE? # OF EMP. ___

EMERGENCY CONTACT KELLY M. HAYNIE PHONE (843) 200-3616
ADDRESS 11 SAM'S DR.
CITY CHARLESTON STATE SC ZIP 29407

Background Statement

Wieland and Trade Contractor desire to set forth the terms and conditions governing any and all work performed by Trade Contractor for Wieland.

Statement of Agreement

For and in consideration of the mutual covenants and benefits contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Wieland and Trade Contractor hereby agree as follows:

1. Documents and Governing Law. The documents which form the entire agreement between Wieland and Trade Contractor consist of this Agreement, Trade Contractor's W-9 tax form, the Scope of Work applicable to the work Trade Contractor is or will be performing for Wieland, the Wieland Safety Booklet, applicable Bid Sheets, the Trade Contractor Payment Policy, all material and information referenced in any of the foregoing, and all documents produced or issued pursuant to or in furtherance of any of the foregoing. For convenience, this Agreement has been translated into Spanish but the English version shall be the only valid and enforceable version. This Agreement and the entire agreement between Wieland and Trade Contractor shall be governed by, and construed and interpreted under, the laws of the State of Georgia.

2. Trade Contractor Obligations. Trade Contractor shall (a) submit to Wieland completed Bid Sheets for work to be performed for Wieland and a completed W-9 tax form, (b) perform work and all other obligations of the Trade Contractor as described in, and in accordance with, the Scope of Work provided by Wieland and according to Wieland quality standards, (c) be paid only for 100% complete work according to the defined payment structure approved by Wieland, (d) represent Wieland in a professional manner and refer customer questions or issues to Wieland, (e) furnish own tools, (f) pay all bills incurred by Trade Contractor, and (g) carry a proper business license and pay all applicable federal, state, and local taxes.

In addition, Trade Contractor and all persons performing work for or on behalf of Trade Contractor shall not damage any improvements, including, without limitation, any house, yard, driveway, walkway, amenity, utility service, common area, road, site work or other utility already in place. Trade Contractor shall give notices and shall comply with all federal, state, county, city and other public authority laws, ordinances, rules, regulations and orders, including, without limitation, all building codes, Occupational Safety and Health Administration ("OSHA") regulations and environmental protection laws and regulations. Trade Contractor shall also follow all the requirements and procedures set forth in the Wieland Safety Booklet.

If Trade Contractor or any person performing work for or on behalf of Trade Contractor damages any improvements already in place or performs any work which is contrary to any of the laws, ordinances, rules, regulations, orders, requirements, and procedures set forth in the immediately preceding paragraph, Trade Contractor shall be given a reasonable amount of time to correct or repair such damage or work at its own cost and expense. If Trade Contractor does not so correct or repair such damage or work within a reasonable period of time, as determined by Wieland, Wieland shall have the right to perform such correction or repair, and Trade Contractor shall be responsible for the costs of such correction or repair and shall be subject to and responsible for paying a backcharge for such costs. Trade Contractor also shall be responsible for the payment of any fines resulting from the failure of Trade Contractor or any person performing work for or on behalf of Trade Contractor to comply with OSHA regulations, any other government regulations or the requirements and procedures set forth in the Wieland Safety Booklet, and Trade Contractor shall be subject to and responsible for paying a backcharge for such fines.

EXHIBIT
tabbies A

JOHN WIELAND HOMES AND NEIGHBORHOODS, INC.
AND AFFILIATED COMPANIES
TRADE CONTRACTOR APPLICATION & AGREEMENT FORM

This Trade Contractor Agreement ("Agreement") is made and entered into as of the _____ day of _____, by and between John Wieland Homes and Neighborhoods, Inc. ("Wieland") and _____ ("Trade Contractor").

This form MUST be filled out by the Accounting Department BEFORE any Trade Contractor is approved. Failure to return this form COMPLETED IN ITS ENTIRETY will result in a delay in payment. A complete W-9 form MUST be returned prior to the acceptance of any Trade Contractor's bid/work.

NAME _____ TRADE _____

COMPANY NAME _____ NEIGHBORHOOD _____

MAILING ADDRESS _____

CITY _____ STATE _____ ZIP _____

BUSINESS PHONE ( ) _____ SOCIAL SECURITY # _____

HOME PHONE ( ) _____ or FEDERAL I.D. # _____

If you answer YES to any of the questions below, the Vice President of Human Resources must be notified.

YES____ NO____ 1. HAVE YOU EVER BEEN EMPLOYED BY JOHN WIELAND HOMES AND NEIGHBORHOODS OR ITS AFFILIATED COMPANIES?

YES____ NO____ 2. ARE YOU RELATED TO ANYONE EMPLOYED BY JOHN WIELAND HOMES AND NEIGHBORHOODS OR ITS AFFILIATED COMPANIES?
IF YES, PLEASE PROVIDE NAME _____

If you answer YES to either of the questions below, a copy of your insurance certificate must be sent prior to any work being performed. Trade Contractor's insurance policy must provide that the insurance company will notify Wieland's Workers Compensation Program at least 30 days prior to cancellation. Trade Contractor will not be paid for any work performed without proof of insurance.

YES____ NO____ 1. DO YOU HAVE WORKERS' COMPENSATION INSURANCE COVERAGE?

YES____ NO____ 2. DO YOU HAVE LIABILITY INSURANCE? # OF EMP. _____

EMERGENCY CONTACT _____ PHONE ( ) _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

Background Statement

Wieland and Trade Contractor desire to set forth the terms and conditions governing any and all work performed by Trade Contractor for Wieland.

Statement of Agreement

For and in consideration of the mutual covenants and benefits contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Wieland and Trade Contractor hereby agree as follows:

1. Documents and Governing Law. The documents which form the entire agreement between Wieland and Trade Contractor consist of this Agreement, Trade Contractor's W-9 tax form, the Scope of Work applicable to the work Trade Contractor is or will be performing for Wieland, the Wieland Safety Booklet, applicable Bid Sheets, the Trade Contractor Payment Policy, all invoices and information referenced in any of the foregoing, and all documents produced or issued pursuant to or in furtherance of any of the foregoing. For convenience, this Agreement has been translated into Spanish but the English version shall be the only valid and enforceable version. This Agreement and the entire agreement between Wieland and Trade Contractor shall be governed by, and construed and interpreted under, the laws of the State of Georgia.

2. Trade Contractor Obligations. Trade Contractor shall (a) submit to Wieland completed Bid Sheets for work to be performed for Wieland and a completed W-9 tax form, (b) perform work and all other obligations of the Trade Contractor as described in, and in accordance with, the Scope of Work provided by Wieland and according to Wieland quality standards, (c) be paid only for 100% complete work according to the defined payment structure approved by Wieland, (d) represent Wieland in a professional manner and refer customer questions or issues to Wieland, (e) furnish own tools, (f) pay all bills incurred by Trade Contractor, and (g) carry a proper business license and pay all applicable federal, state, and local taxes.

In addition, Trade Contractor and all persons performing work for or on behalf of Trade Contractor shall not damage any improvements, including, without limitation, any house, yard, driveway, walkway, existing underground, road, and with all dirty trades, sheetrock in place. Trade Contractor shall give notice that shall comply with all federal, state, county, city and other public authority laws, ordinances, rules, regulations and orders, including, without limitation, all building codes, Occupational Safety and Health Administration ("OSHA") regulations and environmental protection laws and regulations. Trade Contractor shall also follow all the requirements and procedures set forth in the Wieland Safety Booklet.

If Trade Contractor or any person performing work for or on behalf of Trade Contractor damages any improvements already in place or performs any work which is contrary to any of the laws, ordinances, rules, regulations, standards, requirements and procedures set forth in the immediately preceding paragraph, Trade Contractor shall be given a reasonable amount of time to correct or repair such damage or work to its sole cost and expense. If Trade Contractor does not so correct or repair such damage or work within a reasonable period of time, as determined by Wieland, Wieland shall have the right to perform such correction or repair, and Trade Contractor shall be responsible for the costs of such correction or repair and shall be subject to and responsible for paying a backcharge for such costs. Trade Contractor also shall be responsible for the payment of any fines resulting from the failure of Trade Contractor or any person performing work for or on behalf of Trade Contractor to comply with OSHA regulations, any other governmental regulations or the requirements and procedures set forth in the Wieland Safety Booklet, and Trade Contractor shall be subject to and responsible for paying a backcharge for such fines.

3. Insurance. Trade Contractor shall obtain and maintain in full force and effect while performing work for Wieland commercial general liability insurance (for bodily injury and property damage), worker's compensation insurance, contractual liability insurance (for bodily injury and property damage) and business auto liability insurance, if applicable. Trade Contractor's commercial general liability insurance coverage must be a minimum of $1,000,000.00 per occurrence and $2,000,000.00 annual aggregate. Trade Contractor's worker's compensation insurance coverage must be at least equal to the minimum statutory requirements with employer's liability coverage of at least $500,000.00. If Trade Contractor does not provide proof of worker's compensation insurance or such insurance does not meet the requirements set forth in the immediately preceding sentence, Trade Contractor will automatically be placed in Wieland's worker's compensation insurance program, and the premium therefor will be deducted from applicable amounts payable to Trade Contractor for work performed for Wieland.

Policies for such insurance shall contain a provision to the effect that coverage afforded under such policies may not be canceled or allowed to expire until at least 30 days' prior written notice has been given to Wieland. Wieland shall be named as an additional insured on all such policies. Upon request by Wieland, certificates of insurance showing such insurance to be in effect shall be filed with Wieland.

4. Pricing and Payment. The pricing structure and schedule of payment for Trade Contractor's work to be performed for Wieland shall be as defined in applicable Bid Sheets submitted by Trade Contractor (subject to approval by Wieland) and in the Trade Contractor Payment Policy. All requests for compensation and payment of variance purchase orders (VPOs), purchase orders (POs) and other invoices must be complete and signed by Wieland and Trade Contractor and must comply with Wieland's compensation policy. Wieland shall inspect work promptly upon completion, and, if Wieland determines that such work is satisfactory and in accordance with the applicable building codes, industry standards and Scope of Work, Wieland shall submit and process approved VPOs, POs and other invoices for prompt payment to Trade Contractor.

Wieland reserves the right to cancel an order for work or materials if not delivered within the time period specified by Wieland or for any other reason. Wieland shall have no obligation whatsoever to pay for canceled work or materials. If Trade Contractor's work is faulty or incomplete, Trade Contractor shall be given a reasonable amount of time to correct or repair such work. If Trade Contractor does not correct or repair such work within a reasonable period of time, as determined by Wieland, Wieland shall have the right to perform such correction or repair, and Trade Contractor shall be responsible for the costs of such correction or repair and shall be subject to and responsible for paying a backcharge for such costs.

5. Acknowledgments of Trade Contractor. Trade Contractor acknowledges that Trade Contractor (a) has received and read a copy of the current Trade Contractor Payment Policy and Scope of Work applicable to the work Trade Contractor is or will be performing for Wieland and (b) is aware of Wieland's safety program and requirements and has received and read a copy of the current Wieland Safety Booklet, and Trade Contractor consents to, and agrees to be bound by and comply with, the terms of all of the foregoing. Trade Contractor also acknowledges that Trade Contractor and all persons performing work for or on behalf of Trade Contractor are subject to post-accident drug testing in accordance with Wieland policies.

6. Release and Indemnification. Trade Contractor shall be responsible to Wieland for the acts and omissions of Trade Contractor's employees, of sub-subcontractors and their agents and employees, and of other persons performing portions of any of Trade Contractor's work for Wieland. To the fullest extent permitted by law, Trade Contractor hereby releases, covenants not to sue, and indemnifies and holds harmless Wieland and its affiliates, related companies and predecessors, and their respective directors, officers, shareholders, partners, agents and employees, from, against and/or due to any and all claims, charges (including, without limitation, liens), damages, losses and expenses of every kind and nature, including, but not limited to, court costs and attorney's fees, asserted by any person or persons, including Trade Contractor and Trade Contractor's employees, arising out of, resulting from, or relating directly or indirectly to the performance of any of Trade Contractor's work for Wieland, regardless of whether or not such claims, charges, damages, losses or expenses are caused in part by a party indemnified or released hereunder. This obligation shall not be construed to negate, abridge or otherwise reduce other rights or obligations of release and indemnity which would otherwise exist as to a party or person described in this Section. In addition, this obligation shall not be limited by a limitation on amount or type of damages, compensation or benefits payable or available under any statutory provisions.

7. Cooperation in Arbitration. Upon request by Wieland and at no cost or expense to Wieland, Trade Contractor shall cooperate and participate in, as may be reasonably directed by Wieland, any arbitration proceedings arising out of the home warranty coverage provided by Wieland or otherwise related to or arising out of the construction of homes by Wieland.

8. Independent Contractor. Trade Contractor, in performance of any work for Wieland, is an independent contractor and, subject to Wieland's general supervision and direction, shall have sole discretion in the performance of any such work.

9. Assignment. Trade Contractor shall not assign this Agreement or any work to be performed for Wieland, nor shall Trade Contractor subcontract the whole or any portion of this Agreement or work to be performed for Wieland, without the prior written consent of Wieland.

10. Time. Time is of the essence for this Agreement and for any work performed by Trade Contractor for Wieland.

11. Term. The terms and conditions set forth in this Agreement shall apply to and govern any and all work whatever and whenever performed by Trade Contractor for Wieland. Wieland reserves the absolute right to terminate this Agreement, with or without cause, upon ten (10) days' prior written notice to Trade Contractor. Trade Contractor reserves the absolute right to terminate this Agreement, with or without cause, upon thirty (30) days' prior written notice to Wieland. However, Trade Contractor's obligations under Sections 6 and 7 of this Agreement shall continue in effect despite any termination of this Agreement.

IN WITNESS WHEREOF, the undersigned have set their hands and seals hereto as of the date first above written.

JOHN WIELAND HOMES AND NEIGHBORHOODS, INC.

By: _____

Print Name: _____

Title: _____

TRADE CONTRACTOR: THE MUELLER CO INC

By: _____

Print Name: DON W. AHLDSON

Title: CONTROLLER

WAVERLY AT HAMLIN PLANTATION
SCOPE OF REPAIRS

[SEE NOTE ON PAGE 3]

	Item No.	Allegation	Code, Industry Standard or Manufacturer Instructions	Plaintiff's Proposed Repair	H2L Scope of Repair
Roof	1	Roof underlayment does not extend to sheathing edge.	R905	Remove first two (2) feet of the roof system. Install new shingles, step flashing, roofing felt and sheathing in accordance with NRCA and the roof manufacturer's installation recommendations. Provide kick-out flashing where required. Match existing shingles	Remove first two (2) feet of the roof system. Install new shingles, step flashing, roofing felt and sheathing in accordance with NRCA and the roof manufacturer's installation recommendations. Provide kick-out flashing where required. Match existing shingles. Assume this repair required at all roofs, front and rear.
	2	Shingle overhang greater than 3/4".	NRCA Sec 3.5.1	Remove and replace shingles and underlayment.	Trim shingles to 3/4" overhang. Assume full perimeter, all buildings and at stepped roof rakes.
	3	Improper shingle installation – overdriven fasteners.	CertainTeed Installation Instructions	Remove and replace shingles and underlayment.	No repair required.
	4	Water intrusion at flat roof locations.	R905	Remove and replace all flat roofs.	Inspect underside of all flat roofs above front porches for evidence of water intrusion through membrane above. Where moisture intrusion occurs, repair as required to correct entry and repair damages. For pricing, assume 16 of 105 dwelling units require repair. Allow 160 SF of waterproof deck coating matching existing and installed as specified by manufacturer and two 4 x 8 sheets of preservative treated plywood of thickness equal to existing at each location.
Attics	5	a) Missing FRT roof deck adjacent to tenant separation walls.	R317.2.2	Repair fire rated walls to create continuity at the second floor ceiling intersections with fire rated walls.	Missing FRT roof deck. Install 5/8" fire rated gypsum between truss top chords and against the roof deck in accordance with the building code (IRC 2012 Section 302.2.2 Exception). Assume condition occurs at 16 attic locations. Allow three (3) 4 x 8 panels of 5/8" Type X GWB, forty (40) linear feet of 2 x 4 lumber for each location.
		b) Unsealed joints or holes in fire rated attic walls.	R317.3		Holes and untaped gypsum butt joints. Fill holes , mud and tape joints as required. Allow for condition in 53 dwelling unit attics.
		c) Discontiniuous fire rated attic walls.	R317.2.1		Stud walls in attic are not constructed to meet fire rating when roof heights of adjacent units are at different elevations. Assume condition exists at all locations. Install fire rated material to obtain a rated wall assembly. Allow two hundred fifty (250) 4' x 8 sheets of 5/8" type X gypsum.
	6	d) Improper dormer window header and sill framing.	R602.3	Additional framing must be provided around the windows in the attics to comply with the IRC.	Allow window header installation at three (3) shed roof dormers at each of 10 dwelling units (30 dormers total). Allow window header installation at each of three (3) gable end dormers at each of 10 dwelling units (30 dormers total).

tabbies EXHIBIT B

WAVERLY AT HAMLIN PLANTATION
SCOPE OF REPAIRS

	Item No.	Allegation	Code, Industry Standard or Manufacturer Instructions?	Plaintiffs Proposed Repair	H2L Scope of Repair
Exterior Walls	7	a) Hardie Plank siding not caulked or 1/8" gap (at butt joints).	NER #409 APA Nail Base Sheathing 2005 Hardie Installation Instructions	Remove all siding and repair all damaged sheathing. Apply a liquid applied WRB and install all new Hardie Plank siding in accordance with recommendations of the manufacturer. Integrate all new flashing (0.032 aluminum) with WRB.	Repair is addressed in Allegation 7d.
		b) Hardie Plank not back primed..			No repair required.
		c) Hardie Plank siding within 1 inch of roof shingles.			No repair required.
		d) Improper fasteners, spacing, and stud penetration.			Face nail with 6d ring shank (0.113" diameter x 2" long) stainless steel nails spaced 16" on center. Power clean HardiPlank siding, prime and apply two coats of paint. Apply elastomeric sealants at end run terminations and other locations recommended by manufacturer's installation instructions.
	8	Exterior trim not back primed.	None	Replace as part of Item 7.	No repair required.
	9	a) J-Channel windows (YKK-AP) inappropriate for use with trim and siding at Waverly.	YKK-AP Installation Instructions	Plaintiffs' expert RTM specifies removal and replacement of all YKK windows; however, Plaintiffs' repair estimate prices replacement of all windows in order to add a liquid applied waterproofing membrane specified in the Plaintiffs' repair scope at Item 7 in place of the existing Tyvek WRB. There are no conditions present which warrant a full reclad of siding, nor is there justification for substituting a liquid applied waterproofing membrane for the existing Tyvek.	No allowance for window replacement.
		b) Reverse-lap at window head/sill.			Remove siding at window head and repair reverse lap. Make horizontal cut in WRB and install new piece of WRB in shingle-like manner; tape. Reinstall horizontal siding with 1/4" gap between siding and flashing. Allow repair at all unprotected windows (windows not protected by a covered porch). No repair required at window sill. Renew sealants at interface of window frame and perimeter trim at all exposed windows.
	10	Riser variances greater than 3/8".	R311.5.3	Replace all brick stairs.	Inspect, confirm, and rebuild, as necessary, brick steps to maintain maximum 3/8" difference in riser heights. Where tolerance is exceeded in any riser series, replace entire set of steps. Allow for replacement of 50 sets of brick steps from among the 105 total dwelling units.
	11	a) Handrails in various stages of failure/rot.	None	Replace all handrails and pickets.	Inspect pickets and rails at entry steps, front porch guard rails, and flat roof guard rails for evidence of decay and deterioration. Where decay is found, remove rail sections between rail posts and replace with new rail sections post-to-post. Match new sections to existing. Allow for replacing both rails at steps to 50 dwelling units, one rail section at porch of each of 50 dwelling units, and one rail section at flat roofs on 25 dwelling units from among the 105 total dwelling units. Allow for use of YellaWood KDAT railings and pickets, prime and paint (2 coats) following recommendations of the material (wood and paint) suppliers.
		b) Decorative flat roof rail repair.	None	No proposed repair.	See Section (a) above.
	12	Dormer sheathing damaged/not protected by WRB.	R703.2	Remove all siding and repair all damaged sheathing. Apply a liquid applied WRB and install all new Hardie Plank siding in accordance with recommendations of the manufacturer. Integrate all new flashing (0.032 aluminum) with WRB.	Investigate, conform, and repair, as necessary, dormer exterior sheathing. Remove trim and horizontal siding at front of dormer. Inspect WRB and exterior sheathing at corners. Repair as necessary. Allow all dormers to be inspected and 40 dormers to be repaired. Allow one (1) 4 x 8 sheet of exterior wall sheathing replacement per dormer. Remove and reset windows at repair locations. Allow 24 LF of trim replacement per each dormer repaired. Painting of dormers is addressed in Item No. 7d.

WAVERLY AT HAMLIN PLANTATION
SCOPE OF REPAIRS

	Item No.	Allegation	Code, Industry Standard or Manufacturer Instructions	Plaintiff's Proposed Repair	H2L Scope of Repair
Miscellaneous Items	13	Inadequate slope of Parking Lots.	None	Regrade all parking lot inlet areas that do not slope to the drain.	No repair required.
	14	Warped fences.	None	Repair all rear yard fences by removing 50% of all vertical boards and replace with new to match.	No repair required.
	15	Hardwood floors cupping in 2980 Treadwell.	None	Remove and replace hardwood floor in 2980 Treadwell; encapsulate crawlspace.	At 2980 Treadwell, remove 15" wide fiberglass batts and replace with batts of same insulation value sized for joists 19.2" on center. Select support wire length to suit.

NOTE: Repair contractor is requested to also price doing work described at items 4, 5, 6, 10, 11 and 12 at 100% of the locations (dwelling units). For item 9, contractor is also requested to price performing sill repairs by removing trim, carefully slicing SAF at bottom of sill nailing fin to inside corners of jamb studs, and reinstalling trim. The purpose of this request is to allow Owners to determine cost full repair option in this proposed repair scope.

STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON — CASE NO.: 2013-CP-10-3326

WAVERLY AT HAMLIN PLANTATION, TOWNHOME ASSOCIATION, INC.,

PLAINTIFFS,

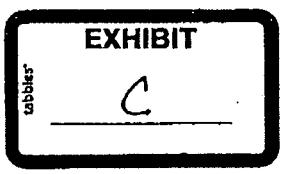
vs.

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., BUILDER SUPPORT SERVICES OF THE CAROLINAS, INC., AND WHEELOCK STREET CAPITAL, LLC D/B/A JOHN WIELAND HOMES AND NEIGHBORHOODS, INC., 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, INC., JESUS MORA A/K/A J. MORA BRICK & BLOCK MASON, LLC, JUAN LUIS SANCHEZ, JUAN LUIS SANCHEZ A/K/A SANCHEZ BROTHERS PAINTING, LATITUDE CONSTRUCTION SERVICES, LLC, THE MUHLER COMPANY, INC., PAUL M. VASQUEZ, RICHARD DITULLIO, RICHARD DITULLIO A/K/A RDT CONTRACTING, LLC,,

DEFENDANTS.

Videotaped Deposition of: L. Glasgow Lewis, Jr., P.E.

August 23rd, 2016



Electronically signed by amanda barbao (401-133-007-0591)
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STATE OF SOUTH CAROLINA — IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON — CASE NO.: 2014-CP-10-4335

JEFFREY SILLS 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, ATTY 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 A. SOKOLOSKI, WILLIAM AND CAROLYN BARONE, MICHELLE RAY, EUGENE AND CYNTHIA RAY, WILLIAM ABEL, DEAN AND CONNY MASON, DAVID MCCARTNEY, PAUL AND PATRICIA WATTERS, JAMES AND ANDREA LOWRY, R. ROBINSON, JR., THADDEUS R. & 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 & KELLY HAGER HOLMES, CAROL & CHRIS GILLESPIE, JARRED D. OVERCASH,

PLAINTIFFS,

vs.

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., BUILDER SUPPORT

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SERVICES OF THE CAROLINAS, INC., WHEELOCK STREET CAPITAL, LLC D/B/A JOHN WIELAND HOMES AND BEIGHBORHOODS, INC., BARR CONSTRUCTION, INC., BENJAMIN MORA D/B/A MORA CONSTRUCTION/ A/K/ BENJAMIN MORA CONSTRUCTION, LLC, BUILDERS FIRSTSOURCE, INC., A/K/A BUILDERS FIRSTSOURCE-SOUTHEAST GROUP, LLC, A/K/ BUILDERS FIRSTSOURCE-ATLANTIC GROUP, LLC, DBC CONSTRUCTION SERVICES, LLC, GERARDO ROSETTE SANCHEZ A/K/A GR PAINTING, JEORGE MEDINA 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 SANCHEZ BROTHERS PAINTING; LATITUDE CONSTRUCTION SERVICES, LLC, THE MUHLER COMPANY, INC., PAUL M. VASQUEZ, RICHARD DITULLIO, RICHARD DITULLIO A/K/A ROT CONTRACTING, LLC,

DEFENDANTS.

The videotaped deposition of L. GLASGOW LEWIS, JR., P.E., taken before Amanda Barbao, Court Reporter and Notary Public, at the law offices of Robertson Hollingsworth & Flynn, 177 Meeting Street, Suite 300, Charleston, South Carolina, on August 23rd, 2016, commencing at 10:14 a.m.

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and gave your attorney a scope of repair and then a footnote with an alternate scope of repair, but you or anybody from H2L has not had any direct communications back and forth with Watkins Services in regards to what is now marked -- these estimates that are marked as 144 and 145; is that correct?

A With respect to the repair scope, the answer is yes. I think I mentioned earlier that at an earlier point in time, Bob Carter in my office, did have I think some conversations with J.R. Watkins.

Q Okay. But at least as far as 144 and 145 you haven't -- you have not had any discussions with Mr. Watkins?

A That's correct.

MR. HAYES: Okay. Based on the reservations I made earlier, I'll pass the witness.

EXAMINATION BY MR. COLE:

Q Skip, I just have a couple of questions so that I am clear on some of the things that you said. First, with the windows and the sticky, flexible flashing that were installed around the windows, do I understand your testimony that at the time that these windows were installed originally, that was an accepted practice of using the sticky back flashing around the windows?

A The ASTM standard that I have is dated 2001. To

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the best of my knowledge, it was not revised until 2007, and I don't know that there was any substantive changes, at least with respect to what I have described, that occurred even in 2007.

Q The terminology that plaintiff's counsel was using calling it reverse lapped sounds like a really scary term, but basically what he's saying is you have the sticky tape on the outside of the flange and on the outside of the building wrap, correct?

A That is correct.

Q And you're saying to me that the way that that's installed was a known and was a proper way to install that particular component?

A Yes, that's what I'm saying.

Q Okay. And so calling it reverse lapped is like yelling fire in a movie theater just to try to scare somebody and frighten them?

A Well, no, that's not entirely true. If the flashing that you apply did not have the adhesion capability, if it was like Tyvek being lapped with Tyvek, it is important that you lap them in a shingle fashion, and it's important when you use a self-adhering flashing and attach it to the outboard face of your weather barrier that would be in normally what people would describe as a reverse-lapped fashion,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitmire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesesne, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle, Dorothy Newman, Nicholas and Debora Yost, Stephen Denby, Colin and Phyllis Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48),

Plaintiffs,

vs.

John Wieland Homes and Neighborhoods

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2014-CP-10-4335

STIPULATION OF DISMISSAL WITH PREJUDICE OF DEFENDANT 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, AND JOHN WIELAND HOMES AND NEIGHBORHOODS, INC.S CROSS-CLAIMS AS TO DEFENDANTS JEORGE MEDINA A/KA JMC CONSTRUCTION, LLC A/KA JMC CONSTRUCTION, INC.; THE MUHLER COMPANY, INC.; AND JUAN LUIS SANCHEZ, JUAN LUIS SANCHEZ A/KA SANCHEZ BROTHERS PAINTING

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

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., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firtsource, Inc. a/k/a Builders Firstource-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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio a/k/a ROT Contracting, LLC,	)
Defendants.	)

WHEREAS, Defendant 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, and John Wieland Homes and Neighborhoods, Inc. (hereafter "Wieland") filed cross-claims against Defendants Jeorge Medina, Jeorge Medina a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc.("JMC"); The Muhler Company, Inc. ("Muhler"); and Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting ("Sanchez") (collectively "Released Defendants") in the above matter; and

WHEREAS, this matter was subsequently consolidated for discovery and trial with the claim captioned *Waverly at Hamlin Plantation Townhome Association, Inc. v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., et al* (C/A No. 2013-CP-10-3326); and

WHEREAS, Wieland is voluntarily dismissing with prejudice all cross-claims against the Released Defendants,

THEREFORE, Pursuant to Rule 41(a), of the South Carolina Rules of Civil Procedure, Defendant Wieland does hereby dismiss and end its cross-claims in this action with prejudice as to all claims, known or unknown, asserted or not asserted, against Defendants JMC, Muhler, and Sanchez relative to the subject matter of this lawsuit.

Each party will bear its own costs and attorney's fees.

(Signatures on next page)

WE, THE UNDERSIGNED, SO STIPULATE:

HOWSER NEWMAN & BESLEY, LLC

Andrew E. Haselden, Esquire
215 East Bay Street, Suite 303
Charleston, SC 29401

And

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

Theodore L. Manos, Esquire
550 King Street, Suite 300
Charleston, SC 29403

Attorneys for Defendants 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, and John Wieland Homes and Neighborhoods, Inc.

COLLINS & LACY, PC

May 11, 2017

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Attorney for Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting

WE, THE UNDERSIGNED, SO STIPULATE:

HOWSER NEWMAN & BESLEY, LLC

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215 East Bay Street, Suite 303
Charleston, SC 29401

And

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

Theodore L. Manos, Esquire
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2014-CP-10-4335

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served, or directed someone on his/her behalf to serve, the following named individual(s) with a copy of the pleading(s) indicated below via hand delivery and/or electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

John C. Hayes, IV, Esquire Mary-Margaret Nolan, Esquire Hayes Law Firm 180 Meeting Street, Suite 330 Charleston, SC 29401 jhayes@hayeslaw.org mnoland@hayeslaw.org I. Keith McCarty, Esquire McCarty Law Firm, LLC PO Box 30055 Charleston, SC 29417 ikeithmccarty@gmail.com *Attorneys for Plaintiffs*	Peter Gunnar Nistad, Esquire Gallivan White & Boyd, PA PO Box 22768 Charleston, SC 29413 gnistad@gwblawfirm.com *Attorney for The Muhler Company, Inc.*
Andrew E. Haselden, Esquire Howser Newman & Besley, LLC 215 East Bay Street, Suite 303 Charleston, SC 29401 ahaselden@hnblaw.com and Theodore L. Manos, Esquire Robertson Hollingsworth Manos & Rahn, LLC 550 King Street, Suite 300 Charleston, SC 29403 tlm@roblaw.net *Attorneys for 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., and Builders Support Services of the Carolinas, Inc.*	Sarah Fragale, Esquire Turner, Padget, Graham & Laney, P.A. 40 Calhoun Street Charleston, SC 29401 sfragale@turnerpadget.com *Attorney for Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting*

FILED
2017 JUN -9 PM 1:48
JULIE J. ARMSTRONG
CLERK OF COURT

PLEADING:

STIPULATION OF DISMISSAL WITH PREJUDICE OF DEFENDANT 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, AND JOHN WIELAND HOMES AND NEIGHBORHOODS, INC.'S CROSS-CLAIMS AS TO DEFENDANTS JEORGE MEDINA A/KA JMC CONSTRUCTION, LLC A/KA JMC CONSTRUCTION, INC.; THE MUHLER COMPANY, INC.; AND JUAN LUIS SANCHEZ, JUAN LUIS SANCHEZ A/KA SANCHEZ BROTHERS PAINTING

Richelle Campbell

Columbia, South Carolina
June 7, 2017

Collins Lacy
ATTORNEYS AT LAW

Andrew N. Cole | D: 803.255.0433 | E: acole@collinsandlacy.com

June 7, 2017

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: Jeffrey Sills as Class Representative, Marie Labarowski, Edward and Nancy Peyser, Francis Sills, Daniel and Suzanne Ruth, Stephanie Adili, Marc and Brandy Lynn, Russell Robinson, George Busnach, Helen Furtado, Jessica Baucom, Nancy S. Coleman, Linda Glitz, Peggy Gerou, Shannon Bebout, Marryann Walsh, Patty Whitmire, Donald L. Tomasell and Patricia Kelly, Chris Leigh-Jones, Edward Ray and Kathy Jo Feagins, Cindy Hunt for Bentgrass Limited, LLC, Adam A. and Susan A. Sokoloski, William and Carolyn Barone, Michelle Ray, Eugene and Cynthia Ray, William Abel, Dean and Conny Mason, David McCartney, Paul and Patricia Watters, James and Andrea Lowry, R. Robinson, Jr., Thaddeus R. & 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 & Kelly Hager Holmes, Carol & Chris Gillespie, Jarred D. Overcash, and James & Susie Lesesne, Jessica Shipman, Arlene Conte, Carol Ann Dumond, Lawrence Murray, Yvonne Walker, Darlene and Richard Gleeson, Robert and Michelle Bagrie, Russell Johnson, Kathryn Howle, Dorothy Newman, Nicholas and Debora Yost, Stephen Denby, Colin and Phyllis Braybrooks, Helen and Bob Harman, Roger Minton, and Stephen and Merifaith Purdue and John and Jane Does (1-48) 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., Builder Support Services of the Carolinas, Inc., Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc., Barr Construction, Inc., Benjamin Mora d/b/a Mora Construction, a/k/a Benjamin Mora Construction, LLC, Builder's Firtsource, Inc. a/k/a Builders Firstource-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 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 Sanchez Brothers Painting, Latitude Construction Services, LLC, The Muhler Company, Inc., Paul M. Vasquez, Richard Ditullio, and Richard Ditullio a/k/a ROT Contracting, LLC
Civil Action No. 2014-CP-10-4335
Claim No. R&A TLA10162
C&L File No. 001083-00166

Dear Ms. Armstrong:

Enclosed for filing please find the original and one copy of the Stipulation of Dismissal with Prejudice of 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 of Charleston, Inc., John Wieland Homes, Inc., Builders Support Services of the Carolinas, Inc. and Wheelock Street Capital, LLC d/b/a John Wieland Homes and Neighborhoods, Inc. 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., and Builders Support Services of the Carolinas, Inc.'s Crossclaims as to Defendants Jeorge Medina a/k/a JMC Construction, Inc., The Muhler Company, Inc., and Juan Luis Sanchez, Juan Luis Sanchez a/k/a Sanchez Brothers Painting in the above matter. Please file the original and return a clocked-in copy to me.

With warmest regards, I am,

Very truly yours,

Andrew N. Cole

Enclosures
cc/enc: Andrew E. Haselden, Esquire
Theodore L. Manos, Esquire
Sarah Fragale, Esquire
P. Gunnar Nistad, Esquire
(via e-mail only)

Collins Lacy
ATTORNEYS AT LAW

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August 15, 2017

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Waverly at Hamlin Plantation Townhome Association, Inc., Respondent/Appellant
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. Appellants/Respondents
And Jeffrey Sills, Individually and as Class Representative, et al, Respondents/Appellants
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. Appellants/Respondents
Appellate Case No. 2017-000542
Civil Action Nos. 2013-CP-10-3326 and 2014-CP-10-4335

Blair & Co. File Nos.: 46227 TL, 46228 TL & 46229 TL
R&A File No: TLA10162
Sextant File Nos: 36-1408-1001 (policy ZARTE003004, eff. May 26, 2006-2007) & 42-1408-1003 (policy ARTE023221, eff. June 12, 2009-2010)
C&L File Nos. 001083-00163 & 001083-00166

Dear Ms. Kitchings:

I was waiting for the stay/abeyance to be lifted regarding the court's decision on a motion to dismiss that was filed by Respondents/Appellants (the Waverly HOA and Sills Class). On July 13, 2017, the court filed its order allowing the appeal filed by John Wieland Homes to continue. I am writing to you now to confirm that my client, Jorge Median a/k/a JMC Construction, LLC a/k/a JMC Construction, Inc. need to actively participate in this pending appeal.

The underlying trial of the case of Waverly and Hamlin Plantation Townhome Association, Inc. (Civil Action No. 2013-CP-10-3326) (the Waverly HOA Action), which was tried simultaneously with the Jeffrey Sills, as Class Representative, et al. (Civil Action No. 2014-CP-10-4335) (the Sills Class Action), was completed in January of this year. These cases were tried together. The only parties at trial were Plaintiffs and the John Wieland Homes entities. My client,

JMC Construction, had settled with Plaintiffs prior to the case going to trial and the remaining cross-claims asserted by John Wieland Homes against my client were bifurcated. Therefore, my client was not compelled to participate in the trial. In fact, I represent to the Court that all of the Defendants except John Wieland Homes and a subcontractor defendant Paul M. Vasquez had reached a settlement with the Plaintiffs prior to trial.

The settlement release language between Plaintiffs and my client[1] was finalized after the trial. The stipulation of dismissal with prejudice as between my client[2] and Plaintiffs was filed in both the Waverly HOA Action and the Sills Class Action cases on May 15, 2017. After additional settlement negotiations, my client[3] reached a settlement agreement with John Wieland Homes. The stipulations of dismissal of the cross-claims asserted by John Wieland Homes against my client[4] were filed in both the Waverly HOA Action and the Sills Class Action on June 9, 2017. Therefore, all of the claims by both Plaintiffs and John Wieland Homes have been resolved against my client. In addition to the claims by Plaintiffs and John Wieland Homes against Muhler and Sanchez, I understand that the other subcontractor defendants *except* Mr. Vasquez have similarly been resolved.

John Wieland Homes appealed the final decisions by the trial court following the trial and the post-trial arguments. The HOA Action and Sills Class Action Plaintiffs filed cross-appeals. It appears in the appeal captions that my client, as well as other subcontractor defendants, are referenced as respondents to these appeals. However, JMC Construction did not and does not intend to proceed as a party to the appeal and cross-appeal filed by John Wieland Homes and the HOA Action and Sills Class Action Plaintiffs. In fact, as part of the settlement of the cross-claims asserted by John Wieland Homes against my client, JMC Construction specifically stated that it did not want to participate in the pending appeal.

This may be a non-issue in the eyes of the court, but I wanted to confirm that JMC Construction does not need to participate in the pending appeal since it has settled out of the case completely. If there is something further that I need to do to confirm this on behalf of JMC Construction, please let me know.

With warmest regards, I am,

Very truly yours,

Andrew N. Cole

cc: Andrew E. Haselden, Esquire

[1] In fact, defendants JMC Construction, The Muhler Company, Inc. and Juan Luis Sanchez and Juan Luis Sanchez a/k/a Sanchez Brothers Painting, were included in the same settlement paperwork with the Plaintiffs and later with John Wieland Homes.

[2] Again, the stipulation of dismissal included the Plaintiffs, JMC Construction, Muhler, and Sanchez.

[3] See footnote 1 above.

[4] See footnote 2 above.

Justin Novak, Esquire
Theodore L. Manos, Esquire
John Hayes IV, Esquire
I. Keith McCarty, Esquire
Jesse Sanchez, Esquire
Mary-Margaret Fitzhenry Noland, Esquire
Sarah Fragale, Esquire
P. Gunnar Nistad, Esquire
Julian Kane Allen, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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

RECEIVED
MAY 11 2018
SC Court of Appeals

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.***

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the foregoing *Record on Appeal* contains all material proposed to be included by any of the parties and not any other material.

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