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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Appellate Case No. 2015-000392
Opinion Filed December 13, 2018

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

v.

IMK Development Co., LLC; Keowee Townhouses, LLC; Ludwig Corporation, LLC; SDI Funding, LLC; Medallion at Keowee, LLC; Integrys Keowee Development, LLC; Marick Home Builders, LLC; Bostic Brothers Construction, Inc.; Miller/Player & Associates; Bradford D. Seckinger; John Ludwig; William Cox; Larry D. Lollis; Rick Thoennes; M Group Construction and Development; LLC; Mel Morris; Joe Bostic; Jeff Bostic; Clear View Construction, LLC; Michael Franz; MHC Contractors; Miguel Porras Choncoas; Builders First Source-Southeast Group; Mike Green; Southern Concrete Specialties; Carl Compton d/b/a Compton Enterprize a/k/a Compton Enterprises; Gunter Heating & Air; All Pro Heating; A/C & Refrigeration, LLC; Coleman Waterproofing; Heyward Electrical Services, Inc.; Tinsley Electrical, LLC; Hutch N Son Construction, Inc.; Upstate Utilities, Inc.; Southern Basements; Carl Catoe Construction, Inc.; T.G. Construction, LLC; Delfino Construction; Francisco Javier Zarate d/b/a Zarate Construction; Alejandro Avalos Cruz; Herberto Acros Hernandez; Martin Hernandez-Aviles; Francisco Villalobos Lopez; Ambrosio Martinez-Ramirez; Ester Moran Mentado; Socorro Castillo Montel; MJG Construction and Homebuilders, Inc. d/b/a MJG Construction; KMAC of the Carolinas, Inc.; Eufacio Garcia; Everado Jarmamillio; Garcia Parra Insulation, Inc.; J&J Construction; Jose Nino; Jose Manuel Garcia; Eason Construction, Inc.; Vincent Morales d/b/a Morales Masonry and Miller/Player & Associates, Defendants,

Of Which Marick Home Builders, LLC and Rick Thoennes are the Petitioners,

APPENDIX
VOLUME IV OF VIII

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

Alexander S. Macaulay, Presiding Judge Seventh Judicial Circuit

Case No. 2015-000392

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Of Defendants, Marick Home Builders, LLC and Rick Thoennes Appellants,

RECORD ON APPEAL
Volume III of VII

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SC Court of Appeals

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1 sort of get your thoughts together and your presentations
2 however you'd like to make them for a few minutes?

3 MR. LYLES: I think if we had a little bit of
4 time, maybe until Monday, to go through this together and
5 sort of figure out what we can take out by agreement, and
6 then we'll have ---

7 THE COURT: Well, there's no question that's
8 the way to do it.

9 MR. LYLES: Yes, sir.

10 THE COURT: As you've seen, although I make
11 some feeble effort in trying to keep up with things, it's
12 rather difficult for me to make a comfortable decision
13 based on something I've only seen, if I've even looked at
14 it earlier ---

15 MR. LYLES: Yes, sir.

16 THE COURT: --- you know, one day when y'all
17 have lived with it. Now, this is another thing, you
18 know, is we're getting to that point where there are two
19 things that are going to be critical in this case. And
20 one of them is charges. I know that I have some pretrial
21 briefs that has some suggested charges. But if you have
22 any charges and verdict forms, now, please get them to
23 Mr. Bowman, hopefully, Monday morning. You've got
24 tomorrow to work on them. And, of course, Saturday and
25 Sunday too, like I used to do. So see if you couldn't

01001

1 get the charges when you come back Monday, and then we'll
2 perhaps be better off to move along with that.

3 Now, is there anything that I can help with as far
4 as the plaintiff's concerned?

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

6 THE COURT: Mr. Belcher, do you want to consult
7 -- well, I'll just go through the roll. Anything from
8 your parties?

9 MR. BELCHER: None from us, Your Honor.

10 THE COURT: All right. How about Mr. Gresh?
11 You got anything you want to bring ---

12 MR. GRESH: No, Your Honor.

13 THE COURT: Don't be so retiring. All right.
14 And Mr. Anderson, anything?

15 MR. ANDERSON: Not until Monday, Your Honor.

16 THE COURT: All right. Very good. You'll be
17 loaded then.

18 All right. Mr. Imhoff?

19 MR. IMHOFF: Nothing until Monday.

20 THE COURT: Okay.

21 Mr. Vick?

22 MR. VICK: No, Your Honor.

23 THE COURT: All right. You going to be with us
24 or Ms. Brown going to be back?

25 MR. VICK: To be determined, Your Honor.

01002

1 THE COURT: All right. Very good. Makes no
2 difference.

3 MR. IMHOFF: Do we get to vote on who gets to
4 come back?

5 MR. VICK: I'll be back at the office on
6 Monday.

7 THE COURT: Well, I've got two -- what is it?
8 -- little programs up here of attorneys, so I'll just --
9 whichever shows up, I'll put one or the other up.

10 All right. Mr. Hemphill?

11 MR. HEMPHILL: No, Your Honor.

12 THE COURT: All right. Well, I'll see you all
13 Monday morning.

14 By the way, ladies and gentlemen that are involved
15 in this case, again, I do appreciate your patience too.
16 And I'll see you all or some of you at least Monday
17 morning. Have a good weekend.

18 MR. LYLES: Thank you, Your Honor.

19 MR. BELCHER: Thank you, Your Honor.

20 MR. IMHOFF: Thank you, Your Honor.

21 (WHEREUPON, court stood in recess for the day at
22 approximately 3:45 p.m.)

23 **November 4, 2013**

24 (WHEREUPON, court convened with all parties present,
25 and the following proceedings were had commencing at

01003

1 approximately 9:22 a.m.)

2 THE COURT: All right. Is there anything we
3 need to bring to the Court's attention before we start,
4 from the plaintiff?

5 MR. LYLES: Your Honor, before court this
6 morning, I discussed with the defense lawyers that I have
7 about five more minutes of examination of Mr. Hodgin on
8 direct. And they have agreed to that.

9 THE COURT: Very well. Thank you.
10 Anything from the defense other than you do agree
11 with that? You're permitting it?

12 MR. BELCHER: Your Honor, we've agreed to
13 accommodate Mr. Lyles on that. I don't think there's
14 anything else to bring before the Court at this time.

15 THE COURT: Very good. All right.
16 Ask the jury to join us, please.

17 (WHEREUPON, the jury entered the open courtroom at
18 approximately 9:22 a.m.)

19 THE COURT: All right. Let the record reflect
20 the jury and the alternate are in the jury box.

21 Mr. Foreman, ladies and gentlemen of the jury, we
22 will now continue with the testimony of Mr. Hodgin.
23 Is that correct?

24 MR. LYLES: Yes, sir.

25 THE COURT: Is he with us? Oh, there he is.

1 (WHEREUPON, the witness resumed the witness stand.)

2 THE COURT: Mr. Hodgins, you understand you're
3 still under oath?

4 THE WITNESS: Yes, sir.

5 THE COURT: Very good. Thank you, sir.
6 You may continue.

7 DIRECT EXAMINATION

8 CONTINUED BY MR. LYLES:

9 Q. Good morning, Mr. Hodgins.

10 A. Good morning.

11 Q. Mr. Hodgins, what are contract administration
12 services?

13 A. Typically, it consists of a design professional,
14 such as an engineer or architect, overseeing the work of
15 a contractor so that there would be site visits made
16 during the construction or repair process. And the
17 design professional would review the work of the
18 contractor and making sure it's in general accordance
19 with the construction contract documents. Typically, the
20 contractor would submit pay applications to the design
21 professional. And then when the design professional
22 signs the pay application of the contractor, he's
23 certifying that the work has been done in accordance with
24 those contract documents and then send them to the owner
25 for payment.

01005

1 Q. And what benefit is there to the owner of those
2 types of services?

3 A. Well, to know that the project is proceeding in
4 accordance with the contract documents, there's no known
5 defects or code issues that need to be resolved.

6 Q. And is it your opinion that contract administration
7 services would be appropriate for the repair that you
8 have specified for the Stoneledge project?

9 A. Absolutely.

10 Q. And is that a service that C.S.E. can provide?

11 A. Yes.

12 Q. Y'all are qualified to do that?

13 A. Yes.

14 Q. And can you tell me how much contract administration
15 services for a repair project like you have specified for
16 Stoneledge would cost?

17 A. I know it's in our documents. I don't recall
18 specifically the number off the top of my head. But I
19 will tell you in general on new construction, you're
20 typically looking at a ten to twelve percent of any
21 construction costs would be for C.A., what they call C.A.
22 services, contract administration services, which also
23 includes design. When you're doing a repair project, we
24 don't necessarily have to redesign the buildings. We
25 know what the original design intent is. But for a

01006

1 repair, we do need to oversee to make sure that the
2 repairs are adequate and complete and comprehensive
3 enough to address the problems that were identified. So
4 we're usually in the five to seven and a half percent
5 range. Somewhere in there.

6 Q. And it's five to seven and a half percent of what?

7 A. The price of the repairs.

8 Q. Thank you very much, Mr. Hodgin.

9 A. Sure.

10 THE COURT: Mr. Belcher or Mr. Gresh?

11 MR. BELCHER: Thank you, Your Honor.

12 CROSS-EXAMINATION .

13 BY MR. BELCHER:

14 Q. Good morning, Derek. Welcome back.

15 A. Good morning.

16 Q. You've had the benefit of sitting here in the
17 courtroom for a few days now along with Mr. Metcalf;
18 right?

19 A. Yes, sir.

20 Q. You've listened not only to your own testimony but
21 the testimony of several other witnesses; right?

22 A. That's correct.

23 Q. And you listened to the testimony of Joe and Jeff
24 Bostic?

25 A. I listened to most of it. I did excuse myself for

01007

1 part of the second witness, whichever one that was.

2 Q. And you understand that they want these buildings
3 fixed?

4 A. Yes, sir.

5 Q. They want them right?

6 A. Yes, sir.

7 Q. And the owners want them made right too?

8 A. Yes, sir.

9 Q. So everyone in the courtroom so far that you've
10 heard has said, "We want to get these buildings fixed."
11 Fair?

12 A. Fair.

13 Q. Now, you showed the jury a bunch of photographs on,
14 I guess, Wednesday and Thursday?

15 A. Yes, sir.

16 Q. And those photographs are now an exhibit to your
17 testimony, I believe.

18 MR. BELCHER: There's a stack of them.

19 THE COURT: All right. We'll go off the record
20 while you -- the court reporter can help you if you ...

21 (Off record discussion)

22 THE COURT: All right. You may proceed.

23 MR. BELCHER: Thank you, Your Honor.

24 Q. So exhibit 22 is all your photographs that you've
25 entered into evidence of issues that you found out there?

1 A. Yes, if that's what the number, exhibit number, is,
2 yes.

3 Q. And these are the photographs that you chose to
4 include for the jury to look at when they go and
5 deliberate?

6 A. Correct.

7 THE COURT: What exhibit is that?

8 MR. BELCHER: Plaintiff's Exhibit Number 22,
9 Your Honor.

10 THE COURT: Very good. Thank you.

11 Q. And those pictures were taken over the time 2009,
12 2010, 2012, 2013; fair?

13 A. Yes, sir.

14 Q. All right. And you've identified unit numbers on
15 each of those photographs?

16 A. Yes, sir.

17 Q. And these are the pictures you want this jury to
18 take a look at to support the idea that your scope is
19 superior to that of any other scope that's going to be
20 presented to the jury to repair these buildings, to fix
21 them and to make them right?

22 A. I guess you could say it like that. Those are
23 photographs that we thought were representative of the
24 hundreds of photographs taken for phase one, yes.

25 Q. Of the hundreds of photographs taken of phase one,

01009

1 you want the jury to look at those one hundred and
2 thirteen photographs?

3 A. Yes.

4 Q. All right. Did you include for the jury any
5 photographs where you didn't find damage to porches or
6 walls or anything behind destructive testing?

7 A. I'm not sure if those exist. If they do exist,
8 there would not be very many of them.

9 Q. You just wouldn't have taken those kind of pictures?

10 A. No. I take pictures of everything. But what I'm
11 saying is the dominant condition at Stoneledge when we
12 did the destructive test, we found damage.

13 Q. All right. So your testimony to this jury would be
14 that if you found conditions that didn't need repairs or
15 conditions that didn't support your scope, you would have
16 still included them in the hundred and thirteen
17 photographs that you want this jury to consider when
18 considering which scop of repair to grant to these
19 plaintiffs?

20 A. Right. I think there's actually photographs in
21 there where you don't necessarily see damage. You'll see
22 a defect that might cause damage. So there's a mixture
23 of both. There's things that are wrong that may not have
24 caused rot at this point, and there's things in there
25 that are rotten that need to be fixed.

01010

1 Q. All right. Do you remember if you've taken a
2 picture -- you've provided a picture for this jury to
3 consider where you have inspected a porch that does not
4 exhibit staining and wood rot?

5 A. I don't remember any porches that where the entire
6 porch would be void of damage. I don't think that any
7 such porch exists. There might be a localized
8 observation where there might not be rot, but I don't
9 know of any porch that does not have damage.

10 Q. Okay. So you acknowledge that there are porches out
11 there where there is a localized condition that needs to
12 be repaired?

13 A. No. I think all of the porches need a comprehensive
14 repair. And I believe that that's the same scope that
15 the defense has offered, is that there's a comprehensive
16 repair on every single balcony. What I'm saying is that
17 there might be a localized destructive test that there
18 wasn't physical damage. That may exist. I'm not aware
19 of it.

20 Q. And just so we're clear, because you gave about five
21 hours of testimony, so we've got to kind of organize it
22 for the jury here because I'm going to be brief with you.
23 Your scope of repair requires the tear down and removal
24 of the balconies?

25 A. The exposed portion of the balconies, yes.

01011

1 Q. All right. So those balconies where they have
2 concrete on top ...

3 A. Yes.

4 Q. ... you're ripping that off?

5 A. Yes.

6 Q. And have you read Mr. Moore's scope of repair?

7 A. I believe so.

8 Q. You know he's doing that too?

9 A. Yeah.

10 Q. All right. You also want to take off all O.S.B.
11 sheathing?

12 A. You mean the subfloor?

13 Q. Yes, the subfloor.

14 A. Yes.

15 Q. All right. Whether it's rotten or it's not?

16 A. Again, I don't know of any places where we did not
17 find rotten subfloor.

18 Q. Okay. So you want to take every piece of
19 subflooring off of all of these exposed decks? That's
20 your scope?

21 A. Yeah. The exposed portion of the deck is relatively
22 small. So if you took off the rotten pieces, there's not
23 much left. So it would make more sense -- it's probably
24 even less money. I don't know this because I'm not a
25 contractor. But to try to salvage the pieces that aren't

01012

1 rotten would probably cost more money than it would take

2 to take it off.

3 Q. All right. Well, we'll look at some pictures of

4 that here in a minute.

5 A. Okay.

6 Q. But I just wanted to tell the jury -- I want to make

7 sure the jury understands the extent of your scope on

8 these balconies.

9 A. Okay.

10 Q. You want to take off all the subfloors?

11 A. Yes.

12 Q. You want to take out all of the floor joists that go

13 underneath the subfloor?

14 A. Joists were specified, but trusses were installed.

15 So if there's untreated wood trusses that we'll take out,

16 we'll replace it with what's originally specified which

17 was treated joists.

18 Q. Okay. So even if there's no damage to those trusses

19 or joists, whatever's there right now, you want to take

20 them all out?

21 A. I know that there's damage. There might be some

22 that you could salvage. But what our intent is is that

23 we're going to slope -- we're going to reframe the

24 balconies to provide slope, so we need continuity of the

25 framing. So we're going to take that small section of

01013

1 exposed deck out and put pressure-treated joists; that's
2 correct.

3 Q. I understand. I understand. And I appreciate your
4 testimony. But I'm trying to define what your scope is
5 here. Okay? And let's stick to that. And I'll give you
6 an opportunity to tell the jury why you're doing what
7 you're doing.

8 A. Okay.

9 Q. I just want to explain to the jury the extent of
10 what you're doing. So no matter whether these trusses or
11 joists or whatever's in there right now, you want to rip
12 them out?

13 A. Correct.

14 Q. And the columns you want to take down as well?

15 A. Yes.

16 Q. And you understand the Rick Moore scope says take
17 down the columns and reframe them?

18 A. Correct.

19 Q. All right. Well, that's just kind of one of the
20 first things that I wanted to address, is just to sort of
21 organize the extent of your scope just on that particular
22 issue. And I'm going to talk about all the issues with
23 you.

24 A. Okay.

25 Q. But I want to back up, and I also want to organize

01014

1 exactly what it is that you do and what Mr. Moore does in
2 cases like this. All right?

3 A. Okay.

4 Q. We have heard the term forensic science or forensic
5 investigation of construction defects?

6 A. Yes.

7 Q. Now, forensic would suggest science; right?

8 A. There's forensic accountants. I mean forensic --
9 just the term forensic I think just means that the
10 material or the subject can be debated in a court of law.

11 Q. And there's a process, there's a forensic method
12 that you undertake when investigating any building?

13 A. Yes.

14 Q. And that's whether you're working with Mr. Moore or
15 working against Mr. Moore, you should always have the
16 same forensic process?

17 A. Yes.

18 Q. All right. Now, based on what I've done in this
19 field over the years, I understand that there's some
20 assumptions that are made in the forensic process when
21 evaluating what goes on with buildings and how you
22 evaluate a building.

23 A. Yes.

24 Q. And let me share those assumptions with you, and you
25 tell me if you agree or disagree with me.

1 A. Okay.

2 Q. One is that water intrusion is what causes the rot
3 and discoloration by and large?

4 A. Yeah.

5 Q. So you've got water coming into a building where it
6 shouldn't be?

7 A. Yes.

8 Q. Or it's coming into a building and it's not getting
9 out the way that it should?

10 A. Correct.

11 Q. And either of those scenarios can happen in a
12 building; right?

13 A. That's correct.

14 Q. It's okay to have water coming into a building or
15 coming into an area as long as it's getting back out?

16 A. Correct. And along its path that it doesn't go to
17 any undesirable places or touch moisture sensitive
18 materials that it might damage.

19 Q. Right. And that's part of the forensic process that
20 we identify as water management; correct?

21 A. Yes.

22 Q. All right. So nobody builds -- maybe some people
23 set out to. But nobody really builds, and it's really
24 impossible to suggest that you're going to build, a
25 watertight building. Fair to say?

1 A. I'm not going to say watertight, but protected,
2 properly protected and water managed would be the right
3 term.

4 Q. Meaning you have to contemplate that water's going
5 to get in the building through a little hole or
6 somewhere; you've got to make sure it's going to get its
7 way out?

8 A. Yes.

9 Q. And as long as it's getting its way out and it's
10 following the appropriate pathway and it's not causing
11 rot and damage and things like that, that's going to be
12 part of the water management process?

13 A. Yes.

14 Q. And that's something that you, as a forensic expert,
15 to investigate the process for that?

16 A. Yes.

17 Q. All right. The second assumption I have is one
18 that, you know, I know you've testified about before.
19 And it's sort of a golden rule perhaps or one of the big
20 rules in this business is the ninety/one rule?

21 A. Yes.

22 Q. Can you explain to the jury what the ninety/one rule
23 is?

24 A. The ninety/one rule is a building envelope concept
25 that ninety percent of all water intrusion happens to one

1 percent of the building envelope.

2 Q. Okay. So you're going to expect as a forensic
3 engineer, just as any forensic professional who's engaged
4 in this business, if there is water getting into a
5 building, there's going to be several culprits that make
6 up that one percent of where you expect water to be
7 getting in; correct?

8 A. That's correct.

9 Q. And that's going to be intersections of dissimilar
10 materials?

11 A. Yes.

12 Q. Such as where the wood wall meets the concrete wall
13 behind the barrier?

14 A. Right. Where the siding meets the stone would be
15 another one.

16 Q. Right. Where your water table is?

17 A. Correct.

18 Q. Okay. And we can talk about the water table because
19 we both know that that needs to be addressed. And that's
20 addressed in both scopes; correct?

21 A. I believe so, yes.

22 Q. All right. And you may get some water around
23 windows?

24 A. You do get water around windows in almost every
25 case.

- 1 Q. Right.
- 2 A. Yeah.
- 3 Q.. It's always windows; right?
- 4 A. Correct.
- 5 Q. In fact, I think back to the testimony that I've
- 6 heard over the years about the window rodeo. Have you
- 7 ever participated in the window rodeo down in Charleston?
- 8 A. No. I know all about it.
- 9 Q. Yeah.
- 10 A. But I do not participate.
- 11 Q. And that's where some of the sharpest minds in the
- 12 forensic industry go down to Marion Square, and they all
- 13 try to install windows in a mockup that doesn't leak;
- 14 right?
- 15 A. Over a two-day process of thinking it over and
- 16 following instructions, yes.
- 17 Q. And even the sharpest minds in the State of South
- 18 Carolina install windows that don't pass tests in the
- 19 window rodeo; right?
- 20 A. That's correct.
- 21 Q. Yeah. All right. Well, back to the forensic
- 22 process. The way I've always looked at it -- and tell me
- 23 if I'm wrong -- is that there's some steps to the
- 24 forensic process. All right? We've made those two
- 25 assumptions that water will get into the buildings and

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1 that's what is the cause of rot and decay or
2 discoloration. Water needs to get out of the building.
3 So the other one is the ninety/one rule that water will
4 get into certain suspect places where we, as construction
5 attorneys, and you, as forensic professionals, know to
6 expect water; correct?

7 A. Correct.

8 Q. Now, the only way I've ever known how to go about a
9 case -- and I just want to -- this is part of trying to
10 organize it for the jury because with five hours of
11 testimony, I think makes it difficult to understand the
12 intricate -- just what the process is. So I want to make
13 sure that this jury understands.

14 Number one in the forensic process, you identify
15 where the water is getting in. Is that fair to say?

16 A. Yes.

17 Q. All right. Number two, you propose an engineering
18 fix of what needs to be done to either stop that water
19 from getting in or managing that water to get back out?

20 A. That's correct. But you skipped over several steps
21 in between.

22 Q. Okay. Well, let me just so -- do you disagree --
23 but that is a step?

24 A. It's a step, but it's much later in the process.

25 Q. Well, let me give you my steps, and you tell me what

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1 order you would put them in.

2 A. Okay.

3 Q. Okay? Because from my side, maybe I see it a little
4 bit differently.

5 A. Okay.

6 Q. Another step would be identifying the damage
7 associated with the water?

8 A. Yes.

9 Q. Would you put that above engineering the repair?

10 A. Yeah. You have to know the extent of the damage and
11 defects before you can come up with the repair scope.

12 Q. Okay. So the process, number one, identify the area
13 of water intrusion; number two, identify the extent of
14 damage caused by that water intrusion?

15 A. And what defects within the walls that you're
16 observing, yes.

17 Q. All right. The extent of damage and then what it's
18 going to take to fix it. That's where I'm coming up with
19 the engineering fix. If there's a defect causing it, you
20 need an engineering fix; right?

21 A. Yes.

22 Q. But before you even get to the engineering fix, you
23 want to know the extent of the damage?

24 A. Yes.

25 Q. And you want to have enough information about the

1 extent of that damage to make sure that your scope is
2 accurate to correct that damage?

3 A. Yes.

4 Q. And you want to make sure that you have enough
5 information to determine whether or not your scope is
6 sufficient or in excess of what's necessary to address
7 the issues that you've found so far; right?

8 A. Can you restate that again?

9 Q. All right. You want to make sure that you have
10 enough information to determine what the extent of your
11 scope needs to be, whether it can be surgical or whether
12 it can be wholesale, whether the buildings can be
13 salvaged? Is that correct?

14 A. That's correct. That's correct.

15 Q. And then finally, you want to repair the damage, and
16 you want to implement the fix?

17 A. Yes.

18 Q. All right. Now, we agree with the process here, so
19 we're all on the same page that by and large -- maybe
20 there's some other sub-steps in there, but that's the
21 process?

22 A. I think so, yes.

23 Q. Identifying water intrusion, extent of damage so
24 that you know how to fix it, repairing or engineering a
25 fix, engineering repairs to whatever's been damaged, and

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- 1 then implementing those repairs. Fair?
- 2 A. Yes.
- 3 Q. So it is a scientific method?
- 4 A. Is that a question?
- 5 Q. It is a scientific method; correct?
- 6 A. Yeah, it should be.
- 7 Q. And it's one that we all agree needs to be
- 8 implemented in this case?
- 9 A. Yes.
- 10 Q. Now, the disagreement, from what I can tell, between
- 11 the parties sitting on this side and the parties sitting
- 12 on that side is number three in that. What's it going to
- 13 take to fix these buildings; correct?
- 14 A. I believe you're correct, yes.
- 15 Q. And then a lot of times, we agree, as I think
- 16 particularly with the roof edges and things like that,
- 17 there's some things that are consistent in both your
- 18 scope and the scope that Mr. Moore's going to testify
- 19 about later on this week. Fair?
- 20 A. I believe so, yes.
- 21 Q. All right. And you've worked with Mr. Moore before;
- 22 right?
- 23 A. Many times, yes.
- 24 Q. All right. In fact, you and he worked together on
- 25 projects as co-experts; right?

1 A. That's correct.

2 Q. And not only in the investigation phase or the court
3 phase, but in the contract administration phase as well;
4 right?

5 A. Yeah, we have done that before. We also have worked
6 together on coming up with mutually agreed upon scopes of
7 repairs in other cases.

8 Q. Okay. For instance, True Blue in Georgetown, do
9 y'all have a mutually agreed upon scope there?

10 A. I don't know that that was a good example of a
11 mutually agreed upon scope, but there's a scope that's
12 based on the settlement of the case. Fairways is an
13 example of an agreed upon scope. That was another case
14 we worked on.

15 Q. Fairways?

16 A. Yes, sir.

17 Q. Fairways was thirty buildings?

18 A. That's correct.

19 Q. Less damage than what you're seeing at Stoneledge?

20 A. Yes, sir.

21 Q. All right.

22 A. Some of the same life safety issues with the fire-
23 rated wall issues, but not as much water damage for sure.

24 Q. None of these issues are really unique to
25 Stoneledge; right?

1 A. There's a few things. I mean, I don't have that
2 many cases with the stone-clad balcony issues. But water
3 intrusion in general is a common feature in most
4 construction litigation.

5 Q. And some people have this kind of water issues in
6 their house, and until it gets inside their house, they
7 don't even know they have it; right?

8 A. Yeah. I think that's a good example of what's
9 happened, I think, at Stoneledge. When you see it in the
10 house, it has happened over a very long period of time,
11 and there's much more extensive damage and the wall needs
12 to be addressed.

13 Q. Well, going back to Mr. Moore, you know Mr. Moore
14 has done an investigation out there; right?

15 A. Yes, sir.

16 Q. And you know that he made, I think, eighteen
17 destructive test cuts where he opened up balconies and
18 opened up walls to look and see what was there?

19 A. I don't know the total number. I know in one of my
20 photographs, there was an eighteen. So if that was the
21 last one, then there would be at least eighteen.

22 Q. At least eighteen?

23 A. Yeah.

24 Q. And have you typically agreed with Mr. Moore's
25 forensic method if he follows the forensic method that

1 we've talked about already?

2 A. Yeah. As far as the investigation, sure.

3 Q. And there are times that you agree and times that
4 you disagree on what needs to be done to buildings?

5 A. Yeah, I would say in general that's what most of
6 these cases come down to. I mean, if you've got two very
7 qualified experts on both sides, it's just a matter of
8 the cost and the scope. I mean, you can't dispute the
9 facts about the case. It's just a matter of what's it
10 going to take to get it fixed. And I think that's where
11 we are in this case.

12 Q. Exactly. Exactly. What's it going to take? Well,
13 what I did last night when I was sitting down and looking
14 at it is I tried to look at the places where the scope of
15 Mr. Moore, which I know the jury hasn't had the benefit
16 of hearing yet ---

17 A. Right.

18 Q. --- but we'll talk about it later. But where Mr.
19 Moore's scope and your scope differ distinctly?

20 A. Okay.

21 Q. There's a wide change in what you're telling the
22 jury has to be done and what Mr. Moore's telling the jury
23 has to be done?

24 A. Okay.

25 Q. And tell me if you agree with me on these because

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1 this is going through your hundred and thirteen photos
2 and taking some Post-it notes and stickies. The
3 agreements are on the siding and the weather -- I'm
4 sorry. The disagreements, the major disagreements, are
5 in the siding and weather-resistant barrier?

6 A. Right. I haven't done the homework like you've done
7 recently, but I think that that's my understanding of
8 what I've looked at in the past, that there's not a
9 removal of all of the siding to install a weather-
10 resistant barrier; that's correct.

11 Q. Right. And a lot of that -- as you've already
12 testified to, a very large part of that deals with the
13 fire-rated and there just not being any weather-resistant
14 barrier on those walls at all. That's a big issue;
15 right?

16 A. Well, that's weird, because when we did the total
17 de-clad, there's a mixture of O.S.B. that shouldn't be
18 there because that's a wood combustible sheathing
19 product. And it actually was covered with weather-
20 resistant barrier. And then the gypsum, which is
21 moisture sensitive, was not. So there's a mixture. So I
22 would not be comfortable to have a repair scope that did
23 not address the fire-rated walls and make sure that
24 they're adequately protected with a weather barrier.

25 Q. Okay. And that's what I'm getting at. That's a

1 major distinction between your scope and Mr. Moore's
2 scope is what we're going to do with those fire-rated
3 walls?

4 A. Right.

5 Q. And your biggest concern is that they don't have a
6 weather-resistant barrier on them, and then you have
7 sheathing, plywood, O.S.B. plywood, right close to it
8 that does have sheathing; right?

9 A. Well, it's not just that. It's that they're not a
10 rated assembly. There's a life safety issue that needs
11 to be dealt with. They're not code compliant as
12 constructed with O.S.B. in the mix. They should be
13 totally covered with what's called Type X, which is a
14 fire-rated gypsum sheathing. Totally covered. And then
15 that should be covered with a weather-resistant barrier.
16 So the moisture is one part, but the other part is the
17 actual life safety issue of the firewalls themselves.

18 Q. Well, let me ask you this, Mr. Hodgin. Obviously,
19 these buildings were exposed without siding on them in
20 2001 or -- I'm sorry -- 2002 or 2003 when Bostic's sub-
21 contractors were building them. Fair to say?

22 A. To some degree, yeah, that would happen.

23 Q. And the Oconee County official, one of the number
24 one things that he's charged with when he comes out and
25 does his inspections is to review or consider life safety

1 issues; right?

2 A. That's one of the things that they look at, yes.

3 Q. All right. And they're not going to pass a building
4 through an inspection for a fire rating that they don't
5 think has an adequate fire-rated wall. Fair?

6 A. If they saw it, they would not pass it if there was
7 a known defect. I don't know that they had any specific
8 inspections. What they did actually in this case was
9 they wrote a letter to the architect and put the entire
10 burden on the architect, Miller Player, to say, "Miller
11 Player, you are required to certify each and every one of
12 these tenant separation walls." And so there's actually
13 letters or certifications in the file from Miller Player
14 to Oconee County that Oconee County relied on to say that
15 they're correct. And we saw a photograph of one that
16 actually had a breach. There was a hole in-between the
17 units. So Miller Player didn't get it quite right.
18 Oconee County relied on Miller Player to say that it was
19 correct.

20 Q. Okay. And you've already heard the testimony that
21 Bostic Construction didn't have a contract with Miller
22 Player and Associates?

23 A. That's correct.

24 Q. All right. So if Miller Player and Associates is
25 telling Bostic, "That is a fire-rated wall, and we will

1 certify that to the Oconee County building official," can
2 Bostic not rely on the architect who's been charged with
3 that responsibility by the Oconee building official to
4 confirm that that wall was put in in accordance with the
5 applicable building code?

6 A. As long as the observations are made by an architect
7 at the appropriate time. I agree, it should have been
8 caught. Some of these mistakes that we're seeing in the
9 photographs should never have been passed.

10 Q. Right. But Bostic wouldn't know if it was fire-
11 rated or not. It would be relying either on the building
12 authority or the -- I mean, Bostic isn't ultimately the
13 one that says this is how we get to pass the code; right?

14 A. Well, I don't know that I would say Bostic had a
15 duty to act as a design professional. They're relying on
16 the documents prepared by Miller Player which clearly
17 call for a rated wall assembly, two hours on the common
18 wall and one hour on the exterior extension of each and
19 every wall. Totally covered with gypsum. It's clear on
20 the plans. So how you could construct something that's
21 different than that and then suggest that someone else is
22 supposed to pick it up, I think that's unreasonable.
23 Bostic should have just complied with the plans that were
24 provided by the design professional and they would have
25 met the code.

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1 Q. What if this jury hears testimony later in the week
2 that Bostic put up weather-resistant barrier on those
3 walls and the building official came out and said, "Tear
4 that down. It's flammable. It doesn't belong on a fire-
5 rated wall"?

6 A. You'd have to find an alternate that would -- you're
7 still mixing two issues. One is moisture protection, and
8 one is the fire-rated wall assembly. So if they took
9 down the weather-resistant barrier because the building
10 code official told them to take it down, you've got to
11 have some kind of alternate that would provide the
12 moisture protection.

13 Q. What if the building county official is going to
14 come up here and testify in a couple of days that he
15 said, "Take that off. I don't want anything flammable on
16 that wall. It doesn't -- you don't put sheathing up,
17 don't put any type of weather-resistant barrier up"?

18 A. I would be surprised by the testimony, and it would
19 be inconsistent with what was left in place, which would
20 be weather-resistant barrier over combustible O.S.B.
21 sheathing.

22 Q. But you would agree and it's your testimony already
23 that has to be there over the O.S.B.?

24 A. The weather-resistant barrier?

25 Q. Yes.

1 A. Well, that's interesting. Technically, that's the
2 only thing that you may not have had to put on, but it's
3 certainly required by a lot of industry standards.
4 There's actually a code provision that would allow that
5 to not be there, which makes no sense whatsoever. But if
6 you did that, if you omitted the weather barrier, you'd
7 create all kinds of other problems, at least in four
8 locations like you were talking about, roof/wall
9 intersections, windows, trim, and at the stone
10 intersection. You have to have a weather barrier to
11 counter-flash the flashing. So to omit the weather
12 barrier creates all kinds of other issues from a water
13 management standpoint.

14 Q. You know, that's not a direction I was going to go
15 with, Mr. Hodgin. But since you've testified in that
16 direction, you've just testified that the code does not
17 require the installation of weather-resistant barrier on
18 O.S.B. sheathing; right? Yes or no, please.

19 A. Well, it's not that simple. The simple answer is --

20 THE COURT: Just a moment. Answer the
21 question.

22 And then he has opportunity to explain his answer.

23 So answer the question first, and then you can
24 explain your answer.

25 Q. Would you like me to repeat the question?

1 A. No.

2 THE COURT: Please.

3 A. Technically ---

4 THE COURT: I would -- very good. If you
5 would, repeat your question.

6 Q. It is your testimony to this jury that the code does
7 not require the installation of weather-resistant barrier
8 over O.S.B. sheathing on this project. Is that your
9 testimony, yes or no?

10 A. Yes. There's a provision in the code that would
11 have allowed it to be omitted.

12 THE COURT: All right. Now, you may explain
13 your answer.

14 A. The reason that that doesn't make any sense is that
15 if you omit it, you actually cause a significant problem
16 in other places to meet the code which would be at the
17 four locations I just described. And there are all kinds
18 of industry standards that would be contrary to the code.
19 Even the folks that said that that was okay, which was
20 the A.P.A., the industry group that oversees O.S.B., in
21 2000, December of 2000, came out with a technical
22 bulletin that says basically we don't ---

23 Q. I'm sorry. You can't testify as to things that you
24 do not have -- you cannot testify as to hearsay
25 information.

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1 THE COURT: Well, just a moment. Just a
2 moment, now. Is this something that you rely on in your
3 profession?

4 THE WITNESS: Yeah.

5 Q. It's a document I haven't seen, but if you're
6 welcome to testify ---

7 A. I do have it here if you want.

8 Q. Sure. Please, just testify.

9 A. There's a code evaluation report in 1999 which said
10 that the O.S.B. met what's called a moisture resistance
11 criteria, that the code described where you could omit
12 the weather barrier. A little bit more than a year
13 later, A.P.A. came out and said basically, "Put a weather
14 barrier over all of our products." This was a couple of
15 years before the Stoneledge project occurred. So
16 technically, the code allowed it to be omitted, but it
17 would be inconsistent with other parts of the code as
18 well as several industry standards.

19 Q. And I think -- so to summarize your testimony, the
20 code doesn't require it if the code doesn't make sense?

21 A. That particular aspect of the code. And, in fact,
22 several years ago I even taught a class called Top Ten
23 Building Code Problems. That was one of the problems
24 included in my class was how that particular piece was
25 inconsistent with other parts of the code and things that

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1 we know make sense.

2 Q. But Bostic's required to follow the building code
3 above all?

4 A. Right, which is "Walls shall provide weather
5 resistance." And they actually did. It's just a mixed
6 bag. They installed it in some places and didn't install
7 it in other places.

8 Q. Well, we may talk about it a little bit more, but I
9 promised organization. And I'm on a tangent, so ---

10 A. Okay.

11 Q. --- let's back up here. All right?

12 A. All right.

13 Q. We've covered the walls now. We have a disagreement
14 about the walls. Rick Moore says that you can do one
15 thing with the walls, and it's going to cost a certain
16 price. And you say we can do something else with the
17 walls, and it's going to cost a lot more. Fair to say?

18 A. Correct.

19 Q. Let's move down to stone removal.

20 A. Okay.

21 Q. That seems to be the next big disagreement or big
22 discrepancy between your scope of repairs and Mr. Moore's
23 scope of repairs.

24 A. Correct.

25 Q. You understand that Mr. Moore's scope of repairs is

1 a surgical scope to remove stone where necessary to
2 address -- to survey and address potential issues with
3 water intrusion. Is that a fair definition of his scope
4 with regard to stone removal?

5 A. I believe so. I think we agree on the balconies,
6 that the balconies have to be stripped. And I think --
7 elsewhere, I think you're correct.

8 Q. Now, you want to take off all the stone though. If
9 there's a piece of stone on these buildings on the
10 exterior, your scope of repair contemplates removing it?

11 A. I believe so, yes.

12 Q. All right. You are attempting to address an issue
13 that occurs at the water table of where the stone veneer
14 meets the O.S.B. sheathing; correct?

15 A. And all damages caused below that point, yes.

16 Q. I may need to -- you're going to get to see some
17 art.

18 A. Okay.

19 Q. It may not be very artistic, but you're going to get
20 to see it. All right. I'm going to try to turn this so
21 that the jury and the Court can see it.

22 THE COURT: That's all right. Just be sure the
23 jury can see it and, of course, the witness.

24 Q. All right. Just so I'm clear -- and I'm not an
25 architect, and I'm not terribly good at drawing these

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1 things, but ---

2 THE COURT: Just a moment. Ma'am, can you see
3 the chart there?

4 THE JUROR: (Nodded head up and down in the
5 affirmative)

6 THE COURT: All right. Very good. Thank you.

7 Q. My understanding is that you have -- let's say that
8 this is a side wall of Stoneledge. We'll put a window in
9 there. You have the cedar siding that we've seen all the
10 pictures of that goes down this wall. Fair?

11 A. Yes.

12 Q. All right. That's lap cedar siding?

13 A. Yes, sir.

14 Q. Then at some point, that siding meets the stone?

15 A. Yes, sir.

16 Q. All right. And this is that veneer Owens Corning
17 stone that sticks on kind of like a brick?

18 A. Yes, sir. Not really, but I'll agree with your
19 illustration.

20 Q. It's mortared on?

21 A. Yes.

22 Q. Okay. Now, in-between here, you have this flat
23 piece of stone that serves as a break; correct?

24 A. Yes.

25 Q. So just like if a wall were coming down on this

1 pillar right here, you would have a horizontal surface.
2 that serves as a little, what we call, water table?

3 A. Yes, sir.

4 Q. All right. And the goal is that all of that water
5 that's getting in under the ninety/one rule is going to
6 roll down, it's going to hit that water table and it's
7 going to splash out; right?

8 A. It shouldn't splash out. It should be directed out
9 in a uniform manner over properly installed flashing.

10 Q. It's going to go in a uniform flashing going over
11 the wall?

12 A. Yes, sir.

13 Q. And when it doesn't at certain locations -- I
14 remember the unit number, but I don't remember which
15 exact picture it was. Unit thirty-three sort of depicts
16 that water table?

17 MR. BELCHER: Your Honor, may I approach the
18 witness for clarification on that?

19 THE COURT: Please.

20 A. Yes, sir.

21 THE COURT: Now, does that photograph have an
22 identification?

23 MR. BELCHER: It does not have a page number
24 other than a watermark as unit thirty-two, photograph
25 taken on 3/15/2010.

1 THE COURT: Is it thirty-two or thirty three?

2 MR. BELCHER: Thirty-two, Your Honor.

3 THE COURT: Thirty-two. Very good. Thank you.

4 MR. BELCHER: Just give me a moment with
5 counsel.

6 THE COURT: Certainly.

7 (WHEREUPON, Mr. Belcher conferred off the record
8 with co-counsel.)

9 MR. BELCHER: Your Honor, could I publish this
10 photograph to the jury?

11 THE COURT: Any objection?

12 MR. LYLES: No, sir.

13 (Off record discussion)

14 Q. Well, we're taking a long time to do this, but I
15 just want to explain to the jury what a water table is
16 here. And I know this is a little bit fuzzy. The jury's
17 going to be able to see all of your pictures back there.
18 But this is that stone water table. This is the wall
19 with weather-resistant barrier; right?

20 A. Yes, sir.

21 Q. So when you go back to this, which actually may be a
22 little bit better in that picture, this black, that's my
23 water table. That's the concrete water table that you're
24 seeing?

25 A. Yes, sir.

1 Q. And that's where water's supposed to flow over it in
2 an organized fashion when it comes down from the walls
3 that's supposed to be flashed.

4 A. If you had flashing there, yeah.

5 Q. And if that happens and happens right, then you
6 should not be getting any further rundown of this water
7 down the wall; right?

8 A. Correct.

9 Q. You're going to exit all that water out?

10 A. Correct.

11 Q. Now, you understand that the Rick Moore scope, along
12 with your scope, addresses this intersection here to make
13 sure that we get water flowing out of this water table?

14 A. Yes, sir.

15 Q. All right. So now we get down to the stone, which I
16 think was where I actually started my question with you.

17 A. Okay.

18 Q. So what do you understand to be behind this stone?

19 A. Ten years of water intrusion.

20 Q. What do you expect to find behind this stone?

21 A. Damaged O.S.B. and damaged framing.

22 Q. Damaged O.S.B. and O.S. framing. Where does the
23 framing and the O.S.B. that you're talking about in sort
24 of a cavalier manner, where does that stop down here
25 below the stone?

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1 A. It would be at the foundation wall. Where the
2 concrete walls meet the wood framing. And I would say,
3 you know, if there's any stone to be salvaged, there's
4 two places that we had considered would be at the
5 foundation wall, the very bottom of that wall after the
6 wood framing stops. But I'd say that's about the only
7 place. We had considered that, but it's such a little
8 amount that it really doesn't add up to a whole lot.

9 Q. Were you present for any of the destructive tests
10 done either by your company or anyone else with regard to
11 the phase one foundations here and what these foundations
12 look like behind this stone?

13 A. I believe I was either present or I've seen the
14 photographs.

15 Q. All right. Have you seen the photographs of the
16 Superior wall systems?

17 A. Yes.

18 Q. All right. The Superior wall systems -- and if I
19 make this the gray, which I'm not suggesting that that's
20 the gray. But the Superior wall systems are a concrete
21 panel; correct?

22 A. Yes.

23 Q. It comes in on a truck; right?

24 A. I believe so.

25 Q. It's already a big four-by-eight or sixteen-by-eight

1 square of a concrete wall; right?

2 A. Yes.

3 Q. Is it not your understanding that that concrete wall
4 system looks like that behind all of this stone to a
5 certain degree, that you're going to have stone direct
6 applied or applied with scratch coat and lath to all of
7 this Superior wall system?

8 A. Conceptually, it's like that, but it's not really
9 like that because Superior walls are more expensive than
10 the wood frame walls, so you have step-down foundations.
11 So it's not like that much Superior wall is sticking
12 above grade. You would stop the Superior after you got
13 above grade, and then you would start the wood frame wall
14 above that.

15 Q. Okay. So you would put the grade somewhere around
16 here?

17 A. What I'm saying is the Superior wall system would
18 have to come up above grade. But you don't pay for a
19 more expensive wall system to extend significantly above
20 grade. So if the grade is sloped, the Superior wall
21 system is stepped as you go from the back of the building
22 toward the front of the building.

23 Q. And you believe that -- so just so I understand it
24 -- and the jury may or may not. The sill plate
25 construction that you have for the wood framing, you

01042

1 believe to be stepped down like this on top of the step-
2 down Superior wall system?

3 A. Yes.

4 Q. All right. And if you're mistaken about that or if
5 we see some photographs here in a little while that
6 suggests that that Superior wall system goes direct
7 across the top, is that going to change or impact your
8 testimony as to how much stone needs to be removed?

9 A. No, I don't think, not substantially. If you had
10 destructive testing, you'd have to do it across the
11 entire wall. How would you know from a single
12 destructive test that it runs continuous across the wall
13 unless you did the entire wall? If you have a small
14 section, you're still going to have the top of one piece
15 of Superior wall. The plans clearly call for a stepped
16 foundation. And I think there was even -- in my very
17 first deposition December -- I can't remember if it was
18 2009 or 2010. But the very first deposition, somebody
19 had some photographs, I think, of the unfinished units
20 when the foundation was in. And you could see the
21 stepped foundations.

22 Q. As you sit here today, do you know whether those
23 photographs depicted one of the units built by Bostic?

24 A. I don't. I'd have to look at it again.

25 Q. Yeah. All right. Well, you understand that there

1 are two different kinds of foundation systems out there,
2 some built by Bostic and some not; right?

3 A. That's correct.

4 Q. All right. I just want to make sure. Because it's
5 an important distinction that I'm trying to make to the
6 jury here.

7 A. Okay.

8 Q. You want to take off all of this stone regardless of
9 what's behind it, whether it's concrete behind it or
10 whether it's O.S.B. sheathing and weather barrier or
11 whatever behind it; right?

12 A. The answer is yes. The most important part of the
13 scope is to get off all of the stone over wood framing.
14 If you want to try to salvage what's over the foundation
15 walls, that's fine. We could certainly live with that.
16 But that's not going to save a whole lot of stone, I
17 don't think, at that point.

18 Q. Well, if this foundation wall is this big and all of
19 this down here is salvageable and all of this up here,
20 which would be wood, up to the water table would be in
21 the area where you would expect the rot and
22 deterioration; right?

23 A. No. Water migrates vertically down the wall due to
24 gravity. So later after this photograph, do you remember
25 seeing a photograph where we took off the stone down to

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1 the base of the wall? And there's actually wet
2 insulation and wet and damaged framing behind the O.S.B.
3 sheathing where it had settled at the base of the wall.
4 So the gravity -- even though the entry point's up at the
5 top of the water table, I would think you would have to
6 concede that all the water that's been going in there for
7 ten years is going to cause damage from that point all
8 the way down to the foundation wall. And I don't know
9 that that's addressed in the Rick Moore scope. You have
10 to take all the stone off to fix the damage of the wood
11 framing.

12 Q. Okay. And I think what we need to do here is we
13 need to clarify for the jury what foundation wall we're
14 talking about here. And I need you to just tell me one
15 way or the other. Do you know what the foundation wall
16 looks like on the buildings that we're here about for
17 this trial? Do you know whether it's necessarily a step-
18 down like that or if it's straight across on the top?

19 A. Based on my understanding of all the file documents
20 and my destructive testing, it's stepped-down. You will
21 not know the specific location or termination point
22 between the foundation wall and the wood framing in the
23 absence of a comprehensive repair.

24 Q. Well, you just told me that if there's stone on top
25 of this concrete, you can salvage it; right?

1 A. What I'm saying is what's below the wood framing, if
2 moisture got to that location, it would just be getting
3 the concrete wet. And I am not familiar water intrusion
4 coming in the side wall. It's just the front walls here
5 with the below-grade stuff. On side walls, I think we
6 should be safe to leave some of that stone in place.
7 We're taking it out because we didn't think it's that
8 much.

9 Q. Well, if it is, if we find out throughout the rest
10 of this trial with Mr. Moore and his photographs and the
11 other people who are going to testify and have done
12 investigations that this is a significant amount damage
13 applied to concrete, that's not an issue that needs to be
14 repaired; correct?

15 A. As long as you can de-clad and take it off and match
16 what's there, I would not have a problem with leaving it
17 in place. It would be functional.

18 Q. And you know Mr. Watkins is already out there
19 performing above-grade repairs; right?

20 A. As well as below-grade repairs, yes.

21 Q. And everybody's satisfied that he matched the stone
22 and he's done a good job. He's repaired all the water
23 damage on those units that he's worked on with regard to
24 the sub-grade repairs?

25 A. As far as I know.

01046

1 Q. So, you know, Mr. Hodgins, one of the things that you
2 have to do for this jury is that you have to testify to
3 what's called a reasonable degree of certainty as to your
4 opinions; correct?

5 A. Correct.

6 Q. Is it fair after our little exercise here that you
7 cannot, as you sit here today, testify to a reasonable
8 degree of certainty that all of the stone has to come off
9 of those buildings?

10 A. I think I've testified to that. I just said if
11 there's areas below the wood framing, you can leave it in
12 place. I don't think there's any disagreement. What I
13 think is not known by either myself or Mr. Moore is the
14 exact extent of wood framing that's going to be damaged
15 below the water table. Unless you have a comprehensive
16 repair to look at that, it's not going to be addressed.

17 Q. If you don't know what Mr. Moore said, let's let Mr.
18 Moore testify as to what he knows. Okay?

19 A. I know what his scope says.

20 Q. All right.

21 A. And that's not to de-clad all of the stone from the
22 side wall.

23 Q. Right. Do you agree with him now that you don't
24 have to de-clad all of the stone from the side wall?

25 A. No. You have to address all of the wood frame

1 damage.

2 Q. So if we're going around in circles now -- my
3 question to you ---

4 THE COURT: Let's do this. State your
5 question.

6 Answer the question, then you can explain your
7 answer.

8 THE WITNESS: Okay.

9 Q. Have you not testified here today that to the extent
10 there's stone applied to concrete Superior wall systems,
11 it does not need to be removed?

12 A. Yes.

13 Q. Now, that changes your prior opinion of removing all
14 the stone?

15 A. It's just ---

16 Q. Yes or no?

17 A. It doesn't change my opinion. My scope is based on
18 taking it all off because I don't think there's that much
19 to salvage, and it's just easier to take it off.

20 Q. Easier?

21 A. Yeah. From a contractor's standpoint to leave some
22 in place and have to integrate -- at the base of the wood
23 frame wall section, you would need to have a weep screed
24 and flashing detail to preclude water from going down the
25 wall. So you'd have to have a stepped flashing system.

01048

1 You're going to have stone that you leave in place
2 integrated with new stone. From a contractor's
3 standpoint and my experience, if there's not a whole lot
4 left to salvage, it would be easier for them to take it
5 off.

6 Q. I'm trying my best not to confuse the jury. I'm
7 trying to give them a linear path to follow here. And
8 what you're testifying about is not the question I asked.
9 Let me ask the question one more time.

10 A. Okay.

11 Q. Has your opinion not now changed as you sit here on
12 the stand that in your -- let me correct that. Your
13 prior opinion was that all of the rock on these
14 buildings, regardless of the substrate behind it, has to
15 be removed. That's your scope, yes or no?

16 A. That's my scope. My opinion has always been, today
17 and in depositions, that any stone over concrete walls
18 are not likely to be a problem and could be salvaged. If
19 you want to try to salvage it, go ahead and salvage it.

20 Q. All right. And you understand that the jury is
21 about to see a bunch of different estimates in this case
22 about how much it's going to cost to fix these buildings;
23 right?

24 A. I think they'll see two at least.

25 Q. Yeah. And you understand that some of those

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1 estimates, including the one implementing your scope, is
2 hundreds of thousands of dollars more expensive because
3 all the stone has to come off of these buildings?

4 A. I don't think that's the main reason. That's one
5 reason why the cost would be higher. But I don't know
6 how significant it is.

7 Q. Well, you just testified to this jury that it would
8 be easier for a contractor to just do it this way. But
9 also it would be a heck of a lot more expensive for them
10 to just tear off a whole bunch of stone that doesn't need
11 to be torn off. Is that fair to say?

12 A. I don't know. I'm not a contractor. You'd have to
13 ask the contractor.

14 Q. All right, sir. We'll move on. Let's move on to
15 the porches. Take a deep breath.

16 A. I'm fine.

17 Q. Because we're going to porches where I think we by
18 and large agree on in a lot of places.

19 A. We what?

20 Q. I think we by and large agree on the porches in a
21 lot of places.

22 A. Okay.

23 Q. We understand that there's going to be -- we all
24 understand that there's some places where rot exists on
25 these porches; right?

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1 A. Yes.

2 Q. And were you here for my opening argument or opening
3 statements?

4 A. No.

5 Q. All right. Would you agree with me that one of the
6 places where we located a significant amount or at least
7 a consistent damage to these porches and decks is the
8 outboard side where these pillars are?

9 A. Yes.

10 Q. All right. Do you understand that Rick Moore's
11 scope and the estimate that we are going to provide
12 contemplates removing those columns, the stone, wood, and
13 everything, and putting them back in and doing them
14 right?

15 A. It should.

16 Q. And your scope includes that too?

17 A. Yes.

18 Q. Our disagreement, similar with the walls, is the
19 extent of what else needs to be done out there. Fair?

20 A. I believe so, yes.

21 Q. All right. And I kind of held you back earlier, so
22 I'm going to let you go now. You were talking about
23 wanting to take out all of the flooring, the subflooring,
24 busting up the concrete, taking out all of the floor
25 joists or truss, whatever they are, in there ---

01051

1 A. Correct.

2 Q. --- and starting from scratch?

3 A. And the only thing that you described that's
4 different than Mr. Moore's scope is the framing. He's
5 busting up the concrete. He's taking off the subfloor.
6 He's repairing damages to the framing. I'm just
7 replacing the framing.

8 Q. You understand that there -- like with the walls,
9 there's a substantial discrepancy in price between what
10 your scope requires and what Mr. Moore's scope requires?

11 A. I would imagine mine would be more expensive since
12 it includes the framing, yes.

13 Q. Right. And we're just trying to find out what's
14 fair and what's a fair amount of work that needs to be
15 done on these porches. Okay?

16 A. Yeah.

17 Q. And I think you testified earlier -- and please
18 correct me if I'm wrong. But based on the hundred and
19 thirteen photographs that you want this jury to see when
20 they're deliberating, you believe that the framing and
21 all of the O.S.B. roof deck has to come off; correct?

22 A. It's not a roof deck; it's the subfloor on the
23 balconies. But that's the scope, yes.

24 Q. All right. Now, over the course of time, Mr.
25 Moore's done his destructive test cuts; right?

1 A. Yes.

2 Q. And several others have been on site for those test
3 cuts; correct?

4 A. Yes.

5 Q. And you understand that Mr. Moore was retained by me
6 for Joe and Jeff Bostic; right?

7 A. Yes.

8 Q. So he was only looking at buildings that Bostic
9 built?

10 A. Well, I would imagine that's the case.

11 Q. And you, about ten days ago or so, sent my office a
12 CD, which I think you had either offered before or we had
13 requested. But you sent us a CD or a stack of CDs that
14 contain all of the photographs that have been provided to
15 you from Mr. Moore and other people who were retained by
16 other parties; right?

17 A. Correct.

18 Q. And have you reviewed all of those photographs?

19 A. No. Not recently, no.

20 Q. Would it be important for you to review all of those
21 photographs to determine whether or not your scope is
22 adequate, consistent or in excess of what needs to be
23 done?

24 A. I've reviewed them in the past. I'm satisfied with
25 my scope.

1 Q. All right.

2 MR. BELCHER: Your Honor, may I approach the
3 witness?

4 THE COURT: Yes, sir.

5 MR. BELCHER: I'd like to mark a series -- I
6 think I'm going to mark them one at a time for now, if
7 that's all right, Your Honor?

8 THE COURT: How many?

9 MR. BELCHER: Well, there's a total of a
10 hundred and two pages of photographs. They're from his
11 file. But I don't want to ---

12 THE COURT: I'm just thinking if you're going
13 to have them marked, we need to go off the record.

14 MR. BELCHER: Well, let's just mark the whole
15 thing for identification purposes, and then I'll decide
16 how much we have to do.

17 THE COURT: Very good.

18 (WHEREUPON, Defendant Bostic's Exhibit Number DB-3
19 was marked for identification only.)

20 Q. Mr. Hodgin, we've just marked a stack of photographs
21 that I think were produced to you from Mr. Moore, our
22 expert. And I want to talk to you a little bit about
23 them. And just for your information and background, I
24 just pulled a bunch of photographs. There's some damage
25 in them. There's some -- you know, there's some pretty

1 nasty things in here. And we'll probably put this whole
2 thing back there for the jury just for good conscience.
3 But take a look here, if you will ...

4 MR. BELCHER: Your Honor, do you mind if I
5 mark, A, B, C, for identification as to which ones he's
6 looking at so we don't have to ---

7 THE COURT: No. Very well.

8 MR. BELCHER: All right. Thank you, Your
9 Honor.

10 THE COURT: Well, let's -- the only thing is --
11 just a moment.

12 Madam Court Reporter, would that be consistent with
13 your identification?

14 COURT REPORTER: It would be ...

15 THE COURT: All right. The exhibit is?

16 COURT REPORTER: Exhibit is DB-3.

17 THE COURT: How many do you want to do? In
18 other words, can you pre-mark them? All right. Very
19 well. We'll go ahead. But just remember, each time you
20 mark one, we'll have to go off the record so we don't
21 interfere with any testimony.

22 MR. BELCHER: Maybe what I'll do -- if it's
23 okay with the Court, if I tab the ones that I showed him.

24 THE COURT: That's what I ---

25 MR. BELCHER: And then later we can mark them

01055

1 ---

2 THE COURT: There we are.

3 MR. BELCHER: --- if they go into evidence.

4 THE COURT: Very well. Very good. Let's just
5 go off the record, and you can see if you can do that now.

6 MR. BELCHER: All right. Thank you.

7 (WHEREUPON, court stood at ease.)

8 THE COURT: All right. Are you ready to
9 proceed?

10 MR. BELCHER: Yes, Your Honor.

11 THE COURT: Very well.

12 MR. BELCHER: All right. If I may approach the
13 witness.

14 THE COURT: Certainly. Excuse me. I was
15 thinking of something else.

16 MR. BELCHER: And you may want to turn the
17 lights back off.

18 THE COURT: All right. Very good.

19 MR. BELCHER: Madam Court Reporter, if the
20 record would reflect that I'm showing Mr. Hodgin a
21 photograph, which seems to be identified as TC7-31312RNH
22 and a photograph below. There are two photographs on one
23 piece of paper.

24 Q. Take a look at that photograph, Mr. Hodgin. Based
25 on your recollection of the conditions on the ground and

01056

1 Mr. Moore's test cuts, does the photograph at the top of
2 that page appear to be a photograph of the cedar ceiling
3 that is underneath these patios that you want to take
4 off?

5 A. Yes, sir.

6 Q. All right. And the photograph below, does that
7 appear to reflect the space between the floor of the deck
8 above that you want to take off and the ceiling that you
9 want to take off?

10 A. It may, yes.

11 Q. All right. If the Court would permit, can you
12 identify for me in this photograph and for the jury where
13 there is damage? And I know that's a very unusual focus.
14 Do you observe any damage in either of these photographs
15 that requires repair?

16 A. No, I don't see any damage in those photographs. If
17 you recall, the scope that we have is to only replace the
18 framing on that open exposed side of the balconies where
19 I don't think we've seen any balconies that did not have
20 damage in those areas. We are salvaging the portion of
21 the framing that's in -- there's like half of it that's
22 open and half of it has a screen-enclosed porch with a
23 roof over it. That side of the framing seemed to be in
24 good shape. And we're going to salvage that. I would
25 think that would likely be below the screen-enclosed

01057

1 porch.

2 Q. All right. To the extent that a photograph such as
3 this is not below a screened-in porch but is, in fact,
4 the conditions on the ground for what is underneath an
5 open deck, would you still call for the removal, complete
6 removal, tear down and building back up of all of those
7 trusses and all that floor and that ceiling and all of
8 that right there?

9 A. I certainly wouldn't think so. I think what you'd
10 find is that anything that's clean and undamaged would be
11 under the screen-enclosed side.

12 Q. All right. Well, let's look at something else.
13 Since that's something that -- Mr. Moore is going to have
14 to testify as to what he saw ---

15 A. Certainly.

16 Q. --- because you didn't see this photograph; right?

17 A. Well, I may have seen it before.

18 Q. And you would say that damage -- if these look like
19 that -- if these uncovered porches look like this, then
20 your scope would change; you just don't believe that that
21 picture is accurate in reflecting those porches?

22 A. Well, even if it is, there's so much at the front
23 and rear walls, I just can't imagine that -- if there's
24 undamaged areas, they're going to be pretty limited. I
25 really think it's probably under the screen-enclosed

01058

1 porch side.

2 Q. Here is another photograph which is marked test cut
3 seven, 3/15/2012, R.H.M. That -- tell me if I'm wrong --
4 depicts similar conditions?

5 A. It does. And what's good about this picture you can
6 actually see this is the point at which you transition
7 from the screen-enclosed porch which would be the top of
8 the photograph to the open side of the porch, which is
9 where the damage starts by this pillar.

10 Q. Now, let's take a look at this picture up here. And
11 please explain to the jury -- I will point ---

12 A. I've got the pointer.

13 Q. Oh, you do?

14 A. Yeah.

15 Q. All right. So please testify to the jury where you
16 believe the screened porch starts and the open deck
17 continues. Where the screened porch stops and the open
18 deck continues.

19 A. Can you turn the light off? I think it might be
20 easier.

21 I believe that the top of the photograph is the area
22 of framing that the screen-enclosed porch, and where you
23 see this water intrusion damage at this location and at
24 the bottom of this framing is where the open porch starts
25 and goes to the right or to the bottom of the photograph.

1 Q. Okay. And the jury probably heard it in my opening.

2 But this is one of those pillars; right?

3 A. Right. That's a structural column that's holding up
4 the framing for the balcony; correct.

5 Q. So when we go look out on the other side, we're
6 going to see the screened-in porch over here, and we're
7 going to see an open deck rail over here; right?

8 A. Right. I think so.

9 Q. All right. And the amount of damage depicted by
10 this photograph is about that much?

11 A. (Laughter)

12 Q. According to what this photograph is showing?

13 A. Well, you could say it that way. I mean, to me ---

14 Q. Well, say it the way you want to say it. I mean,
15 how much damage is there?

16 A. It's localized. But what's important, particularly
17 on a truss framing system, is where the damage exits. If
18 it's at a top corner. If it's at a connection point. So
19 this damage. And from this point to the right would be
20 where we would do the reframing.

21 Q. But your testimony and your scope of repair is that
22 because you see that damage in that much space, you want
23 to take that whole back off, tear it down and put it all
24 back on because of that amount of damage?

25 A. No. This is a transition point. This would stay in

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1 place. Everything to the right of this where this damage
2 starts would be replaced.

3 Q. Right.

4 A. This would likely stay.

5 Q. So where you see this staining here, that would
6 stay?

7 A. Yeah. That's part of this screen-enclosed porch. I
8 mean, we'll look at it when we do the repair. But that's
9 part of the screen-enclosed porch. That's where the
10 damage starts between where the open porch begins.

11 Q. So you're not going to repair where this damage is?

12 A. We'd look at it during our repair process. But if
13 it's just stained and it's under the screen enclosed
14 porch, it's going to stay.

15 Q. Well, then, why are you fixing over here where there
16 is no damage?

17 A. I'm fixing places you can't see which are to the
18 right of this on the open balcony. I mean, what would be
19 interesting to see is undamaged photographs in the open
20 balcony. That would change my opinion if you could show
21 me photographs in those areas.

22 Q. Well, I just grabbed a bunch of photographs for you
23 to look at because I wanted you to have the benefit of
24 looking at other photographs. Mr. Moore, I think, is
25 probably going to have to be the one to testify as to

1 where these are.

2 A. Very good.

3 Q. Now, I will show you these, though. All right?

4 Because in all candor, I'm not trying to trick you. I'm
5 going to show you two pictures here that are part of Rick
6 Moore's testimony, part of his photographic evidence.

7 All right?

8 A. Okay.

9 Q. Take a look at those two pages of photographs, and
10 let me know when you want me -- when I can put them up
11 there.

12 A. Okay.

13 Q. Now, Mr. Moore is going to have to testify to these
14 pictures to put them into evidence, but I want you to
15 look at them because in all fairness -- I think it
16 belongs ---

17 A. Yeah, I think you have the ---

18 Q. Well, that's the bottom. That's cedar; right?

19 A. No. That's the subfloor right there.

20 Q. Now, I don't think I need your testimony to tell me
21 that ain't right; correct?

22 A. I hope not.

23 Q. All right. Now, and the same thing with the one
24 above, that that is a localized issue of damage right
25 there that needs to be replaced. Fair?

1 A. Yes.

2 Q. And that'll be consistent -- you see daylight up
3 here in the top?

4 A. No. I think there's something wrong with the light
5 on the projector. Oh, that damage? I didn't catch that
6 when I looked at the photograph in front of me. It could
7 be.

8 Q. So you think that's the front facia board that forms
9 up the outside of those porches?

10 A. It could be. And this could even be on the screen-
11 enclosed side because at the corners of the screen-
12 enclosed side and the wall on the screen-enclosed side,
13 we do have damages to the wall. But it's not significant
14 damage as to the framing.

15 Q. You just don't know?

16 A. No.

17 Q. All right. Now, if this next picture that I had,
18 which would be right next in line, it's just the same
19 condition looking in the other direction. Do you see any
20 damage or decay or rot or anything that needs to be
21 replaced anywhere in those photographs?

22 A. No. You can tell that there's a stone wall out
23 here, so you're looking toward the other end to where
24 there's a side wall. I would say when it looks that
25 clean, it would likely be the screen-enclosed porch area.

1 Q. But you don't know for sure whether it is or it
2 isn't?

3 A. Based on the lack of damage, I would say to a
4 reasonable degree of certainty it's the screen-enclosed
5 porch.

6 Q. All right. But if Rick Moore testifies about these
7 same photographs and tells you otherwise, then you're
8 going to agree with Rick Moore?

9 A. Sure.

10 Q. So some of these photographs depicts some damage;
11 some of these places simply don't. Right?

12 A. Right. And then again, the balconies, the areas of
13 the balcony, they're pretty much a fifty/fifty split.
14 You've got half that's covered and half that's not. Our
15 scope is simply in the half that's not where we think
16 there's significant damage exists. I think you'd be
17 challenged to show pictures where there's not damage.
18 That's the only place that we're going to replace the
19 framing.

20 Q. Well, if Rick Moore shows, when he gets up here and
21 testifies, that the damage on the uncovered porches where
22 you want to tear them all the way off and put them all
23 the way back on is not significant, are you going to
24 agree with him that some limited scope of repair is
25 appropriate for those balconies?

1 A. Not based on what I've seen. I mean, if Rick wanted
2 to be the repair design professional for the homeowners
3 and have a limited scope, I'm certainly fine with that.
4 He can do that.

5 Q. At any time were you on site when Rick Moore was
6 conducting his test cuts?

7 A. I believe so, but not all of them.

8 Q. Do you recall sticking your head up in any of the
9 test cuts labeled R.M.H. 1716 one through eighteen?

10 A. No. I think my time was limited.

11 Q. Your time was limited. Did you have an employee
12 there who was following Mr. Moore around and watching
13 what he was doing and documenting what he was doing?

14 A. Yes.

15 Q. And you've produced all of your -- but you haven't
16 produced any photographs showing one way or the other
17 what's damaged and what's not underneath this, have you,
18 other than your own photographs?

19 A. If we've got -- well, I'm certain we would have
20 taken photographs the same day as Mr. Moore was out
21 there, and we have produced those.

22 Q. Fair to say that none of the hundred and thirteen
23 photographs that you want the jury to see as they
24 deliberate depict anything other than a complete tear-off
25 of those balconies? Is that fair?

1 A. Just on the side of the open balcony; correct.

2 Q. Well, nobody's suggesting that we need to replace
3 the screened porch balconies; right?

4 A. No. I guess that was my point.

5 Q. All right.

6 A. Why show them photographs of something that I'm not
7 fixing?

8 Q. Okay. Now, you also understand -- and your scope is
9 to pull all of the balconies off of all thirty-seven
10 units?

11 A. The open side, yeah.

12 Q. Do you understand that at least seven of the units
13 do not have basements where this condition could even
14 exist?

15 A. I don't recall a specific number. But if that's the
16 way it is, then that's the way it's been priced. I don't
17 think there's a problem with the scope including
18 something that's not there.

19 Q. Well, if your scope says pull off the balconies of
20 thirty-seven units, that's what the contractor is going
21 to price; right?

22 A. No. Our scope would also say the contractor has the
23 responsibility to field verify all the conditions
24 described by our scope. And if they were to go out there
25 and see that there's seven that don't require the same

1 . scope, then that would be adjusted.

2 Q. Okay. Well, if that's something that we find needs
3 to have an adjustment, you would certainly recommend that
4 that adjustment be made?

5 A. Absolutely.

6 Q. And you do understand that there are a number of
7 units that are slab-on-grade out there?

8 A. I don't remember the total number. But if there are
9 and there's an adjustment that needs to be made, I would
10 agree with that.

11 Q. So some units aren't going to have basements under
12 their porches?

13 A. Correct. Or a patio. Is that what you mean?

14 Q. They would have slab-on-grade patio, a patio and
15 screened-in porch. Right. I just want to make sure that
16 we're clear that this is not an issue for all thirty-
17 seven units out there.

18 A. That's correct.

19 Q. Whether it's an issue or not, it's subject to
20 debate. But at least with regard to seven units, we're
21 not ---

22 A. The scope would be different, yes.

23 Q. Just to wrap it all up. We have seen some issues
24 where maybe not all of stone has to come off; right?

25 A. At the foundation walls, yeah.

1 Q. And are you willing to at least concede for the
2 purposes of today that maybe there are some decks and
3 some framing, based on some of the photographs that
4 you've seen, that can be salvaged?

5 A. No.

6 Q. You're not willing to concede that?

7 A. No.

8 Q. Whatsoever?

9 A. No.

10 Q. Having never stuck your head up in any Rick Moore
11 test cuts to determine the difference in scope that Rick
12 Moore has prepared?

13 A. Correct.

14 Q. All right. So you're not relying to any degree on
15 any other expert and their photographs and their reports,
16 what they found out there, to formulate your scope?

17 A. No. I'm relying on my own personal observations,
18 which we used the borescope and we've been out there for
19 other experts' cuts. What I'm saying -- and I'm
20 comfortable to a reasonable degree of certainty,
21 engineering certainty -- is that there's enough damage in
22 the open side of the balconies to justify our scope. I'm
23 not willing to back off on that scope. If Mr. Moore
24 wants to undertake the limited scope, he's more than
25 welcome to do that.

1 Q. And as you said, you've respected his opinions in
2 the past?

3 A. Sure.

4 Q. But you just simply just disagree on it?

5 A. It's something that I'm not comfortable on
6 personally. If there's any damage and you're going to
7 reframe it, you can't have a mixture of new pressure-
8 treated joists and trusses. So it's kind of like an all
9 or nothing situation as far as replacing it.

10 Q. We've talked about the forensic method?

11 A. Yes, sir.

12 Q. We've talked about the issues that you've
13 identified?

14 A. Yes, sir.

15 Q. We've talked about the issues that we more or less
16 agree upon?

17 A. Yes, sir.

18 Q. That are included in both scopes. And we've talked
19 about where we disagree?

20 A. I believe so.

21 Q. All right. And perhaps we've formed some sort of an
22 agreement on whether or not all this stone has to be
23 taken off?

24 A. Correct.

25 Q. All right. And we have formed absolutely no

1 agreement -- we're not one step further in the agreement
2 process as to what needs to be done to these balconies?

3 A. I think the balconies remain a big issue and the
4 fire-rated walls. Those are about the two biggest things
5 I can think of where Rick and I would disagree.

6 Q. And if you hear testimony from a building official
7 later on, if you sit through the rest of this trial or
8 your associate sits through the rest of this trial, might
9 that change your opinions?

10 A. No. The building official couldn't tell me anything
11 to trump my ethical responsibilities as a professional
12 engineer to protect the public welfare and safety of the
13 occupants. So I have a duty from an engineering
14 standpoint to make sure that the fire-rated walls are
15 proper.

16 Q. The contractor has that same duty, though, don't
17 they, Mr. Hodgins?

18 A. Not to the same level that an engineer does, no.

19 Q. All right. Maybe we'll talk about standard of care
20 in a minute, but I think I want to wrap up instead.

21 A. Okay.

22 Q. The contractor has a duty to build a fire-rated
23 system; correct?

24 A. Yes.

25 Q. And if the building official tells him, "Do it this

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1 way or you don't get your certificate of occupancy,"
2 isn't he required to do what the building official says
3 to do?

4 A. Again, I think if that's the case, if the building
5 official is telling him to deviate from a design
6 professional's documents, I think the building official
7 and to some degree the contractor are now accepting the
8 duty and the role of the design professional. And they
9 have now made a mistake in what was actually constructed.
10 As far as liability, I wouldn't be able to answer that.

11 Q. Let's be linear about it.

12 A. Okay.

13 Q. All right. If a building official for Oconee County
14 is the sole source of code interpretation, he decides
15 what the code says and how it's to be implemented for
16 everything built in Oconee County?

17 A. I believe that's correct.

18 Q. He tells the contractor, "Do it this way or it's not
19 right." Plans and engineers and everything not
20 withstanding. You're saying that the contractor was to
21 deviate from what the building official specifically
22 tells him to do when that building official is the sole
23 source of code interpretation for this county?

24 A. Well, I get the hypothetical. It just doesn't make
25 sense that you would leave combustible O.S.B. with a

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1 weather barrier over part of the wall, and the code
2 official is just going to tell you to take it off of the
3 most moisture-sensitive material in the wall, which is
4 the gyp, and say, "Don't put it there because it's
5 combustible, but leave the other stuff over the
6 combustible material," it makes no sense whatsoever. But
7 I do say that they're not the design professional. Once
8 they deviate from the contract documents, I think that
9 then the contractor is going to have to turn to the
10 design professional and say, "Hey, the code official is
11 telling me to do this. What do I do?" Because they're
12 not -- unless they're going to take the role of the
13 design professional, they need some other guidance. You
14 can't just listen to the building official.

15 Q. Okay. Can we agree -- back to the things we agree
16 on, Mr. Hodgins. That's obviously something that we're
17 just not going to agree on. Can you agree that the
18 damage you found on certain locations is not universal
19 throughout the entire project? Of conditions, maybe;
20 damages, not.

21 A. I think the damage would likely exist in all similar
22 locations. They would just vary in extent.

23 Q. Can you testify to a reasonable degree of certainty
24 on your engineering license -- let's just use the
25 standard, okay?

1 A. Yes.

2 Q. Can you testify to a reasonable degree of certainty
3 that you are going to find damage in every single
4 location of this building where you have identified
5 something like a water table issue, something like a
6 window issue, that needs to be addressed? Not likely; to
7 a reasonable degree of scientific certainty.

8 A. My understanding, that's the same thing. It's more
9 likely than not. So, yes, I can.

10 Q. All right. And if you see pictures during Rick
11 Moore's testimony that suggests otherwise ---

12 A. Well, that's the forty-nine percent.

13 Q. The forty-nine percent?

14 A. Right. The, more likely than not just means it's
15 more likely that you're going to see it than not see it.
16 So if you don't see it, that would be the lesser
17 condition.

18 Q. So there's a fifty/fifty chance you're going to see
19 it or forty-nine/fifty-one chance you're going to see it,
20 and you're going to tell this jury that they should make
21 Bostic Brothers tear down all the walls and all the
22 porches and everything based on that standard of
23 certainty?

24 A. No. I'm trying to explain that the certainty -- my
25 certainty is much, much higher than that. I've seen the

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1 way all the windows were installed. I know what the ten-
2 year service life and water intrusion has caused in other
3 areas. It's likely that you're going to find damage in
4 most if not all locations. I'm saying if you saw an area
5 without damage, that would be the anomaly.

6 Q. And, finally, sir, since we talked about contract
7 administration, and setting aside all of your opinions in
8 this case, you were asked a few minutes of testimony
9 regarding contract administration?

10 A. Yes, sir.

11 Q. Are you serving to provide contract administration
12 on the Traditions project?

13 A. What is that?

14 Q. The Traditions project, a fifteen-building project.

15 A. (No verbal response)

16 Q. It's not one you're working with Mr. Moore on?

17 A. (No verbal response)

18 Q. Fifteen buildings, scope of repair one point one
19 million dollars. Sound familiar?

20 A. No. Could it be called something else?

21 Q. Okay. True Blue, seventy-seven buildings. Six
22 point five million dollars worth of repairs?

23 A. We're working on that. Mr. Moore is not.

24 Q. Fairway is thirty buildings, two point one million
25 dollars in repairs?

1 A. It started at one point one and ended at two point
2 five million, yes.

3 Q. All right. For thirty buildings?

4 A. Right.

5 Q. All right. And those are those big apartment boxes
6 at Fairways; right?

7 A. They're a three-story wood-frame construction, yes.

8 Q. So you're performing contract administration on True
9 Blue; right?

10 A. Yes.

11 Q. Seventy-seven buildings, six and a half million
12 dollars?

13 A. Correct.

14 Q. And Fairway's thirty buildings, two point -- what
15 did you say it was?

16 A. Two point five. But that's completed. Rick and I
17 finished that a couple of years ago.

18 Q. And y'all worked together on that?

19 A. Correct.

20 Q. All right. Thank you, sir. I don't have any
21 further questions for you.

22 THE COURT: All right. Mr. Foreman, ladies and
23 gentlemen of the jury, y'all have been there almost an
24 hour and a half, well, almost two hours. I'm going to
25 suggest that you take a break at this time. When you're

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1 ready to come back, just knock on the door. And do not
2 undertake a discussion of the case among yourselves.

3 (WHEREUPON, the jury exited the open court at
4 approximately 10:44 a.m.)

5 THE COURT: All right. Anything from the
6 plaintiffs before we take a break?

7 MR. LYLES: Nothing, Your Honor.

8 THE COURT: From the defense?

9 MR. BELCHER: No, Your Honor. Thank you.

10 THE COURT: All right. Very good.

11 Mr. Hodgin, you're still under oath. You may step
12 down. Don't discuss your testimony.

13 THE WITNESS: Yes, sir.

14 (WHEREUPON, court stood at recess for a short
15 break.)

16 THE COURT: All right. Anything from the
17 plaintiff before we bring the jury back?

18 MR. LYLES: No, sir.

19 THE COURT: From defendants?

20 MR. BELCHER: None from Bostic, Your Honor.

21 THE COURT: Anyone else?

22 (No response)

23 THE COURT: Mr. Imhoff, are you going to be
24 next?

25 MR. IMHOFF: It appears so.

1 THE COURT: What about Mr. Anderson? Do you
2 have any ---

3 MR. ANDERSON: I am not going to have questions
4 for this witness.

5 THE COURT: Well, that's why -- I just wanted
6 to know.

7 MR. ANDERSON: Yes, sir.

8 THE COURT: I'm trying to find out whoever's
9 next if they're ready. As they ever will be or ---
10 Mr. Imhoff?

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

12 THE COURT: Are you ready?

13 MR. IMHOFF: I am, Your Honor.

14 THE COURT: All right. Ask the jury to join
15 us, please.

16 I didn't want to bring them out and we just sit
17 here.

18 (WHEREUPON, the jury entered the open court at
19 approximately 10:58 a.m.)

20 THE COURT: All right. Let the record reflect
21 the jury and alternate are in the jury box.

22 We will now proceed with the cross-examination of
23 the witness.

24 Mr. Imhoff?

25 MR. IMHOFF: Thank you, Your Honor.

1 THE COURT: Oh, excuse me. Mr. Anderson, I
2 think you're next in line.

3 MR. ANDERSON: I have no questions for this
4 witness at this time, Your Honor.

5 THE COURT: Very good. Thank you, sir.
6 Mr. Imhoff?

7 MR. IMHOFF: Thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MR. IMHOFF:

10 Q. Good morning, Mr. Hodgin.

11 A. Good morning.

12 Q. I'm going to try and help the jury a little bit.
13 Let's see if we can agree on some things first, and we'll
14 move it along a little bit faster. I think that I've got
15 questions that you could agree with.

16 A. Okay.

17 Q. And I think they'll appreciate that, I hope at
18 least. All right. How about this? What was the first
19 day that you were on the site?

20 A. Sometime in May of 2009.

21 Q. Okay. All right. And when did you first do
22 destructive testing in phase one?

23 A. I don't know specifically. It was shortly after we
24 got retained by the H.O.A. when we did the borescope
25 observations of the balconies.

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- 1 Q. All right. Well, it would have been after at least
2 May 2009?
- 3 A. Correct.
- 4 Q. Okay. So you were never on this site from 2005 to
5 2008?
- 6 A. That's correct.
- 7 Q. You were never on the site before 2009?
- 8 A. I don't know about 2009. When I did the borescope,
9 it might have been 2009.
- 10 Q. Well, before 2009?
- 11 A. No. That's correct. I was not on the site before
12 2009.
- 13 Q. Okay. And you never observed the condition of these
14 thirty-seven units before 2009?
- 15 A. That's correct.
- 16 Q. All right. And do you know when Marick and Rick
17 Thoennes left the project?
- 18 A. I don't. I know there's a fellow that testified to
19 that, but I can't remember what his testimony was.
- 20 Q. Okay. If I told you it was the spring of 2008,
21 would you disagree with that?
- 22 A. No.
- 23 Q. All right. So you don't know what Marick and Rick
24 Thoennes and Nathan saw between 2005 and 2008; is that
25 right?

1 A. Not specifically, no.

2 Q. Okay. All right. Now, were you here for the
3 testimony of Mel Morris?

4 A. Yes.

5 Q. Okay. Did you hear that Bostic Brothers
6 Construction was either the second or tenth largest
7 multi-family builder in the country at the time they did
8 this project?

9 A. I don't recall that specifically, but I'd have no
10 reason to dispute his testimony.

11 Q. Okay. And you understand that all of the units
12 originally were permitted by Bostic?

13 A. Yes, sir.

14 Q. And you understand that all of the units for all of
15 the at-fault construction, the stuff you're testifying
16 about, were built by Bostic or their subcontractors?

17 A. To varying degrees, yes.

18 Q. Okay. All right. And at least -- we keep hearing
19 different things. But ten or eleven of those units had
20 certificates of occupancy?

21 A. That's right. I remember the other number which is
22 twenty-six that were permitted by Marick.

23 Q. Okay. All right. So can we agree that all of the
24 exteriors on all of these units were complete before
25 Marick came on site?

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1 A. I wouldn't have the direct knowledge. I have the
2 testimony knowledge, which I think is substantially true.
3 But there was some testimony about some problems with the
4 stone veneer and having to do some waterproofing at the
5 front walls, some problem with balconies and problems
6 with windows and doors.

7 Q. Right. But all of those things are issues with the
8 construction that was already there when they walked on
9 site?

10 A. That's correct.

11 Q. Okay. I'm just trying to get us to agree that we're
12 on the same page, that all of the exteriors of these
13 buildings were complete when Marick got there?

14 A. As far as I know, yes.

15 Q. Okay. All right. Now, let's talk about this Oconee
16 County building inspector. If a C.O. is issued -- well,
17 why don't you tell the jury -- I think most of them
18 probably know. But what is a CO?

19 A. A C.O. is once a building has a final inspection,
20 then the building official will issue a certificate of
21 occupancy basically just saying to the best of their
22 knowledge that the completed unit would meet the building
23 code.

24 Q. Okay. And so that requires the Oconee County
25 building inspector to actually come to that unit; right?

1 A. I believe so.

2 Q. Okay. How many times would the Oconee County
3 building inspector come to a unit?

4 A. You mean during the entire construction process?

5 Q. Well, let's start there, and then we'll go
6 backwards.

7 A. I might not get all of them, but I know there's a
8 foundation inspection. And there's a rough-in, a framing
9 inspection. There's an electrical, plumbing and
10 mechanical inspection. And then there's at least a final
11 inspection.

12 Q. Okay. That sounded like about five inspections;
13 right?

14 A. I think so.

15 Q. And I assume that if the building inspector on some
16 occasions would say, "I don't like that. Change that.
17 I'm not going to pass you this time," could come back a
18 couple of times to look at different inspections?

19 A. That's correct.

20 Q. Okay. It depends on the building inspector, doesn't
21 it?

22 A. It shouldn't, but, I mean, it could, I mean, as far
23 as being how thorough they are. But as far as issues,
24 they should be uniformly enforced.

25 Q. Okay. And at the end of that process, going out

1 there those five times at least, the Oconee County
2 building inspector determines that the builder did things
3 the way that the building inspector wanted them done. Is
4 that fair?

5 A. As far as his inspections go. But unfortunately, I
6 think there's not any kind of exterior cladding
7 inspection. There's not what they call a building
8 envelope inspection. So when they're out there looking
9 for whatever they're looking for, it's specific to that
10 inspection. So I wouldn't think that they would be
11 looking at the whole building envelope. But I agree with
12 you.

13 Q. Okay. All right. And he says, "Okay. Somebody can
14 move in now." Right?

15 A. Yes.

16 Q. And he is the person, the ultimate authority, to
17 make that decision; right?

18 A. Prior to occupancy, yes.

19 Q. All right. Now, I've heard you talking a little bit
20 about fireproofing.

21 A. Fire-rated wall assemblies, yes.

22 Q. Okay. And this is -- if I burn a salmon stew in my
23 unit and it lights my unit on fire, it's going to be
24 delayed to burn into my neighbor's unit is the idea;
25 right?

1 A. Not just delay. It'll actually be contained within
2 your unit between the two rated wall assemblies.

3 Q. Right. My stew doesn't burn their house; right?

4 A. Right.

5 Q. Okay. And that's a very important part of the
6 Oconee County building inspector's job; right?

7 A. It is. But like I said, in this case, it was
8 actually delegated to the architect.

9 Q. Okay. All right. So that's an important part. And
10 now you call it a life safety issue; is that right?

11 A. Yes, sir.

12 Q. Because if you're sleeping when I'm burning my stew,
13 you could potentially, if it's not there and not done
14 correctly, that could actually kill someone; right?

15 A. Yes, sir.

16 Q. Okay. Have you written a letter to any of the
17 owners at Stoneledge telling them to move out because
18 there's a life safety issue?

19 A. No. I think that would be unreasonable. I
20 discussed it at length with the building department, and
21 they did have me write an emergency repair letter for the
22 one area that we identified at the breach. But the
23 common walls of an interior, you know at least have one
24 layer of drywall complete because they've got pictures
25 hanging up and they're painted. Those are fine. The

1 part that we're concerned about is the exterior part that
2 lacks the one-hour rating.

3 Q. And you have an ethical obligation, as you testified
4 earlier ---

5 A. Yes.

6 Q. --- to tell homeowners when there is a life safety
7 issue; correct?

8 A. Yes.

9 Q. And despite your testimony that this firewall is not
10 correct and needs to be replaced, you've never told these
11 homeowners that they have a life safety issue, have you?

12 A. It's in my report, yeah. So they've been notified.
13 I don't know that it's reasonable to do the comprehensive
14 repair in the absence of any funding to do so. So
15 they're going to have to wait until the case is resolved
16 before they can make that repair.

17 Q. If you thought these folks were in danger, you have
18 an obligation to tell them to move out?

19 A. I've told them about the danger. I've not said the
20 buildings are condemned.

21 Q. All right. So does the Oconee County building
22 inspector -- we know that he looks at the firewalls;
23 right?

24 A. Yes, sir.

25 Q. Or if he's not looking at them, he's delegating

1 somebody else to look at them?

2 A. Correct.

3 Q. Okay. Does he look at foundation waterproofing?

4 A. I don't know if that's a specific inspection or not.

5 Q. Okay. Now, it was reasonable when Marick walked
6 onto this site -- knowing that the Oconee County building
7 inspector had issued certificates of occupancy to those
8 ten or eleven units, was it reasonable for Marick to rely
9 on the Oconee County building inspector to have done his
10 inspections?

11 A. I think to some degree. But if you're suggesting
12 that the issuance of a certificate of occupancy is the
13 indicator of a defect-free building, then that's -- C.O.s
14 are issued in every one of the cases I've worked on for
15 like hundreds of cases over the years. So I think
16 there's some reliance on it, but certainly it wouldn't be
17 something you could rely on and say there's no defects or
18 there's no code violations.

19 Q. Well, was it reasonable when Marick walked onto this
20 project in 2005 to believe that Bostic Construction's
21 work was done correctly?

22 A. If not for the observed defects and damages, yes.

23 Q. Okay. And this is one of the things that I wanted
24 to agree on early, Mr. Hodgin, because I expected that.
25 You have no idea what Marick saw between 2005 to 2008;

1 correct?

2 A. No. My answer is totally on somebody else's
3 testimony about the waterproofing and the windows and
4 doors and balconies.

5 Q. All right. So not knowing what Marick saw about
6 Bostic's construction other than it was completed and it
7 had been inspected by the Oconee County building
8 official, it was reasonable for Marick to rely on Bostic
9 having performed their construction correctly; right?

10 A. Yes, with the same clarification I made a minute
11 ago.

12 Q. All right. We're going down that same road. It was
13 also reasonable for them to rely that the foundation
14 subcontractor had done his work correctly; right?

15 A. I believe so.

16 Q. Okay. And that the waterproofing subcontractor had
17 done his work correctly; right?

18 A. Correct. If not for those -- I mean, I don't want
19 to keep saying if we agree. But not for what they knew
20 or found when they got to the site and they thought they
21 had fixed, yes.

22 Q. Right. That you don't know about?

23 A. Not directly.

24 Q. And it was reasonable for them to rely on the
25 framing subcontractor to have done his work right;

1 correct?

2 A. Yes, sir.

3 Q. All right. And that the Oconee County building
4 inspector inspected the framing of the framing
5 subcontractor; correct?

6 A. Yes, sir.

7 Q. All right. And it was also reasonable for them to
8 rely on the fireproofing that was supervised by the
9 general contractor, installed by a subcontractor,
10 inspected by the Oconee County building inspector or at
11 least passed, and inspected by an architect; correct?

12 A. Yes.

13 Q. That's a lot of folks that they can rely on, isn't
14 it?

15 A. Yeah. And I can't remember if I testified at the
16 trial or if it was in a deposition, but the only places I
17 would say you have issues where there are open and
18 obvious issues -- like Marick, I believe, should have
19 seen the same thing I saw in the one unit, the breach.
20 That was open and obvious. So to the extent that any of
21 those other units were not finished and there were things
22 like that, those should have been taken care of. But you
23 wouldn't have to deconstruct the building to go looking
24 for issues. You would rely on the folks that you just
25 described, that whatever came before you was done

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1 correctly.

2 Q: Right. We're going to talk about those units, okay,

3 in a minute.

4 A. Okay.

5 Q. But let me state, just to make sure the jury heard,

6 because they're relying on all these folks and all these

7 inspections to do it right, they don't have to go

8 deconstruct the building; correct?

9 A. I think that's reasonable to a certain extent, yes.

10 Q. All right. Now, so let's see if we can agree on

11 something.

12 A. Okay.

13 Q. So when Marick comes to the project, it can assume

14 it was done right when it's walking onto the project;

15 right?

16 A. Barring no other information, yes.

17 Q. And the only way to know that the work wasn't done

18 right, as you just said, and as you said in your

19 deposition, if it was readily observable?

20 A. Yes.

21 Q. Okay. You just see it?

22 A. Right.

23 Q. Okay. As a matter of fact, I think you testified --

24 actually it was last Thursday, I guess, when you were up

25 here. You call it a latent defect. Tell these folks

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1 what a latent defect is, Mr. Hodgkin.

2 A. A latent defect would be something that's hidden
3 from view and would not be readily observable.

4 Q. That's something that is hidden behind stone; right?

5 A. Yes, sir.

6 Q. Behind siding?

7 A. Yes, sir.

8 Q. Under roof shingles?

9 A. Yes, sir.

10 Q. Underground?

11 A. Yes, sir.

12 Q. And those are the defects that you found on this
13 site?

14 A. Yes.

15 Q. Latent defects?

16 A. Yes.

17 Q. All right. And to find those latent defects, you
18 had to do a lot of destructive testing; right?

19 A. Yes.

20 Q. And destructive testing -- again, we know all of
21 these terms. But for the jury, destructive testing is
22 pulling off shingles, pulling off stone, pulling off
23 siding, digging into the ground; right?

24 A. Yes, sir.

25 Q. Okay. It's destructing the building; right?

1 A. Yes.

2 Q. And that took you -- I think we saw photographs --
3 if you got there in 2009 until 2013 to do that
4 destructive testing and find those latent defects;
5 correct?

6 A. Well, the full extent. I mean, the reason it goes
7 to 2013 is because the homeowners have made some
8 emergency repairs, and other damages have been discovered
9 in the last few years.

10 Q. Of all that destructive testing, all those places
11 where you took up shingles; right?

12 A. Yes.

13 Q. Took up underlayment. That's the felt, right, that
14 goes underneath the shingles?

15 A. Yes.

16 Q. Took off siding, stone, dug up, all of that was
17 destructive testing to find latent defects, hidden
18 defects; right?

19 A. Well, they were hidden to some degree. At first,
20 I'm doing destructive testing, yes. I'm somewhat
21 randomly looking around the buildings at places I know
22 that one percent that we talked about where the water
23 intrusion would occur. Later, as emergency repairs are
24 going on, there's a symptom that caused the emergency
25 repair to be prompted. So it's not guesswork. I mean,

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1 instead of being random, I know that there's a problem

2 because an owner has complained about water intrusion.

3 And then the repair is going to fix that problem.

4 Q. I'm glad you said that because that's where I was
5 going next.

6 A. Yeah.

7 Q. A lot of, if not most of, your destructive testing
8 was done because a homeowner called and said, "I have
9 water in my basement. I have a water leak on my roof."
10 Right?

11 A. Not the initial destructive testing. But as we go
12 through the process over the last three or four years ---

13 Q. Right.

14 A. --- a lot -- in terms of volume, for sure.

15 Q. Right.

16 A. An area of wall is uncovered that would be -- the
17 most substantial portion would be a series of emergency
18 repairs; that's correct.

19 Q. That's right. And so that becomes not a latent
20 defect, but a readily observable defect when the
21 homeowner calls; right?

22 A. The symptom is readily observable. The defect is
23 still a latent defect.

24 Q. And you testified -- I think it was Thursday. But
25 you testified that that water intrusion could potentially

- 1 take years to develop; right?
- 2 A. It could.
- 3 Q. That it has to migrate through the siding or
- 4 whatever, through the stone, whatever, and then through
- 5 the sheathing and framing and insulation and then show
- 6 up; right?
- 7 A. Yeah. In the finished unit in particular, there's
- 8 more materials to pass through.
- 9 Q. So that took years to show up; right?
- 10 A. It did, yeah.
- 11 Q. To make it readily observable, years; right?
- 12 A. Yes.
- 13 Q. Okay. And now, of course, when you go out there and
- 14 you do your destructive testing, you already know
- 15 something's wrong; right, Mr. Hodgins?
- 16 A. In some cases, yeah.
- 17 Q. Well, if they brought you out and said, "I've got a
- 18 leak on my ceiling," you already know something's wrong;
- 19 right?
- 20 A. If that's expressed to us, yeah. But whenever we do
- 21 a lot of the roof testing, there's no leak that was
- 22 observed on the inside.
- 23 Q. Well, those times that you went out there and you
- 24 did your destructive testing ---
- 25 A. Yes.

1 Q. --- because the homeowner called and had a leak, you
2 took photographs of that; right?

3 A. During the emergency repairs; yes.

4 Q.. All right. And so all of these photographs of
5 damage that you've put up and put in your PowerPoint and
6 you've showed this jury, there was already going to be a
7 defect in damage there because there was water intrusion;
8 right, Mr. Hodgins?

9 A. No. No. There's a mixture of photographs. In
10 fact, the very top photograph that you're looking at was
11 a random destructive test where there's no water
12 intrusion reported by a homeowner, yet there's an
13 extensive damage on the exterior wall.

14 Q. But the vast majority of your investigation the last
15 three to four years -- I think this was your testimony
16 just a minute ago.

17 A. Yeah.

18 Q. -- was due to a homeowner complaint of damage;
19 right?

20 A. The emergency repairs, I would say, have outweighed
21 ultimately over the last four years in terms of total
22 observations the destructive tests that we initially did;
23 that's correct.

24 Q. And common sense says if the vast majority of your
25 calls in your destructive testing's because there's

1 already damage, the vast majority of your photographs are
2 going to show damage for these jurors; right?

3 A. Yeah.

4 Q. Okay. But not every roof is leaking, is it, Mr.
5 Hodgins?

6 A. No. Like I said a minute ago, it takes years for
7 these same defects to show themselves within the interior
8 of the home.

9 Q. And not every window, not every door is leaking;
10 right?

11 A. We haven't looked at every window and every door.
12 We did have that one open unit -- every window and door
13 was leaking in that particular unit, so I expect that
14 most windows and doors are leaking, yes.

15 Q. Okay. Well, you expect that, Mr. Hodgins. But if
16 every window and every door was leaking of these thirty-
17 seven homeowners, you wouldn't have time to come here,
18 would you?

19 A. Sure. I think most of them are leaking today;
20 they're just not all showing themselves on the interior
21 of the unit. Because like I said, it takes a while for
22 the path to develop.

23 Q. You think most of them are leaking. Do you know,
24 Mr. Hodgins, as an engineer who has to testify to a
25 reasonable degree of engineering certainty whether every

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1 window at the Stoneledge project is leaking?

2 A. I wouldn't know that every one is leaking. I would
3 say that most are to a reasonable degree of certainty.

4 Q. And not every unit has basement leaks; correct, Mr.
5 Hodgín?

6 A. If they don't have a basement, they don't have a
7 basement leak.

8 Q. Well, that's an issue that Mr. Belcher brought up.

9 A. Right.

10 Q. We need to knock that out of that scope of repair;
11 right?

12 A. I don't know. If it's not adjusted to accommodate
13 that, yes, we would.

14 Q. All right. But of the twenty-nine units that have
15 basements, not every one is leaking, is it?

16 A. Not every one has physical water damage observed on
17 the interior of the finished space; that's correct.

18 Q. All right. And now, you found these defects that
19 you've testified about, showing all these photographs to
20 the jury, after you began -- tore off shingles and stone
21 and did your destructive testing; right?

22 A. Correct.

23 Q. And when Marick got there in 2005 and left in the
24 spring of 2008, they would not have had the benefit of
25 your destructive testing; right?

1 A. That's correct. They would have the benefit of the
2 unfinished unit and then what they observed on the site.

3 Q. Let's talk about what your testimony is, saying that
4 Mr. Thoennes should have known. Okay? Because I think
5 that's what you've said.

6 THE COURT: Now, when you start taking it
7 apart, be sure you put it back where it's supposed to be.

8 MR. IMHOFF: Okay. Yes. Thank you, Your
9 Honor. I will.

10 A. I think it's upside down.

11 Q. Yes, it is, isn't it? All right.

12 Mr. Hodgin, this is the unit thirty-three that you
13 relied upon to testify that Marick should have known that
14 the windows weren't installed correctly; right?

15 A. Yes, sir.

16 Q. Let's see if we can educate the jury. I know you
17 know a lot about windows?

18 A. Yes, sir.

19 Q. Let's educate the jury a little bit about the code.

20 A. Okay.

21 Q. Now the code, it's an international code; is that
22 right?

23 A. Yes, sir.

24 Q. So there's an international group of framers,
25 plumbers, electricians; right? There's all kinds of

1 different subsets of building; right? Subcontractors;
2 right?

3 A. I'm just laughing because the international part is
4 kind of joke. I mean, it's kind of a United States ego
5 thing that we put "International Code" on our code book.
6 Nobody else -- there may be some other countries that
7 have adopted it. That's pretty much the code in the
8 United States.

9 Q. Well, it's a bunch of builders that get together and
10 try to think of the best practices; right?

11 A. No.

12 Q. They come up with the worst practices, Mr. Hodgins?

13 A. They came up with the most economical ways to build
14 what I think is a functional building.

15 Q. All right. And our Legislature in South Carolina
16 determined that whatever they came up with and discussed
17 was how we were going to build buildings in South
18 Carolina; is that right?

19 A. As a minimum, yes.

20 Q. Okay. Does it say this is a minimum code?

21 A. I believe so.

22 Q. It says on the code this is a minimum code?

23 A. I believe in chapter one it talks about these are
24 the minimum standards.

25 Q. All right. But it is the code adopted by our

1 Legislature in South Carolina; right?

2 A. Yes, sir.

3 Q. And it sets the standard for how you build
4 residential homes in South Carolina; right?

5 A. It sets the baseline standard, yes. The minimum
6 standard.

7 Q. And it's what the Oconee County building inspector,
8 hopefully, carries around with him to look at when he's
9 inspecting these homes; right?

10 A. I don't know if they carry it around with them, but
11 they should be familiar enough to enforce what it is
12 they're inspecting, yes.

13 Q. And it doesn't tell a builder how to install a
14 window specifically, does it?

15 A. No. Basically, it's kind of weak on the window
16 section. Chapter seven is the exterior wall; 703.8 is
17 the flashing. And it just says you shall install
18 flashing in the manner to prevent water penetration. So
19 the means and methods by which the contractor chooses to
20 accomplish that intent of code is left up to the
21 contractor.

22 Q. That's right. The code does not tell a builder how
23 specifically to install a window; right?

24 A. Or to keep water out; that's correct.

25 Q. That's right. It has a standard that you can build

1 it any way you want as long as it's weather-resistant;
2 right?

3 A. Correct.

4 Q. Okay. So if you were to walk up into this building,
5 thirty-three, and just look at the way the window's
6 installed, not seeing the water stains, a builder cannot
7 determine if the window is not installed correctly unless
8 they see that it's not weather-resistant; right?

9 A. No. You could see the gaps between the plastic
10 that's put in every single opening and see that it would
11 be not effective.

12 Q. That's not a code violation to have that gap there,
13 is it, Mr. Hodgin?

14 A. I would certainly think it would not meet the intent
15 of the code. You would know enough about construction to
16 know that that's going to leak. But without the damage,
17 you wouldn't know the extent of the problem.

18 Q. Right.. So what a builder would have to know is that
19 it wasn't weather-resistant to determine it's not
20 installed right; right?

21 A. I can agree with that.

22 Q. Yeah. It's a damage standard. It's a letting-
23 water-in standard. Not that he did it wrong, but it's
24 not weather-resistant; right?

25 A. Right. Well, my point is even without the damage,

1 when you see these corners with the gaps, that that would
2 be telling to a competent contractor that the window is
3 going to have water intrusion problems.

4 Q. Do you have more photographs of this unit, Mr.
5 Hodgins?

6 A. Yeah. I think I took a picture of every single
7 window in that unit.

8 Q. Now, were all of the windows leaking, Mr. Hodgins?

9 A. Yes.

10 Q. In every unit in that -- in every window in that
11 unit?

12 A. In every single corner of every single window,
13 there's some staining on the back side of the O.S.B.
14 sheathing.

15 Q. Did you bring those photographs with you for the
16 jury, Mr. Hodgins?

17 A. I don't know if I have the whole file. There should
18 be a CD with all the photographs that you can look at.

19 Q. Now, did you put a moisture reader on that wet area?

20 A. No.

21 Q. Isn't the easiest way to determine whether a window
22 is leaking to determine if the wood around it is wet?

23 A. No.

24 Q. It's not?

25 A. No.

1 Q. So if -- do you know how those stains got there?

2 A. Water intrusion from the exterior wall assembly
3 caused the O.S.B. to get wet and damaged.

4 Q. Could it be that the window was broken or left open?

5 A. No.

6 Q. Was the wood wet at the time you took these
7 photographs, Mr. Hodgin?

8 A. I would doubt it. In 2009 we had -- I think we were
9 still having a pretty good drought. I can't recall.

10 Q. So it didn't rain, I think your testimony now is,
11 from 2005 to 2009?

12 A. No. I'm certain it would have rained during that
13 time. What I'm saying is just because you put a moisture
14 meter in the damaged O.S.B. and it's -- I mean, it may
15 not be wet at the time you're looking at it. There's
16 physical damage. I would say that it would not be
17 necessary to check with a moisture meter. If it's
18 freshly wet, then a moisture meter would be a good
19 indicator that it's getting saturated. You wouldn't need
20 a moisture meter to know that that's getting wet.

21 Q. If it's freshly wet, you could tell this jury that
22 when you took that picture in December of 2009, that
23 window was leaking, right, because it's wet?

24 A. Yeah, I can tell the jury that it's leaking today if
25 it hasn't been fixed.

1 Q. Well, you don't know that it was leaking in December
2 2009 because you didn't check to see if it was wet?

3 A. I can see the gaps between the flashing at the jamb
4 and the sill. And that's exactly where the damage is.
5 To a reasonable degree of certainty, it's leaking.

6 Q. So you don't think the easiest way to determine if a
7 window is leaking is to see if the wall is wet?

8 A. Not always. I think if you're destructing from the
9 outside and it's freshly rained, we'll put the moisture
10 meter in.

11 Q. Well, let's see if we can agree on this.

12 A. Okay.

13 Q. From 2005 to 2008 -- okay? Let's stick with that
14 time period because that's when my clients are going to
15 be judged.

16 A. Okay.

17 Q. All right. Wouldn't the best way to know if windows
18 were leaking be all the homeowners are calling you saying
19 I have wet windows and wet drywall?

20 A. No. If this unit had been finished, there'd be
21 insulation between all these studs, insulation below the
22 window and then drywall installed around it. So all of
23 that would be hidden to the homeowner.

24 Q. Let's talk about that, Mr. Hodgin.

25 A. Okay.

1 Q. That's a photograph you used to implicate my client
2 to say he should have done more investigation; right?

3 A. Yes.

4 Q. Who finished that unit?

5 A. I don't know if it's finished.

6 Q. Have you ever heard of John Ludwig?

7 A. Yes.

8 Q. Did John Ludwig buy many of these unfinished units
9 and re-permit them and get C.O.s for them?

10 A. I don't know. He may have, but that's not what the
11 facts show.

12 Q. Now, Mr. Hodgins, if I represent to you that that
13 unit was sold to Mr. Ludwig in that condition ---

14 A. Yes, sir.

15 Q. --- and Mr. Ludwig pulled a permit for it and sold
16 it in 2010, can you dispute that?

17 A. No.

18 Q. Were you on site in 2009?

19 A. Yes.

20 Q. What did you do when Mr. Ludwig purchased that unit
21 and completed that unit to ensure that Mr. Ludwig
22 repaired your claims of defects correctly?

23 A. I didn't have any knowledge of that. What I would
24 think is that from Mr. Ludwig's standpoint, if he
25 purchased a building with this known damage, he would

1 have a duty to disclose that during the real estate
2 transaction process, and that should have been corrected.
3 But that was out of my hands.

4 Q. Is it fair to say, Mr. Hodgin, that the photograph
5 that you're using to implicate my client, you didn't even
6 know that this unit was finished and sold by someone
7 else?

8 A. Is that fair? Yeah, it's fair to say. But I don't
9 know what relevance that has.

10 Q. Did you put a moisture meter on the floor in the
11 unit by the door?

12 A. No. I think it was dry.

13 Q. It was dry?

14 A. Yeah.

15 Q. That there was dry?

16 A. Yeah.

17 Q. Isn't it possible, Mr. Hodgin, that the door was
18 just left open?

19 A. On that particular damage pattern, it's possible.
20 But then when you look at it closer and you see that
21 there's no flashing or waterproofing below the threshold,
22 I think it's also possible water comes underneath the
23 door.

24 Q. Does the code require that there be flashing
25 underneath that door?

1 A. No. It's the same weak section that we're talking
2 about. Just that the intent of the code is to keep water
3 out, but just says flashing shall be installed as
4 necessary to prevent water penetration.

5 Q. But it is fair to say that that can simply be
6 because the door was left open? Right?

7 A. Not entirely. I agreed a second ago that there's a
8 contributing factor if the door was left open, but that
9 wouldn't be the entire cause of the water intrusion.

10 Q. Let's talk about the other photograph that you used.

11 A. Okay.

12 Q. I think this is the extent of it. That's a hole in
13 the foundation; is that right?

14 A. Correct.

15 Q. What's all this black stuff here?

16 A. I think that's a repair membrane. And the reason I
17 say it's a repair is that it's not consistent with other
18 units. It's called Bituthene, and it was put on the
19 front wall of a building.

20 Q. Who did that repair, Mr. Hodgkin?

21 A. I don't know specifically. But based on the
22 testimony of the Marick fellow, I think it would be
23 Marick.

24 Q. Somebody from Marick testified that they did a water
25 repair, foundation repair, on unit thirty-four?

1 A. Oh, I don't think they said which units in
2 particular. What they said was when they got on site
3 that they observed water intrusion into the finished
4 basement areas, and that the -- somebody at Marick had
5 contacted a waterproofing contractor to come out and
6 address those particular issues on a few units or several
7 units. I'm not sure exactly what the testimony was. But
8 there was -- not all the units were repaired, but some
9 units were repaired. Stone was removed; waterproofing
10 was installed. And they thought that that addressed the
11 problems.

12 Q. Now, I don't mean to be disagreeable, but wasn't the
13 testimony that it was one unit, Mr. Hodgin?

14 A. If it is, it is. I thought it was more than one.

15 Q. Now, you don't know who did this repair, do you?

16 A. Yeah. I think he said the name, but I didn't
17 recognize the name of the contractor.

18 Q. I'm asking you on unit thirty-four, you don't know
19 who did that repair?

20 A. That's correct.

21 Q. That's a terrible repair, isn't it?

22 A. It's ineffective, yes.

23 Q. Okay. That's like rolling your windows up on a
24 convertible when it's raining and the top's off; right?

25 A. Sure.

1 Q. I mean, that's -- why would you take the time, the
2 effort and the money to waterproof all of this wall and
3 then leave a giant hole in the wall? Do you have any
4 idea?

5 A. No, I have no idea. I would say that's a great
6 analogy for the weather barrier as well. It's just
7 incomplete.

8 Q. But you don't know that Marick did that repair, do
9 you?

10 A. No.

11 Q. Mr. Hodgin, who sold that unit?

12 A. I don't know that information.

13 Q. What if I tell you that John Ludwig purchased that
14 unit in 2008 and sold it later? Is it possible that John
15 Ludwig did that repair?

16 A. Certainly.

17 Q. Homeowners have done their own repairs below grade,
18 haven't they?

19 A. Yes.

20 Q. You have no idea, despite your testimony on
21 Thursday, that Marick Home Builders did that repair?

22 A. No. I would say, to summarize my below grade
23 testimony, it would be that the originally delivered
24 buildings did not function adequately. And there's been
25 several attempts to repair, some successful, some not.

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1 Q. Well, you used photographs to implicate my client
2 from unit thirty-three and unit thirty-four; isn't that
3 right, Mr. Hodgins?

4 A. I mean, I understand your question. But when you
5 say implicate your client, all I'm doing is trying to
6 give the jury the facts of what we found during our
7 destructive testing. As far as who did what, I mean, I
8 don't know which project or which units Marick's repaired
9 and which ones they haven't.

10 Q. Well, before you said Marick did an inappropriate
11 repair to that foundation at unit thirty-four, shouldn't
12 you have checked your file to see who actually permitted
13 and C.O.'ed unit thirty-four?

14 A. If I testified about Marick, yeah. I don't remember
15 saying specifically Marick. I agree it's an improper
16 repair. To the extent that Marick did it, it would be
17 their problem.

18 Q. Now, in talking about these basement leaks, all of
19 these basements aren't from the same condition, are they?

20 A. I think there might be a couple of different
21 conditions, but I think the predominant condition is just
22 a general lack of waterproofing on the front below-grade
23 walls.

24 Q. Well, there are leaks that are coming through pipe
25 and wire penetrations, aren't they, Mr. Hodgins?

1 A. Right. I'm lumping all of that together. I mean,
2 wire penetrations, dryer vent holes, gaps between the
3 panels where they're joined together, the grade going
4 above the waterproofing. So there are all kinds of ways
5 that water's going around what was intended to be an
6 effectively waterproofed wall.

7 Q. I'm going to mark off the ones that I was going to
8 ask about because you're saying ---

9 A. Okay.

10 Q. --- it could be sewer or water backups in the
11 basement; right?

12 A. I don't recall that happening, but that is possible.

13 Q. Grading issues; right?

14 A. Right.

15 Q. Where the dirt's laid too high?

16 A. Right.

17 Q. Punctures at pipes; right?

18 A. Not necessarily punctures at pipes. But one thing
19 -- one testimony that did concern me and makes me feel
20 stronger about the more comprehensive repairs, about the
21 crushed pipes -- I wasn't familiar with that. And, you
22 know, you can do all the waterproofing you want. If
23 you're got crushed pipes that are not going to convey
24 your water away from the building, now your waterproofing
25 really has to be almost perfect because you're going to

1 collect all of this water against those walls. So that
2 would be an issue as well.

3 Q. Okay. Crushed pipe. Okay. But the punctures that
4 I'm talking about is where you take a drill and you make
5 a hole in the wall so you can put your pipe or your ---

6 A. Oh, right. I'm sorry. I thought you were talking
7 about the polyethylene, the drainage pipes on the
8 outside. But, yeah, any pipe that penetrated would have
9 to be sealed.

10 Q. There could be damaged waterproofing even from
11 someone who's putting in a bush or a shrub or a tree;
12 right?

13 A. It's possible you could have a shovel impact the
14 waterproofing.

15 Q. All right. And maybe broken pipes and things;
16 right?

17 A. I'm not familiar with that.

18 Q. It could be the cause of the leak in the basement;
19 right?

20 A. It could be the cause of water in the basement, but
21 it wouldn't be the cause of the water coming through the
22 wall below grade.

23 Q. All right. So there's all those different ways that
24 you could have a basement leak; right?

25 A. All the different ways you could have water in a

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1 basement, yeah.

2 Q. And you need to know what the cause is of that leak
3 to fix that leak; right?

4 A. I would say in general, yes. But from a scope
5 standpoint, I think we've seen enough of the
6 inconsistency and ineffectiveness of the original
7 construction that we feel like a more comprehensive
8 approach is needed.

9 Q. Well, Mr. Hodgins, I understand that you want to dig
10 all of these things out; right? Every single one?

11 A. Yes.

12 Q. Okay. At least -- well, twenty-nine have basements;
13 right?

14 A. Right.

15 Q. You put in the new french drain and re-waterproof;
16 right?

17 A. To the extent that it's necessary, yeah.

18 Q. What if there are five they have that hole?

19 A. Then five holes will get patched.

20 Q. So you don't need to do all the waterproofing and
21 french drain; right?

22 A. We just mentioned all of the host of ways that water
23 gets in. That's one. So you need to excavate down to
24 see the extent of gaps in the wall panels, extent of
25 other penetrations that might not be sealed, the extent

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1 of any damages, extent that the lines are crushed at the
2 base of the wall. So all of those things would need to
3 be addressed.

4 Q. Well, let's go back to your forensic investigation.

5 A. Okay.

6 Q. Is part of forensic investigation common sense, Mr.
7 Hodgin?

8 A. Yeah, I would think so.

9 Q. And let's explain to the jury a little bit. Okay?
10 What we're talking about waterproofing is one of four
11 sides of a cube; right?

12 A. A cube has six sides.

13 Q. I apologize.

14 (Laughter)

15 A. I apologize.

16 MR. IMHOFF: I'm not going to move to strike,
17 Your Honor.

18 Q. All right. It's not a cube. Sorry, rectangle.
19 That's why I'm a lawyer; right? All right. Let's assume
20 ---

21 A. A 2D rectangle surface here.

22 Q. Let's assume that that's a footprint of a townhome.
23 Okay?

24 A. Okay.

25 Q. The lake's over there?

- 1 A. Okay.
- 2 Q. The front door is here?
- 3 A. Right.
- 4 Q. The neighbors are over here?
- 5 A. Yeah.
- 6 Q. And let's just say that this is an outside wall;
- 7 right?
- 8 A. Yes, sir.
- 9 Q. Okay. You were talking earlier with Mr. Belcher
- 10 about stepping down the foundation wall ---
- 11 A. Yes, sir.
- 12 Q. --- because the land actually slopes down to the
- 13 lake; correct?
- 14 A. That's correct.
- 15 Q. The lake is lower than the front door?
- 16 A. That's correct.
- 17 Q. Okay. All right. So this is actually a walk-out
- 18 patio; right?
- 19 A. In most units, yes.
- 20 Q. So there aren't foundations back here; right?
- 21 A. There's not a vertical foundation wall. There's a
- 22 slab-on-grade foundation.
- 23 Q. And your testimony earlier was that they're not
- 24 leaking along this side that slopes down to the lake;
- 25 right?

01114

1 A. There's been a little bit, but primarily the
2 problematic wall is the ones that's closest to you across
3 the front.

4 Q. The front door because the land sort of does this;
5 right?

6 A. It shouldn't. It would be a code violation. It's
7 supposed to slope away from the foundation six inches in
8 ten feet.

9 Q. So we're not talking about waterproofing that wall,
10 this tenant wall, with the neighbor's or this outside
11 wall; right?

12 A. Right. We're just talking about the shorter wall
13 across the front of the units.

14 Q. Now, have you been present for the testing that has
15 been done out there on this vertical wall by Mr. Watkins?

16 A. Do you mean the repairs?

17 Q. Have you been present for the testing, Mr. Hodgin?

18 A. I believe I've been present for the repairs. When
19 you say testing, I mean, the repairs are excavating large
20 trenches to expose large surfaces of the wall. I've been
21 available for that. But I'm not sure what you mean by
22 testing.

23 Q. Have you been present when anyone has taken a hose
24 and put it on the front wall and let water run down the
25 wall to see if or where it would leak?

1 A. No, I did not see that.

2 Q. Do you know if Mr. Watkins or any of the other
3 engineers out there found that those walls were leaking
4 where wires and plumbing was going through the wall?

5 A. That would make sense.

6 Q. And if that's where it's leaking ---

7 A. Yes, sir.

8 Q. --- isn't the repair to caulk around those
9 penetrations?

10 A. If that was the only issue, that would make sense.
11 You would have to take -- are you suggesting that you
12 excavate from the outside all the way down to that pole
13 and caulk it on the outside?

14 Q. I'm suggesting that you run water down the wall to
15 see where the wall is leaking, Mr. Hodgins. Have you done
16 that?

17 A. I don't know that that would replicate all the in-
18 service conditions. I think it would be helpful. But
19 what you're suggesting is either you excavate all the way
20 down to the -- where the penetration is on the outside of
21 the wall and waterproof it like our scope requires, or
22 you can tear off the drywall on the interior of the unit
23 to get to the penetration and seal it from the inside.
24 But I would say either one would be effective.

25 Q. That's assuming that all twenty-nine of those units

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1 have problems though, isn't it?

2 A. Yeah.

3 Q. And since common sense is part of your
4 investigation, if there's a hole in the wall ---

5 A. Yes, sir.

6 Q. --- wouldn't common sense dictate that you plug the
7 hole in the wall to see if the leaking in that unit
8 stops?

9 A. Sure. If you do that -- I guess what your
10 assumption is that there's no other defects in the wall
11 that would allow water to penetrate.

12 Q. Isn't it your assumption that there are defects in
13 all of those walls which require an extensive and
14 expensive repair without having done simple water testing
15 on that wall, Mr. Hodgin?

16 A. I don't know that you need water testing when so
17 many of the units have been identified as leaking.
18 There's evidence on the inside of the units that you
19 don't need a hose to figure out. But I agree that my
20 scope requires all the walls to be waterproofed.

21 Q. Now, was your testimony on Thursday that all of your
22 repair scope would have been necessary in 2005?

23 A. No. I think what my testimony was is that the same
24 type of scope would be necessary but you wouldn't have
25 the same allowances. In other words, certainly the

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1 extent of damages are the most today than they've ever
2 been because of time, the passage of time, and rain
3 events and water intrusion. But if my repair scope --
4 and I've worked with many contractors on repairing
5 buildings. If I have an allowance for a piece of O.S.B.
6 to be replaced, it's a full sheet of four feet by eight
7 feet -- that's thirty-two square feet -- the change in
8 the damage, the delta between 2005 and 2009 probably
9 wouldn't extend out beyond that full sheet of O.S.B. So
10 the extent of damages would probably -- would definitely
11 be more today, but it wouldn't substantially change the
12 allowances in the scope. That would be the only thing
13 that it would change would be the allowances.

14 Q. Okay. So you're going to take all the roofs off;
15 right? Or at least all the low-sloped roofs?

16 A. Right.

17 Q. Okay. You're going to have to take all the siding
18 off?

19 A. Right.

20 Q. In 2005; right?

21 A. Yeah.

22 Q. You have to take all the stone off in 2005; right?

23 A. Yeah.

24 Q. Okay. You have to do all those deck repairs that

25 Mr. Belcher was asking you about in 2005; right?

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1 A. No. The only -- on there, maybe at one point that
2 the trusses would have been salvageable. That's
3 possible. But I wouldn't know that for sure. But
4 they're pretty damaged today, so ...

5 Q. And you would have proposed in 2005 to go dig up all
6 twenty-nine of these foundations; right?

7 A. Well, if the same type of due diligence was
8 performed in 2005 and you had the same types of water
9 intrusion, I would imagine the same scope would be the
10 result.

11 Q. So essentially what you're proposing is you're
12 proposing to dig up all these foundations to investigate
13 whether or not they're actually defective; right?

14 A. Well, every one I have looked at so far -- I don't
15 know that we found one that's properly waterproofed that
16 doesn't leak. They all have penetrations. They all have
17 grade issues. Not all have grade issues. But they all
18 have penetrations, and they all have the same type of
19 wall. They just have varying existing conditions based
20 on the extent of repairs that have been performed
21 previously.

22 Q. And you're getting paid by the plaintiffs to be here
23 and provide that testimony; is that right, Mr. Hodgin?

24 A. I'm getting paid for my time, yes.

25 Q. And, in fact, every case that you work on, you get

1 paid for your time and your opinions; right?

2 A. Right. Just like all experts.

3 Q. And you've actually worked for defendants before,
4 haven't you, Mr. Hodgin?

5 A. I actually work for defendants probably more than I
6 work for plaintiffs.

7 Q. And builders and developers; right?

8 A. Right. Engineers and architects, subcontractors.

9 Q. You worked for the contractor and developer in a
10 case called Ravines at Creekside; is that right, Mr.
11 Hodgin?

12 A. Yes, sir.

13 Q. And that was similar construction, wasn't it?
14 Asphalt shingle roof, lap siding, stone?

15 A. Yes.

16 Q. Right? And you testified in that case that not all
17 of the roofs, not all of the siding and all of the stone
18 had to come off; correct?

19 A. That's correct.

20 Q. And you were paid by the defendant in that case for
21 that opinion; correct?

22 A. It's not for the opinion. It's for the time, yeah.

23 Q. And, Mr. Hodgin, were you deposed in that case?

24 A. Yes.

25 Q. And when you testified that the shingles, roof,

1 siding and stone did not all need to come off, that was
2 eleven days after I took your deposition in this case,
3 wasn't it?

4 A. I don't know. If you say that's what it was.

5 Q. Thank you, Mr. Hodgin.

6 THE COURT: Ms. Brown or Mr. Vick?

7 MR. VICK: No questions, Your Honor.

8 THE COURT: Very good.

9 Mr. Hemphill?

10 MR. HEMPHILL: None, Your Honor.

11 THE COURT: Redirect, Mr. Lyles?

12 MR. LYLES: Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. LYLES:

15 Q. Mr. Hodgin, you were in the courtroom for the
16 testimony of Nathan Hornaday; is that correct?

17 A. Yes, sir.

18 Q. And you said earlier that you had learned during
19 this trial about the crushed drain pipes?

20 A. Yes, sir.

21 Q. Who testified about the crushed drain pipes? Do you
22 recall?

23 A. I thought it was Mr. Hornaday, but I'm not -- I
24 don't know the names as well as you guys do.

25 Q. And who did you understand that he worked for?

1 A. Marick.

2 Q. And why did that testimony alarm or concern you?

3 A. Well, it was just what I'd mentioned to Mr. Imhoff
4 was that, you know, I'd considered that the drain pipes
5 that were installed originally would be there and
6 functional, that if the drain pipe is crushed, that just
7 makes the waterproofing that much more critical.

8 Q. Would you have expected a competent general
9 contractor, licensed general contractor, to have an
10 awareness of the result of crushed drain pipes?

11 A. Yes.

12 Q. You were just asked a question by Mr. Imhoff about a
13 case called the Ravines?

14 A. Yes, sir.

15 Q. Were the conditions at the -- in the Ravines case
16 relative to the roof and siding and stone the same as
17 they are at Stoneledge?

18 A. To some degree the roofs were like our main roofs on
19 Stoneledge where the conditions were more isolated on the
20 edges and at roof/wall intersections. The stone issues
21 were isolated to roof/wall intersections. And I don't
22 recall much in the way of siding issues. But there is a
23 much more distinct pattern. The damages were not as
24 widespread, and there was certainly no fire-rated wall
25 assembly issues in that case.

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1 Q. Does the fact that you're requiring that the low
2 roofs be replaced, re-roofed at Stoneledge mean that
3 every case that you've got going forward you're going to
4 have to require that the low roofs be replaced?

5 A. No. And, in fact, I mean, even in this case,
6 there's a mixture. I mean, where we don't have as
7 significant problems on the main roofs, we're going to
8 try to salvage those, and we'll just replace the lower
9 ones where the damages seems to be more significant.

10 Q. And does the fact that you're calling for all of the
11 siding at Stoneledge to be removed and repairs to be made
12 and then the siding be replaced mean that every case that
13 you've got going forward you're going to require that all
14 the siding be taken off?

15 A. No, sir.

16 Q. And would the same be true for the stone?

17 A. Correct.

18 Q. That your opinions would be different depending on
19 the case?

20 A. Absolutely. I mean, just while we're on the
21 subject, I defend a stone installer on a case called --
22 we call it Georgia Stone. And my testimony in that case,
23 defending the stone contractor, is that all the stone has
24 to come off.

25 Q. Mr. Imhoff asked you some questions about homeowners

1 complaining of leaks in windows?

2 A. Yes, sir.

3 Q. If a general contractor was aware of numerous
4 homeowner complaints about window leaks in a project,
5 does that put him on notice of potential problems with
6 the window installation?

7 A. Yes, sir.

8 Q. And does it trigger on the general contractor's part
9 a duty to investigate windows that even haven't been
10 reported as leaking?

11 A. I would think so.

12 Q. So if the testimony in this case is that Marick was
13 advised by several homeowners of several window leaks,
14 would that, in your opinion, trigger an obligation on the
15 part of Marick to thoroughly investigate window
16 installation problems at Stoneledge?

17 MR. IMHOFF: Objection, Your Honor. Misstating
18 testimony. I don't know that the evidence is in ---

19 THE COURT: Well, let's just remember that --
20 what is it? -- the jury is the judge of the testimony,
21 not the lawyers and not -- what is it? -- the judge. So
22 -- what is it? -- they will be the ones that determine
23 what was said and not said.

24 MR. LYLES: Yes, sir.

25 THE COURT: Very good. Overruled. You may

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1 proceed.

2 A. My answer is yes. I mean, let me say that it would
3 give me some pause. I mean, they should have at least
4 some investigation. But in terms of thoroughly, it
5 depends on how the initial investigation goes whether
6 they would continue to investigate it through the project
7 or not.

8 Q. You were asked several questions by Mr. Belcher and
9 Mr. Imhoff about the building official?

10 A. Yes, sir.

11 Q. And inspections?

12 A. Yes, sir.

13 Q. Does the approval or just the passing of an
14 inspection by a contractor relinquish the obligation of
15 the contractor from complying with the building code?

16 A. No.

17 Q. Does it relieve his obligation or her obligation to
18 comply with the building code?

19 A. No.

20 Q. And is that something that is an industry standard,
21 or is that something that's found in the code itself?

22 A. I think both.

23 Q. You were asked questions about the firewalls.

24 A. Yes, sir.

25 Q. The firewalls that you have observed at Stoneledge

1 -- and we're talking about exterior firewalls; is that
2 right?

3 A. Yes.

4 Q. Do those firewalls as they were constructed comply
5 with the requirements of the plans that were prepared by
6 Miller Player?

7 A. No.

8 Q. Do the walls as constructed comply, to your
9 knowledge and in your opinion, with any approved rated
10 assembly for that type of firewall?

11 A. No.

12 Q. Do those firewalls as constructed comply with the
13 building code that was applicable to this project when it
14 was built by Bostic Brothers?

15 A. No.

16 Q. Does the fact that the building official or the
17 architect approved in some way, shape or form those
18 firewalls relieve the contractor from the obligation to
19 follow the plans, approved assemblies and the building
20 code with respect to the firewalls?

21 A. No.

22 Q. Are those firewalls, as they are constructed in your
23 opinion, a life safety issue?

24 A. Yes.

25 Q. Do they need to be repaired?

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1 A. Yes.

2 Q. Would you design a repair for Stoneledge that did
3 not require a repair of the firewall to bring it in
4 conformance with the code?

5 A. No.

6 Q. You were asked some questions about trusses for the
7 porches and decks.

8 A. Yes, sir.

9 Q. Do you recall that?

10 A. Yes, sir.

11 Q. And there was a question about damage to the trusses
12 and whether or not all the trusses were damaged and the
13 degree to which they were damaged.

14 A. Yes, sir.

15 Q. Is the damage to the trusses the reason you are
16 requiring replacement of the trusses under the exposed
17 portion, that is -- let's say the deck as opposed to the
18 roofed-in screened porch?

19 A. Not totally. There's other circumstances that I
20 think is just a better repair to be followed.

21 Q. What other reasons are you aware of that dictate
22 your requirement that the trusses be replaced in those
23 locations?

24 A. Well, what we think is important is that not only
25 that the decks be waterproofed but they have some kind of

1 a slope to the surface that would drain the water. The
2 plans call for a one-eighth inch per foot slope. They
3 may have got that in some places, but in many places they
4 didn't. And there's ponded water on the surface of the
5 balconies that seeps through the concrete and has caused
6 damage. What we'll do is with the pressure treated
7 framing on that one-half of the balcony, we'll be able to
8 have a smaller depth to the framing. And that way we can
9 slope that section and get it to drain.

10 Q. What is the purpose of slope?

11 A. It provides gravity to assist the discharge of water
12 from the surface of the balcony. It makes your
13 waterproofing details less critical. I mean, we'll still
14 do a good job of waterproofing them, but we'll get rid of
15 most of the water first before it even gets to the
16 waterproofing.

17 Q. And regardless of damage to the trusses themselves,
18 have you seen evidence that, in your opinion, has
19 resulted from the lack of slope?

20 A. Well, I would say nothing that we both don't agree
21 needs to be removed. I mean, there's cracks in the
22 concrete, there's damage to the subfloor. All of that's
23 being replaced by our scope and the defense scope.

24 Q. On the issue of W.R.B., did the plans call for the
25 use of W.R.B.?

1 A. They don't, but that doesn't mean it's not required.
2 I mean, the reason that they did -- they specified stucco
3 which the code requires felt paper, a weather barrier
4 behind stucco. It's not called for in the plans, but
5 it's clearly required by the code. They called for
6 shake, the cedar shake. Code clearly requires it behind
7 the shake, but it's not shown on the plans. And when
8 they switched to cedar siding, there was no -- as far as
9 I know, there was no communication with the architect
10 about W.R.B., but it's certainly required by industry
11 standards to have W.R.B. behind the siding.

12 Q. And did you find evidence that Bostic or its
13 subcontractors had, in fact, installed W.R.B.?

14 A. Well, to some extent. We saw it over the oriented
15 strand wood but not the more moisture sensitive gypsum.

16 Q. And did they install it properly?

17 A. No.

18 Q. You have been discussing the Superior wall system.
19 Can you describe the Superior wall system for the jury?

20 A. It's a pre -- it's a manufactured product that gets
21 delivered to the site in panels. Basically, it's a
22 concrete frame system that looks almost like two-by wall
23 studs, but they're concrete. And they have an exterior-
24 rated polystyrene insulation component. And you would
25 just tilt those up or lay those in to the ground to

1 create your foundation wall. And they would have joints
2 between the panels as you put them into place.

3 Q. And how are the joints to be treated?

4 A. Well, they should be waterproofed or sealed in some
5 manner.

6 Q. Have you seen indication or evidence that that did
7 not occur at Stoneledge?

8 A. Yes.

9 Q. Does that need to occur?

10 A. Yeah. If there's gaps between the walls and panels,
11 then the water would be able to pass through joints in
12 the panels.

13 Q. I'm going to take my turn at these photographs
14 briefly. I'm trying to find one in particular. I can't
15 put my fingers on that one, so I'll move on.

16 You were asked some questions about the photographs
17 that Mr. Moore took and whether you actually relied upon
18 those photographs in formulating your opinions?

19 A. That's correct.

20 Q. And did you?

21 A. To some degree. I mean, I think our repair scope
22 had been written at the time Mr. Moore was on site. So
23 certainly I would consider them in potentially changing
24 our scope, but none of the photographs or observations
25 that we made served to do that.

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1 Q. And did you rely on photographs of other experts
2 that were taken in connection with the investigation into
3 phase one?

4 A. In the same manner, yes.

5 Q. If you will, let me show you one of the photographs
6 in the presentation that you made the other day. Is this
7 one of the Rick Moore photographs?

8 A. It is.

9 Q. And that would be test cut number two; is that
10 right?

11 A. Yes.

12 Q. Okay. And then that one?

13 A. I'm sorry. I thought that was the same one. That
14 was eighteen. This one says -- that's two. That's
15 right. That's test cut two.

16 Q. And then that's test cut eighteen?

17 A. Yes, sir.

18 Q. Is that also a Rick Moore test cut?

19 A. Right.

20 Q. And do both of those photographs show extensive
21 damages?

22 A. You can't see as well with the lights on, but it
23 looks like there's a probe that's pushed into the rotted
24 wood that shows extensive damage, yes.

25 Q. After the photographs that you saw today or were

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1 shown today by Mr. Imhoff and Mr. Belcher, are you
2 confident ---

3 MR. LYLES: Excuse me. Would you cut the
4 lights on for us? Can you go back to the prior
5 photograph?

6 Q. And this is test cut two. And what's depicted
7 there?

8 A. It looks like significant damage to the framing at
9 the balcony.

10 Q. After the photographs -- seeing again the
11 photographs that you were shown today by Mr. Belcher and
12 Mr. Imhoff, are you confident that your scope of repair
13 is appropriate and necessary at Stoneledge?

14 A. Yes.

15 Q. And you've actually signed and sealed that scope of
16 repair?

17 A. I believe so, yes.

18 Q. And the significance of that is what?

19 A. That I'm taking responsibility for it and stand
20 behind it.

21 Q. Finally, you were asked about a number of other
22 projects, including two that I wrote down. True Blue, is
23 that down at the beach?

24 A. Yes, sir.

25 Q. And Fairway. Is it Fairway Villas?

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1 A. At Fairways at River Oaks, I think is the technical
2 name.

3 Q. Describe for the jury, if you will, just very
4 briefly what your role and involvement in those projects
5 was?

6 A. In both cases, I was the plaintiff expert for the
7 homeowners. There are similar issues on both of those
8 cases. I came up with a repair scope. The True Blue
9 case settled, and so now we have a -- some funds to begin
10 the repair process on seventy-two buildings. Our firm is
11 overseeing all the repairs and certifying that each of
12 the buildings is code compliant and the damages have been
13 addressed.

14 Fairways is a little bit different. Same defendant
15 contractor, but Mr. Moore and I came up with a joint
16 repair scope that we both agreed to start the project
17 with. Watkins, the same people that are making the
18 repairs at Stoneledge, actually were hired to make the
19 repairs. We started out the contract at one point one
20 million dollars using some known conditions and
21 allowances. We crossed the finished line at two point
22 five million dollars later as we went through the process
23 and we agreed on additional damages that were identified
24 or defects that were identified that required repair.

25 Q. And did you -- or have you -- as you're testifying

1 in the Stoneledge case, have you incorporated into your
2 opinions your experiences on True Blue and Fairway?

3 A. Absolutely.

4 Q. I think that's all the questions I've got for you,
5 Mr. Hodgin.

6 A. All right.

7 Q. Thank you.

8 THE COURT: Mr. Anderson?

9 MR. ANDERSON: Thank you, Your Honor. One of
10 Mr. Lyles questions brought up the necessity that I
11 needed to ask ---

12 THE COURT: Very well. Yes, sir.

13 MR. ANDERSON: Thank you. His redirect.

14 CROSS-EXAMINATION

15 BY MR. ANDERSON:

16 Q. Mr. Hodgin, you've testified over several days now.
17 And you just brought up the issue of the slope in your
18 repair on the balconies?

19 A. Yes, sir.

20 Q. And you indicated that you're going to replace what
21 is there currently which is, I believe, a flat deck
22 surface. Is that the correct name?

23 A. Yes, sir. That's fine.

24 Q. That flat deck surface is what was originally called
25 for in the plans; is that not correct?

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1 A. That's not correct. All the exposed portions of the
2 balconies were intended to have a one-eighth inch per
3 foot slope.

4 Q. But that's on the surface; is that not correct?

5 A. That's right. So ---

6 Q. And originally, the slope was to be done in the
7 concrete by sloping the concrete?

8 A. You can certainly infer that from the plans that
9 don't show the slope on the framing that it would have to
10 be accomplished above the framing; that's correct.

11 Q. Okay. So the framing being flat, there's nothing
12 wrong with the framing being flat in the initial build
13 according to those initial plans?

14 A. That's correct.

15 Q. And so you don't lay any blame on the framer for
16 that condition?

17 A. No.

18 Q. That would be the architect's problem or the
19 waterproofing concrete subcontractor's problem?.

20 A. And the G.C. to comply with the contract documents
21 requiring the slope, yes.

22 Q. All right.

23 MR. ANDERSON: With that, Your Honor, I don't
24 have to show any more slides. Thank you.

25 THE COURT: All right. Very good.

1 All right. Anything else on the -- if you have not
2 examined but cross-examined about anything brought out on
3 redirect?

4 MR. BELCHER: None from Bostic, Your Honor.

5 THE COURT: All right. Mr. Imhoff?

6 MR. IMHOFF: Nothing, Your Honor.

7 THE COURT: Ms. Brown or Mr. Vick?

8 MR. VICK: Nothing, Your Honor.

9 THE COURT: Mr. Hemphill?

10 MR. HEMPHILL: No, Your Honor.

11 THE COURT: Very good. What do you want done
12 with your witness?

13 MR. LYLES: Sir?

14 THE COURT: I said what do you want done with
15 your witness?

16 MR. LYLES: I would say that you order him to
17 buy me lunch.

18 (Laughter)

19 THE COURT: All right. Well, I've enjoyed
20 having him here, but I'm sure he'd like to be somewhere
21 else.

22 THE WITNESS: Yes, please.

23 THE COURT: Is he released?

24 MR. LYLES: I think that he is still under
25 subpoena.

1 MR. ANDERSON: He's under subpoena.

2 THE COURT: Well, that's all I wanted to know.

3 MR. LYLES: Yes, sir.

4 THE COURT: But you can step down. But I do
5 understand that you are under subpoena. Very good. But
6 stay with us for a few minutes.

7 THE WITNESS: Okay. Thank you.

8 THE COURT: Let's see. Next witness how long?

9 MR. LYLES: Probably a couple of hours.

10 THE COURT: Okay.

11 Mr. Foreman, ladies and gentlemen of the jury, I'm
12 going to suggest that we do take a lunch break at this
13 time. Of course, I think it's actually -- because we
14 have a clock over here that hasn't been changed -- one
15 o'clock as it was last week. So it's probably closer to
16 our lunch time. How long would you like to have today?
17 Or do you need today is really what I'm asking.

18 MR. FOREMAN: We can be back by one-thirty.

19 THE COURT: One-thirty. Very good. All right.
20 Again, please do not undertake the discussion of the case
21 among yourselves or permit anyone to discuss it with you.
22 And we'll see you at one-thirty.

23 Everyone else remain seated while the jury retires
24 from the courtroom.

25 (WHEREUPON, the jury exited the open court at

1 approximately 12:06 p.m.)

2 THE COURT: I thought that there was some sort
3 of, not hold -- but what is it? -- request for Mr. Hodgins
4 later. Have y'all discussed that? Because I understand
5 he's got another requirement? In other words, he lives
6 ...

7 You live in Clemson; is that correct?

8 THE WITNESS: Yes, sir.

9 THE COURT: All right. And so he's available.
10 But do you want him to stay here or ---

11 MR. ANDERSON: No, Your Honor, I do not.

12 THE COURT: All right. You're not releasing
13 him from the subpoena so that if you need to get him, he
14 can come back?

15 MR. ANDERSON: Exactly, Your Honor. He's a
16 potential rebuttal for us.

17 THE COURT: Very good.

18 Do you understand that, Mr. Hodgins?

19 THE WITNESS: Yes, sir.

20 THE COURT: All right. Very good. Anything
21 else before we break for lunch from the plaintiff?

22 MR. LYLES: No, Your Honor.

23 THE COURT: From any of the defendants?

24 (No response)

25 THE COURT: Very good. Thank you very much.

1 I'll see you at one-thirty.

2 (WHEREUPON, court stood at recess for a lunch
3 break.)

4 THE COURT: All right. Anything from the
5 plaintiff before we bring the jury back?

6 MR. LYLES: Nothing from the plaintiff, Your
7 Honor.

8 THE COURT: From the defendants?

9 MR. BELCHER: Nothing from me, Your Honor, from
10 Bostic.

11 THE COURT: All right. Very good. Ask the
12 jury to join us, please.

13 (WHEREUPON, the jury entered the open court at
14 approximately 1:40 p.m.)

15 THE COURT: All right. Let the record reflect
16 the jury and alternate are in the jury box.

17 Mr. Foreman, ladies and gentlemen of the jury, we
18 will now continue with the plaintiffs' case.

19 Mr. Lyles, you may call your next witness.

20 MR. LYLES: Yes, Your Honor. The plaintiff
21 would call John Folk.

22 (WHEREUPON, the witness was duly sworn.)

23 THE COURT: If you would, please, sir, give us
24 your full name and spelling your last name for the
25 record.

1 THE WITNESS: My full name is John Perry Folk. ...

2 The last name is spelled F-O-L-K.

3 THE COURT: Very good. Thank you, sir.

4 JOHN PERRY FOLK,

5 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

6 DIRECT EXAMINATION

7 BY MR. LYLES:

8 Q. Mr. Folk, good afternoon.

9 A. Good afternoon.

10 Q. You doing okay?

11 A. Yes, sir.

12 Q. Mr. Folk, have you ever testified before at trial?

13 A. I have not. I must confess I've spent my life
14 trying to avoid that.

15 Q. Are you a little nervous?

16 A. No, not much.

17 Q. Well, if you need anything, need more water, just
18 let me know. Okay?

19 A. Uh-huh (affirmative).

20 Q. Mr. Folk, if you will, for the jury, tell the jury
21 about your educational background.

22 A. Yes. I'm a graduate of Greenville High School, and
23 then a graduate, a 2002 graduate, of Clemson University's
24 Construction Science and Management program.

25 Q. And when did you graduate from Clemson? 2002?

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1 A. May 2002, yes.

2 Q. And if you will, tell the jury what you've been
3 doing from an occupation standpoint since 2002.

4 A. I've been working professionally as a construction
5 manager and primarily during that time as a construction
6 estimator. I actually started in -- well, my
7 construction career actually started in 2000. And I
8 worked for a small general contractor in Six Mile some of
9 you may know, Frank Kelly, Kelly Builders. And worked
10 for him doing labor, carpentry work, that kind of stuff.

11 In 2001, I went to work for Durham Green as an
12 intern and as an assistant project manager. And there I
13 did estimating and project management. And since that
14 time, I've worked for a couple of other firms as a
15 project manager and as an estimator.

16 Q. And what firms have you worked for?

17 A. I've worked for -- let's see -- Durham Green and
18 then Sisson Construction in Traveler's Rest. And then I
19 spent five years at Able Constructors as their chief
20 estimator. And then -- let's see -- about two and a half
21 years ago, I took a job with Trehel Corporation as their
22 senior estimator. And that's what I currently do.

23 Q. What kind of company is Trehel?

24 A. Trehel is a general contractor. We average -- this
25 year we should average thirty-five, forty million of

1 annual volume. We're a commercial contractor. We do
2 everything from condos, apartments, townhomes very
3 similar to Stoneledge up to all types of commercial
4 buildings. We do a lot of church work. We currently are
5 doing the Walhalla High School. Some of you may be
6 familiar with that.

7 Q. Now, you mentioned that you were an estimator; is
8 that right?

9 A. Yes, sir.

10 Q. Would you tell the jury what an estimator does?

11 A. Well, an estimator really has -- out of all of the
12 construction professionals, an estimator has the fun job.
13 He's the guy who gets to figure out what it costs to
14 build a project. And so normally the way that happens,
15 my job every day, I'll take drawings and I will turn
16 those into an estimate. I'll quantify the materials.
17 I'll look at the labor required to build the project and
18 also the equipment and overhead and material items. And
19 then I'll arrive at a total number for that project.

20 Q. In order to do that, do you have to know about
21 construction?

22 A. Yes, sir. You basically have to build the project
23 in your head and on paper and interpret the drawings.
24 And then from that point, once you know how all the
25 pieces fit together, it's really a mathematical exercise

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1 of just taking all of those components and the costs and
2 adding them up in a giant spreadsheet.

3 Q. And is it important as an estimator -- well, let me
4 ask you this. What are your estimates used for?

5 A. They're used for construction. That estimate -- in
6 the case of Trehel specifically, we take that estimate.
7 We meet with a client who wants to build a building. We
8 give them a price. We guarantee that price. And then if
9 we move forward to construction, that estimate becomes
10 the budget. And so it's very -- it's critical to the
11 success of the contractor that his estimate be accurate.

12 Q. And, again, why is that critical?

13 A. Well, because that forms your budget. Say, if we
14 have a client who wants to build, just say, a church, I
15 estimate it. I tell them, "Guys, to perform this scope
16 of work, it's going to be, say, two million dollars. And
17 here's the scope of work for that two million dollars."
18 That's it. That becomes the contract value. And then
19 all of the budgets are set up to manage the project based
20 on that estimate. And there is no more money. That's
21 it.

22 Q. And if you estimate a job too high, what can happen?

23 A. Well, if I'm too high, what normally happens is a
24 owner will say, you know, "John, we would like to work
25 with you, but we just can't afford it." That would be

1 very common in the negotiated realm. On a bid job where
2 you might have several contractors competing for the
3 work, obviously the major deciding factor is usually
4 cost. So you're going to miss work, and you're going to
5 be out of business as a contractor for lack of work. So
6 it's critical that that estimate be accurate.

7 Q. And how many years have you actually been doing
8 estimating work?

9 A. That would be since 2001, so going on thirteen
10 years.

11 Q. And how many total jobs would you say you've
12 estimated in your career?

13 A. Oh, it's in the thousands. In the thousands.

14 Q. And you're -- are you familiar with the Stoneledge
15 project?

16 A. Yes, sir. Yes, sir.

17 Q. And how many jobs have you estimated that involve
18 projects of construction similar to that like we have at
19 Stoneledge?

20 A. Hundreds.

21 Q. And how would you describe that construction?

22 A. The construction of Stoneledge?

23 Q. Yes, sir. In terms of is it a multi-family project?

24 A. Right. Yes. Multi-family, wood-framed residential
25 units.

1 Q. And are you a licensed contractor?

2 A. I have passed the state licensing exam, and I am a
3 qualified party on Trehel's license. So what that means
4 is personally, myself, I do not currently -- I'm
5 currently not organized as a business entity to perform
6 work, but I am qualified from a licensing standpoint.

7 MR. LYLES: Your Honor, I would like to have
8 Mr. Folk qualified as an expert in the areas of
9 contracting and construction estimating.

10 THE COURT: All right. Any voir dire, Mr.
11 Belcher?

12 MR. BELCHER: None from Bostic, Your Honor.

13 THE COURT: Mr. Imhoff?

14 MR. IMHOFF: Yes, Your Honor.

15 THE COURT: You may proceed if you like.

16 MR. IMHOFF: Thank you, Your Honor.

17 VOIR DIRE

18 BY MR. IMHOFF:

19 Q. Mr. Folk, have you ever worked as a general
20 contractor?.

21 A. Worked as a general contractor myself ---

22 Q. Yeah?

23 A. --- or worked for a general contractor?

24 Q. As a general contractor?

25 A. No, I've never been in business for myself as a

1 general contractor.

2 Q. Have you ever pulled yourself a permit for a general
3 contracting job?

4 A. No, sir.

5 MR. IMHOFF: Your Honor, I don't have any
6 further questions for Mr. Folk on the general contracting
7 aspect of his qualifications.

8 THE COURT: Well, let me see, now. What
9 exactly are you seeking to have him qualified as?

10 MR. LYLES: As an expert in contracting as well
11 as contract construction estimating.

12 THE COURT: And what is contracting?

13 MR. LYLES: The general business of
14 contracting, securing jobs.

15 THE COURT: Well, he mentioned that he had bid
16 on jobs ---

17 MR. LYLES: Yes, sir.

18 THE COURT: And he also had negotiated jobs?

19 MR. LYLES: Yes, sir.

20 THE COURT: Did you cover both of those?

21 MR. LYLES: Yes, sir.

22 THE COURT: And you have no objection to the
23 estimating?

24 MR. IMHOFF: That's correct, Your Honor.

25 THE COURT: Anyone else want to voir dire? Mr.

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1 Vick?

2 MR. VICK: No, Your Honor. We have no
3 objection to the estimating, but we do as to the
4 contracting.

5 THE COURT: All right. Mr. Anderson?

6 MR. ANDERSON: We would join in that, Your
7 Honor.

8 THE COURT: Anyone else?

9 MR. HEMPHILL: I too, Your Honor.

10 THE COURT: All right, Mr. Hemphill.

11 Very well. He has testified that he has
12 participated in different forms of contracting in the
13 sense that agreements were reached, either by bid or
14 negotiation. And he also mentioned that he had -- what
15 is it? -- dealt with owners in their projects.

16 Well, I am going to find that he is qualified as an
17 expert in the area of construction estimates and
18 contracting.

19 Now, Mr. Foreman, ladies and gentlemen of the jury,
20 as we've mentioned on another occasion, experts are those
21 who are qualified by reason of their background, training
22 and experience in particular areas. And that expertise
23 gives them the ability to testify to things other than
24 just what they know of their own knowledge or exercise of
25 their own faculties. And more importantly, our rules

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1 provide that expert witnesses are here to help jurors to
2 understand technical testimony. In other words, an
3 expert is not necessarily the final authority but is
4 someone who knows more than the rest of us do about a
5 particular area. At least have had some experience in
6 that particular area. And that would qualify a witness
7 to testify as an expert in that area.

8 So I have qualified this witness as an expert in
9 constructing estimating and contracting, not -- but
10 always remember that all witnesses' testimony, be it a
11 lay witness or a fact witness, is for your evaluation.

12 All right. You may proceed.

13 MR. LYLES: Thank you.

14 DIRECT EXAMINATION

15 CONTINUED BY MR. LYLES:

16 Q. Mr. Folk, have you become familiar with the
17 Stoneledge project?

18 A. Yes, sir.

19 Q. And when did you become familiar with the Stoneledge
20 project?

21 A. In early 2010.

22 Q. And what were you -- who contacted you?

23 A. I was contacted by, I believe, by Burgess Metcalf.
24 And at that time I worked for Able Constructors, and we
25 were asked to perform an estimate for the repair scope

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1 there.

2 Q. Okay. And did you do that?

3 A. Yes.

4 Q. Mr. Folk, I'm going to show you a couple of things
5 that have been marked as exhibits for at least
6 identification purposes. And I will hand you what's been
7 marked as Plaintiff's Number 26.

8 A. Okay.

9 Q. Do you recognize that document?

10 A. Yes, sir, I do.

11 Q. And what is that document?

12 A. This is the repair scope of work that was provided
13 to me by C.S.E. for the purpose of performing that
14 estimate.

15 Q. And is that repair scope related to the building
16 envelope of the phase one units?

17 A. Yes, sir.

18 Q. And then I'm going to show you what has been marked
19 as Plaintiff's 28 and ask you if you recognize that
20 document?

21 A. Yes, sir, I do.

22 Q. And what is that document?

23 A. Okay. That is the below-grade repair scope of work
24 that was provided to me in 2011 for estimating the costs
25 associated with the below-grade work.

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1 Q. Okay. Thank you very much. I'm going to sit those
2 over here.

3 A. Sure. Thank you.

4 Q. If you need them again during your testimony, if
5 you'll let me know.

6 Did you review exhibits 27 and 28 in developing your
7 estimates?

8 A. Yes, sir.

9 Q. And is it typical and customary for a contractor
10 like you who is doing an estimate to review the, in this
11 case, repair plans?

12 A. Absolutely.

13 Q. And the information that you glean from those plans
14 that related to your estimate is what?

15 A. You're speaking of the architectural drawings?

16 Q. Yes. Well, whatever is in those exhibits.

17 A. Yes, those form the basis for my estimate, so
18 they're vitally important. And it's vitally important
19 that I understand the scope of work developed because
20 that's what I'm using to develop my costs.

21 Q. And did you rely on anything else in the development
22 of your estimate?

23 A. Yes, sir. At the same time I was given the original
24 repair documents book there, I was also given a roll of
25 drawings showing the three typical units in phase one. I

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1 was also given a binder of Eagle View reports which show
2 the building arrangement as they're arranged on the site
3 and show the roof areas.

4 Q. And what was the significance of those plans and
5 Eagle View reports?

6 A. Well, the plans and the Eagle View reports allowed
7 me to quantify all of the quantities involved with
8 roofing, siding, stone. That formed the basis for my
9 estimate.

10 Q. And when you say the quantities involved, what are
11 you referring to?

12 A. I'm referring to the quantities that were then input
13 into my estimate spreadsheet.

14 Q. And by quantities, you mean the amount?

15 A. Correct, the amount. Yes, sir. Yes, sir.

16 Q. And that would be the amount of what?

17 A. The amount of the various materials in question.
18 For instance, on the roof, how many square feet of
19 asphalt shingles? On the siding, how many square feet of
20 siding? How many square feet of stone? All of that, you
21 know, becomes very important when you're determining the
22 cost. You have to start with the quantity.

23 Q. And did you review or do anything else to develop
24 information that formed the basis of your estimate?

25 A. With the repair document scope, I was provided with

1 a disk of photographs. I was provided with the drawings.

2 And I also visited the site to become familiar with the

3 actual conditions on site.

4 Q. How many days were you at the site?

5 A. I've probably been at the site a total of ten days.

6 Q. And did you go into some units in phase one?

7 A. I have been into one unit, yes.

8 Q. Did you do anything else to gather information

9 relative to your estimate for phase one?

10 A. No, sir.

11 Q. What's a change order in the construction business?

12 A. Well, a change order is almost just what it sounds.

13 I can give you probably a good example of one better than

14 I can give you a formal definition. After a contract is

15 signed -- let's say that a set amount is agreed upon for

16 the cost of the work. And then if there's a change --

17 if, for instance, the owner might want to change

18 something, he might want to change a finish material,

19 say, from carpet he might want to upgrade to ceramic

20 tile. That would constitute a change order. So he would

21 ask the general contractor, hey, before I agree to

22 proceed with this change, could you advise me as to the

23 cost. And we'll prepare a formal document called a

24 change order. There's any number of actors that could

25 constitute a change order.

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1 Q. Have you been involved in repairs to, remedial
2 repairs to multi-family projects?

3 A. Yes, sir, I have.

4 Q. Have you estimated jobs for the remedial repair of
5 multi-family projects?

6 A. Yes, sir.

7 Q. In the context of remedial projects, that is repair
8 projects; is that right?

9 A. Yes.

10 Q. Is it unusual to find conditions that are
11 unexpected?

12 A. Absolutely. Absolutely.

13 Q. So that often happens when you're doing repairs?

14 A. It does. You know, no matter how much we've heard
15 the phrase destructive testing -- I've heard it a lot
16 just this morning since I've been in the courtroom. But
17 no matter how much destructive testing is done, the
18 reality is you don't see what's hidden until you pull it
19 all off.

20 Q. And do you have some experience in the estimating
21 job of anticipating some of that?

22 A. Yes, sir.

23 Q. And did the scope of work that C.S.E. provided to
24 you, did it provide you information relative to things
25 that you might uncover during the course of construction?

1 A. It did. It did a very thorough job of identifying
2 areas that needed to be addressed in the estimate.

3 Q. When you prepared this estimate, did you prepare
4 this estimate in such a way that the risk of unknown or
5 unforeseen conditions would be on the contract?

6 A. I did, yes. And to respond and to help mitigate
7 that risk, I included a contingency in the estimate.

8 Q. So the price that you set forth in your estimate,
9 that is a price that an owner knows is going to be the
10 final price?

11 A. It should be, yes. Yes.

12 Q. And in order to provide the owner with that level of
13 confidence, again, you've done what in your estimate?

14 A. I've included a contingency to deal with that.
15 Another way to approach it would be to remove that
16 contingency and say, okay, I priced only this exact
17 scope. However, the moment I find something that
18 differs, we'll stop work and estimate a cost and agree
19 upon a change order.

20 Q. And when there's -- if a situation like that occurs,
21 you find something that you haven't anticipated in
22 developing your estimate and you issue a change order,
23 what does that do to the price of the job?

24 A. Oh, that increases the price, yes.

25 Q. Are you familiar with that occurring on repair jobs?

1 A. Absolutely, yeah. Unless an adequate contingency is
2 budgeted, it's a certainty.

3 Q. And you have prepared your estimate in this case to
4 eliminate or at least greatly minimize the chance of that
5 occurring?

6 A. Correct, yes.

7 Q. So as we begin to look at your estimate, are you
8 confident that the amount you've estimated is sufficient
9 to complete the scope of repair that was priced by
10 C.S.E.?

11 A. Yes.

12 Q. And, finally, in preparing your estimate, do you
13 check construction prices?

14 A. Absolutely. Every day.

15 Q. Literally, every day?

16 A. Just about every day. We get updates all the time.
17 And it seems that -- and you guys know if you've ever
18 been to Lowe's or even a grocery store, prices are always
19 on a constant -- they're always in a constant state of
20 change.

21 Q. And did you satisfy yourself that you knew the
22 prices when you prepared your estimate?

23 A. Yes, sir.

24 Q. In reviewing the scopes of repair that were done by
25 C.S.E. and going out to the site, are you aware of any

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1 betterments or enhancements that C.S.E. has included for
2 these owners? That is things that are different and
3 better than what they purchased?

4 A. I am not. It appears to be the exact same materials
5 that were originally specified. However, they would just
6 be installed in the proper manner.

7 (WHEREUPON, Plaintiff's Exhibit Number 29 was marked
8 for Identification only.)

9 Q. Mr. Folk, I'm going to hand you what has been marked
10 for identification as Plaintiff's Exhibit 29.

11 A. Okay.

12 Q. And I'll ask you if you recognize that?

13 A. I do, yes.

14 Q. And what is that?

15 A. That is my estimate for repairs for phase one.

16 Q. Okay. And does that estimate contain the cost to
17 implement the scopes of repair that are referenced in
18 exhibits 27 and in 28?

19 A. Yes, sir.

20 Q. And, Mr. Folk, have you made changes to your
21 estimate as you have worked on phase one in this case?

22 A. Yes, sir, I have, yes.

23 Q. And tell me about those changes.

24 A. Well, the first major change was the below-grade
25 estimate. That was updated in 2011. Again, I started in

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1 2010. I've also made changes to correct the quantity of
2 elevated balconies. It's my understanding that there are
3 thirty balconies. The original -- or the drawings that I
4 had when I prepared the estimate are typical drawings
5 which show balconies on every unit. So originally, when
6 I first looked at it, I thought there were thirty-seven.
7 So I've corrected that. And I've also corrected the
8 below-grade quantity of units. There are actually only
9 twenty-nine units with basements.

10 When I went to the site to investigate, I found one
11 building containing four units that was clearly on a slab
12 on grade, no basement. So I knew that those did not have
13 basements. But it later came to my attention that a few
14 of the other units were built on a crawlspace. So it
15 looked to me as though they did have basements. But
16 after further review, I learned that they did not. So it
17 was a simple matter of just adjusting the quantity.

18 Q. And to your knowledge, are the quantities that are
19 referred to in exhibit 29 accurate quantities?

20 A. Yes, sir.

21 Q. Based on what you know?

22 A. Yes, sir.

23 Q. In fact, based on testimony you heard today in this
24 case?

25 A. Yes.

1 Q. Mr. Folk, I'm going to -- let me see. If you don't
2 mind, I'm going to take that back from you.

3 A. Sure.

4 Q. And I'm going to try to put it up on the screen.

5 A. Okay. No problem.

6 Q. And there's a pointer right there.

7 A. Okay.

8 Q. And what I will tell you about the pointer is it
9 needs to stay on the witness stand. Okay?

10 A. Okay. All right.

11 Q. Thank you.

12 A. No problem.

13 Q. Mr. Folk, we'll do our best with this exhibit up on
14 the screen.

15 A. I should have it memorized by now.

16 Q. You should.

17 A. Yes, sir.

18 Q. You should.

19 A. Yes, sir.

20 Q. If you will -- and the jury's not going to be able
21 to really see this, but they'll have a copy of your
22 exhibit, I believe. If you will, walk through this
23 document and show us how you got this laid out.

24 A. Okay. Well, it's a very simple spreadsheet. You
25 could do the same thing with a calculator and a legal pad

1 there. But basically, what I have, this column is
2 quantity. And I call that the take-off quantity. And
3 that just means the quantity that I've literally taken
4 off from the drawings or from the Eagle View reports. So
5 I've got a quantity. And then I have unit pricing. I
6 have pricing for labor, pricing for material, and then I
7 have subcontractor pricing. And then these next three
8 columns just multiplied the quantity by the unit price to
9 arrive at a total for that line. And then in this column
10 we're just adding up the total labor, material and
11 subcontract numbers.

12 Now, just a quick definition. A subcontractor
13 number, that would be me as a general contractor hiring
14 someone to help me get the work done. So in this case,
15 you can see a quantity there in the roofing. Remove
16 existing shingles. I have a quantity and a subcontractor
17 unit price. So what I'm telling you is, is that I would
18 hire a subcontractor to remove and then replace shingles.
19 And that subcontract number would include labor,
20 material, taxes, equipment and supervision from that
21 subcontractor. So I just want you to understand what's
22 in those numbers.

23 And then it's just a very simple mathematical, you
24 know, just adding up all the line items until you get to
25 a bottom line.

1 Q. If you will, Mr. Folk, go all the way to the left.

2 A. Yes, sir.

3 Q. And all the way to the left ...

4 A. Uh-huh (affirmative).

5 Q. ... and describe what's over on the far left-hand
6 side of your estimate, if you will.

7 A. The far left-hand side, I just have a -- basically,
8 it just says line. I'm just trying to get some order to
9 my thought process. And I've broken down the work by
10 categories so that -- I tried to make this document very
11 easy to understand so that everyone could look at it and
12 know -- not just see a number but also know my thought
13 process in arriving at that number.

14 Q. Okay. Well, the first number you've got under --
15 the first word you've got underlined is what?

16 A. That's roofing, and that's line one.

17 Q. Okay. And then what your pointer is on right now,
18 can you tell the jury what that ---

19 A. That says remove existing shingles.

20 Q. And so those following lines ---

21 A. Right. Right. And so this is the quantity of
22 shingles that need to be removed. And S.Q. -- this is
23 just a units column. And we like to be as confusing as
24 possible in construction, so we come up with all kind of
25 different units. But S.Q. just means square. And that's

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1 a roofer terminology for a hundred square feet. And I
2 believe that number -- you can probably read it better
3 than I can. I don't know if that's a hundred and eleven
4 or -- I can't see it there.

5 Q. Yeah. And going back over to the left below
6 roofing, are those a description of the things that
7 you'll be doing under the roofing category?

8 A. Yes, sir. Yes, sir. Absolutely. So I've got --
9 under roofing I've got, "remove existing shingles, remove
10 roof sheathing." That's your O.S.B. or plywood roof deck
11 that supports the shingles. "Replace roof sheathing.
12 Install new felt paper, install new shingles and
13 flashings and structural truss repair allowance."

14 Q. And then your category beneath that is what?

15 A. Beneath that I have a large category entitled,
16 "exterior wall cladding systems."

17 Q. And what does that relate to?

18 A. Well, that's basically anything on the exterior of
19 the building. Siding and stone primarily.

20 Q. Okay. And then below that you've got some
21 subsections?

22 A. Yes, sir. I've got a section for removal. And then
23 I've got a section for replacement. You know, obviously
24 in a new building, new construction, I'm just concerned
25 with building once. In this case, I have to remove those

1 materials and get rid of them before I can put it back.

2 Q. And then for each category, you've got your various
3 quantities and your costs?

4 A. Yes, sir. Yes, sir.

5 Q. Associated with that activity?

6 A. Correct, yes.

7 Q. And then below your exterior wall cladding systems,
8 what is that?

9 A. Below that I have the rear elevated concrete
10 balconies. And I've got a couple of sub-categories
11 there. I've got a demolition category because, again, I
12 have to take down what's there. Then I have a
13 replacement category for replacing that and rebuilding
14 it.

15 Q. And all of these activities that you're doing, those
16 activities correspond to the work that C.S.E. says needs
17 to be done?

18 A. Yes, sir. Yes, sir.

19 Q. And if an area of the building isn't called out for
20 a repair by C.S.E., then you're not including it; is that
21 right?

22 A. Right. Absolutely. My costs -- the scope of work
23 for this estimate is based on C.S.E.'s report. So I
24 wasn't asked to go investigate anything or come up with
25 my own idea about what needed to be done.

- 1 Q. Okay. And ---
- 2 A. I think you're upside down there.
- 3 Q. Okay.
- 4 A. Okay. And this page picks back up with the elevated
- 5 balconies. This is the replacement of items on those
- 6 elevated balconies.
- 7 Q. Okay. And then below that, you have what?
- 8 A. Below that, I have four line items for interior
- 9 finish work to the inside of the units themselves.
- 10 Q. And what's that related to?
- 11 A. That is related to -- I've got a line item for
- 12 drywall repairs, flooring, trim carpentry, and painting.
- 13 And those are items that are identified in C.S.E.'s
- 14 report. But it's pretty common sense that if I'm going
- 15 to remove all the windows, okay, that's great. But
- 16 there's going to be some items on the inside that have to
- 17 be put back whether it's a drywall return where the
- 18 drywall meets the inside of the window jamb, whether it's
- 19 trim carpentry. And that stuff's going to have to be
- 20 painted as well.
- 21 Q. And your category beneath that?
- 22 A. Below that is fire protection. And that is for
- 23 repairing the firewalls.
- 24 Q. Those exterior firewalls that you heard discussed?
- 25 A. Yes, sir. Yes, sir.

1 Q. And then below that, what category do you have?

2 A. Okay. Below that, I have my allowance for
3 unforeseen conditions. As we discussed a moment ago,
4 things that we can't see right now and we cannot
5 accurately quantify them. But as a professional, you
6 know, I know they're there.

7 Q. And when you charge a number like that, is Trehel
8 assuming responsibility for those unforeseen conditions?

9 A. Yes. Yes.

10 Q. And so the owner doesn't have to worry about those
11 unforeseen conditions?

12 A. That's right.

13 Q. Now, below that category, you've got what?

14 A. Okay. Below that, some people call these indirect
15 costs, or some people call them general conditions or ---

16 Q. Go back up.

17 A. Okay. Yes, sir.

18 Q. What is that?

19 A. Okay. That is the direct cost subtotal. So if you
20 just add up all these line items, total labor, total
21 material, total subcontract, and then what I would call
22 total direct costs.

23 Q. Okay.

24 A. Okay. And then this category is, again, what most
25 people would call indirect costs. And I like to think of

1 an easy way to explain it, when we leave a job site after
2 we've completed a scope of work, whether it's a repair or
3 a brand new building, these are all the things that were
4 part of the costs, yet you don't see them when we leave.
5 And that is things like supervision, field management,
6 temporary toilets, job site continuous cleanup, job site
7 safety. All those kind of things go into the general
8 conditions number. You've also got sales tax. You've
9 got payroll burden, which is just a function of your
10 total labor. That's Workers' Comp, payroll taxes.
11 You've got a subcontractor liability insurance which is
12 just a function of the total subcontract number. And
13 then you come to your general contractor's fee. And
14 obviously, you know, I don't know any general contractor
15 that is not in business to earn a small profit. That
16 also includes your home office expense. People like me
17 who do estimating, project managers, you know, all of the
18 costs associated with keeping up a home office, that is
19 part of your fee. And then we have a general
20 contractor's contingency, which, again, on a project like
21 this, that is there to mitigate risk to ensure that the
22 contractor is able to do the job for the price he's
23 quoted. And then I have a line for performance and
24 payment bond.
25 Q. What's are performance and payment bonds?

1 A. Well, that is basically -- it's a form of insurance
2 which no contractor ever hopes they're going to use. For
3 instance, if you have vehicle insurance, you know that at
4 sometime in your life you're probably going to have an
5 accident and need that insurance policy. This is an
6 insurance taken out on a general contractor in case he
7 defaults on the job. If he just wakes up one morning and
8 says, "You know what? I started this job, but I don't
9 want to finish it," the bonding company would then step
10 in and finish that job. So it's insurance on your
11 general contractor. It's normally required by some
12 lending institutions. So if you're going to build a
13 building and borrow money to do so, your financing source
14 or bank, your lender, might or might not require that.

15 Q. But that's in there for the protection of the
16 owners?

17 A. Yes, sir.

18 Q. Is that right?

19 A. Yes, sir. Yes, sir.

20 Q. And you have a total estimated value?

21 A. Correct. I do, yes.

22 Q. Right there?

23 A. Yes.

24 Q. And this is on -- or the subjects above that are
25 related to the building envelope and the porches and

01166

1 decks; is that right?

2 A. That's correct, yes.

3 Q. And what is your total estimate for the repair of
4 the building envelope based on C.S.E.'s scope of repair?

5 A. Total estimate value is four million four hundred
6 and nine thousand dollars, two hundred sixty-one dollars
7 and fifteen cents.

8 Q. Now, what are these lines, these last few lines
9 beneath the estimate total?

10 A. Okay. The line items below this says, "below grade
11 remediation and waterproofing." And basically I've got
12 another detailed estimate, a couple of pages, just very
13 similar to this same format where I've itemized all the
14 costs associated with the below-grade work. And so all
15 this is is a summary. There are twenty-nine units with
16 basements that need the waterproofing below-grade scope.
17 And then I've got cost associated per each. And then,
18 again, a total. And then below that, I have, "costs
19 associated with rebuilding the garages." And it's very
20 unfortunate that we're having a problem with below-grade
21 waterproofing because you guys may or may not know, but
22 the garages are so close to the front of the buildings
23 that in some cases, I'm going to have to tear them down
24 to actually be able to excavate that and fix the
25 waterproofing. So that's what that line item is for.

01167

1 Q. And what's the total for the below-grade work and
2 its associated work?

3 A. Yes, sir. Total below grade is one million three
4 hundred twenty-nine thousand seven hundred and thirteen
5 dollars.

6 Q. Okay. Thank you very much.

7 A. Yes, sir.

8 Q. I'm going to hand you back ---

9 MR. LYLES: You can cut the lights back on.

10 Q. Let me swap out with you.

11 A. Sure.

12 MR. LYLES: Your Honor, I would move to have
13 Plaintiff's Exhibit 29 admitted into evidence.

14 THE COURT: Any objection?

15 MR. BELCHER: Not from us, Your Honor.

16 THE COURT: Mr. Imhoff?

17 MR. IMHOFF: May I just see it for one moment,
18 please? I think we're going to submit a photocopy, a
19 copy of it.

20 MR. LYLES: Okay. But you don't have an
21 objection to it?

22 MR. IMHOFF: Otherwise, I don't have an
23 objection.

24 THE COURT: All right. Without objection,
25 Plaintiff's Exhibit Number 29 is admitted.

01168

1 (WHEREUPON, Plaintiff's Exhibit Number 29 was -

2 admitted into evidence.)

3 Q. Mr. Folk, earlier today you heard some testimony
4 about contract administration services. Are you familiar
5 with those?

6 A. Yes, sir. Yes, sir.

7 Q. In your experience of working on projects such as
8 this, repair projects such as this, is it appropriate to
9 have contract administration services?

10 A. It is, especially with a project of this magnitude
11 and nature. You know, you want a third-party engineer
12 there to certify and verify and document that the work
13 has been fixed correctly.

14 Q. And would you anticipate having questions of the
15 design professional during the course of the repair?

16 A. I would. I think you're going to encounter -- you
17 know, as you remove cladding, you remove siding and
18 stone, I think you're going to encounter unique problems
19 that needs someone on site to help you find the best
20 solution.

21 Q. And in your experience, what sort of fee is charged
22 by design professionals in performing those sorts of
23 services?

24 A. I would think somewhere in the five to ten percent
25 range would be appropriate.

1 Q. Is Trehel qualified to do the work that's reflected
2 in the C.S.E. scope of repair?

3 A. Yes, sir.

4 Q. And has Trehel discussed or have you discussed doing
5 the repair at Stoneledge with these owners?

6 A. I have not discussed with the owners.

7 Q. And is this work that Trehel is interested in doing?

8 A. We are, yes.

9 Q. And you mentioned bidding earlier. What's the bid
10 process?

11 A. Well, the typical bid process, you know, for new
12 construction -- I would call it the traditional way, or
13 some would call it the old fashioned way or the way that
14 doesn't work all the time -- is for an owner to hire an
15 architect. The architect develops drawings. Okay. So
16 you end up with a roll of drawings that an owner pays, in
17 some cases, tens of thousands of dollars for. Okay. And
18 they don't know -- the owner doesn't know. They want a
19 building or a remodeling project, but they don't know
20 until you go to the bid market what the costs are. Okay.
21 So a traditional method is an owner hires an architect.
22 The architect does working drawings and, you know, put
23 those out for bid. And usually three or more, you might
24 have ten or twenty contractors bid on a project. And
25 then the low bidder is awarded the job. Okay.

01170

1 Normally, Trehel operates under a different
2 environment. Over thirty years ago, Neil Workman, our
3 founder, he started Trehel with the idea that there's a
4 better way to build. And now we call it our 3D process.
5 You're welcome to log onto our website, and you'll get a
6 better explanation than what I'll give you. But
7 basically, it's a partnering approach ---

8 THE COURT: Just a moment. I think I need to
9 say something.

10 THE WITNESS: Yes, sir.

11 THE COURT: Mr. Foreman, ladies and gentlemen
12 of the jury, you're not to do any outside research. In
13 other words, what you make your decision on in this case
14 is what you hear from the witness stand subject to all of
15 the qualifications by reason of direct exam and cross-
16 exam. And so do not do any sort of outside research no
17 matter how technical it might be or how -- what is it? --
18 available it is. That's not going to have the same
19 qualifications as testimony and exhibits that are subject
20 to review before they're given to you.

21 Very well. You may proceed.

22 THE WITNESS: I apologize, Your Honor.

23 A. But basically our process is one of partnering with
24 an owner. We like to get involved early before any
25 design is done. We like to hire the architect, and we

1 like to be responsible for both the design and
2 construction. And then my job as an estimator -- very
3 early on, once we know and once we have a concept of what
4 our client wants, we'll put a budget to it, and then
5 we'll work together with the owner until we have a
6 building or a project that functions and looks the way
7 it's supposed to and meets their budget. So it's more of
8 a partnering arrangement. And most of our work, I would
9 say ninety percent, is negotiated. It's using this
10 process. So we try to avoid the bid market. And the
11 reason for that is just because you have so many --
12 especially with the economy in recent years, you have so
13 many contractors who are just out there to get a low bid.
14 And then once they get the job, they find all kind of
15 reasons to -- you know, issues that -- well, your
16 drawings are incomplete. This wasn't included, you know.
17 And they find all kind of reasons to seek change orders
18 and additional costs from the owner.

19 So I guess what I'm saying is in order to be a low
20 general contractor on a competitive bid job, you have to
21 borderline on unethical. And we just don't play that
22 game.

23 Q. But you're aware obviously here that an architect or
24 design professional has been engaged?

25 A. Yes, sir.

1 Q. And is Trehel still comfortable discussing
2 performing this repair with the owners of Stoneledge?

3 A. We are, absolutely. And I also understand the
4 owners need to get competitive bids. And, you know,
5 we're happy to be part of that process if they wish for
6 us to. We're very competitive. And I do estimate jobs
7 competitively. It's just that the majority of our work
8 comes from negotiated business, repeat clients. That's
9 what we've built our business on. And when you have the
10 opportunity to work under that process, honestly, you
11 don't enjoy the bid world.

12 Q. Have you given some thought to how Trehel would go
13 about actually implementing these repairs in phase one?

14 A. Yes, sir, I have.

15 Q. And how would you do that?

16 A. Well, that would start with putting together a very
17 detailed schedule and a plan to get the work done.
18 Obviously, we're talking about complete cladding removal.
19 So we're talking about mobilizing on the site, setting up
20 scaffolding, removing siding and stone, removing and
21 replacing windows, fixing associated damage to the
22 exterior sheathing, and then putting it all back. So
23 it's quite a process.

24 Q. And would you do it unit-by-unit or building-by-
25 building?

1 A. We would tend to work building-by-building. But we
2 would have multiple buildings under construction
3 simultaneously in different phases of construction. And
4 I think that's necessary with the volume of work that has
5 to be done, that needs to be done just to -- you know,
6 our goal would be to get in, get the work done and get
7 out with minimal disruption to the owners. We know it's
8 going to be disrupting, but we want to minimize the time.
9 This isn't something that you want to hire a contractor
10 who shows up with two men and you're there for the next
11 twenty years.

12 Q. How long do you think it would take to complete the
13 work that's called for by the C.S.E. scope?

14 A. I think it could be done in a year.

15 Q. And what sort of equipment would you have on site?

16 A. Well, we would have a -- we would have Lull, an all-
17 terrain forklift, or several, for moving materials
18 around. We'd have a lot of scaffolding to access these
19 -- you know, these units, the siding and stone and
20 whatnot. We would have a temporary job site trailer. Of
21 course, a fleet of trucks. And then all manner of small
22 tools.

23 Q. Is your job site, is it a hard hat area?

24 A. Yeah, absolutely.

25 Q. And how are you going to get the stone off?

01174

1 A. The stone would come off -- pneumatic hammer, pry
2 bar. It's a labor-intensive job. And ---

3 Q. Is it loud?

4 A. It's loud, yes.

5 Q. Dusty?

6 A. Absolutely.

7 Q. And the porches and decks, are they going to have to
8 be substantially removed?

9 A. Yes, sir.

10 Q. Those that are exposed and not under roof?

11 A. Yes, sir.

12 Q. And when you remove those porches and decks to
13 rebuild them, are you going to have to block off or block
14 ---

15 A. We are. You know, obviously that would present an
16 overhead hazard for anyone in that area. We would be
17 very concerned, especially during demolition about those
18 trusses and materials falling and hurting our workers,
19 but, of course, anyone else. So that area would be off
20 limits.

21 Q. Are you going to have people in units?

22 A. That's debatable. I have not fully investigated
23 that. My preliminary thoughts were that during some
24 parts of the work, you certainly could occupy the unit.
25 Whether or not you would want to ---

1 MR. BELCHER: Your Honor ---

2 THE COURT: Just a moment.

3 MR. BELCHER: --- I object. This testimony
4 exceeds his qualifications as an expert and is a new
5 opinion that we have never heard before, ever in
6 considerable deposition testimony.

7 THE COURT: Well, let's do this. Why don't you
8 restate your question so that it would cover a foundation
9 that the witness is qualified?

10 MR. LYLES: Yes, sir.

11 THE COURT: By reason of his qualification.

12 MR. LYLES: Okay.

13 Q. As part of developing your estimate, did you
14 consider how this work is actually going to have to take
15 place?

16 A. Yes, sir. Yes, sir.

17 Q. And did those considerations go into, for example,
18 how much labor was going to be necessary?

19 A. Yes.

20 Q. And did you anticipate in performing your estimate
21 how you were going to accomplish certain tasks?

22 A. Yes, sir.

23 Q. Tasks like removing and replacing windows?

24 A. Yes.

25 Q. And tasks like doing interior sheetrock and trim

1 work?

2 A. Yes.

3 Q. And are you familiar with those types of activities
4 in your experience in the construction area?

5 A. Yes, sir.

6 Q. And is that a necessary part of knowing how to do
7 your job as an estimator?

8 A. Absolutely.

9 MR. LYLES: My question was simply whether or
10 not people are going to have to go into the units during
11 the course of the repairs to accomplish those tasks?

12 THE COURT: That's what you're talking about?

13 MR. LYLES: Yes, sir.

14 THE COURT: All right. Very good. I overrule
15 your objection.

16 But also remember, Mr. Foreman, ladies and gentlemen
17 of the jury, all testimony, expert or otherwise, is for
18 your evaluation, and it comes down to credibility and
19 basis for it.

20 Very well. You may proceed.

21 Q. Mr. Folk, in your experience, is it good to have
22 children around a construction site?

23 A. No, sir.

24 Q. How long would you anticipate that the owners would
25 be without the use of their exterior decks?

01177

1 A. I would say per unit, I would say at least two to
2 three weeks.

3 Q. And you mentioned scaffolding earlier. What is the
4 purpose of the scaffolding?

5 A. Just to provide access to the elevated work areas.

6 Q. Do people get on scaffolding?

7 A. Absolutely.

8 Q. And would that be necessary for the siding removal
9 and replacement?

10 A. It would be, yes, sir.

11 Q. So there would be workers up on the side of the
12 buildings?

13 A. Correct.

14 Q. And how long would you anticipate that would be the
15 case?

16 A. Per building, several months.

17 Q. And windows that are up on the side of the building
18 would be exposed?

19 A. Yes, sir.

20 Q. So the workers could look in the units?

21 A. That's possible.

22 Q. Mr. Folk, you did your initial estimate, I guess, a
23 couple of years ago; is that right?

24 A. That's correct, back in 2010.

25 Q. And in preparation for this trial you've had an

01178

1 opportunity to review it?

2 A. I have, yes, sir.

3 Q. And have you reviewed the scopes of repair again?

4 A.. Yes, sir.

5 Q. And are you comfortable that you have provided an
6 estimate for the C.S.E. scopes of repair, both the
7 building envelope and to the below-grade areas, that is
8 accurate and reasonable?

9 A. I am, yes.

10 Q. And would Trehel be willing to sign a contract with
11 these owners to implement those scopes of repairs for the
12 total sum of your estimate?

13 A. We would, yes.

14 Q. I think that's all the questions I've got for you
15 right now, Mr. Folk. Thank you.

16 A. Thank you.

17 THE COURT: All right. Mr. Belcher?

18 MR. BELCHER: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. BELCHER:

21 Q. Good afternoon, Mr. Folk. Just a couple of
22 questions. I apologize for the interruption earlier, but
23 it's my understanding that you're here to testify solely
24 as to how much it's going to cost to implement the Hodgin
25 scope of repair; is that correct?

1 A. Yes, sir, that's correct.

2 Q. All right. You prepared an estimate or a series of
3 estimates over the course of time with regard to what
4 it's going to cost to repair, according to your company,
5 one particular scope; correct?

6 A. That's correct.

7 Q. And you're not here to weigh in on the credibility
8 or quality of any other scope or how long it's going to
9 take compared to do it one way as opposed to another?

10 A. I have not -- and I would further say that I have
11 not studied extensively these other scopes of work, so
12 I'm not prepared even to comment on that.

13 Q. So you have not prepared, as we sit here today, what
14 we would call an apples-to-apples estimate of what it
15 would cost to complete a scope prepared by Rick Moore or
16 Moore, Hackney and Associates?

17 A. No, sir. I have not been asked to do that.

18 Q. Have your clients even showed you -- have your
19 clients shown you or asked -- in any way retained you to
20 take a look at any alternative scopes?

21 A. I have seen some estimates. I believe I saw a
22 Watkins estimate some time ago. But, no, I've not been
23 asked to evaluate any other estimate or scope in detail.

24 Q. Sir, I'm going to have your -- and I understand that
25 these numbers may have changed. But just for

01180

1 clarification, we have made an exhibit to your
2 deposition, which is the estimate which is exhibit number
3 -- do you still have the exhibit?

4 A. I do. Twenty-nine, yes, sir.

5 Q. All right. The date that I have on this, which is a
6 blowup, is October 22nd, 2013, which is just a matter of,
7 what, ten days ago?

8 A. Correct. Yes, sir.

9 Q. Has anything changed on that estimate other than
10 your below-grade repairs?

11 A. Yes, it has.

12 Q. All right. Hang on just a second. So I think this
13 is the same thing that you've provided that's an exhibit
14 here. We have below-grade repairs down here which you
15 originally spec'ed at one point four seven four five oh
16 one; is that correct?

17 A. I believe so, yes, sir.

18 Q. What's that number now?

19 A. That is one point three two nine seven one three.

20 Q. One point three two nine seven?

21 A. Seven one three, yes, sir.

22 Q. Okay. Now, so that number went down a hundred
23 thousand dollars?

24 A. That's correct.

25 Q. And that's for a deletion of how many different

01181

- 1 balconies now?
- 2 A. Could you tell me how many are listed there? I have
- 3 twenty-nine on this update.
- 4 Q. Thirty-three here.
- 5 A. Thirty-three, yes, sir.
- 6 Q. So you're only charging twenty thousand dollars a
- 7 balcony? Twenty-five thousand?
- 8 A. Oh, I'm sorry. I apologize. I was looking at the
- 9 below-grade. Are you looking at the ---
- 10 Q. I'm sorry. For below-grade you're charging twenty-
- 11 five thousand dollars a unit?
- 12 A. Is that the number on your document?
- 13 Q. You started at thirty-three on 10/22. Now, what
- 14 number are you down to on quantity?
- 15 A. Okay. I have twenty-nine, and I have a total of one
- 16 three two nine seven one three. So to answer your
- 17 question, I would need a calculator to divide that.
- 18 Q. Okay. Well, you went down four units?
- 19 A. Uh-huh (affirmative).
- 20 Q. All right. About a hundred thousand dollars. Fair
- 21 to say?
- 22 A. That's correct.
- 23 Q. Okay. So about twenty-five thousand dollars a unit
- 24 is what you're charging for below-grade repairs?
- 25 A. Yes.

- 1 Q. And that's pursuant to the scope of repairs provided
2 to you by Derek Hodgin?
- 3 A. Yes, sir. Yes, sir.
- 4 Q. Now, just before I get into it too much deeper,
5 where else have you changed numbers on your estimate?
- 6 A. I have changed the quantity of the rear elevated
7 concrete balconies. There's a total quantity of thirty.
8 And I believe that document shows thirty-seven.
- 9 Q. Okay. So this whole section ---
- 10 A. Yes, sir.
- 11 Q. --- demolition and everything ---
- 12 A. Uh-huh (affirmative).
- 13 Q. --- changes; right?
- 14 A. That's right.
- 15 Q. All right. What does that section break out to now?
- 16 A. I do not have a subtotal for that section.
- 17 Q. All right. Well, we may have to give you a
18 calculator and let you add that up.
- 19 A. Okay. No problem.
- 20 Q. You don't have one handy?
- 21 A. I do not, no, sir. See, I thought I had the day off
22 from estimating.
- 23 Q. If you can, tell me what your current number is on
24 that now.
- 25 A. Okay. It's going to take just a few minutes. Okay.

1 You ready?

2 Q. Yes.

3 A. I have four one one four six four. So four hundred
4 and eleven thousand four hundred and sixty-four dollars.

5 Q. And is that the sum of these in-line items here?

6 A. And the category below that. Yes, sir, all of
7 those.

8 Q. And so that number has gone down or up now?

9 A. It's gone down.

10 Q. Okay. Because there's fewer balconies than you
11 originally thought?

12 A. Absolutely. Yes, sir.

13 Q. And when did you find out that there were seven less
14 balconies out there, nine less balconies out there, than
15 you had originally estimated?

16 A. I actually found that out today.

17 Q. Are there any other numbers that have changed since
18 I got that report a couple of weeks ago?

19 A. No, sir, not to my knowledge.

20 Q. Okay. So your current grand total, according to
21 your exhibit -- can you just give us what your grand
22 total is since it's two different numbers there?

23 A. Yes, sir. If I can just have one second to add
24 those up again. Okay. That's five million seven hundred
25 thirty-eight thousand nine hundred seventy-four dollars.

01184

1 Q. All right. And that's the number you want to
2 implement Derek Hodgins and C.S.E.'s scope of repair?

3 A. Yes, sir.

4 Q. Is that a number that you have spoken with the unit
5 owners at Stoneledge about them paying for you to
6 implement those repairs?

7 A. I have not.

8 Q. All right. When was the last time you were out
9 there?

10 A. It was when I did the below-grade scope of repair
11 estimate. So it's been quite some time ago. That would
12 have been back in ---

13 Q. January of 2012?

14 A. Yes, sir. I've not been out there this year.

15 Q. So almost two years since you've been out to the
16 project?

17 A. Correct.

18 Q. And almost two years since you have any contact with
19 anyone other than the homeowners' attorneys?

20 A. That's correct.

21 Q. All right. So no homeowners called you up and said,
22 "Hey, come fix my foundation"?

23 A. No, sir.

24 Q. Or fix my roof or fix my balcony?

25 A. No, sir.

1 Q. Do you have any indication at this time from any
2 single homeowner that they're going to hire you or your
3 company to do this work if they get enough money from
4 this jury to do it?

5 A. No, sir.

6 Q. You're being proffered as a cost-estimating expert
7 for the plaintiffs though?

8 A. That's right.

9 Q. Okay. But you haven't talked to them?

10 A. I've been working through their attorney and
11 responding to his requests.

12 Q. Thank you. You've been working through their
13 attorney to come up with a five point seven million
14 dollar number to repair these buildings; right?

15 A. That's right.

16 Q. Okay. And you haven't reviewed any alternative
17 scopes?

18 A. I have not.

19 Q. You haven't priced any alternative scopes?

20 A. No, sir.

21 Q. Now, you remember that you and I sat down and I took
22 your deposition for a few minutes probably a year and a
23 half ago; right?

24 A. I don't believe it's been quite that long ago. But
25 I do remember, yes, sir.

01186

- 1 Q. And you and I talked about surgical repairs?
- 2 A. Yes, sir.
- 3 Q. And your company has done surgical repairs before?
- 4 A. We have.
- 5 Q. All right. And you've done them with great success?
- 6 A. Yes.
- 7 Q. All right. But you haven't offered to, the lawyer
- 8 or the homeowners, of any alternative surgical repair
- 9 that would be more affordable than this that would fix
- 10 these buildings?
- 11 A. Correct.
- 12 Q. You've never worked with J.L. Watkins, have you?
- 13 A. I have not, no, sir.
- 14 Q. Have you ever worked with his company or his daddy's
- 15 company?
- 16 A. I don't believe so.
- 17 Q. All right. You made some reference about unethical
- 18 or low bidder fly-by-night contractors. You wouldn't
- 19 suggest that Mr. Watkins' company is either of those
- 20 things, would you?
- 21 A. No, sir.
- 22 Q. All right. You know he's out there doing work right
- 23 now?
- 24 A. I do not know that.
- 25 Q. Okay. So you don't know that he's out there

1 repairing the basement foundations of the homeowners that
2 are in this courtroom?

3 A. No, sir. And I don't live at Stoneledge.

4 Q. Well, I understand that, sir.

5 A. And I don't frequent the site.

6 Q. You don't?

7 A. No.

8 Q. Okay. I'm just asking you if you understand that
9 Mr. Watkins is making those repairs right now.

10 A. I do since you've informed me of that, yes.

11 Q. All right. We've talked a little bit about scope of
12 repairs. We've talked a little bit about contingencies.

13 Should the homeowners decide for some reason now to use
14 your company, will you sign a contract at five point
15 seven three eight nine seventy-four guaranteeing that
16 every problem out there at Stoneledge whether seen or
17 unforeseen will be corrected?

18 A. No.

19 Q. Okay. Let's take a look at some of your cost items
20 here. You have -- you're going to remove -- under this
21 estimate, you're going to remove seven hundred eleven
22 squares of roof shingles?

23 A. Yes, sir.

24 Q. That equates to seventy-one thousand square feet?

25 A. Yes, sir. Seventy-one thousand one hundred.

- 1 Q. How many square feet of roof are out there total?
- 2 A. Seventy-one thousand one hundred.
- 3 Q. Do you understand that Mr. Hodgins has testified that
- 4 less than all the roofs have to be removed here earlier
- 5 in this trial?
- 6 A. Yes.
- 7 Q. Okay. So this number is going to come down too,
- 8 isn't it?
- 9 A. I'm not aware of that.
- 10 Q. Well, if he has testified that less than all of the
- 11 roofs have to come off and your estimate suggests that
- 12 you're going to charge them for taking all of the roofs
- 13 off, doesn't that number need to come down to comport
- 14 with Mr. Hodgins's scope of repair?
- 15 A. Well, his scope of repair that the estimate is based
- 16 on has me removing all the shingles.
- 17 Q. Okay. So if he's changed his opinion, you're going
- 18 to have to change your estimate to go with the scope?
- 19 A. Yes. If he instructs me that not all of them have
- 20 to come off, that's fine. That quantity could change.
- 21 Q. Okay. Tell me about your pricing. What kind of
- 22 roof sheathing are you putting on these buildings where
- 23 you have to go back and replace it?
- 24 A. Five-eighths O.S.B.
- 25 Q. Is that the same as nineteen thirty-seconds? I'm

1 not as good at math. I'm sorry. About the same; right?

2 A. It's close.

3 Q. Okay. What are you charging per sheet for the
4 materials, just for materials for that O.S.B.?

5 A. Materials, it's about twenty dollars per sheet.

6 Q. All right. Now, your company is -- what did you
7 say? -- thirty-four, forty million, fifty million dollar
8 company a year?

9 A. Yes, sir.

10 Q. All right. And you have access to all kinds of
11 supplying resources and wholesalers for materials and all
12 that stuff?

13 A. Absolutely.

14 Q. So you don't have to go to Lowe's like I do and get
15 a piece of plywood to put on a roof; right?

16 A. That's right.

17 Q. You get a better price?

18 A. Well, sometimes.

19 Q. You get it wholesale?

20 A. Yes, sometimes.

21 Q. You get a contractor discount?

22 A. Sometimes.

23 Q. Even when you go to Lowe's, you would get a ten
24 percent contractor discount because that's just the way
25 they do it there; right?

- 1 A. Right. Right.
- 2 Q. Have you looked on Lowe's dot com lately to see how
3 much a piece of O.S.B. sheathing cost?
- 4 A. I have not.
- 5 Q. Would it surprise you that a four by eight sheet of
6 nineteen thirty-seconds O.S.B. sheathing cost fifteen
7 dollars and ninety-six cents at Lowe's?
- 8 A. Not at all.
- 9 Q. And you could get that for a dollar fifty, a dollar
10 sixty, less than that because you've got a general
11 contractor's license; right?
- 12 A. If you say so.
- 13 Q. Well, have you ever used your contractor's license
14 at Lowe's?
- 15 A. No, sir. I don't shop at Lowe's for large projects.
- 16 Q. Right.
- 17 A. But ---
- 18 Q. You can get them for a better deal at wholesale;
19 right?
- 20 A. --- I'll take your word for it.
- 21 Q. All right. But, now, what's the price that you're
22 going to charge these homeowners? Twenty dollars a
23 sheet?
- 24 A. Well, yes. And the difference is, if I might
25 explain that, the O.S.B. market varies wildly. A few

1 years ago you probably could have got that for twelve
2 dollars a sheet. So if you can tell me exactly when we
3 would be released to start work, I could put an exact
4 today's price.

5 Q. Well, today, sir, we're here because the jury has to
6 decide how much money the Bostics and these other people
7 have to pay to fix these buildings.

8 A. Absolutely.

9 Q. So we don't have that luxury. And if I tell you
10 that you can get this same piece of plywood for about
11 four dollars more [sic] than you're telling the
12 homeowners you're going to charge them for it, are you
13 going to get that cheaper piece of plywood even if you
14 have to go to Lowe's and shop for your big project?

15 A. No, because I won't be buying it today. I'll be
16 buying it in a year or whenever I have a contract to
17 proceed with the work.

18 Q. Okay. So you can't sit here today and say whether
19 the plaintiffs are going to have to pay twenty dollars or
20 fifteen dollars or twelve dollars for O.S.B. sheathing?

21 A. I can't. Based on the O.S.B. market, I don't see it
22 being much cheaper than that.

23 Q. But you think it's fair for Joe and Jeff Bostic to
24 pay top dollar under your estimate for a piece of
25 sheathing that these people may or may not buy a year

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- 1 from now?
- 2 A. Yes.
- 3 Q. You do?
- 4 A. Yes.
- 5 Q. Okay. Well, let's go to the next one. How much
- 6 fluctuation is there in the shingle market?
- 7 A. Not as much. There are increases.
- 8 Q. What's your cost per square for shingles? Material?
- 9 A. I have one twenty-five a square.
- 10 Q. All right. Three bundles to a typical square?
- 11 A. Correct. Yes, sir.
- 12 Q. All right. I went to Home Depot dot com this time.
- 13 Lifetime Timberline natural shadow charcoal shingles.
- 14 You're familiar with that brand?
- 15 A. I'm familiar with Timberline, yes.
- 16 Q. It's one of the most widely-used shingles in the
- 17 world -- in the country, if not North America?
- 18 A. Right.
- 19 Q. All right. Twenty-nine ninety a bundle at Home
- 20 Depo?
- 21 A. Right.
- 22 Q. Okay. Times three for a square?
- 23 A. Yeah.
- 24 Q. So that's less than a hundred dollars a square.
- 25 A. Right.

1 Q. For materials?

2 A. Correct.

3 Q. But you're going to charge them how much a square?

4 One twenty-five?

5 A. One twenty-five. Okay. What about all of your
6 fasteners, your flashing, all those other items that ---

7 Q. We don't have a lot of rules, but one of them is is
8 that I ask the question, sir. Do you understand that?

9 A. Yes, sir. Yes, sir.

10 THE COURT: If you will, let's ...

11 MR. BELCHER: All right.

12 Q. Now, down here you have installing thirty-pound
13 felt, flashing. And I'm not going to pick on you too
14 much about your unit cost because I think it's pretty
15 clear that it's high. But I do need to spend a little
16 time with you with your contingencies. Okay?

17 THE COURT: Also, one of the things we don't
18 have in questioning is editorializing. You can save that
19 for argument.

20 MR. BELCHER: I'll try to limit myself, Your
21 Honor. I apologize.

22 THE COURT: Thank you, sir.

23 Q. All right. We need to -- what I'd like to do is I'd
24 like to ask you about the contingencies that you have in
25 this estimate. Can you pull those up, please?

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- 1 A. Sure. Yes, sir.
- 2 Q. All right. You have two contingencies in this
- 3 estimate. Fair?
- 4 A. I haven't counted them recently, but ---
- 5 Q. I'm not talking about allowances, just
- 6 contingencies.
- 7 A. Yes, sir. Yes, sir. Correct.
- 8 Q. All right. You have what we would call in this
- 9 business, an above-the-line contingency; correct?
- 10 A. Correct.
- 11 Q. And what is your current above-the-line contingency?
- 12 A. That is for unforeseen conditions.
- 13 Q. And on this document, it says, three seventy-nine
- 14 seven forty-three. Has that changed?
- 15 A. It has. It is now three sixty-nine zero seven
- 16 five.
- 17 Q. Okay. So you've got three sixty-nine in above-the-
- 18 line contingencies; correct?
- 19 A. Correct.
- 20 Q. All right. Now, you also have what we call below-
- 21 the-line contingency?
- 22 A. Correct.
- 23 Q. And that number will have changed as well; correct?
- 24 A. That is correct.
- 25 Q. So what is the total of those two contingencies?

1 Cash dollars, not percentages.

2 A. I'll need my calculator again. That's asking for
3 your pass code.

4 Q. It's my anniversary.

5 A. I'm glad I don't know that.

6 THE COURT: Let's see, Madam Clerk, do you have
7 a ---

8 THE CLERK: I do.

9 THE COURT: It looks like it's more my style.

10 THE WITNESS: Yeah, I like that a little better
11 anyway. Yeah.

12 MR. BELCHER: Thank you, Madam Clerk.

13 A. Okay. Let me just add these two numbers for you.

14 Okay. The total is four seven nine seven nine seven.

15 Q. All right. So you have a total of four hundred
16 seventy-nine thousand dollars in contingencies?

17 A. Yes, sir.

18 Q. On a five point seven three eight nine seven four
19 million dollar estimate?

20 A. Yes, sir.

21 Q. And even at that, with all that contingency and all
22 that extra price and this number, you're unwilling to
23 sign a contract saying that you will fix every single
24 issue at Stoneledge seen and unforeseen for these people?

25 A. Yes.

1 Q. All right. Thank you, sir.

2 MR. BELCHER: No further questions.

3 THE COURT: Mr. Anderson?

4 MR. ANDERSON: I have no questions, Your Honor.

5 Your Honor, I have Mr. Martin here. May I step out of
6 the courtroom for a minute?

7 THE COURT: Certainly.

8 MR. ANDERSON: Thank you.

9 THE COURT: Well, let's see. We've been here
10 about an hour and a half. Do we need to take a break?
11 Let's do that.

12 Let's take a very short break, and when you're ready
13 to come back, knock on the door. Again, please do not
14 undertake the discussion of the case among yourselves in
15 any way.

16 (WHEREUPON, the jury exited the open court at
17 approximately 2:58 p.m.)

18 THE COURT: You understand you're under oath,
19 sir?

20 THE WITNESS: Yes, sir.

21 THE COURT: You can stand down and stretch your
22 legs.

23 THE WITNESS: Yes, sir. Thank you.

24 THE COURT: Do not discuss your testimony with
25 anyone.

1 THE WITNESS: Yes, sir.

2 THE COURT: Very good. Thank you, sir.

3 All right. Anything from the plaintiff before we
4 take a break?

5 MR. LYLES: No, sir.

6 THE COURT: Anything from the defendants?

7 MR. BELCHER: No, Your Honor.

8 THE COURT: All right. Let's take a short
9 break.

10 (WHEREUPON, court stood at recess for a short
11 break.)

12 THE COURT: All right. Anything from the
13 plaintiff before we bring the jury back?

14 MR. LYLES: No, Your Honor.

15 THE COURT: From the defendants?

16 MR. BELCHER: None, Your Honor. Thank you.

17 THE COURT: Very good.

18 Ask the jury to join us, please.

19 (WHEREUPON, the jury entered the open court at
20 approximately 3:15 p.m.)

21 THE COURT: All right. Let the record show or
22 reflect that the jury and alternate are in the jury box.

23 Mr. Foreman, ladies and gentlemen of the jury, we'll
24 continue with the examination of the witness.

25 And who is it? Mr. Imhoff? Let's see. Mr.

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1 Anderson? I think it is Mr. Anderson.

2 MR. ANDERSON: We have no questions, Your
3 Honor.

4 THE COURT: Now I think it is Mr. Imhoff.
5 Anything from this witness?

6 MR. IMHOFF: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. IMHOFF:

9 Q. Hello, Mr. Folk.

10 A. Hello.

11 Q. Let me make sure that I understand. And I think the
12 jury understands the scope of what Mr. Hodgins is asking
13 for. I want to make sure the jury understands what
14 you've quoted. And that is to remove every exterior
15 component of these buildings from the very tippy top all
16 the way down to the very, very bottom; is that right?

17 A. That's correct, yes.

18 Q. Okay. Roof shingles, siding, stone, windows, doors,
19 all the way down to the below grade; right?

20 A. That's correct.

21 Q. All right.

22 MR. IMHOFF: What was the ruling on moving
23 this? Can I move this? I don't think the jury can see
24 this, Your Honor. Can I move it?

25 THE COURT: That would be fine.

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1 Q. Do you have this estimate in front of you that you
2 could sort of follow along?

3 A. Yes, sir. Yes, sir.

4 Q. Now, you have what I consider to be removal of the
5 exterior component, which would leave the structures
6 complete naked, bare; right? Down to plywood or O.S.B.?

7 A. Correct, yes.

8 Q. And then under each category, roofing, exterior,
9 balconies. Then you have places which I consider to be a
10 little bit different which is when we get it off we're
11 going to evaluate what's there and fix that. Is that
12 fair?

13 A. That's fair, yes.

14 Q. For instance, at two under roofing you have, "remove
15 roof sheathing." And that's a repair; right?

16 A. That's correct, yes.

17 Q. All right. And, again, for the benefit of the jury
18 -- I don't know if the jury knows all these construction
19 terms -- sheathing is what?

20 A. The sheathing is the structural surface of the
21 actual roof. So you peel the shingles off, remove those,
22 peel off the felt paper, underlayment. And then you're
23 left with plywood or O.S.B. In this case, O.S.B. which
24 is just oriented strand board. And it is nailed or
25 sometimes screwed to the actual roof framing trusses. So

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1 it forms the structural deck for the roof.

2 Q. Okay. It's those big pieces of plywood that are

3 flat, about that thick ---

4 A. Yes, sir.

5 Q. --- and then you put on the stuff? Okay.

6 A. Yes, sir.

7 Q. All right. And so where you have two, "remove roof

8 sheathing, fifteen percent."

9 A. Uh-huh (affirmative).

10 Q. That is your guess at what is damaged up there and

11 needs to be removed; right?

12 A. That's correct.

13 Q. You don't know that that needs to be done; right?

14 A. I know the roof sheathing needs to be removed. The

15 exact quantity is an unknown.

16 Q. Okay. So you're guessing at that fifteen percent?

17 A. It's an educated guess, yes.

18 Q. All right. And I thought I heard you say earlier

19 that you're charging twenty dollars per sheet of that

20 board; is that right?

21 A. That's correct.

22 Q. But the first time you did this estimate, you said

23 you could have got it for twelve dollars?

24 A. No. And I may have been talking out of turn. What

25 I'm telling you is O.S.B., oriented strand board, in

1 particular, the price of O.S.B. is a function of the
2 economy and the supply and demand. Okay? As the housing
3 market continues, you'll see the price of -- continues to
4 rebound, you'll see the price of O.S.B. skyrocket. The
5 same is true if a hurricane blows through. You'll -- in
6 fact, you might not even be able to find it when you need
7 it.

8 Q. I think the jury understands, Mr. Folk, that prices
9 change. Have you ever changed this twenty dollar
10 material cost here for roof sheathing in any of the times
11 that you have prepared this estimate?

12 A. I don't recall changing that, no.

13 Q. Okay. So if it was cheaper the first time you did
14 this, you were actually up-charging these homeowners more
15 on your first estimate than it actually cost to get that
16 material; right?

17 A. I disagree.

18 Q. Well, I understand. I'm relying on your testimony
19 where you said a couple years ago it was twelve dollars a
20 sheet.

21 A. Right. What I'm doing is trying to -- what I'm
22 trying to do -- and this is what makes my job as an
23 estimator difficult. I'm trying to arrive at the price
24 of a sheet of O.S.B. at the time I'm going to need it on
25 the job site based on the market. So for me, twenty

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1 dollars is a safe number. It could be less; it could be
2 more when I actually go buy it.

3 Q. But as far as you know since you've been estimating
4 this, it's never been twenty dollars, has it, Mr. Folk?

5 A. No.

6 Q. All right. So the next one, replace roof sheathing.
7 And that's fixing damage to that deck and that roof
8 decking up there if you find that it needs to be done.

9 Again, you've guessed that fifteen percent of the roof
10 decks are going to be done; right?

11 A. Yes.

12 Q. Okay. All right. And then I'm going to go through
13 these a little bit faster.

14 A. Sure.

15 Q. But you've got, once you remove everything, we're
16 talking about the damaged stuff you expect to find. So
17 roofing you've got two and three, remove and replace roof
18 sheathing. And then as you go down -- well, I've lost my
19 notes. Hold on. There's structural truss repair
20 allowance?

21 A. That's correct.

22 Q. At six. And that's -- you take the sheathing off,
23 and then there's a roof truss, a two-by-four that holds
24 up the this whole thing?

25 A. Correct, yeah.

1 Q. And you put twenty-three thousand dollars there?

2 A. Correct.

3 Q. Is that another guess of what you're going to find?

4 A. It's an educated guess, yes.

5 Q. All right. And we move down a little bit. We've
6 got exterior wall cladding systems. And number eight --
7 well, let me ask you this. One through seven, now,
8 that's all to remove the exterior components of these
9 buildings; right?

10 A. That's correct.

11 Q. And then the fix is remove damaged O.S.B. sheathing,
12 twenty-five percent wall area?

13 A. Yeah.

14 Q. So you did some calculation of how many walls and
15 how big they are out there; right?

16 A. Correct.

17 Q. And then you took that number and you reduced it
18 twenty-five percent?

19 A. Correct.

20 Q. And gave a cost for that of twenty-two thousand
21 dollars?

22 A. That's correct.

23 Q. All right. And, again, you guessed at twenty-five
24 percent wall?

25 A. Well, it's an educated guess based on the evidence

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- 1 that I was provided. That's what we have to remember.
- 2 Q. All right. And then you go down. And under B,
- 3 replacement repairs to wood stud framing; right?
- 4 A. Uh-huh (affirmative).
- 5 Q. And two, replace wall sheathing; right?
- 6 A. Correct.
- 7 Q. And now, number one is actually an allowance of
- 8 forty-six thousand dollars. Is that another guess of how
- 9 much -- how many repairs you're going to need to do?
- 10 A. It's an educated estimate, yes.
- 11 Q. Okay. And replace the wall sheathing, same thing.
- 12 As you say, an educated guess; right?
- 13 A. Correct.
- 14 Q. You could find less; you could find more?
- 15 A. Correct.
- 16 Q. All right. And then I'm going to move down a little
- 17 bit faster. I'm going to try to get through this. Down
- 18 at rear elevated concrete balconies, two, three and four.
- 19 A. Uh-huh (affirmative).
- 20 Q. Two, three and four, remove damaged subfloor; right?
- 21 A. Correct.
- 22 Q. Inspect and remove damaged framing; right?
- 23 A. Correct.
- 24 Q. And then demo rotten T&G ceiling?
- 25 A. Correct.

1 Q. Okay. Now, it looks to me that you've got the same
2 amount, twelve thousand square feet, as you do for
3 concrete topping and damaged subfloor; is that right?

4 A. That's correct.

5 Q. Okay. Now, what kind of material is that, this
6 tongue and grove ceiling, that we're talking about?

7 A. That's like a pine one-by-six or one-by-eight
8 ceiling.

9 Q. It's pine, Mr. Folk?

10 A. I believe it's pine.

11 Q. Is it cedar, Mr. Folk?

12 A. Honestly, I don't recall.

13 Q. If it's cedar, why do you use cedar on buildings,
14 Mr. Folk?

15 A. Why do I use cedar on buildings?

16 Q. Why would a builder use cedar?

17 A. Well, it turns gray and looks nice after it's out in
18 the weather for some period of time, if you like the look
19 of cedar.

20 Q. Cedar stands up to the weather better than pine,
21 doesn't it?

22 A. It can, yes.

23 Q. But you've estimated that you're going to have to
24 remove that entire or all of those entire cedar tongue
25 and grove ceilings; right?

1 A. Well, it has to be removed to fix the framing.

2 Q. Do you not replace it?

3 A. That's right.

4 Q. So you're going to throw it all away?

5 A. Well, you know, you can try to pull all the nails
6 out of the splintered, broken pieces, and you may be able
7 to use some of it.

8 Q. All right. So -- and then you have down here
9 similar -- and I apologize to the jury. I keep standing
10 in front of it -- install new treated subfloor at two and
11 install -- that's right. Install new tongue and groove
12 ceiling; right?

13 A. Uh-huh (affirmative). Correct.

14 Q. All right. And if you add all of those items up,
15 you get about two hundred and fifty thousand to do those
16 repairs?

17 A. That's sounds right.

18 Q. Okay. So to repair the damage underneath these
19 exteriors is only about two hundred and fifty thousand
20 dollars; right?

21 A. Correct.

22 Q. Okay. Now, every one of those things that we just
23 talked about is something that you're not sure is there;
24 correct? Or how much is there. Is that fair?

25 A. With the rear balconies? Or can you repeat the

1 question?

2 Q. Every one of the things we're talking about, fixing
3 wall sheathing, roof sheathing, tongue and groove,
4 framing, trusses, all of those things are guesses,
5 according to you, of what you are going to find when you
6 actually take the exteriors off; right?

7 A. Well, they're based on the photographs and repair
8 documents that show issues with those items. You're
9 correct in that we don't know the exact quantity.

10 Q. And those are called contingencies; right?

11 A. You could call it a contingency, or you could call
12 it an allowance.

13 Q. An allowance, contingency, whatever you'd like to
14 call it.

15 A. Sure.

16 Q. It's your estimate?

17 A. Yes, sir.

18 Q. All right. And you have them in, these
19 contingencies or allowances, in every one of these
20 categories; right?

21 A. That's correct.

22 Q. So you factored that contingency or allowance or
23 unknown into every one of these categories; right?

24 A. That's correct.

25 Q. And then you did it again at the bottom? Unforeseen

- 1 conditions allowance ten percent. Right, Mr. Folk?
- 2 A. That's correct.
- 3 Q. So you did it twice; right?
- 4 A. Right. Would you like for me to elaborate on why?
- 5 Q. Well -- so you know from your best guess of what
- 6 you're going to find underneath the roof, underneath the
- 7 siding, underneath the stone. And then you put an
- 8 additional ten percent on top of it; right?
- 9 A. That's correct.
- 10 Q. Now, Mr. Folk, in doing this estimate you relied on
- 11 Mr. Hodgin's investigation; right? His forensic
- 12 investigation?
- 13 A. Yes, sir.
- 14 Q. And his repair scope; right?
- 15 A. Yes.
- 16 Q. And you've been out there ten times, I think you
- 17 said, in three years; right?
- 18 A. At least.
- 19 Q. At least?
- 20 A. Right.
- 21 Q. And you've even looked at aerial photographs; right?
- 22 A. Yes, sir.
- 23 Q. Took measurements when you were out there?
- 24 A. No, not necessarily.
- 25 Q. You didn't take any measurements while you were out

1 there?

2 A. I did my quantity takeoffs from the Eagle View
3 reports and from the drawings.

4 Q. All those things went into your estimate; right?

5 A. Yes, sir.

6 Q. The estimate that you just testified about that this
7 is what Trehel would charge to do these repairs; right?

8 A. Yes, sir.

9 Q. And that this is a fair estimate that this jury can
10 consider and those homeowners to pay; right?

11 A. Yes, sir.

12 Q. And all of that work, all of the four-year
13 investigation done by Derek Hodgkin, all the times he was
14 on site, all the times you were on site, the aerial
15 photographs, is it your testimony this afternoon, Mr.
16 Folk, that until today you and Mr. Hodgkin have missed
17 seven twenty-foot-high ten-thousand-square-foot decks?

18 A. Again, that information was not provided to me when
19 I did the original estimate. I was provided the drawings
20 which showed decks on all units, and that's how I
21 proceeded with the estimate. And, no, I did not -- when
22 I went out there, I did not count them all.

23 Q. Mr. Folk, did you revise this estimate today to
24 remove several decks?

25 A. I have, yes.

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1 Q. Some four years after Mr. Hodgins' investigation and
2 three years after yours, you missed ten-thousand-square-
3 foot decks; correct?

4 A. If you want to state it that way, yes.

5 Q. Thank you, Mr. Folk.

6 THE COURT: Mr. Vick? Mr. Vick?

7 MR. VICK: No questions, Your Honor.

8 THE COURT: All right. Mr. Hemphill?

9 MR. HEMPHILL: No questions, Your Honor.

10 THE COURT: Redirect?

11 MR. LYLES: Yes, sir. Thank you very much.

12 REDIRECT EXAMINATION

13 BY MR. LYLES:

14 Q. Mr. Folk, you were asked if you were given scopes of
15 work by the defendants developed by defense experts to
16 price. Do you remember that?

17 A. Yes, sir.

18 Q. And you were not asked to do that?

19 A. I was not asked to price any other scopes of work,
20 no.

21 Q. Would Trehel be willing to price a scope and willing
22 to sign a contract with these owners to do a scope of
23 work that Trehel knew did not fix life and fire safety
24 issues at the project?

25 A. No, sir.

1 Q. Mr. Belcher asked you some questions about Watkins
2 Services and foundation work out there. Do you recall
3 that?

4 A. I do, yes, sir.

5 Q. Do you know whether or not anyone at Trehel was
6 called by these owners and asked if Trehel would come out
7 and do temporary repairs to four foundation walls?

8 A. I do not, no, sir.

9 Q. Is that something that you think Trehel would be
10 interested in doing at this time, emergency repairs to
11 four foundation walls?

12 A. We would consider that work if that were requested
13 by the homeowners, yes.

14 Q. You were asked a question about the price for
15 shingles.

16 A. Yes, sir.

17 Q. And I think Mr. Belcher indicated that he had seen
18 some prices at Home Depot?

19 A. Yes, sir.

20 Q. In your estimate under roofing, you have a price for
21 shingles; is that right?

22 A. That's correct.

23 Q. And that price includes what?

24 A. That includes all items necessary to install those
25 shingles. You've got flashings, drip edge, counter

1 flashings, sealants, nails and so forth. You've got
2 ridge vent. There's a lot more that goes into it than
3 just buying three bundles of shingles from Lowe's.

4 Q. And have you priced this job as you estimate other
5 jobs for Trehel?

6 A. Yes, sir.

7 Q. And as you did for Able?

8 A. Yes, sir.

9 Q. And in a manner that's customary in the industry?

10 A. Yes, sir.

11 Q. And what you've prepared, it's an estimate; is that
12 right?

13 A. That's correct.

14 Q. It's not an invoice?

15 A. No, sir.

16 Q. Do you recall going to Stoneledge and actually
17 meeting the members of the homeowners association board?

18 A. I do, yes. Yes.

19 Q. And do you recall when that was?

20 A. I remember an initial meeting shortly after the
21 original estimate for the original repair scope was
22 completed in 2010. And I believe that was with Bob and
23 yourself out on site.

24 Q. Now, you were asked a question of whether or not of
25 the estimated price of over five million dollars you

1 would guarantee that all of the repairs, that all of the
2 problems in these building would be completely fixed.

3 And I think you said that you would not guarantee it; is
4 that right?

5 A. Let me be clear. We're willing to perform the scope
6 of work per C.S.E.'s documents. I believe -- the
7 question led me to believe that would I do anything
8 necessary, anything anyone wanted. The answer is, no.

9 Q. For the price that you have estimated, if Trehel was
10 selected to do this work, would you guarantee that all of
11 the damages associated with improperly installed shingles
12 was repaired?

13 A. Yes, sir.

14 Q. Would you guarantee these owners that all problems
15 associated with improperly installed flashing were
16 repaired?

17 A. Yes, sir.

18 Q. Would you guarantee to these owners that all
19 problems associated with deck-to-wall intersections have
20 been repaired?

21 A. Yes, sir.

22 Q. Would you guarantee to these owners, if they
23 selected you to do this work for the sum that you've
24 estimated, that their foundation walls would be properly
25 waterproofed?

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1 A. Absolutely.

2 Q. Would you guarantee to these owners that all of the
3 windows at that project would be properly installed when
4 you left the job site?

5 A. Yes, sir.

6 Q. And would you guarantee to these owners that all
7 damages that resulted from improperly installed windows
8 would be repaired?

9 A. Yes, sir.

10 Q. And would you do the same thing for the doors at
11 this project?

12 A. I would.

13 Q. And then would you guarantee to these owners that
14 the shingles that you have installed have been properly
15 installed?

16 A. We would.

17 Q. And would you guarantee to these owners that the
18 siding that you've installed has been properly installed?

19 A. Absolutely.

20 Q. And that the stone that has been installed by your
21 company was properly installed?

22 A. Yes, sir.

23 Q. And would you represent and guarantee to these
24 owners that the flashing that you install was properly
25 installed?

1 A. Yes, sir.

2 Q. And would you guarantee to these owners that the
3 waterproofing that you install is properly done?

4 A. Yes.

5 Q. And would you represent and guarantee to these
6 owners that the firewalls at their units have been
7 properly constructed and comply with the code?

8 A. We would.

9 Q. I think that's all the questions I've got for you.

10 Thank you.

11 A. Thank you.

12 THE COURT: Any recross?

13 MR. BELCHER: Nothing else, outside of what
14 we've already talked about, Your Honor.

15 THE COURT: All right. You may step down.

16 Thank you, sir.

17 All right. You may call your next witness.

18 MR. LYLES: The plaintiff calls Bob White.

19 Is Bob here? Did he step out?

20 I surprised Mr. White. He didn't realize he was
21 next. But the time he's got to get home today, I need to
22 call Mr. White.

23 (WHEREUPON, court stood at ease.)

24 MR. LYLES: Your Honor, since we can't find Mr.

25 White ---

1 THE BAILIFF: They're checking downstairs.

2 THE COURT: Yes, sir.

3 MR. LYLES: --- I'm happy to call J.R. Watkins.

4 THE COURT: Very well.

5 Mr. Watkins?

6 MR. LYLES: Is he here? There he comes.

7 We call, J.R. Watkins, Your Honor.

8 (WHEREUPON, the witness was duly sworn.)

9 THE COURT: All right. If you would, please,
10 sir, give us your full name, spelling your last name for
11 the record.

12 THE WITNESS: Steve Wayne Watkins, II.

13 THE COURT: Very good. Thank you, sir.

14 **STEVE WAYNE WATKINS, II,**

15 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

16 **DIRECT EXAMINATION**

17 BY MR. LYLES:

18 Q. How are you doing, Mr. Watkins?

19 A. Doing fine.

20 Q. Good deal. You dress up pretty nice. Your dad
21 would be proud.

22 A. Thank you very much. It happens from time to time.

23 Q. Mr. Watkins, two in row. This is your first trial
24 to testify in too, isn't it?

25 A. Yes, sir.

1 Q. Just relax.

2 A. I'm nervous.

3 Q. Mr. Watkins, where are you employed?

4 A. Watkins Services Incorporated.

5 Q. And how long have you been employed by Watkins?

6 A. By a Watkins company?

7 Q. Yes, sir.

8 A. Since I was a teenager.

9 Q. And who started Watkins?

10 A. Actually, my grandfather, Jesse James Watkins. And
11 he, sort of like the mafia, he pulled my dad into it, and
12 my dad pulled me into it.

13 Q. How long was your dad with the company?

14 A. Since 1978.

15 Q. And you've been doing work for Watkins Services
16 since, I think you said, you were sixteen?

17 A. Yes, sir.

18 Q. I suspect your dad probably started you well before
19 that you just don't want to say it?

20 A. Yeah, he did.

21 Q. I figured he probably did. What type of work does
22 Watkins Services do?

23 A. We are -- I'm a licensed unlimited general
24 contractor. But we mainly -- we can do anything. We've
25 done new builds. But we primarily specialize in multi-

1 family, multi-building, large repair projects and
2 restorations.

3 Q. And has that typically been the work of Watkins?

4 A. Yes, sir.

5 Q. And are y'all known in the area for doing remedial
6 repairs?

7 A. Which area?

8 Q. Well, in the area of South Carolina.

9 A. Yes, sir, we are. And beyond. And beyond.

10 Q. Meaning repair to buildings in distress?

11 A. Yes, sir.

12 Q. And have y'all worked on lots of multi-family
13 projects?

14 A. We have.

15 Q. Have you worked on lots of projects like Stoneledge?

16 A. We have.

17 Q. And that's something that you've been involved with
18 the entire time that you've been with Watkins Services?

19 A. Yes, sir.

20 Q. And were you hired as an expert in this case?

21 A. I was.

22 Q. And who hired you?

23 A. Alan Belcher. My dad was originally hired, and, as
24 you know, he passed back in January. So I took over for
25 him.

1 Q. So you were retained by the lawyer for Bostic; is
2 that right?

3 A. Yes, sir.

4 Q. Or your firm was retained by Bostic?

5 A. Yes, sir.

6 Q. Now, have you worked with Mr. Belcher before, or had
7 your firm?

8 A. I'm sure he has. I'm sure my father has, yes, sir.

9 Q. Okay. And how about Mr. Imhoff's firm? Do you know
10 if Watkins Services did any work for Mr. Imhoff's firm?

11 A. I believe my dad has also, yes, sir.

12 Q. Okay. And Mr. Anderson's firm, J.J. Anderson's
13 firm?

14 A. Yeah. My dad and myself, yes, sir.

15 Q. Okay. And have y'all done work for my firm?

16 A. Yes, sir.

17 Q. And for me?

18 A. Yes, sir.

19 Q. Do you know how long I did work with your dad?

20 A. I think it's been more than fifteen years.

21 Q. A long time. How would you describe the type of
22 project that Stoneledge is?

23 A. It's a eight-building multi-townhome unit repair
24 project.

25 Q. And are y'all familiar with the codes that are

1 applicable to projects like Stoneledge?

2 A. Yes, sir.

3 Q. And the type of construction that exists at
4 Stoneledge?

5 A. Yes, sir.

6 Q. And the products and materials that were utilized to
7 build Stoneledge?

8 A. Yes, sir.

9 Q. And are y'all familiar with things like fire rating
10 requirements and other unique aspects of townhomes?

11 A. Familiar with it. I usually have to look it up.

12 But, yes, sir.

13 Q. And is that something that you do?

14 A. Yes, sir.

15 Q. When you have a question, you look things up?

16 A. Before we start a project, usually we have a design
17 professional that assists us. But we also like to
18 contact the local building official and explain to them
19 what we're doing before we pull our permits. Walk into
20 it and make sure there's nothing that was overlooked
21 before we begin as far as making sure everything is code
22 compliant.

23 Q. Is pulling a permit a significant event to you as a
24 general contractor?

25 A. Yes, sir.

1 Q. What's significant about that to you?

2 A. Well, the town or county likes to get paid, and it's
3 the law. And it's important for us when we're doing
4 projects to make sure that everything is legal. We try
5 to make all of the repairs. We try to stick to the scope
6 that the design professional lays out and make sure that
7 we do everything within the code, and the code official
8 assists us in doing that.

9 Q. Pulling a permit, in your experience, obligates you
10 as a general contractor in certain ways to the county?

11 A. Yes, sir.

12 Q. And to the public?

13 A. Yes, sir.

14 Q. In your work at Watkins Services, have you gotten
15 some experience being an estimator?

16 A. Yes, sir.

17 Q. And tell me about that.

18 A. Well, my dad did the construction litigation side
19 with -- I think everybody knows Robert Ayers. He's our
20 in-house estimator. And what a lot of people may not
21 know is that the numbers that Robert Ayers and my dad used
22 were numbers that I put together for bids. So those are
23 real-world historical numbers that we use.

24 Q. Is your role in the company more on the bidding side
25 or the construction side?

1 A. Up until my dad passed, I was director of field
2 operations, and I helped manage all the projects that we
3 had. And I also submitted all the bids. I put the bids
4 together, and I submitted them.

5 Q. And how many jobs would you say that you've
6 estimated in your career? And I would limit that to jobs
7 like Stoneledge, multi-family projects that need repair.

8 A. Dozens and dozens.

9 Q. And it's a process you're comfortable with?

10 A. Yes, sir.

11 Q. And typically when you estimate a job, do you
12 estimate a job -- if you're doing the full scope of
13 repair, estimate a job in a way that at the end of the
14 day you could submit a contract to the owner and say, I'm
15 willing to do the work for that amount of money?

16 A. For the construction litigation?

17 Q. Yes.

18 A. Yes, sir. We look at them as bids, yes, sir.

19 Q. And have you been successful in actually getting ,
20 people who have distressed buildings and buildings that
21 leak and who are in lawsuits hire you, hire Watkins
22 Services?

23 A. Well, my dad always said that's why we suffer
24 through this process because at the end of the day we
25 would like to at least get an opportunity to perform the

1 work.

2 Q. And do you feel qualified to do the type of work
3 that you know has to be done at Stoneledge?

4 A. Yes, sir.

5 Q. And is the work at Stoneledge work that Watkins
6 Services would ultimately like to do? That is, the
7 repair work.

8 A. Very much, yes, sir.

9 Q. As I understand, you've been out there doing some
10 emergency repairs in phase one; is that right?

11 A. We have, yes, sir.

12 Q. Describe for me, if you will, the type of work that
13 you've been doing out there.

14 A. The work we've done has been limited to the -- can I
15 drink this water? I'm sorry. When I talk, my mouth gets
16 dry.

17 THE COURT: Sure. That's what it's there for.

18 MR. LYLES: Is that yours?

19 THE CLERK: It's his.

20 THE WITNESS: All right. Thank you very much.

21 THE COURT: We don't pass it around.

22 MR. LYLES: I looked at it first. I didn't
23 know who sat it up here.

24 A. The emergency repairs -- first of all, those that
25 know me know I'm long-winded. And I try to keep things

1 short. But we were asked to make some repairs. And I
2 think the owners at Stoneledge -- I think you endorsed
3 us, and they talked to some other folks. They had some
4 problems with water entering basements between the slab
5 and the wood frame walls and asked us if we could help.
6 And they hired us to do a unit. And I think we performed
7 to their expectation. And then they asked us to do some
8 more work out there. But it's limited to the base of the
9 wall. We excavate down several feet, and we remove
10 whatever the cladding is. Typically where we've worked
11 it has been the Owens Corning -- we call it the stick-on
12 stone. And we remove that stone. We excavate down,
13 clean everything, make any necessary repairs of damage
14 that we find. And we're installing a liquid applied
15 membrane.

16 Q. And in phase one you've done that to how many units?

17 A. Four.

18 Q. And that's the extent of the work that you've done
19 in phase one?

20 A. In phase one, yes, sir.

21 Q. And have you become familiar with the units in phase
22 one at Stoneledge?

23 A. I have a general familiarity with the layouts. I'm
24 pretty familiar with the buildings, if that's your
25 question. Yes, sir, I know how they're laid out. I know

1 how they're constructed.

2 MR. LYLES: Your Honor, I would ask that Mr.
3 Watkins be qualified as an expert in the areas of
4 construction and remedial repair and construction
5 estimating, cost estimating.

6 THE COURT: Any voir dire?

7 MR. BELCHER: No, Your Honor. That's my
8 witness.

9 THE COURT: I don't know if we need to hear
10 from Mr. Belcher or Imhoff or Lyles, of course. Anybody
11 else, though? Does anyone have any voir dire for this
12 witness?

13 (No response)

14 THE COURT: All right. Very well. I do find
15 that the witness is qualified in construction, remedial
16 repairs and cost estimating.

17 MR. LYLES: Thank you.

18 THE COURT: Again, in his testimony he'll be
19 permitted to give his opinion as well as any other
20 information he might have that's familiar with his area
21 of expertise.

22 You may proceed.

23 Q. Who at Watkins Services was first retained by Bostic
24 Brothers? Do you know? Was that your father?

25 A. Yes, sir. I believe it was, yes, sir.

1 Q. And when did you actually personally become involved
2 with the Stoneledge project?

3 A. I can't give you an exact date. It was earlier this
4 year. Probably in late spring maybe.

5 Q. I'm going to ask you some questions about some
6 estimates that you've done at Stoneledge. You may be
7 testifying about what your father did; is that right?

8 A. Yes, sir.

9 Q. Do you know what your father was originally asked to
10 do?

11 A. No, I don't.

12 Q. Do you know whether or not your father was ever
13 asked to give a price for the C.S.E. scope of work that
14 is reflected in exhibit 27?

15 A. Yes. We have an apples-to-apples estimate for phase
16 one. So, yes, sir, I assume that he did. Yes, sir.

17 Q. And when you say apples-to-apples, what do you mean?

18 A. It's a term that we use, I think most estimators
19 use. We try to stick to the scope. We try to maintain
20 the exact line item. We may have different quantities.
21 We may have different unit costs. But we try to include
22 all the different line items. So they're very
23 comparable, so you can see what our number is to do that
24 work and what a different estimator's number is.

25 Q. In this case, that would be John Folk?

1 A. Yes, sir.

2 Q. And are you familiar with or was your father
3 familiar with John Folk's estimate when he did his
4 apples-to-apples number?

5 A. I believe so. I believe we based it on his. We try
6 to keep the same format if we can.

7 Q. And do you know what information your father had?
8 Well, let me ask you. Did your father prepare the
9 apples-to-apples estimate, or was that done by somebody
10 else?

11 A. Robert Ayers would have prepared it. What Robert
12 Ayers does, he does the basic work. And then he and my
13 dad, they talk after that. And they continue to make
14 changes until they have something that they feel is
15 adequate.

16 Q. Do you know what your father did in order to prepare
17 the apples-to-apples estimate? What information he got?

18 A. I can't tell you specifically. I know he -- I know
19 this case was important to him because he normally
20 doesn't make a lot of on-site visits. You know, at the
21 time he was sixty-four years old. And I remember he
22 wanted to spend a couple of days at Stoneledge. I asked
23 him if I could go help him. He said, no. He said he
24 wanted to take his time, walk around and get familiar.
25 with the layouts. And because the buildings were cut up

1 and they're staggered and there's three different types
2 of townhomes that are linked together in the different
3 buildings, he wanted to make sure that he felt like he
4 had good takeoffs or good quantities for the different
5 lineups.

6 Q. So do you know if your dad looked at exhibit 27?

7 A. I don't know if he did. I'm not sure if he did. I
8 assume he did. Probably, but I don't know if he did or
9 not.

10 Q. Okay. Have you looked at it?

11 A. No, sir. I've seen parts of things, different
12 reports that Derek Hodgins has put together. But I don't
13 know if I've seen everything that he has. I may have.

14 Q. Well, when you prepared the apples-to-apples
15 estimate, what scope of work was anticipated or
16 contemplated by your company?

17 A. Well, what I assume my dad did, because it's
18 typically what we do, is that we like to refer to the
19 expert that developed the scope that the estimate that
20 we're doing the apples to apples to -- I know that was a
21 mouthful. We try to -- we look at that. We refer back
22 to that report as much as we need to, but we try to look
23 at the estimate to see that, okay, we have a line item
24 here. Well, we're going to replace all the shingles.
25 Okay. If we're replacing all the shingles, then what we

1 have to do is we have to find out how many shingles out
2 there need to be replaced. We do our takeoff to do that.
3 If there's something more specific, like if we're doing
4 structural repairs or something like that, we try to dig
5 into the expert -- I guess you can say the other side's
6 expert's reports, see how he wanted it done and make sure
7 that we stay consistent with that.

8 Q. So you don't know the extent to which your father
9 reviewed exhibit 27?

10 A. No, sir.

11 Q. And you have not looked at exhibit 27?

12 A. If exhibit 27 is a binder of all of C.S.E.'s reports
13 -- I've seen a lot of them. I don't know if I've seen
14 every one.

15 Q. Exhibit 27 was referred to as the repair documents.
16 That's Mr. Hodgin's scope of repair and details,
17 specifications.

18 A. Can I look through it?

19 Q. Certainly.

20 A. Yeah, I've seen the first section.

21 Q. And that's the narrative? That's what he wrote?

22 A. Yes, sir. I haven't looked at the next section with
23 the drawings. I haven't looked at those.

24 Q. Okay.

25 A. He's got code references in there.

1 Q. And manufacturer's references?

2 A. Yes, sir. I don't know if it's in here. There's
3 two or three other reports that he had, I guess, put
4 together. One was in '09. And I think there might have
5 been two '09 reports, things like that, that I did look
6 at.

7 Q. So you read that?

8 A. Yes, sir.

9 Q. And you're familiar, at least familiar, with the
10 narrative that he wrote explaining what he needed to have
11 done in the way of a repair?

12 A. Yes, sir.

13 Q. And you've worked with Derek Hodgkin before?

14 A. Yes, sir. And I've talked to him about the -- about
15 Stoneledge and the repairs and things like that from time
16 to time.

17 Q. Have you asked him questions about what he needs or
18 what he's requiring from a repair standpoint?

19 A. A few times over the last several months just to
20 make sure that -- when I went back to review what my dad
21 and Robert had put together, I wanted to make sure that I
22 was comfortable with it. And based on the answers that
23 Derek gave me, that I was comfortable with it.

24 Q. Have you worked with Derek before?

25 A. Yes, sir.

1 Q. Have you done projects that were done -- repaired
2 pursuant to scopes of repair that Derek developed?

3 A. Yes, sir.

4 Q. Do you have an appreciation for or an understanding
5 of his methodology in repairing problems?

6 A. Yes, sir.

7 Q. And what his expectations are?

8 A. Yes, sir.

9 Q. Have you found those to be reasonable from your
10 experience?

11 A. Yes, sir.

12 Q. So are you comfortable as you're testifying today
13 that you have an understanding of the repair that is
14 required at Stoneledge by C.S.E.?

15 A. Yes, sir.

16 (WHEREUPON, Plaintiff's Exhibit Number 30 was marked
17 for identification only.)

18 A. Can I add something to that also?

19 Q. Of course.

20 A. The apples-to-apples that we did, we only did one.
21 And that was everything that was above grade. There's a
22 -- I know that the other estimator has put together an
23 estimate that has below-grade work. I think the number
24 one point four. We weren't asked to put a number on
25 that, so we have not done that work.

1 Q. Okay. Thank you.

2 Let me show you what I've marked as exhibit 30 and
3 ask if you recognize that?

4 A. Yes, sir.

5 Q. And what is that?

6 A. This is the apples-to-apples estimate that Watkins
7 Services prepared based on the other estimator's scope.

8 Q. And that's what your father put together?

9 A. Yes, sir.

10 Q. And what's the date on that?

11 A. April 30th, 2012.

12 Q. And have you satisfied yourself during your review
13 process that that is an estimate that you can testify
14 about today since you didn't prepare it?

15 A. Yes, sir.

16 MR. LYLES: Your Honor, I'd move to have that
17 exhibit admitted as Plaintiff's Exhibit 30.

18 MR. BELCHER: No objection from Bostic, Your
19 Honor.

20 MR. IMHOFF: I don't think I have an objection
21 to it, but I haven't actually seen it, Your Honor.

22 THE COURT: Well, let's go ahead ---

23 MR. IMHOFF: Can we just move it in for right
24 now and let me look at it after?

25 MR. LYLES: You've had it for two years, but

1 I'll be glad to show it to you.

2 THE COURT: Well, let's just go ahead and ...

3 (WHEREUPON, Mr. Imhoff reviewed exhibit.)

4 MR. IMHOFF: No objection, Your Honor.

5 THE COURT: Anyone else?

6 (No response)

7 THE COURT: All right. Then that's exhibit
8 number 28?

9 MR. LYLES: It's 30.

10 THE COURT: Number 30. Excuse me.

11 MR. LYLES: And it's two pages.

12 THE COURT: Plaintiff's Exhibit Number 30 is
13 admitted without objection.

14 (WHEREUPON, Plaintiff's Exhibit Number 30 was
15 admitted into evidence.)

16 Q. I'm going to try this one more time. You've got the
17 pointer?

18 A. I've got the pointer, yes, sir.

19 Q. You've got the pointer.

20 THE COURT: Do you want the lights off?

21 MR. LYLES: Yes, sir, that would probably be
22 helpful. Thank you.

23 Q. Okay. Production quality excuses. My fault. Is
24 this a copy of the front page of your apple-to-apple
25 estimate?

1 A. Yes, sir.

2 Q. And, again, this is to implement the scope of work
3 on the building envelope, not the foundations; that was
4 required or is required by C.S.E.; is that right?

5 A. Yes, sir.

6 Q. And you were in the courtroom for the testimony for
7 Mr. Folk?

8 A. Yes, sir.

9 Q. And Mr. Folk reviewed his estimate with us. Did you
10 and your father -- did your father set this estimate up
11 in a similar fashion?

12 A. Yes, sir.

13 Q. And it starts with roofing; is that right?

14 A. Yes, sir.

15 Q. Goes down to exterior wall cladding systems. And
16 the other topics are similar to those that Mr. Folk has
17 in his estimate?

18 A. Yes, sir.

19 Q. And so the jury can compare the prices; right?

20 A. Correct.

21 Q. By activity or component; is that right?

22 A. Correct.

23 Q. They can look at Mr. Folk's roof cost and your roof
24 cost; is that right?

25 A. Yes, sir. Because we look at it like a bid process.

1 So it's just like submitting a bid on a common scope. So
2 we try to -- usually, you have bid documents that
3 everything is laid out for you. So we try to keep it
4 consistent like that.

5 Q. Okay. I'm going to show you now the second page of
6 your apple-to-apple estimate. Can you see that?

7 A. Yes, sir.

8 Q. And does it simply carry on just as Mr. Folk's
9 estimate did?

10 A. Yes.

11 Q. With rear elevated concrete balconies, interior
12 finishes, fire protection, so on and so forth?

13 A. Yes, sir..

14 Q. You have number eight, unforeseen conditions
15 allowance. Do you see that?

16 A. Yes, sir.

17 Q. And over to the far right, you've got in
18 contingency?

19 A. Yes, sir.

20 Q. We'll come back to that in a minute. Can you tell
21 the jury the total for the building envelope repair in
22 your apples-to-apples estimate?

23 A. Three point nine -- I believe that's eight five.

24 Q. Well, let me give you a ---

25 A. I can't remember. If I could look at it ---

- 1 Q. I'll give you this. How about that?
- 2 A. I always call it the three nine nine estimate.
- 3 Q. Okay.
- 4 A. Three million nine hundred ninety-five thousand one
- 5 hundred and six dollars and thirty-four cents.
- 6 Q. And it's your testimony that that would be Watkins'
- 7 Services costs to implement the building envelope repair
- 8 that Mr. Hodgkin has called for?
- 9 A. Above grade, yes, sir.
- 10 Q. And so that's about four hundred thousand dollars
- 11 less than Mr. Folk's estimate; is that right?
- 12 A. I think so, yes, sir.
- 13 Q. From what you saw today?
- 14 A. Yes, sir.
- 15 Q. Have you tried to figure out why there is that
- 16 discrepancy in price?
- 17 A. The few things I noticed when I went through it, our
- 18 quantities are a little different. I think our roofing
- 19 quantity or our takeoff is a little above his. We have
- 20 some lower quantities on the stone and the lap siding. I
- 21 think one of the biggest differences is our quantities
- 22 for the stone and the shake are a lot less because
- 23 there's very small areas of the shake out there, the
- 24 shake siding. And it's usually, I think, above -- I
- 25 think second floor, you know, bump-out dormer gable-type

1 areas. And, also -- you were getting ready to talk about
2 it -- contractors put these together in different ways.
3 There's really no right or wrong way that they do it.
4 But we put our contingency after the subtotal and not
5 before. So we don't mark up -- we don't mark up our
6 contingency before. We include it as a line item at the
7 bottom.

8 Q. Okay. Well, first of all, let's look and see what
9 you're talking about. And, again, I'll show you the
10 second page, which is where I think your contingency is
11 located; is that right?

12 A. Yes, sir.

13 Q. You see your contingency in there?

14 A. Yes, sir. Right here.

15 Q. Okay.

16 A. Oh, well, no. Our contingency is down here. Yes,
17 sir.

18 Q. Okay. So your contingency is down near the bottom
19 of the estimate; is that right?

20 A. Yes, sir.

21 Q. And so it's below your permit and licenses, below
22 your overhead, below your profit?

23 A. Yes, sir.

24 Q. Okay. Now, Mr. Folk's contingency -- I'm going to
25 put up what was marked previously as exhibit 29 and ask

- 1 you if you see Mr. Folk's contingency? Do you see it?
- 2 A. I know where it's supposed to be. I'm trying to --
- 3 yeah, right there. Yes, sir.
- 4 Q. Okay. And that's the unforeseen allowances?
- 5 A. Yes, sir.
- 6 Q. Or unforeseen condition allowance; right?
- 7 A. Yes, sir.
- 8 Q. And so it's above these numbers?
- 9 A. Right.
- 10 Q. And your contingency on this form would be somewhere
- 11 down in here; is that right?
- 12 A. Exactly. His contingency is before the markups, and
- 13 it gets marked up. Ours is actually a markup.
- 14 Q. Okay. And as you say, contractors do things
- 15 differently?
- 16 A. Exactly, yes, sir.
- 17 Q. Well, first, let's talk about contingency. His
- 18 contingency is ten percent; is that right?
- 19 A. Yes, sir.
- 20 Q. And your contingency is ten percent?
- 21 A. Yes, sir.
- 22 Q. Is a ten percent contingency a number that Watkins
- 23 Services typically uses for repair work like this?
- 24 A. Yeah. It's our baseline number, yes, sir.
- 25 Q. So that number is not in your apples-to-apples

1 estimate because it's what Mr. Folk use; it's in there

2 because that's what Watkins Services used?

3 A. Yes, sir.

4 Q. So the use of a ten percent contingency on a project

5 like this is customary and reasonable in your experience?

6 A. Yes, sir.

7 Q. Now, other than a difference in how you go about

8 putting your estimates together, is there anything that

9 you think is wrong by Mr. Folk putting his contingency

10 higher up in his estimate?

11 A. No. I mean, all contractors mark things up

12 different ways. We just have a standard way that we do

13 it.

14 Q. And you said that you found some quantity

15 differences between y'all's estimate and Mr. Folk's

16 estimate?

17 A. Yes, sir.

18 Q. And is it the quantity differences and then the

19 placement of the contingency that you think results in

20 the four-hundred-thousand-dollar gap between your

21 estimate and Mr. Folk's estimate?

22 A. I believe that it is. The unit costs are pretty

23 similar throughout the estimate, as far as I can

24 remember. I think those are the biggest differences. A

25 little bit of a quantity difference and then where the

1 contingency was put.

2 Q. You wouldn't think that the price charged for a
3 piece of plywood would account for that difference?

4 A. No, sir.

5 Q. Or how much a stack of shingles cost?

6 A. I wouldn't think so. Because if I remember right --
7 I mean, I can go through the exercise now. But I think
8 the -- like I said, I think on the apples-to-apples, the
9 unit costs were pretty similar.

10 Q. Now, there's been some discussion today about C.A.
11 services, contract administration services. Are you
12 familiar with that term?

13 A. Yes, sir.

14 Q. And in your opinion, is a design professional
15 performing A and E services appropriately?

16 A. Yes, sir.

17 Q. For a project like this?

18 A. Yes, sir.

19 Q. Would you recommend that to the owner?

20 A. I would.

21 Q. And why would you recommend it to the owner?

22 A. Well, a project of this size you would want -- the
23 design professional you hire, he's not only going to do
24 the C.A. services. Normally they'll provide engineering
25 services, design services, things like that, as well as

1 the contract administration. And typically what we find
2 is the firms that we work with, they'll have a
3 representative go out and look over our work and make
4 sure that we're conforming to their scope of work and
5 also see how much progress that we've made. So when we
6 apply, when we turn in a pay application, they either
7 approve it or deny it.

8 Q. There's another line item in Mr. Folk's estimate
9 that I don't think was in yours. And that's the
10 performance and payment bond?

11 A. Yes, sir.

12 Q. Do you remember that being a distinction between
13 your estimate and his?

14 A. Yes, sir.

15 Q. Is it your belief that a performance and payment
16 bond would be necessary on a project like this?

17 A. Not on -- we typically don't need them or use them
18 on repair projects. If we do start work or if -- like
19 the owner's borrowing money and part of the agreement
20 with the bank is that they have it, then the owner
21 purchases the bond or pays for the bond. But, you know,
22 in repair projects, especially with our company, the
23 reputation we have -- we pay our creditors, we pay our
24 subcontractors -- we've had a longstanding good
25 reputation in business. And it's typically not required

1 for us.

2 Q. So that could be a price difference as well between
3 you and Mr. Folk's estimate?

4 A. Yes, sir.

5 Q. In your estimate -- and I just want to review these
6 as quickly as possible. Y'all are replacing -- removing
7 the shingles and replacing them?

8 A. In apples-to-apples?

9 Q. Yes.

10 A. Yes, sir.

11 Q. In your apples-to-apples. And y'all are removing
12 most of the siding at the project?

13 A. Yes, sir.

14 Q. And ultimately y'all are going to repair the damage
15 to the building wall components in this estimate; is that
16 right?

17 A. Yes.

18 Q. And you're going to remove and reset all of the
19 windows. Is it three hundred sixty-two?

20 A. I think it's three eighty-two.

21 Q. Three eighty-two? You're going to remove and
22 replace and reset three hundred and eighty-two windows?

23 A. Yes, sir.

24 Q. And you're going to repair all of the fire-rated
25 walls?

- 1 A. Yes.
- 2 Q. And you're going to reinstall the W.R.B.?
- 3 A. Correct.
- 4 Q. And you're going to do it properly?
- 5 A. Yes, sir.
- 6 Q. And you're going to reinstall the siding?
- 7 A. Yes, sir.
- 8 Q. And re-shingle the roofs?
- 9 A. Yes, sir.
- 10 Q. And you're going to make the same guarantees to my
- 11 clients that you heard Mr. Folk guarantee, that the work
- 12 that you've done is done properly?
- 13 A. Yes, sir. Everything -- all the work that we
- 14 perform, we'll stand one hundred percent behind it.
- 15 Q. And the damages that resulted from the faulty work
- 16 is all going to be repaired?
- 17 A. Everything that we find, yes, sir.
- 18 Q. Sure. And with an estimate of this breadth and
- 19 scope, you would hope that you find it all?
- 20 A. Yes, sir.
- 21 Q. Which is the purpose of the scope of repair?
- 22 A. I would assume.
- 23 Q. And you're going to make some minor interior
- 24 repairs; is that right?
- 25 A. Yes, sir.

1 Q. Would Watkins Services sign a contract with
2 Stoneledge H.O.A. to implement C.S.E.'s scope of repair
3 today for -- let's just round it up to four million
4 dollars?

5 A. Yes, sir. The above grade, our apples-to-apples,
6 yes, sir. We consider it a bid. Yes, sir.

7 Q. And how long would that project take?

8 A. I'd like to have -- probably eighteen months. I
9 think we can get it done sooner than that. But to be
10 safe, I'd say eighteen months.

11 Q. And I think you heard Mr. Folk's testimony. Are you
12 going to have to use scaffolding for the project?

13 A. Yes, sir.

14 Q. And are you going to jackhammer that stone off?

15 A. Yeah. The hammers we'll use, we'll use smaller
16 hand-held hammers. Some of the stone will come off
17 easier if it's installed over -- from what I've seen out
18 there, if it's installed over the drywall areas. So,
19 yes, but there will be noise.

20 Q. Explain that to me. Some stone will be removed
21 easier for what reason?

22 A. What we've encountered out there in some of the
23 repairs that we've made is when the lathe is installed on
24 the drywall areas, it tends to come off a little bit
25 easier.

1 Q. And lathe, that's a wire mesh?

2 A. Yes, sir.

3 Q. And that's actually put up on the wall before the
4 stone is applied; is that right?

5 A. Yes, sir.

6 Q. And then you stick the stone to that?

7 A. Right. Well, basically, you're putting on a stucco
8 scratch coat. And when it cures, then you mortar the
9 stone to the wall. Yes, sir.

10 Q. And the stone manufacturer's specifications and
11 recommendations require that lathe be nailed into the
12 framework?

13 A. Most of the time; not all of the time. It depends
14 on the type of fasteners that you use. But we put ours
15 into framing.

16 Q. But you've seen instances out there where this lathe
17 was actually nailed into drywall?

18 A. Yes. But there is sheathing behind it.

19 Q. Now, you're also going to remove portions of the
20 porches and decks pursuant to the C.S.E. scope of repair?

21 A. Yes, sir.

22 Q. And the owners are not going to have the benefit and
23 use of those components while they're removed; is that
24 right?

25 A. While we're working on them, they won't be allowed

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1 out there, no, sir.

2 Q. And the doors are going to have to be locked so
3 nobody can come out or walk out onto a porch that is not
4 there?

5 A. Correct. We'll secure it where nobody can go out,
6 yes, sir.

7 Q. Now, you said several times in your testimony you've
8 been careful to limit your apples-to-apples number to the
9 building envelope and it does not include the foundation;
10 is that right?

11 A. Yes, sir, because I recently saw a revised estimate
12 that had below-grade repairs where it didn't before. And
13 we haven't priced that yet.

14 Q. I'm going to show you what was marked previously as
15 Plaintiff's Exhibit 28 and ask you if you have seen that
16 document?

17 A. Yes, sir.

18 Q. And I provided that document to you last evening?

19 A. Yes, sir.

20 Q. And that's the first time you saw it?

21 A. Yes, sir.

22 Q. So you were never asked or your dad was never asked,
23 as far as you know, to actually provide a price for the
24 foundation repair that C.S.E. is calling for?

25 A. As far as I know.

1 Q. And so you want to be careful and tell the jury that
2 your three point nine nine five estimate does not include
3 this foundation; is that right?

4 A. Correct.

5 Q. Have you, in your experience involved in phase one
6 of Stoneledge -- have you seen evidence that the
7 foundations leak?

8 A. Yes. We've repaired four of them. Yes, sir.

9 Q. And do you have any opinions about whether or not
10 the scope of repair that Derek has specified for those
11 foundation walls is appropriate or not?

12 A. You know, Robert, we were hired to basically bid
13 both scopes. And I read that quickly this morning. And
14 there's nothing wrong with his repair. Nothing wrong
15 with it. I just can't testify to whether or not -- all
16 the balconies might be -- well, all the basements might
17 be leaking, none of them. I just don't have firsthand
18 knowledge of that.

19 Q. Well, you know none of them -- you know it's not
20 right to say none of them are leaking because there are
21 some?

22 A. Well, we've repaired four. We haven't been asked to
23 fix any others yet.

24 Q. And you're familiar with code requirements for damp-
25 proofing foundation walls?

1 A. Yes.

2 Q. And you think that's a good idea?

3 A. Yes.

4 Q. So you don't -- you can't offer an opinion about
5 whether or not this repair is necessary. But if it is,
6 it's not included in your three point nine nine five
7 estimate?

8 A. Correct.

9 Q. If we focus then on the building envelope repair,
10 would you agree with me that if Watkins Services
11 implements that repair, again, exhibit 27 which is
12 Derek's building envelope repair, that these owners at
13 the completion of the repair, excluding the foundation
14 issue, would have a building that's safe?

15 A. (No verbal response)

16 Q. Not subject to fire or the firewalls are properly
17 constructed.

18 A. Correct. All the life safety issues that are
19 included in that scope, we will repair, yes, sir.

20 Q. And, again, you will correct and repair the rot and
21 deterioration that results from the conditions that are
22 being repaired?

23 A. Yes, sir.

24 Q. And you'll give the building -- the owners a
25 building that is dry or at least manages water properly?

1 A. Yes, sir.

2 Q. And you'll give them a building that complies with
3 the code?

4 A. Yes, sir. On the areas that we work.

5 Q. Sure. If you implement the scope of work that's
6 called for by C.S.E. on the building envelope and in a
7 year or two years window leak, will Watkins Services go
8 out and make a repair?

9 A. Number one, that won't happen. But, yes, sir, we
10 will.

11 Q. So the owners can be confident in that?

12 A. Yes.

13 Q. And if you make these repairs and they find a leak
14 coming through a porch door, will Watkins Services take
15 care of that?

16 A. After I find somebody to fire, yes, sir.

17 Q. And if the owners report a roof leak in a roof that
18 you repair, will Watkins Services come out and make the
19 repair?

20 A. Yes, sir.

21 Q. And to implement the C.S.E. scope of repair that was
22 priced by Mr. Folk, but also priced by your father, to
23 implement this building envelope scope of repair is going
24 to cost in round numbers four million dollars if Watkins
25 Services does it?

1 A. Yes, sir.

2 Q. And you'll sign a contract to do that work for my
3 clients?

4 A. Yes, I will.

5 Q. That does not include the foundations?

6 A. Not -- you were waiting on that. Not the
7 foundations, no, sir.

8 Q. Okay. I think that's all the questions I've got for
9 you, Mr. Watkins. Thank you.

10 THE COURT: All right. Mr. Belcher?

11 MR. BELCHER: Your Honor, given that he's my
12 witness, I'm going to have a considerable amount of
13 questions.. Do you want me to start now, or do you want
14 to take a break for a few minutes?

15 THE COURT: We can take a break, but it will be
16 just for a few minutes. All right.

17 MR. BELCHER: Thank you, Your Honor.

18 THE COURT: Do you need the lights on to begin
19 with?

20 MR. BELCHER: That'd be nice.

21 THE COURT: All right. Let there be light.

22 All right. Very good. Just take a few minutes and
23 stretch your legs and come back. I think from what Mr.
24 Belcher says this witness might go beyond five. So if
25 anybody needs to make any telephone calls or

1 arrangements, let me know or let the bailiff know and
2 we'll make the necessary phones available.

3 (WHEREUPON, the jury exited the open court at
4 approximately 4:19 p.m.)

5 THE COURT: All right. Mr. Watkins, you are
6 under oath so you can't discuss your testimony with
7 anyone, but you may step down if you'd like.

8 THE WITNESS: Thank you, sir.

9 THE COURT: Very good.

10 All right. Anything from the plaintiffs before we
11 take a break?

12 MR. LYLES: No, Your Honor.

13 THE COURT: From the defendants?

14 MR. BELCHER: Your Honor, I had planned to call
15 Mr. Watkins in my case-in-chief. I'd like to call him in
16 my case-in-chief. And if he wants to move on to his next
17 witness and let me just call Mr. Watkins after -- see,
18 the thing is, is I've got a different scope of repair
19 that has to come into evidence ---

20 THE COURT: I understand.

21 MR. BELCHER: --- before I ask him ---

22 THE COURT: Well, you could still do that as a
23 reply to it, I guess, if you put in the other testimony.
24 But what do you think? Well, let's see. Any other
25 defendants, do you have any thoughts about how we might

1 proceed with this witness?

2 (No response)

3 THE COURT: In other words, I think I do know
4 what Mr. Belcher is saying is he doesn't want to take him
5 up at this time. He has his direct. You'll all be
6 protected on your cross. And I guess if you put him up
7 as your witness, there would not be any cross from you?

8 MR. BELCHER: Correct.

9 THE COURT: But now, that puts it in -- Mr.
10 Lyles will be able to cross him because he's your
11 witness.

12 MR. LYLES: Well, I'm fine. I mean, if -- so
13 what you're asking is to recognize your right to cross-
14 examine him when you call him up in your case? No. You
15 just want to call him up in your case?

16 MR. BELCHER: Yeah, I just want to call him as
17 a witness.

18 MR. LYLES: Okay. That's fine.

19 MR. BELCHER: I mean, I'm reserving the right
20 to ask him whatever questions I want. I'm not going to
21 ask him leading questions, but ---

22 THE COURT: Well, that's the only thing we're
23 talking about, leading.

24 MR. LYLES: Okay.

25 THE COURT: Y'all haven't been too bad about

1 that at all.

2 Yes, sir?

3 MR. IMHOFF: The only thing I would I suggest,
4 can we talk about it over this break and then decide?

5 THE COURT: Sure. Well, that'll be a good
6 topic of conversation.

7 (WHEREUPON, court stood at recess for a short
8 break.)

9 THE COURT: All right. Have y'all made a
10 decision?

11 MR. BELCHER: Yes, Your Honor. As requested
12 before, I would like to go ahead and reserve the right to
13 question him in my case-in-chief as my witness. He'd be
14 subject to cross-examination from the defendants over
15 here, of course.

16 THE COURT: All right. But during your case?

17 MR. BELCHER: I'm going to call him during my
18 case, yes, sir.

19 THE COURT: All right. But they are reserving
20 their cross-examination of the witness until that time?

21 MR. BELCHER: Correct, Your Honor.

22 THE COURT: All right. Any objection, Mr.
23 Lyles?

24 MR. LYLES: No, sir.

25 THE COURT: All right, sir. You may step down.

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1 THE WITNESS: Thank you, Your Honor.

2 THE COURT: Now, how long do you think it'll be
3 before you'll be back into your case?

4 MR. LYLES: Your Honor, I think we will finish
5 by midday tomorrow.

6 THE COURT: Okay. Well, the reason I ask, you
7 know, as I mentioned, you're under oath so you can't
8 discuss your testimony with anyone, with your attorneys
9 or anyone else.

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Very good. And then
12 you'll be subject to recall.

13 THE WITNESS: Yes, sir.

14 THE COURT: All right. Thank you very much.

15 And then I guess, Mr. Belcher, you'll be in charge
16 of him now.

17 THE COURT: Well, Your Honor ---

18 THE COURT: I mean, in other words, staying in
19 touch with him.

20 MR. BELCHER: Yes, I'd like to stay in touch
21 with him, but he's also my expert witness. And I ---

22 THE COURT: Well, no, if he's going to be here,
23 that's easy to stay in touch with.

24 MR. BELCHER: Right.

25 THE COURT: But I'm saying if you -- you know,

1 if you don't need him in the courtroom ---

2 MR. BELCHER: Uh-huh (affirmative).

3 THE COURT: --- then -- what is it? -- and if
4 he goes, rather than looking at Mr. Lyles to get your
5 witness here.

6 MR. BELCHER: My concern is that the
7 instruction to the witness prejudices me ---

8 THE COURT: Oh, you mean you can't talk to him?

9 MR. BELCHER: --- to discuss what has happened
10 over the last couple of days and what'll happen over the
11 next couple of days. Now I've got my witness completely
12 prejudiced as to what's going to happen. But if there's
13 exception to me talking to him, I guess I just have to
14 take my lumps for not crossing him. To me, I think I ---

15 THE COURT: Well, to be very candid with you,
16 I'm not sure because some of his testimony was such that
17 it would suggest that it does need exploration in the
18 sense that he had not considered the below-grade elements
19 and things of that nature. I'm going to relax the rule
20 as far as preparing your case. In other words -- but I
21 don't want anyone talking to him about something else.
22 In other words, it's as if you're talking to a juror or
23 something like that. Let's don't talk about anything
24 that might not be involved in just what his testimony is
25 going to be. In other words, I don't want to retry a

1 case later or something like that about something that
2 was taken up that was not anticipated.

3 MR. BELCHER: All right. Thank you, Your
4 Honor.

5 THE COURT: All right. In other words, he can
6 talk to his other lawyer inasmuch as the party that's
7 calling him.

8 MR. LYLES: Okay.

9 THE COURT: Because he hasn't been called on
10 that part of the case yet.

11 MR. LYLES: So -- and I am not somebody who
12 normally makes issues like this except I went three days
13 without talking to my expert about -- Mr. Hodgkin, who was
14 under oath, as of last Thursday because they wanted to
15 wait and do their cross. And I just want to make sure I
16 ---

17 THE COURT: Well, what I'm doing is, you want
18 me to bring Mr. Hodgkin back?

19 MR. LYLES: No, sir, I don't. I just want to
20 make sure I understand.

21 THE COURT: Let's just say this. I'm going to
22 permit him to be available to, particularly, Mr. Belcher.
23 And I don't know. He said that he was also retained by
24 Mr. Imhoff and Mr. Anderson. Is there anyone else?

25 (No response)

1 THE COURT: All right. In other words, I'm
2 going to permit him to discuss his testimony this time.
3 And I apologize for you having to ---

4 MR. LYLES: That's okay. I didn't make ---

5 THE COURT: Were you going to take him to
6 Charleston with you or ...

7 MR. LYLES: Who's that?

8 THE COURT: Mr. Hodgin, since you said it was
9 three days?

10 MR. LYLES: Well, it was three days. It's
11 okay. I just didn't even think to request for relaxation
12 of the rules. I just want to make sure -- I understand
13 how bad I messed up.

14 THE COURT: All right. Very good. Anything
15 else?

16 MR. LYLES: Nothing from the plaintiff, Your
17 Honor.

18 THE COURT: Very good. If it was error, it's
19 harmless error. Let's say that.

20 All right. Let's ask the jury to join us.

21 Now, you're going to call Mr. White?

22 MR. LYLES: Yes, sir. And he'll be our last
23 witness today, and I think he'll be a little quicker.

24 THE COURT: Now, will we be able to complete
25 him as far as ...

1 MR. LYLES: I think so.

2 THE COURT: All right. It's getting close to.
3 five o'clock.

4 All right. Ask the jury to join us, please.

5 (WHEREUPON, the jury entered the open court at
6 approximately 4:38 p.m.)

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

9 Mr. Foreman, we've decided to sort of move things
10 along, and Mr. Watkins is going to be called by another
11 party later in the week. In other words, not today. And
12 so we're going to continue with the plaintiffs' case. I
13 believe he has another witness to call.

14 MR. LYLES: Yes, sir.

15 THE COURT: Mr. Lyles?

16 MR. LYLES: Mr. White, Bob White.

17 (WHEREUPON, the witness was duly sworn.)

18 THE COURT: All right. If you would, please,
19 sir, give us your full name spelling your last name for
20 the record, please.

21 THE WITNESS: My full name is Robert Reed
22 White. Last name is spelled W-H-I-T-E.

23 THE COURT: Very good. Thank you, sir.

24 ROBERT REED WHITE,

25 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

1 DIRECT EXAMINATION

2 BY MR. LYLES:

3 Q. Good afternoon, Mr. White.

4 A. Good afternoon.

5 Q. How are you doing today?

6 A. Good.

7 Q. Mr. White, I'll try to be as brief as I can so that
8 we can let the jury go and get out of here.

9 Would you tell the jury a little bit about you? Are
10 you married?

11 A. Yes, I'm married. My wife and I reside here. We
12 have two children and six grandchildren.

13 Q. How long -- when you say you reside here ---

14 A. Yes.

15 Q. --- where's here?

16 A. At Stoneledge.

17 Q. And how long have you been a resident of Stoneledge?

18 A. Since June of 2006.

19 Q. And what brought you to Stoneledge?

20 A. We were attracted to Stoneledge by some marketing
21 material that my wife had received in the mail. And then
22 we actually came up here to take a look at it. We liked
23 the idea of not being responsible for exterior
24 maintenance. I travel a lot in my job. And so
25 consequently, one of the things I don't want to do on the

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1 weekend is any kind of outdoor maintenance and that type
2 of thing. So that's how we found out about Stoneledge,
3 and we came up here to look at it in April of '06 and
4 purchased and closed in June.

5 Q. And who did you purchase it from? Do you remember?

6 A. I.M.K. was the entity that we purchased the unit
7 from.

8 Q. And what did you know about I.M.K.?

9 A. Nothing really. I mean, we just knew that they were
10 the developer and that they were completing the
11 Stoneledge project. They had taken over -- we knew that
12 they had taken over the phase one part of Stoneledge,
13 which is where we purchased. But that's really what I
14 knew about it.

15 Q. Okay. When you say they had taken over, what did
16 you know about that?

17 A. We had understood that Bostic Brothers had started
18 Stoneledge and that I.M.K. had purchased it.

19 Q. And did you know what I.M.K. or who I.M.K. was
20 comprised of?

21 A. We knew -- not at the time that we purchased we
22 didn't know, but we knew later on that it was a
23 combination of Integrys and Marick and some other
24 entities.

25 Q. Are there any individuals or were there any

1 individuals that you associated with I.M.K. in your
2 dealings?

3 A. I.M.K., to me, in terms of the faces of the folks
4 that were part of I.M.K. were Rick Thoennes and his son
5 and Tim Roberson.

6 Q. And anyone else from I.M.K.?

7 A. There were other names like Lollis and Cox and some
8 folks like that, but not people that I dealt with.

9 Q. After you purchased, did you deal with anybody from
10 I.M.K. or Mr. Thoennes or anybody else relative to punch
11 list items in your unit?

12 A. We did have a quite hefty list of punch list items.
13 My wife pretty much dealt with all of that. And she
14 worked at the time with Nathan -- I forget his last name.
15 And some of his folks actually addressed the punch list
16 items. We did have some leak issues that came to mind
17 pretty quickly or came to sight pretty quickly. And we
18 continued to deal with the I.M.K. folks for those.

19 Q. When you say Nathan, do you mean Nathan Hornaday?
20 Does that name ring a bell?

21 A. Yes, that's him.

22 Q. And do you know who Mr. Hornaday worked for?

23 A. I do not.

24 Q. Describe, if you will, some of the problems. You
25 said you had leak problems?

1 A. Yes, we did. We had -- one of the first leaks that
2 we had was around a bedroom window upstairs that actually
3 came into that bedroom and stained the walls in the
4 bedroom. And then eventually, pretty quickly I should
5 say, it, along with other issues at the place where the
6 window was, resulted in a leak in the master bedroom.
7 That was a fairly serious leak that took quite a bit of
8 time to get rectified.

9 Q. And did you report that to somebody?

10 A. Yes. The I.M.K. folks worked on that for a number
11 of months actually before it was eventually stopped, the
12 leak was eventually stopped.

13 Q. Who specifically? Do you remember?

14 A. Nathan did a lot of the work. Nathan and his folks
15 did a lot of the work. Eventually, the leak was solved
16 and resolved by, I believe, a contractor, if I remember
17 correctly, that they brought in to take a look at the
18 issue.

19 Q. If Nathan Hornaday worked for Marick, would you say
20 that Marick was aware of that roof leak?

21 A. I would think so, yes.

22 Q. Or that window leak?

23 A. Yes.

24 Q. Did you have other window leaks?

25 A. Yes. We had a leak around the window in the second

1 bedroom upstairs that actually showed up in the ceiling
2 of the living room. That leak probably -- it took a
3 while for that leak to show up. We had to wait for the
4 rains to come before that leak ever showed up. We had a
5 leak in the powder room bathroom on the main level. We
6 had a leak in the -- a fairly serious leak that still
7 exists today in the crawlspace downstairs in the
8 basement. We had a leak in the basement bathroom. We
9 had a leak around the french door that goes out on the
10 lower-level patio.

11 Q. And did Marick or was Marick aware of all of those
12 leak conditions?

13 A. Marick would have been aware of the leak conditions
14 in the first bedroom that I mentioned, the master bedroom
15 and the leak around the door in the basement. And they
16 were aware of the leak in the crawlspace. I don't
17 remember if the leak in the living room showed up in time
18 for Marick to be involved in that or not.

19 Q. You indicated that you have leaks in the basement.
20 Was that through the lakefront door or was it through the
21 foundation wall?

22 A. It was through the lakefront door.

23 Q. And did you have any other leaks into your basement
24 that you're aware of?

25 A. No, just the leak around that door and then the leak

1 in the crawlspace. And that leak in the bathroom.

2 Q. And the leak in the crawlspace, is that something
3 that has been ongoing?

4 A. Yes. It's been since day one, and it still does it
5 today.

6 Q. And is it coming through the foundation walls?

7 A. It is not at this time.

8 Q. And has that been repaired?

9 A. No, it has not.

10 Q. So when you said it's not at this time, what does
11 that mean?

12 A. Well, it's an unfinished crawl space. We've seen
13 water pouring into it in sufficient quantities that I
14 kind of wonder whether or not it was going to come out
15 the -- there's a little door, access door, to it. And I
16 kind of wondered if it was going to spill out of that
17 door, but it hasn't so far.

18 Q. You've been in the courtroom all day today; is that
19 right?

20 A. Yes.

21 Q. And you heard some discussion about foundation wall
22 repairs?

23 A. Yes.

24 Q. Is that something you think is necessary at your
25 unit?

1 A. We have not seen any issues about foundation leaks
2 in our unit.

3 Q. Do you recall when I.M.K. turned over control of the
4 homeowners association board?

5 A. That occurred in the September 2008 time frame.

6 Q. Okay. What do you remember about the weeks or days
7 or months leading up to that? Anything?

8 A. I knew that I.M.K. was preparing to turn the
9 leadership of the H.O.A. to the owners. I was involved
10 in some of the discussions around that because there's
11 only -- at that time, there were only a few of us that
12 actually lived here full-time. So I was involved as a,
13 quote, a full-timer, and discussions around the
14 composition of the new board and that type of thing.

15 Q. And so the discussions related to what was going to
16 take place after I.M.K. turned over control?

17 A. Yes. You know, how we're going to form the new
18 board, et cetera.

19 Q. And who were you having those discussions with?

20 A. At the time, most of those discussions were
21 internally with us owners. It was Steve Taylor, John
22 Wilson, those folks. We were working together to figure
23 out what the new board was going to look like. Most of
24 the conversations that were had with I.M.K. I was not a
25 party to directly.

1 Q. And who were the representatives of I.M.K. that you
2 understood met with other owners?

3 A. That would have been Rick Thoennes and Tim Roberson
4 primarily, I would imagine.

5 Q. Is that who you believed to be in control of the
6 board immediately prior to turnover?

7 A. Yes.

8 Q. Does the name Bill Cox ring a bell?

9 A. Yes, it does.

10 Q. Do you know if Mr. Cox was a board member
11 immediately prior to turning it over?

12 A. He was an I.M.K. board member when I.M.K. ran the
13 board, yes.

14 Q. Now, are you familiar with a company that went by
15 the name of S.D.I.?

16 A. Yes.

17 Q. And what do you know about S.D.I.?

18 A. We knew at about the time that the H.O.A. was
19 conveyed to the owners that S.D.I. was involved in some
20 fashion with I.M.K. I remember at the time not really
21 understanding what the nature of the relationship was,
22 and I didn't really think that it impacted us at all.
23 Our dealings were primarily with I.M.K. S.D.I. was
24 identified as an entity that I.M.K. was working with to
25 continue the development of Stoneledge, but I don't

1 remember much of anything beyond that.

2 Q. Until the time of turnover, do you remember ever
3 meeting with anybody who you understood to represent
4 S.D.I.?

5 A. No.

6 Q. Do you know if any of the other homeowners met with
7 somebody representing S.D.I. about turnover of control?

8 A. Not to my knowledge.

9 Q. After control, were you elected to the board?

10 A. Yes, I was.

11 Q. Did you hold a -- what sort of position did you
12 hold?

13 A. I was considered director at-large. We had four
14 officers and three directors at-large.

15 Q. I think when they give you the director at-large
16 title, you're in trouble. It always felt that way.

17 As a member of the board, did, at any point, you
18 become aware of systemic and pervasive problems in phase
19 one at Stoneledge?

20 A. I was aware of those problems. It took some time
21 for the board to grasp the enormity of the issue. We
22 were dealing with complaints of leaks from a couple of
23 homeowners or a few homeowners. As the board got sort of
24 jelled and started to actually do its work, we got more
25 and more complaints about leaks and what have you in

1 phase one. And we eventually realized -- and I don't
2 remember the time frame. I mean, it took some number of
3 months before we realized that we had a big problem.

4 Q. When would you say that you sort of realized that
5 you had a big problem?

6 A. That would have been in probably early 2009.

7 Q. And what did you do in response to that problem?

8 A. We -- the board decided that the best course of
9 action was to see if we could get our hands on an expert
10 to come figure out what kind of problem we might be
11 looking at. I remember one of the first problems was the
12 deck railing issue. I believe somebody testified to that
13 today. That occurred fairly early on with Jim Logan's
14 unit. And as a result of that, we hired an expert -- I
15 don't remember the name of them -- to come out and take a
16 look at that issue. I remember that caused the first
17 sort of major repair effort that we started as an H.O.A.
18 in phase one to bolster or to shore up the outdoor decks
19 and screened-in porch areas because we were worried about
20 the support for those structures.

21 Q. What were you worried about happening?

22 A. We were worried about them falling.

23 Q. Were you a part or do you recall being a part of the
24 retention of C.S.E.?

25 A. Yes.

1 Q. Do you know when that occurred?

2 A. No, I don't remember exactly. It probably would
3 have been mid 2009.

4 Q. Do you remember what you asked C.S.E. to do for you?

5 A. Yes. We asked C.S.E. to come in and take a look at
6 the project and to determine what problems we had and
7 what we needed to do to fix them.

8 Q. And in your observation and experience, is that what
9 C.S.E. has done?

10 A. Yes.

11 Q. And is the board or is the association relying on
12 C.S.E. in that regard?

13 A. Yes.

14 Q. Counting on them to do a full repair for you, a full
15 scope?

16 A. Correct.

17 Q. There was a reference made earlier in this trial to
18 the owners' appreciation of I.M.K. and Marick when they
19 arrived at the project. Do you remember that?

20 A. I don't. I.M.K. had arrived at the project prior to
21 the time that we purchased.

22 Q. What was your personal experience with
23 representatives of I.M.K. and representatives of Marick?

24 A. My wife and I had social dealings with Tim Roberson
25 on a few occasions. We never ever socialized or saw the

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1 Thoenneses or any of the rest of those folks.

2 Q. Were you ever asked to go out on the motor boat with

3 Mr. Thoennes?

4 A. No, I was not.

5 Q. Did Mr. Thoennes own a unit?

6 A. Yes, he did.

7 Q. And was Mr. Thoennes current with his dues and
8 obligations?

9 A. No, he was not.

10 Q. And what ultimately occurred with respect to Mr.
11 Thoennes' unit and his arrearage?

12 A. I don't know what the actual disposition was of his
13 unit. I know he's not there any longer. And I do
14 remember that due to lack of payment of dock dues, we
15 took his boat slip.

16 Q. Are you going to be involved in the process for
17 selecting a repair contractor for Stoneledge?

18 A. I probably will be. I am a member of the litigation
19 committee and have been since its inception. I know the
20 board itself will be responsible for the process to
21 select a contractor. I would think that as a member of
22 the litigation committee, I would be involved, yes.

23 Q. Is it your intent to do the scope of repair that
24 C.S.E. has specified?

25 A. Yes.

1 Q. The foundation and the building envelope?

2 A. Yes.

3 Q. And how will the board and the litigation committee
4 go about selecting a contractor?

5 A. I don't know that we've developed that full process
6 yet. But the intent is to socialize our scope of work,
7 our statement of work, to effect the repairs among
8 qualified contractors in the area and to solicit bids
9 from them and evaluate those bids and their approach and
10 award to the best solution.

11 Q. And who's going to ultimately make that decision?

12 A. I would imagine the board would make that decision.

13 Q. Is that something that you personally are going to
14 -- a decision that you're personally going to make?

15 A. I personally will not make that decision, no.

16 Q. Do you know if Trehel will be considered by the
17 board?

18 A. Absolutely.

19 Q. Do you remember at some point in time thinking that
20 Trehel was too expensive to do your repairs?

21 A. Yes, I do. There was a period of time in there
22 where we obviously had to effect some type of emergency
23 repair protocol. We couldn't just let people continue to
24 take on water without addressing it. And during that
25 emergency, some of the early days of that emergency

1 repair protocol work, while I wasn't necessarily
2 personally involved in all of the decision-making and the
3 interaction with the contractors about that, my
4 understanding was, incorrectly, that Trehel was an
5 expensive proposition. But the issue was around the
6 scope of what they were doing. So in other words, they
7 were looking to conduct a full scope replacement or
8 repair around the problem in question versus sort of just
9 plugging the dike and keeping it to -- you know, keeping
10 it from taking on water until we actually got to a full
11 scope of repair.

12 Q. Did the association at that time have the money to
13 effect the scope of repair that Trehel wanted to
14 implement?

15 A. No. That was the problem. We didn't have the money
16 to do that.

17 Q. And so once this lawsuit is resolved, is there any
18 reason that you can think of that you wouldn't consider
19 Trehel to do the repair work?

20 A. There is no reason that we wouldn't consider Trehel
21 to do the repair work.

22 Q. What is the association seeking to recover in this
23 lawsuit, Mr. White?

24 A. We want to get -- we want to obtain the necessary
25 funds that we need to correct our buildings to the point

1 where we have what we thought we purchased, and that we
2 don't have houses that leak and have drafty holes and
3 firewalls that don't exist and those types of things. We
4 just want to get -- we want to get our property fixed.

5 Q. And is it your belief that the fix that you need is
6 reflected in C.S.E.'s scope of repair?

7 A. It is my belief, yes.

8 Q. And do you seek reimbursement for repair expenses
9 that have already been made in phase one?

10 A. I believe that the phase one repair scope that has
11 been priced or has been scoped out from a cost
12 perspective and includes everything that needs to be done
13 -- I don't know personally if any kind of recovery of
14 previous repair is within that scope.

15 Q. I think that's all the questions I've got for you,
16 Mr. White. Thank you.

17 THE COURT: Mr. Belcher?

18 MR. BELCHER: Very briefly, sir.

19 CROSS-EXAMINATION

20 BY MR. BELCHER:

21 Q. You came to the property in 2006; right?

22 A. Correct.

23 Q. All right. From since day one with windows leaking?

24 A. Correct.

25 Q. Basement leak?

- 1 A. Correct.
- 2 Q. All right. You are aware that your unit sat empty
- 3 for probably a year or more before you moved into it?
- 4 A. I know it was empty before I moved into it, yes.
- 5 Q. All right. How far along was your unit when you
- 6 contracted with the ---
- 7 A. The unit had been drywalled.
- 8 Q. No cabinets?
- 9 A. No cabinets.
- 10 Q. No floors?
- 11 A. No trim, no floor.
- 12 Q. No fixtures?
- 13 A. No.
- 14 Q. All right. Windows leaking?
- 15 A. At the time, no, I didn't notice that, no.
- 16 Q. They started leaking immediately after you moved in?
- 17 A. Yes.
- 18 Q. All right. And that was in June of 2006?
- 19 A. Correct.
- 20 Q. And Marick or I.M.K. or I.K. or somebody came in and
- 21 fixed all those windows?
- 22 A. Not all of them, but they did work on the ones that
- 23 we had identified early on, yes.
- 24 Q. Do you have any leaking windows now?
- 25 A. Yes, we do.

1 Q. Which one?

2 A. I'm not exactly sure which one it is. There's one
3 upstairs that's feeding the leak apparently in the
4 basement. I don't know how. I'm not an expert at that,
5 but we do have a leaky window.

6 Q. You haven't asked anybody to make repairs to that?

7 A. No, not yet.

8 Q. Have some of your windows been repaired to your
9 satisfaction?

10 A. Pardon me?

11 Q. Some of your windows have been repaired to your
12 satisfaction?

13 A. Yes, they have.

14 Q. And Marick or I.M.K. or one of those groups that
15 came in after Bostic, they honored warranties?

16 A. I.M.K. did as long as they were around, yes.

17 Q. All right. And they made repairs to your unit?

18 A. They did.

19 Q. All right. If this jury awards you two point five
20 million dollars or some less amount, are you going to
21 hire J.R. Watkins to do the scope prepared by Rick Moore?

22 A. I don't know that. That won't be my decision.

23 Q. But it's your decision to determine whether or not
24 you proceed with a contractor who has already testified
25 here today about how expensive his scope of repair is

1 going to be. Fair enough?

2 A. Would you restate the question?

3 Q. Now, you heard Mr. Folk testify here today; right?

4 A. I did.

5 Q. He's got that big huge estimate; right?

6 A. He has an estimate, yes.

7 Q. And if the jury were to award that estimate, you
8 would use him?

9 A. I don't know. I wouldn't be making that decision.
10 His organization would be considered, yes.

11 Q. All right. If the jury awards two point five
12 million for the scope of repair issue by some other
13 contractor, are you going to go with J.R. Watkins who
14 says he's going to do it for that amount?

15 A. I don't know. I don't know.

16 Q. Is he going to be considered?

17 A. Yes.

18 Q. Thank you. No further questions.

19 THE COURT: Mr. Anderson?

20 MR. ANDERSON: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. ANDERSON:

23 Q. Now, Mr. White, this isn't the first H.O.A. you've
24 belonged to, is it?

25 A. That I've been a member of?

1 Q. Or a member of, yes, or a property owner within an
2 H.O.A.?

3 A. No. I've been involved in other H.O.A.s, yes.

4 Q. All right. And that would include the villa that
5 you have in Hilton Head; is that correct?

6 A. That's correct, yes.

7 Q. And how about your house in Roswell, Georgia? Did
8 that belong to an H.O.A.?

9 A. Yes, it did.

10 Q. All right. And do you have one other residence?

11 A. Yes, in Hilton Head.

12 Q. Okay. So you have two residences in Hilton Head?

13 A. Yes.

14 Q. Okay. And is that one within an H.O.A.?

15 A. Yes, it is.

16 Q. All right. And you're familiar with the mechanics
17 of an H.O.A. because I believe that you bought your villa
18 in 2002; is that correct?

19 A. That's correct.

20 Q. Now, you indicated that you had problems with your
21 unit since the day you moved in?

22 A. Correct.

23 Q. And you noticed water leaks at that time?

24 A. Correct.

25 Q. All right. And you knew, having been a resident in

1 an H.O.A. before, that the H.O.A. had responsibility on
2 the exterior building in taking care of leaks, did you
3 not?

4 A. I knew that the H.O.A. was responsible for
5 maintaining the exterior of the building.

6 Q. All right. And did you know that as a homeowner
7 you, at that time, had a lawsuit against somebody to take
8 care of that problem if it wasn't repaired?

9 A. There was no lawsuit that I was aware of when we
10 purchased.

11 Q. No. Did you know that you had the ability to bring
12 a lawsuit at that time in order to ---

13 A. That never would have entered my mind.

14 Q. Well, my question goes more to what your knowledge
15 level is as opposed to what your intentions would be, if
16 I could make that distinction.

17 A. Okay.

18 Q. Okay. You knew that you had the ability at that
19 time to bring a lawsuit if you had wanted to?

20 A. I suppose on some level I guess I would have known
21 that, but it's not something that would have entered my
22 mind, as I said.

23 Q. All right. No. I understand what you're saying.

24 A. Right.

25 Q. Now -- and you are currently on the litigation

1 committee; is that correct?

2 A. That's correct.

3 Q. Thank you very much.

4 THE COURT: Mr. Imhoff?

5 MR. IMHOFF: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. IMHOFF:

8 Q. I'll try to be brief, Mr. White. I just heard your
9 testimony that when you were -- that your window leaks
10 that you were aware of through 2008 was rectified to your
11 satisfaction by Marick; is that right?

12 A. The window that Marick worked on primarily was the
13 window in the first bedroom that caused the leak there
14 and in the master. And that window was repaired to my
15 satisfaction, yes.

16 Q. And Marick actually hired an outside contractor to
17 come in and fix it?

18 A. An outside contractor was involved at the end, yes.

19 Q. And do you know why that window was leaking?

20 A. I do not.

21 Q. Even to this day, you have no idea why?

22 A. No, I don't know specifically what was fixed, no.

23 Q. Was your unit one of the units -- well, was your
24 unit painted after you moved in on the outside?

25 A. It was painted on the outside when we purchased it,

1 yes.

2 Q. And was it painted by the homeowners association or
3 I.M.K. or anybody else after you moved in?

4 A. The building has been painted since we moved in,
5 yes.

6 Q. When did that happen?

7 A. I don't remember. I don't. It would have been in
8 probably 2009 or '10.

9 Q. Are you sure it wasn't before Marick and I.M.K.
10 left?

11 A. I don't believe it was, no. And the reason I say
12 that is because the H.O.A. was responsible for doing the
13 painting.

14 Q. I believe your testimony is when you took over and
15 became a board member in 2008, despite the fact that you
16 had these leaky windows, you weren't particularly
17 concerned about this leaking window issue and the
18 crawlspace. Is that fair?

19 A. It's fair to say that I wasn't aware of the extent
20 of the leaking window problems.

21 Q. And, in fact, when you and Mr. Taylor were on the
22 board, S.D.I. or John Ludwig or whoever, they held a big
23 auction to sell off a bunch of units out there, didn't
24 they?

25 A. That did occur, yes.

1 Q. That happened over 2009 and 2010?

2 A. Somewhere in there.

3 Q. And the H.O.A. didn't do anything to stop that

4 auction to some of the homeowners and sell to some

5 homeowners that live out there today; isn't that right?

6 A. I don't believe we did anything, no, legally to stop

7 that auction from occurring.

8 Q. Well, the reason you didn't do anything at that

9 auction is because neither you nor the homeowners

10 association in 2009 or 2010 believed there was a

11 pervasive issue with the windows out there. Isn't that

12 right, Mr. White?

13 A. I don't believe that's correct, no.

14 Q. So you allowed an auction to happen where these

15 units were sold to unsuspecting homeowners knowing that

16 you believed there was a pervasive window issue out there

17 and did nothing to warn those people that were buying?

18 A. We made sure that S.D.I. knew that they had to

19 provide some type of disclaimer to anybody that bought

20 saying that they were buying those units as is and that

21 the H.O.A. would not be responsible for any issues that

22 normally it would be responsible for because of the way

23 they were being sold.

24 Q. Do you know if that was done?

25 A. If what was done?

1 Q. If these homeowners were told that they were buying
2 potentially leaking units?

3 A. I don't know. I don't know for sure, no.

4 Q. Mr. White, isn't it true that some of the homeowners
5 have come to you and complained that that happened and
6 they were not warned about these problems?

7 A. Not to me.

8 Q. You've never heard that, Mr. White?

9 A. Not to me.

10 Q. Have you read any of the depositions of your
11 neighbors?

12 A. I have not.

13 Q. Well, let's talk about the leak in the crawlspace.
14 I really don't even understand that. And again, for the
15 homeowners, your crawlspace is actually up a wall and
16 there's like a little door up there?

17 A. Correct.

18 Q. So you have to either get out a ladder or something
19 to look in there; right?

20 A. That's correct.

21 Q. Okay. And it's a dirt or stone floor up there?

22 A. It's not stone. It's dirt.

23 Q. Dirt, okay. And you said it was leaking from the
24 time you moved in all the way until today?

25 A. Correct.

1 Q. And then I heard you testify that it's not leaking
2 to Mr. Lyles and it doesn't need a repair; is that right?

3 A. I don't believe that's what I testified to, but ---

4 Q. I really didn't understand. Please explain.

5 A. The crawlspace, you know, where the building meets
6 the foundation, it leaks through there. It's leaked
7 since day one, as I said. It still leaks today. And
8 it's just never been designated an emergency situation
9 because it's never come inside the basement.

10 Q. Water is getting over the concrete wall?

11 A. Yes. I don't know what the situation is. All I
12 know is I open the door, there's water running in there,
13 and it smells. And I don't know what the mechanics of
14 the leak are. I have no idea.

15 Q. You don't know why it's leaking?

16 A. I do not know why it's leaking, no.

17 Q. You don't know what's leaking?

18 A. Nope.

19 Q. You don't know how the water's gotten in there?

20 A. No, I don't.

21 Q. You reported that to yourself, the H.O.A.?

22 A. Yes. Yes.

23 Q. And who has decided, Mr. White, that you don't have
24 a problem with your foundation wall that requires repair?

25 A. Essentially, the litigation committee makes that

1 call. And as a member of that litigation committee, I
2 would have said, it's not coming in, so there's no reason
3 to call it an emergency repair.

4 Q. You would have said that, or you did say that?

5 A. I did say that.

6 Q. So you haven't asked for that to be repaired?

7 A. Not yet, no.

8 Q. Is water actually getting into that crawlspace?

9 A. Yes.

10 Q. Have you talked to Mr. Watkins about that?

11 A. I have not, no.

12 Q. Did anybody put a hose to the side of your house to
13 see where it's getting in?

14 A. I don't know.

15 Q. Now, the H.O.A. was turned over to you and Mr.
16 Taylor and a couple of other folks out there. And you
17 testified that Mr. Roberson was on the board of the
18 H.O.A.; is that right?

19 A. The previous board.

20 Q. Previous board. Immediately prior to your getting
21 on; is that right?

22 A. As I remember, yes.

23 Q. And the homeowners association has decided to sue
24 every member of the homeowners association board prior to
25 its turnover to y'all except for Mr. Roberson; is that

1 right?

2 A. That's correct.

3 Q. Because he's your neighbor; right?

4 A. Correct.

5 Q. So every other member of the homeowners association

6 board did something wrong except for your neighbor Mr.

7 Roberson; right?

8 A. The board decided at the time that Tim Roberson

9 would not be included primarily because of the

10 relationship that he had with the community.

11 Q. Everybody but Mr. Roberson; right, Mr. White?

12 A. That's correct.

13 Q. Now, I assume being on the litigation committee and

14 the H.O.A., you trust Mr. Watkins and the work that he's

15 doing out there; is that right?

16 A. That's correct.

17 Q. And you've hired Mr. Watkins and his company to do

18 these repairs to your foundations; is that right?

19 A. That's correct.

20 Q. And you're comfortable enough with Mr. Watkins that

21 you would hire him to fix your own problem; is that

22 right?

23 A. My particular personal unit problem?

24 Q. Yes.

25 A. He would be considered, yes.

1 Q. But you wouldn't give all your neighbors someone
2 different that you wouldn't trust for yourself, would
3 you?

4 A. I would assume that the H.O.A. would make the right
5 choice and fix the problem. That's the H.O.A.'s
6 responsibility, not mine.

7 Q. Okay. And he is the one out there doing the repairs
8 now; is that right?

9 A. That's correct.

10 Q. And Trehel has not been to the Stoneledge project
11 since 2010; is that right?

12 A. I don't know. I have not been involved with the
13 actual day-to-day repair issues for a while.

14 Q. And despite your testimony here just a little while
15 ago, you testified to me under oath that the H.O.A. would
16 not hire Trehel because they were too expensive; isn't
17 that right?

18 A. Yes, in my deposition I did state that. As I said,
19 I was operating with incorrect information.

20 Q. All right. Thank you, Mr. White.

21 THE COURT: Mr. Vick?

22 MR. VICK: Yes, Your Honor. Thank you.

23 CROSS-EXAMINATION

24 BY MR. VICK:

25 Q. Good afternoon, Mr. White. How are you?

1 A. Hello. Fine.

2 Q. I'm going to jump around just a tad, but I don't
3 have too many questions. Now, you said you've been a
4 resident at Stoneledge since June of 2006; correct?

5 A. Correct.

6 Q. What are your monthly homeowner association dues
7 currently? What's the amount?

8 A. Three thirty per month.

9 Q. Pardon?

10 A. Three hundred thirty dollars per month.

11 Q. And has that increased or decreased while you've
12 been an owner there?

13 A. Yes, it has increased one time.

14 Q. Okay. What was that increase? What was it, and
15 what was it changed to?

16 A. At the beginning when we first moved in, it was
17 three hundred per month, and it increased to three
18 thirty.

19 Q. When was that?

20 A. Probably 2009.

21 Q. Okay. Now, do you know what it means to testify
22 based on your personal knowledge as opposed to what
23 someone, some third party, has told you such as your
24 attorney?

25 A. I think I understand that concept, yes.

1 Q. You do? Okay. So if you're testifying based on
2 your personal knowledge as to what you know to be true
3 from your own personal experience, your first-hand
4 experience, do you understand that?

5 A. Yes.

6 Q. And I believe when you were asked who I.M.K. was
7 comprised of, you initially answered that you don't know;
8 is that correct?

9 A. I don't remember what I said.

10 Q. Well, is that accurate that you don't, in fact,
11 personally know what I.M.K. is comprised of or who I.M.K.
12 is comprised of?

13 A. I do know -- I know now what I.M.K. was comprised
14 of. You're talking about individuals?

15 Q. Do you know that from any way other than your
16 attorney telling you that?

17 A. Yes. I knew that when we took over the board.

18 Q. Okay. And when Mr. Lyles asked you a little broader
19 question, individuals that you associated with I.M.K.,
20 you answered Tim Roberson and Rick Thoennes and Rick
21 Thoennes, III; is that right?

22 A. Correct.

23 Q. Okay. And those are the individuals that you
24 associated with I.M.K.; correct?

25 A. Correct.

1 Q. Okay. And then Mr. Lyles asked you further were
2 there anyone else that you associated with I.M.K.? And I
3 believe you said others like Lollis and Cox, but not
4 persons I dealt with; is that right?

5 A. That's correct.

6 Q. Okay. So you have no personal knowledge of Larry
7 Lollis or Bill Cox's involvement; correct?

8 A. I have no personal knowledge; you're correct.

9 Q. Okay. And I think later on you said something to
10 the effect of Bill Cox was an I.M.K. board member.

11 A. That's correct.

12 Q. Do you recall saying that?

13 A. Yes.

14 Q. Do you know if Bill Cox is even a member of I.M.K.?

15 A. I don't know.

16 Q. Okay. So what did you mean by he's an I.M.K. board
17 member?

18 A. What I meant was when I.M.K. was the board, that
19 they were the board, that Bill Cox was on the board.

20 Q. He was on the board of the H.O.A.?

21 A. Of the H.O.A.; correct.

22 Q. All right. And Larry Lollis, he never was a member
23 of the H.O.A. board; correct?

24 A. I don't know. I wouldn't know that.

25 Q. To the best of your knowledge?

1 A. I don't -- I don't know.

2 Q. As far as you know, he was not?

3 A. To the best of my knowledge, I don't remember if he
4 was a board member, an H.O.A. board member, or not.

5 Q. So as far as you know, he was not; is that right?

6 A. As far as I know, he was not.

7 Q. Okay. I believe that's all the questions I have.

8 Thank you.

9 THE COURT: Mr. Hemphill?

10 MR. HEMPHILL: No questions, Your Honor.

11 THE COURT: Redirect?

12 MR. LYLES: Yes, sir. Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. LYLES:

15 Q. Mr. White, in the months following the purchase of
16 your unit, you indicated that there were some window
17 leaks and whatnot?

18 A. Correct.

19 Q. How did you respond or address those problems?

20 A. Well, when we discovered the first leak, we
21 contacted Nathan and his folks, and they came over to
22 take a look at it.

23 Q. Did they try to fix it for you?

24 A. They did.

25 Q. Did you have any indication at all that you needed

1 to file a lawsuit over that leak?

2 A. No.

3 Q. And then did you have any appreciation or
4 comprehension that you needed to file a lawsuit over any
5 of your window leaks in 2006 or 1007?

6 A. No, not at all.

7 Q. At what point in time did you have a realization
8 that you had a need or even a right to file a lawsuit
9 over the conditions in your unit?

10 A. Well, that would have occurred in late '08, '09 time
11 frame when were -- as a member of the board and we were
12 beginning to understand the extent of the issues that we
13 had in the subdivision.

14 Q. And prior to that time in your unit in particular,
15 was I.M.K. trying to fix -- excuse me -- Marick trying to
16 fix the leaks in your unit?

17 A. They were.

18 Q. And were you satisfied with that?

19 A. With what they did, yes.

20 Q. The leak in the basement -- I asked you earlier if
21 you needed to have your foundation wall repaired as a
22 result of the leaks, and you said, no. Were you
23 referring to an emergency repair?

24 A. We are not taking on water in the basement, in the
25 basement finished area. The reason that the leak in the

1 crawlspace has never been designated an emergency is
2 because the water has yet to infiltrate the finished part
3 of the basement.

4 Q. The water into the crawlspace is coming through your
5 foundation wall?

6 A. It appears to be coming from where the wall meets
7 the foundation, yes. It's a little complicated and
8 convoluted in there, so I don't know exactly what's
9 happening.

10 Q. Is that a condition that you ultimately want to have
11 repaired at your house?

12 A. Absolutely.

13 Q. But it's not the subject of an emergency?

14 A. That's correct.

15 Q. And there was a reference to a sale of these units,
16 an auction. And I want to be clear. Who was selling
17 Stoneledge units at auction? Do you know?

18 A. That was S.D.I.

19 Q. And who owned the units that S.D.I. was selling?

20 A. I don't know. I don't know. It was complicated,
21 there again. I don't know if it was I.M.K. or S.D.I. I
22 don't know the nature of the relationship that they had.

23 Q. Those units, were they owned by the H.O.A.?

24 A. They were not owned by the H.O.A.

25 Q. And did you know of anything that the H.O.A. could

1 have done to prevent S.D.I. or the owner of those units
2 from having an auction?

3 A. No.

4 Q. Do you know whether or not the H.O.A. demanded that
5 S.D.I. provide a disclosure with regard to the sale of
6 those units?

7 A. To the best of my recollection, we did demand that
8 that notice be provided, yes.

9 Q. And this lawsuit was filed in May of 2009?

10 A. Correct.

11 Q. At any point in time has the board authorized any
12 sale of any unit without the disclosure about the
13 condition of the units or the lawsuit?

14 A. No.

15 Q. I don't have any further questions, Mr. White.
16 Thank you.

17 THE COURT: Yes, sir. Wait a minute.

18 Mr. Belcher?

19 MR. BELCHER: No, Your Honor.

20 MR. IMHOFF: Just -- maybe two questions, Your
21 Honor.

22 THE COURT: Yes, sir.

23 RECROSS-EXAMINATION

24 BY MR. IMHOFF:

25 Q. Mr. White, the disclosure that you gave these new

1 purchasers, new neighbors of yours, that was a disclosure
2 that they were buying an as is?

3 A. I don't remember exactly what that disclosure was
4 meant to convey to any potential new owner, but it was as
5 is. I remember us having a conversation around the fact
6 that anybody who bought those units at auction were
7 buying them as is.

8 Q. And so if they bought those units as is, have you
9 gone back to those homeowners and told them that they are
10 not going to have their units fixed as a result of this
11 litigation?

12 A. Have I?

13 Q. Has anyone in the homeowners association?

14 A. I don't know. I have not. I don't know if anybody
15 else has.

16 Q. Have you gone back and attempted to determine who
17 those people are that bought those units after they were
18 told about these defects and the as-is requirement?

19 A. I don't know.

20 Q. Are you asking for every unit in phase one, all
21 thirty-seven units to be fixed despite the fact that many
22 of your neighbors bought their homes at a reduced price
23 because of that as-is designation?

24 A. I don't know.

25 Q. Thank you, Mr. White.

1 THE COURT: Anyone else?

2 (No response)

3 THE COURT: Very well.

4 All right. You may step down. Thank you, sir.

5 All right. Mr. Foreman, ladies and gentlemen of the
6 jury. Obviously, this is a good time to break for the
7 day. We've made some progress today, and so hopefully
8 we'll be able to finish the testimony and evidence soon.
9 What time would you like to start in the morning?

10 MR. FOREMAN: Nine o'clock is fine with us.

11 THE COURT: Nine o'clock. Very good. Be here
12 at nine o'clock. Come back to the jury room that we've
13 been using. Again, do not let anyone discuss any of the
14 cases with you or you discuss it among yourselves. Very
15 good. Thank you very much. See you in the morning.
16 Have a good evening.

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

19 THE COURT: All right. Anything from the
20 plaintiff?

21 MR. LYLES: No, Your Honor.

22 THE COURT: From the defendants?

23 MR. BELCHER: None, Your Honor.

24 THE COURT: All right. If the plaintiff does
25 finish by noon tomorrow, what's the plan after that? I

1 mean, unless y'all have settled on some scheduling of
2 witnesses or something like that. You don't need to tell
3 me, but I certainly don't want any dead time, so ...

4 MR. IMHOFF: Your Honor, we're going to talk
5 about who we're going to call.

6 THE COURT: Well, that's what I'm just trying
7 to do is give you a little incentive.

8 MR. BELCHER: I would say rest assured that
9 amongst us, we will have at least a witness to go after
10 the plaintiff rests and we go for our post trial or our
11 motions and all of that. We won't waste any time. We'll
12 definitely go until five o'clock.

13 THE COURT: All right. Very good. Well, thank
14 you. Because the jury's been working and working early
15 and sometimes late. So very good. I'll see you in the
16 morning at nine o'clock.

17 MR. BELCHER: Thank you, Your Honor.

18 MR. LYLES: Thank you, Your Honor.

19 (WHEREUPON, court stood at recess for the day at
20 approximately 5:22 p.m.)

21 **November 5, 2013**

22 (WHEREUPON, court convened with all parties present
23 and the following proceedings were had commencing at
24 approximately 9:12 a.m.)

25 (WHEREUPON, Plaintiff's Exhibits Number 31 through

1 41 were marked for identification only.)

2 MR. LYLES: Judge Macaulay?

3 THE COURT: Yes, sir.

4 MR. LYLES: The first witness today will be
5 Larry Lollis. Larry was a member of Integrys Keowee,
6 which was a member of I.M.K. He's a defendant in the
7 case.

8 THE COURT: Yes, sir.

9 MR. LYLES: And the purpose of this testimony
10 is obviously to establish the personal liability of Mr.
11 Lollis and the corporate liability of Integrys. Some of
12 the exhibits that I have that are relevant to his
13 testimony are emails to an owner, a couple by the name of
14 Hayes. The Hayes unit is in phase two. They're not
15 addressing unit problems. This is simply email
16 correspondence back and forth between them about the
17 purchase of the unit. And so I just wanted to alert the
18 Court to the fact that these are phase-two owners. Like
19 I say, it's irrelevant as it relates to defects, but it
20 does establish the manner in which Integrys was dealing
21 with these owners.

22 THE COURT: All right. Now, when you say
23 Integrys, you're talking about the board, when Integrys
24 was part of the board?

25 MR. LYLES: Well, Integrys was a member of

1 I.M.K. I.M.K. was comprised of two members, Marick Home
2 Builders and Integrys Keowee. And what these emails
3 establish is that the sales group of I.M.K. was, in fact,
4 Integrys. We have salesmen communicating with owners
5 under the Integrys name. You know, we've asserted these
6 amalgamation of interest theories against Integrys and as
7 well against the individuals as well who are members of
8 Integrys Keowee. And so that's the purpose of these
9 emails.

10 THE COURT: All right. Ms. Brown, anything?

11 MS. BROWN: Your Honor, obviously those emails
12 mention Integrys Keowee. And you know my position on Mr.
13 Lyles' personal liability as well as I.M.K.'s liability.
14 I mean, it's only a member, a fifty percent member of
15 I.M.K. Mr. Lollis is a twenty percent member of I.K. He
16 has no control. So the emails, he can ask him what he
17 knows about them.

18 THE COURT: All right. Well, just as long as
19 we keep it generic rather than -- what is it? -- specific
20 to either phase.

21 MR. LYLES: And I don't even think you can tell
22 from the emails which phase. It's just I know that the
23 Hayes live in phase two, and I didn't want to raise an
24 issue.

25 THE COURT: Well, let me ask you, are you

1 seeking to introduce those?

2 MR. LYLES: Yes, sir.

3 THE COURT: Are they his emails?

4 MR. LYLES: They are emails sent on behalf of
5 Integrys by an Integrys representative.

6 MS. BROWN: Not Mr. Lollis.

7 THE COURT: Well, how are you -- what's the
8 foundation for them?

9 MR. LYLES: Well, the foundation is he's a
10 member of Integrys, and I think that these emails
11 establish that you have representatives of Integrys
12 corresponding with and engaging in the sales process with
13 these owners.

14 THE COURT: How about the emails? Do the
15 emails themselves mention anything about which phase the
16 units are in?

17 MR. LYLES: They don't. They just mention the
18 name of the Hayes. And I know that they live in phase
19 two, so I didn't want anybody to be surprised.

20 MS. BROWN: Well, my only objection to that
21 would be is if we're using a phase-two sale in a phase
22 one trial, I would object to that.

23 THE COURT: Well, that's just it. That's why I
24 asked if they were generic to the entire development, not
25 to either phase. If he is not the author or communicate

01300

1 -- I guess that's what you'd call it -- the only thing I
2 can think of would be -- and he stands only in the
3 position of the calling entity -- is it might be used for
4 impeachment. In other words, I think -- what is it? --
5 613 or whatever that if you ask him about the contents of
6 the emails and, therefore, you control, you know, what
7 the question is and what goes to the jury. And, of
8 course, if he denies that that was something that his
9 corporate entity did or said, then, of course, you can
10 read it. I wouldn't necessarily put it into the record,
11 but I think it could be read.

12 Let's do that. I think it just -- because that's
13 what you're trying to do is to establish some sort of
14 connection as well as direction from the corporate
15 entities, board or members?

16 MR. LYLES: Yes, sir.

17 THE COURT: All right. Anything, Ms. Brown?

18 MS. BROWN: No.

19 THE COURT: Do you see what I'm saying?

20 MS. BROWN: Yeah, I understand. And like I
21 say, I'm not consenting that these -- obviously these
22 exhibits coming in.

23 THE COURT: That's why I asked if you objected.
24 Because as of right now, I'm going to leave them in for
25 identification only to be used for impeachment if he

1 should deny that, oh, no, this never happened or
2 something like that.

3 MR. LYLES: Yes, sir. Okay.

4 THE COURT: Because that puts him in the
5 corporate position. And that's what they are, corporate
6 communications.

7 MR. LYLES: Yes, sir.

8 THE COURT: All right. Unless there's
9 something else, that's how we'll proceed with that.

10 MR. LYLES: Yes, sir. The only other thing I
11 need to do is grab a chart from behind the little thing
12 over here. I forgot to get it this morning. Excuse me.

13 THE COURT: Are we ready?

14 MR. LYLES: Yes, sir, I'm ready.

15 THE COURT: Ms. Brown?

16 MS. BROWN: Yes, sir.

17 THE COURT: All right. Ask the jury to join
18 us, please. Oh, wait a minute.

19 (WHEREUPON, the jury entered the open court at
20 approximately 9:25 a.m.)

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

23 Mr. Foreman, ladies and gentlemen of the jury, we'll
24 now continue with the plaintiffs' case.

25 Mr. Lyles?

1 MR. LYLES: Yes. The plaintiff would call
2 Larry Lollis.

3 (WHEREUPON, the witness was duly sworn.)

4 THE COURT: All right. If you would, please,
5 sir, give us your full name for the record spelling your
6 last name.

7 THE WITNESS: It's Larry Dean Lollis, L-O-L-L-
8 I-S.

9 THE COURT: Very good. Thank you, sir.

10 LARRY DEAN LOLLIS,

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MR. LYLES:

14 Q. Good morning, Mr. Lollis.

15 A. Good morning.

16 Q. How are you today?

17 A. I'm good. How are you, sir?

18 Q. I'm doing okay. Thank you very much. I appreciate
19 it.

20 Mr. Lollis, are you familiar with the project that
21 we've been trying for the last week, Stoneledge at Lake
22 Keowee?

23 A. Yes, sir.

24 Q. How are you familiar with Stoneledge?

25 A. I was a minority investor in I.K., and I think I.K.

1 was an investor in I.M.K.

2 Q. And I.M.K., is that an L.L.C. or a corporate entity
3 that you're familiar with?

4 A. An L.L.C.

5 Q. Are you familiar with it?

6 A. Only from the standpoint of -- not in the day-to-day
7 business, but I am familiar with who the partners were.

8 Q. And who were the members of I.M.K.?

9 A. Members or managers? I was the only member.

10 Q. Of I.M.K.?

11 A. Yeah.

12 Q. Well, let me back up. How did the Stoneledge
13 project come to your attention, Mr. Lollis?

14 A. Tim Roberson called. And at the last minute, an
15 investor who was a friend of his decided to do something
16 different. Tim called me and asked me if I was
17 interested. And after much thought and prayer, I decided
18 to invest.

19 Q. And what was described to you about the project when
20 Tim called?

21 A. It was a condo project on Lake Keowee.

22 Q. And did he tell you anything about it, any of the
23 details, other than that?

24 A. That it had been left unfinished and that it was a
25 good -- he thought it was a good bargain and that it

- 1 would be -- offer a good return down the road.
- 2 Q. And what was Mr. Roberson's plan? What plan did he
- 3 pitch to you in terms of your involvement?
- 4 A. My involvement was just an investor.
- 5 Q. And did you invest in the project?
- 6 A. Yes, I did.
- 7 Q. And did you understand when you made that investment
- 8 that -- well, what did you understand you were investing
- 9 in exactly? What corporate entities?
- 10 A. I.K.
- 11 Q. And does that stand for Integrlys Keowee?
- 12 A. Yeah.
- 13 Q. Were you a member, or are you a member of Integrlys
- 14 Keowee?
- 15 A. Yes.
- 16 Q. And are there other members of Integrlys Keowee?
- 17 A. Yes. Well, no.
- 18 Q. Were there ever other members of Integrlys Keowee?
- 19 A. Members or managers?
- 20 Q. Members. But if you want to refer to them as
- 21 managers ...
- 22 A. Well, there were other people involved, but I'm not
- 23 sure what their title was. I think they were managers.
- 24 Q. Did you own a portion of Integrlys Keowee?
- 25 A. Yes.

1 Q. And what portion did you own?

2 A. Twenty percent.

3 Q. And did anyone else own an interest in Integrys
4 Keowee?

5 A. Two other people.

6 Q. And who were those people?

7 A. Bill Cox and Tim Roberson.

8 Q. Now, so between the three of you, y'all owned a
9 hundred percent of Integrys Keowee?

10 A. I owned twenty percent, and they owned forty percent
11 each.

12 Q. Now, you mentioned a company called I.M.K.?

13 A. That's correct.

14 Q. Do you know who owned I.M.K.?

15 A. Integrys Keowee and I.M.K.

16 Q. Was Marick also an owner of I.M.K., or do you know?

17 A. Yes.

18 Q. And do you know what percentage of I.M.K. I.K.
19 owned?

20 A. Fifty percent.

21 Q. And do you know what percentage of I.M.K. Marick
22 owned?

23 A. I assume fifty percent. That's Marick and Marick.

24 And again, I'm not familiar with the day-to-day business
25 but I assume it was the two Maricks or the two

1 Thoenneses.

2 Q. And did you have any involvement in the day-to-day
3 operations of I.K.?

4 A. None.

5 Q. Did you have any involvement in the day to day
6 operations of I.M.K.?

7 A. None.

8 Q. You were simply an investor?

9 A. Yes, sir.

10 Q. Did you ever go to the project?

11 A. I've been on the property twice.

12 Q. And when was the first time you were there?

13 A. Probably before I made the investment in 2005 or
14 somewhere around in there.

15 Q. And the second time?

16 A. I rode by in my boat.

17 Q. What did you understand the business of I.M.K. to
18 be?

19 A. I really don't know what the business of I.M.K. was.

20 I mean, I thought they were operating I.M.K. That's
21 really -- I don't know what their business was, to be
22 honest with you. I know Mr. Thoennes and his son were in
23 the construction business.

24 Q. And they were part of I.M.K.?

25 A. Yes.

1 Q. And what did you understand -- how did you
2 understand I.M.K. related to the corporate entity that
3 you had an interest in?

4 A. My understanding with I.M.K. related to I.K.?

5 Q. Yes, sir.

6 A. My understanding was that they were taking care of
7 the business. And I was getting most of my information
8 from Mr. Roberson.

9 Q. Did you understand that I.M.K. was going to be in
10 the business of selling the townhomes on Lake Keowee?

11 A. That was my assumption.

12 Q. And you mentioned a moment ago that you expected
13 when you invested in I.K. to get a return on your
14 investment; is that right?

15 A. Yes.

16 Q. And did you understand that that return was going to
17 come from the sale of those condominiums or townhomes at
18 Lake Keowee?

19 A. Yes.

20 Q. And did you understand that you were affiliated
21 corporately with Marick Home Builders?

22 A. Affiliated from the standpoint of I was a minority
23 shareholder with no control in I.M.K.

24 Q. Do you know of any other business that I.M.K. ever
25 conducted other than the development of the Stoneledge

- 1 community?
- 2 A. It built the clubhouse at Keowee Vineyards.
- 3 Q. Any other business?
- 4 A. They were in the construction business. And I
- 5 invested some money in a project several years ago that
- 6 they had been a part of, but I don't think they were when
- 7 I got involved.
- 8 Q. You're talking about Marick Home Builders?
- 9 A. I think this was Rick.
- 10 Q. Okay. Do you know somebody by the name of Chip
- 11 Albert?
- 12 A. No.
- 13 Q. Did you ever meet anybody by the name of Ty Savage?
- 14 A. The name sounds familiar, but I don't remember.
- 15 Q. Do you have any recollection of Integrlys Keowee
- 16 being involved in the sales part?
- 17 A. No, sir.
- 18 Q. Do you know whether or not Integrlys Keowee was
- 19 actively involved in the sale of the units at Stoneledge
- 20 to the public?
- 21 A. No, sir.
- 22 Q. Were you aware that there are construction defects
- 23 and problems out at the project in phase one?
- 24 A. Yes, sir.
- 25 Q. When did you become aware of that?

1 A. Two years ago, two and a half years ago.

2 Q. After the lawsuit was filed?

3 A. Yes.

4 Q. You had no knowledge of that at the time that you
5 owned an interest in I.K.?

6 A. No.

7 Q. Were you aware that -- have you been in this
8 courtroom for at least periods of time over the last
9 week?

10 A. Yes.

11 Q. Have you heard some testimony about the condition?

12 A. I have.

13 Q. And you were not aware of any of those conditions
14 until approximately two and a half years ago?

15 A. No, sir.

16 Q. Neither Marick or any of the other partners in I.K.
17 told you about construction problems in phase one?

18 A. Not until I realized I was being sued.

19 Q. Do you recall I.M.K. selling its interest in the
20 Stoneledge project to a company called S.D.I.?

21 A. I recall a sale. I don't have a clue who S.D.I. is,
22 but I do recall the sale.

23 Q. Do you recall the name Ludwig?

24 A. Is that the guy that ran into the house? Yes, I do.

25 I recall that name.

1 Q. And is the fact that -- did you understand that
2 I.M.K. sold its interest in Stoneledge to Mr. Ludwig and
3 his corporate entities?

4 A. I had no idea.

5 Q. Were you involved at all in the sales transaction
6 other than ---

7 A. No, not in any way, shape or form.

8 Q. Did you look at the sales information or the sales
9 contracts before they were signed?

10 A. No, I did not.

11 Q. Have you seen them since?

12 A. No.

13 Q. Do you know whether or not I.K. received money as a
14 result of the sale of I.M.K.'s interest in Stoneledge to
15 Mr. Ludwig?

16 A. I didn't know who it came from, but I know we
17 received money from the sale of some of the units.

18 Q. How about the sale of the property generally to
19 Ludwig? Do you recall that?

20 A. No. I don't recall what date any of that happened.
21 I know we sold a block of units to somebody.

22 Q. And do you remember what I.K. received as a result
23 of that sale?

24 A. No, sir.

25 Q. And you haven't seen any of those sales documents?

1 A. No, sir.

2 Q. Prior to that sale, do you recall receiving money
3 from the sale of I.M.K. units?

4 A. Yes.

5 Q. And that would have been the time period 2006/2007?
6 Do you recall that?

7 A. I would say generally that time. It might have been
8 some into '08, but I think it was '06 and '07 was the
9 majority of it.

10 Q. Mr. Lollis, I'm going to hand you what was
11 previously marked as exhibit 38. And it's a compilation
12 of one, two, three, four, five, six pages. And I'll just
13 ask you if you recognize the documents that are contained
14 in that exhibit 38?

15 A. I recognize the amounts of the checks, but I don't
16 really remember -- for some reason, S.D.I. funding
17 doesn't stick in my mind.

18 Q. Okay.

19 A. But I do remember the amounts of the checks.

20 Q. And if you will, Mr. Lollis, these are emails; is
21 that right?

22 A. Yes, that's correct.

23 Q. And these emails reflect disbursements from I.M.K.
24 to various parties?

25 A. That's correct.

1 Q. Do you remember receiving these emails?

2 A. I do remember seeing the emails, yeah. I remember

3 -- mostly I paid attention to the amount of my check.

4 Q. Sure.

5 MR. LYLES: And, Your Honor, I'd move to have
6 Plaintiff's Exhibit 38 admitted into evidence.

7 MS. BROWN: No objection.

8 THE COURT: All right. Without objection,
9 Plaintiff's Exhibit Number 38 is admitted.

10 (WHEREUPON, Plaintiff's Exhibit Number 38 was
11 admitted into evidence.)

12 Q. Mr. Lollis, exhibit 38, these are sums or money that
13 was distributed from I.M.K. to S.D.I. funding, Integrys
14 and then to Mr. Cox, Mr. Roberson and you; is that right?

15 A. These checks?

16 Q. Yes, sir.

17 A. I assume that the checks -- you don't have a copy of
18 the check here, so I really don't know who the check came
19 from. So if you'll give me a copy of the check, I'll
20 tell you who it came from.

21 Q. Well, on the first email, it says, "Subject, I.M.K.
22 distribution checks." Do you see that?

23 A. Yes.

24 Q. And that reference ---

25 MS. BROWN: Your Honor?

1 THE COURT: Yes, ma'am.

2 MS. BROWN: Your Honor, can we approach for
3 just a second?

4 THE COURT: Certainly.

5 (WHEREUPON, a bench conference was held off the
6 record.)

7 THE COURT: All right. You may proceed.

8 Q. Mr. Lollis?

9 A. Yes, sir.

10 Q. I'm going to take that back from you if that's okay.

11 THE COURT: It's into evidence, isn't it, as
12 far as identification?

13 MR. LYLES: It was actually moved into evidence
14 without objection, so I wanted to make sure that we clear
15 that up.

16 THE COURT: All right. But if you would,
17 please, use it for the purposes that we discussed at
18 sidebar.

19 Q. Mr. Lollis, before the time that I.M.K. sold its
20 interest in Stoneledge to Mr. Ludwig and his entities, do
21 you recall receiving funds from the sale of units at
22 Stoneledge?

23 A. Yes.

24 Q. And those were funds that were paid to you and to
25 the other members of I.K. and not left in I.M.K.; isn't

1 that right?

2 A. I'm not sure. What was paid to me was paid to me.

3 Whether it was anything left, I'm not sure. I think --

4 you know, I'm not sure about that. I don't know.

5 Q. Well, if it was paid to you, we know that it wasn't

6 in I.M.K.?

7 A. That's right.

8 Q. Okay. And if it was paid to Mr. Cox, it wasn't in

9 I.M.K.?

10 A. That's correct.

11 Q. And if it was paid to Mr. Roberson, it wasn't in

12 I.M.K.?

13 A. That's correct. But ---

14 Q. Yes, sir.

15 A. Pardon me.

16 Q. Now, at the time of the sale to Mr. Ludwig, do you

17 recall ---

18 A. To who?

19 Q. To Mr. Ludwig and his companies. And that was in

20 the summer of 2008. Do you recall that?

21 A. I know that there was a sale. I don't know the

22 exact date of when it was. Whatever date was on those

23 checks probably pretty well clears it up.

24 Q. And you recall -- or do you recall what was being

25 sold to Ludwig and his entities was I.M.K.'s interest in

1 Stoneledge?

2 A. I really didn't know that. I assumed that. But I
3 didn't know exactly how that transaction occurred. I had
4 really nothing to do with the day-to-day business of how
5 they operated that part of it.

6 Q. Do you remember that as part of that sale of the
7 assets of I.M.K. to Mr. Ludwig and his companies, that
8 I.K. received consideration of a million dollars?

9 A. I'm assuming that's from the part of the units that
10 were sold to us at the same time.

11 Q. Do you remember that being the case, that I.K.
12 received a million dollars from Ludwig's companies?

13 A. I didn't know it was a million dollars. I just knew
14 how much my portion was, which was twenty percent after
15 all the other deductions had come out of it.

16 Q. Okay. And the million dollars that was paid to
17 I.K., was part of that sale as money that was left in
18 I.M.K.?

19 MS. BROWN: Your Honor, I move -- I object.
20 This is leading this witness.

21 THE COURT: Well, I think he's probably
22 associated with an adverse party. In fact, I think he is
23 an adverse party. So I think the rule provides for
24 leading. Overruled.

25 MR. IMHOFF: Your Honor ---

1 THE COURT: Yes, sir.

2 MR. IMHOFF: --- may we have just a brief
3 sidebar, Your Honor.

4 THE COURT: Certainly.

5 (WHEREUPON, a bench conference was held off the
6 record.)

7 THE COURT: All right. You may proceed.

8 Q. Mr. Lollis, you don't have a specific recollection
9 of the terms of consideration that was made to I.K. Is
10 that what you're telling me?

11 A. No.

12 Q. Do you recall as a part of the sale to Mr. Ludwig
13 and his companies, I.K. received as part of that
14 consideration a note for three hundred and fifty thousand
15 dollars?

16 A. No.

17 Q. Do you recall that in order to secure that note,
18 I.K. actually received or actually entered into an
19 agreement that was called a promissory note and a
20 consulting agreement where I.K. agreed to perform
21 consulting services for Mr. Ludwig and his company?

22 A. I do remember that we were due some money from
23 someone else, but I have no clue who it was with -- who
24 it was from. I just don't remember whether it was a bank
25 or -- I thought it was a bank, but maybe it wasn't.

1 Q. And after the sale, do you remember receiving money
2 as a result of the sales, of continued sales of
3 Stoneledge units?

4 A. No. We might have received some, but it wasn't -- I
5 don't remember it.

6 Q. Do you remember receiving money or a promise to pay
7 any money from the sales of Stoneledge units that
8 occurred actually after this lawsuit was started?

9 A. I know there was an agreement that someone was
10 supposed to pay for some service or something that was
11 part of a -- I'm not sure exactly what the terms of the
12 agreement were, but some sales service or something that
13 I.K. did to generate some additional income down the
14 road.

15 Q. Now, Mr. Lollis, I'm going to show you what's been
16 marked -- what I marked before you got here as exhibit
17 39.

18 A. Okay.

19 Q. And ask you is that the agreement that you were
20 referring to?

21 THE COURT: That's number 45?

22 MR. LYLES: It's 39.

23 THE COURT: Oh, excuse me.

24 MR. LYLES: I'm sorry.

25 A. I honestly don't remember this agreement.

1 Q. Okay. Do you remember I.K. actually ever performing
2 any consulting services for Mr. Ludwig or his company in
3 relation to sales?

4 A. No.

5 Q. You don't?

6 A. No.

7 Q. Do you know who was on the board of the Stoneledge
8 H.O.A. up until the time the board was turned over to the
9 owners in September of 2008?

10 A. No.

11 Q. You never went to any board meetings yourself?

12 A. No.

13 Q. You never got any minutes?

14 A. No. Well, wait a minute. Yeah, I think I did get
15 copies of minutes.

16 Q. Did you understand that Mr. Thoennes and Mr. Cox
17 were on the board?

18 A. If their names were listed as president or vice
19 president or some officer of the board, I would have
20 probably gotten that, but I didn't know which office was
21 which or anything like that.

22 Q. But you don't have any independent or personal
23 recollection of them serving on the board?

24 A. No.

25 Q. Do you remember that at the time of the sale to Mr.

1 Ludwig and his corporation that they didn't -- that they,
2 being Mr. Ludwig, didn't want control of the board?

3 A. No.

4 Q. Mr. Lollis, do you think that these buildings need
5 to be fixed?

6 A. Yes.

7 Q. And completely fixed?

8 A. Yes.

9 Q. And properly repaired?

10 A. Yes.

11 Q. Do you feel any responsibility or obligation to do
12 that?

13 A. I actually have a place out there, and I would like
14 to see them fixed. But I don't feel personally
15 responsible for it. I feel like the construction company
16 and the architect and the people that were contracted to
17 do the work should do it.

18 Q. And fix it properly?

19 A. Exactly.

20 Q. Mr. Lollis, I think that's all the questions I've
21 got for you. Thank you.

22 A. Okay.

23 Q. Somebody else may have some for you. Don't run off
24 yet.

25 THE COURT: All right. Ms. Brown?

1 MS. BROWN: I don't have any questions for Mr.
2 Lollis.
3 THE COURT: All right. Mr. Hemphill?
4 MR. HEMPHILL: None, Your Honor.
5 THE COURT: Mr. Belcher?
6 MR. BELCHER: None, Your Honor.
7 THE COURT: Mr. Anderson?
8 MR. ANDERSON: No, Your Honor. Thank you.
9 THE COURT: Mr. Imhoff?
10 MR. IMHOFF: None, Your Honor.
11 THE COURT: Now you may step down, sir.
12 All right. Can this witness be excused?
13 MR. LYLES: Yes, sir.
14 THE COURT: Any objection?
15 MR. IMHOFF: No objection.
16 THE COURT: All right. Without objection, the
17 witness may be excused.
18 You can stay, sir. I was just thinking that you'd
19 like to ---
20 THE WITNESS: Thank you, sir.
21 THE COURT: Yes, sir.
22 Yes, sir. You may call your next witness.
23 MR. LYLES: Bill Cox.
24 (WHEREUPON, the witness was duly sworn.)
25 THE COURT: All right. You may proceed.

1 Whoa. Excuse me. I'm sorry. I do have something
2 to do here. Your name, please, full name, spelling your
3 last name for the record.

4 THE WITNESS: William Cledus Cox. My last name
5 is C-O-X.

6 THE COURT: Very good. Thank you, sir.

7 **WILLIAM CLEDUS COX,**

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MR. LYLES:

11 Q. Good morning, Mr. Cox. How are you today?

12 A. I'm good.

13 Q. Good. Good. Mr. Cox, when did you become involved
14 in the Stoneledge project?

15 A. 2005.

16 Q. And how did that come about?

17 A. Tim Roberson got a contact from somebody who was
18 trying to sell Stoneledge, the Townhomes of Lake Keowee
19 project.

20 Q. And what was your role in that process?

21 A. The process of what?

22 Q. Well, you indicated that Tim Roberson got a call
23 where somebody wanted to sell it, so ...

24 A. Tim Roberson was a partner of mine in Integrays
25 Holdings.

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- 1 Q. And what was the business of Integrys Holdings?
- 2 A. Primarily the software business.
- 3 Q. And so did Mr. Roberson pitch the purchase of the
- 4 what ultimately became the Stoneledge project to you?
- 5 A. He did.
- 6 Q. As an Integrys venture?
- 7 A. No, not a sole Integrys venture, no.
- 8 Q. And ---
- 9 A. It was something we might want to invest in.
- 10 Q. And did you ultimately decide to do that?
- 11 A. Well, Integrys Holdings did not.
- 12 Q. Well, tell me -- go ahead. Who did?
- 13 A. Well, Integrys Holdings was made up of three
- 14 partners. One of the partners decided he didn't want to
- 15 invest in it, so Tim knew Larry Lollis and invited him to
- 16 participate. So we formed Integrys Keowee, which is a
- 17 completely separate entity, to be the investment --
- 18 provide investment capital for the project.
- 19 Q. And was Integrys Keowee owned with you and Mr.
- 20 Roberson owning forty percent and Mr. Lollis with twenty
- 21 percent?
- 22 A. Yes.
- 23 Q. And what was your investment?
- 24 A. My personal investment?
- 25 Q. Yes, sir.

1 A. Three hundred thousand dollars.

2 Q. And then, Mr. Roberson, did he have an equal amount
3 in it?

4 A. He did.

5 Q. And Mr. Lollis had a hundred and fifty?

6 A. That's correct.

7 Q. And the investment, what was that investment used
8 for?

9 A. It was used to purchase and fund the project.

10 Q. And did you create a company to hold title to the
11 project?

12 A. We did.

13 Q. And was that I.M.K., L.L.C.?

14 A. It was.

15 Q. And who owns I.M.K., L.L.C.?

16 A. Marick Home Builders was a fifty-percent owner, and
17 Integrlys Keowee was the other fifty percent.

18 Q. And how did Marick become involved in the project?

19 A. Through Tim Roberson.

20 Q. Had you ever worked with Marick before?

21 A. No, not directly.

22 Q. Were you a managing member of Integrlys Keowee?

23 A. Yes.

24 Q. And were you a managing member of I.M.K.?

25 A. I was.

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1 Q. What does it mean to be a managing member?

2 A. My understanding, it's like being on the board of
3 directors.

4 Q. And what does that mean?

5 A. Responsible for making the decisions of the business
6 subject to the members' interest.

7 Q. Did I.K., that is Integrys Keowee, have any other
8 business other than being a member of I.M.K.?

9 A. It did not.

10 Q. Did I.M.K. have any other business other than
11 developing Stoneledge?

12 A. It did not. That was not necessarily the intent,
13 but that's the way it turned out.

14 Q. Can you describe how I.K. and Marick Home Builders
15 operated within the I.M.K. umbrella?

16 A. Marick Home Builders was to provide the construction
17 at their cost, and I.K. provided the investment. And we
18 did the books for I.M.K. And the agreement was we would
19 split the profits.

20 Q. So Marick would do the construction but do it at
21 only its cost, not put a profit on that?

22 A. That's correct.

23 Q. And Marick would be paid its profits the same as
24 you'd be paid your profits which was by the sales of
25 units; is that right?

1 A. Right.

2 Q. Do you recall being on the board of the Stoneledge
3 Homeowners Association?

4 A. I do now.

5 Q. You've seen exhibits in this trial?

6 A. I did.

7 Q. And you wouldn't deny that you and Rick Thoennes
8 from Marick Home Builders were on the board up until the
9 time of turnover?

10 A. I believe that's correct, yes.

11 Q. What do you recall about the condition of phase one
12 at Stoneledge when you purchased your interest in the
13 project?

14 A. Well, I am not a construction person, and I wouldn't
15 know a defect if I saw it unless it was just blatantly
16 obvious. But I know it was -- the property didn't look
17 good, and there were erosion problems. And, you know,
18 there were thirty-seven units there and in various stages
19 of completion. No boat slips.

20 Q. Did you walk through those units when you got there?

21 A. I went into some, but mostly to look. I was
22 planning to buy one to help fund the project as other
23 members of the two entities did to help fund the project.

24 Q. But you ultimately didn't buy one?

25 A. I did.

1 Q. You did? What were your expectations of Marick Home
2 Builders with respect to the unfinished units in phase
3 one?

4 A. That they would finish them and make them ready for
5 occupancy, for sale.

6 Q. Was your expectation that if they found problems
7 with those units that they could fix them?

8 A. Yes.

9 Q. Were you expecting Marick Home Builders, if they
10 found a problem, to fix it properly?

11 A. Yes.

12 Q. Did Marick Home Builders at any time come to you and
13 report that they had found problems in units in phase
14 one?

15 A. I don't know that they came to me personally, but
16 they came to I.M.K. meetings and reported that, yes.

17 Q. And what sort of problems did they report at the
18 I.M.K. meetings?

19 A. Well, I don't remember all of them. I do remember
20 problems with the decks that they said they needed to
21 fix.

22 Q. And how did he -- did he tell you how he fixed it?

23 A. I know he hired some consulting company, and they
24 had some kind of product they were going to put on top of
25 the decks to stop the problem.

1 Q. And when you say he told you he'd fix them, you're
2 referring to Mr. Thoennes?

3 A. Yes. I believe he was the one that told us about
4 the proposed fix, yes.

5 Q. Did anyone at the I.M.K. meeting suggest or consider
6 retaining an expert to actually do a more thorough
7 investigation of the water infiltration problems?

8 A. I assumed that Marick would do that.

9 Q. If it was necessary?

10 A. If it was necessary. And I know they did look them
11 over before we purchased them as well as afterwards when
12 the homeowners reported issues.

13 Q. Were you aware of leaks into the basements in phase
14 one?

15 A. No, I wasn't.

16 Q. Did you hear the testimony of Nathan Hornaday?

17 A. I did.

18 Q. And were you surprised to hear that they had had to
19 do some basement wall repairs?

20 A. I wasn't surprised at this point, but I did hear
21 that, yes.

22 Q. Had you -- did you hear of any problems with window
23 leaks in phase one?

24 A. I had not heard about that. I don't recall hearing
25 about that until this trial.

1 Q. Did you go into that unfinished unit that we've seen
2 pictures of for the last week, unit thirty-three?

3 A. I don't think so.

4 Q. You didn't observe those conditions yourself?

5 A. I don't think I've ever been in unit thirty-three
6 that I recall.

7 Q. Did you observe similar conditions in any other unit
8 in phase one?

9 A. I have not. I have not made an attempt to observe
10 them. I wouldn't recognize problems, I don't think,
11 generally. It's not my expertise.

12 Q. When you were on the board of the homeowners
13 association until September of 2008, do you remember
14 receiving phone calls from owners about problems that
15 they had in their phase-one units?

16 A. I never received any phone calls. Tim Roberson was
17 the primary interface with the homeowners.

18 Q. Was it ever reported to you that homeowners were
19 calling about leak complaints in the decks or basements?

20 A. I mean, I don't remember specifics that long ago.
21 That's been six or seven years, so I don't remember
22 specifics. But I know that anything that was brought to
23 us we made the decision to fix.

24 Q. Do you know how much money you spent on repair and
25 maintenance in the 2008 year?

1 A. I don't know about 2008, no.

2 Q. Do you remember any discussion about roof leaks in
3 phase one?

4 A. Not until recently, no.

5 Q. Or any discussion about problems with the grade in
6 phase one? This is while you were on the homeowners
7 association board.

8 A. I don't remember anything of that, no.

9 Q. Who was Chip Allen?

10 A. I don't -- I mean, I've met him. He was, I believe,
11 a salesman.

12 Q. And did he work for Integrlys?

13 A. He did not.

14 Q. Do you remember him using an Integrlys email address
15 in communicating with purchasers at Stoneledge?

16 A. We housed some of the salespeople at our office,
17 Integrlys Holdings office, as a matter of convenience
18 because we had space. And that made it easy for them to
19 use our email, but they were not part of Integrlys
20 Holdings or Integrlys Keowee.

21 Q. In other words, they weren't owners?

22 A. They were not owners nor were they employees. They
23 were contractors of I.M.K.

24 Q. So Mr. Albert and Ty Savage, is that another name
25 that you recognize?

1 A. Yes.

2 Q. It's your testimony that they were representatives
3 of I.M.K.?

4 A. Yes.

5 Q. And if they were using email ---

6 A. They were contract salespeople through Marick.

7 Marick would primarily supervise them, but they were
8 contract salespeople.

9 Q. When you say Marick supervised them, what do you
10 mean?

11 A. They managed their activities.

12 Q. So Marick was not only the construction arm of
13 I.M.K.; it was also in charge of managing the sales team
14 at I.M.K.?

15 A. They did do that, yes.

16 Q. Now, Integrys dot com, is that a domain name that
17 belongs to the Integrys companies, or did it?

18 A. I don't remember any -- I don't think Integrys dot
19 com was available. Integrys dot net, Integrys Holdings
20 dot com were.

21 Q. And if Chip Albert and Ty Savage were using email
22 addresses with the Integrys website name, would that
23 surprise you?

24 A. Not necessarily, no.

25 Q. And if owners were receiving those emails and

1 believed they were dealing with somebody who was
2 affiliated with Integrlys, would that seem to be
3 reasonable to you?

4 A. I mean, I think owners clearly knew that when they
5 signed a contract, it was with I.M.K..

6 Q. Sure.

7 A. And any sales literature did not mention Integrlys.

8 Q. Do you remember negotiating a sale of I.M.K.'s
9 interest in this project to John Ludwig and his company,
10 S.D.I.?

11 A. I did.

12 Q. You did that?

13 A. I did.

14 Q. Why did you sell I.M.K.'s interest in Stoneledge to
15 Mr. Ludwig and his companies?

16 A. Well, we were almost forced to.

17 Q. Why is that?

18 A. Either that or we were going to have John Ludwig as
19 a partner.

20 Q. And how did that come about?

21 A. You know, I don't know all the details, but I knew
22 that Marick Home Builders owed John Ludwig some money.
23 And they had pledged the profits from their share of
24 I.M.K. or Stoneledge as collateral or something. And we
25 didn't know that until there was a problem between them

1 and John Ludwig's company, whoever that was.

2 Q. Okay. And so you understood S.D.I. in some capacity
3 or Mr. Ludwig to be a creditor of Marick?

4 A. Yes.

5 Q. Is that right? And at some point, did Mr. Ludwig
6 come knocking on the door say, I'm here to get my
7 profits?

8 A. Sort of, yeah.

9 Q. And, ultimately, who decided it was in your best
10 interest to sell I.M.K.'s interest to S.D.I. Funding or
11 Ludwig?

12 A. Well, I guess it was I.M.K.'s decision.

13 Q. And you negotiated the terms of that deal?

14 A. I did.

15 Q. Mr. Cox, I'm going to show you what I previously
16 marked as number 34 and ask you do you recognize that?

17 A. It's an email from me to John Ludwig.

18 Q. And does that email -- did you draft that email?

19 A. I did.

20 Q. And in that email, are you generally outlining for
21 Mr. Ludwig the terms of the transaction between I.M.K.
22 and Mr. Ludwig's companies?

23 A. Well, this was almost six months before the closing,
24 so these were the terms we were generally discussing at
25 the time, yes.

1 Q. Yes, sir. Okay. As part of the consideration for
2 that sale on number three of that exhibit, there's an
3 indication that the consideration for Integrays Keowee's
4 fifty percent would be one million dollars in cash at the
5 closing plus ten percent of the gross sales price for any
6 Stoneledge townhome sold in the future paid at the
7 closing of each sale; is that right?

8 A. That's right.

9 Q. And ultimately, Integrays Keowee was paid by Ludwig
10 properties at the time of the closing; is that right?

11 A. They were not paid this amount.

12 Q. They were paid something less?

13 A. Right.

14 Q. So that was a negotiated portion of the agreement;
15 is that right?

16 A. What was the negotiated portion?

17 Q. The consideration that I.K. would receive as part of
18 that sale?

19 A. To represent its ownership in I.M.K., yes.

20 Q. And then number five in this email, the last
21 provision is that S.D.I. will assume responsibility for
22 the Stoneledge H.O.A. until it is turned over to the
23 owners. You see that?

24 A. I do.

25 Q. And that was your expectation at least when you

1 started negotiating with S.D.I.?

2 A. That's right.

3 Q. And that didn't happen either; is that right?

4 A. They didn't take responsibility for it, no. The
5 decision was made that we would, as quickly as possible,
6 turn it over to the owners.

7 Q. And ultimately, you agreed with S.D.I. that I.M.K.
8 would remain in control of the board until it was turned
9 over to the owners?

10 A. That's right.

11 Q. And I.M.K.'s representation on the board until it
12 was turned over to the owners was you and Mr. Thoennes?

13 A. No, that's not true.

14 Q. Okay. Who were I.M.K.'s representatives on the
15 board until it was turned over to the owners?

16 A. I don't remember the -- my understanding is that all
17 of the managers of -- at least from the document you
18 showed originally that -- I was not an officer; I was
19 just a board member. But Tim Roberson and Rick Thoennes
20 and myself and Matt Smith, who was an employee of
21 Integrys Holdings, were on the board up until the time.
22 Rick III Thoennes may have also been on the board.

23 Q. Okay. Now, you mentioned a moment ago that Integrys
24 Keowee did not receive a million dollars cash at the time
25 of closing ...

1 A. That's right.

2 Q. ... for the sale. Would you agree with me that
3 Integrys Keowee did receive six hundred and thirty-nine
4 thousand dollars at the time of ---

5 A. No. No, it didn't.

6 Q. Is that what Integrys Keowee was supposed to receive
7 at the time of the closing under the terms of the
8 agreement that was signed between Integrys -- excuse me
9 -- I.M.K. and Ludwig Properties?

10 A. It could have been. I don't remember the exact
11 amount. But there were, you know, lots of offsets that
12 happened. And the net was about five hundred and eighty
13 thousand, if I remember correctly.

14 Q. Okay. And that is money that was paid to I.K. by
15 Mr. Ludwig's companies at the time of closing?

16 A. Yes.

17 Q. And money -- and that transaction was for the sale
18 of assets of I.M.K.?

19 A. That's right.

20 Q. So that's money, five hundred and eighty thousand
21 dollars or so, that was not put into I.M.K.?

22 A. Well, it was -- I.M.K. was selling all of its assets
23 -- or not all of it. We still owned two townhomes. But
24 it was selling the remainder of its inventory to the, and
25 the proceeds were distributed to the owners of I.M.K.

1 Q. And when the owners [sic] were distributed to the
2 owners of I.M.K., it left I.M.K. insolvent?

3 A. Not at the time, I don't think.

4 Q. But ultimately I.M.K. became insolvent?

5 A. It did.

6 Q. And it was unable to pay its bills, which is the
7 definition of insolvency; right?

8 A. Well, it has continued to pay its bills, but it owes
9 more on its assets than they're worth.

10 Q. And I.M.K. does not have cash available to it to
11 satisfy a judgment that my clients might get against
12 I.M.K. in this case?

13 A. It does not have any cash, no.

14 Q. In addition to the cash that I.K. was paid at the
15 time of closing, I.K. also received a promissory note
16 from Mr. Ludwig's companies; is that right?

17 A. Yes.

18 Q. And that was a promissory note in which Mr. Ludwig's
19 companies agreed to pay I.K. the sum of three hundred and
20 fifty thousand dollars; is that right?

21 A. That's right.

22 Q. And, again, that's money that went to I.K. rather
23 than to I.M.K.?

24 A. But it was for the assets of I.M.K., and it was just
25 I.K.'s consideration for its share.

1 Q. Sure. As part of the promissory note, I.K.,
2 Integrys Keowee, actually agreed to also perform
3 consulting services for Ludwig's companies; is that
4 right?

5 A. Technically, yes.

6 Q. Well, when you say technically, I mean, that --
7 there's a document called promissory note and consulting
8 agreement?

9 A. Right. It was a -- we sold the units for a very low
10 price, and that was a way that they profited from them,
11 and we would get additional consideration.

12 Q. And when you say you sold them, you mean I.M.K. sold
13 them to Mr. Ludwig at a very low price?

14 A. That's right.

15 Q. And then I.M.K. was going to realize a profit from
16 the future sale of those units by Mr. Ludwig's companies;
17 is that right?

18 A. That's right.

19 Q. And so in a sense, you remained in some sort of
20 relationship with the person who owned and was selling
21 those units after I.M.K. got out of the development?

22 A. That's right.

23 Q. And, in fact, I.K. and its principles, you and Mr.
24 Lollis and Mr. Roberson, actually stood an opportunity to
25 make money on the sale of these Stoneledge units after

1 this lawsuit got filed?

2 A. I think we -- I mean, we had the possibility we
3 would never be paid all we were owed.

4 Q. Sure. And Mr. Brad Seckinger, who ultimately
5 obtained this project after Mr. Ludwig sold it, Mr.
6 Seckinger entered into an agreement with you and I.K. to
7 pay you commissions or proceeds from units that were sold
8 after this lawsuit was started?

9 A. He did.

10 Q. And you're saying that those sums were never paid?

11 A. Not all of them, no.

12 Q. But it was your expectation that you'd be paid if
13 everything worked out?

14 A. Yes.

15 Q. Even after the lawsuit was started and I.M.K. was
16 the defendant in the lawsuit, it was your intent for
17 I.M.K. -- excuse me -- for I.K. to receive profits or
18 receive proceeds from the sales of these Stoneledge
19 units?

20 A. We hoped to because we -- you know, we made an
21 investment. We certainly had no intention of profiting
22 off of peoples' problems, but that was the responsibility
23 of the ones who created the problems.

24 Q. And those are who?

25 A. Well, I am not an expert to say who caused all the

1 problems in phase one, but the builders were Bostic
2 Construction and Marick.

3 Q. Have you seen anything over the course of this trial
4 that suggests to you that Marick Home Builders didn't do
5 what you expected them to do in phase one?

6 A. I don't know if I'm qualified to say that.

7 Q. Do you want to see these buildings fixed?

8 A. Sure. Yes, I would. We own two of them.

9 Q. And fixed properly?

10 A. Yes.

11 Q. I think that's all the questions I've got for you,

12 Mr. Cox. Thank you. Somebody else may have.

13 THE COURT: Yes, ma'am?

14 MS. BROWN: I don't have any questions of this
15 witness.

16 THE COURT: Mr. Hemphill?

17 MR. HEMPHILL: No, Your Honor.

18 THE COURT: Mr. Belcher?

19 MR. BELCHER: Just a couple, Your Honor, if I
20 may.

21 THE COURT: Very good.

22 CROSS-EXAMINATION

23 BY MR. BELCHER:

24 Q. Good morning, Mr. Cox. I don't think you and I have
25 ever had the pleasure of meeting. I just have a couple

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1 of quick questions for you here.

2 A. Sure.

3 Q. Have you reviewed the amended bylaws to the
4 Stoneledge Townhome Community?

5 A. I have not.

6 Q. If I may, I'll pull them out here. I believe
7 they're already an exhibit. I think that's exhibits
8 number 3 and 4.

9 MR. BELCHER: Your Honor, may I approach the
10 witness?

11 THE COURT: Certainly.

12 MR. BELCHER: Thank you.

13 Q. And just to be clear, it looks to me like bylaws
14 were originally in place under Townhomes of Keowee as of
15 August of 2003. Does that sound about right to you?

16 A. It could be. I'm sure that they were in place when
17 we bought the project.

18 Q. And you all, you or I.K. or whatever company you're
19 affiliated with, purchased around April of 2005?

20 A. That's correct.

21 Q. And the bylaws were readopted, reincorporated and
22 amended, according to that document 11/1/2005?

23 A. What date did you say?

24 Q. 11/1/2005. If you'll check the signature block on
25 exhibit 4, it should be at the back.

1 A. If that's the date that's on there, yes, I'm sure it
2 is. I see signatures that are dated 15 March 2007.

3 That's a notary.

4 Q. Those may be attachments.

5 A. Maybe you can help me find what you're talking
6 about.

7 Q. We're talking about this on exhibit 3.

8 A. Oh, okay. I thought you said four. I'm sorry.

9 THE COURT: What is that exhibit? It has a
10 number on it there, sir?

11 THE WITNESS: Number 3, yes, sir.

12 THE COURT: Number 3?

13 MR. BELCHER: Yes, Your Honor.

14 THE COURT: Is it Plaintiff's Exhibit Number 3?

15 MR. BELCHER: Plaintiff's 3, Your Honor.

16 THE COURT: Very good.

17 Q. Is there a signature place?

18 A. It does say the 1st day of November 2005.

19 Q. And your signature is on that document?

20 A. Yes.

21 Q. So you are one of the individuals who pushed through
22 the adoption and amendment to the bylaws which basically
23 put control of the association in the hands of the new
24 regime. Fair?

25 A. Yes.

- 1 Q. All right. And that would be the change from
2 Townhomes on Keowee to Stoneledge at Lake Keowee?
3 A. Yes.
4 Q. Now, what was your role in Stoneledge at Lake Keowee
5 on the homeowners association?
6 A. I was just a board member.
7 Q. Which -- did you hold a specific occupation?
8 A. No, I didn't.
9 Q. You were an at-large?
10 A. I'm not sure exactly what the term is, but I was not
11 an officer.
12 Q. Officer being you weren't a president, vice
13 president, secretary, treasurer?
14 A. That's right.
15 Q. But you were a board member?
16 A. That's right.
17 Q. So you had the authority to act on behalf of the
18 board as a group? On behalf of the association as a
19 member of the board?
20 A. I believe that's right.
21 Q. How long did you sit on the board?
22 A. I assume it was until it was turned over to the
23 homeowners in September 2008.
24 Q. 2008?
25 A. Yes.

1 Q. And I think your testimony was that when there was
2 this changing of the guard and I.M.K. and Marick and all
3 of those companies came on to complete this project,
4 there was some inspections of the units?

5 A. I would assume that Marick did inspections, yes.

6 Q. Do you recall the circumstances of the change in
7 ownership from Townhomes of Keowee, L.L.C., to I.M.K.?

8 A. I'm not sure what you mean by circumstances.

9 Q. All right. Were you involved in the negotiation of
10 the sale from Townhomes of Keowee, L.L.C., to I.M.K.?

11 A. I was.

12 Q. And you understand that your company basically
13 pulled it out of foreclosure?

14 A. That's right. I think what I was told by Bobby
15 Carpenter that the bank was about ready to foreclose,
16 yes.

17 Q. And your company or the group that purchased from
18 Townhomes of Keowee basically bought it for the balance
19 on the bank note plus a couple of mechanics liens?

20 A. Yeah, there were several -- I'm not sure how many
21 mechanics liens, but there were a lis pendens. There
22 were from a few people trying to take advantage of the
23 situation.

24 Q. Some of the subcontractors that just Townhomes of
25 Keowee didn't pay?

1 A. Apparently, yes.

2 Q. And did your company or the group that purchased
3 from Townhomes of Keowee do any type of due diligence
4 with regard to the value of the units that were
5 unfinished out there?

6 A. I'm sure we did to some degree. I mean, Marick was
7 very experienced in the building industry and told us
8 that there was a lot -- could be a lot of value there.

9 Q. Were there any conversations between your company or
10 within your company and Marick with regard to what would
11 need to be done to bring the unoccupied unsold units up
12 to a place where they could be sold?

13 A. Well, there certainly was -- from time to time there
14 were -- Marick gave us costs with what they thought it
15 would take to finish the units, yes, preparing those for
16 sale.

17 Q. And I want to go back to some of your testimony when
18 Mr. Lyles was asking you questions about your
19 observations of the site when you first went on site.
20 You testified that you saw all kinds of erosion issues?

21 A. I did see some erosion issues, yes.

22 Q. Where the final grade had not been placed down on
23 some of the unsold units or ---

24 A. I wasn't looking at the grading. There was
25 someplace where the lake was intruding into the property,

1 and the sod was collapsing.

2 Q. And the buildings looked like they were in a state
3 of disrepair?

4 A. Well, like I said, that's not my field of expertise.
5 I'm a numbers person. I couldn't draw a good stick man.
6 But the property in general, you know, it wasn't well
7 maintained, the landscaping and what have you. But I
8 don't know that I noticed any construction issues
9 personally.

10 Q. But people started coming to you with complaints
11 early on?

12 A. They didn't come to me. They would have -- you
13 know, Marick or Rick Thoennes was our primary interface
14 on the property, and Tim Roberson to some degree.

15 Q. Did anybody come to you -- any of the owners out
16 there come to you as a board member of the H.O.A.?

17 A. No.

18 Q. Was Mr. Thoennes also a member of the H.O.A.?

19 A. Yes.

20 Q. Was he a board member?

21 A. Yes.

22 Q. Do you know if Marick, the construction company
23 itself, had any membership on the board?

24 A. The corporate entity?

25 Q. Yeah.

- 1 A. I don't think so, no.
- 2 Q. So other than Mr. Thoennes, who was the owner of
- 3 Marick?
- 4 A. I think he and his son both were on the board.
- 5 Q. And you were aware early on in your capacity as a
- 6 board member that people were coming to Mr. Thoennes or
- 7 to Marick with leaking issues, window issues?
- 8 A. I certainly knew there were some. I didn't know of
- 9 anything that was really pervasive. But, you know ...
- 10 Q. So you knew that there were issues; you just didn't
- 11 know the extent of those issues?
- 12 A. Right. And we made an effort to the existing owners
- 13 anything that they had a problem, you know, punch list
- 14 items or whatever, to fix them.
- 15 Q. You assumed warranties?
- 16 A. I don't know exactly what that means.
- 17 Q. Well, you honored warranties?
- 18 A. We fixed problems that they reported, yes.
- 19 Q. And we've heard a little bit of testimony earlier --
- 20 it's been a while now -- about Coleman Waterproofing
- 21 having to come out and do some balcony waterproofing. Do
- 22 you recall that testimony?
- 23 A. I do recall the testimony, yes.
- 24 Q. Did you have anything to do with commissioning their
- 25 repairs to those balconies?

1 A. I did not.

2 Q. Do you know when that happened?

3 A. It would have been 2005, I believe.

4 Q. So right as soon as you took -- as the new
5 homeowners association took over?

6 A. Well, you mean, like when I.M.K. bought the
7 property?

8 Q. Right.

9 A. It was sometime shortly after that, I would assume,
10 yes.

11 Q. Sometime in the 2005 time range?

12 A. Yes.

13 Q. All right. Thank you.

14 MR. BELCHER: I don't have any further
15 questions.

16 THE COURT: Ms. Brown?

17 CROSS-EXAMINATION

18 BY MS. BROWN:

19 Q. Mr. Cox, isn't it true that when I.M.K. took over
20 the property and the erosion problems were reported that
21 I.M.K. paid to have the erosion problems fixed?

22 A. That's correct.

23 Q. Thank you. And did I.M.K. pay to have the repairs
24 made to the construction issues that were brought up to
25 I.M.K. after they purchased the property?

1 A. They did.

2 Q. Were there any unfinished construction issues when
3 you sold the property that you're aware of?

4 A. None.

5 Q. On the -- you mentioned boat slips in your testimony
6 just a minute ago. Were there any boat slips out there
7 when I.M.K. purchased the property?

8 A. No.

9 Q. Did I.M.K. pay to have boat slips built on the
10 property?

11 A. We did.

12 Q. Okay.

13 MS. BROWN: Nothing further.

14 THE COURT: I didn't ask. But Mr. Anderson,
15 any questions?

16 MR. ANDERSON: No, Your Honor. Thank you.

17 THE COURT: All right. Mr. Imhoff?

18 MR. IMHOFF: Just two questions, Your Honor.

19 THE COURT: Very good.

20 CROSS-EXAMINATION

21 BY MR. IMHOFF:

22 Q. Mr. Cox, Mr. Belcher asked you about due diligence
23 and what was done to look at the property. Did you have
24 to get a loan or any loans to purchase this property?

25 A. We did.

1 Q. Okay. And did the bank commission an appraisal of
2 the property?

3 A. They did.

4 Q. Do you recall the name Stone and Associates?

5 A. I don't.

6 Q. Okay. You don't remember the name of the appraiser
7 who went out there?

8 A. I really don't. I'm sorry.

9 Q. Did you get a copy of that report?

10 A. I don't know if I got a copy. I mean, I certainly
11 probably heard what the appraisal was; but I don't
12 remember ---

13 Q. Do you remember that report reflecting that the
14 units were of good construction quality when you bought
15 the property?

16 A. I don't remember. I'm sorry. I don't recall
17 reading the appraisal.

18 Q. Okay. If an appraisal returned and either said the
19 property wasn't worth what you were paying or there were
20 pervasive construction issues on the property, would that
21 have given you pause?

22 A. Absolutely.

23 Q. And you don't recall that happening?

24 A. No.

25 Q. Thank you.

1 THE COURT: Mr. Lyles?

2 MR. LYLES: No further questions, Your Honor.

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

4 All right. Let's take a short break and then come
5 back. Again, do not undertake a discussion of the case
6 among yourselves. But when you are ready to come back,
7 knock on the door.

8 Everyone else remain seated while the jury retires
9 from the courtroom.

10 (WHEREUPON, the jury exited the open court at
11 approximately 10:41 p.m.)

12 THE COURT: All right. Mr. Lyles, what do you
13 believe as the schedule today?

14 MR. LYLES: I think we'll finish by lunchtime.
15 I've got Mr. Thoennes next. I've got -- I thought
16 somebody was talking to me. I've got -- you want me to
17 hand this up?

18 THE COURT: We've had a discussion on those.
19 If you haven't noticed, I think it's on the door to the
20 courtroom is a -- it's more than an admonition. It's an
21 Order by the Chief Justice of the Supreme Court of South
22 Carolina that no electronic devices are to enter a
23 courtroom unless they're turned off, of course. But now
24 we have all of these new things that I have to ask my law
25 clerk, "Exactly what are those?" He says, "They're kind

1 of like a telephone and kind of like a laptop and all
2 that." But the thing is we do not want interruptions.
3 And so if you do have -- and you -- well, I would ask
4 just as a courtesy, maybe not as an order of the Court,
5 that if you do need to use them -- other than the
6 attorneys who are involved in the trial of the case, of
7 course. They need their sources. But if you have
8 private matters to take up, do take them out into the
9 lobby somewhere and use them there. The reason not only
10 are they sometimes disconcerting, but also they sort of
11 interfere with the flow of things in the courtroom. As I
12 mentioned or tried to mention earlier today, there are
13 certain things we just have to have in the courtroom.
14 One of them is order. As you've noticed, the court
15 reporter takes down everything that is said in the
16 courtroom. She can't take down things over -- people
17 speaking over each other, nor can she take down things
18 that are said in -- I won't say chaos, but let's just say
19 confusion. So we try to keep that down to a minimum if
20 not eliminate it if we can.

21 All right. With that sermon, I'll now ...

22 Mr. Belcher, how do y'all wish to proceed, or have
23 you even thought about that yet?

24 MR. BELCHER: Yes, Your Honor, we certainly
25 have given it a considerable amount of thought. After

1 Mr. Lyles rests today ---

2 THE COURT: We'll probably go to lunch if
3 that's in the neighborhood and then take up the
4 Defendant's case.

5 MR. BELCHER: That's fair, Your Honor.

6 THE COURT: All right.

7 MR. BELCHER: And as far as witnesses, we'll
8 figure out who's going to call a witness.

9 THE COURT: That was the other thing. If you
10 could -- and I know that you all have your own parties
11 and issues, but if you could somehow get sort of a
12 schedule of witnesses. All right.

13 MR. BELCHER: If we can't agree, we'll call a
14 witness anyway.

15 THE COURT: All right. I think you'd rather
16 call the witnesses than -- what is it? -- the Court. So
17 at least -- what is it? -- not involved in it.

18 All right. Very good. We'll take a short break
19 until the jury is ready to come back.

20 (WHEREUPON, court stood at recess for a short
21 break.)

22 THE COURT: If they're ready -- well, just a
23 moment.

24 Anything from the plaintiffs before we bring the
25 jury back?

1 MR. LYLES: No, sir.

2 THE COURT: Defendants?

3 MR. BELCHER: No, Your Honor.

4 THE COURT: Very good. Ask the jury to join
5 us, please.

6 (WHEREUPON, the jury entered the open court at
7 approximately 11:10 a.m.)

8 THE COURT: All right. You may call your next
9 witness.

10 MR. LYLES: Yes, sir. Your Honor, the
11 plaintiff calls Rick Thoennes.

12 (WHEREUPON, the witness was duly sworn.)

13 THE COURT: If you would, please, sir, give us
14 your full name for the record, spelling your last name.

15 THE WITNESS: Frederick Richard Thoennes, T-H-
16 O-E-N-N-E-S.

17 THE COURT: Thank you, sir.

18 **FREDERICK RICHARD THOENNES,**

19 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

20 **DIRECT EXAMINATION**

21 **BY MR. LYLES:**

22 Q. Good morning, Mr. Thoennes.

23 A. Good morning.

24 Q. How you doing?

25 A. Good.

1 Q. Good. Mr. Thoennes, you're a licensed builder in
2 South Carolina; is that right?

3 A. I am.

4 Q. And you have a general contractor's license?

5 A. I do.

6 Q. And how long have you had that license?

7 A. Probably since 1971 or '2.

8 Q. And have you been continually in the business of
9 building and constructing residential homes or
10 residential construction since that time?

11 A. Not continually, no.

12 Q. How long have you been in the business of building
13 homes?

14 A. On and off all that time. Probably a year or two
15 that I did not.

16 Q. And you're currently doing business as what? What's
17 the name of your company today?

18 A. I don't have a company. My license is in my name.

19 Q. So you're not doing business in any way, shape or
20 form now?

21 A. No. I help my sons in some construction, but I'm
22 collecting social security now.

23 Q. Okay. You were the license holder for Marick Home
24 Builders, L.L.C.; is that right?

25 A. Correct.

- 1 Q. And is that an L.L.C. that you started?
- 2 A. No. My son and myself.
- 3 Q. And which son was that?
- 4 A. Rick.
- 5 Q. And he's Rick III.
- 6 A. Rick III.
- 7 Q. And you're Rick Thoennes, Jr.?
- 8 A. No.
- 9 Q. You're Rick Thoennes?
- 10 A. II.
- 11 Q. II, okay.
- 12 A. Well, my legal name is Rick Thoennes period.
- 13 Q. Okay. All right. I just wanted to make sure.
- 14 A. It's senior. They just call me senior to
- 15 differentiate between senior and III. So it's either
- 16 senior or III.
- 17 Q. Okay. And who have been members of Marick Home
- 18 Builders, L.L.C.?
- 19 A. When we first formed Marick, it was Mark Hutcherson,
- 20 myself and my son.
- 21 Q. And at some point, did Mr. Hutcherson leave the
- 22 company?
- 23 A. Yeah, with less than a year.
- 24 Q. When he left, he left in less than a year?
- 25 A. Yes, after we started.

1 Q. And how long did you and Rick III operate Marick
2 Home Builders, L.L.C., without Mr. Hutcherson?

3 A. That would have been, I guess, from sometime in '99,
4 which is when it was formed. And he left in '99, I
5 believe. So it would have been from that time forward.

6 Q. And Marick Home Builders, L.L.C., ceased operations
7 in 2009; is that right?

8 A. I thought it was 2008, but ...

9 Q. Okay. And at the time Marick Home Builders ceased
10 operations, it was insolvent?

11 A. Yes.

12 Q. And that means it was unable to pay its bills in the
13 ordinary course of business?

14 A. That's correct.

15 Q. And at that time, you and Rick III started another
16 company, is that right, called the M Group?

17 A. Not immediately, but shortly thereafter.

18 Q. Okay. And the M Group started at a time when Marick
19 Home Builders was insolvent?

20 A. Correct.

21 Q. And M Group started because Marick Home Builders was
22 insolvent?

23 A. No.

24 Q. Why was M Group started?

25 A. M Group was started because we needed to continue to

1 generate some kind of income personally for myself and
2 for Rick. So we asked two investors to come in and
3 invest in a new company so that we could build some small
4 houses.

5 Q. And the reason you needed M Group to serve the
6 function of providing you with some income is because
7 Marick Home Builders was insolvent?

8 A. Yes.

9 Q. And it had a lot of debt?

10 A. Yes.

11 Q. Who were the two new investors who came?

12 A. My other son Mark and Mark Hutcherson.

13 Q. And is M Group still in business?

14 A. No.

15 Q. How long did M Group stay in business?

16 A. I would guess two years, a year and a half.

17 Q. Did M Group actually do any work?

18 A. Yes.

19 Q. What did it do?

20 A. Build some smaller houses in Simpsonville.

21 Q. And M Group had a fine homes division, as I recall;
22 is that right?

23 A. Yes. We didn't do any -- we didn't build any fine
24 homes, though.

25 Q. And you and Rick III were members of both Marick

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- 1 Home Builders and the M Group; is that right?
- 2 A. Correct.
- 3 Q. And you were the license holder for Marick Home
- 4 Builders and the M Group?
- 5 A. Correct.
- 6 Q. Matthew Gooch was a superintendent for Marick Home
- 7 Builders and the M Group; is that right?
- 8 A. Not at the same time.
- 9 Q. At different times?
- 10 A. Yes.
- 11 Q. At some point, he worked for Marick Home Builders
- 12 and then began working for M Group?
- 13 A. Yeah. There was a lag in between.
- 14 Q. How long was the lag?
- 15 A. I don't know.
- 16 Q. And when you started the M Group, do you recall that
- 17 the M Group website was linked to the Marick dot com
- 18 website?
- 19 A. I wouldn't have any idea.
- 20 Q. You've heard the testimony today of Mr. Cox earlier.
- 21 Did you?
- 22 A. Yes.
- 23 Q. And he described the role of Marick Home Builders
- 24 and I.M.K. as being the member of I.M.K. responsible for
- 25 construction activities; is that right?

1 A. Correct.

2 Q. And you charged I.M.K. for your construction hard
3 costs; is that right? You didn't charge I.M.K. for
4 overhead and profit?

5 A. Correct.

6 Q. And then you -- Marick Home Builders was to take ---

7 A. Well, we didn't charge them. They actually paid the
8 bills. I mean, we'd give a bill to I.M.K., and they
9 would write a check for that so that Marick could pay
10 that bill.

11 Q. And the bills that were paid were subcontractor
12 bills?

13 A. Among other things.

14 Q. And material supplier bills?

15 A. Yes.

16 Q. And how about labor for Marick Home Builders? Did
17 y'all have laborers in-house, or was all your work
18 subcontracted?

19 A. Yes. We had -- I think we had cleanup laborers out
20 at Stoneledge that would sweep and keep the place picked
21 up. They were employees, and so was Nathan.

22 Q. And those bills were paid directly by I.M.K., not by
23 Marick Home Builders?

24 A. To Marick Home Builders.

25 Q. So I.M.K. -- you would submit a bill, I.M.K. would

1 write a check to Marick Home Builders, then you would pay
2 your suppliers and employees?

3 A. Correct, except we actually submitted invoices from
4 the suppliers and subcontractors. We didn't just give
5 them a Marick bill that said you owe us a hundred
6 thousand dollars. We would actually submit the invoices.

7 Q. Okay. And when an invoice was submitted, say, by a
8 lumber company or materials delivered, would I.M.K.
9 simply pay that invoice directly ---

10 A. No.

11 Q. --- or would I.M.K. issue a check to Marick Home
12 Builders in that amount?

13 A. To Marick.

14 Q. And then Marick would pay the bill?

15 A. Yeah, because I.M.K. had no -- they didn't have any
16 credit at the time, so they couldn't have had an account
17 anyway.

18 Q. And was Marick Home Builders responsible for the
19 management of the sales team, Chip Albert and Ty Savage?

20 A. For the most part, I.M.K. had some responsibility in
21 that too. I mean, the sales was -- all had to be
22 approved by I.M.K. and what we were doing, and then sales
23 materials and all of those things. So certainly I.M.K.
24 had some responsibility for the sales.

25 Q. But Marick Home Builders also had responsibility for

1 the sales team?

2 A. Yes.

3 Q. We go back to the point in time when Marick Home
4 Builders began working on phase one. Was that in about
5 2005?

6 A. Yes.

7 Q. Was it mid to late 2005?

8 A. Mid.

9 Q. And how long had it been since Bostic had been on
10 the site? Do you recall?

11 A. How long what?

12 Q. Since Bostic had been on the site.

13 A. I have no idea.

14 Q. Did you hear the testimony earlier this week that
15 they left the site in October of 2004?

16 A. I heard that.

17 Q. And when Marick Home Builders started doing work at
18 -- let me back up a little bit further. Who decided what
19 work Marick Home Builders was going to do in the
20 unfinished units in phase one?

21 A. Who decided?

22 Q. Yes, sir.

23 A. I guess I would have. I mean, in conjunction with
24 Rick III who was -- he was more the marketing-type
25 person; I was more the hands-on person. So together we

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1 would decide what needed to be done in the units and if
2 we needed to make any changes or any esthetic changes to
3 the units.

4 Q. How about completing units from the foundation up?
5 Do you remember seeing some of those building permits
6 that were pulled the other day?

7 A. Yes.

8 Q. And in terms of creating a plan for Marick Home
9 Builders to complete those units, was that completely
10 within your discretion?

11 A. Well, first of all, it's impossible to complete a
12 unit from the foundation up with the roof already on it.
13 All the roofs were on, and the stone was on. Siding was
14 on. All the framing was done. Stone was on. Paving was
15 in. Landscaping was in. Garages were in. So I'm not
16 sure where the -- what "the foundation up" means, to tell
17 you the truth. That was something evidently Oconee
18 County wrote down. But that's an impossibility.

19 Q. Who gave Oconee County the values that were used in
20 the building permits that were pulled by Marick?

21 A. I did.

22 Q. So that was an assessment that you made about the
23 value of work you would do with respect to each of the
24 units ---

25 A. Yes.

1 Q. --- on which you pulled the permit?

2 A. Yes.

3 Q. And, again, in terms of establishing that unit --
4 excuse me -- that value in deciding what work Marick was
5 going to perform, that was something within your
6 providence?

7 A. For the most part. Like I said, we would -- I would
8 talk to Rick and Tim, for that matter, about any changes
9 or anything that needed to be added or taken away, or
10 doors differently or whatever. But for the most part, I
11 would, yes.

12 Q. And you and Nathan, when Marick Home Builders became
13 involved on the site, you and Nathan actually walked the
14 project and inspected the work that had been done by
15 Bostic; is that right?

16 A. I don't remember who walked it. I know I did.

17 Q. And were you assessing the quality of the work that
18 was done by Bostic?

19 A. Yes.

20 Q. And were you making sure that the work that had been
21 done by Bostic was done in conformance with the building
22 code?

23 A. No.

24 Q. Would you have been able to do that?

25 A. No.

1 Q. Did you find it, or did you think it was necessary
2 to have somebody else come in and make some sort of
3 assessment about the quality of work that had been done
4 by Bostic?

5 A. No, because I have been in multi-family -- I'm
6 sorry. I need to go back to your previous question.

7 Q. Sure.

8 A. I'd built a lot of multi-family construction. You
9 said residential. I consider multi-family residential
10 ---

11 Q. Yes, sir.

12 A. --- as opposed to this building, for instance, is
13 commercial. But I built a lot of multi-family units and
14 had been aware of Bostic through that construction, knew
15 that they were a large company that had a lot of
16 integrity. So I assumed that the project was built like
17 it was supposed to be. And I had understood that this
18 project was not the reason they had filed for bankruptcy.
19 So I had no reason to believe that they would have
20 shortcut anything.

21 Q. What did you understand the reason to be that Bostic
22 Brothers filed for bankruptcy?

23 A. Other multi-family projects. They had dozens, I
24 guess.

25 Q. When you say you're familiar with Bostic, do you

1 know of another multi-family project that they had done
2 for sale?

3 A. No. I just knew them like I know now that Lyles and
4 Lyles is an attorney firm in Charleston. Being in the
5 business, I knew that Bostic was a multi-family
6 contractor. That's all. And developer. But as far as
7 specific units or projects that they would have done, I
8 had absolutely zero knowledge of that.

9 Q. But it's your testimony that you assumed or you were
10 relying on the quality of Bostic's construction when you
11 got to phase one?

12 A. To a great part, yes.

13 Q. Do you recall the photographs ---

14 A. And they looked nice. That was a good looking
15 project, so ...

16 Q. When did you become aware of the decks and the
17 porches leaking?

18 A. I don't remember who the first person was that told
19 me about it. It may have even been Nathan for that
20 matter. It's eight years ago now, so it's -- I have
21 enough trouble with eight months ago. So it could have
22 been Nathan; it could have been a homeowner that said
23 that they were getting water underneath the deck.

24 Q. And did you assess that problem?

25 A. I had Nathan look at it first.

1 Q. And then did you ultimately do it yourself?

2 A. Yes.

3 Q. And did you find a pattern of leaking problems with
4 the porches and decks in phase one?

5 A. No.

6 Q. You just found it isolated in a couple of units?

7 A. Yes.

8 Q. Did you ever hire any sort of forensic investigator
9 or other qualified person to investigate the source of
10 the leaks?

11 A. To tell you the truth, I wouldn't have known what a
12 forensic investigator was at that time. Never in my
13 forty or fifty years have I been involved with anything
14 like that, so I wouldn't have known to do that. But we
15 hired a consultant to look at the decks that were
16 leaking. It was a waterproofing company that I had dealt
17 with for several years.

18 Q. And they ultimately put the topping on the decks; is
19 that right?

20 A. Yes, an elastomeric coating of some kind.

21 Q. And did they assure you that that would take care of
22 the problem?

23 A. Yes.

24 Q. And did it appear to take care of the problem?

25 A. Yes.

1 Q. At the time you got off of the board, were you aware
2 of any failures in the deck leak repairs that you
3 performed?

4 A. I don't remember any. I do recall that there was
5 oil, an oil spot or a gas spot or something like that,
6 under the elastomeric in one place, so it didn't stick.
7 So they redid that. That's all I recall.

8 Q. Do you recall any evidence of water infiltrating
9 down through the basement walls or the foundation walls
10 in phase one?

11 A. I don't recall any. It seems to me we had one that
12 Nathan brought to my attention.

13 Q. Do you remember the testimony about unit thirty-
14 three that we looked at the photographs of?

15 A. Yes.

16 Q. Do you remember that unit?

17 A. Do I remember that unit?

18 Q. Yes, sir.

19 A. Somewhat.

20 Q. Do you remember going in it and seeing the
21 conditions that were reflected in the photograph that we
22 showed the jury on last Tuesday?

23 A. No. I remember going in it, but those pictures were
24 taken five years later.

25 Q. 2009?

1 A. Well, I assume. I don't know the dates on those
2 pictures, but I assume that's five years later.

3 Q. And it's your testimony that you didn't see the
4 conditions that appeared like that at the time you went
5 in there?

6 A. They didn't appear like that when I saw it, no.

7 Q. Did you see any evidence of window leaks throughout
8 phase one?

9 A. We couldn't tell in that -- now, are you asking me
10 about that unit?

11 Q. Well, that unit to start with.

12 A. That unit, we saw what looked like the stains on the
13 floor. The water stains on the floor, yes.

14 Q. And did you try to figure out where those water
15 stains were coming from?

16 A. Yeah.

17 Q. And where were they coming from?

18 A. We felt like they were coming through open, broken
19 windows.

20 Q. And did you see any evidence, the evidence of water
21 leaking in the corner of the windows in that unit?

22 A. We couldn't tell where it was coming from. Those
23 pictures were much different in 2010 than they were in
24 2005. You didn't have those dark spots in the corners.
25 And windows are installed differently at that time than

- 1 they are now too.
- 2 Q. And which window? You talking about the windows ---
- 3 A. Any window.
- 4 Q. The windows installed by Bostic?
- 5 A. Any window.
- 6 Q. It's different today than it was then?
- 7 A. Yes.
- 8 Q. Do they install it better today?
- 9 A. What's that?
- 10 Q. Do they install them better today?
- 11 A. I hope so. I think they do, yes.
- 12 Q. Okay. Well, how about the firewall? Do you
- 13 remember seeing pictures of the firewall in that unit?
- 14 A. The hole you looked through?
- 15 Q. Well, the whole tenant separation wall. There was
- 16 no drywall in the interior face of unit thirty-three?
- 17 A. I -- no, I don't remember that.
- 18 Q. Okay. You don't remember seeing studs in that
- 19 photograph?
- 20 A. I remember seeing a hole about this big, if that's
- 21 what you're talking about, between the two units five
- 22 years later.
- 23 Q. Okay. And did you -- you heard Nathan testify that
- 24 the building official in Oconee County demanded that
- 25 y'all complete or repair that firewall?

1 A. Yes, I heard him say that. But what's strange to me
2 is that hole would have been there when we saw it in
3 2005. It's really weird. I mean, it's so glaring and so
4 against everything that I would see. I mean, it just
5 makes no sense to walk into an apartment, me see into the
6 next apartment and say, "okay." It just doesn't work
7 that way.

8 Q. Sure.

9 A. So if I had seen that in 2005, it would have been
10 fixed. It could have been made after that time to fix
11 something, to fix an electrical wire or a plumbing pipe
12 or anything.

13 Q. Okay.

14 A. I don't know what happened after 2005 or '6.

15 Q. And why is that?

16 A. Because I didn't go back in the units.

17 Q. Mr. Thoennes, during the period of time that you
18 were at Stoneledge and on the board from 2005 to 2008, in
19 addition to serving as the contractor, you were also in
20 the business of selling those units; is that right?

21 A. Was I in the business?

22 Q. At Stoneledge?

23 A. What does that mean?

24 Q. That means that you were in the business of selling
25 those units.

- 1 A. I.M.K. was.
- 2 Q. Yes.
- 3 A. Yes. As the owner, I.M.K. was to sell the units.
- 4 They owned them. They're the only ones that could sell.
- 5 Q. And you profited from the sale?
- 6 A. Yes.
- 7 Q. And you, at least in part, managed the sales team?
- 8 A. I did what?
- 9 Q. Managed the sales team.
- 10 A. In part. Like I said, marketing was not and is not
- 11 my strong suit.
- 12 Q. You've been here all week; is that right?
- 13 A. Yes.
- 14 Q. Have you read the C.S.E. report? That is, the
- 15 report that Derek did?
- 16 A. I have skimmed it. I have not read it.
- 17 Q. When did you skim it?
- 18 A. What's that?
- 19 Q. When did you skim it?
- 20 A. In the last year, maybe year and a half. Could be
- 21 two years now. I don't honestly remember.
- 22 Q. Were you surprised by the photographs that you've
- 23 seen this week of the conditions in phase one?
- 24 A. Yes.
- 25 Q. Are you disappointed?

1 A. Yes.

2 Q. In your observation, who's responsible for the
3 conditions, the rot and deterioration, that we've seen in
4 the photographs this week?

5 A. I would think the general contractor would have
6 been.

7 Q. And that would have been Marick Home Builders?

8 A. Bostic.

9 Q. Bostic? Would you agree with me that the conditions
10 that we've seen in these photographs needs to be
11 repaired?

12 A. Yes.

13 Q. And needs to be repaired properly?

14 A. Yes.

15 Q. And do you think that the owners in phase one
16 deserve that?

17 A. Absolutely.

18 Q. I don't have any further questions for you at this
19 time, Mr. Thoennes. Thank you.

20 A. My pleasure.

21 THE COURT: Mr. Belcher?

22 MR. GRESH: Thank you, Your Honor.

23 THE COURT: Oh, Mr. Gresh.

24 MR. GRESH: Thank you.

25 CROSS-EXAMINATION

1 BY MR. GRESH:

2 Q. Mr. Thoennes, my name is Jack Gresh. You and I have
3 never met in this case. I've got just a few questions
4 for you, if I could this morning.

5 A. Sure.

6 Q. You told the jury a little bit about your background
7 and expertise. You actually began construction on multi-
8 family apartment units in ---

9 A. I'm sorry. You're going to have to say that again.

10 Q. Sure. You began construction in multi-family
11 apartment units around 1969. You've been doing this for
12 a while?

13 A. That's correct.

14 Q. Okay. And ---

15 A. I didn't begin with -- I began with a duplex.

16 Q. Okay. But you've been doing this a long time,
17 though. Is that fair to say?

18 A. Yes, that's fair.

19 Q. All right. And you had heard about the Stoneledge
20 project from a friend; correct?

21 A. Correct.

22 Q. And became interested in it and eventually had your
23 construction company join up with a capital group to form
24 I.M.K. for the purpose of purchasing this project; right?

25 A. Correct.

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1 Q. And your contribution to this I.M.K. would be the
2 construction part. Anything that's construction related,
3 Marick is going to handle. Is that fair?

4 A. It would be a little more fair to say that my
5 contribution would be the profits that I would not charge
6 to construct it. That was my -- they put in money; I put
7 in hard labor.

8 Q. Got you. Okay. And before you would have invested
9 in this kind of company and put your construction company
10 out there on the line like that, you would have done some
11 due diligence in the project that you're going to buy?

12 A. Correct.

13 Q. Is it fair to say you wouldn't walk into a multi-
14 million dollar construction deal without doing some
15 homework before you got into it; right?

16 A. I guess, yeah.

17 Q. Do you routinely spend multi-millions of dollars
18 without knowing what you're getting into?

19 A. No. I mean, the point -- I'm just losing the track
20 of your question.

21 Q. I guess what I was driving at is your coming on site
22 and you're wondering, "Is this a good deal for Marick?
23 Is this a good deal for I.M.K.?"

24 A. Correct.

25 Q. We need to know what we're getting into.

1 A. Correct.

2 Q. Because if these things are falling down or they're
3 built on fault lines, that's something you need to know
4 before you plunk down millions of dollars?

5 A. Absolutely.

6 Q. So when you're coming in, you're doing your
7 investigation, you see ten units that are completely
8 built and sold; correct?

9 A. Ten or eleven.

10 Q. Ten or eleven units. And you've got twenty-seven
11 other units that are in various stages of completion;
12 true?

13 A. True.

14 Q. And what you would have done is you would have said,
15 okay, pick any one of those units that's unsold.
16 Thirteen. Let's make it up. Number thirteen. All
17 right. What condition is number thirteen in? It doesn't
18 have cabinets. It doesn't have this. And you would have
19 determined what needed to be done to bring that
20 particular building up to code and get your C.O. so you
21 can get it sold out to the next unit?

22 A. No. You added one little phrase there that I
23 disagree with, and that was bringing it up to code. I
24 couldn't do that with something I couldn't see.

25 Q. Okay.

1 A. And, secondly, I wouldn't have just looked at one
2 unit. Number thirteen, for instance.

3 Q. That's right. You would have looked at all of the
4 units?

5 A. I would have looked at all of them.

6 Q. All of the unfinished units, you would have
7 personally inspected with Nathan Hornaday?

8 A. That's right. And even went into some that were
9 sold.

10 Q. Because you wanted to make sure you knew what you
11 were getting into?

12 A. I wanted to see what they looked like.

13 Q. In fact, you did some checking for code compliance
14 at least on the exterior of the units; is that fair?

15 A. You've got to be more specific.

16 Q. Did you check for code compliance on some of the
17 units on the exteriors?

18 A.. Well, what kind of code on the exterior are you
19 talking about?

20 Q. The International Building Code.

21 A. Yeah, but there's a lot of codes. Now, I can't say,
22 yes, I checked every code. The International Building
23 Code is as big as that notebook sitting to your left.

24 Q. Do you remember telling us in your deposition when
25 you were under oath that you had checked the exterior of

1 these units for compliance with the applicable building
2 code?

3 A. I don't remember that, but I would have looked to
4 see if there were any code violations, yes.

5 Q. And, in fact, when you looked, you didn't notice any
6 of those exterior code violations?

7 A. That's right.

8 Q. Okay.

9 A. In fact, somebody showed a picture a couple of days
10 ago where the nail popped through the shingles.

11 Q. Right.

12 A. There are probably two million nails in that
13 project, and there's just no way that you would see a
14 nail popping in a roof. It's the same color as the roof,
15 first. I mean, there's a lot of things you cannot see.

16 Q. And kind of going back, when you're about to enter
17 into this deal, you understood that the Bostic Brothers
18 Construction was unable financially to complete this
19 project; right? Y'all knew that when you were going into
20 it?

21 A. Well, yes. There were a couple of entities, so I'm
22 not -- I wasn't at the time -- I guess I'm still not sure
23 what the relationship was between Bobby Carpenter and
24 Bostic. So I don't -- you know, it could have been that
25 Bobby Carpenter couldn't have continued, and he couldn't

1 pay Bostic so Bostic could continue. I don't know all
2 the intricacies of that. I just know that Bostic had
3 filed bankruptcy, and I don't know whether Bobby
4 Carpenter stopped it or whether Bostic stopped it or who
5 stopped it. That was beyond me.

6 Q. And I appreciate that point of clarification. The
7 developer, Bobby Carpenter, you don't know whether he had
8 stopped paying Bostic Brothers for their construction on
9 the project?

10 A. I have no idea.

11 Q. That's fine.

12 A. I do know that there were some liens on the project.

13 Q. Sure. And because the project was unable to be
14 completed due to financial difficulties, I assume that
15 raised your antenna a little bit when you went in to
16 purchase this?

17 A. Like I told you be -- like I told Mr. Lyles before,
18 I knew Bostic Brothers to have a good reputation. I had
19 no reason to think differently. And when you drove on
20 the site, that's what you saw. You saw what looked like
21 a good, reputable project. So I had no reason to say,
22 okay, these guys shortchanged or tried not to do
23 something to code or didn't pay somebody on purpose. I
24 had no reason to believe that.

25 Q. So fast forward a little bit. The due diligence is

1 done, and I.M.K. purchases the remaining townhomes and
2 the land there at the Stoneledge project; fair?

3 A. Uh-huh (affirmative). Let me back up just a second.

4 The time we had to do our due diligence was a little bit

5 compressed too because, as I recall, Bobby was under

6 pressure to do something prior to the bank foreclosing.

7 And I don't know whether the bank was foreclosing on

8 Bostic or Bobby Carpenter or on Townhomes at Lake Keowee.

9 But that's what we were told, as I recall, that something

10 had to be done quickly. So we were a little bit limited

11 in how much time we could spend on due diligence.

12 Q. Okay. But after the due diligence period was over,

13 however long or brief it ended up being, I.M.K. purchased

14 these unsold townhomes, incomplete townhomes, and the

15 land, et cetera; correct?

16 A. Correct.

17 Q. And then upon taking over this project, it's now

18 I.M.K.'s development. And so I.M.K. would have redone

19 the bylaws and otherwise so that it could control the

20 ownership, the board, of the Stoneledge property; right?

21 A. I don't recall bylaws being redone. But, you know,

22 I didn't have anything to do with that part of it.

23 MR. GRESH: Your Honor, may I approach?

24 THE COURT: Certainly.

25 Q. Earlier, you had heard reference to Plaintiff's

1 Exhibit Number 3 -- which was sitting right over there --
2 Plaintiff's Exhibit Number 3. . And it's called Amended
3 and Restated Bylaws of Stoneledge at Lake Keowee Owners
4 Association, Inc. Do you see that?

5 A. Yeah, I see it.

6 Q. And it goes along with, hand-in-hand, Plaintiff's
7 Exhibit Number 4, which is essentially where these bylaws
8 are filed with the Oconee County?

9 A. Okay.

10 Q. I may from time to time reference these, so I'll
11 leave them here in front of you.

12 A. Okay.

13 Q. These amended and restated bylaws were prepared, it
14 looks like, November 1st of 2005; is that right?

15 A. That's right. That's what it says.

16 Q. And you actually have -- you had signed it -- on the
17 last page here of Plaintiff's Exhibit Number 3, you had
18 signed that as a director of the board November 1st,
19 2005; correct?

20 A. That's correct.

21 Q. Okay.

22 A. That's my signature.

23 Q. And from the time that you signed this as a member
24 of the board of directors out there at Stoneledge until
25 the project was ultimately sold to S.D.I. or whoever, Mr.

1 Ludwig, whoever came in later, you were a member of that
2 board of directors out there at Stoneledge. Fair?

3 A. That's correct.

4 Q. And as a member of the board, whenever an owner of a
5 townhome had an issue, they would bring -- particularly
6 if it dealt with the common areas, they would bring those
7 issues to the board so that the board could address
8 those. Is that fair?

9 A. Incorrect.

10 Q. The board ---

11 A. That is not correct.

12 Q. Why is that not correct?

13 A. They came to Nathan mostly. Or if I was -- I owned
14 a unit out there. As part of our investment to raise
15 money, I bought a unit. And so I was out there a lot on
16 the weekends. So they would -- it wasn't -- you're
17 making this sound like this was a formal process where a
18 homeowner would call a director to make a complaint.
19 That's just not the way it was.

20 Q. And if I characterized it that way, I didn't mean
21 to. What I was trying to impart is ---

22 A. Well, that's what you said.

23 Q. Okay. Well, right here in the bylaws, does it not
24 say that as the property owners association that you all
25 have the ultimately responsibility for the exterior

1 envelope of the building and the maintenance; correct?

2 A. I couldn't possibly tell you what's in there. I
3 would assume that's correct. It's just that I don't
4 know.

5 Q. And that's what you'd expect to be in here; right?

6 A. Yes. I would expect that all the exterior, the
7 grounds, landscaping, the exterior of the buildings.

8 Q. Because those would be the common elements, what
9 they call common elements?

10 A. That's right.

11 Q. And, in fact, here on Plaintiff's Exhibit Number 4,
12 we have a discussion about the Stoneledge Property Owners
13 Association responsibility is to take care of exterior
14 maintenance; is that right?

15 A. Yes.

16 Q. And there's actually some in the amended bylaws ---

17 A. I'll be glad to grant you your wish that the H.O.A.
18 is responsible for the exterior maintenance and upkeep of
19 the building.

20 Q. And that's what I was trying to drive at. That when
21 a townhome unit owner had a problem with the exterior of
22 the maintenance, it would be their expectation that they
23 could take those issues to the association to be
24 addressed. And whether they did that through you or
25 Nathan or verbal or email, that would be their

1 expectation?

2 A. You'd have to ask them what their expectation was as
3 to who they would take it to. I think if you asked any
4 of those people there, they would have said they'd have
5 taken it to me or Nathan.

6 Q. Because y'all were in construction?

7 A. Because we were out there and accessible.

8 Q. And, in fact, we heard from a lot of them, Mr.

9 Taylor, the mayor of Stoneledge, how he had these issues
10 early on and that he would bring them to you and Nathan
11 about various leaks and et cetera; right?

12 A. Correct.

13 Q. And, in fact, the board as a whole out there at
14 Stoneledge had notice of various leaks, whether it was
15 with the decks or some windows from lots of different
16 homeowners; correct?

17 A. You keep saying the board. And I want to make that
18 distinction again. I mean, we didn't meet as a board and
19 take these complaints or, say, call Marick and have them
20 fix these complaints. It was a very informal thing. It
21 wasn't a formal, we've got a -- you fill out this form
22 and submit it to the board, and the board will meet and
23 decide what to do or what not to do. That's just not the
24 way it was.

25 Q. But from the time y'all took over in 2005 and up

1 until 2006 and into 2007, if a homeowner had an issue
2 regarding the exterior of their unit, they would have
3 forwarded it on, however informally, to the board so that
4 it could be addressed as a common area; correct?

5 A. Say that again?

6 Q. From 2005 to 2006 and into 2007, if a townhome unit
7 owner had a complaint or an issue regarding the exterior
8 of their home or any other common element feature, that
9 they would bring that to the board, no matter how
10 informally, so that the board could do what it's supposed
11 to do?

12 A. It wasn't brought to the board, and I don't know why
13 you ---

14 Q. You were a member of the board.

15 A. I'm not sure what the importance of that is, but ...

16 Q. And I guess what I was driving at, you're a member
17 of the board; correct?

18 A. Yes.

19 Q. Okay. So they would bring it to the attention of a
20 member of the board so that it ---

21 A. It depends on which hat I had on on that particular
22 day. I've been -- Mr. Lyles said I sold them. Somebody
23 else said I built them, and somebody else said I'm a
24 director on the board.

25 Q. And now you're on the board.

1 A. So I guess it depends on which hat I had. You know,
2 on some days I would go out and jump somebody's car, so I
3 guess I was a mechanic too. But I just -- you know, I
4 didn't have the pleasure of being able to say, I'm a
5 director now. At seven o'clock, I'm a contractor. At
6 eight o'clock, I'm a marketing person. I didn't have
7 that luxury. So you're trying to put words in my mouth
8 that I don't want you to do. It was very informal. I
9 mean, this was not a multi-national company out there
10 trying to build this complex. This was me and Steve
11 Taylor or me and Jessie Grasso or me -- you know, it was
12 a very informal thing. So I don't want people to think
13 that this was a formal thing that people took to the
14 board. It wasn't at that time. I can't speak to it
15 after I left. I do know if somebody came to me with a
16 complaint and I could fix it, I fixed it. It's that
17 simple. It wasn't a matter of deciding yes or no.

18 Q. Homeowners like Mr. Taylor and Ms. Furnari ---

19 A. Uh-huh (affirmative).

20 Q. --- and others who had issues regarding the exterior
21 of their home or common elements would bring to you,
22 regardless of which hat you were wearing; correct?

23 A. Me or Nathan and sometimes Tim. Tim lived out there
24 a whole lot more than I did. So ---

25 Q. And Tim's also a member of the board?

1 A. That's right.

2 Q. He signed that same exhibit we were just talking
3 about that you had signed?

4 A. He did.

5 Q. And so whether it went to you or to Tim or to
6 Nathan, the information that the homeowners were
7 complaining about was conveyed to members of the board;
8 fair?

9 A. Yes, or others.

10 Q. Or others.

11 A. And you have to remember too that the homeowners
12 association had no money to do anything when we got
13 there.

14 Q. Right.

15 A. They could not keep up what they had, so we ended up
16 doing that. So instead of the homeowners association
17 repainting the buildings, we did it. Instead of the
18 homeowners association getting the sewer plants in shape,
19 we did. Instead of somebody putting sod where it needed
20 to be put, being the H.O.A., we did. They didn't have
21 any money to do that, and we wanted the project to look
22 nice. It was that simple. I lived there. My partners
23 lived there. We wanted to sell the units, and it made
24 sense to make it look as good as it could. And that
25 would include the exteriors.

1 Q. And any of those complaints, whether they came in
2 from units that Bostic had sold or units that I.M.K. was
3 selling, those issues, whatever they were, would have
4 been addressed by Marick as the construction people;
5 right?

6 A. For the most part.

7 Q. That's all I have. Thank you very much.

8 A. You're welcome.

9 THE COURT: Mr. Anderson?

10 MR. ANDERSON: No questions, Your Honor. Thank
11 you.

12 THE COURT: Mr. Imhoff?

13 MR. IMHOFF: Just briefly, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. IMHOFF:

16 A. Nice to see a friendly face.

17 Q. I'm not going to ask you very many questions, Mr.
18 Thoennes. Let me just ask you a couple of questions.
19 You've seen and heard testimony this week repeatedly
20 about unit thirty-three. And you said that you didn't go
21 into unit thirty-three until -- or after 2005. Will you
22 tell the jury why? Why didn't you go into unit thirty-
23 three after 2005?

24 A. Why didn't I?

25 Q. Yes.

1 A. It was unsold. I think that was the units we sold
2 to S.D.I.

3 Q. You never worked in that unit; is that right?

4 A. I don't believe so, other than to close the windows
5 and make sure there was -- that kind of thing.

6 Q. And that was the one ---

7 A. Now, Nathan could have. I don't know. But I
8 didn't.

9 Q. And that is -- the photograph that has been shown to
10 this jury throughout this trial to infer that you knew
11 all of these water leaks were happening; right?

12 A. That's what the inference is, yes.

13 Q. But you didn't work in that unit; right?

14 A. Right.

15 Q. And ultimately it was sold, and someone else got a
16 permit and got a certificate of occupancy and sold it to
17 one of these homeowners?

18 A. That's right.

19 Q. You don't know what they did with those leaks or any
20 of that?

21 A. No.

22 Q. All right.

23 A. That was the case in several units. I mean, we sold
24 several units in phase one to S.D.I.

25 Q. But that's the photo they keep showing?

1 A. Yeah. That's the baseline, I guess you could call
2 it.

3 Q. And when the homeowners, Mr. Taylor and everybody
4 else, would come to you, did you repair their units or
5 instead of making repair to their units, hire someone to
6 repair their unit?

7 A. Yes. I can only think of a rare instance where we
8 didn't, and that would have been some kind of cosmetic
9 thing inside the unit that we probably would not have
10 tackled. But even inside, we did warranty work. We
11 fixed doors and sump pumps and those kinds of things. It
12 was more the cosmetic stuff that we didn't feel like we
13 should fix.

14 Q. I think what everybody's looking to hear from you,
15 Mr. Thoennes, were there so many complaints of leaks out
16 there that it became clear to you at some point that
17 these units were defective or constructed improperly?

18 A. No. In fact, I made the cardinal mistake. Rule
19 number one for any developer is don't live where you
20 develop. But I lived where I developed, and we enjoyed
21 our neighbors. We had -- my seven grand kids spent a
22 good part of their life growing up there in the
23 summertime. So it was a very friendly, easygoing place.
24 So these problems were not as pervasive as what I've
25 heard throughout this whole time. They just were not

- 1 there. If they were, we would have fixed them.
- 2 Q. And did?
- 3 A. And did.
- 4 Q. How many units are out there?
- 5 A. How many units? Thirty-seven.
- 6 Q. You lived in one or had a unit out there?
- 7 A. I lived in one. Not full-time.
- 8 Q. So you would have seen your windows, your roof, your
- 9 -- all those things, right?
- 10 A. Yes. And I had a toilet leak in my unit.
- 11 Q. Did you have all of those other leaks?
- 12 A. No.
- 13 Q. Even in your own unit?
- 14 A. No. I coated the deck the same way as everybody
- 15 else. We gave the people the option to do that.
- 16 Q. Let's talk about that. So the deck issue, what did
- 17 you understand the deck issue was in 2005?
- 18 A. I understood that the concrete had cracked. They'd
- 19 poured concrete over it. And that concrete had cracked,
- 20 and water was permeating through it and going down into
- 21 the patio underneath.
- 22 Q. You actually saw cracks in the concrete?
- 23 A. Yes.
- 24 Q. Right on the deck?
- 25 A. Yes.

1 Q. What else led you to believe that it was the cracks
2 in the concrete that was causing the leaks?

3 A. Well, Coleman Waterproofing we asked to take a look
4 at it, and they told us the same thing. And that's what
5 they recommended.

6 Q. So at that time, you believed that the water was
7 getting through the cracks in the concrete and into the
8 tongue and grove cedar ceiling below?

9 A. Yes.

10 Q. Did Nathan do an investigation to support that at
11 that time?

12 A. I think he cut a hole or -- didn't cut a hole. He
13 took a part of the board out underneath. If you're
14 standing in the patio down in the basement and look up,
15 there's tongue and grove cedar there. I think he took
16 one of those boards out. And that's where he saw -- he
17 took it out underneath -- if I recall, he took it out --
18 and I couldn't tell you which unit. But he took it out
19 underneath where the water was coming, which would have
20 been the obvious thing to do. And that's when we took a
21 hose and ran the hose, sprayed the building. And that's
22 where it was coming through.

23 Q. Where?

24 A. Through that crack.

25 Q. In the middle of the deck?

- 1 A. Yes.
- 2 Q. And was there a water stain on the middle of the
- 3 underside of that deck?
- 4 A. Yes.
- 5 Q. Was it the outboard edge? Outboard, lakeside edge?
- 6 A. Was there a stain?
- 7 Q. It wasn't outboard?
- 8 A. No.
- 9 Q. Was it underneath the sliding glass door?
- 10 A. No. Mostly in the middle.
- 11 Q. Is that why -- well, is that why you waterproofed
- 12 the cracked concrete?
- 13 A. Yes.
- 14 Q. Do you understand that these decks leak now?
- 15 A. Yes.
- 16 Q. And how do you know that, Mr. Thoennes, that they're
- 17 leaking at the outboard edge and underneath those doors
- 18 potentially?
- 19 A. Well, I've seen the pictures, and I've heard
- 20 testimony from -- I've forgotten the engineer's name --
- 21 Derek Hodgkin. So, yeah.
- 22 Q. And those pictures show the decks?
- 23 A. Yes. And we asked each homeowner if they wanted us
- 24 to -- we recommended that they coat it. In fact, we
- 25 asked the mayor to ask each of those current homeowners

1 if we could coat their decks. And I think they all did
2 except one.

3 Q. Somebody actually refused that?

4 A. Yeah. And I don't remember why. I do know there
5 were some that had -- I do not know how many had tile.
6 But there was at least one that had tile. And we were --
7 at the time, I remember being amazed that somebody didn't
8 want us to waterproof the deck. And I don't remember
9 why.

10 Q. Do you know what unit that was?

11 A. No.

12 Q. All right. No more questions. Thank you, Mr.
13 Thoennes.

14 A. You're welcome.

15 THE COURT: Ms. Brown?

16 MS. BROWN: No questions, Your Honor.

17 THE COURT: All right.

18 MR. LYLES: Your Honor, I've got two follow-up
19 questions. Is it my turn?

20 THE COURT: Mr. Hemphill?

21 MR. LYLES: Oh, sorry.

22 CROSS-EXAMINATION

23 BY MR. HEMPHILL:

24 Q. Mr. Thoennes, did something happen in the national
25 economy in the 2008/2009 time frame?

1 A. The national economy and the construction industry
2 in particular, yes.

3 Q. And you've been a home builder for more than forty
4 years; is that correct?

5 A. That's correct.

6 Q. Did you feel the effects of that?

7 A. It's the worst recession in construction that I had
8 ever been through since 1968.

9 Q. Okay. Now, Marick Home Builders is still an
10 existing corporation; is that correct?

11 A. It's an L.L.C.

12 Q. Okay. And it did multi-family construction and
13 larger home construction for those forty years. Let me
14 rephrase that. You've done multi-family and larger home
15 construction over forty years; is that correct?

16 A. As well as smaller homes and some commercial as
17 well, yes.

18 Q. Okay. And Marick Home Builders came into being in
19 the late 1990s?

20 A. That's correct.

21 Q. All right. And so in 2008/2009 when this recession
22 occurred -- let me ask you this. Are there a lot less
23 homebuilders now than there were before that?

24 A. Probably forty percent less.

25 Q. Okay. Now, as it relates to Marick Home Builders,

1 it came into being in the late 1990s; is that right?

2 A. That's correct.

3 Q. And you had an original investor named Mark
4 Hutcherson; is that true?

5 A. That's true.

6 Q. And he was in for a while but was out of Marick in a
7 year or so; is that right?

8 A. That's correct.

9 Q. Okay. So were you ready to get out of the home
10 building, your passion, in the 2009 time frame or ---

11 A. No.

12 Q. You were not? So what did you decide to do?

13 A. We decided to keep building houses. And at the --
14 in the early 1990s -- I mean, 2000s -- it was very
15 strong. And our company grew. Rick III, that's the
16 reason I partnered with him was because of his marketing
17 expertise.

18 Q. But, now, you started a new corporation in 2009;
19 isn't that right?

20 A. That's right.

21 Q. Do you recall that being the February to March time
22 frame of 2009?

23 A. I don't remember the month.

24 Q. Okay. And did you decide to try to build different
25 homes, different types of homes than you had been

1 building?

2 A. Yes.

3 Q. Why?

4 A. We felt like -- larger homes were not selling
5 period. We had built up in the Cliffs and Montebello and
6 Kilgore, which are larger subdivisions in Greenville.
7 And those sales were completely flat. So the only thing
8 that was selling at that time -- and we had to wait to
9 get through a little bit of that recession even to start
10 selling the smaller homes. But we felt like the hundred
11 and twenty to two hundred thousand dollar home was the
12 only thing that was going to sell.

13 Q. So did you form a new corporation to sell that
14 priced home?

15 A. A new L.L.C., yes.

16 Q. And did you call it something new?

17 A. We called it M Group.

18 Q. Why did you call it M Group?

19 A. Mark and Mark were the two new partners we brought
20 in, so we named it M Group.

21 Q. All right. And Mark Hutcherson had been with Marick
22 but ten years earlier; is that correct?

23 A. Yes.

24 Q. And the other partner was your other son, Mark
25 Thoennes; is that correct?

1 A. That's true.

2 Q. Had you ever been in business with your son Mark in
3 home building?

4 A. No.

5 Q. Okay. What did each of those two fellows bring into
6 the new company?

7 A. Money and the ability to borrow some money.

8 Q. What did they contribute in terms of money?

9 A. I think they initially put in seven thousand dollars
10 each.

11 Q. Okay. Now, when you started this new company, did
12 you -- did Marick sell any assets or any of its stock
13 over to M Group?

14 A. No.

15 Q. Let's talk about assets of Marick at this time
16 frame. What sort of assets within the group? You
17 talking trucks? We're talking buildings? What type of
18 assets?

19 A. No. We had some shovels and brooms. And like I
20 said earlier, the only people we hired were maybe
21 laborers to sweep out the homes or something like that.
22 So we had to supply a broom or a shovel or something like
23 that. And since we subcontracted everything, we had no
24 need for assets. We had some office supplies, that kind
25 of thing.

1 Q. Did you have a laptop computer?

2 A. I don't think I had a laptop until later on.

3 Q. Okay. And then did M Group get any new assets of
4 its own? New shovels or a laptop?

5 A. Yes, we bought some shovels and new brooms. We
6 bought a computer for the office for the girl that was in
7 the office, our administrative assistant. And we bought
8 -- later on, we opened a model and furnished that model.
9 M Group did.

10 Q. Is that a model home?

11 A. Yes.

12 Q. Was that in the particular subdivision where you
13 were building?

14 A. Yes.

15 Q. And so did you have a different office location from
16 Marick when you started -- when you started M Group?

17 A. Yeah. Marick shut down, and it was a while later
18 when M Group opened.

19 Q. So you didn't merge anything from Marick over to M
20 Group?

21 A. Myself and Rick.

22 Q. Okay.

23 A. Rick III.

24 Q. All right. And did you form this corporation to
25 defraud your creditors in any way?

1 A. No. I've never done anything like that. Never
2 would. My reputation isn't for sale.

3 Q. All right, sir. Thank you for answering my
4 questions.

5 A. You're welcome.

6 THE COURT: Mr. Lyles?

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

8 REDIRECT EXAMINATION

9 BY MR. LYLES:

10 Q. Mr. Thoennes, you indicated in your responses to Mr.
11 Imhoff's question that the homeowners association had no
12 funds. And so you and the other people at I.M.K. funded
13 some efforts of the H.O.A.; is that correct?

14 A. I may have misstated it a little bit. There was a
15 bank account. And there was some money in it, but it was
16 very small because there were only ten or eleven people
17 contributing monthly to that fund.

18 Q. And that's the point I wanted to make. When y'all
19 arrived, there were only ten or eleven homeowners?

20 A. That's right.

21 Q. And then as I.M.K. evolved in the process of
22 Stoneledge, it sold a number of other units. And the
23 homeowners association finances improved with the
24 additional homeowners?

25 A. Every time we sold a unit, it went up by -- I think

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1 he said three hundred dollars a month.

2 Q. You indicated also to Mr. Imhoff about the problems
3 at the unit. And I think you said that you were not
4 aware of pervasive problems at the unit when you were
5 there; is that right?

6 A. Correct.

7 Q. And throughout phase one?

8 A. Correct.

9 Q. Would you agree with me that based on the
10 information and the photographs that you've seen this
11 week that the problems were, in fact, there; they just
12 weren't apparent?

13 A. Some of them were there. Certainly, some of them
14 were not in 2005, '06 and '07. Obviously, as Derek said,
15 they got worse as time went on. Some got worse. Some
16 just showed up. Does that answer your question?

17 Q. Sure. I mean, you've seen evidence in these
18 photographs and heard the testimony this week that
19 suggests to you that the construction problems existed
20 from the time that Bostic left the site?

21 A. I guess so.

22 Q. And whether or not those problems manifested
23 themselves -- that is became apparent to you -- is the
24 question of discussion; is that right?

25 A. That's true.

- 1 Q. You couldn't see what was going on behind the stone?
- 2 A. That's right.
- 3 Q. And in large part, you couldn't see what was going
- 4 on behind the cedar siding?
- 5 A. That's true.
- 6 Q. And under shingles?
- 7 A. That's correct. All of those things.
- 8 Q. Okay.
- 9 A. I'll save you some ...
- 10 Q. Yes, sir. And in response to Mr. Hemphill's
- 11 questions, he asked you about your intent to defraud
- 12 creditors. And I heard your answer loud and clear. But
- 13 would you agree with me that when Marick ceased
- 14 operations, it ceased the ability to generate income?
- 15 A. And expenses, that's true.
- 16 Q. So if Marick wasn't in business or wasn't building
- 17 houses, it couldn't generate an income; is that right?
- 18 A. That's true.
- 19 Q. And without income, it can't pay its bills?
- 20 A. That's true.
- 21 Q. And after the creation of M Group ---
- 22 A. But you're kind of getting in reverse there. We
- 23 couldn't pay our bills because we didn't have the income
- 24 to do it. And I think you kind of reversed that, yes.
- 25 Q. Okay. All right. I think that's all I've got.

1 Thank you.

2 THE COURT: All right. Anything else?

3 (No response)

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

5 THE WITNESS: You're welcome.

6 MR. IMHOFF: Your Honor, we ask that Mr.

7 Thoennes be released from his subpoena.

8 THE COURT: Certainly, but remain with us?

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

10 THE COURT: I say, you asked Mr. Thoennes to

11 remain with us?

12 MR. IMHOFF: I will ask him to stay here. He

13 does have a surgical procedure tomorrow. We'll take that

14 up.

15 MR. LYLES: Thank you, Mr. Thoennes.

16 THE COURT: Very good then.

17 All right. Mr. Lyles?

18 MR. LYLES: Mike Furnari.

19 (WHEREUPON, the witness was duly sworn.)

20 THE COURT: If you would, please, sir, give us

21 your full name for the record, spelling your last name.

22 THE WITNESS: Michael Vincent Furnari, F-U-R-N-

23 A-R-I.

24 THE COURT: Thank you, sir.

25 MICHAEL VINCENT FURNARI,

1 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

2 DIRECT EXAMINATION

3 BY MR. LYLES:

4 Q. Mr. Furnari, good afternoon.

5 A. Hey, Robert.

6 Q. Are you nervous?

7 A. A little bit, but I'm okay.

8 Q. Okay. Have you ever testified in trial?

9 A. No, sir.

10 Q. Okay. It'll be all right.

11 Mr. Furnari, if you will, tell the jury where you're
12 from.

13 A. I'm twenty minutes outside of Cleveland, Ohio.

14 Q. And are you married?

15 A. Yes.

16 Q. And who are you married to?

17 A. Donna Furnari.

18 Q. And did Donna testify on Tuesday of last week?

19 A. I guess she did.

20 Q. And how long have you and Donna been affiliated with
21 Stoneledge?

22 A. We bought in 2008.

23 Q. And I believe Donna's testimony was that she was on
24 the first board that was controlled by the homeowners?

25 A. Yes.

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1 Q. And have you ever been a board member?

2 A. No.

3 Q. Have you ever served on any sort of committee at
4 Stoneledge?

5 A. I volunteer for the architectural committee.

6 Q. Are you active in the homeowners association at
7 Stoneledge?

8 A. Yes.

9 Q. And you participate in meetings?

10 A. I don't really participate. I just sit in on them
11 because I'm not an official board member.

12 Q. So you sit in on board meetings?

13 A. Yes. I listen in.

14 Q. Are you familiar with the business of the board of
15 the Stoneledge H.O.A.?

16 A. Yes, sir.

17 Q. And do you discuss that business with Donna?

18 A. Yes, daily.

19 Q. How long have you been on the architectural
20 committee?

21 A. Approximately four and a half years now.

22 Q. And as a member of the -- are you -- have you held
23 an office on the architectural committee? Are you the
24 chairman of that committee?

25 A. Yes, sir, but I have no help.

1 Q. Okay. So you're the only person on that committee?

2 A. Yes.

3 Q. What does the architectural committee do?

4 A. Well, I volunteered originally to help the board
5 when there were issues with owners wanting to make
6 changes to the exteriors of their unit. The function of
7 the committee is supposed to keep the grounds and the
8 buildings -- not regimented, but supposed to be pleasing
9 to the eye when you're looking at them. So you don't
10 want someone to put a red tarp on their decks, for
11 instance. Or, you know, residents don't want to drive in
12 there and see twenty different flags representing
13 different issues. So that's the purpose of the
14 committee.

15 Q. And that is to keep some esthetic uniformity on the
16 project?

17 A. Well, for example, if somebody wanted a storm door
18 put on the front door, we would spec out a storm door
19 that would blend with the architecture. So the committee
20 would be there to talk the owner through the selection of
21 the proper door so as not to make one owner have one door
22 and another owner have a different door.

23 Q. Do you have a background in construction at all?

24 A. I ran a roofing company for a few years.

25 Q. And what sort of roofs did you do?

1 A. I would only do walkable ranch homes. I wouldn't
2 touch church steeples or anything like that. It was more
3 of a -- I would just cherry pick the jobs. I wasn't out
4 there because I had to do the work. So I was just out
5 there to do roofs that were very easy to do, and I had a
6 couple of guys who were helping.

7 Q. In the course of your marriage to Donna and your
8 life at Stoneledge and your position as the architectural
9 committee, have you been active with the association
10 relative to the building defects that are at issue in
11 this trial?

12 A. Yes, sir.

13 Q. And have you worked, for example, with C.S.E. as
14 part of their work?

15 A. Yes, sir.

16 Q. And what do you do for C.S.E. or with C.S.E.?

17 A. We would consult with C.S.E. for any repairs that we
18 had to enact on our buildings because of water intrusion
19 to the interiors. I would review their scope of repair.

20 I would call a contractor out. Well, let me back up.

21 Are you looking for the procedure that we enacted?

22 Q. Not the emergency repair. I'm just curious bout
23 your interaction with C.S.E. generally?

24 A. Okay.

25 Q. Have you met with C.S.E.?

1 A. Yes, sir.

2 Q. Have you been on site with C.S.E.?

3 A. Yes.

4 Q. Have you given them or helped give them access to
5 units?

6 A. Yes.

7 Q. Have you observed the work of C.S.E.?

8 A. Yes.

9 Q. Have you reviewed their reports?

10 A. Yes, sir.

11 Q. Did you review or have you reviewed the scopes of
12 repair that C.S.E. did?

13 A. Yes, all of them.

14 Q. Do you understand those scopes of repair?

15 A. Every one of them.

16 Q. And have you made it your business to understand it?

17 A. Yes, sir.

18 Q. Have you assisted C.S.E. with coordinating the data
19 that they generated? Reports. Photographs. Things like
20 that.

21 A. Yes. If there were photos taken, we would forward
22 those to C.S.E. and vice versa. They would also send me
23 photos of what they have observed on the site. And I
24 would put all of that information with each and every
25 unit's permanent file for reference should we need it

1 down the road.

2 Q. Do you feel as though based on your interaction with
3 C.S.E. you have a thorough understanding of the
4 investigation that they did at phase one and the work
5 that they've performed?

6 A. One hundred percent.

7 Q. How about the other experts? Have you worked with
8 other experts that were retained by defendants, for
9 example?

10 A. Yes. We contracted with the Watkins Group to come
11 in and do some below-grade repairs.

12 Q. Was that an emergency repair?

13 A. Yes, sir.

14 Q. Let's talk a little bit about the emergency repair.
15 What is an emergency repair procedure?

16 A. Well, due to the numerous requests, verbal, email,
17 work order requests, we had to start identifying which
18 repairs we were going to act on because we didn't have
19 the money to fix all of the units that were leaking, that
20 are leaking. So the litigation committee in conjunction
21 with the board came up with a repair document that stated
22 we would try to preserve the defendants' rights to come
23 on site and make repairs as they arose. But we weren't
24 going to labor the defense with every single request. So
25 what we decided to do -- well, not me, the litigation

1 committee -- was to come up with a document that would
2 act on water intrusion that was damaging the interiors of
3 the homes. So it would start with an owner submitting a
4 work order. I would receive that, and I would talk with
5 the homeowner, or I would ask the onsite resident to take
6 a look and verify if it was water intrusion into the
7 unit. Once it was determined that we would classify it
8 as an emergency, I would notify Robert who would notify
9 C.S.E.

10 MR. ANDERSON: Objection, Your Honor. Could we
11 have a sidebar, please?

12 THE COURT: Certainly.

13 (WHEREUPON, a bench conference was held off the
14 record.)

15 THE COURT: All right. You may continue.

16 Q. All right. Mr. Furnari, let me back you up a few
17 steps.

18 A. Okay.

19 Q. At what point was an emergency repair procedure
20 deemed necessary by the homeowners association?

21 A. I believe it was when we contracted with C.S.E. to
22 start enacting some repairs. It was after they came on
23 site, did their analysis and suggested that we have them
24 on site when we were doing repairs so they could document
25 information for you.

1 Q. At any point did the homeowners association
2 determine that it could not keep up with the number of
3 repair requests that were being made by the owners?

4 A. Yes.

5 Q. And when did that occur?

6 A. I don't remember the year, but I would guess it was
7 in 2000 -- early 2009.

8 Q. And when I say ---

9 A. Well, wait. Maybe I can tell you if I can just look
10 at my ...

11 Q. Okay.

12 A. I'm going to say it was 2009.

13 Q. Now, did the homeowners association at that time in
14 2009 have enough money available to it to effect all of
15 the repairs that people were wanting?

16 A. No, we didn't.

17 Q. And so did you enact or create an emergency repair
18 procedure in an effort to prioritize the requests for
19 repair?

20 A. Yes, sir.

21 Q. And do those repairs that were most important that
22 you could afford to do?

23 A. Well, the board decided that we had to fix any unit
24 that had water intrusion coming into it. That was the
25 responsibility of the board. So whether we had the money

1 or not, we had to do those repairs.

2 Q. Okay.

3 A. And we only fixed the repairs to the extent that it
4 stopped the water from coming and doing more damage to
5 interior components.

6 Q. And who made the decisions about what repairs were
7 going to be made by the homeowners association and which
8 repairs would have to be deferred until later?

9 A. I guess that would be me.

10 Q. And to do that, did you evaluate requests for
11 repairs that had been made to you by the owners?

12 A. Yes, sir.

13 Q. And starting in 2009, how many requests for repair
14 would you say you have evaluated for phase one owners?

15 A. Over fifty.

16 Q. And of those fifty, how many repairs have you
17 determined needed to be made emergently?

18 A. Twenty-two.

19 Q. And those twenty-two -- was it twenty-two -- do you
20 need some more water?

21 A. Yes.

22 Q. Would you describe for the jury the nature of those
23 twenty-two repairs that you have had to make?

24 A. You want specific details on one or two of the
25 units?

1 Q. Well, is it -- let's do it this way. Have you
2 repaired or made repairs to twenty-two separate units?

3 A. Yes, sir.

4 Q. And have the repairs all been related to the roof?

5 A. No.

6 Q. Have you done some roof repairs to those twenty-two
7 units?

8 A. Yes, sir.

9 Q. And what other types of repairs have you done to
10 those twenty-two units, just generally?

11 A. Well, we have a water management issue with the
12 units. And by that, I mean when it rains, we have water
13 that sheds off the upper-level roof. And on many of the
14 units, they don't have any gutters. So what happens,
15 they overload the lower gutters, and it tends to overflow
16 and it taxes the take-away drains. So people have water
17 pooling around their foundations. So when we would call
18 a contractor out, we start at the top of the roof and we
19 work our way down until we can figure out where the
20 water's coming in from. If a unit owner says they have a
21 skylight problem, sometimes it's the flashing. Other
22 times, it's water that finds its way down the siding and
23 goes down the roof slope. So it looks like it's a --
24 from the inside, it looks like it's a skylight problem,
25 but it's really a roof-to-wall intersection.

1 Other issues are -- you would think it's a roof
2 problem, but it turns out to be a foundation issue where
3 the water finds itself coming up over the sill of the
4 foundation, but it appears that it's coming down from the
5 wall. Until you get in there and remove the drywall, you
6 have no clue.

7 Q. Are you still having -- or are there any units out
8 there where the porches and decks are reporting leaks?

9 A. Yes, sir.

10 Q. And are there units out there where the basements
11 are flooding?

12 A. Yes.

13 Q. And are there units out there where it appears there
14 are leaks at the foundation walls?

15 A. Yes.

16 Q. And do you have units out there that have leaks in
17 windows?

18 A. Yes, sir.

19 Q. And under porch doors?

20 A. Yes.

21 Q. When you hire a contractor to make a repair, are you
22 doing the repair that Mr. Hodgins says you have to do to
23 do a complete fix?

24 A. No, sir. We're only doing the scope of repair to
25 the extent that it stops the water from coming into the

1 unit. We can't afford to do the full scope of repair
2 right now.

3 Q. And you hired the contractors to do that?

4 A. Yes, sir.

5 Q. And do you set the budget for that work, or do you
6 take prices from the contractors?

7 A. Well, when I got involved in this, I used to try and
8 get two to three estimates. And as the years went on, we
9 couldn't rely on the estimate because every repair that
10 has been made out there exceeded the estimate. For
11 example, unit four ten -- I believe it's Sunset Point.
12 It's on a slab. And originally the unit or the work
13 order stated that the upstairs bedroom was getting water.
14 So I called the contractor out and I asked him to go up
15 and do the roof repair. I got an estimate. It was like
16 two hundred and fifty dollars. And when the contractor
17 got up there, they said that there was extensive damage
18 to the sheathing ---

19 MR. IMHOFF: Objection, Your Honor. Hearsay.

20 THE COURT: Sustained.

21 Q. As a result of the work of the contractor, did you
22 pay for repairs that exceeded the repairs you thought you
23 were going to have to pay for?

24 A. Yes, we paid more than what the estimate was.

25 Q. And did you observe damages in that unit that

1 exceeded what you thought you were going to have to
2 repair?

3 A. Yes, sir.

4 Q. And how far down the unit did those damages go in
5 your observation?

6 A. Well, this unit has been -- this unit as of today is
7 still leaking. So when I was on site back the last
8 holiday we had -- I don't remember what it was, Labor
9 Day, Memorial Day -- I went into the unit. And when I
10 walked in the front door, the hardwood floors in the
11 hallway were floating because of the water. And we asked
12 -- well, this is getting back to where I say every time
13 we enact a repair, it turns out to be more money. We had
14 J.R. Watkins out there performing a repair for us.

15 Q. Was he doing the roofing work?

16 A. No, sir.

17 Q. Something else?

18 A. We called him out there because we took care of the
19 roof, the upper-level roof, a couple of years ago. And
20 it was fixed, but -- in the bedroom. And six to nine
21 months later, I got another work order request that
22 stated there was ---

23 Q. Don't tell us what it stated. But what did you do
24 when you got it?

25 A. When I got the work order request ---

1 Q. That's right.

2 A. --- I asked the contractor to go in and find the
3 leak that was beginning to stain -- well, it was water
4 coming through the ceiling at this point. I asked him to
5 go in there and fix it. And it turned out it was a wall-
6 to-roof intersection leak. Supposedly -- so now that is
7 fixed, but then I got another work order request because
8 they were still getting water intrusion into their
9 bathroom.

10 Q. Okay. And is that an example of what it's been like
11 for you to try to effect these emergency repairs?

12 A. Yes, sir.

13 Q. And have you had problems similar to that in units
14 throughout phase one?

15 A. All twenty-two units have issues like that. You
16 think it's one thing, and it's not. When the contractor
17 gets there, they're doing two or three other types of
18 repairs to the unit.

19 Q. Of the -- there are thirty-seven units in phase one;
20 is that right?

21 A. Yes.

22 Q. Okay. You say you've done emergency repairs to
23 twenty-two of those thirty-seven?

24 A. Yes, sir.

25 Q. Are the other fifteen units not reporting any

1 problems?

2 A. We are getting work order requests from those other
3 units, but we're not able to act on them because they're
4 not falling into the guidelines of our emergency repair.

5 Q. You arrange for the contractors -- is that right --
6 as far as the emergency repair?

7 A. Yes, sir.

8 Q. Have you attempted or have you actually used Trehel
9 to do emergency repairs?

10 A. Yes, we have.

11 Q. Okay. And have you called Trehel recently to get
12 Trehel or to see if Trehel is interested in doing
13 emergency repairs?

14 A. Yes. I called them to see them if they would be
15 interested in coming out and quoting for some repairs
16 that we needed done, and they said they were too busy and
17 they weren't interested.

18 Q. And when was that phone call?

19 A. I made that phone call probably five months ago.

20 Q. Okay. And is Trehel somebody that you think that
21 the homeowners association would consider to effect the
22 full repair that Derek Hodgkin has specified?

23 A. Yes, sir.

24 Q. Were you here yesterday for the testimony of Bob
25 White?

1 A. Yes, sir.

2 Q. And did you hear some questions asked about sales of
3 units in as-is conditions?

4 A. Yes, I heard them.

5 Q. And do you know anything about units being sold in
6 as-is condition?

7 A. Yes, I do.

8 Q. And what do you know about that?

9 A. These units were auctioned off. And they -- some of
10 them were auctioned off with the stipulation that the
11 owners had purchased them as is meaning they could finish
12 off the interiors of the units because they were not
13 finished at that point. So when they were buying them
14 as-is -- for example, if you bought the unit for a
15 hundred thousand dollars and it didn't have the cabinets
16 installed, you would get some kind of a discount for
17 buying it as-is.

18 Q. Are you aware of any unit in phase one that the
19 homeowners association has not been willing to fix the
20 exterior of the unit?

21 A. No, sir.

22 Q. Are you aware of any unit in phase one where the
23 homeowners association doesn't intend to effect the
24 C.S.E. repair?

25 A. No, I don't.

1 Q. Are you convinced the homeowners association is
2 obligated to and intends to effect the C.S.E. repair
3 throughout phase one?

4 A. Yes. We have to fix every unit.

5 Q. Mr. Furnari, have you become aware of what the
6 homeowners association has paid for the emergency repair
7 procedures in phase one?

8 A. To date, I think it's a hundred and thirty-nine
9 thousand dollars.

10 MR. LYLES: Let me mark this.

11 (WHEREUPON, Plaintiff's Exhibit Number 42 was marked
12 for identification only.)

13 Q. Mr. Furnari, I'm going to show you what's been
14 marked as Plaintiff's Exhibit 42 and ask you if you
15 recognize that document.

16 A. Yes, I do.

17 Q. And what is that?

18 A. It's a spreadsheet of the unit numbers and dates and
19 how much the H.O.A. has paid to have these units repaired
20 for what we consider emergency repairs only.

21 Q. And is that a document that was put together by you
22 and Donna?

23 A. Yes, sir.

24 Q. And does that reflect the amounts that the
25 homeowners association has paid in phase one for the

1 emergency repair procedures?

2 A. Yes, sir. One hundred and thirty-nine thousand
3 eight hundred dollars.

4 Q. And the number on that's 42?

5 A. Yes, sir.

6 MR. LYLES: Your Honor, I'd move to admit
7 Plaintiff's Exhibit 42 into evidence.

8 MR. GRESH: Your Honor, perhaps if we could
9 talk at sidebar about that, please?

10 THE COURT: Yes, sir.

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

13 THE COURT: All right. The objection is
14 overruled. You may proceed.

15 MR. LYLES: Thank you, Your Honor.

16 (WHEREUPON, Plaintiff's Exhibit Number 42 was
17 admitted into evidence.)

18 Q. Does the H.O.A. seek to recover the sums that are
19 reflected in exhibit 42 in this lawsuit?

20 A. Yes, sir.

21 Q. You indicated earlier that J.R. Watkins has done
22 some work at the project?

23 A. Yes, sir. They are currently today.

24 Q. Okay. Can you very briefly describe how many units
25 is Mr. Watkins working on?

1 A. Four.

2 Q. And what type of work was he doing, just very
3 generally?

4 A. Below-grade repairs which one unit turned into a
5 roof repair.

6 Q. Is it your intent that Mr. Watkins' repair be a full
7 repair of the foundation walls in those units?

8 A. No. We're not able to do the full repair we would
9 have want done.

10 Q. So that's an emergency repair?

11 A. It's considered an emergency repair.

12 Q. Did you hear the testimony of Mr. Watkins yesterday
13 ...

14 A. Yes, sir.

15 Q. ... when he indicted that he would be willing to
16 sign a contract with the H.O.A. for approximately four
17 million dollars to implement the C.S.E. scope of repair?

18 A. Yes.

19 Q. And is that something that you think the H.O.A.
20 would consider?

21 A. Yes. But that doesn't take care of the whole
22 problem. That is only the above-grade repairs.

23 Q. So in addition to that, you'd have to have somebody
24 do the foundations?

25 A. Yes, sir.

1 Q. And is it your intention that the association effect
2 the repair that C.S.E. has specified for both the
3 building envelope and the below-grade?

4 A. Yes.

5 Q. And as part of that repair, is it the intention or
6 your intention of the H.O.A. to retain C.S.E. or another
7 design firm to perform contract administration services?

8 A. Well, we already have C.S.E. retained for ongoing
9 emergency repairs.

10 Q. So you're paying them for that?

11 A. Yes, sir.

12 Q. And what you'll do -- and so you will continue to
13 employ them as the full repair is implemented?

14 A. Yes.

15 Q. I think that's all the questions I've got, Mr.
16 Furnari. Thank you.

17 THE COURT: Mr. Belcher or Mr. Gresh?

18 CROSS-EXAMINATION

19 BY MR. GRESH:

20 Q. Good afternoon, Mr. Furnari.

21 A. Hello.

22 Q. I'm Jack Gresh. Just real briefly. The emergency
23 repair protocol that was put in place once the homeowners
24 took control of the board wouldn't have been necessary
25 back when I.M.K. and Marick had control of the board;

1 right?

2 A. It probably should have been enacted back then.

3 Q. But it wasn't?

4 A. No, sir.

5 Q. All right. And over the course of time, y'all have

6 -- excuse me -- the board had requested that Trehel come

7 out from time to time and make some repairs; correct?

8 A. Yes.

9 Q. And you know, because you have a background in

10 roofing, that some of the time when Trehel would come out

11 to make repairs, you thought that the prices that Trehel

12 was charging were excessive; fair?

13 A. Yes.

14 Q. In fact, you said they could have redone the whole

15 roof in that thing for the price they charged us for that

16 little fix; right?

17 A. Well, there were engineering concerns involved when

18 they came out. So, yes, a standard roof repair should

19 not have cost what we paid for. But ...

20 Q. And I think a lot of what your testimony went to was

21 the reason we have engineers working hand-in-hand with

22 contractors to determine what the scope will be and how

23 to fix it; right?

24 A. Yes.

25 Q. For instance, you talked about that you would think

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1 it's one thing because you see a leak in the skylight.
2 And you might say, well, that's because it's not flashed
3 right. But an engineer who came in and did a scope of
4 repair might look and say, you know what, it's not really
5 the flashing. It's the roof-wall intersection over here.
6 True?

7 A. True.

8 Q. And so you have to have both. You have to have the
9 engineer and then the person coming in to make the
10 repairs?

11 A. Yes.

12 Q. And here you've had a lot of interaction with C.S.E.
13 Have you had any interactions with Rick Moore? Do you
14 know that name?

15 A. Yes, sir.

16 Q. He's another licensed engineer in South Carolina.
17 Do you know that to be true?

18 A. Yes.

19 Q. Okay. Have you heard of a fixed-price contract?
20 Does that mean anything to you?

21 A. No.

22 Q. Okay. I'll save that for somebody else. Thank you
23 very much for your time.

24 A. Okay.

25 THE COURT: Mr. Anderson?

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

3 THE COURT: Certainly.

4 MR. ANDERSON: Thank you.

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

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

9 THE COURT: Yes, sir.

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

12 THE COURT: All right. Mr. Anderson?

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

15 THE COURT: Very good.

16 All right. Mr. Imhoff?

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

19 CROSS-EXAMINATION

20 BY MR. IMHOFF:

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

23 A. Over fifty.

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

1 A. Yes.

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

5 A. Yes.

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

9 A. They all involve water.

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

12 A. Yes, sir.

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

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

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

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

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

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

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

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

5 A. Yes, sir.

6 Q. Every one?

7 A. Every one.

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

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

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

15 A. Yes, sir.

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

18 A. Yes, sir.

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

21 A. That's correct.

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

23 A. Yes, sir.

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

1 A. That's correct.

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

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

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

12 A. Price?

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

17 A. Yes, sir.

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

20 A. Yes, I have.

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

22 A. Yes.

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

1 listen to what those proposals are?

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

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

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

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

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

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

16 A. No, I don't.

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

20 A. Yes, we do.

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

23 A. Yes, sir.

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

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

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

3 A. Yes, sir.

4 Q. Did you have any concern in hearing that Mr. Hodgins
5 has proposed a more surgical repair when working for
6 defendants? Has he offered that proposal to you, Mr.
7 Furnari?

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

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

11 A. No, I don't.

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

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

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

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

22 Q. And we talked about Trehel a little bit earlier.
23 Did you have any concern that Mr. Folk -- the method in
24 which and the prices in which he proposed to charge the
25 homeowners association?

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

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

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

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

20 A. Yes, sir, they did.

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

23 A. That's correct.

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

- 1 A. Whose testimony?
- 2 Q. I believe it was Bob White, Robert White.
- 3 A. I don't remember hearing him say that yesterday.
- 4 Q. And Trehel -- when did Trehel tell you they wouldn't
- 5 come out? How recently?
- 6 A. It was approximately five months ago I spoke with
- 7 Brian Miller. I called him..
- 8 Q. And he told you they were too busy and didn't want
- 9 to help you?
- 10 A. No. He said they would like to do the work, but
- 11 they were just too busy to come out right now and do some
- 12 estimating and/or get involved in the project.
- 13 Q. And despite that, the homeowners association called
- 14 Mr. Folk to testify about the costs for Trehel to do the
- 15 work they're too busy to do?
- 16 A. Well, that probably happened a couple of years ago
- 17 when this got started that they asked Mr. Folk to do the
- 18 estimating. This has been going on for over three years
- 19 now, so ---
- 20 Q. But Trehel ---
- 21 A. Go ahead.
- 22 Q. But Trehel isn't going to do that work, is it, Mr.
- 23 Furnari?
- 24 A. I think they will because I had a discussion
- 25 yesterday with Mr. Folk.

1 MR. BELCHER: Hearsay, Your Honor.

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

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

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

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

13 MR. IMHOFF: Okay.

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

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

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

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

23 MS. BROWN: Nothing of this witness.

24 THE COURT: Mr. Hemphill?

25 MR. HEMPHILL: No, Your Honor.

1 THE COURT: All right. Mr. Lyles?

2 MR. LYLES: No further questions.

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

4 Thank you, sir.

5 THE WITNESS: Thank you.

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

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

9 THE COURT: That's it?

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

11 THE COURT: Okay. Very good.

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

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

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

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

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

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

1 it with you.

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

4 THE COURT: Was that summary actually
5 introduced?

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

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

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

9 Madam Court Reporter?

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

12 Has it been admitted?

13 COURT REPORTER: Yes, sir.

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

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

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

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

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

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

23 THE COURT: Those are the two notebooks?

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

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

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

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

10 MR. LYLES: Yes, Your Honor.

11 THE COURT: All right. Mr. Belcher?

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

23 THE COURT: Right.

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

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

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

24 MR. BELCHER: I think the Fourth Circuit has
25 ---

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

6 THE COURT: Not even in this circuit.

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

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

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

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

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

22 THE COURT: All right. I understand.

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

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

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

5 THE COURT: All right. Thank you.

6 MR. BELCHER: Thank you.

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

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

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

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

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

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

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

4 THE COURT: Well, let me say this.

5 MR. LYLES: Yes, sir.

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

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

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

5 MR. LYLES: Okay.

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

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

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

12 (No response)

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

15 MS. BROWN: Recently?

16 THE COURT: Ma'am?

17 MS. BROWN: Not recently.

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

22 Yes, sir?

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

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

15 THE COURT: All right. Thank you.

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

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

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

7 THE COURT: All right. Anyone else?

8 Oh, yes, sir, Mr. Imhoff?

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

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

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

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

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

21 Now what? Are you ready to rest?

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

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

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

3 MR. IMHOFF: For lunch, Your Honor?

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

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

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

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

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

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

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

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

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

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

12 MR. BELCHER: Thank you, Your Honor.

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

17 MR. BELCHER: Yes, Your Honor.

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

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

23 MR. LYLES: Yes, Your Honor.

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

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

3 MR. LYLES: No, Your Honor.

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

10 MR. LYLES: Yes, sir.

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

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

17 THE COURT: Please.

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

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

24 MR. LYLES: Yes, sir.

25 (WHEREUPON, Plaintiff's Exhibits Number 19 through

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

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

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

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

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

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

25 Suit was filed against the Bostic Brothers in

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

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

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

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

1 notice of a defect in the 2005 time frame.

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

21 THE COURT: It's a 2009 case.

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

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

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

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

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

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

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

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

8 THE COURT: All right.

9 Mr. Lyles, what do you say?

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

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

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

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

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

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

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

17 MR. GRESH: Briefly, Your Honor?

18 THE COURT: Yes, sir.

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

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

23 THE COURT: Just a moment, please.

24 Could I have exhibit 6?

25 (Off record discussion)

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

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

13 THE COURT: All right.

14 MR. GRESH: Thank you, Your Honor.

15 THE COURT: Mr. Anderson?

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

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

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

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

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

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

22 THE COURT: All right.

23 Mr. Lyles?

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

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

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

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

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

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

22 MR. LYLES: Okay.

23 THE COURT: Where is the ---

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

1 THE COURT: Oh, certainly.

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

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

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

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

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

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

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

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

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

22 All right. What's -- 2002?

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

25 THE COURT: October 2004?

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

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

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

6 THE COURT: Pardon?

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

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

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

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

17 MR. GRESH: That's right.

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

19 MR. GRESH: I have April of 2005.

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

21 MR. GRESH: Yes, Your Honor.

22 THE COURT: What's that?

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

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

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

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

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

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

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

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

14 MR. GRESH: Yes, Your Honor.

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

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

20 THE COURT: And February 7, 2007?

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

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

24 MR. GRESH: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

1 2005. No. I'm sorry.

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

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

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

8 MR. GRESH: Yes, Your Honor.

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

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

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

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

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

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

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

1 THE COURT: I mean, Mr. Anderson.

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

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

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

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

20 THE COURT: All right.

21 Mr. Imhoff?

22 MR. IMHOFF: Yes, Your Honor.

23 THE COURT: Anything?

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

1 opinion on ---

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

4 MR. IMHOFF: All right.

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

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

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

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

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

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

6 THE COURT: All right.

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

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

11 All right.

12 Next?

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

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

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

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

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

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

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

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

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

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

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

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

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

16 THE COURT: All right.

17 Mr. Lyles?

18 MS. BROWN: Your Honor?

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

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

23 THE COURT: Very good.

24 Mr. Lyles?

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

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

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

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

9 THE COURT: 633?

10 MR. LYLES: Yes, sir.

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

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

25 The Concerned Citizens Dunes West case, which

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

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

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

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

17 THE COURT: Okay.

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

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

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

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

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

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

12 THE COURT: All right.

13 Now Mr. Anderson?

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

16 THE COURT: Go ahead.

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

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

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

14 THE COURT: All right.

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

18 THE COURT: All right. Very good.

19 All right.

20 Now Ms. Brown?

21 MS. BROWN: Yes, Your Honor.

22 THE COURT: Okay.

23 Mr. Imhoff?

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

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

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

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

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

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

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

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

25 THE COURT: Okay. How about the others?

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

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

6 MR. ANDERSON: No, Your Honor.

7 THE COURT: Mr. Imhoff?

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

10 THE COURT: Ms. Brown?

11 MS. BROWN: No, Your Honor.

12 THE COURT: Mr. Hemphill?

13 MR. HEMPHILL: No, Your Honor.

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

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

21 THE COURT: Right.

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

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

1 something like that.

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

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

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

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

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

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

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

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

12 MR. BELCHER: Okay.

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

17 MR. LYLES: Yes, sir.

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

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

22 THE COURT: All right.

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

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

1 us, please

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

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

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

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

25 All right. With that I will excuse you until

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

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

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

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

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

12 MR. GRESH: Yes, Your Honor.

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

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

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

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

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

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

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

1 Hill.

2 MR. LYLES: I gave it to him.

3 THE COURT: We got it?

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

5 MR. ANDERSON: Dean versus Ruscon.

6 THE COURT: Ruscon?

7 MR. ANDERSON: Ruscon, R-U-S-C-O-N. It's 321
8 S.C. 360.

9 THE COURT: 321 360 South Carolina?

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

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

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

17 THE COURT: Okay.

18 MR. ANDERSON: Thank you.

19 THE COURT: Yes, sir.

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

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

25 MR. IMHOFF: § 15-38-15.

1 THE COURT: Okay.

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

5 THE COURT: Okay. Effective date?

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

8 THE COURT: It should be ---

9 MR. IMHOFF: 2005.

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

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

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

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

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

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

24 MR. LYLES: Detyens.

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

1 THE COURT: Is that 352 714?

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

5 THE COURT: Okay.

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

8 THE COURT: Certainly.

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

11 THE COURT: Do what?

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

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

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

18 THE COURT: Okay.

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

21 THE COURT: Oh, all right.

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

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

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

3 THE COURT: Okay.

4 MR. GRESH: Thank you, Your Honor.

5 THE COURT: All right. Mr. Lyles?

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

9 THE COURT: Okay.

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

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

12 MR. LYLES: Yes, sir.

13 THE COURT: Okay.

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

16 THE COURT: 447?

17 MR. LYLES: Yes, sir.

18 THE COURT: S.E.2d?

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

21 THE COURT: Just a second. 708?

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

23 LAW CLERK: What was it?

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

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

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

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

11 MR. LYLES: Yes, sir.

12 THE COURT: What is the page?

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

15 THE COURT: S.E.?

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

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

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

21 THE COURT: Okay.

22 MR. LYLES: And I apologize for that.

23 THE COURT: No problem.

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

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

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

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

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

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

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

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

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

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

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

25 MR. IMHOFF: Well ---

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

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

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

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

23 MR. IMHOFF: Okay.

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

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

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

9 Your Honor, I do have one more.

10 THE COURT: Okay.

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

13 THE COURT: Who is this?

14 MR. IMHOFF: Rick Thoennes, Your Honor.

15 THE COURT: Uh-huh (affirmative).

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

1 THE COURT: And I.M.K.

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Mr. Lyles?

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

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

01500