

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SC SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Circuit Court Judge

Case No. 2007-CP-42-296
Appellate Case No. 2014-001151
Unpublished Opinion No. 2016-UP-168—Filed April 6, 2016

Nationwide Mutual Insurance Company,
and Gilliam Construction Company, Inc. Respondents,

v.

Eagle Windows & Doors, Inc., ... Petitioner.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI,
VOLUME II

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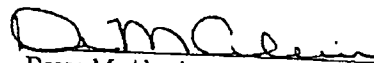
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ROA231

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG 2007-CP-42-00296

Nationwide Mutual Insurance
Company, and Gilliam Construction
Company, Inc.,

Plaintiffs,

-vs-

Eagle Windows & Doors, Inc., et al,

Defendant.

TRANSCRIPT OF RECORD

December 10, 2013
Spartanburg, South Carolina

Ordered: December 2013/January 2014

Delivered: February 10, 2014

BEFORE:

The Honorable J. Mark Hayes, II, Presiding Judge.

APPEARANCES:

Mr. Jason M. Imhoff,, Esquire
Attorney Appearing for the Plaintiffs

Mr. G. Davis Sinkler, Esquire
Mr. Guy Gibbs, Esquire
Attorneys Appearing for the Defendant

Transcript of the testimony of MR. WILLIAM R. STILL, SR. and CINDY
THOMAS, and the arguments of Counsel following their testimony.

Pamela Faucette, CVR-M
Circuit Court Reporter

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA232

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EXHIBITS**Joint Exhibits:****Marked:****Received:**

1 - (Responses to Plaintiffs' Request for Admissions)	4	4
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ROA233

EXHIBITS

Joint Exhibits:	Marked:	Received:
4 - (Answers to Plaintiffs' Interrogatories)	4	4
5 - (Website for Eagle)	4	4
6 - (Application for Amended Certificate of Authority)	4	4
Plaintiffs' Exhibits:	Marked:	Received:
1 - (Contract Agreement)		(Over Obj)
2 - (Invoice)		
3 - (Letter Dated 5/17/03)		
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(None)		
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REPORTER'S NOTES: This transcript contains quoted material. Such material is reproduced as read or quoted by the speaker.

REPORTER'S NOTES: Some of the names in this transcript are spelled phonetically.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA234

December 10, 2013

10:47 A.M.

(Joint Exhibits 1 through 6 were previously marked for
identification and admitted into evidence by stipulation of the parties.)

(Whereupon,

William Randall Still, Sr.

first being duly sworn, testified as follows:

(Off-the-Record Comments)

Direct Examination by Mr. Imhoff:

10:47 A.M.

Q. Mr. Still, please spell your full name for the record.

A. William Randall Still, Sr.

Q. Okay. And, again, for the record and for the court reporter — and for
the record, will you — what do you do for a living?

A. I'm a professional engineer.

Q. Okay. Where did you go to school?

A. I went to the University of South Carolina. I graduated in 1974.

Q. What degree did you get?

A. I have a BS in engineering.

Q. Do you have any licenses in your profession?

A. Yes, sir, I do. I am a registered professional engineer in seven states,
including North Carolina, South Carolina, Georgia, Mississippi, and several others.

Q. And how long have you been working as a professional engineer in the
State of South Carolina?

A. I was first registered in 1979.

Q. Is part of your — is part of your work forensic engineering?

A. Yes, sir, it is.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA235

1 Q. And what does that mean?

2 A. Forensic engineering is the evaluation of some component in
3 preparation for litigation or to determine where defects may be or causes of defects.

4 Q. And have you been looking at building envelopes (phonetic) to find
5 causes of water infiltration throughout your career?

6 A. I have for about the last 19 years.

7 Q. Okay. Does that include investigation of window installation?

8 A. It does.

9 Q. Stucco?

10 A. It does.

11 Q. And window products?

12 A. It does.

13 Q. And have you looked at windows in your profession to determine if they
14 are leaking?

15 A. Yes, sir, I have.

16 Q. Are windows supposed to leak?

17 A. They are not.

18 Q. Have you ever been — have you ever testified in court in the State of
19 South Carolina?

20 A. Yes, sir, I have.

21 Q. Have you ever been offered as a — an expert in professional
22 engineering?

23 A. Yes, sir.

24 Q. Okay. What other, if any, areas have you been qualified as an expert
25 in the State — in the courts of the State of South Carolina?

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA236

1 A. I have been qualified as a structural engineer to look at structural
2 components. I have been qualified for building exterior cladding and the components
3 that fall in that cladding and the construction of those buildings themselves.

4 MR. IMHOFF: Your Honor, at this time, we would offer and ask
5 that Mr. Still be qualified in residential construction, building envelope,
6 including the cladding and products involved in the building envelope, and
7 building products, specifically windows, Your Honor.

8 MR. SINKLER: If I could ask of the Court a couple of questions?

9 **Voir Dire by Mr. Sinkler:**

10 Q. Have you ever designed a window?

11 A. No, sir, I have not.

12 Q. Have you ever published any articles on that?

13 A. I'm sorry, I don't understand the question.

14 Q. Have you ever published an article on the design of windows?

15 A. No, sir, I have not.

16 Q. Have you ever constructed — constructed a window or had anything to
17 do with the construction of a window?

18 A. No, sir, I have not.

19 Q. Okay. And do — do you publish articles about various things that — in
20 the engineering world or not?

21 A. Normally, I do not.

22 Q. You haven't published anything about the manufacture of windows?

23 A. No, sir, I have not.

24 (Brief Pause)

25 MR. SINKLER: That's all I wanted to start off with.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA237

1 THE COURT: All right. Thank you, sir. I'll qualify him as
2 requested.

3 MR. IMHOFF: Thank you, Your Honor.

4 Continued Direct Examination by Mr. Imhoff:

5 Q. Mr. Still, were you hired to investigate the Able residence at 4 Lobelia
6 Way in Landrum, South Carolina?

7 A. I was.

8 Q. Who were you hired by?

9 A. I believe I was originally hired by John Devlin (phonetic) and, then, by
10 Frank Gibbs.

11 Q. Okay. Who did John Devlin and Frank Gibbs work for?

12 A. They worked for the Ables.

13 Q. Okay. And, then, was it your understanding that you were also working
14 for the Ables?

15 A. Yes, sir.

16 Q. What were you asked to do?

17 A. I was asked to look at the exterior cladding to determine why they were
18 having water intrusion at various locations within the house.

19 Q. Did you understand who the builder of the home was?

20 A. I did.

21 Q. Do you understand that to be Gilliam Construction and Phil Gilliam?

22 A. Yes, I do.

23 Q. Okay. And did you offer opinions which were adverse to Mr. Gilliam?

24 A. Yes, sir.

25 Q. Did you consider yourself a witness adverse to Mr. Gilliam in the

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA238

1 arbitration proceeding brought by the Ables?

2 A. I would say so, yes.

3 Q. All right. All right. What did you do to -- to investigate the Ables' water
4 issues?

5 A. Well, the house is a fairly large house in The Cliffs of Glassy (phonetic).
6 It's clad with a hard coat stucco, which is a cementitious material. It's about 5/8ths to
7 3/4th of an inch thick.

8 We looked-- I did a visual observation of the interior surfaces, listened
9 to the areas that Mr. Able had concerns about.

10 We, then, did moisture testing of the substrates below the stucco by
11 drilling holes in the walls and using a moisture meter. We, then, published that to
12 Mr. Able.

13 From that we did some destructive test cuts to look at substrates and
14 how the windows were installed. And we participated and caused limited, fairly
15 simple water tests to occur on the windows.

16 MR. IMHOFF: May I approach, Your Honor?

17 THE COURT: Yes, sir.

18 Q. (By Mr. Imhoff) I'm going to hand you some documents out of your
19 file. And I think we're probably going to have to mark them one-by-one. But let's
20 start with the first page.

21 (Document shown to the witness.)

22 A. Yes, sir.

23 Q. Is that the Able residence?

24 A. That is the front of the house, a photograph of it.

25 (Off-the-Record Discussion)

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA239

1 MR. IMHOFF: Your Honor, may I approach?
2 THE COURT: (Nods affirmatively.)
3 MR. IMHOFF: I didn't have the IT capability to put it on the
4 screen.
5 (Document handed to the witness.)
6 Q. (By Mr. Imhoff) What is the second page, Mr. Still?
7 A. It is a photograph of the back left corner of the house.
8 (Off-the-Record Discussion)
9 Q. Do you have three pages, Mister — I'm sorry.
10 THE COURT: I have three pages.
11 MR. IMHOFF: You have three pages? Are Pages 1 through 4
12 okay?
13 MR. SINKLER: Yeah.
14 Q. (By Mr. Imhoff) What is the third page, Mr. Still?
15 (Document handed to the witness.)
16 A. The third page is a photograph of the stucco as it abuts to windows.
17 Q. Okay. And this is a rather large house. Where is it located?
18 A. It's on the back of the house. And I believe I've got a photograph of it.
19 Q. I'm sorry. Let me —
20 A. If we go back to Page 2, it's on the far left corner.
21 Q. I'm sorry. What I meant to ask you is ---
22 A. I'm sorry.
23 Q. — where is the house located, the house itself?
24 A. The house is located in The Cliffs of Glassy.
25 Q. Okay.

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ROA240

1 MR. SINKLER: Where? Where?

2 MR. IMHOFF: The Cliffs of Glassy.

3 MR. SINKLER: Oh. Sorry.

4 Q. (By Mr. Imhoff) All right. Did you have an opportunity to do water
5 testing on the windows at the home?

6 A. Yes, sir, I did.

7 Q. Okay. Did you coordinate with Mr. Gibbs to invite the manufacturer to
8 the home to observe and participate in the water testing?

9 A. We did.

10 Q. Okay. How were you able to determine who the manufacturer of the
11 windows was?

12 A. Well, if you go back and look at Page 3, you can see, in the corner of
13 the window, it looks like something is written in the lower window and the upper right
14 corner.

15 If you go to Page 4, I blew that up. And you can see the word "Eagle"
16 written backwards. So you can read it from the inside.

17 (Brief Pause)

18 MR. IMHOFF: Your Honor, at this time, I would ask to mark them,
19 but I would ask to admit into evidence Pages 1 through 4 — 1 through 3
20 rather.

21 MR. SINKLER: Is there any date on these photographs so we
22 know when all of this was done?

23 (Off-the-Record Discussion)

24 THE COURT: Any objection to the photographs?

25 MR. SINKLER: Yes, sir. I would just like to ask what — at what

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA241

1 point in time, when did you — when did you take these pictures?

2 A. Well, the whole group that's in this exhibit start at 2004 and I think they
3 go through 2006.

4 MR. SINKLER: Okay.

5 (Brief Pause)

6 MR. SINKLER: That's all I wanted to know. Thank you.

7 THE COURT: All right. So, they will be admitted as Defendant's
8 -- Plaintiffs' 5 -- I'm sorry -- as a group.

9 MR. IMHOFF: Yes, Your Honor.

10 (Whereupon, Plaintiff's Exhibit 5 was marked for identification and
11 admitted into evidence without objection.)

12 Q. (By Mr. Imhoff) Mr. Still, did it -- did representatives of Eagle Windows
13 come to the water testing that you did?

14 A. They did.

15 Q. Did they offer any suggestions for the water testing that you did?

16 A. I don't believe that they did.

17 Q. Did they offer any criticism for the water testing that you did?

18 A. No, sir. The water testing we did was very simplistic.

19 Q. Other than being there, did they participate in the water testing at all?

20 A. I believe their -- I believe they had an expert there. They took
21 photographs of what all was going on. But I believe that was the extent of it.

22 Q. And approximately what year was that, Mr. Still?

23 A. I believe that was in 2004.

24 Q. Okay. When you did the water testing, what did you find?

25 A. We found that the corners of the windows leaked in the miter joint.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA242

1 They leaked both outboard of the nailing pin and inboard of the nailing pin.

2 Q. And just for explanation, again, Mr. Gilliam described the window as a
3 — as a vertical piece — or actually two vertical pieces with window glass between
4 them.

5 A. Yes, sir.

6 Q. Is that right?

7 A. Well, it really is four pieces. There were two jams on either side.

8 Q. Right.

9 A. And there's the head at the top and the sill at the bottom. And those
10 four pieces create the frame.

11 Q. A box?

12 A. A box.

13 Q. With glass in it?

14 A. And, then, there is a glass section that sits in that whether it's a fixed
15 window or a casement window that would be operable is installed in that frame.

16 Q. Yes, sir. And the joint that you found was leaking was where the two
17 pieces of metal came together?

18 A. Yes.

19 Q. All right. And it leaked you said inboard and outboard of the nailing
20 flash. What is a nailing flash (phonetic)?

21 A. I think I can describe it if we go to a photograph that's in this group right
22 here.

23 Q. And tell us what page and let me show it to Mr. Sinkler.

24 THE COURT: And me.

25 (Brief pause while witness reviews documents.)

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ROA243

1 A. Probably the best one will be Page 19 and Page 20.

2 MR. IMHOFF: Do you have any objection to those photographs?

3 MR. SINKLER: Oh, no.

4 MR. IMHOFF: Your Honor, may I approach?

5 THE COURT: (Nods affirmatively.)

6 (Whereupon, Plaintiff's Exhibit 6 was marked for identification.)

7 (Documents handed to the witness.)

8 Q. (By Mr. Imhoff) All right. I've now marked Pages 19 and 20 as
9 Plaintiffs' Number 6. What — what do those photographs show, Mr. Still?

10 A. Well, Page 19 shows a photograph when one of the water test was
11 being performed. You see this black material that says, "Grace Byflow Plus,"
12 (phonetic) and we used that as a damn.

13 Immediately below that you see a white line. And, if you go to Page 20,
14 you'll see that same material; this black material that has "plus" written on it.

15 And immediately below that you'll see a white material with a — a nail
16 in it. And that's called a nailing pin. And the nailing pin is the method used to attach
17 the window to the wall frame.

18 Q. So you literally put that nailing pin onto the wall and nail it in so it stays
19 in the wall?

20 A. That is correct.

21 Q. All right. And tell us what your water test found in regard to that nailing
22 pin.

23 A. Well, if you look at Page 20, you will see that there's a finger pointing to
24 a corner. And you will see that there is a white piece of material — it's a little bit of a
25 lighter white than the rest of it. And you see the rusted nail over to the right.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA244

1 And the way these windows are constructed and they're shipped, the
2 nailing pin is on four sides and the corners are just continuous. So the white piece
3 of material that you see that has a vertical cut on it and, then, shows angular to the
4 right hand side, are corner pieces.

5 And you put those in the corner of the window, on top of the nailing pin,
6 to make a continuous path around the window so that water that gets on the outside
7 of the window drains out.

8 Q. All right. Did you find that water was leaking behind that nailing pin?

9 A. Yes, sir.

10 Q. Is water supposed to leak behind that nailing pin?

11 A. No, sir, it is not.

12 Q. Where does the water go if it leaks behind the nailing pin?

13 A. Well, it is on top of the OSV (phonetic) sheeting as you see. It's on top
14 of the frame. It's within the opening where the window has been placed.

15 It's behind the secondary moisture barrier. And it's behind the stucco.

16 Q. Is it supposed to be there?

17 A. No.

18 Q. Are windows supposed to leak like this?

19 A. No.

20 Q. Did you find that the window was defective?

21 A. In the case of it leaking, yes, that is defective.

22 Q. And the test that you did, is that a difficult or a hard test to pass for a
23 window?

24 A. The test we performed — there — there are many stages of testing of
25 windows. What we did is a very simple damn test. We created — if you look on

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA245

1 Page 19, you'll see that black material across there. And essentially what it does is it
2 seals the vertical surfaces of the window.

3 And you pour water in on top of the sill of the window. It's very simplistic.
4 There are much more elaborate tests that require pressure chambers and a spray
5 rack (phonetic) and they're very elaborate and they take a lot of time to set up. This
6 is very simplistic.

7 Q. Should a properly functioning window have passed this test?

8 A. Yes.

9 Q. Okay. Did this test equal the pressure conditions that a window is
10 supposed to be able to resist in regard to water?

11 A. No.

12 Q. Okay. Is it higher or lower?

13 A. Oh, substantially lower.

14 Q. Okay. So did this — is — is this failure lower, much — substantially
15 lower than what the window should have been able to perform?

16 A. Yes.

17 Q. Okay. And, if you had performed the pressure test you indicated
18 earlier, is that a higher standard or a lower standard than what you actually did?

19 A. Higher.

20 Q. You add more pressure to the window?

21 A. Well, you do two things. One you pressurize the closure. And, then,
22 you spray the window continuously so you've got suction being incurred and you pull
23 the water in through all the cracks and crevices.

24 And you have a continuous supply of the water. There is a prescription
25 of how you do that.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA246

1 Q. Based on your experience and your tests, would these windows have
2 passed that pressure water test?

3 A. In my opinion, no.

4 Q. All right. Did damage to Mr. Able's house occur due to these windows
5 leaking?

6 A. Yes, sir.

7 Q. Did you — were you asked to prepare a repair for Mr. Able's house?

8 A. I was.

9 Q. And did that repair require the removal of stucco?

10 A. It did.

11 Q. Was the removal of stucco necessary because the windows were
12 leaking?

13 A. Yes.

14 Q. Was all of the stucco removed from Mr. Able's house?

15 A. No.

16 Q. Why not?

17 A. Well, we found that — one, I think it's economic waste. Two, we found
18 a suitable way to take a limited amount of stucco off, re-mediate the windows,
19 replace some of the windows, and re-install stucco.

20 Q. Is that called a surgical repair?

21 A. It is.

22 Q. Instead of just taking everything off of the outside of the house and
23 putting new on, was your proposal less expensive than that?

24 A. Yes, sir.

25 Q. And less expensive than that?

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA247

1 A. Yes, sir.

2 Q. Did you — did your repair include removing the windows, purchasing
3 new windows, and re-installing them?

4 A. In broad scope, no. In limited areas, we replaced some windows.

5 Q. Why didn't you replace all of the windows? Well, strike that. How did
6 you put the house back together with leaking windows and still assure your client that
7 his house would be okay?

8 A. Well, we gave a — we gave Mr. Able and his wife an option to install
9 what's called pan flashing, which is a metal pan below the window that would catch
10 any water that would leak through the window and drain it back behind the stucco
11 and allow it to drain out at the bottom.

12 Q. Is it like putting a diaper on each of the windows?

13 A. That might be a way of putting it.

14 Q. Okay. But it would catch the water that leaked through these windows
15 and get it out of the house?

16 A. Yes, sir.

17 Q. Okay. Was it also a reasonable repair to take all of the windows out
18 and buy new ones and put the new ones back in?

19 A. You could have done that, but the repair that we chose to use, that Mr.
20 Able was comfortable with, didn't do that.

21 Q. In your opinion, is the repair that you offered to the Ables the most
22 efficient and economical repair?

23 A. Yes, sir.

24 Q. In your opinion, is there a more economical or efficient repair?

25 A. Not that I'm aware of.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA248

1 Q. Was that repair necessitated due to the leaking Eagle windows?

2 A. Yes.

3 Q. Did you actually oversee the repair?

4 A. I did.

5 Q. And were you asked to provide contract administration services?

6 A. I was.

7 Q. And what does that mean?

8 A. It means that I, as a design professional, through the company I was
9 working for, prepared the repair documents, took bids for the work itself, consulted
10 with Mr. Able.

11 And, during the repair process, I was out there to look at the installation
12 by the contractor, to provide technical assistance, if he had questions, and to
13 approve pay applications and review changes orders that occurred during the
14 process.

15 Q. All right. So you were actually part of the repair process?

16 A. Yes.

17 Q. And oversaw the work as it went on?

18 A. Yes.

19 Q. And you were asked to do that by the Ables?

20 A. Yes.

21 Q. And did you charge the Ables for that?

22 A. I did.

23 Q. Do you recall how much you charged the Ables?

24 A. I think I know the total number. I'm not exactly sure of the construction
25 and administration amount. But the total amount was about twenty-seven (\$27,000),

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA249

1 twenty-eight thousand dollars (\$28,000).

2 Q. Okay. Do you recall how much you approved for the contractor that
3 was doing the repairs?

4 A. I think the last change order and the last pay application that I
5 approved gave a total of about a hundred and eighty-four thousand (\$184,000) if I
6 remember.

7 MR. IMHOFF: May I approach, Your Honor?

8 THE COURT: Yes, sir.

9 (Whereupon, Plaintiffs' Exhibit 7 was marked for identification.)

10 Q. (By Mr. Imhoff) I'm going to hand you Plaintiffs' Exhibit Number 7.

11 (Exhibit handed to the witness.)

12 Q. What — what are those documents, Mr. Still?

13 A. This is letter dated August the 9th, 2005 to Kalynn Bowman (phonetic)
14 with Blue Ridge Construction. And it gave him executed copies of change orders 5
15 through 9 that Mr. Able signed, and a summary of the change orders 1 through 9 and
16 the date.

17 And the second page has the base bid amount, the amount requested,
18 the amount approved for change orders 1 through 9.

19 Q. And —

20 A. And a total at the end.

21 Q. All right. And does this help you recall the total amount that was paid
22 to the repair contractor?

23 A. Yes, sir.

24 Q. And what is that number again, please?

25 A. One hundred and eighty-four thousand, twenty-one dollars, and seven

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA250

1 cents (\$184,021.07).

2 MR. IMHOFF: Your Honor, I would ask that Exhibit I believe it's 7
3 be entered into evidence at this time.

4 And if I haven't put the other two in, also the photographs.

5 THE COURT: So, the two photographs from Pages ---

6 MR. IMHOFF: Nine ---

7 THE COURT: --- 19 and 20 are being introduced as Plaintiffs'
8 Number 6. And the document just identified by the witness is being offered as
9 Plaintiffs' Number 7?

10 MR. IMHOFF: Yes, Your Honor.

11 THE COURT: Any objection?

12 MR. SINKLER: No objection.

13 THE COURT: Without objection it'll be Plaintiffs' 6 and 7.

14 (Whereupon, Plaintiffs' Exhibits 6 and 7 were admitted into
15 evidence without objection.)

16 Q. (By Mr. Imhoff) And that hundred and eighty-four thousand dollars
17 (\$184,000) is in addition to the twenty-seven thousand dollars (\$27,000) that you
18 charged to come up with the scope of repair and oversee the repairs for the Ables?

19 A. That is correct.

20 (Brief Pause)

21 Q. I think I asked this earlier, but let me make sure: Was the removal of
22 the stucco necessary due to the leaking Eagle windows?

23 A. Yes.

24 Q. Was the installation of pan flashing necessary due to the leaking in ---
25 leaking Eagle windows?

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ROA251

1 A. Yes, sir.

2 Q. And was repair of damage necessary due to the leaking Eagle
3 windows?

4 A. Yes.

5 Q. In your — in your work and experience, are you asked to look at failures
6 of contractors and subcontractors?

7 A. Yes, sir.

8 Q. Does that require you to have a working knowledge of the duties and
9 obligations — obligations of contractors and subcontractors?

10 A. I would think so, yes.

11 Q. In the case of a contractor that does not self perform any work, instead
12 he hires subcontractors, what is a general contractor's obligation?

13 A. Well, the general contractor's responsibility is — I guess, at the end of
14 the day, he's responsible for everything that happens. But, what he would normally
15 do is he would be responsible for supervision, coordination, making sure people get
16 paid.

17 He can rely upon his subcontractors to do their work. And clearly he
18 would not be self performing; in other words, he would have to rely upon his
19 subcontractors.

20 Q. Okay. In your opin — in your opinion, should a general contractor
21 know that windows are defective and leaking?

22 A. I don't think he can.

23 Q. Did your investigation, of the Ables home, reveal any evidence that
24 Gilliam Construction or Phil Gilliam knew these windows would leak?

25 A. Not that I'm aware of, no.

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ROA252

1 Q. Is it reasonable for a general contractor to assume that windows
2 purchased from a reputable company — company would not leak in the manner
3 these windows leaked?

4 A. Yes.

5 Q. And — and just, again, these windows, or any windows installed in a
6 home —

7 MR. SINKLER: Your Honor, he just keeps leading this witness.
8 Have him ask him a question, please.

9 THE COURT: Yes, sir.

10 Q. (By Mr. Imhoff) Are residential windows supposed to leak in this
11 manner?

12 A. No.

13 Q. Are these windows defective because they leak in this window — in this
14 manner?

15 A. Yes.

16 Q. Did they cause — did these defective windows cause damage?

17 A. They did.

18 Q. Did that damage and these leaking windows necessitate the entire
19 scope or the scope of repair that you prepared for the Ables?

20 A. Yes.

21 Q. And did that repair scope necessitate the money that was charged by
22 Blue Ridge Builders and yourself to repair those issues?

23 A. Yes.

24 (Brief Pause)

25 MR. IMHOFF: I don't have any further questions for you. Thank

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ROA253

1 you, Mr. Still.

2 **THE WITNESS:** Yes, sir.

3 **Cross Examination by Mr. Sinkler:**

11:07 A.M.

4 **Q.** Mr. Still, you — you gave a deposition on I believe January 12th, 2006;
5 is that correct?

6 **A.** I don't know. I know I gave a deposition.

7 **Q.** Allow me to show it to you (inaudible). Is this a copy of your
8 deposition?

9 **(Document shown to the witness.)**

10 **A.** It appears to be. It's a different format than I've seen.

11 **Q.** All right. In this deposition, which I've read, you seem to find other
12 contributing factors to the damage caused by the leaking water. You're not trying to
13 isolate it and say it only was leaking windows, are you?

14 **A.** I don't think so.

15 **Q.** All right. I want you to tell me what other things, besides the windows
16 themselves, contributed to the problems that caused the — the leaking of that house.

17 **A.** I know that I talked about in my deposition the lack of or the failure of
18 kick-out flashing to cause a problem. And that was a stucco issue.

19 **Q.** All right. We'll just — tell us what that problem was no matter — I want
20 you to give me — to give me the people that contributed no matter how small or how
21 huge it is, to any — to do with the water problems.

22 **(Brief Pause)**

23 **A.** I'm not sure I understand your question now.

24 **Q.** You have restricted your testimony today to windows.

25 **A.** That was the questions I was -- was asked.

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ROA254

1 Q. I understand.

2 A. Yes, sir.

3 Q. But, in your deposition, you had opinions with respect to other matters
4 that contributed to the problems with the house.

5 A. That's correct.

6 Q. And I believe ----

7 (Brief Pause)

8 Q. And I'm going to refer you back to a question asked you. He said, "If
9 windows had been installed in the house which did not leak and did not fail your
10 water tests -- or the water test -- assuming, for the purposes of this question, that
11 the sealing joints (phonetic) did not leak either, would there have been a moisture
12 intrusion problem in this house?" And you asked, "Let me make sure I understand."

13 You said, "If the windows did not leak when they were installed,
14 correct?" And, then -- and the answer that you gave, "and, if the sealing joints did
15 not fail, would there be a moisture intrusion into this house?" And you unequivocally
16 said, "Yes."

17 A. Yes.

18 Q. "Because of the lack of flashing and the installation method of the
19 stucco itself as a barrier, you want an outlet for the water somewhere." Is that right?

20 A. Yes, sir.

21 Q. Okay. So tell us about that.

22 A. There were places where the stucco, on the back of the house, was at
23 grade, which is probably not the best idea.

24 Q. Well, that's a -- that's a terrible idea, isn't it?

25 A. Well, it is if water gets in, but if water doesn't get in, it really doesn't

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1 matter.

2 Q. Okay. Water always gets in, doesn't it?

3 A. It does.

4 Q. Okay.

5 A. And, when water gets in, it either gets in through sealant joints. It gets
6 in through windows. It gets in through failed flashing.

7 It gets in through at intersections of walls and roofs. It gets in through
8 cracks in the stucco.

9 Q. So, we want — we want it to be able to drain, right?

10 A. Yes, sir.

11 Q. This house was not constructed so that it drained properly, was it?

12 A. That's not true.

13 Q. That's not true?

14 A. No, sir. If it had been such that it would not drain, on the walls where
15 we didn't take all the stucco off, I would have taken the stucco off.

16 Q. But the stucco — tell me what the stucco being — going down to
17 grade does.

18 A. Going down to grade does not prevent it from draining. It only gives it a
19 secondary moisture source. It would amount and settle at the bottom of the walls
20 (phonetic).

21 Q. Well, you said, "Because of the lack of flashing and the installation
22 method and the stucco itself as a barrier it was — even though the windows didn't
23 leak or anything, you still would have moisture problems." That's what you're saying
24 in this deposition.

25 A. Well, I think, if you go back to that, it was a hypothetical question.

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ROA256

1 Q. Well ---

2 A. I answer a hypothetical question.

3 Q. Right. But you say because of the lack of flashing — you're talking
4 about this house, right?

5 A. No, sir. I'm answering a hypothetical question.

6 Q. No, no, no.

7 A. Go back and read the beginning of the question. I believe it was
8 hypothetical.

9 (Brief Pause)

10 Q. "Assuming for the purposes of this questions that the sealing joints did
11 not leak, would there have been a moisture intrusion problem in this house?" And
12 you say, "Let me make sure I understand."

13 You said, "If the windows did not leak when they were installed." And,
14 And, then, Mr. Gibbs said, "Correct." "And, if the sealing joint did not fail, would
15 there be a moisture intrusion problem in this house?" "Yes, sir." Talking about —
16 "Okay, right."

17 And you — you said — and, then, Mr. Gibbs said, "Because of the
18 flashing? You answered, "Because of the lack of flashing and the installation
19 method of the stucco itself as a barrier."

20 All right. Now tell me — and you're talking about this house?

21 A. And it says — you haven't talked about the windows. We illuminated a
22 whole bunch of things and it's a hypothetical.

23 Q. Well, you — you knew that the stucco applicator was sued?

24 A. Yes, sir.

25 Q. And you knew that the —

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ROA257

1 MR. IMHOFF: Your Honor, objection. I — again, that misstates —
2 that misstates facts.

3 THE COURT: Well, he's on — he's on —

4 MR. IMHOFF: The stucco applicator was not sued.

5 THE COURT: All right. He's on cross — he's on cross
6 examination. He's got some leeway. Go ahead, sir.

7 Q. (By Mr. Sinkler) You were representing the Ables in the — in —

8 A. Yes, sir.

9 Q. — as well as I am. And — and they brought a claim against the stucco
10 manufacturer, who — who settled their case, right?

11 A. I'd have to go back and look at the underlying litigation, the claim. I
12 don't recall that they were involved in it.

13 Q. But did you — didn't you find also that these windows were — the
14 openings to these windows was too tight?

15 A. I don't think so. Now, it may be — it may be in the deposition, but I
16 don't recall that.

17 (Brief Pause)

18 MR. SINKLER: Give me the complaint if you will.

19 (Brief pause while document is retrieved and given to Mr. Sinkler.)

20 Q. (By Mr. Sinkler) The complaint that is on file with the Court — and this
21 is the complaint of the Ables — at Paragraph 11 alleges that, "Among the alleged
22 deficiencies were the Ables' allegations that the waterproofing was done improperly,
23 the stucco application was deficient, and the defective framing and the window
24 installation was defective. And the windows were defective and leaking." Now, tell
25 me about the waterproofing being done improperly.

1 A. There was waterproofing in the basement wall in the front of the house
2 that was leaking into I believe the elevator. And that was repaired.

3 Q. All right. "The stucco application was deficient and defective."

4 A. I didn't write that.

5 Q. I — I understand that, but you were representing the man who did write
6 it.

7 A. I didn't write it.

8 Q. I didn't say you did write it. I say you were representing the man who
9 did write it. And I want you to know he had claims against these people.

10 A. I'm sorry, I don't understand your question. I didn't do that legal
11 document, nor did I prepare it.

12 Q. I understand that. But are you just saying they made this up, the
13 Ables?

14 A. I'm just saying I didn't write that.

15 Q. I know. I'm — but I'm asking —

16 A. You can ask the author of it about these issues.

17 Q. No, I think I can ask you since you were representing them and trying
18 to find out what the problems were.

19 A. And I did.

20 Q. All right. So tell me why the stucco — the stucco application was
21 deficient and defective. The stucco guy paid forty-one thousand dollars (\$41,000).
22 Why did he do that?

23 A. I have no idea what the stucco applicator paid. I wasn't part of the
24 settlement.

25 Q. Assuming — assuming — assuming he paid that, I mean, why did he

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1 pay that if — if he wasn't partially responsible?

2 MR. IMHOFF: Objection, Your Honor. He's asking him to give an
3 opinion as to why someone else did something.

4 THE COURT: I'll have to sustain the objection.

5 Q. (By Mr. Sinkler) The — it's alleged that the framing and window
6 installation was defective.

7 A. Okay.

8 Q. Is that true?

9 A. I'm going to go back to the original thing. I did not write that complaint.

10 Q. I didn't say you wrote it. I just asked you if — whether it — was the
11 framing and — and installation defective?

12 A. Of the windows?

13 Q. Of the window opening?

14 A. Not that I'm aware of. I mean, we reused the same window openings
15 when the windows were taken out and replaced and pan — pan flashing was added.

16 MR. SINKLER: One moment.

17 (Pause)

18 (Off-the-Record Discussion)

19 Q. (By Mr. Sinkler) Can you testify that the leaking of these windows was
20 due to a design defect? Do you have any experience in the design of windows such
21 that you can testify to that?

22 A. No, sir, I have not designed a window such as that. But what I can
23 testify to is, under a simple water test, the miter joints leaked both inboard and
24 outboard of the nailing pin fairly early in the life of the window.

25 Q. But windows will get wracked in shipments sometimes or wracked in —

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1 in installation and — do they not?

2 A. They could.

3 Q. Yeah. So there could be other causes of the — of the leak other than a
4 design defect; isn't that correct?

5 A. Could be.

6 Q. All right. And — and so that means there could be other causes other
7 than a manufacturing defect?

8 A. It could be.

9 MR. SINKLER: Okay. That's all I have. Thanks.

10 (Brief Pause)

11 (Off-the-Record Discussion)

12 MR. SINKLER: Just one moment.

13 Q. (By Mr. Sinkler) All right. I have Page 21 of your deposition —

14 A. Yes.

15 Q. And your deposition is numbered two ways; it's numbered pages and
16 containing additional pages. This is actually Page 49 of your deposition.

17 A. Okay.

18 Q. All right. You were asked, "Anything else wrong with the installation of
19 the windows in your opinion?" Your answer, if you would read that?

20 A. It says, "Well, when we took the windows out and we put the pan
21 flashing in, the windows were an exceptionally tight fit; it means that they were
22 setting the windows back in, it was difficult to take the windows out and in was
23 difficult (phonetic), even with fairly thin copper flashing because it's such a tight fit.
24 And that's because you reduce the width of the windows by the additional flashings
25 and pan flashings that we put in."

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ROA261

1 Q. And that's so — so, you can square the windows — you can square the
2 windows and shim (phonetic) them; is that right, or you're supposed to?

3 A. Uh-huh (affirmative).

4 Q. But you think — think most windows allow for a flashing gap around the
5 edges so, one, you can square the windows and shim them. And, in this case, a lot
6 of the windows were very tight, so, it was difficult to put them in, right?

7 A. And that's when we did the repairs.

8 Q. Okay, yes.

9 (Brief Pause)

10 Q. And, then, Mr. Gibbs said, "Well, other than that, then, it complies with
11 the requirements for installing windows as to ..." and you said, "That's right." Well,
12 you said, "I don't think so. I don't think it does because the installation of the
13 windows requires a gap around them to allow you to square them and shim them"?

14 A. That's correct.

15 Q. So — and this didn't allow that, right?

16 A. Not once we were putting the pan flashing back in. It was a tight fit.

17 Q. Uh-huh (affirmative).

18 (Brief Pause)

19 MR. SINKLER: I don't have anything further, Your Honor.

20 THE COURT: Any redirect limited to what he went into?

21 MR. IMHOFF: Yes, Your Honor.

22 Redirect Examination by Mr. Imhoff:

11:35 A.M.

23 Q. Mr. Still, did the tight fit of the original window installation cause the
24 window to leak?

25 A. Not that I'm aware of.

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ROA262

1 Q. Did it have anything to do with the necessary repair to the damaged
2 pan flashing and the stucco?

3 A. No.

4 Q. Mr. Still, when you investigated and did your water testing on the
5 windows, were there other forensic engineers there?

6 A. There were.

7 Q. Did they also participate and observe your testing?

8 A. They did.

9 (Whereupon, Plaintiff's Exhibit 8 was marked for identification.)

10 Q. (By Mr. Imhoff) I'm going to hand you Plaintiffs' Exhibit Number 8.

11 (Exhibit handed to the witness.)

12 Q. What is that, Mr. Still?

13 A. It is group of pages starting with Page 5 through it looks like 9, but 9 is
14 covered up. And the title of it is "CSE Reported Findings" and its Construction Site
15 Engineering. And they were there during the testing.

16 Q. Who specifically for Construction Site Engineering?

17 A. Martin Phillips.

18 Q. Do you know Mr. Phillips?

19 A. I do.

20 Q. And have you worked with Mr. Phillips before?

21 A. I have.

22 Q. What type of work does Mr. Phillips do?

23 A. About the same thing I do. He does a lot of forensic evaluations.

24 Q. On occasion, do you read and review investigations and reports done
25 by other forensic engineers?

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ROA263

1 A. Absolutely.

2 Q. Do you read and review those reports to help you develop an
3 understanding of the issues and your opinions as to either defects for repairs?

4 A. Yes.

5 Q. Did you consult with Mr. Phillips about these windows?

6 MR. SINKLER: If Your Honor please, I object to any testimony
7 that he's going to give that relates to what Mr. Phillips told him. He can bring
8 him in as a witness if he wants, but I'm going to let that in at this time.

9 THE COURT: All right. So far I haven't heard that question asked
10 yet.

11 MR. IMHOFF: And may I respond, Your Honor?

12 THE COURT: (Nods affirmatively.)

13 MR. IMHOFF: Your Honor, and that's why I'm laying the
14 foundation. Mr. Still just testified that he relies on investigations, reports,
15 works done by other engineers to help develop his opinion.

16 And this is in his file and helped him develop his opinion for the defects
17 and also the scope of repair, Your Honor.

18 THE COURT: That's not in the record yet.

19 MR. IMHOFF: I thought — I thought I just asked — I'll ask him that
20 again.

21 THE COURT: You haven't — you haven't asked him anything
22 about this report.

23 MR. IMHOFF: Okay.

24 Q. (By Mr. Imhoff) Mr. Still, have you read and reviewed Mr. Phillip's
25 report?

1 A. I have.

2 Q. Okay. And did you use that in any way to help you develop your
3 opinions as to the water leaking or the repair?

4 A. I think it was a confirmation of where we found leaks. I don't know that
5 I used it specifically to create the repair package.

6 Q. Do you, in developing your opinions, utilize a scientific method?

7 A. Yes.

8 Q. Okay. And is part of a scientific method that, whatever the test is, can
9 be recreated or redone by someone else?

10 A. Yes.

11 Q. Does this report help you to confirm your findings using a scientific
12 method?

13 MR. SINKLER: I object to this. He's saying — getting into the
14 report into evidence when — when the author of the report is not present.

15 MR. IMHOFF: I'm just trying to lay a foundation, Your Honor, so,
16 that I can, then, move for this —

17 THE COURT: All right.

18 MR. IMHOFF: — and Mr. Sinkler can object to it.

19 THE COURT: All right. My understanding is expert witnesses can
20 take a look at any number of things that are hearsay, that are third party, that
21 are hearsay upon hearsay or hearsay information that ordinarily would not be
22 presented to prove the matters — the truth of the matters that — that they
23 contend to be.

24 But expert witnesses can also educate the trier of fact as to what forms
25 the basis of their opinions. I would — if — if he goes down that road, and if

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1 you ask him those questions, I would only accept that information for that very
2 limited purpose of that this was something that he looked at in forming his
3 opinion.

4 I would not accept it for the purposes of saying that the opinions in
5 there are valid.

6 **MR. IMHOFF:** Okay.

7 **THE COURT:** Okay.

8 **MR. IMHOFF:** Thank you.

9 **Q.** (By Mr. Imhoff) Did you use this, at least partially, to help you arrive
10 and confirm your opinion?

11 **A.** Yes. Mr. Phillips was there when we were doing the testing.

12 **Q.** And did Mr. Phillips share the opinion that the windows were defective
13 and causing leaking?

14 **A.** Yes. His comment was the windows were leaking.

15 **MR. IMHOFF:** Your Honor, at this time, I would ask to move into
16 evidence Exhibit 8.

17 **MR. SINKLER:** What is that? Is that the report? I -- I object unless
18 he offers ----

19 **THE COURT:** I -- I will -- I will sustain the objection. It's -- the
20 report is just going to be redundant on what he's just testified to.

21 **Q.** (By Mr. Imhoff) In your opinion, Mr. Still, what caused the water or
22 allowed the water to get into this home which necessitated all of these repairs then?

23 **A.** Well, the primary problem is the failure of the intersecting joint, the
24 miter joint, in the windows. There are other areas that are defects because of
25 flashing that fills the roof to wall intersections (phonetic), but the -- if you look at

1 photographs, where the damage occurs, it occurs at corners, the bottom corners of
2 the windows.

3 And, in all of those cases, when we looked at it to see which ones were
4 in place, so the barrier between the stucco and the window was there, and the
5 testing proved that the miter corner joints leaked under very little pressure.

6 (Off-the-Record Discussion)

7 (Brief pause while document shown to Mr. Sinkler.)

8 (Whereupon, Plaintiffs' Exhibit 9 was marked for identification.)

9 (Exhibit handed to the witness.)

10 Q. (By Mr. Imhoff) All right. Mr. Still, I've now handed you Defendant's
11 [sic] Exhibit Number 9, which is your Pages 23 through 28. Does that show the
12 damage and the location of damage which was caused by the leaking windows?

13 A. It does.

14 MR. IMHOFF: Your Honor, we would ask that Exhibit Number 9
15 be moved into evidence at this time.

16 THE COURT: Any objection to these new pictures?

17 MR. SINKLER: I don't have -- what -- what pages -- let me what
18 pages.

19 MR. IMHOFF: Pages 22, 23, 24, 25, 26, 27, and 28.

20 MR. SINKLER: Are those pictures you took?

21 A. Yes, sir.

22 MR. SINKLER: All right. Well, I don't have any objection to those.

23 THE COURT: All right. Without objection, they'll be Defense 9.

24 Q. (By Mr. Imhoff) All right. And Mr. Still --

25 THE COURT: Plaintiffs' 9, sorry.

1 (Whereupon, Plaintiffs' Exhibit 9 was admitted into evidence
2 without objection.)

3 MR. IMHOFF: I'm sorry.

4 Q. (By Mr. Imhoff) Mr. Still, you were asked about foundation
5 waterproofing and leaking in an elevator shaft?

6 A. Yes, sir.

7 Q. Okay. Do you understand that, that was repaired by Mr. Gilliam's
8 Construction?

9 A. That is my understanding, yes.

10 Q. And that was not part of the repair that was paid for by the Ables or
11 overseen by you?

12 A. That is correct.

13 Q. And doesn't have anything at all to do with this window leaking issue,
14 does it?

15 A. It does not.

16 MR. IMHOFF: No further questions, Your Honor.

17 Recross Examination by Mr. Sinkler:

11:44 A.M.

18 Q. In your deposition at Page 62, Mr. Gibbs was talking about the report of
19 Mr. Phillips (phonetic); is that right?

20 A. I don't know. I can't read that.

21 Q. He said it was according to the report (inaudible)?

22 A. Let's see... June 28th, 2004, yes, sir.

23 Q. Okay. And down at Line 16 — excuse me, at Line 10, Mr. Gibbs reads
24 you his first sentence at Page 4 of 4.

25 THE COURT: Let me just interject. I — I did not let the report in.

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ROA268

1 If you're going to ask him questions about the report, Mister — Mr. Imhoff
2 would have the ability to get the report in.

3 MR. SINKLER: Well, I — I just asked him in his deposition if he
4 was referring to Mr. Phillips' report. And he's — he's saying ---

5 THE COURT: But I — I just want you to be sure you understand
6 what my ruling is. I'm only viewing the existence of that report as being
7 something that this expert did in his investigation. I'm not considering the
8 substance of the report.

9 So, if — if you go now into the substance of the report, then, he — then,
10 we're going to be here even longer because Mr. Imhoff, then, has the ability to
11 go into the substance of the report.

12 (Brief Pause)

13 MR. SINKLER: It's not worth it.

14 THE COURT: I mean, I -- I just want to be clear. I mean, I'm
15 willing to let you do it, but I just ---

16 MR. SINKLER: That's okay.

17 THE COURT: I — I accepted it only for a limited purpose.

18 (Brief Pause)

19 MR. SINKLER: I don't have anything further.

20 THE COURT: Okay. Thank you, sir. You may step down.

21 (The witness complied with the request.)

22 THE WITNESS: Thank you.

23 MR. IMHOFF: Your Honor, just for timing, I think we're going to
24 call Ms. Thomas, which will probably be 15 minutes, maybe — maybe five.

25 THE COURT: Whatever.

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ROA269

1 MR. IMHOFF: Okay.
2 THE COURT: I'll be here all day and tomorrow.
3 MR. IMHOFF: Okay. We call Ms. Cindy Thomas, Your Honor.
4 (Off-the-Record Comments)
5 (Whereupon,

6 CINDY THOMAS
7 having been first duly sworn, testified as follows:)

8 Direct Examination by Mr. Imhoff: 11:47 A.M.

9 Q. Good morning, Ms. Thomas.
10 A. Good morning.
11 Q. Would you, please, state your full name for the record?
12 A. Cynthia Lynn Thomas.
13 Q. All right. And where do you work?
14 A. Nationwide.
15 Q. Okay. And what do you do there?
16 A. I'm an insurance adjuster.
17 Q. And is — and — and when — doing your job, you have numerous files,
18 too many I think you told me before; is that right?
19 A. I would never say that, no.
20 Q. Okay. All right. Is one of your files *Nationwide vs. Gilliam Construction*
21 — I'm sorry — *Nationwide and Gilliam Construction vs. Eagle Windows*?
22 A. Yes.
23 Q. Okay. And when did you take that file over?
24 A. In March of 2006.
25 Q. Okay. And does that happen regularly that you get files after they've

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1 been opened and handled by someone else?

2 A. Yes.

3 Q. Okay. And do you look in the file and read the file to bring yourself up-
4 to-date on what's happening?

5 A. Yes.

6 Q. Okay. And, in this case, do you understand, after your review of the
7 file, what happened in the litigation *Able vs. Gilliam Construction*?

8 A. Yes.

9 Q. What is your understanding of that litigation?

10 A. It was litigation brought by a homeowner against the contractor who
11 built the home. And it actually was resolved prior to my coming aboard. The — the
12 homeowner's claims against the contractor had been resolved.

13 Q. Okay. And do you recall the forum for that litigation; Circuit Court,
14 arbitration, some other forum?

15 A. No, I don't. Sorry.

16 Q. All right. In your review of the file, did you see that Eagle Windows was
17 invited to participate in that first case?

18 A. Yes.

19 Q. Okay. Do you — in your review of the file, did you — were you able to
20 determine whether or not they did participate in that first case?

21 A. Well, if by participating, you mean paying anything, then, they did not.

22 Q. Okay. All right. And, then, did you authorize the institution of this
23 contribution action?

24 A. Yes.

25 Q. Okay. In your review of the file, did you see that the original litigation

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ROA271

1 between the Ables and Gilliam Construction was settled?

2 A. Was what?

3 Q. Settled.

4 A. Yes.

5 Q. Okay. And what were the terms of that settlement?

6 A. Do you mean the amount?

7 Q. Yes.

8 A. Well, Nationwide paid two hundred thousand (\$200,000). And Mr.
9 Gilliam paid ten thousand (\$10,000) in cash and, then, waived twenty-six thousand
10 (\$26,000), which -- twenty-five by eighty-three (\$25,083) and some change, he
11 waived that amount that was due back to him by the Ables.

12 Q. Okay. And, in exchange for those payments, was Mr. Gilliam and
13 Nationwide Insurance Company able to obtain a release from the Ables?

14 A. Yes.

15 MR. IMHOFF: May I approach, Your Honor?

16 THE COURT: (Nods affirmatively.)

17 Q. (By Mr. Imhoff) I'm going to hand you Plaintiffs' Exhibit Number 4.
18 (Exhibit handed to the witness.)

19 Q. Do you recognize that exhibit as the release in this case?

20 A. (No Response)

21 Q. I'm sorry, in the *Able v. Gilliam Construction* case?

22 (Brief pause while witness reviews documents.)

23 A. Yes.

24 Q. All right. And, in that release, does it indicate that Nationwide
25 Insurance Company and Gilliam Construction would be paying two hundred and ten

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1 thousand dollars (\$210,000)?

2 (Brief pause while witness reviews documents.)

3 A. Yes.

4 Q. Okay. Did Nationwide have an insurance policy with Gilliam
5 Construction?

6 A. Yes.

7 Q. Okay. And did, at some point, Gilliam Construction put Nationwide on
8 notice of the claim being made by the Ables?

9 A. Yes.

10 Q. Okay. Did Nationwide hire defense counsel?

11 A. Yes.

12 Q. And did defense counsel, in your review of the record, report back to
13 Nationwide?

14 A. (No Response)

15 Q. Provide status updates, litigation updates?

16 A. Not this record, but, yes.

17 Q. But it did?

18 A. Yes, yes.

19 Q. Okay. And, based upon the insurance contract with Gilliam
20 Construction, and the advice of counsel, did Nationwide determine that the best
21 course of action was an attempt to settle the case?

22 A. Yes.

23 Q. And, again, how much did Nationwide pay?

24 A. Two hundred thousand (\$200,000) to the — to the Ables.

25 Q. And, in addition to the two hundred thousand (\$200,000) and the ten

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1 thousand dollar (\$10,000) check, what more did Gilliam Construction give as
2 consideration for that release?

3 A. The — he — the twenty-six thousand dollars (\$26,000) that was due to
4 him, he forgave or waived it.

5 MR. SINKLER: I — I object to that on the — on the grounds that
6 the document speaks for itself. And they're trying to interpret the document in
7 a way that's not consistent with what the document says.

8 THE COURT: All right. Well, she's already testified to it before.
9 Why are you going back through it again?

10 MR. IMHOFF: Well, I'll — I'll move on, Your Honor, but the
11 document does speak for itself.

12 Q. (By Mr. Imhoff) In your review of the file, did you understand that the
13 terms of the settlement included that Gilliam Construction would waive approximately
14 twenty-five (\$25,000), twenty-six thousand dollars (\$26,000) in money owed to them
15 by Mr. Able?

16 A. Yes.

17 Q. And that was part of the terms of the settlement?

18 A. Yes.

19 Q. Okay.

20 (Brief Pause)

21 Q. In addition, does the release also release any claims —

22 MR. SINKLER: Object to that. Ask — ask her a question what —
23 what does it do, not tell her what it does. Leading.

24 THE COURT: All right. You want to —

25 MR. IMHOFF: I'll — I'll — I'll try to change my question.

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1 THE COURT: Okay.

2 Q. (By Mr. Imhoff) Do any of the terms of the settlement discharge any
3 liability of Eagle Windows?

4 A. (No Response)

5 MR. IMHOFF: May I approach, Your Honor, and help?

6 THE COURT: (Nods affirmatively.) But the document — I mean, I
7 agree; both of you have said the document is going to speak for itself. So why
8 — I'm wondering why we ask this witness if she knows what's in the
9 document.

10 (Brief Pause)

11 MR. IMHOFF: Well, crossing "I's" and dotting "t's" I suppose.

12 THE COURT: I understand. That's what lawyers do; they cross
13 "I's" — cross "t's" and dot "I's." Okay.

14 Q. (By Mr. Imhoff) Do you understand that the settlement agreement
15 discharges any liability of Eagle Window?

16 (Brief Pause)

17 A. Yes.

18 Q. Okay. And Eagle Window did not — did not participate in that
19 settlement?

20 A. That's correct.

21 Q. Okay. And is the basis of the contributions suit — what is the basis,
22 then, for the contribution suit we're here for today?

23 A. To try to recover money back from them.

24 Q. From Eagle Window?

25 A. Yes.

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1 (Brief Pause)

2 Q. Do you recall when that contribution lawsuit was filed?

3 A. I think in 2006, later — later on in 2006. If not — if it wasn't 2006, it
4 was in early 2007.

5 (Brief Pause)

6 MR. IMHOFF: Okay. I don't have any further questions for Ms.
7 Thomas at this time.

8 Cross Examination by Mr. Sinkler:

11:54 A.M.

9 Q. You're — you're not suggesting that Eagle Windows was the only
10 Defendant in that contribution suit, are you?

11 A. No.

12 Q. There were a bunch of Defendants, weren't there?

13 A. There were a couple.

14 Q. Well, you had the stucco applicator, correct?

15 A. Yes.

16 Q. They paid you forty-one thousand dollars (\$41,000)?

17 A. Yes.

18 Q. Did you give any of that back to Mr. Gilliam?

19 A. Actually, yes.

20 Q. You gave them some of it too?

21 A. I'm sorry?

22 Q. Did you give Mr. Gilliam any part of that?

23 A. Oh, yes.

24 Q. Of the forty-one thousand (\$41,000)?

25 A. Yes.

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ROA276

1 Q. How much did you give him?

2 A. I believe it broke down to fourteen percent (14%).

3 Q. Fourteen percent (14%)? All right. And you had the seller of the
4 windows and -- and the -- the owner of the seller, correct?

5 A. Right.

6 Q. And you got twenty-one thousand dollars (\$21,000) from them?

7 A. It was twenty-four (\$24,000).

8 Q. Twenty-four (\$24,000); excuse me. That's right, twenty-four thousand
9 (\$24,000). And did you give some of that to Mr. Gilliam too?

10 A. Yes.

11 Q. Okay. And how about -- your -- your -- your complaint alleges that
12 Architectural Products, Incorporation, was a Defendant too. And that was -- that
13 was the -- that was the original owner of Eagle, right?

14 A. I don't know the answer to that question. I don't recall.

15 Q. You don't know -- I mean, you -- you know that this is -- you under --
16 you know that this -- after -- this occurred back in 2000, right?

17 A. I'm sorry?

18 Q. You know that this -- this -- the problems arose from construction
19 which was ended in about 2000?

20 A. Right, yes, sir.

21 Q. All right. At a time when the Eagle that you're suing now was -- was
22 not involved; you know that?

23 A. I can't say that I agree with that.

24 Q. You don't understand that?

25 A. I do not.

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1 Q. All right. How about Harbor Plastering (phonetic) and Charles Gold
2 (phonetic)?

3 A. I believe that's the stucco applicator we just talked about.

4 Q. Okay. And the -- that the installation guy was a -- was a fellow named
5 Gary Churchill?

6 A. Okay.

7 Q. He was a part of it too, was -- was he not?

8 A. Well, we only collected from the plastering and, then, the distributor
9 because those were the only ones, other than you guys, that we felt we needed to.

10 (Brief Pause)

11 Q. So you -- you sued -- sued them, but you didn't go after them?

12 A. Oh, well, I mean, discovery -- that's why discovery -- that's why we
13 have that discovery process.

14 Q. If Mister -- if Mr. Churchill had money, would you have gone after him?

15 A. I -- I don't remember the details as to why the others we did not collect
16 from them.

17 MR. SINKLER: Okay. Thank you.

18 THE COURT: Any redirect limited to what he went into?

19 (Brief Pause)

20 MR. IMHOFF: No, Your Honor.

21 THE COURT: Thank you, ma'am. You may step down.

22 (The witness complied with the request.)

23 (Brief Pause)

24 MR. IMHOFF: Your Honor, the last thing I think I have left to do is
25 move in the Joint Exhibits which have been stipulated to.

1 THE COURT: What are those?

2 MR. IMHOFF: Those were — those were the things that we didn't
3 put in the trial of this case because we stipulated that they were —

4 THE COURT: They dealt with the other issue?

5 MR. IMHOFF: Yeah, the successor liability issue, yes, Your
6 Honor.

7 THE COURT: Okay. As far as any other testimony that's going
8 to be received, I have now received it all?

9 MR. IMHOFF: Yes, Your Honor.

10 THE COURT: Okay. And you all — and am I correct, you all
11 don't have any witnesses; is that correct?

12 MR. SINKLER: No, sir, no, sir. And, if that — if that closes their
13 testimony, I just — what I'll make is a — is a — is a request for a directed
14 verdict at this point or — and/or reconsideration of his motion for summary
15 judgment.

16 And — and I understand we'll deal with that this afternoon or maybe
17 later?

18 THE COURT: That was my — my suggestion was going to let's
19 do it this afternoon and have lunch first.

20 MR. SINKLER: Whatever.

21 THE COURT: All right. And, yeah, if we've — if we've received
22 all the testimony that's going to be received, and, then, all of the exhibits that
23 you all have submitted previously, you all are agreeing that I can receive that,
24 then, I would suggest let's break for lunch and come back and — and receive
25 the arguments on the other stuff and anything else you want me to hear as

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ROA279

1 far as arguments after lunch.

2 MR. IMHOFF: Great.

3 MR. SINKLER: Fine. Thank you, sir.

4 THE COURT: Okay. Let's try to get back together maybe 1:30?

5 MR. SINKLER: Fine.

6 MR. IMHOFF: Your Honor, I guess when I — when I close and I

7 rest I supposed I — I was to make a directed verdict motion there also. And

8 I'm not sure if he rested, but I guess I'll renew my — my directed verdict if he

9 rested also.

10 THE COURT: Okay.

11 MR. IMHOFF: Just for the record.

12 THE COURT: All right. Everybody's rested. We'll — we will hear

13 the motions when we come back.

14 MR. IMHOFF: Thank you, Your Honor.

15 MR. SINKLER: Thank you.

16 THE COURT: Thank you.

17 (Off-the-Record Comments)

18 (Whereupon, a lunch recess was taken from 12:02 p.m. until 1:32

19 p.m.)

20 THE COURT: All right. We'll go back on the record. I am ready

21 to receive the arguments. Who would like to go first?

22 MR. SINKLER: I would assume that the — the — I — I would

23 assume the burden is on him to establish this and not for me —

24 THE COURT: Okay.

25 MR. SINKLER: --- to establish.

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ROA280

1 THE COURT: All right.

2 MR. IMHOFF: Your Honor, I — and I think I that I can simplify it
3 and hopefully make this efficient.

4 I have introduced six (6) exhibits, which I would like — or we did I
5 guess the joint exhibits.

6 (Brief Pause)

7 MR. IMHOFF: May I hand them to you?

8 THE COURT: (Nods affirmatively.)

9 MR. IMHOFF: Your Honor, we — we think that, based upon the
10 Supreme Court's rulings in this case, *Nationwide vs. Gilliam*, *Simmons vs.*
11 *Marklift* and the *Brown* case, that this is a successor liability case.

12 And based on those documents, which I'll go through in just a moment,
13 that it is clear that Eagle Windows and Eagle Windows are predecessor and
14 successor companies and a mere continuation. And the reason for that
15 belief, and the reason that we don't think that there's any more evidence
16 necessary, are those documents.

17 And, if we may go through them, Your Honor, if you look at Plaintiffs'
18 — I'm sorry -- Defendant's responses to Plaintiffs' Requests for admissions
19 first — and, I'm sorry, when we numbered them, I did not number mine.

20 THE COURT: All right. You — I'm looking first at Plaintiffs'
21 Responses to Requests for Admissions?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: Okay. That is Joint Exhibit Number 1.

24 MR. IMHOFF: Excellent. If you look at that exhibit, Eagle has
25 admitted, in response number 4, that Mr. Beeken was the president of Eagle

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1 and Taylor Company, doing business as Eagle Window & Door, from 2000
2 until approximately May 6th, 2002.

3 He, then, says — they go on — and I need to go down a couple of
4 sentences, Mr. Beeken was, then, the president of Eagle Window & Door,
5 Inc. continuously after May 6th, 2002.

6 And — and, Your Honor, the asset sales, the requests to admit — well,
7 let me — let me keep going on, Your Honor. Let me show you a couple of
8 other things before I do that.

9 If you look at the affidavit of Steven Perry, Your Honor, which is now
10 stipulated and admitted into evidence ----

11 **THE COURT:** That is Joint Exhibit Number 2.

12 **MR. IMHOFF:** Excellent. And, if you look at Number 11, Your
13 Honor, within that affidavit —

14 **THE COURT:** Who is Steven Perry?

15 **MR. IMHOFF:** Mr. Perry was a — I believe, a director of a
16 company called Linsalata.

17 **THE COURT:** Co-president and senior managing director?

18 **MR. IMHOFF:** Yes, Your Honor.

19 **THE COURT:** Okay.

20 **MR. IMHOFF:** And Number 11, "The closing of the assets
21 purchase was scheduled to be held on May 6th 2002."

22 (Brief Pause)

23 **MR. IMHOFF:** Are — are you with me?

24 **THE COURT:** I'm with you now. Thank you.

25 **MR. IMHOFF:** Okay. On that date, after consummation of the

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1 purchase, by payment of the agreed sales price, Mr. Perry issued a
2 resolution, on behalf of Eagle Window & Door, Inc., removing all existing
3 officers..." — which is only him — "...and appointing the following officers..."

4 And you see there are one, two, three, four, five, six, seven, eight, of
5 them, Your Honor. This is actually done — and I'll show you a document in a
6 minute — there is a company which was sold on May 6th, 2002, called Eagle.

7 There was a company that bought the assets on May 6th, 2002, which
8 was called EWD Acquisition, Incorporated, which stands for Eagle Window &
9 Door.

10 And on May 6th, after EWD purchases the assets of Eagle, as you see
11 in the footnote here, of those officers, one, two, three, were all Linsalata
12 people while the rest were former officers of Eagle and Taylor Company
13 doing business as Eagle Window & Door.

14 The test for mere continuation is that there is a continuation of the
15 same entity, Your Honor. And that test, at least to this point, is whether the
16 officers, directors, or shareholders are the same in the predecessor and the
17 successor corporation.

18 (Brief Pause)

19 MR. IMHOFF: And, if I may, Your Honor, maybe I need to go
20 back a little bit more. I — I know that you've looked at the file. But just so
21 that you understand — and, again, the website has also been entered — and
22 we'll talk about that in a minute — from Eagle.

23 Eagle, in some form or another, has been an autonomous fenestration
24 (phonetic) manufacturer. I've learned that in the course of lit — litigation.

25 THE COURT: A what?

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ROA283

1 MR. IMHOFF: Fenestration I believe.

2 THE COURT: Fenestration? Okay.

3 MR. IMHOFF: Windows, trim, building products, materials. And,
4 in their own marketing material, they essentially say that they have been out
5 in Iowa building these windows, doors, and those types of things,
6 autonomously for a century.

7 And, every now and then, someone will come along and they will buy
8 up their shares, but they will essentially leave them alone.

9 And, in the 80's or 90's, that happened a couple of times, including by
10 a company called American Architectural Products Company.

11 And, as I understand it, American Architectural Products Company, did
12 that with a lot of different manufacturers. Unfortunately, for American
13 Architectural Products Company, that company, the parent company of
14 Eagle, got into financial trouble.

15 And, when they got into financial trouble, the parent company, AAPC,
16 went into bankruptcy.

17 They had very few assets, as you can imagine. There were a lot —
18 they were in bankruptcy, so, they had a lot of liabilities.

19 One of their shining stars, their assets, was this Eagle company, out in
20 Iowa, that built these windows that were sold to Phil Gilliam and Rob Able
21 and, then, put in the house that we were talking about earlier today.

22 Thereafter, to get some assets into the bankruptcy estate, Eagle was
23 auctioned off. Linsalata came along and had the highest purchase price.

24 And a judge, in the Northern District Bankruptcy Court of Ohio,
25 approved the sale of those assets and put some very self-serving language

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1 into that bankruptcy sale, asset sale, which our Supreme Court has now said
2 does not prevent us from bringing this.

3 But essentially what happened is this: The folks at Linsalata opened a
4 corporation in Delaware called EWD Acquisition Corp. or Inc. EWD
5 presumably standing for Eagle Window & Door.

6 On May 6th, the shares were transferred from Eagle, through American
7 — or AAPC to Linsalata. And they were moved from this fictitious entity,
8 Eagle, into EWD Acquisition.

9 EWD Acquisition — and I'll — I'll give you the document here in a
10 minute — then, immediately reappointed all of the same officers and changed
11 its name back to Eagle with absolutely no interruption in the design,
12 manufacture, marketing, advertising, or sale of the exact same products from
13 the exact same company, with the same parking lot, same machinery, same
14 employees, and everything else.

15 Our Supreme Court has said that doesn't particularly concern us.
16 We're not going to look at there's product line exceptions and some of the
17 things in Justice Burnett's dissenting opinion in the *Simmons Marklift* case.

18 What they say matters is a continuation of the predecessor
19 corporation. And a continuation of the predecessor corporation is shown by
20 continuity of ownership and direction; officers, directors, shareholders.

21 In this case — and the reason that all of this is being submitted to you
22 through these documents is there really isn't a disagreement between Mr.
23 Sinkler and myself about those facts; that those officers continued in their
24 role.

25 He will argue that it's an "or" instead of an "and" I assume. That is at

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ROA285

1 least what I have read. But —

2 **MR. SINKLER:** No, an "and" rather than an "or."

3 **THE COURT:** Yeah. I was going to say, he's going to argue ----

4 **MR. IMHOFF:** Okay, "and." I'm sorry. I — I -- I think that's one,
5 misinterpretation of the law; and two, extremely unfair and clearly not what
6 our — at least Justice Burnett would want done — but what I think the
7 Supreme Court would want done.

8 This is clearly a mere continuation of the exact same company. It had
9 different folks that had — took a hands-off approach to managing the
10 company or owning the company — I'm sorry — but the same people were
11 managing the company.

12 And let me show you a couple other things, Your Honor. In — in the
13 affidavit of Andrew Wickham (phonetic) ----

14 **THE COURT:** Joint Exhibit Number 3.

15 **MR. IMHOFF:** — the corrected affidavit of Andrew Wickham; I
16 apologize.

17 Again, Mr. Wickham is instrumental, as you see here, in the first
18 couple of paragraphs, Four specifically, "He was very much involved in the
19 effort to attract a purchaser for the assets, carry — as to Eagle, but actually
20 owned by Eagle and Taylor, which in turn was wholly owned by AAPC.

21 As you see from the previous document, Your Honor, Mr. Wickham is
22 the controller for Eagle pre-bankruptcy, looked for the purchaser, and, then, is
23 the controller for Eagle post-bankruptcy.

24 **(Brief Pause)**

25 **MR. IMHOFF:** Your Honor, if you will look to the answers to

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ROA286

1 Plaintiffs' Interrogatories provided by Eagle Window ----

2 (Brief Pause)

3 THE COURT: Joint Exhibit Number 4?

4 MR. IMHOFF: --- in Number 11 ----

5 THE COURT: Number 11 in that one?

6 MR. IMHOFF: Yes. On Page 8 it starts, Your Honor.

7 (Brief Pause)

8 THE COURT: Okay.

9 MR. IMHOFF: And I asked about the former and present
10 shareholders, directors, officers, number of employees, et cetera. And I
11 didn't get all of that information.

12 But what I did get, again, as you see, is David Beeken, Andrew
13 Wickham, as the comptroller instead of president. The comptroller or
14 controller, Ronald Vander Weerd (phonetic), the vice-president of
15 engineering and quality assurance, Charles Daoud (phonetic) executive vice-
16 president, Stephen Stoppelmoor (phonetic) vice-present of finance.

17 If you -- if you look further down, Your Honor, to Number I believe 13
18 in those answers, "Does this Defendant, either now or in the past,
19 manufacture the same or similar products to the products installed in the
20 Ables' home? "Yes. It produces aluminum clad wood windows and doors."

21 (Brief Pause)

22 And, if I can -- I apologize, I missed it.

23 (Brief Pause)

24 MR. IMHOFF: If you'll look at 15 in the affidavit of Steven B.

25 Perry, Your Honor ----

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ROA287

1 (Brief Pause)

2 THE COURT: Number 15?

3 MR. IMHOFF: Yes, Your Honor, Steven B. Perry.

4 THE COURT: Joint Exhibit Number 2, Number 15? Okay.

5 (Brief Pause)

6 MR. IMHOFF: You will see that those same — same gentlemen
7 become owners in Eagle Window & Door. I don't know what "Holding
8 Company" is; I've never seen that before, but, again, Eagle Window & Door.

9 As you see, David Beeken is there, Charles Daoud is there Ronald
10 Vander Weerd is there. Andrew Wickham is there. Charles Daoud is — is
11 also on the next page.

12 They now have ownership interest, Your Honor. They are also owners
13 of the company that it is the successor.

14 THE COURT: What do those numbers represent, the number of
15 shares?

16 MR. SINKLER: Yes, sir.

17 THE COURT: Okay.

18 MR. IMHOFF: I'm not sure exactly where it is, but David Beeken,
19 who is the president — again, he is the president prior to bank — prior to the
20 bankruptcy and the sale. He is the president after the bankruptcy and the
21 sale.

22 He also becomes a director of the successor corporation, Your Honor.
23 And I believe that's either in —

24 THE COURT: Number 13 above?

25 MR. IMHOFF: Thank you, Your Honor. You have studied the

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ROA288

1 case. Your Honor, I'd like to also point to the Application for Amended
2 Certificate of Authority from the Secretary of State of Iowa.

3 (Brief Pause)

4 MR. IMHOFF: Do you have that, Your Honor?

5 (Brief Pause)

6 THE COURT: I do.

7 MR. IMHOFF: All right. And that, as you can see, is the
8 corporation that is EWD Acquisition Company. That's this corporation that
9 was made up out of thin air in Delaware to -- to purchase these assets.

10 As you see, what they've done here is they've now changed it to Eagle
11 Window & Door, Inc., or back to that.

12 (Brief Pause)

13 MR. IMHOFF: I don't -- I don't see a date on here. It was filed
14 June of 2002.

15 So the sale happens May 6th, 2002, Your Honor, and by June they're
16 changing the name so the corporation has the exact same name as it did
17 before.

18 So there's no interruption to any purchaser or marketer or distributor --
19 distributing or manufacturer.

20 If you look to the third page of that -- well, I'm sorry, Your Honor, let's
21 stay where we are -- at number 7, the names and business addresses of the
22 current directors and officers. And it says see attached officers, directors,
23 buyers (phonetic).

24 And you go over to the third page and there they all are again, the
25 same group; Beeken, Daoud, Stoppelmoor, Vander Weerd, and Wickham. I

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ROA289

1 can't remember if Taylor (phonetic) was one or not. But, anyway, those.

2 And it says, "Names and business addresses of the current directors
3 and officers." You've got president, executive vice-president, vice-president
4 of finance, vice-president of engineering, and the controller, all pre- and post.

5 And, Your Honor, it's -- I've lived with the case now for seven, eight
6 years, something like that. And I just wanted to show you what it looks like
7 (retrieves document).

8 And I'll hand this up so you can follow along, Your Honor.

9 (Document handed up.)

10 MR. IMHOFF: But what the operation of this company looks like
11 pre-bankruptcy and post-bankruptcy. This says, as you can see at the top,
12 on May 6th, 2002.

13 Not May 6th and, then, May 7th; this all happens on May 6th of 2002.
14 Eagle Taylor, doing business as Eagle Window & Door, Inc., is run by David
15 Beeken, the president; Charles Daoud, the executive vice president; Stephen
16 Stoppelmoor, the vice-president of finance; Ronald Vander Weerd, the vice-
17 president of engineering, and Andrew Wickham, the controller.

18 The assets are, then, transferred, in the asset transfer from the
19 Bankruptcy Court, and that exact same day, these folks are installed as EWD
20 Acquisition Corp's president, executive vice president, vice-president of
21 finance, vice-president of engineering, and controller, on the same day.

22 There was no interruption at all in the operation and the continuation of
23 this company.

24 I don't know, if these are all of the officers, but when you have the
25 president and the vice-presidents and the controller, I would say that, that is a

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1 substantial control of the company.

2 In addition to that, as you can see down here, David Beeken becomes
3 a director within — well, within a year certainly. Within a month and a half,
4 EWD changes the name back to Eagle Window & Door, Inc., which is exactly
5 how they were operating prior to the bankruptcy and asset sale.

6 And, then, each one of these folks here owns an interest in the
7 successor corporation. They become owners.

8 Now, Your Honor, why all of that is important is because I think — I
9 believe that the Court would take this particular situation and the facts in this
10 situation and apply it to *Brown* and apply it to *Simmons* to find that this is a
11 mere continuation.

12 I think one, based on the law as it is seen in here today; officers,
13 directors, or shareholders. I think there are as many cites in those cases to
14 "or" as there are to "and." For whatever reason, our Courts uses — uses
15 them interchangeably.

16 "And" and "or" certainly in most cases doesn't mean the same thing.
17 But it appears to me — and certainly in — in Justice Burnett's very, very long
18 analysis of this, he uses "or."

19 Specifically Justice Burnett says that the most conservative and
20 traditional test, the one that's been used for eighty years, is officers, directors,
21 shareholders. He says that's the old test; that's the traditional test that has
22 not harmed (phonetic) and doesn't comport with modern principles of product
23 liability law.

24 I don't know, if you've read the entire thing, but it was actually very
25 good I thought.

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ROA291

1 THE COURT: It was long.

2 MR. IMHOFF: I'm sorry?

3 THE COURT: It was long.

4 MR. IMHOFF: It was long, but I thought it was a good analysis of
5 it. And he says we've got to bring our laws up-to-date.

6 Now, the — the — the majority doesn't do that, but they don't say he's
7 wrong. They just say, "We're not doing that." "It's a certified question. We're
8 not going to go look at if we're going to lose — use the products line — lines
9 test or we're going to use any of these other tests. We're just going to leave
10 it on *Brown*."

11 But in his dissent he says "or." The traditional test, the old test is "or."
12 And, if it's "or," Your Honor, then, we have absolutely met the burden.

13 Not even we've met the burden. It's clear that the officers are the
14 same pre and post asset sale.

15 Now, one of the other things that I found interesting was in Mr.
16 Sinkler's brief as Exhibit A. He actually sent the Court an order from the
17 *Simmons* case where the certified question is taken and applied to the facts
18 in the *Simmons* case.

19 And, in that order — and I don't know if you've had a chance to read it
20 or not — but on both Page 3 and 7 the Court states, "Prior to that pre-asset
21 (phonetic) order, neither Terex nor Lift Industries had any business
22 relationship with Mark. There had never been any commonality of officers,
23 directors, or stockholders between Mark."

24 And, then, it talks about, after the September 30th, 1992 California
25 plant closure, only three former Mark employees, none of whom were officers

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1 or directors, continued to work for Terex.

2 The reason I think that's important is, although the Supreme Court
3 answered the certified question, this Court was looking at facts beyond and in
4 addition to just officers and directors.

5 And what they found in that order is that it truly was an asset sale; that
6 the company bought the assets. They removed all of the officers, all of the
7 directors, all of the shareholders, all of the employees, Your Honor, except for
8 three;

9 And closed the plant, moved to the other side of the country, and set
10 up shop with a completely new cast of characters and a completely new
11 plant.

12 And that's what the Court is analyzing in this *Simmons* case, those
13 things. And clearly in this case that didn't happen. Everything continued.

14 There was no interruption of service. No one received notice that
15 Eagle wasn't Eagle any more and they were no longer liable or going to
16 handle warranties.

17 Additionally, Your Honor, on Page 7 of that same order —

18 (Brief Pause)

19 MR. IMHOFF: Oh, I'm sorry. I'm off track a little bit.

20 (Brief Pause)

21 MR. IMHOFF: Well, that — that, Your Honor, is essentially where
22 we are. What we have is an old case which doesn't say — I think the *Brown*
23 case — which doesn't say what mere continuation is.

24 And, then, we — we have the Court going back to the mere
25 continuation doctrine as something that's alive, well, and good. And it's

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1 something we're able to use in this, but it doesn't give a whole lot of clarity on
2 what it is, especially in light — as Justice Burnett has said — in light of
3 modern products liability law.

4 But we would submit to you that the facts and equity and the modern
5 direction of successor liability and mere continuation are — are all on our side
6 we believe.

7 We think the Court would look at these facts and say clearly this is a
8 mere continuation of this corporation with the same, again, plant, employees,
9 designs, manufacturing facility, president, vice-president, controller, all the
10 way down.

11 And I didn't — I didn't talk about it, Your Honor, but the websites, Your
12 Honor. I don't — I don't have them in front of me, but I think they're in front of
13 you.

14 **THE COURT:** They are Joint Exhibit 5.

15 **MR. IMHOFF:** You know -- yes. Well, I have — I mean, I have
16 read them many, many times. You don't even have to take my version of the
17 mere continuation.

18 If you read their own marketing materials, they've been around for a
19 hundred years making essentially the same products that they've always
20 made.

21 David Beeken, their president, has navigated them through their
22 parent company's bankruptcy. Linsalata is taking a hands-off approach and
23 giving them complete autonomy.

24 And they're in the same place making the same products, again, that
25 they've always been made so a consumer who owns or purchased Eagle

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1 Windows, don't worry; we're still here. We've been around for a hundred
2 years; we're a stable company.

3 Unless, Your Honor, your windows leak, in which case we are not us
4 anymore. But it doesn't say that in their marketing material.

5 What it says is, "Trust us. Buy from us. We've been around for a
6 century and we'll continue to be here."

7 Thank you, Your Honor.

8 **THE COURT:** Let me ask you a question: Are you going to
9 argue the other part of the case as well or ---

10 **MR. IMHOFF:** What is the other part of the case, Your Honor?

11 **THE COURT:** The one we did this morning.

12 **MR. IMHOFF:** Oh, would you like a closing argument on that?

13 **THE COURT:** Yes.

14 **MR. IMHOFF:** Now — now?

15 **THE COURT:** I mean, would you want to come back to that?

16 **MR. IMHOFF:** Yes, sir.

17 **THE COURT:** Do you think that would be — we should do it
18 separately? We might be here ---

19 **MR. IMHOFF:** I'm happy to do it however the Court would like me
20 to.

21 **THE COURT:** Well, I'll tell you what. Let's — let's go ahead and
22 address this issue. And, then, let's come back because I would like for you
23 all to also argue what we did this morning.

24 **MR. IMHOFF:** Okay.

25 (Brief Pause)

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ROA295

1 THE COURT: Yes, sir?

2 (Brief Pause)

3 MR. SINKLER: Your Honor, in order to understand this, you --
4 you have to know why in the world they have a test. The test is to -- is to
5 make sure there is no bankruptcy fraud.

6 What they don't want is for the selling company to, in effect, become
7 part of the purchasing company. And -- and in so doing cheat their creditors
8 out of money.

9 So the test is to check and see what kind of relationship there was pre-
10 bankruptcy between the selling corporation, which is AAPC; it was AAPC.

11 It owns -- owns all of Eagle Window & Door, which was doing
12 business as Eagle Window, Inc.

13 So you got the selling company, who has got those two entities under
14 it, but -- but owns total control. And, then, you got the purchasing company,
15 which is Linsalata, through it's wholly owned subsidiary, EWD.

16 Now, what the Court wants to know is whether there's some sort of
17 commonality of ownership between those -- those entities pre-bankruptcy.
18 Post-bankruptcy, nobody is going to pay for a -- for a company like this
19 unless they continue to run it.

20 And you're going to continue to run it with the same employees.

21 There's no question about that.

22 And -- and that -- and I've cited many cases, in addition to *Simmons*
23 and *Walton* (phonetic) and *Brown* and Judge Perry's (phonetic) decision,
24 which I have.

25 And if you -- if Your Honor would like to read that, I think it's instructive

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1 because he had no trouble at all finding that pre-bankruptcy there was no
2 commonality of ownership. And, therefore, what they did after bank — the
3 bankruptcy was of — of no matter.

4 In other words, it was — it was a — an arm's length transaction. And
5 — and that's what they're looking for.

6 Now, if the Supreme Court found that Terex did not have any business
7 relationship with Mark — now that's — that's in the *Simmons* case.

8 THE COURT: The *Simmons* case? All right.

9 MR. SINKLER: They say "Terex did not have any business
10 relationship with Mark until purchasing its assets in the bankruptcy court
11 auction. There had never been — or there had never been any commonality
12 of officers, directors, or stockholders between Mark and Terex."

13 Well, in this case, the question is whether there had ever been any
14 commonality of ownership between Linsalata and its subsidiary, EWD and
15 AAPC, which was wholly owned by Eagle Window & Door.

16 And I gave you three affidavits saying there was no such commonality
17 of office — of the officers, employees, or stockholders pre-bankruptcy. And
18 that's the only thing we've got to prove.

19 He's got to prove that, that's not true. And he hasn't offered any
20 evidence to do that.

21 THE COURT: So you want me to look and focus on Linsalata
22 and AAPC?

23 MR. SINKLER: You've got to because the — the Supreme Court
24 says that it's predecessor and successor. And, if you look at the — if you
25 look at the asset purchase agreement, which is attached to my first brief --

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1 which I believe you have — in my first memorandum.

2 I had a memorandum and a supplemental memorandum and, then,
3 I've sent another one which is — which it just deals with what happened with
4 Judge Cutt (phonetic).

5 But you have to — but in the Supreme Court opinion and the *Walton*
6 opinion, in fact, says — and I quoted it in — in my memos — that you have to
7 look to the predecessor and the successor corporations to determine whether
8 there's any commonality of ownership.

9 And there's no question but that the Supreme Court defined that as
10 "and" and not "or." And that's what they say. They say, "We refuse to allow it
11 in anything — any cases other than those where they have the same
12 employees, officers, and stockholders."

13 And there was absolutely no connection between AAPC and its wholly
14 owned subsidiary and Linsalata and its corp — its corporation, EWD. And
15 that is — and that is all there is to it.

16 You -- they're not trying to keep the company from running obviously.
17 You don't pay sixty-five million dollars for a corporation that you don't plan to
18 run.

19 And you don't run it with other officers when you've got officers that
20 are doing a good job running it. So you hire them after the bankruptcy.

21 And that's what's happened in so many cases. And, if you look at — at
22 some of the cases that I have cited in the supplemental brief or the
23 supplemental memo, you'll see cases from all other jurisdictions.

24 There are very few — there are very few jurisdictions that accept the —
25 what — what Judge Burnett was — was — Judge Burnett was — was arguing

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1 in favor of. And Mr. Imhoff has spent a good bit -- deal of time arguing
2 about that in Court.

3 And -- and Justice Pleicones and -- suggested that it isn't appropriate
4 to -- to argue dissent when you've got a -- a four-judge majority that says
5 something else.

6 So I've got -- I've quoted the language. And post-bankruptcy, you're
7 obviously are going to hire the -- the people that run the company. You're
8 going to do everything you can to keep the company going. And that's --
9 that's -- there's nothing wrong with that.

10 The -- the bankruptcy judge found that it was an arm's length
11 transaction for value. They paid cash, which is important, because
12 sometimes they -- they'll try to use stock or something like that. They paid
13 cash for it.

14 And, then, after they had done that, they hired everybody or most of
15 the people that were running the company and kept it going. And ultimately
16 sold it to Anderson.

17 But what the Court was worried about is bankruptcy fraud. And there
18 wasn't any in this situation.

19 In the Virginia case which I sent, I sent it to you because Judge Perry
20 (phonetic) cited with approval in his opinion. And it, in effect, says that, if you
21 have an arm's length transaction, you don't even -- you don't even raise the
22 issue of whether or not it's a -- a commonality of ownership because there's
23 no fraud.

24 (Brief Pause)

25 MR. SINKLER: I could -- the memo that -- the cases in favor of

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1 Judge Pleicones, and I -- and in all of mine -- in the memorandum, the first
2 memorandum, and in the supplemental memorandum and in the one I sent
3 -- that I thought I sent on the 5th, but I sent last evening or yesterday before I
4 left Charleston.

5 And that one shows the various Courts that have considered it and --
6 and the importance being only that there's some sort of fraud. Otherwise,
7 there's nothing wrong with the continuation of the operation of the company.

8 **THE COURT:** So are -- are you suggesting that -- that I read
9 these cases? That I -- that I'm actually determining successor liability; that
10 there has to be a showing of fraud before you actually apply those tests?

11 **MR. SINKLER:** That -- well, there has to be -- what has to
12 happen, for that test to apply, is that the -- the old corporation, which was
13 wholly owned by AAPC, is actually involved in and owns part of the new
14 corporation and all that.

15 And that never happened. That's what you got to show.

16 **THE COURT:** So there's no need -- but I thought -- I thought
17 you were arguing that -- that I needed to look to see if there was a fraud
18 being committed?

19 **MR. SINKLER:** No, because the -- the only evidence in the case
20 is that there was no fraud. That there was -- that they paid full value.

21 And I cited that in my brief and -- and given the citation of the -- of the
22 order of the bankruptcy Court that held that. And there -- there's no question
23 that it was a arm's length transaction and a -- and a legitimate sale.

24 **(Off-the-Record Discussion)**

25 **MR. SINKLER:** Judge Perry's -- do you have Judge Perry's

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1 decision? It is attached to one of my memos.

2 THE COURT: I do.

3 MR. SINKLER: Okay. Well, he — he had no trouble with what the
4 — with what the test was. And — and he cites with approval the Virginia case
5 that I talk about —

6 THE COURT: I have that as well.

7 MR. SINKLER: — that, in effect, says the — if it's an arm's
8 length transaction and a bone fide sale you — you don't even get to the
9 question of whether or not there's commonality of ownership.

10 But, on the issue of commonality of ownership, there was non pre—
11 pre-bankruptcy.

12 THE COURT: Doesn't that sort of fly in the face of what our
13 Supreme Court has already ruled in *Nationwide vs. Eagle Window*, what I'll
14 call Nationwide-Eagle One where they said, "Well, no, you got — we're going
15 to send it back down because we're going to take a look and see whether or
16 not one of the *Brown* test can — can establish —

17 MR. SINKLER: No, all — all they say is that — that, if you can
18 satisfy one of the three tests enun — enunciated in — In *Brown*, you may —
19 they may be liable.

20 But they can't — they can't do that because they cannot show any
21 commonality of ownership between the successor and the — the predecessor
22 and the successor. You've got to be able to show that.

23 THE COURT: Well — and I understand that, but — but you keep
24 bringing up this issue of fraud. And I'm not —

25 MR. SINKLER: Well —

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ROA301

1 **THE COURT:** I just — I understand — if I understand your
2 argument correctly, that you're presenting to me through — through what
3 Judge Perry did in the — in the *Harris* (phonetic) case from Virginia, that the
4 policy reason why you have this avenue, this vehicle, that — that gets you
5 past the bankruptcy courts because you want — you don't want to have rules
6 of court that promote fraud.

7 And so I understand — I believe I understand that argument. But, in —
8 in — in the first *Nationwide vs. Eagle Window & Doors* case, they don't
9 mention the — the fraud. They just set out, "Okay. We're going to send it
10 back down to see if one of the four tests that were set forth in *Brown* would
11 apply here."

12 And one of the tests that they said would be the successor is a mere
13 continuation of the predecessor. And I've — I've — I've never read that, for
14 that test to apply, I've got to go and find fraud.

15 I thought that test was a test that the Supreme Court had established
16 as a way to say, "Okay, if you've got these facts, and these facts are
17 established, then, we're going to let the — go ahead and let liability attach."

18 And that's sort of like that a — a — that test is — it's sort of like the way
19 that you measure. You're not going to require a party, who has been injured,
20 who is being denied their ability to pursue a lawful claim, is not going to be
21 told, "You can't pursue that claim unless you are able to present to a Court
22 the ability to establish fraud has been committed."

23 I think what our Supreme Court has said is that "We're going to allow
24 that — we're going to allow you, injured party, who is being denied your right
25 to come to court to have your injury addressed, we are not going to require

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1 you to show fraud that would be committed through the bankruptcy court."

2 We're going to say that "We will allow you to continue your ability to
3 pursue that case if you can meet one of these four tests in *Brown*."

4 One of these four tests in *Brown* is — is to establish the successor is a
5 mere continuation of the predecessor.

6 MR. SINKLER: All right. And, in — in — in doing that, you've got
7 to establish that there's — two corporations pre-bankruptcy ---

8 THE COURT: Commonality?

9 MR. SINKLER: — had — had the commonality of ownership.

10 THE COURT: Right.

11 MR. SINKLER: And they cannot do that. It's not there. They —
12 they cannot satisfy that test. There is no other test. That's — that is the test.

13 THE COURT: Okay.

14 MR. SINKLER: But I'm just saying that the — the — the — a lot of
15 the cases refer to if — if — if — for instance, if Eagle and Taylor had survived,
16 which it couldn't — it couldn't do because, under 14.2 of the asset purchase
17 agreement, it had to give up all its names that — that had anything to do with
18 Eagle.

19 And so ---

20 THE COURT: It does sounds like that bankruptcy order was
21 actually just drafted in a way just to just eliminate successor — successor
22 liability without actually taking a look at, you know, is this going to be a
23 continuation of the company?

24 I mean, it sounds to me like that's ----

25 MR. SINKLER: No, no ---

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ROA303

1 **THE COURT:** — that's approaching that fraud element where —
2 where the ---

3 **MR. SINKLER:** No.

4 **THE COURT:** — where bankruptcy court may be —

5 **MR. SINKLER:** No.

6 **THE COURT:** — you know, not by design of the bankruptcy
7 judge but maybe got used?

8 **MR. SINKLER:** Well ---

9 **THE COURT:** Because it doesn't sound like Eagle, the company,
10 the asset that was owned by the parent company, was ever in any type of
11 financial distress.

12 **MR. SINKLER:** It doesn't matter. It doesn't matter. It was wholly
13 owned by AAPC. It didn't have any other ownership. AAPC had every right
14 to — to sell that company in bankruptcy.

15 And you — you have a totally new company coming from Ohio that
16 was buying it with no prior connection with — with any of that.

17 So, if — if you apply the test, you don't have to — it doesn't have to be
18 fraud, but you to, in effect, have the — the predecessor continuing on in — in
19 the successor. And you don't have that in their ownership.

20 **THE COURT:** I think the strength of your argument, from where I
21 sit, is getting me to focus on the two corporations. I don't think your argument
22 has strength as to whether or not Eagle, this company, that's located in Iowa,
23 was a continuation from the early/late 1900's — I mean 1990's or 2000's to
24 2003, 2004, 5, 6, or even today ---

25 **MR. SINKLER:** Of course ---

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ROA304

1 THE COURT: --- because that company is still there.
2 MR. SINKLER: Of course.
3 THE COURT: That company is still being operated in the same
4 fashion today as it was then, with the same directors.
5 MR. SINKLER: Exactly.
6 THE COURT: Okay.
7 MR. SINKLER: That's why they paid sixty-five million ---
8 THE COURT: And that's why ---
9 MR. SINKLER: --- dollars for it.
10 THE COURT: And that's why the strength of your argument
11 should focus me on those two corporations because I'm of the belief, based
12 upon what's been presented so far, is that this is, in fact, a continuation.
13 Now, legally, can it be a continuation for purposes of his client being
14 able to maintain a liability suit? I don't know yet.
15 MR. SINKLER: Well ---
16 THE COURT: But the company factually is a continuation. Oka.
17 MR. SINKLER: And there's nothing wrong with it, in post-
18 bankruptcy. If it is a --- a continuation, that's fine.
19 There's nothing wrong with that. That's what you --- that's what you
20 pay sixty-five million dollars for.
21 If --- if they --- if it hadn't been for that, they wouldn't have bought the
22 thing. And that's what the Supreme Court was trying to guard against
23 because they want the bankruptcy sales to be successful so that the creditors
24 can get their money.
25 And, in this corporation, the only --- the only real asset they had was

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1 Eagle and Taylor.

2 THE COURT: And — and so you want me to focus on those two
3 corporations?

4 MR. SINKLER: The Supreme Court wants you to focus on those
5 two corporations. They say — they say you got to — you got to focus on the
6 predecessor and successor.

7 And the predecessor is the AAPC because it totally owns Eagle
8 Window & — Eagle Taylor Windows. And the — the successor Linsa — Linsa
9 — Linsalata through EWD.

10 So there's got to be some commonality of ownership between those
11 two corporations. And — and you — you can't do like Judge Cutt said and
12 consider just the — whether — whether or not there's a — a continuation
13 because that's what they were arguing before Judge Burnett.

14 Of course, it's a continuation. That's why they paid sixty-five millions
15 for. That's no joke.

16 And, I mean, I — I — I put in all the stock they got and everything else.
17 And there's nothing wrong with that. And —

18 THE COURT: That's why I — I wanted to be sure I understood
19 your argument because I don't — I don't read what — that he has to establish
20 there's a fraud being committed.

21 MR. SINKLER: No, no, he has — all — what he has to establish is
22 that there commonality of ownership between those two entities. And, if he
23 can't do that, that's the end of it.

24 THE COURT: Okay.

25 (Brief Pause)

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ROA306

1 **THE COURT:** He wants to — did — I'm sorry. Were you
2 finished?

3 **MR. SINKLER:** Yes, sir, I'm finished.

4 **THE COURT:** Well, why do you want me to deviate from
5 focusing on — I mean, I know why; you — you want — well, you want a good
6 result. But, I mean, where — what can you direct me in — in the law that —
7 that says that he is incorrect that you're actually having me to focus on the
8 Eagle Windows before and then they go through the asset purchases;

9 They go through bankruptcy. And, then, all of a sudden somehow
10 there's Eagle Window that comes out afterwards. But there's these in
11 between businesses and corporations that — that I — that this test is
12 supposed to apply to.

13 **MR. IMHOFF:** Well, that's correct, Your Honor. But what I'm
14 relying on is the law. And what the law says is officers, directors, or
15 shareholders.

16 If you get rid of officers and directors, then, they're sup — superfluous.
17 There's no reason to have officers and directors in that test if the only
18 requirement is ownership. Why is it in there at all? Why has it been in there
19 for 50 years?

20 The reason that it's in there and has been for 50 years is because
21 officers and directors continue the company. And because the test isn't just
22 ownership, just shareholders, it's directors and officers also.

23 And that's what you have in this corporation. In this corporation that
24 made the defective windows, which is why we're here, the president at the
25 time they were made, marketed, shipped, sold to my client, was David

1 Beeken. And David Beeken is still the president today. That's a mere
2 continuation.

3 And that is one of the three words that Justice Burnett uses, the
4 Supreme Court uses; officers, directors, and shareholders.

5 And I think it's an equitable and a fair result, Your Honor. I think you
6 hit it earlier when you said this bankruptcy order is bordering on fraud. I said
7 earlier it's a —

8 THE COURT: I didn't say that.

9 MR. IMHOFF: It's — I — I — I heard that maybe, Your Honor, in
10 my — in my head. It is extremely self-serving. And, of course, it was written
11 up and presented to the judge by the asset purchasers.

12 THE COURT: My — my point in — in saying that was that I was
13 trying to see where he was going. I — I have heard from his argument that I
14 had to — that I had to find fraud.

15 MR. IMHOFF: Yeah.

16 THE COURT: But I did not read the test from *Simmons* as saying
17 that, in order for it to be a continuation or not to be a continuation, that I have
18 to find that there is or is not a fraud being committed.

19 Otherwise, I've got to go take a look at that bankruptcy order. And I've
20 got to figure out what was their motives in doing the things they do.

21 I don't read *Simmons* like that. I read *Simmons* as setting — setting
22 out the test.

23 MR. IMHOFF: And here's the test — and, Your Honor, the only
24 place in the opinion — opinion, the sentence directly above "Discussion"
25 says, "There has never been any commonality of officers, directors, or

1 stockholders between Mark and Terex." And that's the exact same quote that
2 is used by Judge Perry to dismiss it; it's "or."

3 And those two words have to mean something. And I think what it
4 means is that we are going to look to the facts of each situation. We're going
5 to apply principles of equity and fairness.

6 And that's why you have a mere continuation — a mere continuation
7 doctrine at all, for situations exactly like this, where nothing really has
8 changed for these folks based on their own literature.

9 That's what I think the law is, is I think that, if you continue — if Ford
10 Motor Company buys back all their shares today, and I own shares, and,
11 then, they sell all their shares on the open market tomorrow, is that an
12 ownership change that, then, bars me from — if my — my Pinto blows up
13 from suing Ford?

14 And that's essentially what they're saying. That Ford, all their
15 factories, all their employees, all their presidents, officers, directors, products,
16 designs, all of that is the same.

17 But don't look behind that curtain, Your Honor. What we want you to
18 look at is these two companies that left Eagle completely alone and are
19 autonomous out there in Iowa to do what they want.

20 And that's — that's why I think that, that language is in there, is equity
21 and fairness; it gives the Court the opportunity to apply principles of equity
22 and fairness;

23 That, if you are going to — as Justice Burnett said — a great quote in
24 there — but, if you're going to take the good with the bad, the history, the
25 good will, the marketing, then, you also have to take the responsibility for

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ROA309

1 those products out there if you're going to continue doing the exact same
2 thing with the same folks.

3 And, again, I'm — I'm starting to probably repeat myself, but going
4 back to what I said initially is that's the language of the test; officers and
5 directors are included. And — and that's why I think they're included.

6 Otherwise, you have to look completely — you — you have to — to
7 wipe those two things out to read that sentence. And that's what we've
8 proven that the officers are.

9 As a matter of fact, one of the directors is the same. And they all end
10 up with stock ownership in the company.

11 **THE COURT:** All right. But you keep arguing Justice — Justice
12 Burnett's dissent. Justice Burnett's dissent was not recognized by the other
13 four justices.

14 Now they reference it in a footnote and he gets very — he's lengthy in
15 — in what he writes and sets forth the reasons why he should be right, but
16 that — but the reason he should be right, that's not what the Supreme Court
17 adopted.

18 That's — that's not what came out of *Simmons*. What came out of
19 *Simmons*. What came out of *Simmons* was officers, directors, shareholders.

20 **MR. IMHOFF:** I agree. And I'm — and I'm — and I'm citing some
21 — some of the things in his dissent, not necessarily saying that — that you
22 should apply everything he said. But I think what the — what the — the
23 majority said is, "We're just not going to go that far."

24 He didn't disagree with their ruling necessarily; he just wanted them to
25 go further. And I think specifically says, "We need to provide the buyers of

1 these corporations and these purchasers with some direction here of what
2 they will be responsible for."

3 But I don't think he said they're absolutely wrong; he just wanted it to
4 go further. And, unfortunately, for all three of us as we sit here today, there
5 isn't any more analysis than that.

6 Justice Burnett is the only one who took the time to do that analysis.

7 **THE COURT:** Well it — and the — and the reason I point that
8 out to you is the same reason as I thought he was arguing fraud, you're
9 arguing things that are important to your side that's persuasive; he's arguing
10 things that are important for his side that are persuasive that I don't see as in
11 this test.

12 I don't have to find that fraud is being committed. And I don't have to
13 go back behind these elements and come up with this equitable type of — of
14 decision saying, "Oh, what a grand thing for — for the world this would be if I
15 rule this way."

16 You know, this — this is going to be an officers, directors, shareholder
17 test period.

18 **MR. IMHOFF:** Yeah. And, if that's the test I think — I think that,
19 based on the showing that we've done with the officers, we show the
20 predecessor and the successor had the same officers and potentially the
21 same directors and some of the same shareholders.

22 So we think — so we think that we meet that — that burden.

23 And I would also point out, Your Honor, that the arguments that are
24 being made by Mr. Sinkler are the same arguments, again, that were made to
25 Judge Couch. And I don't know how, at this point, that matters or not. But

1 they were also made to the Supreme Court.

2 THE COURT: Well, I'll — I'll look. The Supreme Court can judge
3 the importance of their arguments to them. But, I — like I said, when we
4 started this case, the things that were presented to Judge Couch I don't
5 consider binding one way or another on me —

6 MR. IMHOFF: Okay.

7 THE COURT: — because I was not going to do a
8 reconsideration; I was just going to take the arguments. Okay. Yes, sir?

9 MR. SINKLER: In the — in the most recent of my memos that I
10 thought I had sent on the 5th but didn't send until yesterday morning actually, I
11 noted that the footnote on Page 215 of — of *Simmons* clearly says that, "The
12 mere continuation exception to the general rule of no liability will only apply..."
13 — and this their Court — "...to cases which there's no such commonality of
14 officers, directors, and shareholders."

15 So that is the test. And it's "and shareholders." And what if — if that's
16 not enough, *Walton* did the same thing in their — *Walton* came up with "and
17 shareholders."

18 I mean, so I don't think there's any question but that the test includes
19 all three.

20 And what I have given you is three affidavits. One — two from the
21 AAPC side, one from the Linsalata side, all of which establish that there were
22 never any — any — any commonality of officers or stockholders or
23 employees pre-bankruptcy.

24 There never — at — at no time was there. And that's the same thing
25 the Supreme Court said in its findings of fact in the *Simmons* case and the —

1 unless he — he can meet that test.

2 I mean, I — I — I gave affidavits. I — I presented the only evidence on

3 that issue. And he's done nothing to repute that other than argue the dissent

4 of — of Judge Burnett that the Supreme Court soundly rejected.

5 I don't think there's any question what the Court would do with this.

6 THE COURT: All right.

7 MR. IMHOFF: Let me ask a question. He just cited from

8 *Simmons* and — and said that it was "and." And I can't find that.

9 MR. SINKLER: It's in the — it's in the footnote.

10 MR. IMHOFF: In the footnote?

11 MR. SINKLER: Well, that's — that's where they make the holding.

12 THE COURT: All right.

13 (Brief Pause)

14 THE COURT: Then, we're through with that issue. Let's —

15 MR. IMHOFF: Your Honor — Your Honor, again, I — the

16 footnote says, "or."

17 MR. SINKLER: No, no, no. I don't know what you have, but it's

18 not — the footnote does not say "or."

19 MR. IMHOFF: I'm reading from *Wes Law*.

20 MR. SINKLER: Well, I don't know about *Wes Law*, but I've got the

21 — let me have it and see.

22 MR. IMHOFF: Okay.

23 (Document handed to Mr. Sinkler.)

24 MR. SINKLER: That's not the footnote.

25 THE COURT: It — it reads both.

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ROA313

1 **MR. IMHOFF:** It does read both, Your Honor. I — I read a little
2 bit further.

3 **MR. SINKLER:** No, because — because I point out in my
4 memorandum that they're quoting — they're really quoting. They don't put
5 quotes around it, but if you look back at Page 7 of Justice — Justice Burnett's
6 — where he's — he's discussing it, it's word for word exactly what the
7 Supreme Court put.

8 They said he — he admits this and, then, they put that in. And, then,
9 they say, "We — we refuse to apply it," and — and intentionally use "and."

10 **(Brief Pause)**

11 **MR. SINKLER:** So, I mean — and, then, *Walton* said the Supreme
12 Court said "and." So, I mean, two — two controlling Courts have held that it's
13 — it's all three.

14 **THE COURT:** All right.

15 **MR. SINKLER:** And — and all — and — and they've all held that
16 the — you've got to look to the predecessor and successor.

17 In — in every case, you — I mean, nobody is going to pay money for a
18 — for a company they're not going to continue to operate. I mean, that's —
19 there's nothing —

20 **THE COURT:** Well, the — the problem with that position —
21 you've said that three times — is that if — if ownership, which is not
22 controlling under successor liability under the State of South Carolina, but, if
23 pure ownership is — is — is the test, then, we would never have successor
24 liability.

25 And our — and our Supreme Court has said we have successor

1 liability if the test from -- from *Simmons* can be met, okay?

2 MR. SINKLER: But the test is the test they lay down.

3 THE COURT: Exactly. It is the test -- the test that they lay

4 down.

5 MR. SINKLER: Yeah.

6 THE COURT: Because I -- both of you are arguing policy

7 positions, when you make that type of statement about no one is going to pay

8 for a company in bankruptcy if they're -- if they're -- if they're not protected

9 from successor liability.

10 The same way he's going to argue, you know, how wrong it is to keep

11 people who have legitimate claims against a corporation that, when they feel

12 like the bankruptcy system is keeping these poor injured people from being

13 able to come to court.

14 Both -- those are policy positions. I think the Supreme Court as set

15 forth a test in *Simmons* that I actually understand.

16 I've got to take a look at the facts that you all have given me to see if

17 that test is met or is not met. I think I understand the positions.

18 But -- and I appreciate the arguments of -- that go beyond which I

19 believe are the test, which are the policy positions against wanting companies

20 to be able to go into bankruptcy and be able to sold.

21 I understand the policy position that Burnett had in his dissent saying

22 you've -- you've got to look at the equities involved. You got to look at the

23 injustice of it.

24 I think I understand those, but I really -- I don't have to look beyond

25 that test that they've articulated.

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ROA315

1 MR. SINKLER: Well ----

2 THE COURT: And you all can argue that to the Supreme Court if
3 you all can get them to clarify things that — that maybe you all think they're
4 unclear — unclear about.

5 But I think the test for me is -- is set forth. I've just got to see if that
6 test is, facts — backed up by the facts that I have.

7 Okay. All right. Tell me about this morning.

8 MR. IMHOFF: Your Honor, the — the evidence that was
9 presented this — this morning is that there is a — a — a joint damage. As --
10 as you can see, Mr. Still indicated was a removal of stucco, fixing these
11 windows, repair to the stucco, those types of things.

12 We brought a contribution action based on that. I think that was -- the
13 case was settled for two hundred and thirty-five thousand dollars (\$235,000).
14 It was a reasonable settlement. The settlement was based on the window
15 issue solely;

16 That — that \$235,000 was either paid or traded; in other words, it was
17 — the amount was reduced because money was owed by the other side.

18 There was evidence submitted that the windows were defective and
19 that the liability was — that Gilliam's liability was based on those defective
20 windows. And that he was required, because he was in arbitration and didn't
21 have any participation with Eagle Windows, to pay \$235,000.

22 And the only evidence that was submitted by the Defendants was
23 cross examination. And the cross examination did not reveal any defects of
24 any of the other prior parties.

25 In fact, one of the questions was about below grade waterproofing.

1 And the below grade waterproofing was done by — if you look at the caption,
2 by Pullman Water Proofing (phonetic) and Dale Coleman.

3 And that issue was resolved by Gilliam. It was not part of the
4 damages that Randy Still and Mr. Gilliam testified about this morning was
5 related to the window leaks.

6 And so that doesn't — that's not a — that's not a common liability with
7 Eagle and doesn't have anything to do with this case.

8 THE COURT: All right. Let me — use this time to educate me if
9 you all would.

10 MR. IMHOFF: All right.

11 THE COURT: All right. You brought — your client brought a
12 action for — to get money from them.

13 MR. IMHOFF: Yes.

14 THE COURT: What did — what you call that?

15 MR. IMHOFF: A contribution action.

16 THE COURT: A contribution action? Okay. Thank you. Tell me
17 what has to be established in the contribution. Like you've got to have this —
18 you all have settled the case. And — and you're responsible for establishing
19 what?

20 MR. IMHOFF: Yes, Your Honor. If I — if I may, I will bring it —
21 relate it to the statute.

22 THE COURT: This is my first contribution case —

23 MR. IMHOFF: Okay.

24 THE COURT: — in my entire career. I've never had one of
25 these.

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ROA317

1 **MR. IMHOFF:** Al. right. The statute, Your Honor, is 15-38-10 and
2 — and in all I think it goes to 60 or 70, but most of it is not relevant. And (b),
3 "The right of contribution exists only in favor of a tortfeasor who has paid
4 more than his pro rata share of the common liability..." It's got to be common
5 liability. "...and his total recovery is limited to the amount paid by him in
6 excess of his pro rata share."
7 **THE COURT:** The amount paid by him in excess of his — of his
8 pro rata share?
9 **MR. IMHOFF:** Yes. And, Your Honor, that is what Mr. Sinkler
10 was arguing this morning about what — what the denominator will be, what
11 the pro rata is. And that's what I was going into just now.
12 **THE COURT:** Okay. So the — the first parameter, though, if I
13 understand what you just read to me, is how much your client paid in the
14 settlement?
15 **MR. IMHOFF:** Yes.
16 **THE COURT:** Okay. And you — you contend it was two, thirty-
17 five?
18 **MR. IMHOFF:** Yes, sir. It — it was two, thirty-five.
19 **THE COURT:** All right.
20 **MR. IMHOFF:** And, then ---
21 **THE COURT:** And how much — how much do you believe that
22 the evidence has established that they owe you?
23 (Brief Pause)
24 **MR. IMHOFF:** That's a more complicated argument, Your Honor,
25 but —

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ROA318

1 THE COURT: Well ---

2 MR. IMHOFF: Well, you're going to have to ---

3 THE COURT: --- that's what you're asking me to find out.

4 MR. IMHOFF: Well, this --- this is --- this is our argument: There
5 is only one Defendant in this case that we brought here today.

6 We originally sued other people, some of who ended up not being
7 responsible; some of who settled out.

8 If you look at --- there's actually more --- more to this statute on how
9 you determine a pro rata share. And I'm certain Mr. Sinkler will argue it. But
10 let me read it to you if I can.

11 15-38-30, "In determining the pro rate shares of tortfeasors, in the
12 entire liability, their relative degrees of fault shall upon not be considered."
13 That's what Mr. Sinkler was telling you earlier this morning.

14 "If equity requires, the collective liability of some group, as a group,
15 shall constitute a single share. Principles of equity --- equitable --- equity
16 applicable to contribution generally shall apply."

17 What we are asking the Court to do is to have two --- two --- two as a
18 denominator, but essentially two pro rata shares.

19 One is the builder and his subcontractors. Two is Eagle. And to split it
20 that way. And I think from \$235,000, the pro rata share would be --- my math
21 is terrible --- a hundred and fifteen thousand (\$115,000), something like that.

22 Their --- I am certain Mr. Sinkler will argue that's not proper. He wants
23 the denominator to be 10.

24 So, if this Court decides that we have jumped through the hoops of
25 successor liability and, then, proving the joint liability, he will, then, want you

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ROA319

1 to divide whatever the \$235,000 or less is by 10.

2 We don't think that's equitable. And we don't think that's right.

3 As I said, some of these defendants have absolutely nothing to do with
4 that common liability. Dale Coleman, Coleman Water Proofing, was not
5 repaired by Randy Still and Blue Ridge general contractors; was not part of
6 the damages that we submitted here today.

7 Therefore, they, along with some of these other defendants, shouldn't
8 even be considered. We think, once we dismissed them, they don't go on the
9 bottom of that fraction as a denominator; they don't count.

10 So that's what we are purposing, that we have — that we had a
11 common liability; that we investigated, defended the common liability; that we
12 settled it reasonably;

13 That we distinguished Eagle's liability, which gives it — which gives us
14 the right to, then, bring the contribution action to have them pay us. And that,
15 that liability pro rata should be judged on a 50/50 percent basis, Your Honor.

16 **THE COURT:** So your client's ability to be in court today is
17 statutory?

18 **MR. IMHOFF:** Yes, Your Honor.

19 **THE COURT:** All right. And the statute that was in effect, at — at
20 the time, then, allows — requires that — that, if someone is in the place of
21 where your client finds themselves, and they've done the things that they've
22 done to resolve a legal dispute, that through the statutes they're able, then, to
23 go and ask for other joint tortfeasors to actually make contributions to the
24 payment?

25 (Brief Pause)

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ROA320

1 MR. IMHOFF: Instruct me what the word "joint tortfeasor" is.

2 THE COURT: Okay. Maybe I didn't — other ---

3 MR. IMHOFF: Other parties with a common liability.

4 THE COURT: Common liability? Okay. Other parties with
5 common liability? Okay.

6 Now, doesn't that require you to — I mean, I heard — how did it get to
7 be 50/50? I'm — I'm struggling to see what evidence that you have that
8 establishes how I draw that 50/50 mark?

9 MR. IMHOFF: Well, there are two. There are two parties. That's
10 where you get 50/50.

11 What — what — what you would do — and this is just what I would —
12 it's also my first contribution case — is you would establish those things that I
13 just talked about; that there's a common liability, which I think we presented
14 evidence about;

15 That there was a settlement. That there was an amount. And, then,
16 that it distinguished their liability. I think you do all of those things.

17 And, then, you divide two — two hundred and thirty-five (\$235,000).

18 THE COURT: And I'm measuring — the two parties that I
19 measure 50/50 are Gilliam and — and ---

20 MR. IMHOFF: Eagle. That's — that's our — so that's ---

21 THE COURT: All right.

22 MR. IMHOFF: I think you find those things first. And I think that
23 comes from 15-38-20.

24 Then, I think you apply — well, I've set it down, but I think it's 30 — 15-
25 38 — yes, 30. Then, you determine who is responsible for what. And I

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ROA321

1 believe that my client has to be responsible for his share.

2 So it says, "In determining the pro rata shares of tortfeasors in the
3 entire liability"; because we have a common liability, and we are both
4 tortfeasors, I think my client has be counted as one.

5 It is our argument that Eagle is counted as one. And, then, your
6 analysis stops there.

7 It's — it's two. In other words, pro rata means one of two. If it's three,
8 then, it would be one of three. If it's four, it would be one of four, and so on
9 and so forth.

10 But we believe, due to the continuation of this, that requires that, "The
11 collective liability of some groups shall constitute a single share," and, then,
12 three, "Principles of equity applicable to contribution generally shall apply,"
13 that it should be two parties instead of — I think Mr. Sinkler is going to argue
14 the entire bottom of the caption, which doesn't make sense at all.

15 And the reason that I think that — well, especially because we didn't —
16 we didn't submit damages here for anything that Coleman did. But that's
17 especially true because, as you've heard Mr. Sinkler eloquently argue, it's
18 AAPC, which is also on the caption. And Windows and Doors Concepts,
19 which is their distributor, is also on the caption.

20 So he's trying — he will argue to dilute his contribution to this
21 settlement by saying, "We're not Eagle." And, then, he is going to say here in
22 a minute, "We're also not AAPC."

23 (Brief Pause)

24 MR. IMHOFF: I — I — I would bet \$15 on that, Your Honor; that
25 he wants to include them even though he has argued that's who they —

1 ultimately would be responsible.

2 THE COURT: I'm on a fixed income. I don't — can't see it.

3 MR. IMHOFF: All right. Well, ultimately — and the reason why is
4 you've got construction issues. The reason I think that — that this common
5 liability should be one group is you've got construction issues, general
6 contractor, and, then, you got product issues, the windows. And that's why I
7 think it should be one and one.

8 THE COURT: All right.

9 MR. IMHOFF: We've also pled pre-judgment interest, Your
10 Honor. I don't know if you want to hear an argument about that.

11 THE COURT: Well, I had noted that because with it being pre-
12 judgment interest, that was — this case was filed in January of 2007.

13 MR. IMHOFF: Yeah.

14 THE COURT: Are you asking for interest — but I thought the way
15 your pleading was — was written it was, from the time the contribution was
16 made, which would have been even before then.

17 MR. IMHOFF: Yes. Yeah, I would say it's from the time of the
18 contribution because I believe we asked them to — to participate. As a
19 matter of fact, I think I was going back and forth with an attorney in Iowa at
20 the time about that.

21 And they — I've gotten the same thing for seven years now I know.

22 THE COURT: That's going to be — I mean, regardless of how
23 much money it is, that's a lot of interest.

24 MR. IMHOFF: Well, it is, Your Honor, but it has been around that
25 long. As you indicated this morning, it's a very, very old case.

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ROA323

1 And we — I don't — I don't believe we've ever asked for a continuance
2 or an appeal. We were happy to come here and try it.

3 It certainly wasn't our delay. I don't think there is anything in the file
4 that would show that we delayed this case for once.

5 (Brief Pause)

6 THE COURT: All right. We may have to come back to that pre-
7 judgment interest thing. Well, Mr. Sinkler has never indicated he wasn't
8 happy to come try this case.

9 (Brief Pause)

10 MR. IMHOFF: Your Honor, there's several — there's
11 continuances right in my folders here for — for Eagle.

12 THE COURT: Yes, sir?

13 MR. SINKLER: I mean, obviously — obviously I've — they brought
14 suit against I think five — five defendants, two of whom have settled. They —
15 they — they still should be in the — be factored into the pro rata liability
16 irrespective of what they settled for.

17 THE COURT: And you say even though they settled or...?

18 MR. SINKLER: Yeah, even though. I mean, they should be
19 considered as — as — well, you've got the Window — Window & Door
20 Concepts, Inc. or as it was sold to Windows. Certainly, they're the — they're
21 in it as much as the — the manufacturer of the windows.

22 And I don't — I don't believe there was any testimony earlier that there
23 was a manufacturing mistake or a design error. So I'm not sure that they've
24 really proven entitlement to collect from the manufacturer.

25 But they've also got the — the — I mean, evidently they're — they're

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ROA324

1 saying all of these people are — are — are joint — are common tortfeasors, I
2 mean.

3 And so you've got the coating on here. It think it's Harbor Plastering,
4 Inc. (phonetic), who put the — I think the shell on the building or whatever.

5 You got the -- you've got the Upstate Waterproofing Company and
6 you've got a fellow named Gary Churchill who did -- installed all of the
7 windows. You've got that many. So...

8 THE COURT: I'm — I'm not seeing Upstate. Where is Upstate?

9 MR. SINKLER: It says "Upstate Waterproofing." It's — it's — it's
10 almost the fourth line up from the bottom.

11 THE COURT: Oh, there it is. Yes, sir. Thank you. I see it.

12 MR. SINKLER: And the way that — that case that we gave you of
13 — of — this morning that — that says it's got to be pro rata.

14 (Brief Pause)

15 THE COURT: The *Southeast Freightline vs. Parson* (phonetic)?

16 MR. SINKLER: Yes.

17 (Brief Pause)

18 MR. SINKLER: And, if — if the Court — I have all three. You
19 know, there were — were a lot of amicus (phonetic) briefs filed and summons.

20
21 I've got them all if — if the Court wants — wants to see them. I mean, I
22 don't know how much you want to go into it.

23 THE COURT: Well, I've got to make a decision and I — I got to
24 make a decision. I mean, I — this is where — this is where — I'll tell you all
25 where I'm already am with this case.

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ROA325

1 The — the testimony was presented to me in a — and convinces me
2 that the windows were defective.

3 The experts, the people who testified, while — while their expertise is
4 questionable, and you questioned them on their credibility, you attacked it. I
5 still — this — that's — that's all that I heard was their testimony.

6 And their credibility is sufficient enough to me and they appear to be
7 credible in court, as well as their — their — their education and experience
8 and the fact that they've worked so much in the industry, that I'm going to
9 consider them as — as experts.

10 And they all testified they felt the windows were defective by not — by
11 having that metal to metal thing that didn't have the — I'm probably not saying
12 it correctly — the glazing or the caulking or the barrier between it. So I —

13 MR. SINKLER: I don't think — I don't think — but I don't think
14 defective because of manufacturing or design. I mean, the —

15 THE COURT: The windows were delivered together. The
16 windows were put together. And they were already together when they were
17 delivered.

18 So I think it is not that difficult of an assumption on my part to say that,
19 that is a manufacturing problem with the windows because they were already
20 together when they — when they arrived.

21 I didn't hear any competing experts, so, I have to — so I — and they
22 were credible enough that I'm going to accept what they testified.

23 If I had heard — if — if I had been presented a — a different expert, or
24 an expert that would explain to me how these people were wrong, I — I might
25 have gone the other way. But I believe that — that — that the windows were

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ROA326

1 defective because windows are not supposed to leak and these windows
2 leaked.

3 So I'm at that point with the case. What I'm trying to get some help
4 with from you all is, okay, what does that mean?

5 I've heard testimony that — that you sued — your client chose to sue a
6 lot of people. That is not present before me today.

7 I've also heard testimony that suggests that there were other problems
8 with the house that's just not the window problems. I heard no real
9 explanation of what — of the few things — of the few people that have settled
10 other than Hobbit (phonetic).

11 Somebody gave me a little bit of information that — that Hobbit had
12 problems with the stucco elsewhere in the house that wasn't window related.

13 So I'm — I'm struggling over how do I apply what little information I
14 have about these other people in making a decision on how do I proportion
15 out this percentage. That's what I'm struggling with.

16 So — I have not reviewed *Southeastern Freight* so maybe that will give
17 me some guidance. But that's what I'm struggling with.

18 (Brief Pause)

19 MR. IMHOFF: *Southeastern* — I'm not sure what that is.

20 THE COURT: *Southeastern Freight*, the case that — that he
21 handed up at the start, *Southeastern Freight vs. The City of Hartsville*
22 (phonetic).

23 MR. IMHOFF: Well, I don't — I don't — I don't believe that will
24 help you with that. But just — this is the first time I've seen it, but I — like I
25 said, I don't — do you believe it helps with the issue?

1 **MR. SINKLER:** With — with the issue of — it certainly establishes
2 pro rata.

3 **MR. IMHOFF:** I mean, just the denominator though, does it help
4 with the denominator, how many? Who?

5 **MR. SINKLER:** I — I'd have to read it again. I haven't read it in a
6 while.

7 **MR. IMHOFF:** In my — my brief review of it, it doesn't help with
8 that.

9 But let me — let me share some information here. And I — I mean, I
10 purposely didn't present that evidence.

11 If — it's — it's Mr. Sinkler's burden to make the denominator what he
12 wants it to be and show that this settlement was based on common liabilities
13 of other parties as I indicated this morning.

14 He either couldn't or didn't do that and didn't present any evidence or
15 testimony to show that the common liability was more than Eagle Windows.

16 Again, I pointed out — and let me tell you who Upstate — let me just
17 go through the caption, Your Honor.

18 And — well, it's not in evidence. Do you want me to tell you who these
19 people are?

20 **THE COURT:** Well, I — well, I'd argue things that are not in —
21 that are not into evidence.

22 **MR. IMHOFF:** I think that a plaintiff has the right to sue and bring
23 into court anyone they want to. And as Ms. Thomas said, there are folks on
24 the caption.

25 Several of them are on there because of Eagle's position that they're

1 no longer equal. And that, that's what the discovery process is.

2 And I — I believe this Court has done it. And I know you can dismiss
3 anyone you want at any time in a lawsuit.

4 I don't — I've haven't heard of a Court saying, "No, no, no, you must
5 bring them or you must bring them." We chose to only bring Eagle.

6 We presented our case, testimony and evidence, that the common
7 liability, the basis for — you heard Randy Still say it, you heard Phil Gilliam
8 say it, the basis for and the necessity of the repair was the leaking windows.

9 If Eagle Windows wanted to present evidence that the repair was
10 necessitated — the settlement was necessitated by someone else, they were
11 welcome to do that.

12 And they didn't. And so the evidence in front of you is, all of it is, that
13 the entire amount, of two hundred and thirty-five thousand dollars (\$235,000),
14 was necessitated because of the windows.

15 And I think that's what you have to consider and have to consider. But
16 that's all you have.

17 And there wasn't anything else except a little bit of cross examination
18 where Mr. Gilliam and Mr. Still disagreed with Mr. Sinkler about these other
19 products.

20 So that's — that's — that's where we stand with that, Your Honor. I
21 don't — I don't believe it is our burden to prove his denominator to lessen his
22 damages.

23 He could have — he — and — and I'm sorry that I'm pointing at Mr.
24 Sinkler. He's just doing his job. Eagle could have done that. I don't mean to
25 point at Mr. Sinkler.

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ROA329

1 **THE COURT:** I don't know. Again, I have not read the statute
2 and I apologize. I probably should have read the old statute before I did the
3 case, but I've been busy with those other issues.

4 **MR. IMHOFF:** But — but — Your Honor, the statute just — I don't
5 think it's going to shed a whole lot of light. And I haven't found a case that
6 will help you with that, or --- or I would have given it to you.

7 But the only Defendant is Eagle Window. And, I think, just in a plain
8 reading of the statute, barring the — I — I don't know what's before you — but
9 barring any other case law that would help this Court, that is how I read it;
10 that is how I presented my case.

11 I do not believe there is case law out there. I think that Eagle Window
12 would have presented you with that case law also if — if it existed.

13 And so I apologize to the Court, but I think that's what you're left with is
14 one Defendant. And — and reading the statute, which says it's pro rata, and
15 there's two of us.

16 **THE COURT:** All right.

17 **MR. IMHOFF:** That's the best I can do, Your Honor.

18 **THE COURT:** Okay.

19 **MR. SINKLER:** There's certainly the windows and the — and the
20 window seller is certainly, and the — the — the installer Harbor (phonetic).
21 And I think the — the one that put the siding on it, who is — the cement or
22 whatever he put on the building.

23 I mean, they — they both settled out. And they were both considered
24 joint tortfeasors. I mean, to a — certainly everybody that he considered joint
25 tortfeasors and brought into this — this action should be part of the equation.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA330

1 THE COURT: Is it your position that — that the — that however
2 many parties he named in the — in his caption, then, that would be
3 mathematically the same?

4 MR. SINKLER: Certainly — certainly those that — that we've
5 mentioned. The — and the installer of the windows.

6 I mean, he alleges that — that they were all joint tortfeasors. And, if
7 they're all joint tortfeasors, I think they've got to be included.

8 (Brief Pause)

9 THE COURT: So, if I'm counting correctly, there are a total of
10 eight (8) different —

11 MR. SINKLER: Well, of course, they've got — they've got
12 corporations. And, then, the man that owns the corporation. I don't know
13 why they did that.

14 I don't — I don't — I don't think you can — I mean, that's sort — sort of
15 double —

16 THE COURT: So there's five (5)?

17 MR. SINKLER: That's what I think.

18 THE COURT: So — so your argument is that it should be 20%
19 with everybody?

20 MR. SINKLER: Yeah, yes, sir.

21 (Off-the-Record Comments)

22 MR. SINKLER: And, of course, Gilliam — Gilliam is one so you've
23 really got six (6) I guess.

24 MR. IMHOFF: Your Honor, there isn't any evidence to — to
25 support that. We've dismissed them.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA331

1 But there is evidence — and this is just one piece that we put in — that
2 Dale Coleman and Upstate Waterproofing, who are part of that six, have
3 absolutely nothing to do with these damages or this settlement.

4 Phil Gilliam fixed that separately on his own dime. It was not in this
5 settlement. It wasn't considered in this settlement. It wasn't part of the Ables'
6 damages. And that's the evidence that you heard.

7 And — and that's why I'm struggling with that as the denominator. I
8 specifically pointed that one out to show that not all of these people on the
9 bottom of the caption have a common liability.

10 Coleman Waterproofing, waterproofing of the below grade cement,
11 had absolutely nothing to do with the window repair and the stucco repair.

12 And so that's one — one showing that they have no business being
13 included in this — as the denominator, as the — as the number. So....

14 THE COURT: All right. Well, I'll have to take a look at who has
15 what burdens and responsibilities in these types of cases.

16 All right. Is — okay. Was that it?

17 MR. IMHOFF: You wanted to bring up the pre-judgment interest
18 again, Your Honor.

19 THE COURT: All right. Tell me about the pre-judgment interest.

20 MR. IMHOFF: Just — just the case on that, QHG of Lake City
21 McCutchin (phonetic) case, which is 360 SC 196 — I'm sorry, I don't have
22 another one.

23 THE COURT: Can you give me that cite again?

24 MR. IMHOFF: Yes, it's 360 SC 196.

25 THE COURT: Uh-huh (affirmative).

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ROA332

1 MR. IMHOFF: Or 600 SE 2nd 105.

2 THE COURT: One oh five (105)?

3 MR. IMHOFF: Yes, Your Honor.

4 THE COURT: All right. Yes, sir?

5 MR. IMHOFF: All right. And it — it — what it says, Your Honor, is
6 — and it's talking about pre-judgment interest and whether — and the test for
7 awarding pre-judgment interest., which is that it's quantifiable.

8 And, as you can see, this is a contribution action. We believe it is
9 quantifiable. And therefore we believe the pre-judgment interest — if they
10 had paid their pro rata share, whatever their pro rata share is, then, there
11 wouldn't be a right to pre-judgment interest.

12 But they didn't. And, therefore, if this Court rules that they could have
13 and should have, and that it was quantifiable in 2006, then pre-judgment
14 interest is — is awardable I guess or should be awarded.

15 THE COURT: Quantifiable meaning...?

16 MR. IMHOFF: In — in — in the case, Your Honor, they don't say
17 you have to have it down to the penny. But they say, if there's some analysis
18 that can be done to determine what it is, it's not — it's in there about
19 liquidated and unliquidated damages —

20 THE COURT: Well, I'd like to know what that analysis is if I'm
21 going to do it.

22 MR. IMHOFF: Well, let me — let me — let me do it, if I can, Your
23 Honor.

24 THE COURT: Because it doesn't seem like — if it's not by
25 statute and it's not mandatory, it seems like I've — I've got to use something

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ROA333

1 and tell me when is justified to be awarded and when it's not justified to be
2 awarded.

3 (Brief Pause)

4 MR. IMHOFF: One moment, Your Honor. I'm sorry.

5 (Brief Pause)

6 MR. IMHOFF: All right. "The law allows pre-judgment interest on
7 obligations to pay money from the time when, other by an agreement of the
8 parties or operation of law, the payment is demandable if the sum is certain
9 or capable of being reduced to certainty."

10 And that's — I guess that's the definition of liquidated. "A claim is
11 liquidated if the sum claimed is certain or capable of being reduced to
12 certainty.

13 "The proper test for determining whether pre-judgment interest may be
14 awarded is whether or not the measure of recovery, not necessarily the
15 amount of damages, is fixed by conditions existing at the time the claim
16 arose." There it is, Your Honor.

17 THE COURT: So, this is — that's not something that you need
18 to — that the statute that you're having me apply? You're just looking at the
19 normal pre-judgment interest statute?

20 MR. IMHOFF: Yes, Your Honor. And — yes.

21 THE COURT: Okay.

22 (Brief Pause)

23 THE COURT: All right. All right, is that it?

24 MR. IMHOFF: Probably not, but I can't think of anything else right
25 now.

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA334

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THE COURT: All right. All right. We'll go off the record.

(Off-the-Record Discussion)

(Whereupon, the proceeding concluded at 3:01 p.m.)

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF \$.75 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT."

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ROA335

REPORTER'S CERTIFICATE

I, the undersigned **PAMELA FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 104, were transcribed by me and represent a true and accurate transcript of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

February 7, 2014

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

ROA336

CONTRACT AGREEMENT

COPY

GILLIAM CONSTRUCTION COMPANY

2000 West Lakeshore Drive
Landrum, SC 29356

(864)457-3299
(864)483-9950

Mr. and Mrs. Renaul Abel
350 Turnberry Drive
St. Louis, MO 63011

SCHEDULE FOR COMPLETION OF WORK:

APPROXIMATE START DATE	6/1/99
APPROXIMATE COMPLETION DATE	6/1/00

DATE	3/22/99
PROJECT NAME	Renaul and Karen Abel
ADDRESS	Lot # 207, The Cliffs at Glassy Landrum, SC 29356
PHONE	314-577-4873
ARCHITECT	Design Basics
ADDRESS	11112 John Galt Blvd. Omaha, NE 68137-2384
PHONE	402-331-9223
LENDER	Branch Banking and Trust
ADDRESS	PO Box 2586 Greenville, SC 29602
PHONE	864-242-8059

Description of Work: Contractor will furnish all materials and perform all labor in a good, workmanlike and substantial manner for the following described project upon the following described property:

Description of Project:

Construction of a custom home to be located upon Lot #207, Lobelia Way, The Cliffs at Glassy. Home is to be constructed in accordance with plans provided by the customer from Design Basics, Plan #2411 as well as the attached specifications dated February 25, 1999.

Description / Location of Property:

Lot #207, Lobelia Way, The Cliffs at Glassy

PAYMENT SCHEDULE:

Owner will pay the Contractor the sum of \$ 699,997.00 in installments as follows:

DATE	AMOUNT OF WORK / SERVICES TO BE PERFORMED	AMOUNT OF PAYMENT
	Deposit of 10% at Signing of Contract	\$70,000.00
	Balance to be paid in monthly draws requested from and approved by financial authority based on labor and/or materials completed and/or stored to date.	

TERMS AND CONDITIONS:

The terms and conditions listed on the attached documents are expressly incorporated into this Agreement, with the exception of the following noted paragraph:

Any additional charges or credits due to changes in the original contract, allowance overages, additional work or items not covered in the original budget will be billed to the customer on a monthly basis due to the fact that the banking institutions will not provide funding other than the original loan amount.

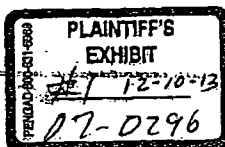
SPECIAL PROVISIONS:

Deposited will be credited back to the customer in the last two draw requests as indicated in the funding disbursement estimates.

ACCEPTANCE OF CONTRACT AGREEMENT:

St. Louis 3/22/99
Contractor Signature Date
SC 13329
Contractors License #

Renaul H. Abel 3/20/99
Owner Signature Date
Karen V. Abel 3/20/99
Owner Signature Date



ROA337

PROVISIONS OF THE CONTRACT AGREEMENT

I. PROJECT PROVISIONS

- a. **Guideline:** The Project will be constructed in strict conformance to the plans and specifications which have been examined and approved by the owner.
- b. **Compliance:** The Project will be completed in strict compliance with all laws, ordinances, rules and regulations of the applicable government authorities.
- c. **Control:** The Agreement, plans and specifications are intended to supplement each other. In case of conflict, the plans will control the specifications and the Agreement provisions will control both.
- d. **Change Orders:** As directed by the Owner, construction leader, public body or inspector, any alteration or deviation from the specifications that involves extra cost (subcontract, labor, materials) will be executed only upon the parties entering into a written change order.
- e. **Allowances:** If the Agreement price includes allowances, and the cost of performing the work is greater or less than this allowance, then the Agreement price will be adjusted accordingly.

II. FINANCIAL RIGHTS AND RESPONSIBILITIES

- a. **Labor and Material:** Contractor will provide and pay for all labor and materials necessary to complete the Project. Contractor is released from this obligation for expenses incurred when the Owner is in arrears in making progress payments.
- b. **Permits:** Contractor will obtain and pay for all required building permits and licenses.
- c. **Taxes, Assessments and Charges:** Taxes, special assessments of all descriptions, and charges required by public bodies and utilities will be paid for by the Owner.
- d. **Deposit of Payments:** Contractor is required to deposit all payments received from the Owner to be used expressly for the construction and expenses directly related to this project. Deposits become the property of the Contractor when they are applied according to the Construction Agreement payment schedule, when a breach of contract by the Owner occurs, or when the Construction Agreement has been substantially performed.
- e. **Bankruptcy:** If either party becomes bankrupt, the other party has the right to cancel this Agreement.

III. OWNER'S RIGHTS AND RESPONSIBILITIES

- a. **Cancellation:** Owner has an unconditional right to cancel the Agreement, without penalty or obligation, until midnight of the third business day after the Agreement was signed. Cancellation must be done in writing. Upon cancellation, any property traded in, any payments made under this Agreement, and any negotiable instrument executed will be returned within 10 business days following receipt by the Contractor of cancellation notice.
- b. **Property Lines:** Owner shall locate and point out property lines to the Contractor. Contractor may, at his option, require the Owner to provide a licensed land surveyor's map of the property.
- c. **Lien:** Failure to pay persons supplying materials or services according to the terms of this Agreement may result in the filing of mechanic's liens on the affected property. Owner has the right to ask the Contractor for lien waivers from all persons supplying these materials or services. In the event any mechanic's lien is filed through no fault of the Owner, then the Contractor agrees to take all steps necessary for the release and discharge of such lien.
- d. **Insurance:** Owner will maintain property damage insurance at least equal to the Agreement price.
- e. **Damage to Project:** Contractor will not be responsible for any damage caused by the Owner, or other causes beyond the control of the Contractor. Owner will pay for any restoration work.


Owners Signature


Contractors Signature

ROA338

IV. CONTRACTOR'S RIGHTS AND RESPONSIBILITIES

a. **Delay:** Contractor will be excused for any delay beyond his reasonable control. These delays may include, but are not limited to Acts of God, labor disputes, inclement weather, acts of public authority, acts of the Owner, or other unforeseen contingencies.

b. **Right to Stop Work:** If any payment under this Agreement is not made when due, the Contractor may suspend work on the job until such time as all payments due have been made. Any failure to make payment is subject to a claim enforced against the property in accordance with the applicable lien laws.

c. **Substitution of Materials:** Contractor may substitute materials without notice to the Owner in order to allow work to proceed, provided that the substituted materials are of no lesser quality than those listed in the specifications.

d. **Salvage:** All salvage resulting from work under this Agreement is to be retained by the Contractor unless other agreements are contained in the written specifications.

e. **Excavation Provision:** Any work necessary beyond the scope of what is visible; unforeseen circumstances such as, but not limited to, underground springs, rock ledges, buried utilities, etc. are not included as part of this Contract Agreement and any work necessary to correct such conditions will be negotiated on an item by item basis.

f. **Insurance:** Contractor will maintain workers' disability compensation insurance for his employees and comprehensive public liability insurance policies.

V. COMPLETION OF PROJECT

a. **Notice:** Owner agrees to sign a Notice of Completion within 5 days after completion of the project. If project passes final inspection and the Owner does not sign the Notice, the Contractor may act as the Owner's agent and sign the Notice.

b. **Clean-up:** Contractor is responsible for removing debris and surplus material from the property, and leaving the property in a neat and orderly condition.

VI. CONFLICT PROVISIONS

a. **Arbitration:** Any controversy or claim arising out of this Agreement that cannot be resolved, is subject to arbitration, with an arbitrator of mutual agreement, and all parties (including Owner, Contractor, Architect and Sub Contractors) are bound to this arbitration. If any party does not appear at arbitration proceedings, the arbitrator is empowered to decide the controversy in accordance with whatever evidence is presented by the party(ies) that do participate.

b. **Attorney Fees:** If either party becomes involved in litigation arising out of this Agreement, the court shall award costs/expenses including attorney fees to the party justly entitled to them.

c. **Limitations:** No actions related to this Project may be made by either party against the other more than 2 years after the completion of work.

VII. GENERAL PROVISIONS

a. **Notice:** Any notice required or permitted under this Agreement may be given by certified or registered mail at the addresses contained in the Agreement.

b. **Prohibition of Assignment:** Neither party may assign this Agreement or payment due under this Agreement without the written consent of the other party.

c. **Qualification:** This document constitutes the entire agreement of the parties. No other agreements exist. This Agreement can be modified only by written agreement signed by both parties.

d. **Governance:** This Agreement shall be construed in accordance with and governed by the laws of the state in which the Project is located.

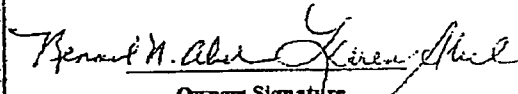

Owners Signature


Contractors Signature

ROA339

VIII. CORRECTION OF WORK

The contractor shall promptly correct any work rejected by the owner as defective or failing to comply to the contract documents whether observed before or after substantial completion and whether or not installed or completed, and shall correct any work found to be defective or nonconforming within a period of one year from date of completion of contract or within such longer period of time as may be prescribed by law or by the terms of any applicable special warranty required by the contract documents. The provisions of this Article 8 apply to work done by subcontractors as well as work done by direct employees of the Contractor.


Owners Signature


Contractors Signature

ROA340

GILLIAM CONSTRUCTION COST ESTIMATE

GCC ACCOUNT #	ITEM DESCRIPTION	COST	
3000	PERMITS/LICENSES	900	
3005	SITE PREPARATION	9422	
3010	FOOTERS/FOUNDATION	38140	
3015	BACKFILL / DIRT		
3020	WATERPROOFING	3280	
3025	TEMPORARY TOILET	900	
3030	CONCRETE SLABS	8465	
3035	EROSION CONTROL	450	
3040	WATER TAP FEE		
3045	TERMITE TREATMENT	800	
4000	FLOOR SYSTEM	9640	
4005	FRAMING	114245	
4010	SIDING	22690	masonry stucco
4015	SOFF FASC. WIND.	6200	
4020	ROOFING	13860	40-year archit.
4025	WINDOWS	32000	allowance
4030	DECKS & PORCHES	23822	courtyard pavers
5000	PLUMBING ROUGH IN	15250	
5005	PLUMBING FIXTURES	9500	allowance
5010	ELECTRICAL ROUGH IN	13530	
5015	ELECTRICAL FIXTURES	8000	allowance
5020	MECHANICAL	24628	4 units gas
5040	INSULATION	4210	
5050	DRYWALL	19450	
5060	PAINTING	24861	
5070	FIREPLACES	9900	pre-fab units
5075	STONE/BRICK	21000	allowance
5080	GARAGE DOORS	3100	
6000	MILL WORK/DOORS	12600	allowance
6005	HARDWARE	2300	allowance
6010	FINISH CARPENTRY	12000	
6020	CABINETS	34025	allowance
6025	C-TOPS, SOLID SURFACE	8800	allowance
6030	CERAMIC TILE, VINYL	6000	allowance
6040	CARPET	10850	allowance
6050	HARDWOOD	17600	#2 red oak
6060	STAIRS	16525	stained, curved
6065	CLOSET SYSTEMS	3500	allowance
6070	APPLIANCES	7900	allowance

Revised Estimate for The Abels, Lot 207, The Cliffs
March 20, 1999

PAGE 1 OF 2

Robert Lee
3/22
Theresa H. Abels
Known April 3/92

ROA341

February 25, 1999

Preliminary Construction Specifications

Lot # 207, Section 3, The Cliffs at Glassy

Renaud and Karen Abel

This exhibit is part of the construction contract between Gilliam Construction Company and Renaud and Karen Abel for the construction of a home to be located upon Lot # 207, Section 3, at The Cliffs at Glassy, Landrum, SC.

Item #1 - Site Preparation

The homesite is to be cleared according to owners selection of the home location. Adequate erosion control will be utilized, foundation will be backfilled, and finish grade will be established around the home upon completion. This contract does not include the cost of rock blasting if it should become necessary in order to construct footings.

Item #2 - Footing and Foundation Walls

Footings to be constructed per code requirements and foundation walls to be 10" poured concrete to main level.

Item #3 - Waterproofing and Drainage

Curtain drain will extend around the base of foundation walls. Floor drain will be located in the mechanical area. Waterproofing will include all sub-grade portions of the foundation walls.

Item #4 - Concrete Slabs

4 inch fiber reinforced concrete slabs to be poured in the following locations; Lower level - entire footprint of full height area, front porch and garage floor.

Item #5 - Floor System

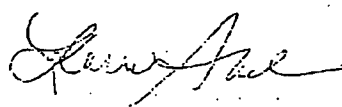
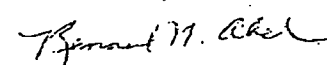
The floor systems will be "Silent Floor System" Truss joist for main and upper level floors.

Item #6 - Framing

The framing of the home will be to the specifications of the blue prints and constructed to meet or exceed all local building codes. All lumber furnished by contractor will be #2 & BTR SPF or STD & BTR SPF. Flooring will be 3/4 inch T & G, nailed and glued. Sheathing to be 7/16 OSB, with Tyvek moisture barrier.

Item #7 - Roofing

The shingles estimated to be installed are based upon a 40 year architectural shingle on 30# building felt. Color to be selected by owner.



ROA343

Item #8 - Siding

Exterior of home to be a combination of materials as per owner specifications. 35% Natural stacked stone, 65% wire lathe masonry stucco with sand finish. Fascia is to be 2x6 metal wrapped. Soffit to be vinyl with continuous venting.

Item #9 - Decks and Porches

Porch ceiling to be of tongue and groove beaded material, painted to match trim at owner's decision. Courtyard to be stamped concrete with brick pattern, style and color to be selected by owner.

Item #10 - Windows and Exterior Doors

The estimate is based upon an allowance for Peachtree, aluminum clad, insulated, Low-E glass, casements and fixed units installed per drawings. The exterior doors will be Peachtree aluminum clad, insulated with Low-E glass as per drawings with the exception of the front entry door, style to be selected by owner.

Item #11 - Gutters

Continuous, baked enamel, aluminum to extend around entire house. Downspouts will be connected to drainage lines which will direct water away from house.

Item #12 - Stone

Stone to be natural stacked stone, color to be determined, exact use, location and amount to be determined.

Item #13 - Garage Doors - Openers

Garage doors to be sectional, insulated metal. Openers to be installed on each door.

Item #14 - Plumbing Rough-In

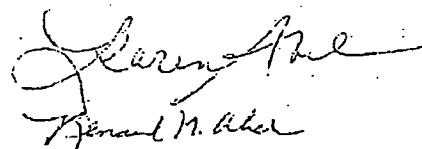
To be installed as per drawing and local code. All water piping will be copper with soldered fittings. Waste and drainage lines will be PVC. Venting of waste lines will be through the roof. Water heaters will be gas, 50 gallon units (2).

Item #15 - Electric Rough-In

To be installed as per drawing and local code. All wire used will be copper, 12 AWG. Circuit breakers will be GE brand. 200 Amp panel with 30 circuits.

Item #16 - Mechanical Rough-in

To be installed as per drawing and local code. The equipment quoted is 4 Lennox gas furnaces to provide heating and electric air conditioning for main, upper and lower levels.


Gerald M. Baker

ROA344

Item #17 Insulation

Ceiling insulation to be R-30 batts in sloping sections, all flat and tray areas to be blown fiberglass insulation equivalent to R-30, exterior wall insulation to be R-13, floor insulation to be R-19. Baffle vents to be installed as required. Firestops - per code. Sound insulation will be provided around baths, laundry, and sleeping areas.

Item #18 - Drywall

1/2 inch drywall to be installed throughout finished portion of home. Bath ceilings to be moisture resistant.

Item #19 - Painting

Interior painting will be primer plus 2 coats of paint, colors to be selected by owner.

Item #20 - Ceramic Tile / Vinyl Flooring

Ceramic tile to be installed in upper level baths and laundry room. Color and style to be selected by owners.

Item #21 - Cabinetry

Style, color and make to be selected by owner. Also includes hardware for kitchen and bath cabinets.

Item #22 - Countertops

Kitchen countertops to be Corian or equivalent, color to be selected by owner. Bathroom countertops to be cultured marble, color to be selected by owner.

Item #23 - Millwork and Doors

Interior doors will be 6 panel colonial style. Casing style to be selected by owner. Base molding style to be selected by owner and will be installed throughout finished floor area of house. Window casing style to be selected by owner. This item includes a \$3000.00 allowance for entry door which is to be selected by owner.

Item #24 - Finish Carpentry

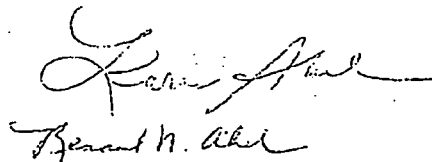
Labor to complete item # 23.

Item #25 - Carpet

Carpet to be installed as per plan.

Item #26 - Stair System and Railing

Stairs to lower level to be pine treads covered with carpet. Railing to be constructed of painted spindles with oak handrail. Stairway to upper level to be stained, free-standing, curved as illustrated in plan. Railing to be determined.


Robert H. Allen

ROA345

Item #27 - Hardwood

#2, 2-1/4 Red Oak flooring to be installed as per plan. Finish to be three coats polyurethane.

Item #28 - Water/ Septic

PVC water line run from meter to reducing valve inside house. Septic system to be installed according to local regulations and codes.

Item #29 - Security System

Not included in this estimate.

Item #30 - Intercom/Music - Central Vac

Not included in this estimate.

Item #31 - Utilities

Temporary power and water.

Item #32 - Trash Removal

Disposal of construction trash.

Item #33 - Rental Equipment

Temporary use of equipment such as crane, scaffolding, tamping equipment, loader, etc.

Item #34 - Hardware

Interior door hardware to be Schlage, polished brass. Deadbolts to be installed on all exterior doors. Includes door and hinge stops, towel and tissue hardware for bathrooms.

Item #35 - Closets

Style and layout to be determined.

Item #36 - Driveway /Walks

Concrete drive in front of house. Exact location and width of drive to be determined after placement of home. This item is shown on budget as an allowance.

Item #37- Plumbing Fixtures

Style, color and make to be determined by owner.

Item #38 - Electrical Fixtures

Selections to be made by owner.

Item #39 - Wallpaper

Selections and areas to be determined by owner.

James A. Adair
Benjamin M. Adair

ROA346

Item #40 - Mirrors/ Shower Doors

Mirrors over vanities in each bathroom . Also to include glass shower doors at each shower.

Item #41 - Cleaning

Cleaning upon completion of home and prior to move in.

Item #42 - Toilet

Temporary toilet facilities.

Item #43 - Erosion Control

Use of silt fencing and straw bales as required by the development.

Item #44 - Laborer Cost

Use of temporary laborer for general duties and cleaning.

Item #45 - Insurance

Builders Risk and General Liability

Item #46 - Tap Fee

As required by the development.

Item #47 - Landscaping

Not included in this estimate.

Item #48 - Appliances

To include oven, cooktop, dishwasher, 2 garbage disposals and refrigerator. Make and models to be determined by owner.

Item #49 - Supervision Fee

Gilliam Construction Company Overhead and Profit

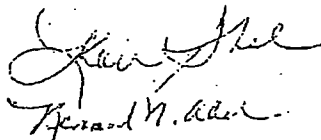
Item #50 - Backfill/Dirt

Not included in estimate. Cost to be incurred by owner only if additional dirt is needed.

Item #51 - Termite Treatment

Pre-treatment of ground prior to construction.

Item #52 - Mail/Fax/Misc.


Gerald N. Allen

ROA347

Item #53 - Permits/Licenses

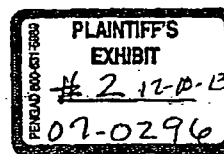
As required by county and state.

Item #54 - Fireplaces

Corner fireplace in hearth room as per owners request, sitting room, great room and lower level to be metal, pre-fabricated units with 10" double wall metal flue pipes.

Kevin Allen
Ronald M. Allen

ROA348



September 11, 2001

Renaul,

You will find listed below a detail of the final charges for the additional items requested in the completion of your home.

Stone Adds

Additional stone as requested and agreed upon around the Hot Tub Area

Total Billing	\$7,200.00
Paid directly to Vickery by the Abels	\$3,600.00
Balance Due	\$3,600.00

Electrical Changes

Upgrading Rocker switches to Decor switches as requested
Materials and Labor

Balance Due	\$ 466.00
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Hook Up Generator, Yard Lights & Sprinklers

Balance Due	\$ 675.00
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Fan Blades not included with fan selected	\$ 66.78
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Plumbing Changes and Adds

Upgraded Faucets (Credits Included)

Balance Due	\$ 564.00
-------------	-----------

Change out of Water Heater from 50 gal to 75 gal	
75 Gal Heater	\$897.75
50 Gal Heater	- 450.00
Remove & Re-install L & M	200.00

Balance Due	\$ 647.75
-------------	-----------

ROA349

Appliance Add

Undercounter Refrigerator for the Lower Level Bar Area

Balance Due \$ 240.00

Total of Final Billing \$ 5,584.53

Plus Remaining Amount Due on Billing Dated 12/15/2000 \$ 20,000.00

Total Monies Due \$ 25,584.53

ROA350

May 17, 2003

Dear Phil:

Thank you for your recent letter regarding the final phases of construction on our house. It is true I am holding \$25,584.53 of the contract price while we are in final punch list phase. I disagree with your characterization of holding "hostage" this amount. My attorneys have advised I am within my rights under your contract in withholding these funds. I specifically refer you to Article VIII of your contract, stating that you shall promptly correct any defective work. This has not been done. Further, your own letter serves as an admission of a breach since you define your own work as being sluggish and admit your defects.

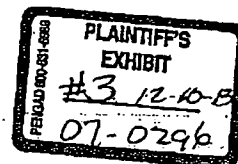
However, it is not my desire to prolong this process any further. Karen and I merely want to have our house finished. I am attaching a final list of items deserving correction. As each of these items is corrected I will release a commensurate amount from the retained funds. When the sum has been exhausted we will consider the house to enter its warranty period.

Please contact me as soon as possible to coordinate the final items and your payment. I look forward to hearing from you and trust we can settle any disputes among ourselves without involving our attorneys.



Renaul N. Abel

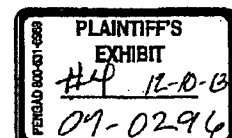
cc: Ashmore, Leaphart & Rabon, LLC



ROA351

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

WHEREAS, Defendants deny that they are responsible for alleged defects, if any, and denies that Plaintiffs have suffered any damages resulting therefrom; and



WHEREAS, Plaintiffs have asserted claims against Defendants alleging damages resulting from the alleged construction defects; and

WHEREAS, Plaintiffs instituted an arbitration action in Spartanburg County,

WHEREAS, Plaintiffs and Defendants desire to fully, finally and forever compromise and settle all disputes currently pertaining between them, whether relating to the Property or not;

NOW THEREFORE, for and in consideration of the mutual promises contained herein, the parties agree as follows:

RNA
1-1-8

1. We, Renaul N. Abel and Karen V. Abel, individually and as husband and wife, for the consideration of Two Hundred Ten Thousand and No/100ths (\$210,000.00) Dollars to us in hand paid by Phillip Gilliam, Gilliam Construction Company Inc., and Nationwide Insurance Company, the receipt whereof is hereby acknowledged, do release and discharge, and by these presents do for ourselves, and any heirs, executors, administrators, personal representatives, successors and assigns release and forever discharge Phillip Gilliam, Gilliam Construction Company Inc., Nationwide Insurance Company, Eagle Windows, Window and Door Concepts and Charles Goad, Hobbitt Plastering and Phil Bender, Coleman Waterproofing and Dale Coleman, and Gary Churchill and their heirs, executors, administrators, successors, personal representatives, assigns, employers, employees, bailees, agents, subcontractors, partners, servants, insurers, sureties, and all other persons, firms, corporations, associations or partnerships, whether herein named or referred to or not, and who, as a result of their relationship with Defendants, may be liable to Plaintiffs and their heirs, successors and assigns, of and from any and all past, present and future claims, demands, debts, rights, actions, damages (including but not limited to, direct, indirect, incidental, statutory and consequential damages), costs, causes of action, suits at law or in equity, expenses and fees of attorneys, expenses and fees of consultants and/or experts in all claims of any nature or kind

whatsoever, now existing or which may hereafter accrue, whether known or unknown and from any and all manner of actions, causes of action, suits, debts, accounts, judgments, claims and demands whatsoever in law or equity as a result of, growing out of, or in any way connected with any and all damages to property resulting or to result or which might result in the future from construction of the house located at 4 Lobelia Way (formerly Lot #207), Landrum South Carolina 29356, and all activities, conduct, and communications attendant therewith for which damages to property we have claimed the said Phillip Gilliam, Gilliam Construction Company Inc., and Nationwide Insurance Company to be legally liable, which liability was and is expressly denied.

2. We, Phillip Gilliam and Gilliam Construction Company Inc., for the consideration of the mutual promises made herein by Renaul N. Abel and Karen V. Abel the receipt and sufficiency whereof are hereby acknowledged, do release and discharge, and by these presents do for ourselves, and any heirs, executors, administrators, personal representatives, successors and assigns release and forever discharge Renaul N. Abel and Karen V. Abel and their heirs, executors, administrators, successors, personal representatives, assigns, employers, employees, bailees, agents, subcontractors, partners, servants, insurers, sureties, and all other persons, firms, corporations, associations or partnerships, whether herein named or referred to or not, and who, as a result of their relationship with Plaintiffs, may be liable to Defendants and their heirs, successors and assigns, of and from any and all past, present and future claims, demands, debts, rights, actions, damages (including but not limited to, direct, indirect, incidental, statutory and consequential damages), costs, causes of action, suits at law or in equity, expenses and fees of attorneys, expenses and fees of consultants and/or experts in all claims of any nature or kind whatsoever, now existing or which may hereafter accrue, whether known or unknown and from any and all manner of actions, causes of action, suits, debts, accounts, judgments, claims and demands whatsoever in law or equity as a result of, growing out of,

or in any way connected with any and all damages to persons or property resulting or to result or which might result in the future from any amounts owed or allegedly owed by Plaintiffs to Defendants relating to the Property and allegedly defamatory remarks made by Plaintiffs about Defendants and all activities, conduct, and communications attendant therewith for which damages to persons and property we have claimed the said Renaul N. Abel and Karen V. Abel to be legally liable, which liability was and is expressly denied.

3. The parties further agree, as a consideration and inducement for this compromise settlement, that it shall apply to any and all unknown and unanticipated damages, defects, deterioration, mold, or any other damage, patent or latent, resulting from said construction, and/or from the allegedly defamatory remarks as well as to those now disclosed.

4. Plaintiffs hereby assign to Defendants any and all claims which may survive this release, which survival is expressly denied, against Eagle Windows, Window and Door Concepts and Charles Goad, Hobbitt Plastering and Phil Bender, Coleman Waterproofing and Dale Coleman, and Gary Churchill, and any other parties which may be responsible, whether in whole or in part, for the design, manufacture, installation or construction of the above mentioned alleged defects, or which may otherwise be liable for any of the damages alleged in the Arbitration action (hereinafter collectively referred to as "Third Parties") but said assignment does not revive any claims released by this document for purposes of avoiding a contribution action under S.C. Code Ann. §15-38-10, *et seq.* and Plaintiffs expressly state that all Third Parties' liability to it is extinguished by this settlement and release. Plaintiffs further agree to assist and cooperate with Defendants in the presentation and prosecution of any and all claims against such Third Parties to include all claims assigned by Plaintiffs and any and all claims otherwise available to Defendants, including but not limited to, claims for contribution and indemnity. Such cooperation shall include, but shall not to be

RNA
KNA

limited to, Plaintiffs providing access to the Property, at reasonable times and upon reasonable advance notice to representatives, contractors, and experts of Defendants.

5. Plaintiffs expressly acknowledge and agree that this settlement and the consideration paid therefore shall completely discharge any common liabilities for Plaintiffs' alleged damages pursuant to Section 15-38-40(D)(1), South Carolina Code of Laws, 1976, as amended; and that said settlement and the consideration paid therefore shall completely extinguish all liability of Defendants to Plaintiffs and shall preserve Defendant's rights of contribution and indemnity pursuant to S.C. Code § 15-38-20(D). The foregoing language of this paragraph 4 is intended only to preserve, pursuant to the Contribution Among Tortfeasors Act, Defendants' rights against any person or entity not a party to this Agreement.

6. Plaintiffs and Defendants hereby acknowledge that this compromise and settlement is and shall be a complete bar to any subsequent action or proceeding to set aside or vacate this instrument because of a mistake in fact or otherwise.

7. Plaintiffs and Defendants declare and represent that they have read this agreement and acknowledge that they have the advice of counsel and that no promise, inducement, or agreement not herein expressed has been made to them and that this instrument contains the entire agreement between Plaintiffs and Defendants hereto and that the terms of the instrument are contractual and not a mere recital, and further, that if any paragraph or part of this agreement is found void or unenforceable, the remainder of this agreement shall not be affected.

8. This instrument shall be binding on all successors, partners, agents, insurers, subcontractors, servants, employees, heirs, purchasers and assigns of Plaintiffs and Defendants.

9. This agreement shall be construed in accordance with the laws of the state of South Carolina.

10. The parties further agree, as a consideration and inducement for this compromise settlement, that they have the sole right and exclusive authority to execute this release and to receive the sums specified herein and that they have not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action referred to herein and each also agrees to defend, hold harmless and indemnify the other from any and all claims, demands, actions, causes of action or judgments of any type whatsoever which have been or may be brought by any parties asserting an interest in the settlement proceeds paid hereunder including any action brought by any party asserting any sort of subrogation claim or other lien, assignment or claim of any type whatsoever and they agree that they will indemnify the other and their heirs, successors and assigns for any amounts paid by them in connection with the assertion of any such claims whether these amounts are paid for settlement, verdict, defense costs, including attorneys' fees, or otherwise.

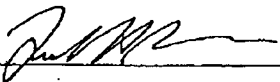
11. They further agree and understand that this settlement is a compromise of doubtful and disputed claims, and that payment is not to be construed as an admission of liability or wrongdoing by any party by whom liability is expressly denied and who have entered into this settlement agreement solely to avoid the trouble and expense of further litigation.

12. They further agree that this settlement and the amount of this settlement is confidential, and that they shall not discuss, reveal, publicize or otherwise make known or available any information concerning this settlement or the amount of this settlement other than to their financial or legal advisors as may be necessary to carry out our financial or legal affairs, to agencies of the government for income tax reporting purposes, by written agreement of the parties, upon an order of a court of competent jurisdiction, as necessary to give effect to the provisions of paragraphs 4 and 5 of this Agreement, or as otherwise required by subpoena or law. Providing information regarding this settlement or the amount of this settlement to anyone, including but not limited to any contractor,

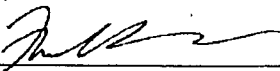
residents or agents of The Cliffs at Glassy, publisher, other attorney, representative of the media, journals, and/or periodicals in the absence of a court order or subpoena compelling the undersigned to do so is strictly forbidden unless in regard to the subsequent litigation referenced herein at paragraphs 4 and 5. The only exceptions to the foregoing shall be that (a) the undersigned will be allowed to discuss this settlement and the amount of this settlement when required to do so by legal process as set forth in this paragraph and (b) the undersigned may respond to questions from third parties asking about this matter with the specific phrase "It has been amicably settled" and no other. The parties acknowledge that this requirement of confidentiality is a material term of the settlement of this litigation and that any failure to fully and completely comply with the confidentiality requirement by one party shall render the breaching party liable to the other party for liquidated damages in the amount of Ten Thousand (\$10,000.00) Dollars. Additionally, if a party is required to initiate any action to enforce this confidentiality provision, the party, if successful, will be entitled to recover from the party breaching the obligation of confidentiality the reasonable costs of such action, including attorney's fees.

IN WITNESS WHEREOF, we hereunto set our hands and seal as of the Effective Date written above.

WITNESSES:

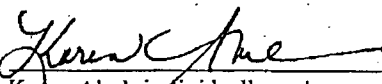


Emerson Steel



Emerson Steel


Renaul Abel, individually and as
husband of Karen Abel


Karen Abel, individually and as
wife of Renaul Abel

Sam Michael
Mandell Golden

Gilliam Construction Company, Inc.

By: *[Signature]*

Its: PRESIDENT

[Signature]

Phillip A. Gilliam

THA

張


Notary Public for South Carolina

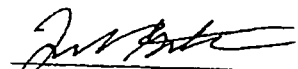
9

Appendix 364

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

On this 21st day of March, 2006, before me personally came Karen V. Abel, individually and as wife of Renaul Abel, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.


Notary Public for South Carolina

My Commission Expires: 10/2/11

AWA
LWA

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

On this 18 day of ^{Mar} March, 2006, before me personally came Gilliam Construction Company, Inc., by and through its duly authorized officer, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.

D. Mac
Notary Public for South Carolina

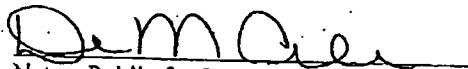
My Commission Expires: 8/30/11

CUA
BABA

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

On this 18 day of ^{May} ~~March~~, 2006, before me personally came Phillip A. Gilliam, to me known and known to me to be the person who is described herein and who executed the foregoing instrument, and acknowledged to me that he executed the same, and that the same is his free act and deed.

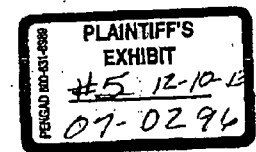

Notary Public for South Carolina

My Commission Expires: 8/30/11

MAH
PWA



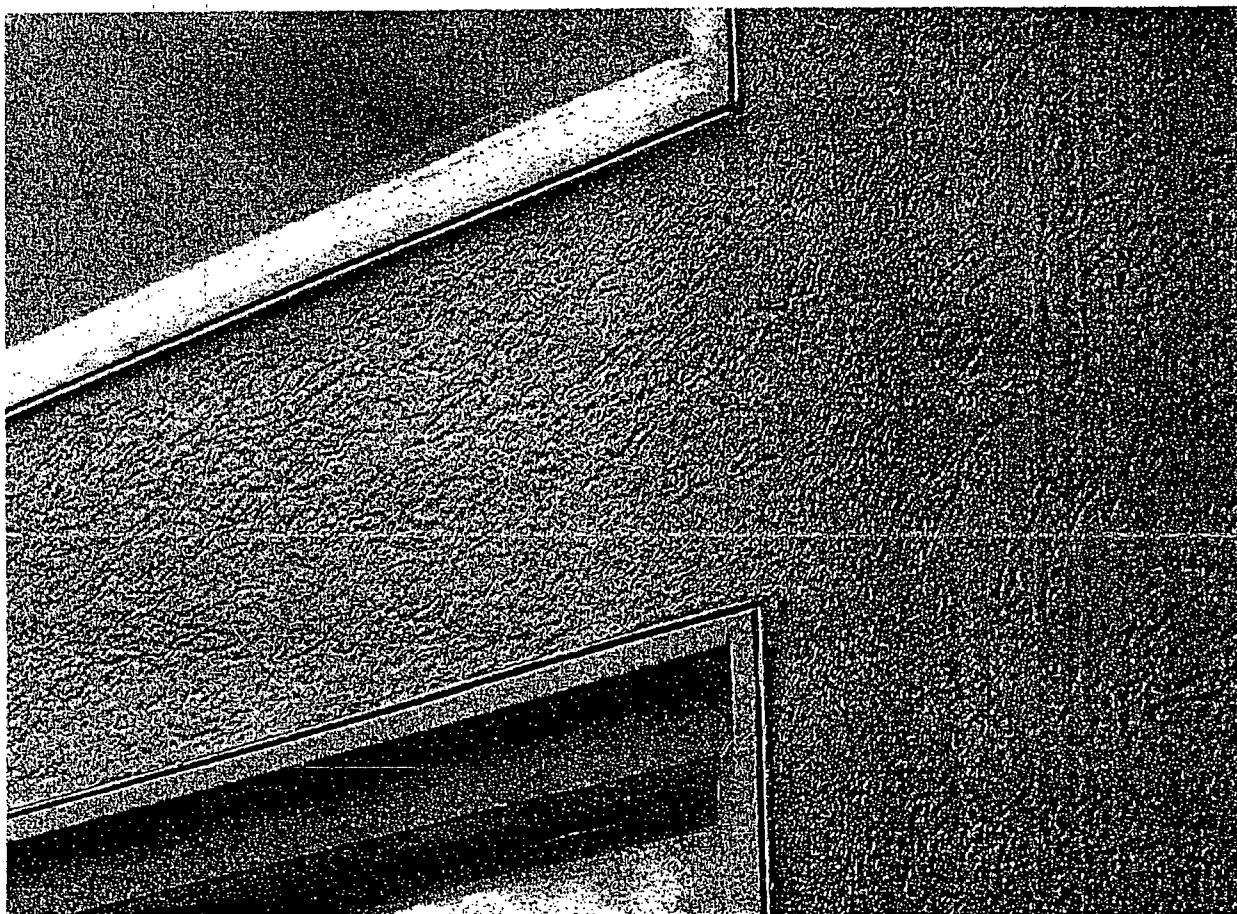
Able Residence, 4 Lobelia Way, Landrum, SC

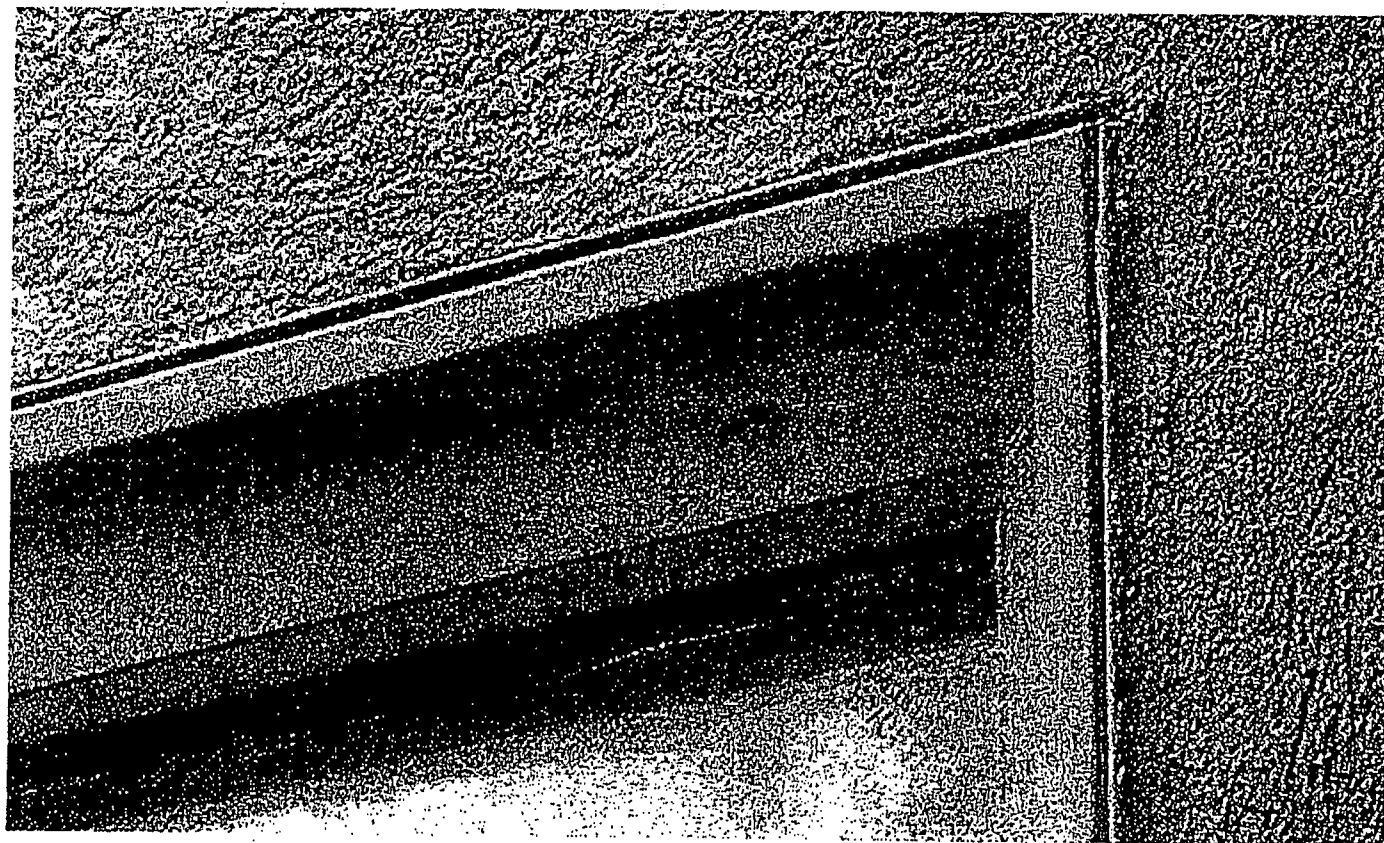




ROA365

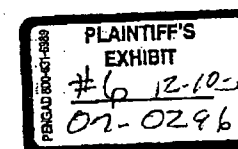
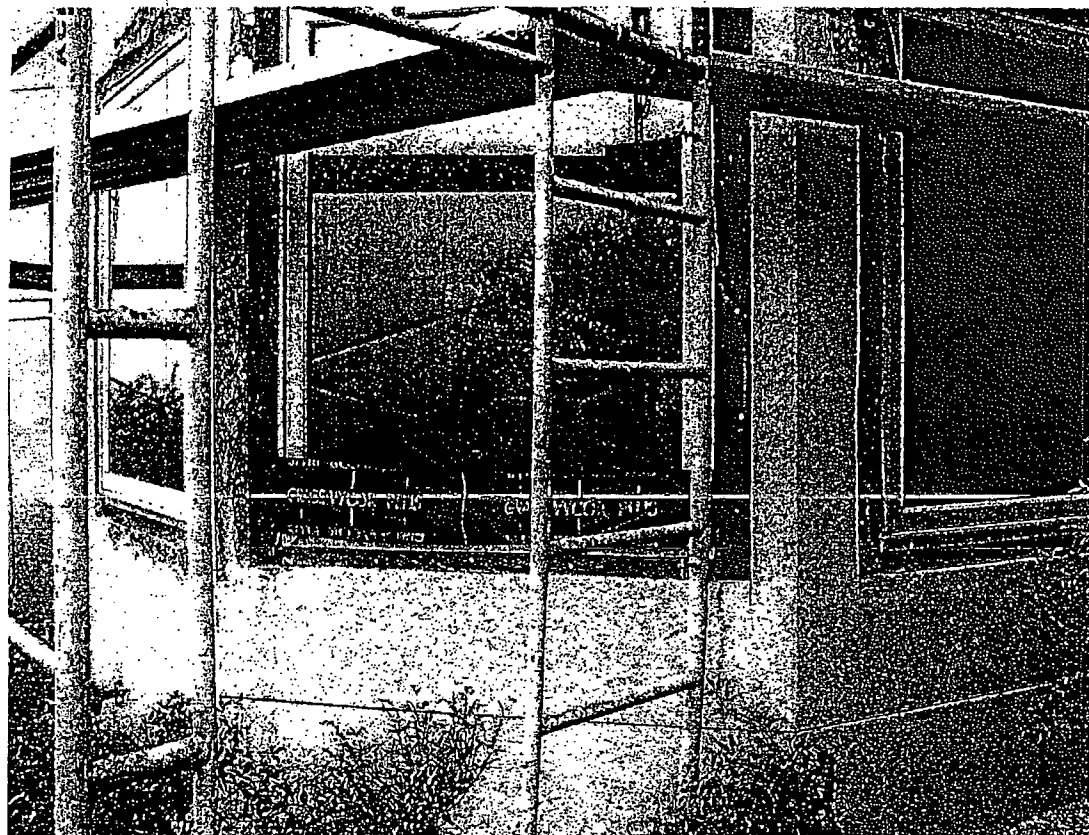
Appendix 369





ROA367

Appendix 371



April 2005 Window Water Testing



April 2005 Window Water Testing

ROA369

Appendix 373

03632



122 EDGEWORTH STREET
GREENVILLE, SOUTH CAROLINA 29607
(864) 233-8844 FAX: 232-2679



August 9, 2005

Mr. Kalen Bowman
BLUE RIDGE CUSTOM BUILDERS, INC.
100 South Glassy Mountain Road
Landrum, SC 29634

RE: (03632) RENAUL & KAREN ABEL v. Gilliam Construction

Dear Mr. Bowman:

Enclosed please find executed copies of Change Orders #5 through #9 signed today for your records. I have also enclosed a summary of Change Orders #1 through #9.

If you should have questions, please call me to discuss.

Cordially,

H2L CONSULTING ENGINEERS

W. Randall Still, Sr., P.E.
Vice President

WRS/II

Encl.

cc: Renaul Abel
File



ROA370

Abel Residence
Summary of Blue Ridge Custom Builders, Inc. Charges

9-Aug-05

Items	Requested Amount	Approved Amount	Current Total
Base Bid	\$ 117,279.00	\$ 117,279.00	\$ 117,279.00
Change Order #1	\$ 3,832.37	\$ 3,832.37	\$ 121,111.37
Change Order #2	\$ 14,283.93	\$ 14,283.93	\$ 135,395.30
Change Order #3	\$ 2,138.40	\$ 2,138.40	\$ 137,533.70
Change Order #4	\$ 19,791.00	\$ 19,791.00	\$ 157,324.70
Change Order #5	\$ -	\$ -	\$ 157,324.70
Change Order #6	\$ 12,297.00	\$ 9,417.00	\$ 166,741.70
Change Order #7	\$ 7,080.00	\$ 7,080.00	\$ 173,821.70
Change Order #8	\$ 3,312.00	\$ 3,312.00	\$ 177,133.70
Change Order #9	\$ 6,888.00	\$ 6,888.00	\$ 184,021.70

Change Order #10

credit to Follow against CO's 1 & 2 for windows

ROA371

Section 2.7 - Change Order Request Form
(EXHIBIT G)

CHANGE ORDER (CO)

COR No: 5 Date: 7/5/2005
Contract: Abel
Project #: 3632

Contractor Name: Blue Ridge Custom Builders, Inc.
Address: 100 South Glassy Mountain Rd.
Landrum, SC 29356
Attention: Kalen Bowman

Except as otherwise expressly provided herein, Contractor agrees to perform the Work described herein in accordance with the Contract. Contractor shall notify surety (if applicable).

Description of CO:

Request additional days for completion of project

Pricing:

N/A

Days (added)(deleted) as a result of the CO: 12
Revised Substantial Completion Date is: 7/7/2005
Revised Final Completion Date is: 7/17/2005

ORIGINAL CONTRACT PRICE	\$ 117,279.00
PREVIOUS CO NUMBERS (<u>1</u> through <u>4</u>)	\$ 40,045.70
AMOUNT OF THIS CO	\$ 0.00
CURRENT CONTRACT PRICE	\$ 157,324.70

This CO represents final adjustment for any and all amounts due or to become due Contractor for changes referred to herein. Contractor further releases all other claims, if any (except those claims previously submitted in accordance with the Contract), for additional compensation under this Contract, including without limitation any rights Contractor may have for additional compensation arising out of delays or disruption of Contractor's schedule as may have arisen prior to the date of the CO. Unless otherwise provided herein, the time of completion and other items and conditions of the Contract remain unchanged.

OWNER	CONTRACTOR
By: <u>Bernard Abel</u>	By: <u>Kalen Bowman</u>
Title: <u>Homeowner</u>	Title: <u>President</u>
Date: <u>8/19/05</u>	Date: <u>7/5/05</u>

ROA372

Section 2.7 - Change Order Request Form
(EXHIBIT G)

CHANGE ORDER (CO)

COR No: 6 Date: 7/29/2005
 Contract: Abel
 Project #: 3632

Contractor Name: Blue Ridge Custom Builders, Inc.
 Address: 100 South Glassy Mountain Rd.
Landrum, SC 29356
 Attention: Kalen Bowman

Except as otherwise expressly provided herein, Contractor agrees to perform the Work described herein in accordance with the Contract. Contractor shall notify surety (if applicable).

Description of CO:

Labor and material provided for additional stucco tear off and replacement along with damaged wall sheathing and studs on two (2) outside walls designated as "hearth" room on plans - both floors.

Pricing:

Section 2.7 Change Order Form - Pricing Detail Attached

~~\$9,417.00~~ K.B. NA
 \$9,417.00

Days (added)(deleted) as a result of the CO: 7Revised Substantial Completion Date is: 7/14/2005Revised Final Completion Date is: 7/24/2005

ORIGINAL CONTRACT PRICE

\$ 117,279.00

PREVIOUS CO NUMBERS (1 through 5)

\$ 40,045.70

AMOUNT OF THIS CO

\$ 9,417.00

CURRENT CONTRACT PRICE

\$ ~~126,741.70~~

L \$166,741.70

This CO represents final adjustment for any and all amounts due or to become due Contractor for changes referred to herein. Contractor further releases all other claims, if any (except those claims previously submitted in accordance with the Contract), for additional compensation under this Contract, including without limitation any rights Contractor may have for additional compensation arising out of delays or disruption of Contractor's schedule as may have arisen prior to the date of the CO. Unless otherwise provided herein, the time of completion and other items and conditions of the Contract remain unchanged.

OWNER		CONTRACTOR	
By: <u>Kenail Abel</u>		By: <u>Kalen Bowman</u>	
Title: <u>Homeowner</u>		Title: <u>President</u>	
Date: <u>8/09/05</u>		Date: <u>8/1/05</u>	

ROA373

Section 2.6 - Change Order Request Form
(EXHIBIT F)

COR No: 6 Date: 7/29/2005
Contract: Abel Contractor: Blue Ridge Custom Builders, Inc
Project #: 3532

Description of Change:

Labor and material provided for additional stucco tear off and replacement along with
damaged wall sheathing and studs on two (2) out side walls designated as "hearth"
room on plans - both floors

Reason for the Change:

Water damaged stucco, studs and wall sheathing

Drawing and Specification References:

Drawing Numbers

5.5

Section Numbers

OWNER		CONTRACTOR	
By:	<u>Gerard Abel</u>	By:	<u>K. J. Brown</u>
Date:	<u>8/09/05</u>	Date:	<u>8/2/05</u>

ROA374

Section 2.7 - Change Order Request Form
(EXHIBIT G)

CHANGE ORDER (CO)

COR No: 7 Date: 7/29/2005
 Contract: Abel
 Project #: 3632

Contractor Name: Blue Ridge Custom Builders, Inc.
 Address: 100 South Glassy Mountain Rd.
Landrum, SC 29356
 Attention: Kalen Bowman

Except as otherwise expressly provided herein, Contractor agrees to perform the Work described herein in accordance with the Contract. Contractor shall notify surety (if applicable).

Description of CO:

Labor and material provided for additional skim coat over remaining balance of stucco on house with the exception of the chimney to rear of house, per homeowner and engineer.

Pricing:

Section 2.7 Change Order Form - Pricing Detail Attached	\$2,880.00
Section 2.7 Change Order Form - Pricing Detail Attached	\$4,200.00

Days (added)(~~deducted~~) as a result of the CO: 7
 Revised Substantial Completion Date is: 7/21/2005
 Revised Final Completion Date is: 7/31/2005

ORIGINAL CONTRACT PRICE

\$ 117,279.00

PREVIOUS CO NUMBERS (1 through 6)

\$ ~~49,402.70~~ K.B. NA

AMOUNT OF THIS CO

\$ 7,080.00

CURRENT CONTRACT PRICE

\$ ~~124,359.00~~ \$173,221.70 K.B.

This CO represents final adjustment for any and all amounts due or to become due Contractor for changes referred to herein. Contractor further releases all other claims, if any (except those claims previously submitted in accordance with the Contract), for additional compensation under this Contract, including without limitation any rights Contractor may have for additional compensation arising out of delays or disruption of Contractor's schedule as may have arisen prior to the date of the CO. Unless otherwise provided herein, the time of completion and other items and conditions of the Contract remain unchanged.

OWNER		CONTRACTOR	
By: <u>Bernard H. Abel</u>		By: <u>Kalen Bowman</u>	
Title: <u>Homeowner</u>		Title: <u>President</u>	
Date: <u>8/9/05</u>		Date: <u>August 3, 2005</u>	

ROA377

Section 2.6 - Change Order Request Form
(EXHIBIT F)

COR No: 7 Date: 7/29/2005
Contract: Abel Contractor: Blue Ridge Custom Builders, Inc
Project #: 3632

Description of Change:

Labor and material provided for additional skim coat over remaining balance of house with the exception of the chimney to the rear of house, per homeowner and engineer.

Reason for the Change:

Match other refurbished areas of the exterior of the house.

Drawing and Specification References:

Drawing Numbers

5.1
5.3
5.4
5.5
5.6
5.8

Section Numbers

2.7
2.7
2.7
2.7
2.7
2.7

OWNER		CONTRACTOR	
By:	<u>Bernard Abel</u>	By:	<u>Kelley J. Brown</u>
Date:	<u>8/09/05</u>	Date:	<u>August 3, 2005</u>

ROA378

Abel-Contract Change Order-b7.xls8/2/200510:19 AM

Abel-Contract Change Order-a7.xls8/2/20059:13 AM

Section 2.7 - Change Order Request Form
(EXHIBIT G)

CHANGE ORDER (CO)

COR No: 8 Date: 7/29/2005
Contract: Abel
Project #: 3632

Contractor Name: Blue Ridge Custom Builders, Inc.
Address: 100 South Glassy Mountain Rd.
Landrum, SC 29356
Attention: Kalen Bowman

Except as otherwise expressly provided herein, Contractor agrees to perform the Work described herein in accordance with the Contract. Contractor shall notify surety (if applicable).

Description of CO:

Labor and material provided for interior trim repair to windows reinstalled prior to revised pan drawing.

Pricing:

Section 2.7 Change Order Form - Pricing Detail Attached \$1,152.00
Section 2.7 Change Order Form - Pricing Detail Attached \$2,160.00

Days (added)(~~deducted~~) as a result of the CO: 2
Revised Substantial Completion Date is: 7/23/2005
Revised Final Completion Date is: 8/2/2005

ORIGINAL CONTRACT PRICE
PREVIOUS CO NUMBERS (1 through 7)
AMOUNT OF THIS CO
CURRENT CONTRACT PRICE

\$ 117,279.00
\$ 59,422.70 56,542.70
\$ 3,312.00
\$ 117,133.70

This CO represents final adjustment for any and all amounts due or to become due Contractor for changes referred to herein. Contractor further releases all other claims, if any (except those claims previously submitted in accordance with the Contract), for additional compensation under this Contract, including without limitation any rights Contractor may have for additional compensation arising out of delays or disruption of Contractor's schedule as may have arisen prior to the date of the CO. Unless otherwise provided herein, the time of completion and other items and conditions of the Contract remain unchanged.

OWNER		CONTRACTOR	
By: <u>Bernard N. Abel</u>		By: <u>Kalen Bowman</u>	
Title: <u>Homeowner</u>		Title: <u>President</u>	
Date: <u>8/9/05</u>		Date: <u>August 3, 2005</u>	

ROA381

Section 2.6 - Change Order Request Form
(EXHIBIT F)

COR No: 8 Date: 7/29/2005
 Contract: Abel Contractor: Blue Ridge Custom Builders, Inc
 Project #: 3632

Description of Change:

Labor and material provided for interior trim repair to windows reinstalled prior to revised
pan drawing.

Reason for the Change:

Original pan drawing created separations between the window jamb and trim after
installation of pan and window reinstall.

Drawing and Specification References:

Drawing Numbers

5.1
5.3
5.4
5.5
5.6
5.8

Section Numbers

2.7
2.7
2.7
2.7
2.7
2.7

OWNER		CONTRACTOR	
By:	<u>Bernard Abel</u>	By:	<u>K. J. [Signature]</u>
Date:	<u>8/09/05</u>	Date:	<u>8/3/05</u>

ROA382

ROA383

Appendix 387

[illegible]

Abel-Contract Change Order-a8.xls8/2/200510:19 AM

Section 2.7 - Change Order Request Form
(EXHIBIT G)

CHANGE ORDER (CO)

COR No: 9 Date: 7/29/2005
 Contract: Abel
 Project #: 3632

Contractor Name: Blue Ridge Custom Builders, Inc.
 Address: 100 South Glassy Mountain Rd.
Landrum, SC 29356
 Attention: Kalen Bowman

Except as otherwise expressly provided herein, Contractor agrees to perform the Work described herein in accordance with the Contract. Contractor shall notify surety (if applicable).

Description of CO:

Labor and material provided for painting interior window trim.

Pricing:

Section 2.7 Change Order Form - Pricing Detail Attached	\$1,728.00	} OK w/ps
Section 2.7 Change Order Form - Pricing Detail Attached	\$5,160.00	

Days (added)(deleted) as a result of the CO: 3
 Revised Substantial Completion Date is: 7/26/2005
 Revised Final Completion Date is: 8/5/2005

ORIGINAL CONTRACT PRICE	\$	117,279.00	
PREVIOUS CO NUMBERS (1 through 8)	\$	~~6,888.00~~	\$59,854.70 K.B.
AMOUNT OF THIS CO	\$	6,888.00	
CURRENT CONTRACT PRICE	\$	~~124,167.00~~	\$184,021.70 K.B.

This CO represents final adjustment for any and all amounts due or to become due Contractor for changes referred to herein. Contractor further releases all other claims, if any (except those claims previously submitted in accordance with the Contract), for additional compensation under this Contract, including without limitation any rights Contractor may have for additional compensation arising out of delays or disruption of Contractor's schedule as may have arisen prior to the date of the CO. Unless otherwise provided herein, the time of completion and other items and conditions of the Contract remain unchanged.

OWNER		CONTRACTOR	
By: <u>Bernard Abel</u>		By: <u>Kalen Bowman</u>	
Title: <u>Homeowner</u>		Title: <u>President</u>	
Date: <u>8/09/05</u>		Date: <u>August 3, 2005</u>	

ROA385

Section 2.6 - Change Order Request Form
(EXHIBIT F)

COR No: 9 Date: 7/29/2005
 Contract: Abel Contractor: Blue Ridge Custom Builders, Inc.
 Project #: 3632

Description of Change:
 Labor and material provided for painting interior window trim.

Reason for the Change:
 Original pan drawing created separations between the window jamb and trim after
 installation of pan and window reinstall. Trim needed to be painted after repairs
 had been made.

Drawing and Specification References:

Drawing Numbers

5.1
5.3
5.4
5.5
5.6
5.8

Section Numbers

2.7
2.7
2.7
2.7
2.7
2.7

OWNER		CONTRACTOR	
By:	<u>Renard RHP</u>	By:	<u>Kel J. Bon</u>
Date:	<u>8/09/05</u>	Date:	<u>August 3, 2005</u>

ROA386

Abel-Contract Change Order-a9.xls8/2/200510:47 AM

Abel-Contract Change Order-b9.xls8/2/200510:43 AM

CSE Report of Findings





CSE File No. 300.06
June 28, 2004

Mr. Keith Walker, A/C, CCLA
L. K. Walker Adjusting Company, Inc.
P.O. Box 470425
Charlotte, North Carolina 28247

Re: Abel Residence
4 Lobelia Way
Cliffs at Glassy Subdivision
Landrum, South Carolina 29356

Dear Mr. Walker:

Pursuant to your request, I performed a visual survey of selected portions of the referenced residence. The purpose of the visual survey was to determine the cause of reported water intrusion around the windows of the subject residence. Limited water testing was also performed during the visual survey. This report provides a summary of our findings.

DESCRIPTION

The subject residence is a three-story structure near Landrum, South Carolina. For the purposes of this report, the front of the structure is considered to face north, toward Lobelia Way. The house is constructed with conventional (hard-coat) stucco. Portions of the exterior of the house include numerous styles of windows which are primarily aluminum-clad wood units manufactured by Eagle® Window and Door, Inc. (Eagle). The roof configuration includes multiple, intersecting gables and hips that are covered with heavy-weight composition shingles with a simulated slate appearance. The Certificate of Occupancy (COA) for the house was recorded in Photos 1A, 1B, 2A and 2B show the front structure, respectively.

DESCRIPTION

The subject residence is a three-story structure located in the Cliffs of Glassy subdivision, near Landrum, South Carolina. For the purposes of this report, the front of the structure is considered to face north, toward Lobelia Way. The house is constructed on a steep slope, such that part of the first floor is constructed below-grade. The above-grade portions of the house are constructed with conventional wood framing, clad primarily with conventional (hard-coat) stucco. Portions of the house are also clad with stone veneer. The exterior of the house includes numerous styles of windows which are primarily aluminum-clad wood units manufactured by Eagle® Window and Door, Inc. (Eagle). The roof configuration includes multiple, intersecting gables and hips that are covered with heavy-weight composition shingles with a simulated slate appearance. The Certificate of

210 EAST MAIN STREET - WEA
PHONE (804) 647-1100

28 2004

211/15/04 10:00 AM

1/15/04 10:00 AM

Add Residence - Landrum, SC
CSE File No. 300-06
Page 2 of 4

BACKGROUND

It is my understanding that the homeowner's have retained H2L Consulting Engineers (H2L) to perform moisture testing and destructive testing at selected areas of the house. Based on this work, H2L has identified localized areas that exhibit water intrusion and associated damage. These areas are primarily located around and below the windows at the house.

OBSERVATIONS

A visual survey of selected portions of the subject residence was performed by Martin R. Phillips, P.E. and R.T. Harris of C 27, 2004 in your presence. Limited H2L was also present as well as subcontractor and Mr. Phil Gilliam of Gilliam Construction (general contractor). A summary of relevant observations noted during the survey is provided below.

OBSERVATIONS

A visual survey of selected portions of the subject residence was performed by Martin R. Phillips, P.E. and R.T. Harris of Construction Science and Engineering, Inc. (CSE) on May 27, 2004 in your presence. Limited water testing was also performed. Mr. Randy Still of H2L was also present, as were Mr. Phil Bender of Hobbit Plastering, Inc. (stucco subcontractor) and Mr. Phil Gilliam of Gilliam Construction (general contractor). A summary of relevant observations noted during the survey is provided below.

Interior

1. Mr. Still reported that the house (or basement) had not the sheetrock returned. Sealant some of these windows. Dist sash joinery and the joint betw
2. Evidence of water intrusion living room, as the rear of the house. The windows in this area are fixed, and surrounded at the interior by custom-milled wood trim. Sealant repairs had also been attempted at these windows in the same manner described above in item #1.

Exterior

3. As described above, H2L performed previously localized removal of the stucco cladding at selected windows of the house. At the time of our site visit, the destructive tests by H2L were covered by a self-adhering rubber membrane product, such that observations were possible at these locations by temporarily removing the membranes. The majority of the destructive tests had been performed around the fixed windows at the rear of the second floor living room, and the fixed and casement windows at the rear of the basement.
4. The stucco had been removed from between the bottom corners of the right-hand windows of the basement (Photo 3). The left-hand window in Photo 2 is a fixed window, and the left-hand window is a casement window. The oriented strand board (OSB) wall sheathing and wood wall framing in the area directly below the windows

Abel Residence - Landrum, SC
CSE File No. 300.00
Page 3 of 4

exhibit moderate to severe water damage (Photo 4A). Close observation of the destructive test revealed that the wall assembly consisted of the following:

- The OSB wall sheathing is covered by a woven, polyolefin building wrap.
- The building wrap had been wrapped into the rough opening of the window, after which asphalt-saturated felt spones were wrapped over the surface of the building wrap, on the back of the window nailing flange (Photo 4B).
- After the window was set in place, 8 inch wide strips of self-sealing rubber membrane were applied over the exterior surface of the window nailing flanges (Photo 5A).
- Self-furring metal lath and casing bead were installed over the various barriers described above. The casing bead was noted to be terminated within approximately 1/4 inch of the window frame, and the scratch and brown coats of the stucco installed onto the lath.
- Backer rod and sealant were installed into the gap between the casing bead and the window frame, on the coat and over the sealant.

5. Simple dam tests were performed at the bottom corners of each of the windows shown in Photo 3. Specifically, duct tape and plumbers putty were used to create a 1 1/2-inch deep trough on the exterior of the windows at these locations. The results of the dam tests are described below.

- Photo 5B shows the test at the left-hand fixed window. Within approximately 30 seconds of filling the trough with tap water, water was observed to begin running freely out of the joint at the bottom corner of the window frame (Photos 4B and 6A). Photo 6B shows the likely point of water intrusion in the joinery at the bottom corner of the window sash.
- Photo 7A shows the dam test that was conducted at the right hand casement window. Prior to the destructive test, the inside corner of the window sash was noted to be corroded due to long-term water intrusion (Photo 7B). Within approximately 30 seconds of filling the trough, water was noted to be running freely from the joint at the bottom corner of the window frame.

6. Destructive tests had also been performed at the rear of the basement (Photo 88) to determine the extent of damage caused by water intrusion.

5. Simple dam tests were performed at the bottom corners of each of the windows shown in Photo 3. Specifically, duct tape and plumbers putty were used to create a 1 1/2-inch deep trough on the exterior of the windows at these locations. The results of the dam tests are described below.

- Photo 5B shows the test at the left-hand fixed window. Within approximately 30 seconds of filling the trough with tap water, water was observed to begin running freely out of the joint at the bottom corner of the window frame (Photos 4B and 6A). Photo 6B shows the likely point of water intrusion in the joinery at the bottom corner of the window sash.
- Photo 7A shows the dam test that was conducted at the right hand casement window. Prior to the destructive test, the inside corner of the window sash was noted to be corroded due to long-term water intrusion (Photo 7B). Within approximately 30 seconds of filling the trough, water was noted to be running freely from the joint at the bottom corner of the window frame.

10 299d

(411574)

7001 Residence - Landrum, SC
CSC File No. 2009.06
Page 1 of 4

7. Destructive tests had also been conducted by H2L under the fixed windows at the rear of the second floor, above the basement windows described above. Observations at these locations revealed that the water intrusion appears to be directly related to the bottom corners of the windows (Photo 9A). Specifically, the water damage is shaped in a plume directly below the bottom corners of the window frame.

CONCLUSIONS

Based on the observations described above, associated damage has primarily been caused by leaks in the window units. The leaks primarily appear to be occurring at the configuration of the window frames, the self-adhering rubber membrane that is applied to the exterior of the window nailing flanges. Therefore, although the stucco cladding in the window frames have resulted in localized damage below the windows.

Photographs referenced in the report call me if you have any questions regarding this report or require additional assistance.

Sincerely,

CONSTRUCTION SCIENCE AND ENGINEERING, INC.

Martin R. Phillips
Martin R. Phillips, P.E.

CONCLUSIONS

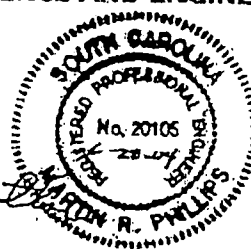
Based on the observations described above, it is our opinion that the water intrusion and associated damage has primarily been caused by leaks in the window units. The leaks primarily appear to be occurring at the joinery of the window sashes. Due to the configuration of the window frames, the water intrusion penetrates behind the self-adhering rubber membrane that is applied to the exterior of the window nailing flanges. Therefore, although the stucco cladding appears to have been installed properly, the leaks in the window frames have resulted in localized damage below the windows.

Photographs referenced in the report are attached for your reference. Please feel free to call me if you have any questions regarding this report or require additional assistance.

Sincerely,

CONSTRUCTION SCIENCE AND ENGINEERING, INC.

Martin R. Phillips
Martin R. Phillips, P.E.



300 Da 2009 reference report

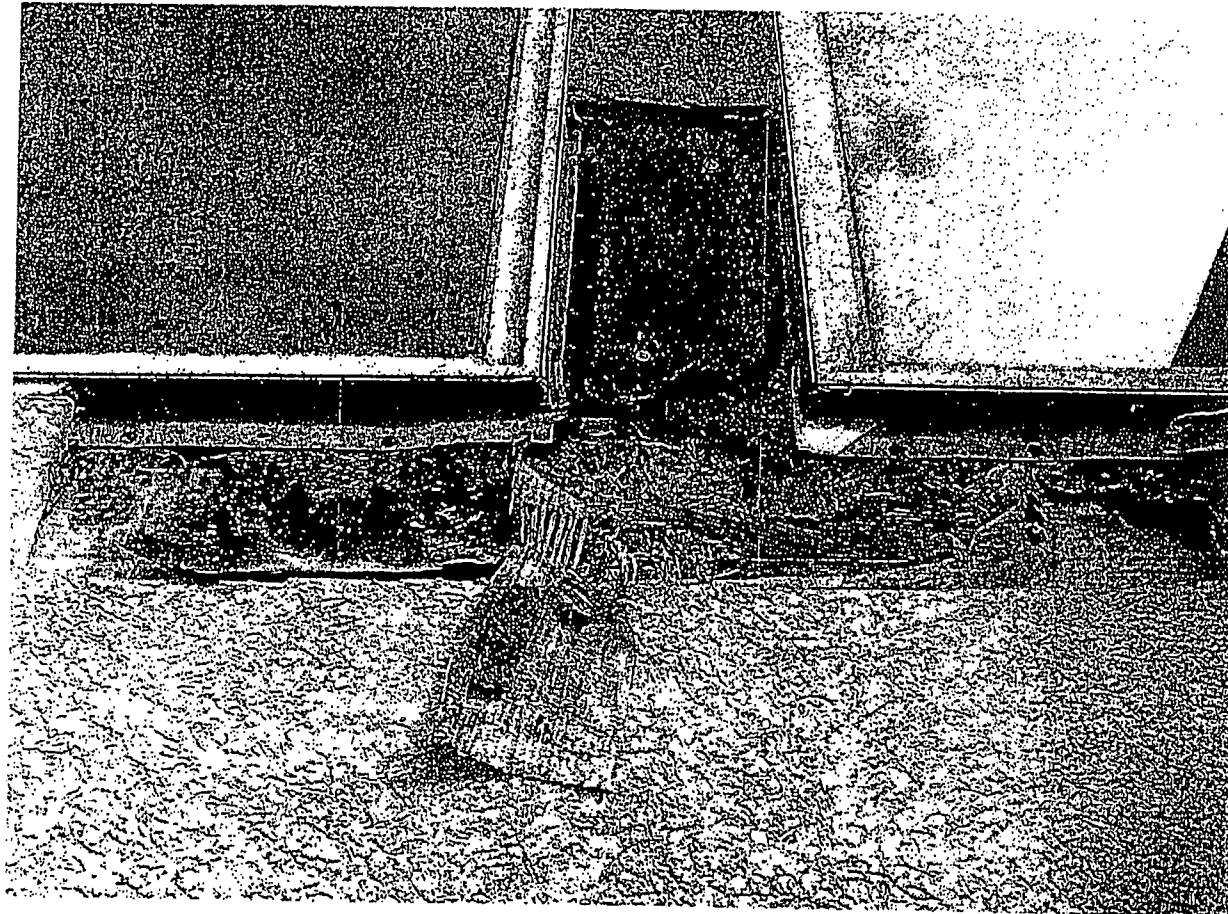




ROA395

Appendix 399



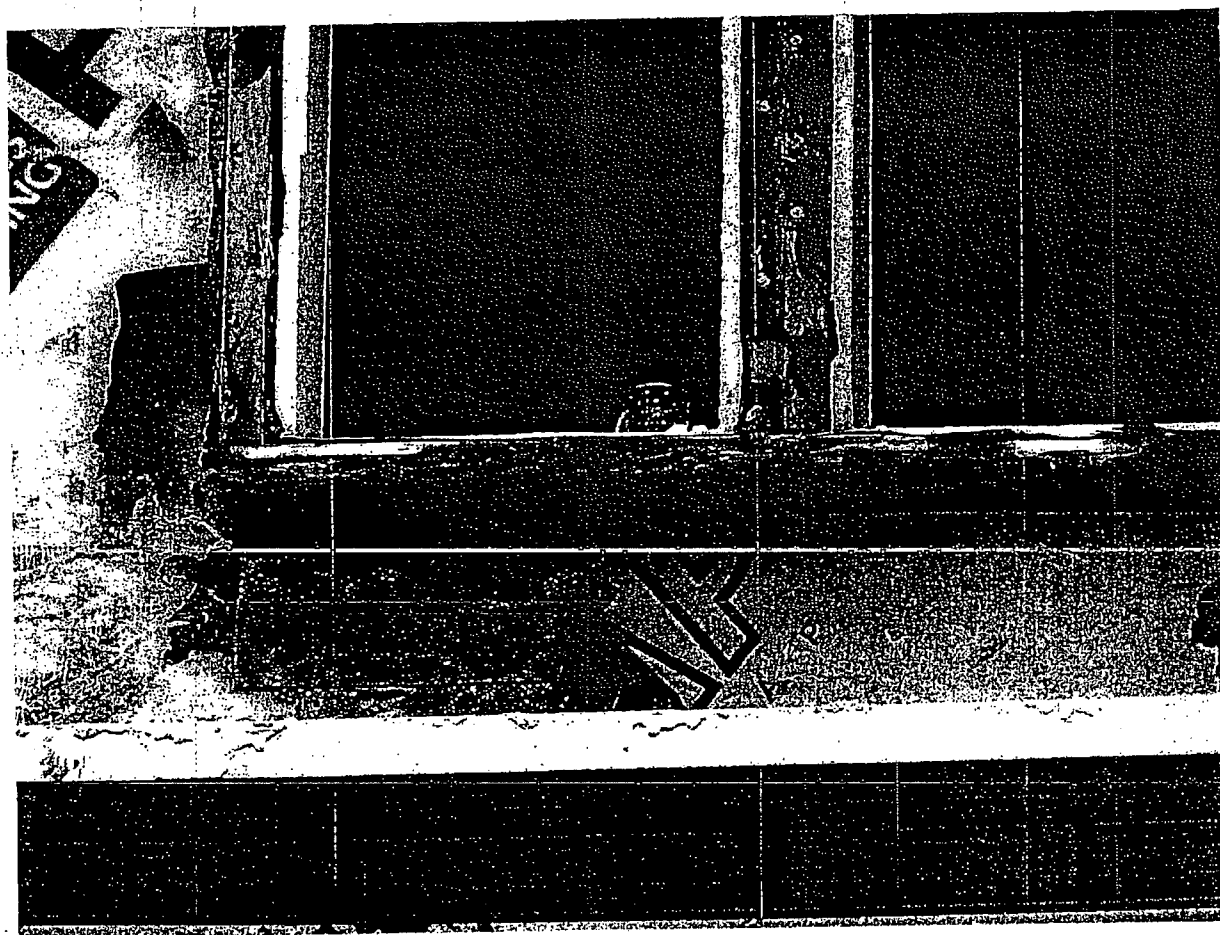




ROA398

Appendix 402





STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)

Plaintiffs,

vs.

EAGLE WINDOWS & DOORS,)
INC., AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW AND)
DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC., DALE)
COLEMAN, and GARY)
CHURCHILL,)

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

RESPONSES TO PLAINTIFFS'
REQUESTS FOR ADMISSIONS

TO: JASON M. IMHOFF, ATTORNEY FOR PLAINTIFFS

Defendant, Eagle Window & Door Manufacturing, Inc. (Eagle), pursuant to Rules 26 and 36 of the South Carolina Rules of Civil Procedure, responds to the Request for Admissions of Plaintiffs as follows:

1. Steven B. Perry and Gregory L. Taber are the Senior Managing Director and a principal, respectively, in Linsalata Capital Partners, which funded the purchase of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from American Architectural in 2002, and both Mr. Perry and Mr. Taber became officers of the renamed EWD Acquisition Co., renamed as Eagle Window & Door, Inc.

ROA 401

RESPONSE: Eagle does not have sufficient information to form a belief as to whether Steven B. Perry and Gregory L. Taber are presently the Senior Managing Director and a principal in Linsalata Capital Partners and therefore deny the same. Eagle denies that Linsalata Capital Partners funded the purchase of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from American Architectural in 2002. Eagle admits that in April, 2002, Steven B. Perry and Gregory L. Taber were officers of EWD Acquisition Co., a Delaware corporation, and that EWD Acquisition Co. was renamed Eagle Window & Door, Inc. on May 1, 2002.

2. Ronald H. Neal is an attorney with the firm of Calfee, Halter & Griswold, LLP, and served as the secretary of Eagle Window & Door, Inc. from 2002 until 2005.

RESPONSE: It is admitted that Ronald H. Neill was an attorney with the firm of Calfee, Halter & Griswold, LLP and served as director and secretary of Eagle Window & Door, Inc. from April, 2002 until May 23, 2005.

3. Mr. Taber, Mr. Neal and Mr. Perry all reside in Ohio and did not deal in the day to day operations of Eagle Window & Door, Inc., especially in regard to product design, manufacture, marketing and/or sales.

RESPONSE: Eagle does not have sufficient information to form a belief as to where Mr. Taber, Mr. Neill and Mr. Perry reside at this time. Any involvement that they had with the operations of Eagle Window & Door, Inc. began in April, 2002 and ended at the time of Andersen Corporation's acquisition of Eagle Window & Door, Inc. on May 23, 2005. The balance of the request is denied.

4. David Beecken has been the President and Chief Executive Officer of Eagle Window & Door, Inc., and Eagle & Taylor Company since 2000, and has worked at numerous incarnations of Eagle Window & Door, Inc. since high school.

RESPONSE: Denied. Mr. Beeken was the President of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from 2000 until approximately May 6, 2002, the effective date of sale of the assets of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. to EWD Acquisition Co., a Delaware corporation. From that date on, Mr. Beeken was no longer an officer or employee of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. From that date until April 1, 2007, Mr. Beeken was the President of Eagle Window & Door, Inc. On April 1, 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc. From April 1, 2007 until September 2009, Mr. Beeken was President of Eagle Window & Door Manufacturing, Inc. The balance of the Request is denied.

5. That the business records from the Iowa Secretary of State attached hereto as Exhibit "A" are true, accurate, and authentic copies of business filings prepared in the ordinary course of business and submitted to and filed by the Secretary of Iowa.

RESPONSE: Eagle admits that the records attached as Exhibit A to the Requests for Admissions purport to be true, accurate and authentic copies of documents filed with the Secretary of State of the State of Iowa. Eagle does not have sufficient information to admit the balance of the request and therefore denies the same.

6. That the documents from Eagle Window & Door, Inc.'s website attached hereto as Exhibit "B" are true, accurate, and authentic copies of the Eagle Window & Door, Inc. website as of September 6, 2007, and are available on Eagle Window & Door, Inc.'s website in the ordinary course of business.

RESPONSE: Eagle is unable to view Eagle Window & Door, Inc.'s website as of September 6, 2007, and therefore must deny Request for Admission number 6.

7. Linsalata, the investor in Eagle Window & Door, Inc. from 2002 through 2005, allowed Eagle Window & Door, Inc. a great deal of autonomy and took a hands-off approach to running Eagle Window & Door, Inc.

RESPONSE: Denied as being vague, indefinite and subjective.

8. Eagle Window & Door, Inc. is a mere continuation of Eagle Window & Door, Inc. from 2000 through 2005.

RESPONSE: Denied.

WARREN & SINKLER, L.L.P.



G. DANA SINKLER

171 Church Street, Suite 340

P.O. Box 1254

Charleston, SC 29402

(843) 577-0660

dsinkler@warren-sinkler.com

Attorney for Defendant

Eagle Window & Door Manufacturing, Inc.

October 18, 2011

Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned certifies that she served a copy of the foregoing Defendant Eagle Window & Door Manufacturing, Inc.'s Responses to Plaintiffs' Requests for Admissions on October 18, 2011, by mailing a copy of the same with sufficient first class postage affixed to all counsel of record at their addresses set forth below:

Jason M. Imhoff, Esquire
The Ward Law Firm
Post Office Box 5663
Spartanburg, SC 29304-5663


Jo Davis, Legal Assistant

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 NATIONWIDE MUTUAL)
 INSURANCE COMPANY, INC.,)
 and GILLIAM CONSTRUCTION)
 COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS & DOORS,)
 INC., AMERICAN)
 ARCHITECTURAL PRODUCTS)
 CORPORATION, WINDOW AND)
 DOOR CONCEPTS, INC.,)
 CHARLES GOAD, HOBBIT)
 PLASTERING, INC., PHILLIP L.)
 BENDER, UPSTATE)
 WATERPROOFING, INC., DALE)
 COLEMAN, and GARY)
 CHURCHILL,)

Defendants.)

STATE OF OHIO:)

COUNTY OF CUYAHOGA:)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

AFFIDAVIT OF STEPHEN B. PERRY

Personally appeared before me, STEPHEN B. PERRY, who being duly sworn,
 deposes and says:

1. He is 57 years old and a resident of Bentleyville, Ohio. He is Co-President
 and Senior Managing Director of Linsalata Capital Partners, which is a Cleveland, Ohio
 middle market private equity buyout firm. He has firm responsibilities for administration
 of investment partnerships including Linsalata Capital Partners Fund IV, L.P. (Linsop),
 which was the successful bidder for a substantial portion of the assets of Eagle & Taylor

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 MICHAEL BLACKLEY

ROA 406

Company (E&T), which was a wholly owned subsidiary of American Architectural Products Company (AAPC).

2. In the spring of 2001, he learned from the firm of Conway, Del Genio, Gries & Co., Bankruptcy Professionals headquartered in New York who were representing AAPC, that it had filed for chapter 11 bankruptcy and that the assets of E&T were going to be placed on the auction block in the course of the bankruptcy. Lincap considered participating in the bidding for the assets but initially decided not to.

3. Not until Long Point Capital Partners (LPC), a competitor of Lincap, had made the initial bid for the assets, in March of 2002, (a "stalking horse" bid of \$48,500,000), did Lincap change its mind and get involved in the proceedings. It then performed its due diligence with the assistance of Conway, Del Genio, which arranged meetings with the management team of Eagle & Taylor d/b/a Eagle Window & Door, Inc., a fictitious entity, to acquire the necessary information to evaluate the assets. In the course of those meetings, he was told Eagle & Taylor was being cash starved by AAPC which was using its profits to try to keep its other subsidiaries afloat.

4. Prior to this, Lincap had had no business dealings, nor any contact with Eagle & Taylor d/b/a Eagle Window & Door, Inc. or its parent, AAPC. Further, Lincap had played no role in approving of, participating in, causing or contributing to AAPC's bankruptcy.

5. The Bankruptcy Court issued an Order on March 19, 2002: (1) Scheduling Date and Time for Hearing on Sale of Eagle Assets; (2) Approving Procedures for Notice and Submission of Competing Bids; and (3) Approving Break-Up Fee.

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SPARTANBURG COUNTY
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J. H. DE BLACALEY

"Bidding Procedures" Orders), which provided, among other things, for the solicitation and submission of competing bids for the assets by no later than April 9, 2002. Lincap submitted a Qualified Bid of \$50,150,000 and was thus entitled to participate in the auction of the assets.

6. Thereafter, an auction was held in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division, in Youngstown, Ohio on April 15, 2002 and conducted by or on behalf of the Conway Del Genio Investment Banking firm of New York, AAPC'S financial advisors.

7. He, personally, was the bidder for Lincap and, after a considerable period of time and at least 15 competing bids, he emerged as the successful bidder on behalf of Lincap at a price of \$64,750,000. Immediately after the conclusion of the bidding, the parties, Lincap, by its affiliate EWD Acquisition Co., and AAPC/Eagle & Taylor d/b/a Eagle Window & Door, Inc., entered into an Asset Sale Agreement. (See page 2 of Bankruptcy Order). The Asset Sale Agreement did not assume and specifically excluded "any liability for damage to third parties resulting from acts, events, or omissions occurring prior to the Closing Date, . . ." ¶ 2.3(a)

8. The execution page of the Asset Sale Agreement, attached hereto as Exhibit A, reflects that it was signed by only two people. They were the affiant, Stephen B. Perry, who signed as chairman of EWD Acquisition Co. and as Senior Vice President and Chief Financial Officer of Lincap, and Joseph Dominijanni, the Chief Executive Officer of E&T and the President and Chief Executive Officer of AAPC.

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9. Before the auction was held, both LPC and Lincap had created Delaware corporations to acquire and manage the assets of AAPC/E&T if they should become the successful bidder. LPC created Eagle Window & Door, Inc., a Delaware corporation, as its acquiring company and made its initial bid in that name. Lincap created EWD Acquisition Co. as its acquiring company. (See Bankruptcy Court Order of April 19, 2002, page 1, attached as Exhibit B).

10. After the auction, LPC cancelled its charter of Eagle Window & Door, Inc. and on April 30, 2002, the name of EWD Acquisition Co. was changed to Eagle Window & Door, Inc. (See Certificate of Amendment to Certificate of Incorporation of EWD Acquisition Co. attached as Exhibit C).

11. The closing of the assets purchase was scheduled to be held on May 6, 2002 and, on that date, after consummation of the purchase by payment of the agreed sales price, he issued a resolution on behalf of Eagle Window & Door, Inc. removing all existing officers (only himself) and appointing the following Officers:

Stephen B. Perry	-	Chairman
David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller

(See Written Action of the Sole Director, May 6, 2002, attached as Exhibit D).

*Of those officers, Stephen B. Perry, Gregory L. Taber and Ronald H. Neill were all Linsalata people while the rest were former officers of Eagle & Taylor Company or Eagle Window & Door, Inc.

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12. Then, on May 7, 2002, he issued another resolution removing existing Directors (only himself) and appointing the following Directors:

Stephen B. Perry	-	Chairman
Frank N. Linsalata	-	Founder of Linsalata Capital Partners
Ronald H. Neill	-	Attorney with the firm of Calfee, Halter & Griswold, LLP, Counsel for Lincap and other partnerships of Linsalata Capital Partners

(See Written Action of the Sole Stockholder, May 7, 2002, attached as Exhibit E).

13. At some time after May 7, 2002, David Beeken was added as a Director of Eagle Window & Door, Inc. but, at all times subsequent to the acquisition of the assets of Eagle & Taylor d/b/a Eagle Window & Door, Inc., Linsalata Capital Partners had total control of the operations of Eagle Window & Door, Inc., until the sale of the company to Andersen Corporation in 2005. (See Exhibit F attached).

14. To the knowledge of Affiant, prior to Lincap's acquisition of the assets, the officers of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. held no ownership interest in Eagle & Taylor Company.

15. Upon the closing and acquisition of the assets, he distributed subscribed shares of stock in Eagle Window & Door Holding Company on May 6, 2002 as follows:

Linsalata Capital Partners Fund IV, L.P. – Twenty-Three Thousand (23,000)
David Beeken – Four Hundred Fifty (450)
Charles A. Daoud – Two Hundred Seventeen and 5/10 (217.5)
Ronald Vander Weerd – Seventy-Five (75)
Dennis Thomsen – Sixty-Five (65)
Douglas Weideman – Thirty (30)
Andrew Wickham – Fifteen (15)
Kristie Paulsen – Twenty-Five (25)
Gregory Kieler – Twenty and 00/100 (20.00)
William Lynch – Twenty (20)
John Hannan – Fifteen (15)
Jeffrey Roen – Fifteen (15)

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Charles A. Daoud – Two Hundred (200)
Massachusetts Mutual Life Insurance Company – One Thousand (1,000)
Massachusetts Mutual Life Insurance Company – Two Hundred Sixty-Two and
5/10 (262.5)
Massachusetts Mutual Life Insurance Company – Three Hundred Eighty-Seven
and 5/10 (387.5)
MassMutual Corporate Investors – Two Hundred Twenty-Five (225)
MassMutual Participation Investors – One Hundred Twenty-Five (125)

(See example of Stock Certificate attached as Exhibit G).

16. Linsalata Capital Partners Fund IV, L.P., through its wholly owned subsidiary, EWD Acquisition Co., which changed its name to Eagle Window & Door, Inc., was the successor to AAPC/Eagle & Taylor Company d/b/a Eagle Window & Door, Inc., which was its predecessor.

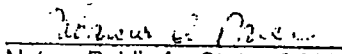
17. Prior to the bankruptcy proceedings, there was no commonality of ownership between the predecessor and successor entities.

Further affiant sayeth not.


STEPHEN B. PERRY

State of Ohio)
County of COLUMBIA) SS:

Before me on this 11th day of April, 2012, a notary public in and for said County and State, appeared Stephen B. Perry, known to me personally, who upon taking an oath, did swear that the above affidavit was derived from his own personal knowledge and that he was under no duress in signing such affidavit.


Notary Public for State of Ohio
My Commission Expires: 11/07/2012

Patricia A. Price
Notary Public, State of Ohio
My Commission Expires 11/07/12

6

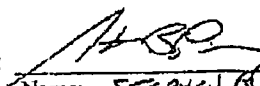
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M. HUGH BLACKLEY

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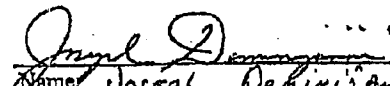
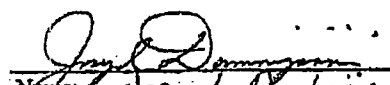
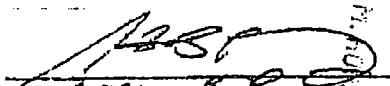
IN WITNESS WHEREOF, the parties hereto have duly caused this Agreement to be executed as of the date first above written.

BUYER:

EWD ACQUISITION CO.

By: Name: STEPHEN B. PECK
Title: CHAIRMANSELLER PARTIES:SELLER:

EAGLE & TAYLOR COMPANY

By: Name: Joseph Dominijanni
Title: CEOAAPC:AMERICAN ARCHITECTURAL
PRODUCTS CORPORATIONBy: Name: Joseph Dominijanni
Title: President + CEOLINCAP:LINSALATA CAPITAL PARTNERS FUND
IV, L.P.By: Name: STEPHEN B. PECK
Title: Sr. Vice President
A party solely for purposes of Section 3.2(b)
of this Agreement

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B. CHLEY

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U.S. BANKRUPTCY COURT

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
YOUNGSTOWN

In re

AMERICAN ARCHITECTURAL
PRODUCTS CORPORATION, *et al.*

Debtors.

Jointly Administered Under
Case No. 00-43726

Chapter 11

Chief Judge William T. Bodoh

**ORDER APPROVING: (1) ASSET SALE AGREEMENT WITH EWD
ACQUISITION CO.; (2) SALE OF ESTATE PROPERTY FREE AND
CLEAR OF ALL INTERESTS; AND (3) ASSUMPTION AND
ASSIGNMENT OF CERTAIN RELATED EXECUTORY CONTRACTS**

This matter is before the Court on the "Debtors' Motion for Order Approving: (1) Asset Sale Agreement With Eagle Window & Door, Inc.; (2) Sale Of Estate Property Free And Clear Of All Interests; and (3) Assumption And Assignment Of Certain Related Executory Contracts" filed on March 12, 2002 (the "Motion") by American Architectural Products Corporation and Eagle & Taylor Company (d/b/a Eagle Window & Door, Inc., "Eagle"), debtors and debtors-in-possession in these Chapter 11 cases (the "Debtors"). The Motion sought, among other things, an order of the Court authorizing the Debtors to consummate a sale of substantially all the assets of Eagle (the "Assets") to Eagle Window & Door, Inc. ("EWDI"), a newly-created Delaware corporation and affiliate of Long Point Capital, Inc. ("LPC"), or such higher and better bidder as the Court may approve. In accordance with the "Asset Sale Agreement" between the Debtors and EWDI attached to the Motion (the "Original Agreement"), EWDI's purchase price for the Assets was \$48,500,000, subject to certain adjustments as provided in the Original Agreement.

On March 19, 2002, the Court entered its "Order: (1) Scheduling Date and Time for Hearing on Sale of Eagle Assets; (2) Approving Procedures for Notice of Sale and Submission of

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Competing Bids; and (3) Approving Break-Up Fee" (the "Bidding Procedures Orders"), which provided, among other things, for the solicitation and submission of competing bids for the Assets by no later than April 9, 2002 (the "Bid Deadline"). One competing bidder, Linsalata Capital Partners Fund IV, L.P. ("Linsalata"), submitted a Qualified Bid (as defined in the Bidding Procedures Order) for the Assets by the Bid Deadline.

In accordance with the Bidding Procedures Order and the Debtors' "Notice of Date, Time and Procedures For Auction of Eagle Assets" filed and served on the parties on April 10, 2002, the Debtors conducted an auction for the Assets between EWDI and Linsalata (which had by then designated a newly-created affiliate entity, EWD Acquisition Co. ("EWD Acquisition"), as its buyer entity) on April 15, 2002. At the conclusion of the auction, the Debtors determined that EWD Acquisition had submitted the highest and best bid for the Assets at \$64,750,000 (the "Purchase Price").

On April 16, 2002, the Court conducted a hearing on the Motion (the "Sale Hearing"), during which the Court heard and considered statements of counsel for the Debtors, counsel for EWD Acquisition, counsel for the Official Committee of Unsecured Creditors (the "Committee"), and counsel for Taylor Building Products and Taylor Building Products, Inc. and Ignazio Cangialosi (collectively, the "Taylor Group"), which had filed its "Limited Objection" to the Motion (the "Objection"). Counsel for the Debtors also informed the Court of the process and results of the auction that took place the day before and orally modified the Motion such that the Debtors requested authorization to consummate a sale of the Assets to EWD Acquisition rather than EWDI.

After consideration of: (a) the Motion and "Asset Sale Agreement" executed between the Debtors and EWD Acquisition attached to this Order (the "Final Agreement"); (b) the "Declaration of Joseph Dominjanni" the Debtors' CEO, filed contemporaneously with the Motion and counsel's proffer of the contents of that declaration as Mr. Dominjanni's direct testimony; (c) the Taylor Group's Objection and the Debtors' written response to

Eagle Sale Order, 2

2

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STATE OF DELAWARE
SECRETARY OF STATE
DIVISION OF CORPORATIONS
FILED 09:00 AM 05/01/2002
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CERTIFICATE OF AMENDMENT
TO
CERTIFICATE OF INCORPORATION
OF
EWD ACQUISITION CO.

Pursuant to Section 242 of the
Delaware General Corporation Law

The undersigned, Stephen B. Perry, being the Chairman of the Board of EWD Acquisition Co., a Delaware corporation (the "Corporation"), hereby certifies as follows:

1. The name of the Corporation is EWD Acquisition Co.
2. The amendment of the Certificate of Incorporation as hereinafter set forth has been duly adopted in accordance with Section 242 of the Delaware General Corporation Law.

3. The Certificate of Incorporation of EWD Acquisition Co. is hereby amended so that Article FIRST shall henceforth read, in its entirety, as follows:

"FIRST

"The name of the corporation is Eagle Window & Door, Inc."

IN WITNESS WHEREOF, the undersigned subscribes this Certificate of Amendment and affirms that the facts stated herein are true under penalties of perjury, this 30th day of April, 2002.


Stephen B. Perry,
Chairman of the Board

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R. NORTON BLACKLEY

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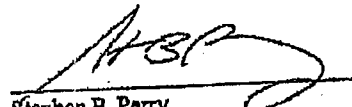
EAGLE WINDOW & DOOR, INC.

Written Action of the Sole Director

Pursuant to the authority of Section 141(f) of the Delaware General Corporation Law, the undersigned, being the Sole Director of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing officers of the Corporation are hereby removed from office, effective immediately, and each of the following persons is hereby appointed to serve in the office or offices of the Corporation set forth opposite his name below, to serve at the pleasure of the Board of Directors:

Stephen B. Perry	-	Chairman
David Becken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller


Stephen B. Perry

Effective Date: May 6, 2002

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EAGLE WINDOW & DOOR, INC.

Written Action of the Sole Stockholder

Pursuant to the authority of Section 228 of the Delaware General Corporation Law, the undersigned, being the sole Stockholder of EAGLE WINDOW & DOOR, INC., a Delaware corporation (the "Corporation"), does hereby adopt the following resolution:

RESOLVED: That all of the existing Directors of the Corporation are hereby removed from office, effective immediately, and the following persons are hereby nominated and elected as Directors of the Corporation, to serve until the next annual meeting of the stockholders of the Corporation and until their respective successors shall have been elected and qualified:

Stephen B. Perry - Chairman
Frank N. Linsalata
Ronald H. Neill

EAGLE WINDOW & DOOR HOLDING COMPANY
("Sole Stockholder")

By: _____

Stephen B. Perry, Chairman

Effective Date: May 7, 2002

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N. J. C. BLACKLEY

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EXHIBIT F

NATURE OF BUSINESS		PRINCIPAL PLACE OF BUSINESS (OUTSIDE OF DELAWARE)	
Mfg/Sale of Windows & Doors		2045 Kerper Blvd., Dubuque, IA 52001	
DIRECTORS	NAME	STREET/CITY/STATE/ZIP	DATE TERM EXPIRES
1.	Stephen B. Perry, Chairman	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124	
2.	Frank N. Linsalata	Linsalata Capital, 5900 Landerbrook Dr., Mayfield Hts., OH 44124	
3.	Eric V. Bacon	Linsalata Capital Partners, Landerbrook Dr., Mayfield Hts., OH 44124	
4.	David Beeken	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001	
5.	Ronald H. Neill	Calfee, Halter & Griswold, 800 Superior Ave., Cleveland, OH 44114	
6.	Donald H. Pratt	433 Ward Parkway, Kansas City, MO 64112	

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OFFICERS	NAME	STREET/CITY/STATE/ZIP	DATE TERM EXPIRES
1.	Steven R. Stoppelmoor	Eagle Window & Door, 2045 Kerper Blvd., Dubuque, IA 52001	
2.	Gregory Taber	Linsalata Capital Partners, 5900 Landerbrook Dr., Mayfield Hts., OH 44124	
ORIGINAL SIGNATURE (SENDER, DIRECTOR OR INCORPORATOR)		TITLE	DATE
X <i>Paul [Signature]</i>		President	1-27-07

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W. HOE & BLACKLEY

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Certificate No. A-2 For 23,000 Shares issued to Linsalata Capital Partners Fund IV, L.P. Transferred from Self-1, New Issue 12/999
 Dated May, 2002 Receipt acknowledged

No. Original Certificate	No. Original Shares	No. Of Shares Transferred
1	1	1 (plus new issue of 22,999 shares)

 TRANSFER RESTRICTED - SEE REVERSE SIDE HEREOF

the State of Delaware

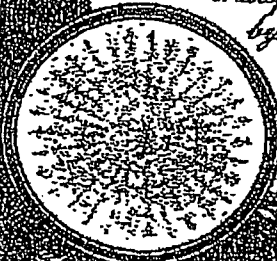


Eagle Window & Door Holding Company

Class A Common Shares, \$.01 Par Value

This Certifies that Linsalata Capital Partners Fund IV, L.P. is the owner of
** Twenty-Three Thousand (23,000) ** fully paid
 and non-assessable Shares of the Capital Stock of the above named Corporation
 transferable only on the books of the Corporation by the holder hereof in person or
 by duly authorized Attorney upon surrender of this Certificate properly endorsed.

In Witness Whereof, this said Corporation has caused this Certificate to be signed by its duly authorized officers
 and its Corporate Seal to be hereunto affixed this 6th day of May A. D. 2002

 James H. Finell
 Secretary

Stephen B. Perry
 Chairman of the Board

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EXHIBIT G

ROA 419

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)
NATIONWIDE MUTUAL)
INSURANCE COMPANY, INC.,)
and GILLIAM CONSTRUCTION)
COMPANY, INC.)

Plaintiffs,)

vs.)

EAGLE WINDOWS, AMERICAN)
ARCHITECTURAL PRODUCTS)
CORPORATION, WINDOW AND)
DOOR CONCEPTS, INC.,)
CHARLES GOAD, HOBBIT)
PLASTERING, INC., PHILLIP L.)
BENDER, UPSTATE)
WATERPROOFING, INC., DALE)
COLEMAN, and GARY)
CHURCHILL,)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2007-CP-42-296

CORRECTED
AFFIDAVIT OF ANDREW WICKHAM

Personally appeared before me, Andrew Wickham, who being duly sworn,
deposes and says:

1. He is currently the Finance and Business Integration Manager of Eagle Window & Door Manufacturing, Inc., a Delaware corporation originally created on April 10, 2002 by Linsalata Capital Partners Fund, IV, L.P. as EWD Acquisition Co. By amendment dated May 1, 2002, EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. (Eagle Inc.).

2. In December of 2001, when American Architectural Products Company (AAPC) filed for bankruptcy, he was the Controller of Eagle Window & Door, Inc., the

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fictitious division through which Eagle & Taylor Company, a Delaware corporation, wholly owned by AAPC, did part of its business. (Eagle Window)

3. The other officers of Eagle, at the time of the bankruptcy, were Ronald Vander Weerd, Vice President of Engineering and Quality Assurance; Charles Daoud, Executive Vice President; Steven Stoppelmoor, Vice President of Finance. David Beeken was President of Eagle & Taylor Company and President of Eagle.

4. Following the filing for bankruptcy, he was very much involved in the effort to attract a purchaser for the assets, carried as assets of Eagle, but actually owned by Eagle & Taylor which, in turn, was wholly owned by AAPC.

5. There were a number of entities that were interested in acquiring the assets of Eagle/Eagle & Taylor and on April 15, 2002, Linsalata Capital Partners Fund IV, L.P. (LinCap), an Ohio Limited Partnership, became the successful bidder at auction for \$64,750,000.00. (See Asset Sale Agreement dated April 15, 2002 attached as Exhibit 1)

6. Title to the assets was initially taken in the name of EWD Acquisition Co., a Delaware corporation created by LinCap. EWD Acquisition Co. changed its name to Eagle Window & Door, Inc. LinCap created two other Delaware corporations in connection with the sale, Eagle Window & Door Holding Company and Eagle Window & Door Services, Inc.

7. None of the officers of Eagle were officers, directors or shareholders of LinCap or any of the three corporations created by it in conjunction with the Eagle assets.

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purchase until after the sale of the assets to EWD Acquisition, Inc. which changed its name to Eagle Window & Door, Inc.

8. Effective May 6, 2002, Stephen B. Perry, the Senior Vice President and CFO of Linsalata Capital Partners Fund IV, LP, the then sole Director of Eagle Window & Door, Inc. (Eagle, Inc.), which was the successor by name change of EWD Acquisition, Inc., removed the existing officers of Eagle, Inc. and appointed himself as Chairman and the following officers:

David Beeken	-	President
Charles A. Daoud	-	Executive Vice President
Steven R. Stoppelmoor	-	Vice President of Finance
Ronald Vander Weerd	-	Vice President of Engineering
Gregory L. Taber	-	Treasurer and Assistant Secretary
Ronald H. Neill	-	Secretary
Andrew Wickham	-	Controller

(See Exhibit 2)

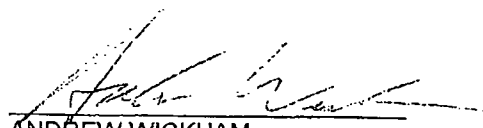
9. Effective May 7, 2002, Stephen B. Perry then removed from office the Directors of Eagle, Inc. and appointed himself, Chairman, and Frank N. Linsalata and Ronald H. Neill, an attorney for Linsalata, as Directors. (See Exhibit 3)

10. Not until sometime prior to January 27, 2003 was David Beeken made a Director of Eagle Window & Door, Inc. (See Exhibit 4)

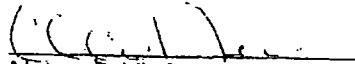
11. There was no commonality of ownership between LinCap and AAPC or Eagle & Taylor Company, nor did AAPC or Eagle & Taylor Company and LinCap have substantially the same officers, directors and shareholders.

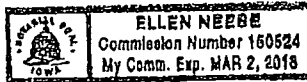
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MAINTENANCE UNIT

FURTHER AFFIANT SAYETH NOT.


ANDREW WICKHAM

Sworn to before me this 18
day of August, 2012.


Notary Public for Illinois
My Commission Expires:
03/02/13



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#4

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUTY OF SPARTANBURG)	C.A. No. 2007-CP-42-296
NATIONWIDE MUTUAL)	
INSURANCE COMPANY, INC.,)	
and GILLIAM CONSTRUCTION)	
COMPANY, INC.)	
Plaintiffs,)	
vs.)	ANSWERS TO PLAINTIFFS'
EAGLE WINDOWS & DOORS,)	INTERROGATORIES
INC., AMERICAN)	
ARCHITECTURAL PRODUCTS)	
CORPORATION, WINDOW AND)	
DOOR CONCEPTS, INC.,)	
CHARLES GOAD, HOBBIT)	
PLASTERING, INC., PHILLIP L.)	
BENDER, UPSTATE)	
WATERPROOFING, INC., DALE)	
COLEMAN, and GARY)	
CHURCHILL,)	
Defendants.)	

TO: JASON M. IMHOFF, ATTORNEY FOR PLAINTIFFS

Defendant, Eagle Window & Door Manufacturing, Inc. (hereinafter referred to as "Eagle"), pursuant to Rules 26, 33 and 34 of the South Carolina Rules of Civil Procedure, responds to the Interrogatories of the Plaintiffs as follows:

GENERAL OBJECTIONS

Eagle objects to Plaintiffs' Interrogatories to the extent they seek disclosure of information subject to the attorney-client privilege, work product or anticipation of litigation protections afforded by Rule 26(b)(3) of the South Carolina Rules of Civil Procedure, or any other applicable privilege or immunity

(hereinafter referred to as "protected information"). By responding to Plaintiffs' Interrogatories, Eagle does not waive protected information, but instead relies specifically on such protected information.

Eagle's answers to Plaintiffs' Interrogatories are made pursuant to the South Carolina Rules of Civil Procedure using ordinary definitions of words contained within those Interrogatories. To the extent directions or instructions given by Plaintiffs in its Interrogatories either conflict or are inconsistent with the South Carolina Rules of Civil Procedure, Eagle objects to them.

Eagle objects to Plaintiffs' Interrogatories to the extent they seek discovery regarding Eagle products other than product lines installed in Plaintiffs' residence or products with manufacture dates other than those of products installed in Plaintiffs' residence. Such discovery is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, however, Eagle will provide information regarding Eagle products, if any, of the same model and manufacture date as those installed in Plaintiffs' residence.

Subject to the foregoing objections, which are specifically incorporated into each of the following answers, Eagle responds to Plaintiffs' Interrogatories as follows:

1. Either separately, or in the response to each of the following Interrogatories, please state the name, address, job title, and employer of each person answering and assisting in answering these Interrogatories on your behalf. Also, list all documents, files or categories of documents used, reviewed,

or referred to in preparing each response and identify who supplied those documents or files.

ANSWER: Eagle and its counsel answered these interrogatories.

2. Do you do business as a corporation, partnership, sole proprietorship, or joint venture? Please identify the name of any corporation or other entity in which this Defendant owns an interest or which owns an interest in the Defendant.

ANSWER: Eagle Window & Door, Inc. is a Delaware corporation incorporated on April 10, 2002 by Linsalata Capital Partners Fund IV, L.P. After the time EWD Acquisition Company acquired the assets of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. at the bankruptcy sale in 2002, on May 1, 2002, EWD Acquisition Company changed its name to Eagle Window & Door, Inc.

3. If you have not been sued under your correct name, explain why not, state the correct name, and provide your registered agent or agent for service of process so that service may be properly obtained.

ANSWER: Eagle Window & Door, Inc.'s name was changed to Eagle Window & Door Manufacturing, Inc. on April 1, 2007. There is no necessity for further service of process.

4. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim and set forth the number of the policies involved and the amount or amounts of liability coverage

provided in each policy. If no liability insurance coverage is available for this claim, set forth the reasons you believe there is no insurance available.

ANSWER: That information is not available at this time and will be provided by supplemental response.

5. Give the names and addresses of persons whom you believe may have knowledge concerning the facts of this case or the underlying case Renaul and Karen Abel v. Gilliam Construction Company, Inc. and Phillip A. Gilliam, C.A. No. 2005-CP-23-1892. For each person listed, set forth a summary sufficient to inform Plaintiffs of the important facts you believe to be known or observed by such witness and provide a copy of any written or recorded statements taken from such witness.

ANSWER: As to the Abel case, all persons identified in that litigation as witnesses and all witnesses who were deposed in that litigation.

As to this case, the following:

Andy Wickham – Mr. Wickham was Comptroller of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc., a wholly owned subsidiary of American Architectural Products Corporation and was involved in efforts to find a buyer for Eagle & Taylor at the time of the bankruptcy proceedings in 2002. There were numerous entities interested in acquiring Eagle & Taylor, and Linsalata Capital Partners Fund IV, L.P., a Cleveland based private equity firm, ultimately purchased Eagle & Taylor in the name of EWD Acquisition Company, which changed its name to Eagle Window & Door, Inc. He also has some

knowledge of Eagle's involvement with the Abel residence in 2004, 2005 and 2007. No written statements have been taken from Mr. Wickham.

6. Did this Defendant or anyone at its direction perform an investigation of the facts involved in this action or the underlying case? If so, please state the name of the person or persons who conducted such investigation and whether the investigation yielded any written report.

ANSWER: Eagle did not perform any investigation in connection with the underlying case, but some of its field service people were involved in making repairs at the Abel residence and also attended a meeting at the site which is discussed in a letter to Frank H. Gibbes, Esq. from Edward R. Cole dated May 13, 2004, which is already in possession of Plaintiffs' counsel. Field reports are produced.

7. Please describe any and all claims or demands for compensation previously made against this Defendant, in which the claimant alleged deficiencies with windows manufactured by this or any previous Eagle Window entities, including, but not limited to, Eagle Windows and Doors, Inc., EWD Acquisition Company, Eagle and Taylor Co. d/b/a Eagle Window and Door, Inc., Eagle and Taylor Co., or Eagle Windows. For each such claim or demand, please provide the date(s) when the claim or demand was learned of or communicated to one of the above entities; the name, address, and telephone number of the person(s) who made the complaint, demand, or other notice; describe the incident or allegations which gave rise to the same; describe the product or products by name and identifying model involved in the allegations

and describe what response, if any, was made to such demand or complaint. Also, please state whether such claim or demand resulted in the initiation of litigation or other adversarial proceeding, and provide the Court in which such action was initiated, the caption of the case, and the civil action or arbitration number.

ANSWER: Eagle objects to this interrogatory on the grounds that information sought to be discovered relating to "claims or demands for compensation" arising from the alleged deficiency of product installed prior to the acquisition of the assets of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc. is overly broad and unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence because no such "claims or demands for compensation" were ever accepted as legitimate obligations of Eagle and all such claims or demands were contested.

8. Please provide the model number or other identify marking of the product which you believe was installed in the Abel's residence. Provide any trademarks or patents for said product, where it was manufactured, the name of the owner of the manufacturing facility, the date it was manufactured, and how it is identified within your company.

ANSWER: Copies of the orders for the products provided to the Abel residence are being produced. The trademarks or patents for the product are proprietary documents and could not lead to the discovery of admissible evidence on the issues raised in these proceedings and Eagle therefore objects to their production. The purchase order produced will provide the information as

to the dates of purchases and the products purchased. The owner of the manufacturing facility at that time was Eagle & Taylor Company d/b/a Eagle Window & Door, Inc., a wholly owned subsidiary of American Architectural Products Corporation.

9. Do you contend that any other person or entity other than this Defendant is or may be liable in whole or in part for the claims raised by this lawsuit? If so, state the full name and address of each such person or entity, the legal basis for your contention, the facts or evidence upon which your contention is based, and whether or not you have notified each such person or entity of your contention.

ANSWER: Yes. The class of contractors and subcontractors who had anything to do with alleged water intrusion in the Abel's residence. The legal basis for this contention is S.C. Code of Laws §§ 15-38-20–15-38-50. Assuming, but not conceding, that all such members of that class were named as Defendants in this action, there is no need to notify any member of that class because they were already named in Plaintiffs' suit for contribution and, it is Eagle's understanding, that Plaintiffs have settled with or released all of them except for Eagle. Nonetheless, the members of that class will provide the denominator by which the total amount paid for water intrusion must be divided to determine the maximum amount Eagle could be responsible for. However, Eagle can be established to be a member of that class only by a finding that there was sufficient commonality of ownership between American Architectural Products Corporation and EWD Acquisition Company and Linsalata Capital Partners Fund

IV, L.P. at the time that the assets of Eagle & Taylor Company d/b/a Eagle Window and Door, Inc. were acquired in bankruptcy proceedings on May 6, 2002.

10. Describe in detail how Eagle Windows and Doors, Inc. became the owner of the assets of Eagle and Taylor Co. d/b/a Eagle Window and Door, Inc. Please include what valuations, due diligence, inspection, analysis, appraisals, and other investigatory work was done by EWD Acquisition Co. prior to the purchase, what specific persons, shareholders, officers, directors, or employees were involved in that process, what information was obtained by EWD Acquisition Co., what information was provided to Eagle and Taylor Co., d/b/a Eagle Window and Door, Inc., and who at EWD Acquisition Co., made the decision to purchase the assets of Eagle and Taylor Co., d/b/a Eagle Window and Door, Inc.

ANSWER: Eagle Window & Door, Inc. became the owner of the assets of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. by change of name of EWD Acquisition Company on May 1, 2002. Eagle & Taylor's officers and employees were not privy to any due diligence exercised by EWD Acquisition Company, nor were they privy to any of the other information sought by this interrogatory.

11. Please set forth the names of all former or present shareholders, directors, officers, owners, employees, executives, chair persons, presidents, or anyone else employed by or having an ownership interest in EWD Acquisition Co. and Eagle Window and Door, Inc. and whether they were ever a

shareholder, director, officer, owner, employee, executive, chair person, or president of Eagle and Taylor Co. or Eagle and Taylor Co. d/b/a Eagle Window and Door, Inc. Include in your answer, the title and/or titles of each person, the dates they were employed with any of the above enumerated entities, and their job description.

ANSWER: David Beeken was the President of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from 2000 until approximately May 6, 2002, the effective date of the sale of the assets of Eagle & Taylor to EWD Acquisition Company. From that date until April 1, 2007, Mr. Beeken was the President of Eagle Window & Door, Inc. On April 1, 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc. From April 1, 2007 until September, 2009, Mr. Beeken was President of Eagle Window & Door Manufacturing, Inc. He had a minor ownership interest in Eagle Window & Door, Inc. until the sale of the company to Andersen.

Andy Wickham was the Comptroller of Eagle & Taylor d/b/a Eagle Window & Door, Inc. from 1998 until approximately May 6, 2002, the effective date of the sale of the assets of Eagle & Taylor to EWD Acquisition Company. From that date until April 1, 2007, Mr. Wickham was the Comptroller of Eagle Window & Door, Inc. On April 1, 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc. From April 1, 2007 until the present, Mr. Wickham has been the Vice President of Finance of Eagle Window & Door Manufacturing, Inc. He had a minor ownership interest in Eagle Window & Door, Inc. until the sale of the company to Andersen.

Ronald Vander Weerd was the Vice President of Engineering and Quality Assurance of Eagle & Taylor d/b/a Eagle Window & Door, Inc. from 1997 until approximately May 6, 2002, the effective date of the sale of the assets of Eagle & Taylor to EWD Acquisition Company. From 2002 until 2007, he was Vice President of Engineering and Quality Assurance of Eagle Window & Door, Inc. On April 1, 2007, Eagle Window & Door, Inc. changed its name to Eagle Window & Door Manufacturing, Inc. From April 1, 2007 until the present, Mr. Vander Weerd has been the Vice President of Engineering and Quality Assurance of Eagle Window & Door Manufacturing, Inc. He had a minor ownership interest in Eagle Window & Door, Inc. until the sale of the company to Andersen.

Charles Daoud was the Executive Vice President of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from 2000 until approximately May 6, 2002, the effective date of the sale of the assets of Eagle & Taylor to EWD Acquisition Company. From 2002 until 2007, Mr. Daoud was Executive Vice President of Eagle Window & Door, Inc. He had a minor ownership interest in Eagle Window & Door, Inc. until the sale of the company to Andersen.

Steven Stoppelmoor was Vice President of Finance of Eagle & Taylor Company d/b/a Eagle Window & Door, Inc. from 1998 until approximately May 6, 2002, the effective date of the sale of the assets of Eagle & Taylor to EWD Acquisition Company. From that date until 2003, he was Vice President of Finance of Eagle Window & Door, Inc. He had a minor ownership interest in Eagle Window & Door, Inc. until the sale of the company to Andersen.

12. Please list all assets, including physical assets, property, real property, trademarks, patents, designs, or otherwise which EDW Acquisition Co. and/or Eagle Window and Door, Inc. purchased from Eagle and Taylor Co. or Eagle and Taylor Co. d/b/a Eagle Window and Door, Inc. In your answer, please identify whether this Defendant still owns each of the above requested assets.

ANSWER: See Purchase Agreement produced.

13. Does this Defendant, either now or in the past, manufacture the same or a similar product to the products installed in the Abel's home?

ANSWER: Yes. It produces aluminum clad wood windows and doors.

WARREN & SINKLER, L.L.P.



G. DANA SINKLER

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Attorneys for Defendant

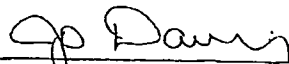
Eagle Window & Door Manufacturing,
Inc.

October 28, 2011
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned certifies that she served a copy of the foregoing Defendant Eagle Window & Door Manufacturing, Inc.'s Answers to Plaintiffs' Interrogatories on October 28, 2011, by mailing a copy of the same with sufficient first class postage affixed to all counsel of record at their addresses set forth below:

Jason M. Imhoff, Esquire
The Ward Law Firm
Post Office Box 5663
Spartanburg, SC 29304


Jo Davis, Legal Assistant

DEALERS ONLY HOMEPAGE
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PRODUCTS
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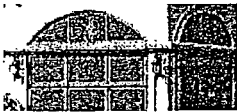
About Eagle

INTRODUCTION **HISTORY** WHY EAGLE? MEDIA CORNER CAREER OPS
 TOUR FACILITY ENVIRONMENTAL STATEMENT NEWS & ANNOUNCEMENTS

History

Past, Present and Future



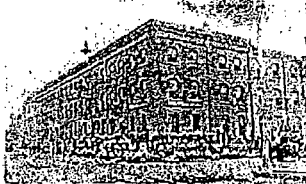


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Lumbering and woodworking have long been one of the principal industries in Dubuque, Iowa's history. The industry, which started in the early 1800's, saw millions of feet of timber from the upper Midwest float in log rafts down to Dubuque mills where it was processed into a variety of component parts for the building trade industry. Utilizing its ideal location on the Mississippi River, Dubuque became a hub of lumbering and millwork activity which flourished in the mid-1860's and on into the 20th century. Wood millwork (specifically sash and doors) soon became the new symbol of Dubuque's prosperity, overshadowing all other businesses.

Shortly before the Civil War in 1862 a young man named William W. Carr headed west from Chicago to Dubuque, Iowa hoping to start a business of his own in America's heartland. Carr soon met an experienced woodworker named Woodbury H. Austin and together they founded, Carr, Austin & Company in 1866. With a starting work force of only two men, the Carr, Austin & Company began producing millwork products in its new manufacturing facility. It was destroyed by fire in both 1871 and 1879, but in spite of their difficulties, a third building was constructed and their employee base grew to 35 men over the next eight years. In 1887, it was renamed Carr, Ryder and Wheeler Company. The business continued to grow and soon its stock capitalization was increased. In 1890, the name changed to Carr, Ryder and Engler Company. Over the next seven years the original plant increased in size many times showing a healthy growth in employment and sales. By 1897, the name was changed again to Carr, Ryder & Adams Company, under which the business grew in astronomical proportions and added several buildings. This name remained until 1938 when the firm became Carr, Adams and Collier Company, manufacturers of Bilt-Well woodwork products. Progressing through this vast series of name changes, the company eventually became Caradco in 1958. It remained one of the largest window and door manufacturers in the country during this period of time.



Carr, Ryder and Engler Company

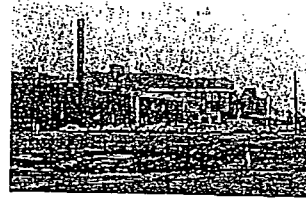
In 1967, as Caradco was still a major player in Dubuque, a window distribution center was established in Cedar Falls, Iowa by a group of investors called Caradco of Cedar Falls. Its initial intent was to set up and distribute Caradco windows to lumber yards in Cedar Falls and its surrounding areas. Throughout the late 1960's and early 1970's, this business expanded to include residential doors, trim, and hardware items. Despite its heavy competition, Caradco of Cedar Falls soon became the largest Caradco distributor (in a single location) in the country.

In 1976 citing constraints in growth and productivity in their facility, Caradco moved its office and manufacturing facilities from Dubuque to Rantoul, Illinois. At this time, the window distribution from Cedar Falls was moved to Dubuque and into some of the vacant building space provided by Caradco's departure. Soon afterwards, quality and delivery problems began to plague Caradco. The quality of their products had

diminished and lead times were greatly extended. Much of this was due to the relocation and restructuring of their plant, the lack of trained personnel, and literally no back-up plan whatsoever. The Dubuque plant had totally shut down.

Soon the investors of Caradco of Cedar Falls decided to terminate their relationship with Caradco and design, manufacture and market a window line of their own. Only one problem existed. This was an era when energy efficiency was an essential commodity. America knew it as the "energy crisis" of the 70's. So, designing a high-quality product with built-in energy efficient features became the goal. With a vacant production facility and a group of eager, experienced personnel, both left behind by Caradco, Eagle Manufacturing launched a new era.

In 1977, Eagle produced its first aluminum clad wood casement window furthering the rich heritage of millwork production in Dubuque. During the next twelve months, Eagle continued developing better techniques, enhancing their designs, training their personnel, and making quality a priority. By 1980, the clad Sliding Patio door was introduced. Over the next six years, five more product lines were developed including; clad double-hung, skylights, circle-tops, geometric windows and French doors.



Eagle Manufacturing, 1980's

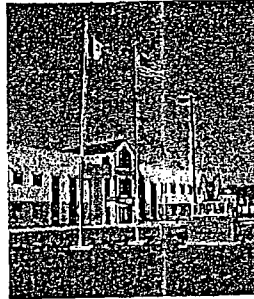
Even with the introduction of these new products, the early 1980's managed to be some of the worst business times in history. However, the extreme dedication and efforts put forth by Eagle and its employees helped them survive and even grow in a time of uncertainty. Nearing the end of the decade, it became apparent that Eagle's current ownership could not generate the resources necessary to take advantage of the base that had been built for them, so the company was sold to Masco Corporation of Taylor, Michigan in September of 1987.

Masco Corporation (a Fortune 500 company) was known for its long history in consumer products for the home and family. These included home furnishings such as Henredon and Drexel Heritage; faucets and plumbing products like Delta and Peerless; Cabinetry including Fieldstone and Merillat; and many other hardware and appliance companies. During its Masco tenure, Eagle made substantial growths while increasing market share due to broadening its distribution throughout North America and Japan. It also tripled its product breadth by introducing French Sliding doors, entry doors, bi-parting doors, radius casements, elliptical units, and a full line of all-wood windows and doors. As you can well imagine, the investment and commitment on Masco's behalf was massive, but for Eagle to grow and be recognized as a quality, national brand name in the industry, it was essential.

The early 1990's proved to be interesting years for Eagle. With the economy on a downward trend, housing starts were flat which in turn lowered Eagle's sales. This was a time for Eagle to fine tune their product line and search for distribution in new markets with the hopes of eliminating some of the seasonality in their business. Gaining market share in the southern part of the country would help level out sales and place it on a consistent path over the year. Fortunately, turn around began in 1992 and sales progressively increased over the next few years.

In 1998, Masco surprised all with an announcement that they would be selling off their furnishings and building products divisions respectively. The divestitures would allow them to focus and concentrate on their core line of consumer and transportation products for which the companies had become recognized. The sale of Eagle Window and Door received a great deal of interest among the industry and due diligence continued for many months. However, in August of 1998, a transaction between MascoTech and American Commercial Holdings, Inc. transferred the ownership of Eagle Window & Door to the newly formed and publicly traded American Architectural Products Corporation. The new company, headquartered in Boardman, Ohio, was determined to grow its existing base of businesses and acquire new businesses with high-quality products and services that would complement the growing family of building industry companies. The goal was to become a major consolidator within the fenestration industry. To support this goal, many smaller window, door and glass manufacturers were acquired during the next two years.

With extreme growth between 1996 and 2000, Eagle had outgrown its old facility. Efficiencies in processes and production were hindered. It became evident that for Eagle to continue its growth pattern, changes were necessary. Talk of a new facility was



Eagle Window & Door, 2001

elevated and soon plans were under way. By moving production to a single-floor facility, increased productivity and capacity for expansion in the coming years would be attainable.

The year 2000 became an exciting time for Eagle Window & Door. In October of 2000, Eagle officially began its move into a brand new 390,000 sq. ft. manufacturing facility. The move was orchestrated by Eagle's employees. Due to a detailed plan and a lot of hard work, interruption to service was totally avoided. State-of-the-art equipment, enhanced design, and production flow were put into place with the move and will now allow Eagle to efficiently manufacture its line of high-end, low-maintenance, aluminum-clad wood windows and doors.

In 2001, Eagle continued its impressive growth. However, American Architectural Products Corporation, its then parent company, was forced to file for bankruptcy. With Eagle as its only profitable company, AAPC placed Eagle on the selling block in order to help pay off their debt. In April of 2002, Linsalata Capital Partners, a Cleveland-based private equity firm purchased Eagle. With the new ownership Eagle was finally able to focus on what they do best — building quality windows and providing unparalleled service and support.

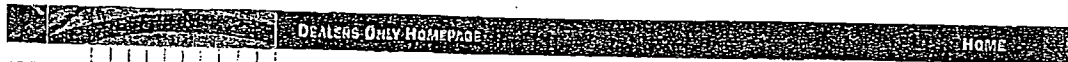
Eagle experienced phenomenal growth in 2003! In that time, Eagle introduced 5 significant innovations. At the International Builder's Show in Las Vegas, Eagle introduced its new Talon™ Double-Hung window with a concealed locking and tilting mechanism. It also introduced 2 between-glass blind systems, a new generation of casement hardware and its 50 standard exterior colors; innovations that lead the industry. Later in October, Eagle introduced the new Talon RetroFit double-hung specifically for the replacement market. With the addition of many new and satisfied dealers and distributors, 2003 will remain an unforgettable year.

Today, in 2004, Eagle continues to grow in extreme proportions. A protective film applied to the interior and exterior of the glass during the construction process, was introduced as a standard product in January and is a hit in the marketplace. And a new line of alternative hardware finishes for casements, awnings and double-hungs brought added flexibility to our hardware options.

At Eagle, we continue to remain innovative and are committed to the future and continued rich heritage of window crafting in the Dubuqueland area.

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News & Announcements



07/10/02 EAGLE Buyer Plans for Growth

Linsalata Capital Partners has a proven record of building mid-size companies, a corporate official said, and the investment firm plans more of the same for one of its newest acquisitions - Eagle Window & Door Inc. of Dubuque.

Cleveland-based Linsalata in April won a bankruptcy bidding war, earning the right to purchase Eagle Window & Door from the manufacturer's financially strapped parent American Architectural Products Corp., also headquartered in Ohio. According to the Securities and Exchange Commission, Linsalata paid nearly \$65 million for American Architectural Products' most successful subsidiary.

"Eagle Window & Door, we think, is an outstanding company, positioned well in its market," said Stephen Perry, a senior vice president for Linsalata.

The private equity investment company, currently with about \$500 million under management, has built its name by building mid-size companies like Eagle, he said.

"Linsalata is in the business of investing in middle-market companies, growing them over time and delivering solid returns to the investment and ownership of those investments," Perry said. "We have an 18-year track record of delivering above-average returns to our investors."

That was apparently the formula for another window-and-door company Linsalata acquired.

"PGT (Industries, Inc.) is similar to Eagle in that it has a solid niche market led by a superior management team," Perry said of the Venice, Fla.-based window and door manufacturer Linsalata purchased in January 2001. "Its employment base has grown about 20 percent along with the business since we acquired it."

With reported annual revenues of about \$120 million and a work force of more than 1,100 employees, PGT is poised for continued growth, Perry said. And growth is the plan for Linsalata's Dubuque operation.

"We want to provide the capital necessary to add the equipment to the facility that would be needed to capture the growth of the businesses," Perry said.

Statements like that must surely come as a huge relief for Eagle, long constrained in its growth by financially faltering American Architectural Products. Although Eagle President and Chief Executive Officer David Beeken could not be reached for comment for this article, he has in the past made no secret of the stifling influence American Architectural Products has had on the Dubuque plant.

"Under this new ownership, we will not have those levels of constraints," Beeken has said. "It will free us up to do a lot of things we haven't been able to do."

John Schoenike, secretary and general counsel for American Architectural Products, admitted that the company did not welcome the loss of Eagle Window & Door.

"But at the same point in time, it was something that was necessary to be done for the benefit of Eagle and the remaining (American Architectural Products) companies," Schoenike said.

In December 2001, American Architectural Products filed for Chapter 11 bankruptcy, looking to crawl out from \$125 million in debt. The company has sold off the lion's share of its subsidiaries - 15 of 19 units - in its reorganization bid.

<http://www.eaglewindow.com/buhatenew.cfm?num=70>

ROA 439

9/6/2007

"Along with the sale of Eagle and the cash resulting from that, we anticipate emerging this year and putting the bankruptcy process behind us," Schoenike said, adding that the Eagle sale was a "significant cash infusion" for American Architectural Products.

Linsalata's investments cover a diverse range of companies, far beyond the scope of the window-and-door business. The investment firm is involved in the production of everything from agricultural equipment and truck beds to sportswear and feminine-hygiene products.

But Perry said autonomy of Linsalata's individual holdings is crucial to the companies' continued growth. To that end, Linsalata, to a great extent, takes a hands-off approach to running successful companies like Eagle Window & Door, Perry said.

"We work closely with management teams in developing and buying into the strategies, but from there forward it is up to management to utilize that strategy and manage that capital wisely to grow the business," he said. "Without the appropriate level of autonomy, it would be difficult for the team to accomplish that."

While officials say the sale of Eagle is essentially final, Schoenike said a few financial loose ends have to be tied up. Due to normal fluctuations in working capital, Schoenike said final calculations still must be made in the sale.

"We hope it is within the next 30 days, although the transaction in reality is final and closed," he said.

Source: Telegraph Herald
Dubuque, IA
By M.D. Kittle
July 10, 2002

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06/27/03 EAGLE President and CEO David Beeken Recognized as Manufacturing Entrepreneur of the Year

For Immediate Release

EAGLE President and CEO David Beeken Recognized as Manufacturing Entrepreneur of the Year



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OMAHA, NEBRASKA, June 27 – The Ernst & Young Entrepreneur Of The Year award honors entrepreneurs whose ingenuity, hard work and perseverance have created and sustained successful, growing business ventures. Founded in 1986, the awards are presented in 38 U.S. regional competitions and 35 worldwide competitions. The Iowa/Nebraska program, now in its fifteenth year has recognized over 130 outstanding business leaders. Individuals awarded in the Iowa/Nebraska program will become eligible for the national awards, given in November in Palm Springs, California.

This year six categories were awarded including: Emerging Entrepreneur, Master Entrepreneur, Technology Entrepreneur, Manufacturing Entrepreneur, Family-Owned Entrepreneur and Financial Services Entrepreneur. David Beeken, President and CEO of EAGLE Window & Door, Inc., Dubuque, Iowa was nominated and later awarded the Manufacturing Entrepreneur of the Year at a ceremony in Omaha, Nebraska on June 26, 2003.

Throughout his rise as a high school graduate on the production floor of EAGLE Window & door, Inc., to the CEO's desk, David Beeken has closely followed this advice: "Worry less about what you will make, and more about what can be learned." Using his voracious appetite for learning all aspects of the business, from production to sales to distribution, Beeken has double sales and found new markets for EAGLE's products.

Fresh out of high school, Beeken took a job on the production floor of what was then Caradco, a window distributor that has been in business since 1866. Beeken's path to success found him working in a variety of positions, continually rising in the company until he was named president and CEO three years ago.

Beeken sets EAGLE apart by offering modified door and window products to its customer instead of completely customized products. This allows the company to charge premium rates for windows and doors but not disrupt the production process as much as customizing would. Beeken has achieved rapid growth in sales at EAGLE by focusing on two growing markets – high-end homes and the institutional segment, such as health care facilities, schools, and churches – and by expanding its sales in the South and West, where year-round construction activity opens more doors for EAGLE.

Having worked his way up the corporate ladder, Beeken understands the value employees at all levels of the company bring. He holds dear the philosophy that "bricks and mortar make a company but people make a business," and he listens to input and ideas on how to improve operations at frequent employee meetings.

Throughout the years, EAGLE has gone through several ownership changes, in addition to a bankruptcy filing by its parent company. In 2002, the company sold off EAGLE, one of its few profitable operations, to a private-equity company. Throughout this tumult, one of EAGLE's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make EAGLE soar.

<http://www.eaglewindow.com/aboutnew.cfm?num=07>

4/17/2007

ROA 441

Source: Ernst & Young LLP
Driving Force – The Element of Success

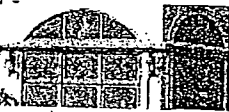


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Beeken sets EAGLE apart by offering modified door and window products to its customer instead of completely customized products. This allows the company to charge premium rates for windows and doors but not disrupt the production process as much as customizing would. Beeken has achieved rapid growth in sales at EAGLE by focusing on two growing markets – high-end homes and the Institutional segment, such as health care facilities, schools, and churches – and by expanding its sales in the South and West, where year-round construction activity opens more doors for EAGLE.

Having worked his way up the corporate ladder, Beeken understands the value employees at all levels of the company bring. He holds dear the philosophy that "bricks and mortar make a company but people make a business," and he listens to input and ideas on how to improve operations at frequent employee meetings.

Throughout the years, EAGLE has gone through several ownership changes, in addition to a bankruptcy filing by its parent company. In 2002, the company sold off EAGLE, one of its few profitable operations, to a private-equity company. Throughout this tumult, one of EAGLE's consistent aspects has been Beeken's leadership and commitment. His guidance has kept employees motivated and eager to make EAGLE soar.

<http://www.eaglewindow.com/whatsnew.cfm?news=02>

ROA 443

4/17/2007

Source: Ernst & Young LLP
Driving Force -- The Element of Success



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About Eagle

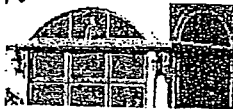
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History

Past, Present and Future

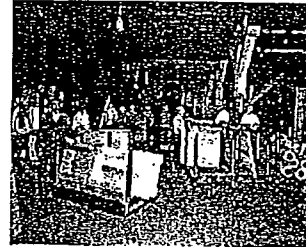
Lumbering and woodworking have long been one of the principal industries in Dubuque, Iowa's history. The industry, which started in the early 1800's, saw millions of feet of timber from the upper Midwest float in log rafts down to Dubuque mills where it was processed into a variety of component parts for the building trade industry. Utilizing its ideal location on the Mississippi River, Dubuque became a hub of lumbering and millwork activity which flourished in the mid-1860's and on into the 20th century. Wood millwork (specifically sash and doors) soon became the new symbol of Dubuque's prosperity, overshadowing all other businesses.



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Shortly before the Civil War in 1862 a young man named William W. Carr headed west from Chicago to Dubuque, Iowa hoping to start a business of his own in America's heartland. Carr soon met an experienced woodworker named Woodbury H. Austin and together they founded, Carr, Austin & Company in 1866. With a starting work force of only two men, the Carr, Austin & Company began producing millwork products in its new manufacturing facility. It was destroyed by fire in both 1871 and 1879, but in spite of their difficulties, a third building was constructed and their employee base grew to 35 men over the next eight years. In 1887, it was renamed Carr, Ryder and Wheeler Company. The business continued to grow and soon its stock capitalization was increased. In 1890, the name changed to Carr, Ryder and Engler Company. Over the next seven years the original plant increased in size many times showing a healthy growth in employment and sales. By 1897, the name was changed again to Carr, Ryder & Adams Company, under which the business grew in astronomical proportions and added several buildings. This name remained until 1938 when the firm became Carr, Adams and Collier Company, manufacturers of Bilt-Well woodwork products. Progressing through this vast series of name changes, the company eventually became Caradco in 1958. It remained one of the largest window and door manufacturers in the country during this period of time.



Carr, Austin and Company



Carr, Ryder and Engler Company

became the largest Caradco distributor (in a single location) in the country.

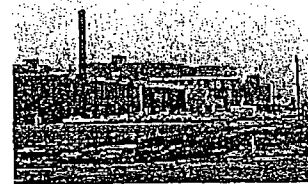
In 1967, as Caradco was still a major player in Dubuque, a window distribution center was established in Cedar Falls, Iowa by a group of investors called Caradco of Cedar Falls. Its initial intent was to set up and distribute Caradco windows to lumber yards in Cedar Falls and its surrounding areas. Throughout the late 1960's and early 1970's, this business expanded to include residential doors, trim, and hardware items. Despite its heavy competition, Caradco of Cedar Falls soon

In 1976 citing constraints in growth and productivity in their facility, Caradco moved its office and manufacturing facilities from Dubuque to Rantoul, Illinois. At this time, the window distribution from Cedar Falls was moved to Dubuque and into some of the vacant building space provided by Caradco's departure. Soon afterwards, quality and delivery problems began to plague Caradco. The quality of their products had

diminished and lead times were greatly extended. Much of this was due to the relocation and restructuring of their plant, the lack of trained personnel, and literally no back-up plan whatsoever. The Dubuque plant had totally shut down.

Soon the investors of Caradco of Cedar Falls decided to terminate their relationship with Caradco and design, manufacture and market a window line of their own. Only one problem existed. This was an era when energy efficiency was an essential commodity. America knew it as the "energy crisis" of the 70's. So, designing a high-quality product with built-in energy efficient features became the goal. With a vacant production facility and a group of eager, experienced personnel, both left behind by Caradco, Eagle Manufacturing launched a new era.

In 1977, Eagle produced its first aluminum clad wood casement window furthering the rich heritage of millwork production in Dubuque. During the next twelve months, Eagle continued developing better techniques, enhancing their designs, training their personnel, and making quality a priority. By 1980, the clad Sliding Patio door was introduced. Over the next six years, five more product lines were developed including; clad double-hung, skylights, circle-tops, geometric windows and French doors.



Eagle Manufacturing, 1980's

Even with the introduction of these new products, the early 1980's managed to be some of the worst business times in history. However, the extreme dedication and efforts put forth by Eagle and its employees helped them survive and even grow in a time of uncertainty. Nearing the end of the decade, it became apparent that Eagle's current ownership could not generate the resources necessary to take advantage of the base that had been built for them, so the company was sold to Masco Corporation of Taylor, Michigan in September of 1987.

Masco Corporation (a Fortune 500 company) was known for its long history in consumer products for the home and family. These included home furnishings such as Henredon and Drexel Heritage; faucets and plumbing products like Delta and Peerless; Cabinetry including Fieldstone and Merillat; and many other hardware and appliance companies. During its Masco tenure, Eagle made substantial growths while increasing market share due to broadening its distribution throughout North America and Japan. It also tripled its product breadth by introducing French Sliding doors, entry doors, bi-parting doors, radius casements, elliptical units, and a full line of all-wood windows and doors. As you can well imagine, the investment and commitment on Masco's behalf was massive, but for Eagle to grow and be recognized as a quality, national brand name in the industry, it was essential.

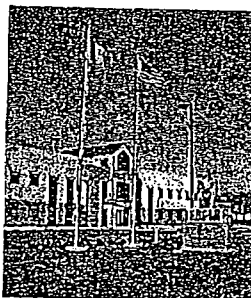
The early 1990's proved to be interesting years for Eagle. With the economy on a downward trend, housing starts were flat which in turn lowered Eagle's sales. This was a time for Eagle to fine tune their product line and search for distribution in new markets with the hopes of eliminating some of the seasonality in their business. Gaining market share in the southern part of the country would help level out sales and place it on a consistent path over the year. Fortunately, turn around began in 1992 and sales progressively increased over the next few years.

In 1996, Masco surprised all with an announcement that they would be selling off their furnishings and building products divisions respectively. The divestitures would allow them to focus and concentrate on their core line of consumer and transportation products for which the companies had become recognized. The sale of Eagle Window and Door received a great deal of interest among the industry and due diligence continued for many months. However, in August of 1996, a transaction between MascoTech and American Commercial Holdings, Inc. transferred the ownership of Eagle Window & Door to the newly formed and publicly traded American Architectural Products Corporation. The new company, headquartered in Boardman, Ohio, was determined to grow its existing base of businesses and acquire new businesses with high-quality products and services that would complement the growing family of building industry companies. The goal was to become a major consolidator within the fenestration industry. To support this goal, many smaller window, door and glass manufacturers were acquired during the next two years.

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With extreme growth between 1996 and 2000, Eagle had outgrown its old facility. Efficiencies in processes and production were hindered. It became evident that for Eagle to continue its growth pattern, changes were necessary. Talk of a new facility was



Eagle Window & Door, 2001

elevated and soon plans were under way. By moving production to a single-floor facility, increased productivity and capacity for expansion in the coming years would be attainable.

The year 2000 became an exciting time for Eagle Window & Door. In October of 2000, Eagle officially began its move into a brand new 390,000 sq. ft. manufacturing facility. The move was orchestrated by Eagle's employees. Due to a detailed plan and a lot of hard work, interruption to service was totally avoided. State-of-the-art equipment, enhanced design, and production flow were put into place with the move and will now allow Eagle to efficiently manufacture its line of high-end, low-maintenance, aluminum-clad wood windows and doors.

In 2001, Eagle continued its impressive growth. However, American Architectural Products Corporation, its then parent company, was forced to file for bankruptcy. With Eagle as its only profitable company, AAPC placed Eagle on the selling block in order to help pay off their debt. In April of 2002, Linsalata Capital Partners, a Cleveland-based private equity firm purchased Eagle. With the new ownership Eagle was finally able to focus on what they do best — building quality windows and providing unparalleled service and support.

Eagle experienced phenomenal growth in 2003! In that time, Eagle introduced 5 significant innovations. At the International Builder's Show in Las Vegas, Eagle introduced its new Talon™ Double-Hung window with a concealed locking and tilting mechanism. It also introduced 2 between-glass blind systems, a new generation of casement hardware and its 50 standard exterior colors; innovations that lead the industry. Later in October, Eagle introduced the new Talon RetroFit double-hung specifically for the replacement market. With the addition of many new and satisfied dealers and distributors, 2003 will remain an unforgettable year.

Today, in 2004, Eagle continues to grow in extreme proportions. A protective film applied to the interior and exterior of the glass during the construction process, was introduced as a standard product in January and is a hit in the marketplace. And a new line of alternative hardware finishes for casements, awnings and double-hungs brought added flexibility to our hardware options.

At Eagle, we continue to remain innovative and are committed to the future and continued rich heritage of window crafting in the Dubuqueland area.

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EXHIBIT "A"

000001-WF



CHESTER J. CULVER
Secretary of State
State of Iowa

IOWA 2002
BIENNIAL REPORT
for a
FOREIGN
CORPORATION
Required by Iowa Code chapter 490

CHESTER J. CULVER
Secretary of State
FILED
Date: 1/16/2002 10:11
Corporation No.: 196911
Certification No.: A02196911

1. Name of the Corporation, its registered agent and registered office

EAGLE & TAYLOR COMPANY
CORPORATION SERVICE COMPANY
729 INS EXCH BLDG
DES MOINES, IA, 50309

2. ☐ The Corporation has no officers. ☐ The Corporation has no directors.

3. Officer(s)

☒ Pres ☐ Sec ☐ Treas ☐ Dir

Name

DAVID BEEKEN

Address

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Address

City State Zip Country
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☐ Pres ☐ Sec ☒ Treas ☒ Dir

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Address

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☐ Pres ☒ Sec ☐ Treas ☐ Dir

Name

JONATHAN SCHOENIKE

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4. Address of the Principal Office of the Corporation

Address

860 BOARDMAN - CANFIELD ROAD

Address

SUITE 107

City State Zip Country
BOARDMAN OH 44512 USA

5. The state or country under whose laws the corporation is incorporated. DE
6. Does the corporation hold an interest in agricultural land in Iowa? No
7. Is the corporation a "family farm corporation?" No
8. Signed: DAVID J. WOLFE, JR. Capacity: ASSISTANT SECRETARY

ROA 448