

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

RECEIVED
Sep 28 2020
SC Court of Appeals

Case No. 2015-CP-10-00955
Appellate Case No. 2019-001520

Palmetto Pointe at Peas Island Condominium Property
Owners Association, Inc., and Jack Love, individually, and
on behalf of all others similarly situated,

Appellants,

v.

Island Pointe, LLC, Complete Building Corporation, Tri-
County Roofing, Inc., WC Services, Inc., Miracle Siding,
LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC,
Eloy Alonzo Vasquez, JMC Construction, Inc., and JMC
Construction, LLC,

Defendants,

Of whom WC Services, Inc., is the

Respondent.

**RECORD ON APPEAL
VOLUME 1**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
PALMETTO POINTE AT PEAS	)	CASE NO. 2015-CP-10-0955
ISLAND CONDOMINIUM PROPERTY	)	
OWNERS ASSOCIATION, INC. AND	)	
JACK LOVE, INDIVIDUALLY, AND	)	
ON BEHALF OF ALL OTHERS	)	
SIMILARLY SITUATED,	)	
	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	VERDICT FORM
	)	
COMPLETE BUIDLING CORP., ET AL,	)	
	)	
DEFENDANTS.	)	
	)	

1) We, the jury, find for the Plaintiffs against the following Defendants on the cause of action for Breach of Implied Warranty (select all that apply):

a)	☒ Yes / No (Circle one)	Complete Building Corporation;
b)	☒ Yes / No (Circle one)	TriCounty Roofing;
c)	Yes / ☒ No (Circle one)	WC Services;
d)	☒ Yes / No (Circle one)	Wilson Lucas Sales d/b/a Miracle Siding;
e)	☒ Yes / No (Circle one)	Eloy Vasquez.

2) We, the jury, find for the Plaintiffs against the following Defendants on the cause of action for Negligence (select all that apply):

a)	☒ Yes / No (Circle one)	Complete Building Corporation;
b)	☒ Yes / No (Circle one)	TriCounty Roofing;

- c) Yes / ☒ No (Circle one) WC Services;
- d) ☒ Yes / No (Circle one) Wilson Lucas Sales d/b/a Miracle Siding;
- e) ☒ Yes / No (Circle one) Eloy Vasquez.

(Answer next questions only if one or more subparts in the first two (2) questions were found in favor of the Plaintiffs)

- 3) If the answer to any of the subparts to the foregoing two (2) questions is in favor of the Plaintiffs, set forth below your award of damages to the Plaintiffs:

(\$ 6,544,044.00)

- 4) If you find through clear and convincing evidence that any of the Defendants acted with gross negligence, or with conscious or reckless disregard for Plaintiffs' rights, so indicate by circling Yes below. Otherwise, circle No below:

- a) ☒ Yes / No (Circle one) Complete Building Corporation;
- b) ☒ Yes / No (Circle one) TriCounty Roofing;
- c) Yes / ☒ No (Circle one) WC Services;
- d) Yes / ☒ No (Circle one) Wilson Lucas Sales d/b/a Miracle Siding;
- e) Yes / ☒ No (Circle one) Eloy Vasquez.

- 5) If your answer to the forgoing question (4) was yes, how much do you award against the specified Defendants in punitive damages?

- a) Complete Building Corporation:

(\$ 500,000.00)

b) TriCounty Roofing:

(\$ 500,000.00)

c) WC Services:

N/A
(\$ _____)

d) Wilson Lucas Sales d/b/a Miracle Siding:

N/A
(\$ _____)

e) Eloy Vasquez:

N/A
(\$ _____)

6) Do you find that Complete Building Corp. is entitled to indemnity from TriCounty Roofing ? Yes / No (circle one).

If yes, how much do you award Complete Building Corp. on its cross-claim against TriCounty Roofing ?

(\$ 1,000.00)

7) Do you find that Complete Building Corp. is entitled to indemnity from WC Services ?

Yes / No (circle one).

If yes, how much do you award Complete Building Corp. on its cross-claim against WC Services ?

(\$ n/a)

Date: 16 May 19

 Walter J. Dean
Presiding Juror

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41, SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, individually, and on behalf of all similarly situated	Complete Building Corporation	\$7,000,000.00
Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, individually, and on behalf of all similarly situated	TriCounty Roofing	\$7,000,000.00

JBM/1

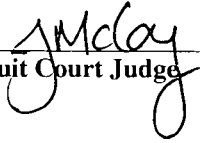
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2018 MAY 16 PM 4:00
JULIE J. ARMSTRONG
CLERK OF COURT

Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, individually, and on behalf of all similarly situated	Wilson Lucas Sales d/b/a Miracle Siding, LLC	\$325,000.00
Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, individually, and on behalf of all similarly situated	Eloy Vasquez	\$325,000.00
WC Services, Inc.	Palmetto Pointe at Peas Island Condominium Property Owners Association and Jack Love, individually, and on behalf of all similarly situated	N/A
Indemnity Claim:		
Complete Building Corporation	TriCounty Roofing	\$1,000.00
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

 Circuit Court Judge	2764 Judge Code	5/16/19 Date

JBM/2

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

Island Pointe, LLC, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

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☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion for JNOV and/or New Trial as to WC Services, Inc., is DENIED. Defendant WC Services, Inc., may submit a proposed formal order by August 1, 2019.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

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N/A		

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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764

Judge Code

Date

7/15/19

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-10-00955

Palmetto Pointe at Peas Island Condominium
Property Owners Association, et al.

PLAINTIFF(S)

Island Pointe, LLC, et al.

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Reconsider this court's ruling denying Plaintiff's Motion for JNOV and/or New Trial as to WC Services, Inc., is DENIED without hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

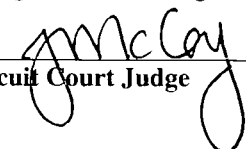
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
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E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764

Judge Code

8/5/19

Date

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0955

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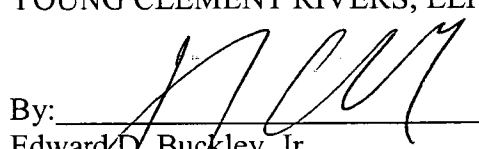
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JULIE J. APOSTOLAKIS
CLERK OF COURT

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Respectfully submitted,

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By: 

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Charleston, South Carolina 29402

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Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 2/13/2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. and KATHY MILNER,
individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

ISLAND POINTE, LLC; LEONARD T.
BROWNE; COMPLETE BUILDING
CORPORATION; TRI-COUNTY ROOFING,
INC.; CREEKSIDE, INC.; AMERICAN
RESIDENTIAL SERVICES, LLC d/b/a
ARS/RESCUE ROOTER CHARLESTON;
AND JOHN DOE 1-60,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0955
)
)
)

COMPLAINT
(Defective Construction)

(Jury Trial Demanded)

FILED
2015 FEB 13 PM 4:19
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Kathy Milner, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The POA is the property owners association for the Palmetto Pointe at Peas Island Horizontal Property Regime.

3. The Palmetto Pointe at Peas Island Horizontal Property Regime is a Horizontal Property Regime ("Palmetto Pointe") which exists by virtue of a Master Deed dated January 6,

2006 and recorded on January 10, 2006 in the RMC Office of Charleston County in Book W568, Page 532 and the Amended and Restated Master Deed dated January 19, 2007 and recorded January 22, 2007 in the RMC Office of Charleston County in Book R612, Page 823.

4. Palmetto Pointe originally consisted of forty (40) townhome style condominiums located in twenty (20) buildings and related common elements and a clubhouse, which are located in Charleston County, South Carolina. There are four (4) recently built units in two (2) buildings, which are not subject to this matter.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with Palmetto Pointe.

6. The POA is charged with, *inter alia*, the management and administration of Palmetto Pointe, the investigation, maintenance and repair of Palmetto Pointe's Common Elements and other areas of responsibility, including exteriors and roofs, and has the right and obligation to bring this action on behalf of Palmetto Pointe, the POA, and the respective owners and members.

7. Plaintiff Kathy Milner (hereinafter "Plaintiff Milner") is an owner of a condominium within Palmetto Pointe more particularly described as 1610 Folly Creek Way, Charleston, South Carolina, 29412, and she owns an undivided interest in all other property within the Palmetto Pointe regime, except such property comprising the remaining thirty-nine (39) units.

8. By virtue of property ownership in Palmetto Pointe, Plaintiff Milner is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

9. Defendant Island Pointe, LLC (“Island Pointe”) is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Island Pointe was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston County, South Carolina.

10. Defendant Leonard T. Browne (“Browne”) is an individual residing in Charleston, South Carolina. At all times, Browne was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston, South Carolina.

11. At all times relevant hereto, Browne controlled Island Pointe and acted as its agent and the Island Pointe, LLC which form the basis of the complaint herein. Additionally, he and /or Island Pointe, LLC controlled the POA until that control was turned over to the owners themselves.

12. Defendant Complete Building Corporation (hereinafter “Complete Building”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Complete Building was engaged in the business of designing, constructing condominiums in Charleston County, South Carolina.

13. At all times relevant hereto, Browne, Island Pointe, and Complete Building were acting in concert with each other, and as agents for each other, and each are jointly responsible for each other’s failures.

14. Defendant Tri-County Roofing, Inc. (hereinafter “Tri-County Roofing”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tri-County Roofing supplied materials, installed roofing and related materials, among other work, at Palmetto Pointe.

15. Defendant Creekside. Inc. (hereinafter “Creekside”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action,

Creekside supplied materials, applied painting and caulking, among other work, at Palmetto Pointe.

16. Defendant American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston (hereinafter “ARS”) is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, ARS supplied materials, installed the HVAC systems, among other work, at Palmetto Pointe.

17. The address and identity of all John Doe Defendants are unknown at this time.

18. Defendants John Doe #1-60 (hereinafter “John Doe Defendants”) are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, and/or sale of Palmetto Pointe.

19. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

20. This matter arises out of the design, development, construction, and sale of Palmetto Pointe.

21. At the time the Certificates of Occupancy were issued, Palmetto Pointe contained latent building defects.

22. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

23. A preliminary inspection of Palmetto Pointe evidences failure of one or more components the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components,

structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting there from.

24. Defendants had a duty to design, develop, construct, and repair Palmetto Pointe in a workmanlike manner with suitable materials and free from all defects.

25. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

26. The Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

27. Remedying the above-wrongs will result in additional consequential damages and loss of use.

28. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur a reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

29. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical general liability policies.

CLASS ACTION ALLEGATIONS

30. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Milner brings this action both individually and as a proposed class action against Defendants on behalf of herself and all other similarly situated persons and entities, who own, per the class definition, a condominium within Palmetto Pointe (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a townhome style condominium within Palmetto Pointe located in Charleston, South Carolina.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants; (c) Defendants' legal representatives, assigns and successors of Defendants; (d) Defendants' current or former employees, investors, members, or officers; and (e) all persons who properly execute and file a timely request for exclusion from the Class.

31. *Numerosity:* The Class is composed of in excess of forty (40) persons or entities geographically dispersed throughout the State of South Carolina and the United States, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty (60) members.

32. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- (a) Whether the construction of Palmetto Pointe was defective;
- (b) Whether Defendants knew or should have known of the defects;
- (c) Whether Defendants failed to disclose to purchasers and/or homeowners the defects;
- (d) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- (e) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- (f) Whether Defendants' expertise, superiority, and financial interest in sales transactions gave rise to a duty to disclose the material facts which were concealed; thereby, giving rise to a claim for fraudulent concealment;
- (g) Whether Plaintiffs and the Class are entitled to compensatory damages, including,

among other things: (i) compensation for all out-of-pocket monies expended by other members of the Class for repair of their condominiums as well as repair/replacement of other property damage; (ii) temporary repairs and (iii) compensation for loss of use.

(h) Whether Defendants negligently designed, developed, and/or constructed Palmetto Pointe;

(i) Whether the Plaintiffs are entitled to prejudgment interest, attorneys' fees and costs from Defendants.

33. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, and selling Palmetto Pointe, Defendants' conduct in concealing the defective condition of Palmetto Pointe, and Plaintiffs' and Class Members' purchasing homes containing building defects.

34. *Adequate Representation*: Plaintiff Milner will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Milner has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

35. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the

court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

36. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within Palmetto Pointe.

37. Plaintiff Milner and the Class envision no unusual difficulty in the management of this action as a class action.

38. Each Class Member has an interest of more than \$100.00.

39. The amount of money at stake for each Class Member is not sufficient for each member to hire his own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

40. Defendants are estopped from relying on any statutes of limitation or repose by virtue of its acts. Upon information and belief, Defendants should have known Palmetto Pointe was defectively constructed and failed to alert the Plaintiffs of Palmetto Pointe's defective condition.

41. Defendants had a duty to inform Plaintiffs of the defects described herein, which it should have known. Notwithstanding its duty, Defendants never disclosed the defects to Plaintiffs.

42. Despite exercising reasonable diligence, Plaintiffs could not have discovered the

defective condition of Palmetto Pointe.

43. Given Defendants' failure to disclose this non-public information about the defective nature of Palmetto Pointe – information over which it had exclusive control – and because Plaintiffs could not reasonably have known of Palmetto Pointe's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

44. Defendants are further estopped from relying upon any statute of limitations as they have represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

**ESTOPPEL FROM PLEADING ANY ANTI-SUIT PROVISIONS
CONTAINED IN PALMETTO POINTE'S MASTER DEED AND BY-LAWS**

45. The Island Pointe and Browne Defendants are estopped from relying on any anti-suit provisions contained in Palmetto Pointe's Master Deed and By-Laws because said provisions are void pursuant to public policy and the Horizontal Property Regime Act and/or voidable as such constitutes a breach of the Island Pointe/Browne's fiduciary duty to Plaintiffs.

**FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)**

46. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

47. At all times relevant hereto, the Defendants, its agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design and construction of Palmetto Pointe in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

48. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, willful, and wanton in the following particulars:

- (a) In designing, developing, constructing, and selling Palmetto Pointe with construction deficiencies including those previously identified;
- (b) In failing to construct Palmetto Pointe in accordance with due care and in accordance with standard building practices;
- (c) In failing to construct Palmetto Pointe in accordance with building code;
- (d) In failing to properly supervise the work and construction of Palmetto Pointe;
- (e) In failing to properly coordinate the subcontractors;
- (f) In failing to construct with an adequate exterior building envelope;
- (g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- (h) In covering up their own defective work and the defective work of others;
- (i) In failing to make proper repairs; and
- (j) Such other failures to be proven at trial.

49. Any violations of applicable building codes constitutes negligence *per se*.

50. Plaintiffs and the Class have been damaged as a direct and proximate result if the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

51. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence *per se*, Plaintiffs and Class are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to all Defendants)

52. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

53. The design, construction, and/or sale of Palmetto Pointe came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that Palmetto Pointe would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

54. The design, construction, and/or sale of Palmetto Pointe, and the components used therein, came with implied warranties of fitness, merchantability, and workmanship.

55. Additionally, Defendant Developers owed Plaintiffs a warranty of habitability.

56. Defendants have breached their warranties by constructing Palmetto Pointe in a defective manner as set forth above.

57. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiff's have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: *S.C. Code Ann. § 15-73-10 et seq.* as to John Doe Defendants who manufactured and/or supplied components used in the construction of Palmetto Pointe)

58. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

59. In manufacturing and supplying products for the construction of Palmetto Pointe, the manufacturer and supplier John Doe Defendants placed products into the stream of commerce.

60. By introducing their products into the stream of commerce, the manufacturer and supplier John Doe Defendants represented said products were safe and suitable for their foreseeable use.

61. In the manufacture and supply of products to Palmetto Pointe, the manufacturer and supplier John Doe Defendants anticipated and expected that their products would reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

62. The manufacture and supplier John Doe Defendants have supplied and manufactured their products in a defective manner unreasonably dangerous to persons or property other than the products themselves, which has resulted in repeated water intrusion into and damage to Palmetto Pointe and other building deficiencies.

63. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

64. The cost of altering the design, construction, and/or repair of the products supplied to Palmetto Pointe was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

65. The design and manufacture of the products supplied to Palmetto Pointe was inherently defective as sold was a direct and proximate cause of the damages suffered by Plaintiffs.

66. The manufacturer and supplier John Doe Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Breach of Fiduciary Duty as to Defendants Island Pointe and Browne)

67. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

68. The Island Pointe and Browne Defendants have a fiduciary relationship to the Plaintiffs by virtue of their capacity as the developer and steward of Palmetto Pointe and their former capacity controlling the POA.

69. The Island Pointe and Browne Defendants promoted, created and maintained control of the POA and Palmetto Pointe for a period of time, and thus, had fiduciary duties they owed to the POA, its members and individual homeowners.

70. The Island Pointe and Browne Defendants breached the fiduciary duties they owed to the Plaintiffs by:

- (a) failing to investigate defective conditions prior to handing over the property to the POA and the homeowners;
- (b) failing to disclose said defective conditions;
- (c) failing to properly repair said defective conditions prior to handing over the property to the POA and the homeowners;
- (d) turning over the property to the POA in said defective condition without depositing sufficient funds to the account of the POA to bring the elements up to a reasonable standard;
- (e) failing to timely hold the other Defendants accountable for the construction defects; and
- (f) inserting provisions in the Master Deed which benefited Defendants at the expense of Plaintiffs.

71. As a direct and proximate result of the Island Pointe and Browne Defendants' breach of fiduciary duty, Plaintiffs have been damaged as hereinabove set forth and as to be further proven at trial.

FOR A FIFTH CAUSE OF ACTION
(Unfair Trade Practices as to Island Pointe, Browne, and Complete Building)

72. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

73. At all times relevant herein, the Island Pointe, Browne, and Complete Building Defendants engaged in the business of developing, designing, constructing, and selling Palmetto Pointe into the stream of commerce.

74. The Island Pointe, Browne, and Complete Building Defendants were engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

75. The Island Pointe, Browne, and Complete Building Defendants above-described activities, including placing Palmetto Pointe with defective design and construction into the stream of commerce, failing to comply with the building code, failing to disclose those defects to potential and actual purchasers and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of the Island Pointe, Browne, and Complete Building Defendants' trade.

76. The Island Pointe, Browne, and Complete Building Defendants' above-described acts are capable of repetition and adversely affect the public interest.

77. The Island Pointe, Browne, and Complete Building Defendants knew or should have known that their conduct was in violation of the S.C. Code Ann. § 39-5-20.

78. As a direct, foreseeable, and proximate result of the Island Pointe, Browne, and Complete Building Defendants' unfair trade practices in South Carolina, Plaintiffs have suffered

significant damage and have and will incur attorney's fees and the costs and expenses of this action.

FOR A SIXTH CAUSE OF ACTION
(Declaratory Action/Reformation as to Island Pointe and Browne Defendants)

82. Plaintiffs re-allege the allegations, which are not inconsistent with this cause of action and are, contained in the above paragraphs as if fully set forth herein.

83. The anti-suit provisions of the Palmetto Pointe Master Deed are in violation of public policy, statutory law and/or provisions of the Constitution, and the Island Pointe and Browne Defendants' fiduciary duties.

84. Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions included within the Master Deed by the Island Pointe and Browne Defendants are in violation of statutory law and/or provisions in the Constitution and are therefore void and/or require reformation to eliminate the subject provisions.

85. As the provisions in the Master Deed are severable, the Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions are severable from the other terms of the Master Deed.

86. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Master Deed construed against the Island Pointe and Browne Defendants and/or reformed by the Court to more accurately reflect the reasonable expectations of the POA and Homeowners.

WHEREFORE, Plaintiffs demand a trial by jury and pray actual and consequential damages; statutory or punitive damages expected to be millions of dollars; reasonable attorneys' fees; costs of suit; and prejudgment interest; declaration/reformation of the Master Deed; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

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Attorneys for the Plaintiffs

February 13, 2015

Charleston, South Carolina

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

PALMETTO POINTE AT PEAS ISLAND) CASE NO. 2015-CP-10-0955
CONDOMINIUM PROPERTY OWNERS)
ASSOCIATION, INC. AND JACK)
LOVE, INDIVIDUALLY, AND ON)
BEHALF OF ALL OTHERS SIMILARLY)
SITUATED,)

PLAINTIFFS,)

vs.)

ISLAND POINTE, LLC; COMPLETE)
BUILDING CORPORATION; TRI-)
COUNTY ROOFING, INC.; CREEKSIDE,)
INC.; AMERICAN RESIDENTIAL)
SERVICES, LLC D/B/A ARS/RESCUE)
ROOTER CHARLESTON; ANDERSEN)
WINDOWS, INC.; ATLANTIC BUILDING)
CONSTRUCTION SERVICES, INC. N/K/A)
ATLANTIC CONSTRUCTION SERVICES,)
INC.; BUILDER SERVICES GROUP, INC.)
D/B/A GALE CONTRACTOR SERVICES;)
NOVUS ARCHITECTS, INC., F/K/A SGM)
ARCHITECTS, INC.; TALLENT AND)
SONS, INC.; W C SERVICES, INC.; CRG)
ENGINEERING, INC.; CERTAINTEED)
CORPORATION; KELLY FLOORING)
PRODUCTS, INC., D/B/A CARPET)
BAGGERS; CORNERSTONE)
CONSTRUCTION AND MARK MALLOY)
D/B/A CORNERSTONE CONSTRUCTION;))
MIRACLE SIDING, LLC AND WILSON)
LUCAS SALES D/B/A MIRACLE SIDING,)
LLC; MARK PALPOINT A/K/A MICAH)
PALPOINT; ELROY ALONZO VASQUEZ;))
CHRIS A/K/A JOHN DOE 61;)
ALDERMAN CONSTRUCTION;)
STANLEY'S VINYL FENCE DESIGNS;)
COHEN'S DRYWALL COMPANY, INC.;)
MOSELY CONCRETE;)
HAND A FRAMING CONSTRUCTION,)
LLC A/K/A H&A FRAMING)

**PLAINTIFFS' SECOND
AMENDED COMPLAINT**

FILED
2017 NOV -2 PM 1:30
JULIE J. ARISTONG
CLERK OF COURT
BY _____

CONSTRUCTION, LLC AND D/B/A	)
H AND A FRAMING, LLC, H&A	)
CONSTRUCTION, AND HAND A	)
CONSTRUCTION; JMC	)
CONSTRUCTION, INC.; JMC	)
CONSTRUCTION, LLC; JOHN DOE 1-	)
15,	)
	)
DEFENDANTS.	)
COMPLETE BUILDING CORPORATION,	)
INC.,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
LEONARD T. BROWNE AND	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANTS.	)
CREEKSIDE, INC.,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
CHRISTOPHER N. UNION,	)
	)
THIRD-PARTY DEFENDANT.	)

The Plaintiffs, Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually and on behalf of all others similarly situated, complaining of the Defendants named herein, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. ("POA") is a non-profit corporation organized and existing under the laws of the State of South Carolina.

2. The POA is the property owners association for the Palmetto Pointe at Peas Island Horizontal Property Regime.

3. The Palmetto Pointe at Peas Island Horizontal Property Regime is a Horizontal Property Regime ("Palmetto Pointe") which exists by virtue of a Master Deed dated January 6, 2006 and recorded on January 10, 2006 in the RMC Office of Charleston County in Book W568, Page 532 and the Amended and Restated Master Deed dated January 19, 2007 and recorded January 22, 2007 in the RMC Office of Charleston County in Book R612, Page 823.

4. Palmetto Pointe originally consisted of forty (40) townhome style condominiums located in twenty (20) buildings and related common elements and a clubhouse, which are located in Charleston County, South Carolina. There are four (4) recently built units in two (2) buildings, which are not subject to this matter.

5. By virtue of governing documents and the South Carolina Horizontal Property Regime Act, S.C. Code § 27-31-10, *et. seq.*, the POA is charged with certain duties, powers, rights and authority in connection with Palmetto Pointe.

6. The POA is charged with, *inter alia*, the management and administration of Palmetto Pointe, the investigation, maintenance and repair of Palmetto Pointe's Common Elements and other areas of responsibility, including exteriors and roofs, and has the right and obligation to bring this action on behalf of Palmetto Pointe, the POA, and the respective owners

and members. Additionally, the POA is the assignee of homeowner interests relating to these claims and repairs.

7. Plaintiff Jack Love (hereinafter "Plaintiff Love") is an owner of a condominium within Palmetto Pointe more particularly described as 1651 Folly Creek Way, Charleston, South Carolina, 29412, and he owns an undivided interest in all other property within the Palmetto Pointe regime, except such property comprising the remaining thirty-nine (39) units.

8. By virtue of property ownership in Palmetto Pointe, Plaintiff Love is a member of the POA, has been a member of the POA at all times relevant hereto, and has ownership and membership rights relating thereto.

9. Defendant Island Pointe, LLC ("Island Pointe") is a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Island Pointe was engaged in the business of designing, developing, marketing, constructing, and/or selling condominiums in Charleston County, South Carolina.

10. Defendant Complete Building Corporation (hereinafter "Complete Building") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Complete Building was engaged in the business of designing and constructing condominiums in Charleston County, South Carolina.

11. At all times relevant hereto, Island Pointe and Complete Building were acting in concert with each other, and as agents for each other, and each are jointly responsible for each other's failures.

12. Defendant Tri-County Roofing, Inc. (hereinafter "Tri-County Roofing") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tri-County Roofing supplied materials and installed roofing and related

materials, among other work, at Palmetto Pointe. Tri-County also supplied siding, flashing, deck waterproofing, gutters and other materials at Palmetto Pointe.

13. Defendant Creekside, Inc. (hereinafter "Creekside") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Creekside supplied materials and applied painting and caulking, among other work, at Palmetto Pointe.

14. Defendant American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston (hereinafter "ARS") is a limited liability company organized and existing under the laws of the State of Delaware. At all times relevant to this action, ARS supplied materials and installed the HVAC systems, among other work, at Palmetto Pointe.

15. Defendant Andersen Windows, Inc. (hereinafter "Andersen") is a corporation organized and existing under the laws of the State of Minnesota. At all times relevant to this action, Andersen supplied windows and related products at Palmetto Pointe.

16. Defendant Atlantic Building Construction Services, Inc. n/k/a Atlantic Construction Services, Inc. (hereinafter "Atlantic") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Atlantic supplied materials and installed framing, metal fabrications, rough carpentry, metal plate connected wood trusses, weather resistant barriers, sheet metal flashing and trim, joint sealants, and wood windows and doors, among other work and products, at Palmetto Pointe.

17. Defendant Builder Services Group, Inc. d/b/a Gale Contractor Services (hereinafter "BSG") is a corporation organized and existing under the laws of the State of Florida. At all times relevant to this action, BSG supplied materials and installed fireplaces, among other work, at Palmetto Pointe.

18. Defendant Novus Architects, Inc., f/k/a SGM Architects, Inc. (hereinafter “Novus”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Novus performed design work, among other work, at Palmetto Pointe.

19. Defendant Tallent and Sons, Inc. (hereinafter “Tallent”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Tallent performed grading and paving work, among other work, at Palmetto Pointe.

20. Defendant W C Services, Inc. (hereinafter “W C”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, WC supplied and installed fire sprinkler systems and related components, among other work, at Palmetto Pointe.

21. Defendant CRG Engineering, Inc. (hereinafter “CRG”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, CRG provided civil engineering services, among other work, at Palmetto Pointe.

22. Defendant CertainTeed Corporation (hereinafter “CertainTeed”) is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this action, CertainTeed manufactured and supplied aluminum trim coil stock and siding, among other products, at Palmetto Pointe.

23. Defendant Kelly Flooring Products, Inc. d/b/a Carpet Baggers (hereinafter “Carpet Baggers”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Carpet Baggers supplied materials and installed carpet, wood flooring and related materials, among other work, at Palmetto Pointe.

24. Defendants Cornerstone Construction Corporation and Mark Malloy d/b/a Cornerstone Construction (“Cornerstone”) are South Carolina companies located in Charleston County, South Carolina. At all times relevant to this action, Cornerstone supplied materials and installed siding, flashing, and related components, among other work, at Palmetto Pointe.

25. Defendant Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding (“Miracle Siding”) is a Limited Liability Company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Miracle Siding supplied materials and installed siding, flashing, and related components, among other work, at Palmetto Pointe.

26. Defendant Mark Palpoint a/k/a Micah Palpoint (“Palpoint”) is a South Carolina resident who, at all times relevant to this action, installed Sealoflex waterproofing, among other work, at Palmetto Pointe.

27. Defendant Eloy Alonzo Vasquez (“Vasquez”) was a South Carolina resident who, at all times relevant to this action, installed roofing, flashing, other roofing components, and waterproofing, among other work, at Palmetto Pointe.

28. Defendant Chris a/k/a John Doe No. 61 (“Doe No. 61”) is a resident of South Carolina and, at all times relevant to this action, installed waterproofing, among other work at Palmetto Pointe.

29. Defendant Alderman Construction, Inc. (“Alderman”) is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Alderman supplied and installed interior trim, among other work, at Palmetto Pointe.

30. Defendant Stanley's Vinyl Fence Designs (“Stanley’s”), is a North Carolina company located in Kinston, North Carolina. At all times relevant to this action, Stanley’s supplied and installed residential railings, among other work, at Palmetto Pointe.

31. Defendant Cohen's Drywall Company, Inc. ("Cohen's") is a corporation organized and existing under the laws of the State of South Carolina. At all times relevant to this action, Cohen's supplied and installed insulation and drywall, among other work, at Palmetto Pointe.

32. Defendant Mosley Concrete ("Mosley") is a South Carolina company located in Richland County, South Carolina. At all times relevant to this action, Mosley supplied and installed concrete, among other work, at Palmetto Pointe.

33. Defendant H and A Framing Construction, LLC a/k/a H&A Framing Construction, LLC and d/b/a Hand A Framing, LLC, H&A Construction, and Hand A Construction ("H&A") is a South Carolina limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, H&A supplied materials and installed framing, among other work and products, at Palmetto Pointe.

34. Defendant JMC Construction, Inc. and JMC Construction, LLC (collectively "JMC") is a South Carolina corporation and a limited liability company organized and existing under the laws of the State of South Carolina. At all times relevant to this action, JMC supplied materials and installed framing, among other work and products, at Palmetto Pointe

35. The address and identity of all John Doe Defendants are unknown at this time.

36. Defendants John Doe #1-15 (hereinafter "John Doe Defendants") are subcontractors and/or other entities involved in the design, development, marketing, construction, material manufacturing and/or supplying, and/or sale of Palmetto Pointe.

37. Defendant Andersen, CertainTeed, and John Doe #1 are hereinafter referred to collectively as the "Manufacturing and Supplier Defendants."

38. This Honorable Court has jurisdiction over all subject matter alleged herein and over all parties hereto and venue is proper in this forum.

FACTUAL ALLEGATIONS

39. This matter arises out of the design, development, construction, and sale of Palmetto Pointe.

40. At the time the Certificates of Occupancy were issued, Palmetto Pointe contained latent building defects.

41. The latent building defects in combination with fortuitous weather, repeated water intrusion and/or other events have resulted in consequential damage to other building components and other property.

42. A preliminary inspection of Palmetto Pointe evidences failure of one or more components the exterior building envelopes; water intrusion into and through the exterior building envelope; and resulting consequential damage to non-defective building components, structural members, and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting therefrom.

43. Defendants had a duty to design, develop, construct, and repair Palmetto Pointe in a workmanlike manner with suitable materials and free from all defects.

44. The aforementioned deficiencies and consequential damages evidence that Defendants breached their duties to Plaintiffs.

45. The Defendants' acts and omissions, individually and collectively, have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

46. Remedying the above-wrongs will result in additional consequential damages and loss of use.

47. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiffs and class members have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur reasonable attorney's fees and costs for the retention of experts to determine the damage and the scope of work for repair.

48. Upon information and belief, the water intrusion and resulting consequential damages have occurred and have been occurring in each and every year since the completion of construction and constitute "occurrences" and "property damage" under the standard and/or typical commercial general liability policies.

CLASS ACTION ALLEGATIONS

49. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Love brings this action both individually and as a proposed class action against Defendants on behalf of himself and all other similarly situated persons and entities, who own, per the class definition, a condominium within Palmetto Pointe (hereinafter collectively referred to as the "Class"). The Class is particularly defined as follows:

All persons and entities that own a townhome style condominium within Palmetto Pointe located in Charleston, South Carolina.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants; (c) Defendants' legal representatives, assigns and successors of Defendants; (d) Defendants' current or former employees, investors, members, or officers; (e) all persons who properly execute and file a timely request for exclusion from the Class; and (f) the owners of the four excluded units referenced in Paragraph 4.

50. *Numerosity*: The Class is composed of in excess of forty (40) persons or entities geographically dispersed throughout the State of South Carolina and the United States, the

joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of sixty (60) members.

51. *Commonality*: Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- a) Whether the construction of Palmetto Pointe was defective;
- b) Whether Defendants knew or should have known of the defects;
- c) Whether Defendants failed to disclose to purchasers and/or homeowners the defects;
- d) Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- e) Whether Defendants are financially responsible to pay the full costs and expenses of repair of said defective conditions;
- f) Whether Defendants' expertise, superiority, and financial interest in sales transactions gave rise to a duty to disclose the material facts which were concealed; thereby, giving rise to a claim for fraudulent concealment;
- g) Whether Plaintiffs and the Class are entitled to compensatory damages, including, among other things: (i) compensation for repair of their condominiums; (ii) temporary repairs; and (iii) compensation for loss of use; and
- h) Whether Defendants negligently designed, developed, and/or constructed Palmetto Pointe.

52. *Typicality*: Plaintiffs' claims are typical of the claims of the members of the Class, as all such claims arise out of Defendants' wrongful conduct in designing, developing, constructing, and selling Palmetto Pointe, Defendants' conduct in concealing the defective condition of Palmetto Pointe, and Plaintiffs' and Class Members' purchasing homes containing building defects.

53. *Adequate Representation*: Plaintiff Love will fairly and adequately protect the interests of the members of the Class and has no interests antagonistic to those of the Class. Plaintiff Love has retained counsel experienced in the prosecution of construction defect claims

and complex litigation, including consumer class actions involving product liability and product design defects.

54. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the members of the Class predominate over questions affecting only individual members, and a Class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class Members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale and comprehensive supervision by a single Court.

55. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class Members have the same legal right to and interest in redress for damages associated with the defective conditions existing within Palmetto Pointe.

56. Plaintiff Love and the Class envision no unusual difficulty in the management of this action as a class action.

57. Each Class Member has an interest of more than \$100.00.

58. The amount of money at stake for each Class Member is not sufficient for each member to hire his own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

59. Defendants are estopped from relying on any statutes of limitation or repose by virtue of their acts. Upon information and belief, Defendants should have known Palmetto Pointe was defectively constructed and failed to alert the Plaintiffs of Palmetto Pointe's defective condition.

60. Defendants had a duty to inform Plaintiffs of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiffs.

61. Despite exercising reasonable diligence, Plaintiffs could not have discovered the defective condition of Palmetto Pointe.

62. Given Defendants' failure to disclose this non-public information about the defective nature of Palmetto Pointe - information over which they had exclusive control and because Plaintiffs could not reasonably have known of Palmetto Pointe's defective nature, Defendants are estopped from relying on any statutes of limitations or repose that might otherwise be applicable to the claims asserted herein.

63. Defendants are further estopped from relying upon any statute of limitations as they have represented to Plaintiffs that they are only responsible for correcting work for a period of one year after sale.

**ESTOPPEL FROM PLEADING ANY ANTI-SUIT PROVISIONS
CONTAINED IN PALMETTO POINTE'S MASTER DEED AND BY-LAWS**

64. Island Pointe is estopped from relying on any antisuit provisions contained in Palmetto Pointe's Master Deed and By-Laws because said provisions are void pursuant to public policy and the Horizontal Property Regime Act and/or are voidable as such constitutes a breach of Island Pointe's fiduciary duties to Plaintiffs.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence as to All Defendants)

65. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

66. At all times relevant hereto, the Defendants, their agents, servants, employees, and subcontractors undertook and had a duty to Plaintiffs to exercise and use due care in the design and construction of Palmetto Pointe in a good workmanlike manner and with suitable materials, in accordance with the applicable building codes, state law, good design, and in conformance with the prevailing industry standards.

67. Defendants breached their duties to Plaintiffs and the Class in a manner that was negligent, careless, reckless, willful, and wanton in the following particulars:

- a) In designing, developing, constructing, and selling Palmetto Pointe with construction deficiencies including those previously identified;
- b) In failing to design and construct Palmetto Pointe in accordance with due care, good workmanship, and in accordance with standard building practices and the plans;
- c) In failing to design and construct Palmetto Pointe in accordance with the building code;
- d) In failing to properly supervise the work and construction of Palmetto Pointe;
- e) In failing to properly coordinate the subcontractors;
- f) In failing to design and construct an adequate exterior building envelope;
- g) In failing to act as a reasonable person would in the circumstances then and there prevailing;
- h) In covering up their own defective work and the defective work of others;
- i) In failing to make proper repairs; and
- j) Such other failures to be proven at trial.

68. Any violations of applicable building codes constitute negligence *per se*.

69. Plaintiffs and the Class have been damaged as a direct and proximate result of the negligence, carelessness, recklessness, willfulness, and wantonness of the Defendants.

70. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, and/or constituted negligence per se, Plaintiffs and Class are entitled to an award of punitive damages against the Defendants.

FOR A SECOND CAUSE OF ACTION
(Breach of Warranty as to all Defendants)

71. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

72. The design, construction, and/or sale of Palmetto Pointe came with express and implied warranties that the work would be performed in a careful, diligent and workmanlike manner and that Palmetto Pointe would be constructed with suitable materials and components and free from all defects and be of superior quality befitting of an upscale condominium complex.

73. The design, construction, and/or sale of Palmetto Pointe, and the components used therein, came with implied warranties of fitness, merchantability, and workmanship.

74. Additionally, Island Pointe owed Plaintiffs a warranty of habitability.

75. Defendants have breached their warranties by constructing Palmetto Pointe in a defective manner as set forth above.

76. As a direct and proximate result of the Defendants' breach of the implied warranty, Plaintiffs have suffered actual and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Strict Liability in Tort: S.C. Code Ann. § 15-73-10 et seq. as to
Manufacturing and Supplier Defendants)

77. Plaintiffs repeat and reallege the allegations contained in the above paragraphs as if more fully set forth herein.

78. In manufacturing and supplying products for the construction of Palmetto Pointe, the Manufacturing and Supplier Defendants (including Andersen, CertainTeed, and John Doe. No. 1) placed products into the stream of commerce.

79. By introducing their products into the stream of commerce, the Manufacturing and Supplier Defendants represented said products were safe and suitable for their foreseeable use.

80. In the manufacture and supply of products to Palmetto Pointe, Manufacturing and Supplier Defendants anticipated and expected that their products would reach the public in substantially the same condition in which they were designed, developed, constructed, and sold.

81. The Manufacturing and Supplier Defendants have supplied and manufactured their products in a defective manner unreasonably dangerous to persons and/or property other than the products themselves, which has resulted in repeated water intrusion into and damage to Palmetto Pointe and other building deficiencies.

82. Plaintiffs could not have discovered the product defects through the exercise of reasonable care.

83. The cost of altering the design, construction, and/or repair of the products supplied to Palmetto Pointe was substantially less than the resulting damage, cost, and injury suffered by the Plaintiffs.

84. The design and manufacture of the products supplied to Palmetto Pointe was inherently defective as sold and was a direct and proximate cause of the damages suffered by Plaintiffs.

85. The Manufacturing and Supplier Defendants are therefore liable to Plaintiffs under the doctrine of strict liability in an amount to be determined by the trier of fact.

FOR A FOURTH CAUSE OF ACTION
(Unfair Trade Practices as to Island Pointe)

86. Plaintiffs repeat and re-allege the allegations contained in the above paragraphs as if more fully set forth herein.

87. At all times relevant herein, Island Pointe was engaged in the business of developing, designing, constructing, and selling Palmetto Pointe, and thereby placing Palmetto Pointe into the stream of commerce.

88. Island Pointe was engaged in commerce as defined by the South Carolina Unfair Trade Practices Act.

89. Island Pointe's above-described activities, including placing Palmetto Pointe with defective design and construction into the stream of commerce, failing to comply with the building code, failing to disclose those defects to potential and actual purchasers, and other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices in the conduct of Island Pointe's trade.

90. Island Pointe's above-described acts are capable of repetition and adversely affect the public interest.

91. Island Pointe knew or should have known that its conduct was in violation of the S.C. Code Ann. § 39-5-20.

92. As a direct, foreseeable, and proximate result of Island Pointe's unfair trade practices in South Carolina, Plaintiffs have suffered significant damage and have and will incur attorney's fees and the costs and expenses of this action.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Action/Reformation as to Island Pointe)

93. Plaintiffs re-allege the allegations, which are not inconsistent with this cause of action and are contained in the above paragraphs as if fully set forth herein.

94. The anti-suit provisions of the Palmetto Pointe Master Deed are in violation of public policy, statutory law and/or provisions of the Constitution, and the Island Pointe's fiduciary duties.

95. Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions included within the Master Deed by Island Pointe are in violation of statutory law and/or provisions in the Constitution and are therefore void and/or require reformation to eliminate the subject provisions.

96. As the provisions in the Master Deed are severable, the Plaintiffs are entitled to a declaration by this Court that the anti-suit provisions are severable from the other terms of the Master Deed.

97. Plaintiffs are also entitled to have ambiguous and contradictory provisions in the Master Deed construed against Island Pointe and/or reformed by the Court to more accurately reflect the reasonable expectations of the POA and Homeowners.

WHEREFORE, Plaintiffs demand a trial by jury and pray actual and consequential damages in excess of \$17.5 Million; statutory and/or punitive damages; reasonable attorneys' fees; costs of suit; prejudgment interest; engineering and diagnostic fees; declaration/reformation of the Master Deed; and granting such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

BY: 

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Stephanie Drawdy, Esquire

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-and-

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Attorneys for the Plaintiffs

Charleston, South Carolina

Dated: 11/2/2017

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc. and Elizabeth A. Bushey,
Individually, and on behalf of all others
similarly situated,

Plaintiffs,

vs.

Island Pointe, LLC; Complete Building
Corporation, Inc.; Tri-County Roofing, Inc.;
Creekside, Inc.; American Residential
Services, LLC D/B/A ARS/Rescue Rooter
Charleston; Andersen Windows, Inc.;
Atlantic Building Construction Services,
Inc. N/K/A Atlantic Construction Services,
Inc.; Builder Services Group, Inc. D/B/A
Gale Contractor Services; Novus
Architects, Inc., F/K/A SGM Architects,
Inc.; Tallent and Sons, Inc.; WC Services,
Inc.; CRG Engineering, Inc.; Certainteed
Corporation; Kelly Flooring Products, Inc.,
D/B/A Carpet Baggers; Cornerstone
Construction and Mark Malloy D/B/A
Cornerstone Construction; Miracle Siding,
LLC And Wilson Lucas Sales D/B/A
Miracle Siding, LLC; Mark Palpoint A/K/A
Micah Palpoint; Elroy Alonzo Vasquez;
Chris A/K/A John Doe 61; Alderman
Construction; Stanley's Vinyl Fence
Designs; Cohen's Drywall Company, Inc.;
Mosely Concrete; Hand A Framing
Construction, LLC A/K/A H&A Framing
Construction, LLC and D/B/A Hand A
Framing, LLC, H&A Construction, and
Hand A Construction; JMC Construction,
Inc.; JMC Construction, LLC; John Doe 1-
15,

Defendants.

of whom

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-0955

FILED
2017 NOV -9 PM 2:06
JULIE J. ARMSTRONG
CLERK OF COURT
BY
P

**ANSWER OF DEFENDANT W C
SERVICES, INC. TO THE PLAINTIFFS
SECOND AMENDED COMPLAINT**

(Jury Trial Demanded)

Complete Building Corporation, Inc.,

Third-Party Plaintiff,

vs.

Leonard T. Browne and Christopher N.
Union,

Third-Party Defendants,

of whom

Creekside, Inc.

Third-Party Plaintiff

vs.

Christopher N. Union,

Third-Party Defendant

Now comes the defendant, W C Services, Inc., answering the November 2, 2017 Second Amended Complaint of the Plaintiffs, above named, and alleges and states as follows:

1. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraphs 1 through 8 of the Second Amended Complaint, and on that basis denies the same.
2. That the allegations of paragraphs 9 through 19 of the Second Amended Complaint are directed to others and the Defendant is not required to answer the same. However, to the extent any are deemed directed to the Defendant the same are denied.
3. That the undersigned as counsel for the Defendant currently lacks sufficient information to form a belief as to the allegations of paragraph 20 of the Second Amended Complaint and on that basis denies the same.

4. That the allegations of paragraphs 21 through 37 of the Second Amended Complaint are directed to others and the Defendant is not required to answer the same. However, to the extent any are deemed directed to the Defendant the same are denied.
5. That the allegations of paragraph 38 of the Second Amended Complaint are conclusions of law and the Defendant is not required to answer the same.
6. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraph 39 through 42 of the Second Amended Complaint and on that basis denies the same.
7. That the Defendant denies the allegations contained in paragraphs 43 through 45 of the Second Amended Complaint to the extent any are directed to the Defendant.
8. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraph 46 of the Second Amended Complaint and on that basis denies the same.
9. That the Defendant denies the allegations contained in paragraph 47 of the Second Amended Complaint to the extent any are directed to the Defendant.
10. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraph 48 of the Second Amended Complaint and on that basis denies the same.
11. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraphs 49 through 54 of the Second Amended Complaint and on that basis denies the same.
12. That the Defendant denies the allegations contained in paragraph 55 of the Second Amended Complaint to the extent any are directed to the Defendant.

13. That the Defendant lacks sufficient information to form a belief as to the allegations of paragraphs 56 through 58, including subparts, of the Second Amended Complaint and on that basis denies the same.

14. That the Defendant denies the allegations contained in paragraph 59 through 63 of the Second Amended Complaint to the extent any are directed to the Defendant.

15. That the allegations of paragraph 64 are directed to others and the Defendant is not required to answer the same. However to the extent any are deemed directed to the Defendant the same are denied.

16. That in response to the allegations contained in paragraph 65, the Defendant hereby realleges and incorporates by reference paragraphs 1 through 15 above as fully and effectively as if set forth herein verbatim.

17. That the Defendant denies the allegations contained in paragraphs 66 through 70, including subparts, of the Second Amended Complaint to the extent any are directed to the Defendant.

18. That in response to the allegations contained in paragraph 71, the Defendant hereby realleges and incorporates by reference paragraphs 1 through 17 above as fully and effectively as if set forth herein verbatim.

19. That the Defendant denies the allegations contained in paragraph 72 through 76 of the Second Amended Complaint to the extent any are directed to the Defendant.

20. That in response to the allegations contained in paragraph 77, the Defendant hereby realleges and incorporates by reference paragraphs 1 through 19 above as fully and effectively as if set forth herein verbatim.

21. That the allegations of paragraphs 78 through 85 are directed to others and the Defendant is not required to answer the same. However, to the extent any are deemed

directed to the Defendant the same are denied.

22. That in response to the allegations contained in paragraph 86, the Defendant hereby realleges and incorporates by reference paragraphs 1 through 21 above as fully and effectively as if set forth herein verbatim.

23. That the allegations of paragraphs 87 through 92, including subparts, are directed to others, and the Defendant is not required to answer the same. However, to the extent any are deemed directed to the Defendant the same are denied.

24. That in response to the allegations contained in paragraph 93, the Defendant hereby realleges and incorporates by reference paragraphs 1 through 23 above as fully and effectively as if set forth herein verbatim.

25. That the allegations of paragraphs 94 through 97 are directed to others and the Defendant is not required to answer the same. However, to the extent any are deemed directed to the Defendant the same are denied.

26. That the Defendant denies each and every allegation of the Second Amended Complaint not hereinabove specifically admitted or modified.

FOR FIRST AFFIRMATIVE DEFENSE
(Bifurcated Jury Trial)

27. To the extent punitive damages are claimed, this Defendant demands a bifurcated jury trial pursuant to S.C. Code Ann. §15-32-520 and that said damages, if any, are limited to three times the amount of compensatory damages, or the sum of \$500,000.00, whichever is greater, if any.

FOR SECOND AFFIRMATIVE DEFENSE
(Breach of Warranty as to Plans & Specifications)

28. That upon information and belief the Defendant was furnished plans, specifications and/or drawings for use in the construction of the project and were

impliedly warranted to be sufficient for the purpose in view and impliedly warranted to fully and accurately disclosed all information necessary for the proper construction of the project. That the plans, specifications and/or drawings furnished by were defective, insufficient, conflicting and incomplete and thereby breached the foregoing warranties which are implied by law and such constitutes a complete defense to all claims.

FOR THIRD AFFIRMATIVE DEFENSE
(Contributory Negligence)

29. That upon information and belief whatever injury or damage incurred by Plaintiffs, if any, was due to and caused by and was the direct and proximate result of the contributory negligence, recklessness, willfulness and wantonness of Plaintiffs, combining and concurring with the alleged negligence, recklessness, willfulness, and wantonness of the Defendant, which is specifically denied, and without which the injuries alleged by the Plaintiffs in this action would not have occurred.

FOR FOURTH AFFIRMATIVE DEFENSE
(Comparative Negligence)

30. That upon information and belief the injuries and damages sustained by the Plaintiffs, if any, were due to and caused by and were the direct and proximate result of the negligence, carelessness, recklessness, willfulness and wantonness of Plaintiffs, and recovery should be barred or reduced in proportion to Plaintiffs negligence as provided by law.

FOR FIFTH AFFIRMATIVE DEFENSE
(Duties Alleged Beyond Scope of Services)

31. That the duties and obligations alleged are not within the scope of services which were provided by the Defendant, and such duties and obligations lie beyond the scope

of services provided by the Defendant, and such constitutes a complete defense to the claims of the Plaintiffs for negligence.

FOR SIXTH AFFIRMATIVE DEFENSE
(Estoppel By Conduct)

32. That the Plaintiffs by their actions, conduct, words or silence which amounts to a representation or other concealment of material facts, has caused the Defendants to alter its position to its prejudice or injury and Plaintiff should therefore be estopped from bringing the within claims by their own conduct and such constitutes a complete defense to the claims of the Plaintiffs.

FOR SEVENTH AFFIRMATIVE DEFENSE
(Economic Loss Rule)

33. That the damages suffered by Plaintiffs, if any, were limited solely to the buildings themselves and/or to diminution in value thereof, and therefore there exists no right of action in tort, and such constitutes a complete defense to all claims other than those sounding in contract.

FOR EIGHTH AFFIRMATIVE DEFENSE
(Final Completion and Acceptance)

34. That the work undertaken by the Defendant was fully and finally completed and such work was previously accepted as fully and finally complete and in full compliance with applicable contract documents putting an end to all further obligations pursuant to the contract and such completion and acceptance constitutes a complete defense to all claims for breach of warranty.

FOR NINTH AFFIRMATIVE DEFENSE
(Failure to Join a Necessary Party)

35. That the Plaintiffs have failed to join a necessary and indispensable party pursuant to the provisions of SCRCP Rule 19 and, therefore, the within action should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(7).

FOR TENTH AFFIRMATIVE DEFENSE
(Failure to Maintain)

36. That the Plaintiffs were obligated to maintain the structures at issue against normal wear, tear and deterioration due to age and the elements and upon information and belief the Plaintiffs failed to do so and such is the direct and proximate cause of the damages suffered by the Plaintiffs and such constitutes a complete defense to the claims of the Plaintiffs.

FOR ELEVENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate Damages)

37. That the Plaintiffs have failed to take prompt and reasonable action under the circumstances to avoid the occurrence of additional damage to the structures and such failure to mitigate damages constitutes a complete defense as to that portion of damages which could have been otherwise avoided by reasonable and prompt action.

FOR TWELFTH AFFIRMATIVE DEFENSE
(Failure to State Facts Sufficient)

38. That the Second Amended Complaint, in all or part, fails to state facts sufficient to constitute a cause of action and the Second Amended Complaint should, to that same extent be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6).

FOR THIRTEENTH AFFIRMATIVE DEFENSE
(Intervening & Superseding Cause)

39. That the injury or damage suffered by the Plaintiffs if any, was due to and caused by and was the direct and proximate result of the intervening and superseding negligence, willfulness, wantonness and recklessness of others over whom Defendant

had no control, resulting directly and proximately in the damage of which Plaintiffs complains and such constitutes a complete defense to all claims for negligence.

FOR FOURTEENTH AFFIRMATIVE DEFENSE
(Intervening & Superseding Negligence)

40. That if the Defendant was negligent, which is specifically denied, the injuries and damages sustained by the Plaintiffs, if any, were due to and caused by and were the direct and proximate result of the intervening and superseding negligence, carelessness, recklessness, willfulness and wantonness of others.

FOR FIFTEENTH AFFIRMATIVE DEFENSE
(Incorporation of Affirmative Defenses)

41. The undersigned denies each and every allegation of the Second Amended Complaint, asserts those affirmative defenses set forth in Rule 8 of the South Carolina Rules of Civil Procedures, contests service and personal jurisdiction, and raises those defenses set forth in Rule 12, all to the extent they are applicable.

FOR SIXTEENTH AFFIRMATIVE DEFENSE
(Improper Service of Process)

42. That upon information and belief service of process was insufficient in the within action and, therefore, the within action should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(5).

FOR SEVENTEENTH AFFIRMATIVE DEFENSE
(Laches)

43. That Plaintiffs neglected for an unreasonable and unexplained length of time to provide notice of such alleged deficiencies to Defendant who has been prejudiced by the delay and such unreasonable delay and resulting prejudice constitutes a complete defense to all claims.

FOR EIGHTEENTH AFFIRMATIVE DEFENSE
(Lack of Proper Service)

44. That the court lacks jurisdiction over the person of the Defendant because the Plaintiffs have not obtained proper service in the manner required by law and, therefore, the Plaintiffs' Amended Complaint should be dismissed pursuant to the provisions of SCRPC Rule 12(b)(2).

FOR NINETEENTH AFFIRMATIVE DEFENSE
(Notice and Opportunity to Correct Workmanship)

45. That the Plaintiffs failed to give any reasonable and meaningful notice to the Defendant as to the existence of the alleged breach and failed to give the Defendant a reasonable opportunity to correct such alleged defects, (the existence of which is denied) and such failure to give notice constitutes a complete defense to the claims of the Plaintiffs for breach of warranty of workmanship.

FOR TWENTIETH AFFIRMATIVE DEFENSE
(No Duty Under Trade Usage and Standard Industry Practice)

46. That the duties and obligations alleged to exist were not obligations imposed upon Defendant within the usage of the trade at the time of construction and were not imposed upon it under the usual and customary practices of the industry at the time of construction, and such constitutes a complete defense to all claims for negligence.

FOR TWENTY-FIRST AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional - Procedural Due Process)

47. That the Plaintiffs' Second Amended Complaint to the extent that it seeks punitive or exemplary damages violates the right of the Defendant to procedural due process under the Fourteenth Amendment of the United States Constitution and the Constitution of the State of South Carolina, and, therefore, fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

FOR TWENTY-SECOND AFFIRMATIVE DEFENSE
(Punitive Damages Unconstitutional - Substantive Due Process)

48. That the Plaintiffs' Second Amended Complaint to the extent that it seeks punitive or exemplary damages, violates this Defendant's right to substantive due process as provided in the Fifth and Fourteenth Amendments of the United States Constitution and the Constitution of the State of South Carolina and, therefore, fails to state a cause of action upon which either exemplary or punitive damages can be awarded.

FOR TWENTY-THIRD AFFIRMATIVE DEFENSE
(Sole Negligence)

49. That the injury or damage sustained by Plaintiffs , if any, was due to, caused by and was the direct and proximate result of the sole negligence, recklessness, willfulness and wantonness of Plaintiffs or of others over whom Defendant had no responsibility or control.

FOR TWENTY-FOURTH AFFIRMATIVE DEFENSE
(Spoilation of Evidence)

50. That the primary evidence and proof of the facts alleged has been destroyed, altered, or otherwise lost to the prejudice and detriment of Defendant. That Plaintiffs knew or should have known of the importance of such evidence and had a duty to preserve same and such constitutes a complete defense to all claims.

FOR TWENTY-FIFTH AFFIRMATIVE DEFENSE
(Statute of Limitations)

51. That Plaintiffs have failed to commence this action within the time required by the applicable Statute of Limitations, and the failure to timely commence the action constitutes a bar and complete defense to all claims.

FOR TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Statute of Repose)

52. That Plaintiffs have failed to commence this action within the time required by the applicable Statute of Repose, and the failure to timely commence the action constitutes a bar and complete defense to all claims.

FOR TWENTY-SEVENTH AFFIRMATIVE DEFENSE
(Waiver/Acceptance)

53. That Plaintiffs knew and were aware of conditions attributed to work performed by the Defendant, as complained of in this action, which were upon information and belief readily apparent, and nevertheless accepted and used the property in such condition, and have thereby waived all claims arising out of such conditions.

FOR TWENTY-EIGHTH AFFIRMATIVE DEFENSE
(Accord and Satisfaction)

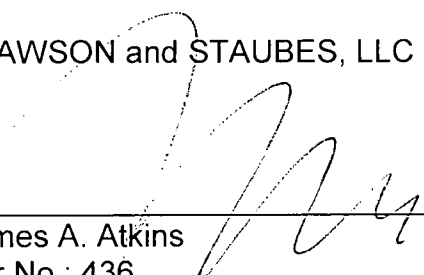
54. That all issues alleged in this action as between Plaintiffs and Defendant hereto were previously resolved by an agreement entitled "Condominium Transition Agreement and Release" entered by and between Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. AND Island Pointe, LLC and Galaxy Development, LLC in May 2014, and filed in the County of Charleston R.M.C. office in Book 0411 at Page 728, and such constitutes a complete defense to all claims.

FOR TWENTY-NINTH AFFIRMATIVE DEFENSE
(Release/Third-Party Beneficiary)

55. That Defendant has previously been granted a release by Plaintiffs of Plaintiffs' claims asserted in this action pursuant to the terms of the agreement reference in Paragraph 56 above, and such constitutes a complete defense to all claims alleged herein. Alternatively, and by the plain language of said agreement Defendant is either an identified releasee or a third-party beneficiary thereto.

WHEREFORE, having fully answered the Second Amended Complaint of the Plaintiffs, this Defendant prays for a trial by jury and that the Plaintiffs' Second Amended Complaint be dismissed, together with the costs and disbursements of this action and for such other and further relief as this Court may deem just and proper.

CLAWSON and STAUBES, LLC


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Attorney for Defendant W C Services, Inc.

Charleston, South Carolina

11/8 2017

STATE OF SOUTH CAROLINA.	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Palmetto Pointe at Peas	)	CASE NO. 2015-CP-10-00955
Island Condominium Property	)	
Owners Assn., Inc., et al.,	)	
	)	
PLAINTIFFS,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	CERTIFIED COPY
	)	
Island Pointe, LLC, et al.	)	
	)	
DEFENDANTS.	)	
	)	

May 6 to May 9, 2019 (Week One of Trial)

Charleston, South Carolina

B E F O R E:

The Honorable Jennifer McCoy, and a Jury.

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

Attorneys for the Plaintiff:

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Edward D. Buckley, Jr.
Joshua F. Evans

Attorneys for the Defense:

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Brent Boyd
Andrew N. Cole
James L. Williams
Brandon T. Reeser
G. Troy Thames
James A. Atkins
Bonum S. Wilson, II
James Flynn

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I N D E X

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(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

<u>P L A N I T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
5A	CBC & Palmetto Pointe Subcontract	95	413
9	CBC & Tri-County Subcontract	95	413
22	CBC Change Order	95	---
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189	Certain Teed Siding Instructions	95	352
203	WC Services Sub-Contract w/CBC	95	413
259	SGM Sketch: Wall Section	95	300
272	HydroStop Specs	95	351

<u>P L A N I T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
340	Project Manual	95	413
342	Certain Teed Applicators	95	350
478	HydroStop Flex Coat Warranty	95	---
583	A201-1997 AIA Gen Conditions	95	413
619	Construction Set Plans	95	413
669	ESR Report - Certain Teed Siding	95	365
671	Mease Hurricane Irma Photo Log	95	---
677	Handegan Revised Estimate	95	600
679	3/6/06 Letter, Re: Fire Suppression	95	511
705	WC Services Fire Sprinkler Drawing	95	---
710	Inspection Photos	95	---
713	Inspection Photos	95	---
722	Polk Site Visit Photos	95	---
726	Polk Site Visit Photos	95	---
751	IRC R106 Construction Documents	95	---
764	NFPA 13D Sprinkler Standards	95	---
789	Certificates of Occupancy	95	639
812	Schweickhardt Site Visit Photos	95	225
813	Schweickhardt Site Visit Photos	95	246
814	Schweickhardt Site Visit Photos	95	278
815	Schweickhardt Site Visit Photos	95	278

<u>P L A N I T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
826	Schweickhardt Depo Points	95	---
827	Rear Damage & Flashing	95	284
828	Front Damage per Al's Table 2	95	284
852	Polk Site Photos	95	---
853	HydroStop Standard Drip Edge Detail	95	---
854	HydroStop Standard Drip Edge Detail	95	---
889	Elkin Engineering Site Visit Photos	95	675
891	Elkin Engineering Site Visit Photos	95	682
893	Elkin Engineering Site Visit Photos	95	740
895	Elkin Engineering Site Visit Photos	95	747
931	Watkins Prelim Draft Estimate	95	---
961	Redacted Fee Agreements	95	323
962	Photograph	95	353
963	Photograph	95	353
964	Photograph	95	353
965	Photograph	95	353
966	Photograph	95	353
967	Photograph	95	353
968	Photograph	95	353
969	Photograph	95	353
970	Photograph	95	353

<u>P L A N I T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
971	Photograph	95	353
972	Photograph	95	353
973	Photograph	95	353
974	Photograph	95	353
975	Photograph	95	353
976	Photograph	95	353
977	Photograph	95	353
978	Photograph	95	353
979	Photograph	95	353
980	Photograph	95	353
981	Photograph	95	353
982	Photograph	95	353
983	Photograph	95	353
984	Photograph	95	353
985	Photograph	95	353
986	Photograph	95	353
987	Photograph	95	353
988	Photograph	95	353
989	Photograph	95	353
990	Photograph	95	353
991	Photograph	95	353

<u>P L A N I T I F F E X H I B I T S</u>			
<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
992	Photograph	95	353
993	Photograph	95	353
994	Photograph	95	353
995	Photograph	95	353
996	Photograph	95	353
997	Photograph	95	353
998	Photograph	95	---
999	Photograph	95	---
1000	Photograph	95	509
1001	Shingle	403	404
1002	Siding	403	404
1039	Photograph	95	---
1040	Photograph	95	353
1041	Photograph	95	353
1042	Photograph	95	353
1043	Photograph	95	353
1044	Folly Beach Ordinance	95	---
1048	Photographs	95	---
1049	Estimate Handegan	489	---
1050	Plycem Document	711	---

D E F E N D A N T E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARK</u>	<u>ADMIT</u>
1	VSC Fire & Sprinkler Proposal	630	640

C O U R T E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
1	Depo - Schweickhardt	255
2	Jury Note	522
3	NFPA	537
4	Juror Note	575
5	Estimate Report	575
6	Juror #262 - Note	580
7	Depo - Handegan	634
8	Exhibit Clarification	720
9	Affidavit of Atty's Fees	797

1 continue to happen until a complete repair is done on this
2 complex. Complete. Not a cut and paste. Not a cookie-cutter
3 job. A complete set of proper flashing. And waterproofing.

4 And the engineers will tell you about what is called
5 redundancy. All of your exterior building systems are
6 supposed to be redundant. Two layers of protection. So if
7 one fails the other one works. Not much redundancy at Peas
8 Island right now. They missed a lot.

9 And if all I had to talk to you about was leaks, we might
10 be okay. Not really, but at least we could just focus on the
11 leaks. Well, when they went to investigate the leaks they
12 found that the fire separation assemblies in the attics and
13 in the basement - what I will call a basement; it is a
14 drive-under - were improperly constructed. There's gaps.
15 This is multi-family housing. These 40 homes are in 20
16 buildings. They share a common wall.

17 The engineers will tell you about what the building code
18 requires. When they share a common wall you are supposed to
19 have what is called a fire assembly, sometimes referred to as
20 a one-hour fire assembly.

21 We will put in evidence from not our engineer but the
22 general contractor's engineer that these fire assemblies have
23 on average a hundred building code violations per house. Per
24 residence. A hundred on each side. That is 200 per building,
25 building code violations. And that is in the attic. And that

1 is before we talk about the fire suppression system.

2 The fire suppression system, sprinkler system us lay
3 people typically call it, was not built according to the
4 plans. The plaintiffs called for a fire suppression system
5 for each side. The defendant that installed the fire
6 suppression system decided just to install right up the
7 middle. So he also pierced the one-hour firewalls with his
8 pipes in violation of what is called UL-341 which the
9 engineers will tell you about is the one-hour fire assembly
10 that was supposed to be installed at this complex.

11 There is a litany of other problems. We talked about the
12 decks already, right? Well, we are not done. The decks are
13 supposed to be sloped. They are, until you get about eight
14 inches from the end; and then there is a lip.

15 So what happens? Water ponds. Every time it rains water
16 ponds. And what happens when water ponds? Well, two things.
17 One, the evidence will show that ponding water will degrade a
18 surface on a deck. Secondly, when it evaporates it leaves
19 residues, algae, dirt.

20 One, it is ugly. It is not attractive. It is not
21 becoming of what were supposed to be luxury townhouse style
22 condominiums. Secondly, it is a trip hazard. Maybe not for
23 everybody. Maybe just for older people or young kids. But it
24 is a trip hazard. And that is wrong. And it is not how it is
25 supposed to be built. The decks are supposed to have a slope.

1 The evidence will show that that failed to happen. The
2 evidence will show that this was the first job of this type
3 that Tri-County ever attempted. The evidence will show that
4 Tri-County was not qualified for this job.

5 The two additional subcontractors that are here, the
6 second two subcontractors that we are talking about that work
7 for Tri-County, one is the siding contractor called Miracle
8 Siding. Or Sales is the gentleman's name. Sometimes he goes
9 by Mr. Sales, d/b/a Miracle Siding. The same company. They
10 did all the siding and the trim work on this job. They
11 installed the code violating siding and the trim on the decks
12 that is supposed to interact with the flashing that didn't
13 happen.

14 The other second tier sub for Tri-County is a gentleman
15 named Vasquez, V-A-S-Q-U-E-Z I believe. He did the decking
16 and the roofing where we will show over a dozen code
17 violations.

18 The remaining two -- three parties, excuse me, at the
19 defense table, one of them is named WC Services. They are the
20 ones that installed the fire suppression system that we talked
21 about earlier.

22 The last sub on the main job, the last sub it Stanley
23 Vinyl Fence. They are the ones that used -- that supplied the
24 brackets that all break and then the 5/8 inch or 3/4 inch
25 screws that don't pierce any structural member for the

1 railings on the first and second floors of these building.

2 One more subcontractor is at the defense table, named
3 JMC. JMC took off and put back on some of the siding at this
4 project. There is an issue with regards to whether or not
5 some of the substrate under the siding was properly fastened.
6 So during construction on roughly a dozen homes or so they
7 took some of the siding back off. And JMC is the
8 subcontractor that put it back up. And they put it back up in
9 the same building code violation fashion as the original
10 siding contractor.

11 We brought a claim -- plaintiffs have brought a claim.
12 Our two law firms have brought a claim on behalf of the
13 homeowners and the homeowners association regarding these
14 defects.

15 The homeowners have all assigned their claims, whatever
16 interest they have in these claims, to the Association since
17 the Association is responsible for the exterior maintenance
18 and repairs anyway. To the extent that it protrudes into the
19 home the homeowners have assigned that claim to the
20 Association so that the Association can prosecute the entire
21 claim and seek to recover the repair cost; which is what
22 brings us here to today, the recovery of the repair cost.

23 Plaintiff has brought a cause of action, several causes
24 of action. That is legal ease, our claims. We basically
25 brought a claim for negligent construction, reckless and

1 MR. ATKINS: I will go.

2 THE COURT: Thank you, Mr. Atkins.

3 MR. ATKINS: Yes, ma'am.

4 MR. ATKINS: Good morning.

5 THE JURY: Good morning (in unison).

6 **OPENING BY MR. ATKINS:**

7 Invariable in a -- in any organization or in any
8 group -- you have been to school classes. Even in a lot
9 of families we all know there is an odd ball. There is
10 someone who didn't quite fit the group. It is the round
11 peg in a square hole, the guy that is just a little bit
12 off, not quite with the crowd. We all know that guy. We
13 all knew that girl as we have grown up.

14 I am here because I represent the oddball. I have
15 got the oddball in this case. It is my pleasure to
16 represent the oddball. But they do not fit what you are
17 going to hear for the next possibly two weeks. So bear
18 with us.

19 It is not going to come up much. You might forget
20 about it. I am going to remind you I am still here
21 representing that oddball.

22 The oddball is WC Services. Now you heard in the
23 opening statement WC Services was a subcontractor who
24 installed the fire sprinkler systems. Okay. In all the
25 residential units and in the clubhouse I believe.

1 You heard a lot of people talking. You heard Mr.
2 Lucey talking. And he talked about a lot of leaks. And
3 he showed you pictures in his opening statement. And he
4 has got experts to come in and talk about leaks, water,
5 water, damage, rot; things of that nature.

6 You heard Mr. Kendall talk about CBC, how we are
7 going to come together and fix these problems. What did
8 he talk to you about? Did he ever mention fire
9 sprinklers? He never did. He never did.

10 You know, there is going to be very little said in
11 the scheme of this trial about first sprinkler systems.
12 They are the oddball. They don't fit the rest of this
13 group. There will be no evidence presented to you, none,
14 that fire sprinklers systems are contributing to water
15 getting into any of these units, that they played any
16 part in that. You will -- no evidence on that.

17 You will hear some evidence that there are some fire
18 sprinkler pipes in the attics that pierced those
19 firewalls that you heard about. And then you see they
20 weren't sealed. But you won't hear any evidence that
21 that was WC Services responsibility to seal those
22 penetrations. There will be no evidence on that either.

23 But that is really the kind of the small fry of a
24 case that the plaintiff is going to make against my
25 client. I didn't hear it mentioned in the opening

1 statements, but it has been part of this case from the
2 beginning. We have done a lot of discovery on it and had
3 a lot of testimony -- a lot of witnesses on it, and that
4 is that there should be fire sprinklers in the attics of
5 the residential buildings, that somehow that was required
6 and it wasn't done.

7 And they are going to bring in a guy who was a fire
8 code official at the City and a fire -- and a building
9 code official who has come up with a theory that he
10 agrees, yeah, there should be sprinklers in those attics
11 and they are not there and that should be installed. And
12 that is the big-ticket item to fix and repair that the
13 plaintiff's counsel has been talking about.

14 In contrast to that theory by this witness I am
15 going to bring you people who were involved in the
16 project making the design of this fire sprinkler system
17 who implemented the fire design criteria that was applied
18 to what was installed to explain to you why. Because
19 what was install complies. It is in conformity with what
20 was required from a design standpoint.

21 So once again once you have heard that evidence I am
22 going to turn to you, ladies and gentlemen; and unlike
23 Mr. Kendall who says we just want a reasonable cost to
24 fix this thing, we want to make it right, I am going to
25 come to you and say you should return your verdict for

1 the defendant in this case, W C Services.

2 You are going to agree that this oddball did nothing
3 wrong and is not responsible to provide any money, pay
4 any money to these plaintiffs at all.

5 So, once again, I am an oddball; and I am going to
6 come up and I am going to ask you straight out for that
7 verdict. And once you have heard all of the evidence you
8 will agree that it is not right to bring a verdict and
9 make W C Services pay money for damages they didn't
10 cause. Thank you.

11 THE COURT: Thank you.

12 Mr. Reeser.

13 MR. REESER: May it please the court.

14 THE COURT: Yes.

15 **OPENING BR MR. REESER:**

16 Ladies and gentlemen of the jury, everybody wants a
17 good deal. The developer sees a pretty island off of
18 Folly Road and thinks I can stick some condos up there; I
19 can build them for real cheap and I can sell them for a
20 lot of money.

21 The general contractor says I want to build those; I
22 want to bid high; I want to build all of them; but I
23 don't really want to pay that much for them, because that
24 is a good deal.

25 And the subcontractors say I want to do the same

1 Mr. Reesener's -- Reeser's clients don't have really
2 contracts, so we are not stipulating those in.

3 THE COURT: Okay. Any objection to that stipulation that
4 was read by plaintiff's counsel?

5 MR. COLE: That was accurate to what we talked about,
6 Your Honor.

7 THE COURT: Okay.

8 MR. KENDALL: I am scrambling a little because I wasn't
9 part of the conference. I was doing other things. But --
10 yeah, but I previously stipulated.

11 THE COURT: Okay.

12 MR. KENDALL: I just wanted to double check the numbers.
13 Thank you.

14 THE COURT: Sure. Take your time.

15 (WHEREUPON, Plaintiff's Exhibit Number 5A, 9, 583, 340, 111,
16 619, 203, admitted into evidence.)

17 MR. BUCKLEY: Your Honor, I have one more matter that
18 only affects Mr. Atkins' clients. He and I have been
19 discussing over the last few days stipulating to admissibility
20 of three documents. One is the actual ordinance for a Folly
21 Beach ordinance dealing with fire sprinklers. And that is
22 Exhibit 1044.

23 THE COURT: Okay.

24 MR. BUCKLEY: And then the actual code book containing
25 that ordinance at Folly Beach which is Exhibit 141. And there

1 is a national standard, national NFPA 13D which is Exhibit
2 764. And we have stipulated that those are in evidence.

3 THE COURT: All right. Is that correct?

4 MR. ATKINS: Your Honor, so we are clear, because I
5 always get -- I get a little nervous when I hear it is in
6 evidence. My interpretation of it being in evidence means it
7 goes to the jury.

8 MR. BUCKLEY: No ---

9 MR. ATKINS: We are not -- we are not sending this back
10 to the jury.

11 THE COURT: Okay.

12 MR. ATKINS: These are not to go to the jury. They
13 are -- we are simply waiving the necessity of calling people
14 to authenticate ---

15 THE COURT: I understand.

16 MR. ATKINS: --- that they are what they purport to be.

17 THE COURT: Okay.

18 MR. ATKINS: Because you can't take judicial notice of an
19 ordinance or ---

20 THE COURT: Right.

21 MR. ATKINS: --- a fire code standard or what have you.
22 So it is to save each of us that difficulty.

23 THE COURT: Understood.

24 MR. BUCKLEY: Exactly.

25 THE COURT: Oh, okay. Yeah, I mean I think obviously

1 anything that would need to be admitted still would need to be
2 admitted on the record. All right.

3 MR. THAMES: Your Honor, I want to be clear that the
4 dismissal with CBC was with prejudice.

5 THE COURT: Okay.

6 MR. KENDALL: That is correct.

7 THE COURT: All right. Let's just so we are all clear
8 then moving forward on mentioning of the guardrail system that
9 we are still going to be ---

10 MR. LUCEY: There is no issue of preclusion at all, Your
11 Honor.

12 MR. KENDALL: No ---

13 MR. LUCEY: That is in the case.

14 THE COURT: Okay. All right. Okay. Anything else
15 before we resume?

16 It looks like not. All right. I think we can bring the
17 jury back in.

18 THE BAILIFF: Yes, ma'am.

19 (WHEREUPON, break awaiting jury.)

20 (WHEREUPON, jury enters 8/5/19, 11:36 a.m.)

21 THE COURT: All right. Thank you very much. Please be
22 seated. Do we have all the jurors?

23 THE BAILIFF: (Nods head.)

24 THE COURT: All right. Who is going to begin
25 cross-examination this morning?

1 **CROSS-EXAMINATION BY MR. ADKINS OF RUSSELL MEASE:**

2 Q. Good afternoon, Mr. Mease.

3 A. Good afternoon.

4 Q. You have been testifying here. And I am going to be very
5 quick. Just a few questions I need to ask you. You were
6 talking at one point about the penetrations in the firewalls.
7 And you made a comment that the code says you can't do that.

8 It is not uncommon in construction where you might have a
9 pipe or an electrical conduit or something of that nature that
10 might penetrate a firewall separation such as we had in these
11 attics; is that correct?

12 A. That is correct. It would be more correct to say the
13 firewall has to maintain integrity.

14 Q. That's right.

15 A. You have to have ---

16 Q. That's right.

17 A. --- integrity in the firewall. There are a lot of
18 details that are provided by UL that tell you how to pass
19 items through firewalls. You have to follow those guidelines.

20 Q. I have got you. So it is not that the penetration itself
21 is the code violation; in this instance for pipes in
22 particular it is that they weren't sealed afterwards to
23 maintain the integrity of that firewall?

24 A. The only problem I have with that is it depends on the
25 materials as well. You can't just put anything in a fire

1 environment.

2 Q. Right.

3 A. Wood obviously burns.

4 Q. Right.

5 A. So if the wood burns and it goes to the firewall I am not
6 aware of a way to segregate that material in a detail that I
7 have seen just to prevent that from being a problem.

8 Q. And I appreciate that. And what you are saying is, wood
9 going through these firewalls that is a whole different
10 magnitude of issues and problems; is that correct; would that
11 be fair to say?

12 A. Yes or similar materials that are flammable, yes.

13 Q. And assuming that pipes that are penetrating are
14 themselves -- meet ratings, fire ratings, and they are
15 properly sealed, the opening or gap that they create is
16 properly sealed, so that that wall can maintain its rating,
17 it's fire rating, and do its job, then those penetrations
18 should be okay?

19 A. Yes, they are -- if they are properly installed, those
20 are appropriate.

21 Q. Okay. So far as these attics are concerned, you talked
22 about Unit 1635 and the tear that ran along the vertical run
23 of -- horizontal run of some fire sprinkler pipe. Do you
24 remember talking about that in the photograph we saw?

25 A. I do.

1 seated.

2 Hope you had a good lunch, a little bit of a break. I
3 understand we are ready to proceed. I believe the bailiffs
4 mentioned this to you, ladies and gentlemen, Friday is a State
5 holiday.

6 I was not aware of that at the beginning of the week. It
7 is not a County holiday, interestingly. But because our court
8 system involves state employees we will not be here on Friday.
9 So I just wanted to run that by you one more time to let you
10 know that we will not need your service on Friday.

11 But as things are progressing it does look like we will
12 go into next week. So at least you will have a nice long
13 weekend before you return next week. Okay. All right.

14 So with that I think we can continue.

15 Who is plaintiff's next witness?

16 MR. BUCKLEY: Doug Smits, Your Honor.

17 THE COURT: All right.

18 (WHEREUPON, the witness was duly sworn.)

19 THE CLERK: For the record will you please state your
20 name and spell your last name.

21 THE WITNESS: Douglas Mark Smits. S-M-I-T-S.

22 **DIRECT EXAMINATION BY MR. BUCKLEY OF DOUGLAS SMITS:**

23 Q. Mr. Smits, where do you live?

24 A. I live at REDACTED

25 REDACT

1 Q. And what do you do for a living?

2 A. I have been a code enforcement officer since 1981 in
3 South Carolina.

4 Q. And where are you currently a code enforcement officer?

5 A. I am a certified code enforcement officer in South
6 Carolina and also a -- currently a residency fire marshal. I
7 am also nationally certified as a fire marshal and a certified
8 building official.

9 Q. And where did you go to college?

10 A. I went to Clarkson University in Upstate New York.

11 Q. What was your area of study?

12 A. I have a bachelors degree in civil and environ- -- excuse
13 me, civil and environmental engineering.

14 (WHEREUPON, water break for witness.)

15 Q. And I think you graduated in 1974; is that correct?

16 A. Yes, sir.

17 Q. And what did you do after you graduated?

18 A. I was in engineering and surveying in New York State with
19 a private firm until approximately 1979. And then I came to
20 South Carolina. I actually opened up a branch office of that
21 same firm. I was doing that for two years. And then in
22 January of 1981 I went to work for the City of Charleston,
23 originally as the assistant city engineer.

24 Q. And are you a PE; do you have a license to practice
25 engineering?

1 A. No, sir.

2 Q. And tell the jury why you don't have that.

3 A. When I went to work for the City of Charleston as the
4 assistant city engineer, six weeks after that the mayor asked
5 me to run the building department on an interim basis, that
6 quickly became permanent.

7 And shortly thereafter -- I was only 29 years old. I
8 became the chief building official for the City of Charleston.
9 So I got involved in code enforcement both at the local and
10 national level. And I did that until I retired from the City
11 in 2006 along with other hats that I wore for the City.

12 Q. You have a pin on your lapel. What is that pin?

13 A. It is a pin for the International Code Council. It
14 denotes that I was on the charter board of directors for the
15 International Code Council.

16 Q. Explain to the jury what the International Code Council
17 is, please.

18 A. The International Code Council in the mid-90s was a
19 combining of the three model code groups in the country.
20 There was BOCA, ICBO, and the Southern Building Code Congress
21 International which most people in this area are probably
22 familiar with.

23 The idea was that let's make a single model code for the
24 entire country that would be uniform across the country to
25 establish minimum standards for construction. And that was

1 done in the early 2000's.

2 Q. And are you still a member of ICC?

3 A. Yes, sir.

4 MR. BUCKLEY: Would you pull up 699, please.

5 (WHEREUPON, item displayed.)

6 MR. BUCKLEY: I'm sorry, that's not what I wanted. I
7 have the wrong number. I apologize.

8 TECH ASSISTANT: That's okay. What is the description?

9 MR. BUCKLEY: It was the ICC report that we used during
10 Mr. Mease's testimony. It has ICC up in the left-hand corner.
11 I was just going to ask him if that is the same organization.
12 But it doesn't matter. It is no big deal.

13 Q. As a board member of ICC what did you do, what was your
14 role and what was the role of your organization?

15 A. Well, being a charter board member we oversaw the
16 combining of the three model code groups and made the
17 decisions as far as what track it would go on and how it would
18 operate.

19 MR. BUCKLEY: Go ahead and pull it back up again, 669. I
20 am sorry.

21 (WHEREUPON, item displayed.)

22 Q. If you look at Exhibit 669 up in the left-hand corner it
23 says ICC evaluation service. Is that the same service that
24 you are talking about?

25 A. Yes, sir. The ICC evaluation service evaluation reports

1 is done through the International Code Council.

2 Q. Okay. And would you as a board member be involved on
3 occasion with those evaluations yourself?

4 A. Yes, sir, if questions came up or they were disputed or a
5 problem arose typically a board would address that.

6 Q. Okay. Did I hear you say that you when you were with the
7 City of Charleston -- how long were you there?

8 A. Just shy of 26 years.

9 Q. And while you were with the City of Charleston you got in
10 there when you were 29 years old. Did you become chief
11 building -- chief building official for the City at 29?

12 A. Yes, sir.

13 Q. And did you also say that you were fire marshal as well?

14 A. Yes, sir. I became -- I became the fire official, fire
15 marshal, for the City of Charleston in 1986 concurrent with
16 that.

17 Q. Was there at the time you became both fire marshal and
18 chief building official were there any other individuals in
19 the entire State of South Carolina who held both of those
20 designations?

21 A. I believe there was an individual in Spartanburg.

22 Q. And what did you have to do in order to get those
23 designations?

24 A. I had to pass exams both at the -- well, certainly in
25 South Carolina I had to pass exams here and be qualified to

1 take those exams. Then you have to stay on a maintenance
2 program by taking continuing education courses to maintain
3 those certifications.

4 And then the same is also true on the national level. On
5 the national level it is a three-year cycle. In the State of
6 South Carolina it is a two-year cycle.

7 Q. And did you have to take tests in order to become a
8 national fire marshal as well?

9 A. Yes, sir. The national fire level, you take fire level
10 inspector one, fire level inspector two. And then on top of
11 that for the State of South Carolina you took a separate test
12 for the State of South Carolina.

13 On the building official side you do -- you take legal
14 management and technical at the national level, and you have
15 to pass all three modules.

16 MR. BUCKLEY: Your Honor, I move to qualify Mr. Smits as
17 a building code expert -- an expert in the field of building
18 codes and fire codes and inspection.

19 THE COURT: Any objection from the defense?

20 MR. ADKINS: No objections, Your Honor.

21 MR. KENDALL: No objection.

22 THE COURT REPORTER: I'm sorry, I didn't hear which
23 person said no objection.

24 THE COURT: Mr. Adkins said no objection and Mr. Kendall
25 said no objection.

1 THE COURT REPORTER: Thank you.

2 THE COURT: All right. Ladies and gentlemen, once again
3 sometimes people can give opinion testimony if they are deemed
4 as experts. This gentleman will be permitted to give expert
5 opinions or opinion testimony in the area of building codes
6 and fire codes. That does not mean you have to accept his
7 opinions. But it is evidence for you to use in any way that
8 you see fit. Please continue.

9 MR. BUCKLEY: Thank you, Your Honor.

10 Q. Have you reviewed the building codes that are applicable
11 to this case?

12 A. Yes, sir.

13 Q. And generally -- explain to the jury generally what the
14 national codes are, the state codes, and then local ordinances
15 that might apply to this case.

16 A. At the time that this project was undertaken the 2003
17 International Residential Code was the applicable code for
18 this project. The International Residential Code covers
19 one- and two-family dwellings.

20 This project consisted of numerous duplexes, dwellings,
21 townhouse style. But they are duplexes. So they are
22 considered two-family dwellings and fell under this code.

23 So the IRC governs. And that is a national code. But in
24 the State of South Carolina that code is mandated for adoption
25 by local jurisdiction.

1 Now concurrent with that, each jurisdiction may have some
2 distinct code requirements typically going above and beyond
3 what the national code requires because the national code is
4 simply a minimum standard. And I stress the word minimum. It
5 truly is minimal.

6 And in this particular case Folly Beach has an ordinance
7 that governs the sprinkling of one- and two-family dwellings
8 and commer- -- no, I'm sorry, two-family dwellings and
9 commercial buildings. Not single-family homes. At that time
10 the IRC did not contain the requirement for the sprinkling of
11 one- and two-family dwellings.

12 Q. Let me show you what has been marked as Exhibit 1044.
13 And then I am going to also hand you 141. But I want to talk
14 about 1044 first. And just take a second and look at that if
15 you would when we put it up.

16 MR. ATKINS: Whoa, whoa, Your Honor, this is not supposed
17 to -- the jury is not supposed to see this.

18 MR. BUCKLEY: They are just not supposed to take it back
19 to the jury. It is not to go to the jury.

20 THE COURT: Why don't you approach real quick.
21 (WHEREUPON, bench conference 5/8/19, 2:38 p.m.)

22 THE COURT: All right. Please continue.

23 Q. Is that Exhibit 1041, Ordinance 87-16 that was passed in
24 1987 by the City of Folly Beach, by the Town of Folly Beach?

25 A. Yes, sir. But if I may, it is 1044, not 1041.

1 Q. I'm sorry, 1044. And if you look in the upper left-hand
2 corner who was the mayor of Folly Beach at that time?

3 A. Richard L. Beck.

4 Q. Is he sitting in the courtroom today?

5 A. Yes, sir.

6 Q. Is he one of the owners at Palmetto Pointe?

7 A. To my knowledge yes, sir.

8 Q. Okay. Who signed that ordinance?

9 A. It is obviously signed by the clerk and then the mayor
10 and apparently members of council.

11 Q. Okay. And in the preamble of that ordinance what does it
12 say about why the ordinance is being passed? About the third
13 paragraph that begins with the word "whereas".

14 A. Whereas the studies indicate that other benefits
15 resulting from the installation of sprinkler systems include a
16 substantial reduction in the amount of water required for
17 firefighting purposes, increased design freedoms, and reduced
18 insurance rates for industrial and commercial structures.

19 Q. And then it goes on to implement a requirement for
20 installation of automatic sprinkler systems in both one- and
21 two-family dwellings on Folly Beach, correct?

22 A. Yes, sir.

23 Q. Okay. To your knowledge was there any other community in
24 the entire state of South Carolina that passed a sprinkler
25 ordinance that early?

1 A. Not that early, sir.

2 Q. Okay. They were the leader in the field?

3 A. At that time, yes, sir.

4 Q. Okay. And if you look at the -- there is a table,
5 Table 1?

6 A. Yes, sir.

7 Q. And it says in Table 1, sprinkler locations, areas where
8 sprinklers may be omitted. And on the left-hand column it
9 says area where sprinklers may be omitted. And you can do it
10 in bathrooms of certain sizes, small closets of certain sizes.
11 And you can do both of those areas on both single-family
12 dwellings and two-family dwellings, correct?

13 A. Yes, sir.

14 Q. And then you go down to open -- open attached porches.
15 And you can do -- you can eliminate open attached porches on
16 both single-family and two-family dwellings, right?

17 A. Yes, sir.

18 Q. And then carports and similar attached structures and you
19 can do it there as well with an asterisk, correct?

20 A. Correct.

21 Q. And what does the asterisk say?

22 A. The asterisk indicates that you can do that if the
23 attached structure is separated from dwelling units by a
24 minimum of a one-hour fire-rated construction.

25 Q. Okay. And the like -- the one I like is attics not used

1 for living or storage. And where does Folly's ordinance allow
2 those to be omitted?

3 A. You can omit it in a single-family dwelling but not in a
4 two-family dwelling.

5 Q. Okay. So it is mandatory in a two-family dwelling?

6 A. Per their ordinance, yes.

7 Q. Okay.

8 MR. BUCKLEY: Let's go on farther down the page, please,
9 Alex. That last section. There you go.

10 Q. Section 4, variances to this ordinance may be granted
11 after a hearing by the fire chief, building official, and
12 member of the building industry appointed by the City Council.
13 Have you seen any variance for this project that was granted
14 by the fire chief, the building official, and a member of the
15 building industry appointed by City Council at Folly Beach?

16 A. I have not.

17 Q. What is the number for the other exhibit I handed you,
18 please?

19 A. One forty-one.

20 Q. Okay. And is Exhibit 141 the same ordinance that has
21 actually been published into a code book?

22 A. Yes, sir, it has been what we call codified.

23 Q. Okay. And does it provide a history of that ordinance at
24 the end of Section 90.08? At the end of section 90.08 is
25 there a history for the ordinance?

1 A. Well, the following section, 90.09, they talk about
2 building height limits and they reference the fire department
3 is without the necessary equipment to fight fires or prevent
4 their spread to adjacent structures or floors.

5 Q. Let me show you ---

6 A. I'm sorry?

7 Q. --- my copy. I'm sorry.

8 (WHEREUPON, document provided to witness.)

9 A. Well ---

10 Q. Does that history that is provided in the ordinance book
11 indicate that the origin of 90.08 is 87-16 the ordinance
12 itself?

13 A. Right. I apologize. Yes, it does -- that indicates that
14 that came from that previous ordinance, yes.

15 Q. Okay. That is all I was trying to do. Look at your code
16 book, your IRC 2003 book, please.

17 A. Yes, sir.

18 Q. Go to Section 102.2.

19 A. Yes, sir.

20 Q. Let me make sure I am right on this one. Read or publish
21 the language in 102.2 which is the statewide building code for
22 one- and two-family dwellings that were operable for this
23 project -- right?

24 A. Yes, sir. At that time, yes sir.

25 Q. Okay. Publish that please.

1 A. Our 102.2, titled other laws. The provisions of this
2 code shall not be deemed to nullify any provisions of local,
3 state, or federal law.

4 Q. So as a building code official does that indicate to you
5 that the provisions of 203, 2003 IRC, do not nullify the
6 ordinance that has been marked as Exhibit 1041?

7 A. Correct.

8 Q. Okay. And if 1041 is more restrictive than the statewide
9 code, as a building code official which would you apply and
10 which controls?

11 A. Well, you are charged to enforce the local ordinance.

12 Q. Okay. Have you studied some of the documentation that
13 dates back to the period when this project was actually
14 underway?

15 A. Yes, sir.

16 Q. And among those documents have you seen a letter from Tom
17 Hall that was addressed to a fellow named Tommy Brown?

18 A. Yes, sir.

19 Q. And that is Exhibit 679.

20 MR. BUCKLEY: Let's go ahead and pull that up.

21 Q. And that is dated -- it is dated March 6, 2006; right?

22 A. Yes, sir.

23 Q. And who was Tom Hall?

24 A. Tom Hall at that time was the building official for Folly
25 Beach.

1 Q. Okay. And they are recapping a meeting they had in
2 February, the month earlier; and they were talking obviously
3 about having the City inform them of what the sprinkler
4 requirements would be; right?

5 A. Correct.

6 Q. And what requirements did Mr. Hall indicate would apply
7 to this project?

8 A. That each unit would be equipped with an NFPA 13D fire
9 sprinkler system and that per 90 -- it reads 90.3,
10 Subparagraph C. But I think there is consensus that that
11 should read 90.08, Subparagraph C. You omit -- you may omit
12 the garage area where there is a one-hour fire construction
13 separating the dwelling from the garage, which is consistent
14 with what the ordinance says. The clubhouse must also be
15 sprinkled in accordance with its primary occupancy. And the
16 area around the entrance gate must be widened to accommodate a
17 fire truck.

18 Q. In looking -- are you familiar with NFPA 13D?

19 A. Yes, sir.

20 Q. Does NFPA 13D pertain to general requirements for
21 sprinkler systems?

22 A. Right, it is the standard for installation.

23 Q. Okay. Does it tell you where you have to put them?

24 A. Yes, sir.

25 Q. And does it have a requirement for sprinkling attics in

1 certain situations?

2 A. Only if combustible space and used for storage.

3 Q. Okay. So if you have an attic that has -- that is
4 accessible and can be used for storage; clothes, Christmas
5 decorations, anything like that; does even NFPA 13D require
6 sprinkling in those attics for two-family dwellings?

7 A. Yes, sir.

8 Q. Okay. Do these -- you -- have you been in the attics of
9 these properties?

10 A. Yes, sir.

11 Q. And do these attics have access that is easy to get to?

12 A. Yes, sir. They have an actual pull-down ladder rather
13 than a folding stair.

14 Q. Okay.

15 A. So access is quite re-di-bal (ph).

16 Q. And do they have plenty of space upstairs to store
17 whatever you want to store up there?

18 A. Yes, sir.

19 Q. Okay. Does it matter whether a particular owner or not,
20 if you are a building code official, whether that particular
21 owner or not happens to store materials while they own their
22 property; or is it whether or not someone in the future could
23 as well?

24 A. If the possibil- -- the concern would be that the
25 possibility exists that it could be used for storage.

1 Q. Okay. Is there any question in your mind that 90.8 or
2 90.08 of the City of Folly Beach's code of ordinances required
3 the sprinkling of these attics at the time they were
4 constructed?

5 A. It does require it based on the ordinance and the actual
6 table chart that is in that ordinance.

7 Q. Okay. And have you seen any variance at all ---

8 A. No, sir.

9 Q. --- or any indication that there was an exception to
10 that?

11 A. No, sir. Because it would have had to have been formally
12 addressed in writing and there should be a record of it in the
13 building department.

14 Q. And Item 2 of Mr. Hall's letter says that for the purpose
15 of this section you may omit the garage areas where there is a
16 one-hour fire-construction separating the dwelling from the
17 garage. Is that a variance or is that just part of what the
18 statute says or the ordinance says?

19 A. That is exactly what the ordinance allows.

20 Q. Okay. And when these buildings were constructed did they
21 comply with that?

22 A. The one-hour fire construction? It's -- it's in
23 question.

24 Q. It is not only in question; there are many many
25 violations ---

1 A. There's code violations on separation, yes.

2 Q. Go also to the building code, Section 106.12. And I
3 think that is Exhibit 751.

4 MR. BUCKLEY: Your Honor, I move Exhibit 1041 into the
5 court record. Not into evidence but into the court record.

6 MR. COLE: Your Honor, I think he means 1044.

7 MR. BUCKLEY: Is it 1044?

8 MR. COLE: Yes.

9 MR. BUCKLEY: Keep me straight, please.

10 MR. COLE: Yes, and I -- and just trying ---

11 MR. BUCKLEY: The ordinance.

12 THE COURT: Why don't we -- what was the title? It was
13 the ordinance ---

14 MR. BUCKLEY: It is 1044.

15 THE COURT: The reports that you referred to?

16 MR. BUCKLEY: It is 1044. It is the ordinance itself,
17 Your Honor.

18 THE COURT: All right. It will be marked for
19 identification purposes only. Thank you very much.

20 MR. BUCKLEY: Thank you.

21 (WHEREUPON, Plaintiff's Exhibit 1044, was marked for
22 identification.)

23 Q. In looking at Exhibit 951 and Section 106.13 does the
24 building code have any requirements for meeting installation
25 instructions for manufacturer's products?

1 A. It does. Our 106.1.2, manufacture's installation
2 instructions: Manufacturer's installation instructions as
3 required by this code shall be available on the job site at
4 the time of inspection.

5 Q. Is that a goal you hope to achieve with a perfect
6 construction, or is that a minimum requirement?

7 A. That is a minimum requirement.

8 Q. And if you fail to meet that minimum requirement it is a
9 building code violation?

10 A. Yes, sir.

11 Q. And is each separate instance where that occurs a
12 building code violation?

13 A. Yes, sir.

14 Q. Okay. You actually attended the last session of Mr.
15 Schweickardt's deposition. Do you recall that ---

16 MR. KENDALL: Your Honor, if he is going to try to pit a
17 witness ---

18 MR. BUCKLEY: I'm not. I'm not.

19 MR. KENDALL: If he is going to talk about -- if you want
20 to talk about what was said in court yesterday, that is fine.
21 But to talk about something he said last week

22 THE COURT: I am not sure what the question is. So it is
23 hard for me to make a ruling at this point.

24 MR. BUCKLEY: Let me back up ---

25 THE COURT: If you want to approach.

1 MR. BUCKLEY: Let me back up and lay a foundation, Judge.

2 THE COURT: Okay. That would be fine. Thank you.

3 Q. As a building code official in performing your function
4 and as acting as an expert witness in that field do you review
5 opinions of other engineers and experts in cases you get
6 retained in?

7 A. Yes, sir.

8 Q. Okay. And is that part of your not only your job but
9 your responsibility to make sure that your opinions are
10 accurate?

11 A. Correct. Yes, sir.

12 Q. And in doing that did you attend a session of Mr.
13 Schweickhardt's deposition last -- two weeks ago?

14 MR. KENDALL: May we approach, Your Honor?

15 THE COURT: Uh-huh. Sure.

16 (WHEREUPON, bench conference 5/8/19, 2:57 p.m.)

17 THE COURT: Thank you.

18 Q. Have you visited enough attics at the project and
19 reviewed documentation produced by others, including
20 photographs, to determine whether or not there are -- whether
21 or not fire code violations in every attic at Palmetto Pointe?

22 A. There are.

23 Q. What is the purpose of a firewall where you separate two
24 units with that firewall?

25 A. The purpose of a firewall is to provide a fire barrier in

1 between occupied spaces, individually occupied spaces, or the
2 protection of certain compartments.

3 Q. What is ---

4 A. In this instance ---

5 Q. What is it intended to do?

6 A. It prevents the spread of fire for a certain length of
7 time from one occupied space to another and essentially buys
8 time for the fire to be controlled and not spread to adjacent
9 units.

10 Q. Does it also buy time for people in the neighboring
11 structure or dwelling to escape?

12 A. Absolutely.

13 Q. Okay. Have you observed firewall penetrations in the
14 garages where there is supposed to be a fire-rated, one-hour
15 fire-rated, assembly?

16 A. Yes, sir, I have.

17 Q. Have you observed firewall penetration by the sprinklers
18 themselves?

19 A. Yes, sir.

20 Q. Okay. Have you observed firewall penetration by wood
21 members?

22 A. Yes, sir.

23 Q. Structural wood members? How many firewall penetrations
24 would you estimate you have actually observed at Palmetto
25 Pointe?

1 A. Well, in each unit a minimum of a couple dozen. So you
2 have got 26. So there is 52 in a building. And each
3 penetration is considered a separate code violation. So you
4 are up -- you are basically up to like a thousand when you
5 consider all of those units.

6 Q. Well, if you do the math, 52 times 26 is 1,040. And is
7 that just in the attics?

8 A. Yes, sir.

9 Q. Okay. How about the tops of piers, the pilings?

10 A. Those would be code violations also. And I believe there
11 is a minimum of -- underneath the party wall there is a
12 minimum I think of four pilings that penetrate. So you have
13 got four per building. So you are looking at another 80 plus,
14 depending upon the number of piles.

15 Q. How about the area where the fire sprinkler system and
16 the potable or potable water that is actually is used by the
17 residence to supply fresh water, what do you call that
18 assembly or that -- is it called a closet?

19 A. Well, it is the fire sprinkler closet. What concerned me
20 is that the fire sprinkler closet is in the location directly
21 underneath the party wall. And so now you have a fire
22 sprinkler system that is actually sandwiched within the
23 firewall running up through the two levels in the attic area.

24 When the original design, at least to the extent of the
25 plans that I have seen, called for them to be totally

1 separated. But that is not what was built on site.

2 Q. Let's look at what you were talking about just now with
3 the plans that called for separation. Exhibit 705.

4 MR. BUCKLEY: And, Alex, Exhibit 111 please up on the
5 screen.

6 TECH ASSISTANT: Do you mean 705 or 111? I am confused.
7 which one?

8 MR. BUCKLEY: 705 and 111.

9 TECH ASSISTANT: 705 and 111.

10 MR. BUCKLEY: I am going to have him compare them.

11 TECH ASSISTANT: Okay.

12 (WHEREUPON, exhibits displayed.)

13 Q. Okay. What is Exhibit 111? It is up on -- it is up on
14 the screen.

15 A. I'm sorry.

16 Q. It says P101 down in the lower right-hand corner.

17 A. Oh, okay. Okay. Yeah, it is not quite clear.

18 Q. You can stand up if you need to.

19 A. Yeah, it is clearer -- okay, on this plan the ground
20 floor where the garage is, is referred to as the first floor.
21 And it shows the plumbing layout on what I would call the
22 ground floor. It is called the first floor here (pointing).

23 But it shows that the entry of the water supply system is
24 actually on each side of the building, meaning it runs into
25 each unit separately. In the -- you can see the one-inch

1 water service for meter up in wall space. And it is on the
2 outside of each unit. Okay.

3 What we have in the field is that in this area here
4 (pointing), this is the party wall, okay, at the ground level.
5 What we have in the field is that the fire sprinkler system
6 panel is located here (pointing) and then runs up somehow into
7 this party wall and is actually sandwiched within the party
8 wall.

9 And of course, well, this plan just confirms that the
10 water supply was originally intended to come from outside each
11 individual structure on its outside wall and not on an
12 interior wall.

13 Q. And look at the actual sprinkler plan itself if you
14 would.

15 THE COURT: And what exhibit is that?

16 Q. What exhibit is that?

17 A. It is 705.

18 Q. And what does that show?

19 A. Seven-oh-five shows the sprinkler system as it was
20 originally designed. Which shows again the supply comes from
21 the exterior of the building of each unit, is contained within
22 that unit. And right here (pointing) this is the party wall,
23 and there is no crossovers or penetrations indicated.

24 So they had two totally separate systems, one for each
25 unit. And no indication where that joint fire system

1 sprinkler box was located where it is now in the field.

2 Q. So in looking at both of those exhibits, 705 and 111, was
3 that system built?

4 A. No, what we have built in the field is nowhere close to
5 what is shown on these drawing.

6 Q. Have you ever seen any plans for either the sprinkler
7 system or the construction of this building that show ---

8 A. I have not seen ---

9 Q. --- that show what was built and what exists out there
10 today?

11 A. No, sir, ---

12 Q. Have you ever seen ---

13 A. --- I have not.

14 Q. Exhibit 705, is it signed or stamped by an engineer?

15 A. No, sir.

16 Q. Exhibit 705, is it signed or stamped by any building code
17 official?

18 A. No, sir.

19 Q. And Exhibit 111 was it signed -- was that -- sets out
20 plans -- you reviewed the entire set of plans, right?

21 A. Yes, sir.

22 Q. Was it signed or stamped by any building code official?

23 A. No, sir. I have not seen any plans signed and sealed for
24 this project.

25 Q. Okay. Have you seen any documentation, any drawing, any

1 letter, any memo, any email, anything whatsoever that would
2 indicate that there was any oversight by a building code
3 official or an engineer to approve what is built and exists at
4 Palmetto Pointe today as far as the fire sprinkler system is
5 concerned?

6 A. No, sir.

7 Q. Okay. The fire system cabinet or closet itself, it is
8 right outside of the garage; it is between the two units?

9 A. Yes, sir.

10 Q. What is directly above it?

11 A. There is -- well, there is exterior decking. And there
12 is a ceiling over where if you parked your vehicle outside of
13 the garage door it is covered by that ceiling.

14 The concern there would be if heaven forbid a vehicle
15 caught on fire basically sitting in that area it would affect
16 both sprinkler systems.

17 And there are no sprinkler heads in the carport. I call
18 it a carport area. So nothing would trigger the system. And
19 yet the fire sprinkler system could be damaged.

20 Q. Let me show you three photographs that have been marked
21 as Exhibit 1,000. And what do those photographs show?

22 A. Those are photographs of one of those sprinkler --
23 sprinkler system cabinets.

24 Q. Okay. And if you look to the right of the insulated
25 pipe --

1 MR. BUCKLEY: Can you go ahead and pull that up, Alex?
2 You don't have it?

3 (WHEREUPON, Mr. Buckley confers with technician.)

4 Q. If you look to the right of the insulated -- the
5 insulation on the pipe, what is that white material?

6 A. That is nonstructural sheathing. Or part -- partly
7 insulate material.

8 Q. Is it foam?

9 A. Yes, sir.

10 Q. Okay. And is it fire-rated?

11 A. No, sir.

12 Q. Is the cabinet itself a code violation, a fire code
13 violation?

14 A. Yes, sir, because of where it is located it needs to be
15 protected.

16 Q. Okay. What is that -- let me get a better picture of
17 that. What is that black thing with the stainless steel
18 screws in it?

19 A. We have found that this is actually a product
20 manufactured by Rain Bird who does irrigation systems, lawn
21 sprinkler systems, and was installed as a backflow preventer
22 on the potable water side.

23 And the reason for that is you need a backflow preventer
24 because the sprinkler system gets to the point where it
25 contains dormant, stale water because it only gets flushed out

1 typically on an annual basis.

2 And so you don't want that water going into your
3 household system and contaminating your potable water. The
4 idea would be you have a backflow preventer that would close
5 if the fire sprinkler system gets triggered. But in this case
6 this is a misapplication of a product because this is only
7 intended to be used on irrigation systems where it ties into a
8 potable water systems such as your home residence.

9 And these were found to be manually set in the open
10 position so that even when it got a signal that it should be
11 going into the closed position because the sprinkler is
12 getting set off, it wouldn't do that. It would be open.
13 Which is not what you want.

14 Q. When you have that equipment in your yard and your
15 sprinkler system, how does it operate; is it open or closed
16 all of the time until it is activated by an electric signal?

17 A. Well, yes, it is in the closed position, okay. And when
18 you turn on your sprinkler system, whether you do it manually
19 or electronically there is an electric trigger that goes to
20 that unit and opens up that unit to allow the water to flow;
21 but it won't flow back. And that is why it is always off when
22 the sprinklers aren't running.

23 You don't want the water that is in your irrigation
24 system or your sprinkler backing up into your house.

25 Q. So it is intended to be used where it is in the closed

1 position. An electrical signal comes and opens it. If it is
2 manually opened and an electrical system comes through it,
3 what happens?

4 A. It just remains in the open position.

5 Q. So it doesn't do anything as a back flow ---

6 A. It doesn't do anything.

7 Q. --- as a back flow preventer?

8 A. No, sir.

9 Q. Okay. Is that a building code violation?

10 A. Yes, sir.

11 Q. Why?

12 A. It is a health hazard for one thing. It is also a misuse
13 of a product.

14 Q. Okay. Have you ever in your life inspected a fire
15 sprinkler system or a potable water system where you found
16 Rain Bird solenoids being used as backflow preventers?

17 A. Only in irrigation system.

18 Q. As to your ---

19 A. I'm sorry.

20 Q. --- in your home -- in homes have you ever been -- have
21 you ever seen that before?

22 A. No, sir.

23 Q. Okay. With the location as drawn on the plans for the
24 sprinkler system that we have looked at and the plans for the
25 plumbing that we have looked at, if the sprinkler system

1 equipment had been located in those areas as opposed to being
2 located in the middle between the two units, would that have
3 been capable of avoiding firewall penetrations for the
4 sprinklers?

5 A. It would have avoided it completely.

6 Q. Okay. With the location and the pipes running up, there
7 is nowhere for the pipes to run but through the middle of the
8 firewall; right?

9 A. Correct.

10 Q. And you have to penetrate the firewall at every floor,
11 right?

12 A. Right.

13 Q. And do they penetrate the firewall in the attic as well?

14 A. Yes, sir.

15 Q. Okay. It is impossible to install that system that is
16 shown nowhere on the plans without many penetrations of the
17 firewall?

18 A. And if I may add, not just the firewall but
19 penetration -- in essence by putting those pipes, sandwiching
20 them in the firewall, you are creating what is called a chase
21 situation. Because you are actually penetrating the floor
22 assembly also in the garage area. And as you work your way
23 up, unless it is properly sealed and draft stopped, again it
24 is a code -- and it is another code violation.

25 Q. And if a fire starts low down, maybe in the electrical

1 components of the cabinet itself, the whole firewall acts like
2 a chimney?

3 A. All would be lost.

4 Q. Have you ever seen anything like that?

5 A. No, sir.

6 Q. What is UL, Underwriters Laboratory?

7 A. They provide the testing and compile actual directories
8 of products and assemblies that have been tested for certain
9 fire ratings.

10 Q. What is a UL approved assembly, what does -- tell the
11 jury what that means.

12 A. That means that assembly, such as a firewall, has
13 actually been tested to a certain rating. And that is what
14 architects, engineers, go to when they specify a certain
15 firewall for a certain rating, whether that be -- it could be
16 one hour, two hours, up to four hours. Okay.

17 And they reference that. And the UL listing shows how
18 that wall gets put together, whether it be metal studs, wood
19 studs, the number of layers of sheet rock, the dead air space
20 you may have to have in between, the spacing between
21 electrical boxes, anything that may be involved in that
22 assembly. And the goal is to have as few penetrations as
23 possible in any UL assembly.

24 Q. Have you studied those UL assemblies both in your career
25 and for purposes of your testimony here today?

1 A. Yes, sir.

2 Q. Have you found any UL assembly that will repair the
3 firewall penetration at this project?

4 A. Certainly not for the wood penetrations in the attic that
5 we can see.

6 Q. Have you ever seen -- have you ever seen wood
7 penetrations in an attic like this project is constructed?

8 A. No, sir.

9 Q. Typically are the trusses for the roof that actually hold
10 the roof -- truss roof system up, with sheathing up and the
11 shingles, typically do they run parallel to the wall so they
12 don't run through it?

13 A. Typically they would run parallel to a party wall.

14 Q. Okay.

15 A. Yes, so they don't ---

16 Q. Here?

17 A. But they don't have intersecting members.

18 Q. Here where the fire -- with the fire-rated wall have you
19 ever seen roof trusses penetrating fire-rated wall?

20 A. No, sir. Not penetrating them, no.

21 Q. Other than here?

22 A. No, sir, I have not.

23 Q. Okay. And is there any UL-rated assembly that you have
24 ever seen that would comply or pass muster with a building
25 code or fire -- a building code official or fire marshal such

1 as yourself to remedy that situation?

2 A. No, sir.

3 Q. Might all of that have to be reframed?

4 A. Possibly, yes. Certainly whatever the solution ends up
5 being or -- it is very labor intensive. And it is probably
6 best to simply start clean, frame it up right.

7 Q. Can you even -- can you even get to some of those
8 penetrations because of where they are located in a low slope
9 or behind electri- -- mechanical equipment?

10 A. That would be my concern. I mean you would basically
11 have to disassemble this party wall in order to get a feel for
12 every penetration of that membrane or through penetration.

13 Q. A thousand forty times just for the attic?

14 A. Yes, sir.

15 Q. On each of these units, right?

16 A. Yes, sir.

17 Q. But it is no big deal, is it?

18 A. It -- well, it wouldn't be if it was built right.

19 Q. Is this a minor problem; is this an insignificant set of
20 technical violations in your opinion?

21 A. No, sir. These are -- this is a life safety concern both
22 for the protection of life and property.

23 Q. Should sprinklers be installed in those attics while a
24 solution is worked out for how to address those penetrations,
25 given the fact that there is not a UL-approved assembly?

1 A. In my opinion, yes.

2 Q. Would that at least buy some time in the event there is a
3 fire, particularly in the attics?

4 A. Yes, sir.

5 Q. We talked about fire separation walls. You recall the
6 fire that was pretty infamous here in Charleston ---

7 MR. KENDALL: Objection, Your Honor.

8 THE COURT: All right.

9 MR. KENDALL: No relevance here.

10 THE COURT: Okay. Again, I don't know what the question
11 is. If you want to rephrase it ---

12 MR. KENDALL: He was about to talk about another fire ---

13 THE COURT: Uh.

14 MR. KENDALL: --- at another location.

15 MR. BUCKLEY: I am. Sofa Superstore.

16 THE COURT: Okay.

17 (WHEREUPON, attorneys speaking with each other as approaching
18 bench conference:)

19 MR. BUCKLEY: (Inaudible) ... Complete Building Corporation
20 (inaudible)...

21 (WHEREUPON, bench conference 5/8/19, 3:19 p.m.)

22 Q. From your standpoint as both a fire marshal and a
23 building code official these structures are dangerous?

24 A. Yes, sir.

25 Q. Do you know how -- is it a job of a building code

1 official to tell someone how to fix something like this?

2 A. No, sir.

3 Q. Okay. Would you ever rely on an engineering judgment
4 prepared by somebody at a company selling products where the
5 engineering judgment was not prepared by an engineer?

6 A. No, sir.

7 Q. Or where it was unknown what the qualifications or
8 experience of the authors were?

9 A. No, sir. At a minimum it would have to come from a
10 professional engineer, preferably a fire protection engineer,
11 to be submitted, you know, in his -- in the proper format,
12 signed and sealed.

13 Q. And at Folly Beach would that professional engineer have
14 to be licensed in the State of South Carolina?

15 A. Yes, sir.

16 Q. Have you ever seen any proposed fix that you would accept
17 as a fire marshal or a building code official for the walls
18 and the penetrations at this project, the firewalls?

19 A. No, sir.

20 Q. Did the owners at Palmetto Pointe do anything to cause or
21 contribute to that problem?

22 A. Certainly not to my knowledge, no.

23 Q. As a building code official sometimes you see problems
24 that are open and obvious, and sometimes you have to look for
25 other problems that might be hidden; right?

1 A. Yes, sir.

2 Q. Okay. Given the extent and number of the open fire
3 violations, fire code violations, and building code
4 violations, is it reasonable from your point of view as a
5 building code official and fire marshal to infer that there
6 are thousands more that we haven't seen?

7 A. Yes, sir. And as a matter of fact I made reference to
8 that I believe in my initial report, that based on the
9 violations that you could visibly see it started raising the
10 question well what is with the party wall that is finished and
11 you can't see that is going through those occupied spaces.

12 Q. Have you seen electrical penetrations through the
13 fire-rated assemblies?

14 A. Yes, sir.

15 Q. Are they properly fire-caulked?

16 A. No, sir.

17 Q. If you have a CPVC fire sprinkler system that penetrates
18 a firewall can you just fire-caulk it?

19 A. Well, it is unusual to have a fire sprinkler pipe
20 actually penetrate the firewall. And if you do end up sealing
21 it, it is not a simple task because you -- you are required to
22 keep a certain amount of annular space that -- the space that
23 is between the pipe and the sheetrock in this case, okay, that
24 space has to be filled with a certain depth with the fire
25 caulk because as the heat rises that pipe is going to get

1 damaged. And of course if it is a sprinkler pipe that kind of
2 defeats the whole purpose.

3 Q. At what point does the fire caulk actually work or begin
4 to work?

5 A. As soon as the penetration starts to fail, the fire caulk
6 starts expanding and will actually seal the opening where the
7 pipe was.

8 Q. Let me get really simple. What causes it to expand?

9 A. Heat.

10 Q. Heat?

11 A. Yes, sir.

12 Q. So the fire has to get to the sprinkler pipe before the
13 pipe sealant even starts to work?

14 A. Correct.

15 Q. Okay.

16 A. And in the attic those pipes are vulnerable because there
17 is no sprinkler system in the attic, and the spread of fire
18 can readily occur because the firewall in the attic has been
19 compromised.

20 Q. And then you have burned through your CPV -- does CPVC
21 burn?

22 A. It will certainly melt, yes, sir.

23 Q. Yes. And if you burn through your sprinkler system in
24 the attic it doesn't do any good in the rest of the house,
25 does it?

1 A. Correct.

2 Q. If you burn through it on the second floor and the wall
3 of the fire -- of the fire and assembly, it doesn't do any
4 good for the rest of the house; right?

5 A. If the fire -- if the fire sprinkler gets damaged in the
6 attic it offers no protection to the occupied spaces below.

7 Q. Okay. How many years have you been doing this?

8 A. I would have to say 38 years now.

9 Q. In the course of 38 years how many different buildings
10 have you examined from a code evaluation perspective or a
11 perspective of a fire marshal?

12 A. Thousands.

13 Q. Have you ever seen any building in your entire career or
14 any set of buildings in your entire career where the fire --
15 where there were this many code violations?

16 A. Not on a singular project, no, sir.

17 Q. Okay. Well, you might have seen a total of them in all
18 the projects you have looked at ---

19 A. Correct.

20 Q. Have you ever seen any project that even came close?

21 A. No, sir.

22 Q. Okay. Explain to the jury -- I'm not sure I understood.
23 When you go from floor to floor, when you go from the garage
24 or concrete floor up into the first floor living space, when
25 you go from the ceiling of the garage into the subfloor of the

1 first floor, the first living floor, ---

2 A. Yes, sir.

3 Q. --- what happens there?

4 A. Well, since it is not open and you can't see it I have to
5 make an assumption that the pipes are coming up through that
6 assembly.

7 And that assembly is also supposed to be a fire-rated
8 construction per Folly's ordinance and the one-hour separation
9 that they say is required between where you store your car and
10 the livable space. So that penetration of that pipe also has
11 to be properly fire-caulked. And that in and of itself is
12 another violation.

13 And then you don't want to create a chase. So at any
14 time it penetrates a horizontal member on its way to the
15 attic, that is another code violation. That is a penetration
16 that has to be properly addressed.

17 Q. And each one of those chases, does that act as a small
18 chimney where air is accelerated through that hole?

19 A. Correct, and that is where the expression "chase" comes
20 from.

21 Q. From a fireplace chase?

22 A. Yes.

23 Q. Okay.

24 MR. BUCKLEY: Your Honor, we would move Exhibit 1,000
25 into evidence which is the three photographs we talked about.

1 MR. ATKINS: Without objection, Your Honor.

2 MR. KENDALL: No objection.

3 THE COURT: All right. It will be marked collectively as
4 Plaintiff's 1,000.

5 (WHEREUPON, Plaintiff's Exhibit Number 1,000 was admitted into
6 evidence.)

7 MR. BUCKLEY: Okay. And again I would -- Exhibit 751
8 which is the actual ordinance book itself, I would make that a
9 court's only.

10 THE COURT: It will be marked for identification purposes
11 only.

12 MR. BUCKLEY: Thank you.

13 THE COURT: Thank you.

14 (WHEREUPON, Plaintiff's Exhibit Number 751, was noted as
15 marked for identification.)

16 MR. BUCKLEY: And Exhibit 679 which is the letter from
17 Tom Hall to Tommy Brown, March 6, 2006, we would introduce
18 that as well.

19 THE COURT: For ID purposes or -- what letter was that?

20 MR. BUCKLEY: That is 679, Your Honor.

21 MR. KENDALL: No objection.

22 THE COURT: All right. Appears to be no objection.
23 Thank you.

24 MR. ATKINS: No objection, Your Honor.

25 THE COURT: Okay.

1 (WHEREUPON, Plaintiff's Exhibit Number 679 was admitted into
2 evidence.)

3 MR. BUCKLEY: Thank you, Mr. Smits. Answer any questions
4 these other lawyers may have.

5 THE WITNESS: Yes, sir.

6 MR. KENDALL: Thank you, Your Honor.

7 THE COURT: And if you want, Mr. Kendall, we can take a
8 brief five-minute recess at this time.

9 MR. KENDALL: That might help just shuffle some papers
10 and ---

11 THE COURT: Yeah, that is no problem. May ease the time.

12 MR. KENDALL: Thank you.

13 THE COURT: Ladies and gentlemen, we will take an
14 afternoon break at this time and we will resume in about five
15 or ten minutes. Thank you very much.

16 (WHEREUPON, jury exits courtroom 5/8/19, 3:30 p.m.)

17 (WHEREUPON, Mr. Cole begins to approach bench.)

18 MR. COLE: Your Honor, two things.

19 THE COURT: Okay.

20 MR. COLE: Are we clear?

21 THE COURT: Do you need everybody up here?

22 MR. COLE: I don't know. Maybe. First, I was confused
23 when Edward was putting -- I think he had the wrong numbers.
24 So you might want to clear that up.

25 THE COURT: Okay. Just let me know what I need to clear

1 up.

2 MR. COLE: Second, I want to put it on the record a
3 motion for a mistrial based off of Mr. Buckley using the
4 statement about the Sofa Super Store. Because I believe that
5 is especially here in Charleston that is very prejudicial
6 statement that Your Honor ruled ---
7 (WHEREUPON, clarification by the Court that we are on the
8 record.)

9 THE COURT: Are you making a motion for a mistrial?

10 MR. COLE: I would like to make a motion for a mistrial
11 based off of Mr. Buckley's statement that he was trying to
12 equivocate this property to the Superstore.

13 Even though this is not my issue I think that prejudices
14 the case. And even though Your Honor ruled that that was not
15 admissible, that still the jury heard that comment to try to
16 associate that with the case. And so that is not in evidence,
17 but it is something that was a statement that was given.

18 I realize that typically motions are supposed to be made
19 contemporaneous with the thing when it comes out. But in this
20 case, like the Toyota -- the Toyota case where they use the
21 Hiroshima bomb during closing statement and the Court said it
22 was so prejudicial that you are still able to use it.

23 I wanted to wait until we had our first break before I
24 brought this up. Otherwise it could cause additional
25 problems.

1 THE COURT: Well, the objection was made
2 contemporaneously. And I think the way I read the case law is
3 it is the next proper time you can make a motion. So I am not
4 going to fault you for making that at the first break ---

5 MR. COLE: Thank you.

6 THE COURT: --- after the objection was made. All right.
7 So just basically ---

8 MR. COLE: Basically it is highly prejudicial and it was
9 information that was not put into evidence. And even though
10 the fire issues are not my -- a part of my case, I think it
11 prejudices, you know, me and my client now because of the fact
12 that that was brought out to basically focus into that same
13 prejudice.

14 THE COURT: Okay.

15 MR. REESER: And I will join -- I will join in that
16 motion, Your Honor.

17 THE COURT: I think what was -- you know, we can have the
18 court reporter read that portion of the transcript back. But
19 I think I said I don't know what he is going to ask. And I
20 believe Mr. Kendall responded he was going to ask about
21 another case. And then I think Mr. Buckley said right in
22 front of the jury, yeah, the Sofa Super Store case. And then
23 I think he said on the way to the bench CBC built them too or
24 something along those lines.

25 And, ultimately, you know, it is hard for me to tell

1 sitting here what they heard. You have got a great voice that
2 carries greatly, for better or worse in times like this.

3 But, you know, I will think -- I will think about this
4 for a few minutes.

5 MR. COLE: Thank you, Your Honor.

6 THE COURT: You know, do all defendants join in this
7 motion?

8 MR. WILSON: It is joined. And I was in the back of the
9 courtroom and I heard it as well.

10 MR. BUCKLEY: And I think -- I think it was admissible.
11 I know that you disagree.

12 THE COURT: Sure.

13 MR. BUCKLEY: I know you disagree.

14 THE COURT: Oh, I mean I understand that, yeah.

15 MR. BUCKLEY: But ---

16 THE COURT: You heard my ruling but.

17 MR. BUCKLEY: On the issue of punitive damages. But I
18 think the way to handle it, Your Honor, is just to instruct
19 the jury that if they heard anything about another case or
20 another fire to disregard it ---

21 THE COURT: Uh-huh. Yeah.

22 MR. BUCKLEY: --- and they cannot consider it in this
23 case.

24 THE COURT: That is my first line of thinking is would be
25 to issue a curative instruction.

1 MR. COLE: Well, here's ---

2 THE COURT: But then I know you think that just calls
3 more attention to it.

4 MR. COLE: Right, and that is the problem is that a
5 curative instruction it calls more attention to it. And so
6 that is the problem with this that if it is something that
7 Your Honor has already ruled is not supposed to come in and it
8 is so prejudicial because that is still a recent issue that
9 happened in Charleston County that I know a lot of people are
10 familiar with that, that you doing a curative instruction
11 creates -- you know, escalates the problem. And so that is
12 the issue I have. And I just wanted to make sure I brought it
13 up here.

14 THE COURT: If I were to do some sort of a curative
15 instruction what would you want to say?

16 MR. COLE: I don't know. I don't know that you can cure
17 it ---

18 MR. BUCKLEY: He has got the burden to prove that.

19 MR. COLE: So I mean it is forget that he said something
20 that is not in evidence. And that is difficult to do. If I
21 can come up with something on a break I will come back, Your
22 Honor.

23 THE COURT: We have a break. Try to think about it.
24 Because that is what I am leaning towards, issuing a curative
25 instruction. I certainly don't want to call -- say anything

1 that would blame them anymore but. All right. I will think
2 about all sides of it. Thank you. We will be at ease.

3 (WHEREUPON, break 5/8/19, 3:35 p.m.)

4 (WHEREUPON, resume following break, 5/8/19, 3:48 p.m.)

5 THE COURT: Noted for the record Mr. Atkins joins in
6 defense joint motion for a mistrial.

7 While I have considered your motion, I am not inclined to
8 grant your motion for a mistrial. But I am happy, apart from
9 what was already stated on the record earlier, I am happy for
10 you to enter anything else you deem relevant for purposes of
11 the record at this point in time. And I will certainly
12 entertain a potential curative instruction if you wish.

13 I will note for the record, obviously at my opening and
14 at my closing I always indicate to the jury that no statements
15 by the attorneys are ever to be considered evidence in a case
16 in any way, shape or form. So I think that covers the
17 statement without potentially drawing more attention to it at
18 this point in time.

19 But if you have anything additional that you would like
20 me to say, I would be happy to entertain that.

21 MR. COLE: Your Honor, I think just for the record, one,
22 I don't know a curative instruction that we can ask for here.
23 So I just stand on the fact that I think it is so prejudicial.
24 On that. So I will stand on that.

25 THE COURT: Okay.

1 MR. COLE: And then second we can either proffer some of
2 the people in the back just so it is on the record that they
3 could hear in the back at least Superstore and CBC. As, you
4 know, if they would have a similar perspective to who is on
5 the jury. We can waive that and we will concede to that
6 people in the back row could hear at least those terms, Sofa
7 Super Store and CBC, and then we can move on.

8 THE COURT: Okay. However you want to proceed is -- I
9 believe you said -- Mr. Buckley, Sofa Super Store, and at some
10 point CBC.

11 Would you like to be heard, Mr. Lucey?

12 MR. LUCEY: Only if the Court would like to hear from us.

13 THE COURT: I am happy to hear from you.

14 MR. LUCEY: I think that we would stipulate that the
15 people in the back could hear the reference to Sofa Super
16 Store. We don't think it is prejudicial for a number of
17 reasons.

18 But beyond that, I do not believe the people in the back
19 could have properly heard it was built by CBC too; because I
20 had difficulty hearing that. And I don't think it is proper
21 to call them up here. I think the record is fine. I think we
22 are short on time. We are closed on Friday. We need to get
23 on with the trial if the Court pleases.

24 THE COURT: Okay. I appreciate that. All right. Well,
25 at this point in time I am not inclined to give a curative

1 instruction if you don't have one proposed.

2 Like I said, I think that my standard language in both
3 the opening and certainly it will happen again at the close
4 which instructs the jurors specifically not to consider any of
5 the statements or objections made by the attorneys to be
6 evidence in any way, shape or form. I will reiterate that.

7 If there is something else you like for me to add, after
8 you think about this for a few days, at the close, you know, I
9 can consider it at that time as well.

10 MR. KENDALL: Your Honor we would like to actually
11 proffer the statement or the -- what the witnesses who are in
12 the back of this courtroom heard.

13 THE COURT: Okay.

14 MR. KENDALL: So that we can preserve that for the
15 record.

16 THE COURT: No problem with that. Who is it specifically
17 you would like to ask?

18 MR. KENDALL: First of all I think Mr. Wilson has
19 indicated that he testi- -- he heard. So ---

20 MR. LUCEY: Mr. Wilson is not an objective third party.
21 Mr. Wilson is a counsel for one of the parties in the case.
22 He in fact participated in jury selection. Most of the other
23 people here are either clients or they are insurance adjusters
24 that insure some of the defendants.

25 I have stipulated as to the fact that you could hear Sofa

1 Super Store. That is what the prejudicial comment was. And
2 you really couldn't hear the CBC. But either which way they
3 have got their argument preserved.

4 MR. BOYD: We could hear it from right here. He is --
5 what he heard -- and he is a party to the plaintiff who is
6 objecting to the motion. So, Your Honor, just for the
7 record ---

8 THE COURT: I don't mind -- let's - let's move on with
9 it. I don't mind hearing -- yes, sir, Mr. Wilson.

10 MR. WILSON: Yes, Your Honor.

11 MR. BOYD: Do we need to put him under oath or are you
12 just going to let him speak as an officer of the court?

13 THE COURT: He is an officer of the court. I am not
14 going to require him to be under oath. You are sitting in it
15 looks like the second pew. Is that ---

16 MR. WILSON: Back pew on the right-hand side.

17 THE COURT: Third pew. Okay.

18 MR. WILSON: Yes, ma'am.

19 THE COURT: All right.

20 MR. WILSON: I clearly heard Mr. Buckley say Super --
21 Sofa Super Store. I heard CBC, but it was indeed difficult to
22 hear. I must admit I am listening for it because I know they
23 are a party. But it sounded to me like that.

24 THE COURT: Okay. I appreciate you for that information.

25 MR. LUCEY: And I want the record to reflect please that

1 when Mr. Wilson says he is on the right-hand side, the jury
2 box is on the left-hand side and the counselor was facing the
3 bench to the right when he made the statement. So he was
4 facing indirectly more towards Mr. Wilson than to the jury.

5 MR. WILSON: I guess I should be clear. I meant to the
6 right as the judge is facing the jury ---

7 THE COURT: Okay.

8 MR. WILSON: --- on the same side as the jury is that is
9 relevant.

10 THE COURT: Got it. And we are in courtroom 3A in
11 Charleston County, for the record too. Okay.

12 MR. KENDALL: Your Honor, there are others. But we will
13 just suffice that we have preserved our record of a proffer we
14 would like to make.

15 THE COURT: Sure. I think it has been thoroughly
16 preserved.

17 All right. Anything else before I bring the jury back
18 in.

19 MR. LUCEY: No, Your Honor.

20 THE COURT: All right. So are we set on a method of
21 cross-examination at this point in time; do we know who is
22 going to go first and all of that?

23 MR. KENDALL: I will go first.

24 THE COURT: Okay.

25 MR. KENDALL: And I will be fairly brief.

1 MR. COLE: I will be quick. I am not going ---

2 THE COURT: I am not going to hold you to any time limit.
3 I just wanted just so we are prepared.

4 All right. Give me the jury back in. Thank you very
5 much.

6 I am going to hand this note also to the court reporter.
7 Over the break the jury elected Number 67, Walter Doan, to be
8 the foreman of the jury.

9 (WHEREUPON, Court's Exhibit Number 2, jury note, marked for
10 identification.)

11 THE COURT: Can we start at 9:00 in the morning; is that
12 okay with ya'll?

13 MR. LUCEY: Yes, Your Honor.

14 (WHEREUPON, jury enters 5/8/19, 3:54 p.m.)

15 THE BAILIFF: All jurors are present.

16 THE COURT: All right. Thank you, ladies and gentlemen.
17 It is my understanding -- Mr. Doan, how do I pronounce your
18 last name?

19 MR. DOAN: You got it right.

20 THE COURT: Has been elected foreman of the jury; is that
21 correct?

22 MR. DOAN: Yes, ma'am.

23 THE COURT: All right. Mr. Doan, that doesn't arise to
24 too much. However, you will sort of be the liaison between
25 the jury and the court if need be if there are any questions

1 at any point in time or communications that need to be made
2 between the rest of the jury and the court you will sort of be
3 the go-to person for that. And then at the end of the trial
4 you will actually be the person who will sign and date the
5 verdict form, okay.

6 MR. DOAN: Yes, sir.

7 THE COURT: That is basically all that means for now.
8 And all we need you to do is just remain in that seat for the
9 remainder of the trial. Anybody else can move around and sit
10 where ever you want. All right. Thank you very much. We are
11 ready to proceed.

12 Mr. Kendall.

13 MR. KENDALL: Thank you, Your Honor.

14 **CROSS-EXAMINATION BY MR. KENDALL OF DOUGLAS SMITS:**

15 Q. Mr. Smits, as a building code official when you were with
16 the City of Columbia one of the things - City of Charleston -
17 one of the things you did was to -- your department would do
18 is to receive plans from builders to approve for construction;
19 correct?

20 A. Yes, sir.

21 Q. And that is part of the permitting process?

22 A. Yes, sir.

23 Q. And part of the documents that had to be submitted would
24 be things like fire protection and fire suppression systems,
25 correct?

1 A. Yes, sir.

2 Q. And what you have observed -- and those things are
3 reviewed and approved by the building official before a permit
4 for construction is issued, correct?

5 A. Normally, yes, sir.

6 Q. And then at the completion of the construction or
7 actually even during construction there are periodic
8 inspections by the building official to ensure that the
9 construction is being done in conformance with the plans that
10 were approved, correct?

11 A. Correct.

12 Q. And at the end of construction there is a final
13 inspection before a certificate of occupancy is issued,
14 correct?

15 A. Yes, sir.

16 Q. And when your department would issue a certificate of
17 occupancy it was assuring the owner that to the extent
18 reasonably understandable the buildings had been built
19 according to the plans that had been submitted, correct?

20 A. Correct. But the code contains language, if I may,
21 Section R110, certificate of occupancy, use and occupancy: No
22 building or structure shall be used or occupied and no change
23 in the existing occupancy classification of a building or
24 structure or a portion thereof shall be made until the
25 building official has issued a certificate of occupancy

1 therefore as provided herein. Issuance of a certificate of
2 occupancy shall not be construed as an approval of a violation
3 of the provisions of this code or of other ordinances of the
4 jurisdiction.

5 Q. Understood. But the point being that the building code
6 official may not be able to be blamed for not catching
7 something, but the fact is that during the course of all of
8 the construction there is the building codes official and the
9 Department are involved in the process and at the end of the
10 job they issue a certificate of occupancy; correct?

11 A. Based on a very limited number of inspections.

12 Q. Correct. Now the -- we -- you looked at an Exhibit 679
13 that involved the -- from the City -- from the Town of Folly
14 Beach. Do we have that document, the letter from Mr. Hall to
15 Mr. Brown; do you have that handy?

16 A. I don't have that here.

17 Q. It was handed to you during the -- did you hand it back?

18 A. I believe I may have.

19 Q. Okay. Do you recall ---

20 A. Or it came up on the screen.

21 Q. It maybe came up on the screen.

22 A. Yes, sir.

23 Q. Do you recall the letter was from Mr. Hall to Mr. Brown,
24 correct?

25 A. Yes, sir.

1 Q. Do you understand Mr. Brown was the developer of the
2 project?

3 A. As I understood it, yes, sir.

4 Q. Right. Because the developer is the one who works with
5 the design professionals in figuring out how this project is
6 going to get designed, correct?

7 A. Yes, sir.

8 Q. And so that communication goes from the Town to the
9 developer to the design professionals, correct?

10 A. Normally, yes, sir.

11 Q. Right. There is no indication that that letter went to
12 the builder, is there?

13 A. Not that I am aware of.

14 Q. The plans that you were shown, I believe they were
15 exhibits, Number 705 and 111. You said they were not sealed,
16 correct?

17 A. Correct.

18 Q. They were not stamped, correct?

19 A. Correct.

20 Q. And that is the process after plans have been reviewed
21 and approved for use they get sealed or stamped, correct?

22 A. No, sir.

23 Q. And you made a point as though these were not the
24 actual ---

25 MR. BUCKLEY: Objection, Your Honor. Let him finish his

1 answer, please.

2 MR. KENDALL: He did. I asked ---

3 THE COURT: I thought he did. I'm sorry.

4 MR. BUCKLEY: I thought he said incorrect.

5 A. No

6 THE COURT: Go ahead.

7 A. Okay. No, documents that are submitted to a building
8 department have to be signed and sealed to begin with.

9 Q. Right. Okay. So I put it in the wrong order. I
10 apologize. The point is when they get submitted for approval
11 they are signed and sealed by the engineer?

12 A. They should be, yes.

13 Q. So that the plans that you have looked at, there is no
14 indication that those are the plans that were signed -- that
15 were delivered to the building department for approval?

16 A. Yeah, I have not seen any indication of that.

17 Q. So you don't know what plans were in fact approved for
18 use at this project, do you?

19 A. I haven't seen any plans that have been signed and
20 sealed.

21 Q. Right, so you don't know what was actually approved for
22 use; do you?

23 A. Correct.

24 Q. Okay. And so you don't know when a change was made or
25 why a change was made between what was on the drafts that you

1 saw and the actual construction; you don't know what happened
2 in between, do you?

3 A. No, but it would have required amended documents.

4 Q. Right, but you could have very well just had drafts; you
5 don't know that anybody reviewed those and approved those, do
6 you?

7 A. I have seen no evidence of that, yes.

8 Q. Right.

9 A. Correct.

10 Q. Right. They do not have seals, so they are not -- they
11 were not final. But if we -- so we don't know how we got to
12 the end. But what we do know is that a professional fire
13 suppression company was hired to design that sprinkler system
14 in conformance with all of the local and state ordinances,
15 wasn't it; WC Services?

16 A. Well, my opinion is it doesn't fully comply but ---

17 Q. They were hired to do that, weren't they?

18 A. Yes.

19 Q. Okay. Now in terms of -- I want to focus on the fire
20 stopping issues.

21 A. Yes, sir.

22 Q. The sprinkler guy will ask you about the sprinkler. But
23 on the fire stopping issues you have had a number of chances
24 to go up and observe that condition in the attics, correct?

25 A. Yes, sir.

1 Q. And in the garage?

2 A. Yes, sir.

3 Q. And you issued a report, your initial report, on March
4 31st, of after you have had a chance to do all of your
5 inspections; correct?

6 A. Yes, sir, I had done some; yes, sir.

7 Q. And you noted in that report the various penetrations
8 through that wall by various wood component, electrical cords,
9 pipes, and that kind of stuff; correct?

10 A. Yes, sir.

11 Q. And you -- you also did further inspections and issued
12 another report in November of 2016, didn't you?

13 A. Yes, sir.

14 Q. And again in this you showed -- you note the various gaps
15 and holes and that kind of thing in that firewall system that
16 are of concern to you and that need to be repaired, correct?

17 A. Correct.

18 Q. What was not contained after the two sets of reports was
19 any of this information about the closet, the chase, the back
20 flow preventer, you didn't bring that up in any report or any
21 testimony until you got here today; have you?

22 A. No, sir.

23 Q. Now in fact when we took your deposition you said at that
24 time -- let me back up and ask you this question. In terms of
25 the repair you today said you don't know how to put this into

1 a correct situation; is that your -- is that a good summary of
2 your testimony?

3 A. To make it code compliant.

4 Q. I'm sorry, I didn't mean to use those words. You haven't
5 designed an assembly that will meet the requirements of the
6 UL, correct?

7 A. I'm not a designer.

8 Q. Right. And you haven't seen anybody put together that
9 design, correct?

10 A. That would comply ---

11 Q. Right.

12 A. --- with the ---

13 Q. Mr. Mease ---

14 A. --- wood penetrations, no, sir.

15 Q. Mr. Mease hasn't done it; effectively I believe he said
16 he hasn't done; is that correct; is that ---

17 A. Correct.

18 Q. --- your understanding?

19 A. Correct.

20 Q. However, when we took your deposition back in January of
21 2018 you told us that all that was required is to mud and tape
22 the joints, fire caulk and patch where there were breaks in
23 the caulk -- in the Gypsum with proper Gypsum board, mud and
24 seal the joints, and seal the penetrations; that is what you
25 told us was required, didn't you?

1 A. It would have to be properly done, yes.

2 Q. Right. So in January of 2018 your opinion was this can
3 be fixed, it will be tedious but it can be fixed using Gypsum
4 board patch, drywall mud and tape, and fire sealant; correct?

5 A. Correct. But at that time I didn't realize that what was
6 constructed in the field deviated that much from the drawings
7 that I eventually got.

8 Q. The draft drawings that you eventually got, correct?

9 A. I don't know that they are draft drawings. But that is
10 what I got, yes, sir.

11 Q. Nor do you know that they are final. But you observed
12 the as-built and in January of 2018 said, drywall, the gypsum
13 board, mud and tape, and fire caulk will solve that; even if
14 it is tedious to do, it can be done; didn't you?

15 A. Anything can be done.

16 Q. Right. And you said that is what it would take to get
17 that wall code compliant?

18 A. Okay, if you are asking me can it be corrected the answer
19 is yes.

20 Q. Okay.

21 MR. KENDALL: Thank you, Your Honor.

22 **CROSS-EXAMINATION BY MR. ADKINS OF DOUGLAS SMITS:**

23 Q. Mr. Smits, you mentioned your credentials and I did not
24 hear that you were ever the fire marshal for the City of Folly
25 Beach.

1 A. I was not.

2 Q. You had never been?

3 A. No, sir.

4 Q. And I did not hear among your sterling credentials the
5 fact that you were a building code official ever for the City
6 of Folly Beach.

7 A. That is correct.

8 Q. And so you were not the authority having jurisdiction
9 during this project that we are here about; is that correct?

10 A. That is correct.

11 Q. Now the authority having jurisdiction, that is a term
12 that has some significance; and the authority having
13 jurisdiction is in many respects the ultimate authority as to
14 the application, interpretation and the enforcement of code,
15 building code or fire code; is that correct?

16 A. Correct.

17 Q. And the fire marshal would be the individual who has the
18 ultimate authority, the authority having jurisdiction on
19 issues that relate to fire code issues; correct?

20 A. Correct.

21 Q. Okay. Now the project that we are talking about the fire
22 code official you understand was George Tivel?

23 A. That is my understanding, yes, sir.

24 Q. And you were hired when by plaintiff's attorney to become
25 involved in this matter?

1 A. The first part of 2016.

2 Q. Okay. Mr. Tivel passed away in September of 2017. Were
3 you aware of that?

4 A. I am now, sir.

5 Q. Did you ever reach out to Mr. Tivel to find out what
6 code, what provisions, he enforced on this project?

7 A. I knew the code and the ordinance that had to be applied
8 for this project.

9 Q. That's fine. Did you ask the man who was doing the
10 job ---

11 A. No, sir.

12 Q. --- what he enforced? Okay. Have you since that time,
13 since Mr. Tivel passed away, have you reached out to any code
14 official particularly in the fire marshal's office in the
15 Department of Public Safety I think they call it out at the
16 City of Folly Beach have you reached out to anyone that worked
17 with or for Mr. Tivel to discuss with them or to find out from
18 that source what was or was not enforced from the fire code
19 perspective?

20 A. No, sir.

21 Q. Okay. Have you discussed or reached out to anyone who
22 was involved in the design of the fire sprinkler system?

23 A. No, sir.

24 Q. Have you reached out or attempted in any way to reach out
25 to say Chris Constantine who sealed the specifications and the

1 compliance submitted to the fire marshal's office?

2 A. No, sir.

3 Q. Do you realize within the last two weeks Mr. Buckley and
4 Ms. Brawdy were in Chris Constantine's office ---

5 MR. BUCKLEY: Objection, Your Honor. Assumes facts not
6 in evidence.

7 MR. ADKINS: I am going to get back to whether he has
8 gotten -- bothered to ---

9 THE COURT: You can ask him ---

10 MR. ADKINS: --- get the information.

11 THE COURT: --- if he knows or not.

12 Q. Yes, are you aware of it?

13 A. No, sir.

14 Q. So neither one of them told you anything from their
15 discussion with Mr. Constantine about what he sealed and why
16 he sealed these specifications and the certificate?

17 A. There may have been a mention that someone spoke to
18 Constantine. But anything further than that, no.

19 Q. That you haven't been provided the substance of the
20 conversation and what Mr. Constantine said about the plans
21 that he sealed?

22 A. No, sir.

23 Q. Okay. The sum -- is it not fair and accurate, the sum of
24 your contention with the fire sprinklers as built, you have
25 talked about the 90.8, Section 90.8 of the Folly Beach

1 ordinance, that ---

2 A. Yes, sir.

3 Q. Okay. And that you saw that referenced in a letter from
4 Mr. Hall to Tommy Brown?

5 A. And it is also represented in their ordinance.

6 Q. Okay. Well, I am just -- I just said the ordinance. You
7 are basing it on 90.8 ---

8 A. 90.08. That's right.

9 Q. Ninety point -- yeah, 90.8. Yeah, 90.8. And that it is
10 referenced in the letter from Mr. Hall to Mr. Brown that we
11 talked about?

12 A. Yes, sir.

13 Q. Okay. And it is your interpretation, obviously your
14 interpretation, of the ordinance 90.8 that you are relying
15 upon for your opinion that there should be sprinklers there?

16 A. In part, yes, sir.

17 Q. Okay. And did you -- I thought when you were deposed I
18 thought you had -- did you not see the subcontract that WC
19 Services had on this project?

20 A. I believe I did, yes, sir.

21 Q. Okay. And it references that letter as within the scope
22 of work, as you recall?

23 A. I vaguely recall, yes, sir.

24 Q. It also referenced NFPA 13D?

25 A. Yes, sir.

1 Q. Okay. And so that -- and you have not seen a writing, a
2 documentation of a variance?

3 A. I apologize, when you walked away I missed ---

4 Q. I'm sorry. I apologize for walking away from you like
5 that. And you have not seen, again getting back to the basis
6 of your opinion about the sprinklers being put in the attic in
7 the original construction, you have based on ninety- -- 90.8
8 you have not seen any written documentation of a variance or
9 waiver of that application for the sprinklers in the attics;
10 is that correct?

11 A. Per their ordinance, no.

12 Q. Okay. So it is the absence of documentation waiving that
13 application?

14 A. And my concern about the combustible construction and the
15 accessibility as it relates to storage.

16 Q. Now NFPA 13D, the 2000 edition would have been the
17 version -- I think we marked this at your deposition; is that
18 correct; do you remember that?

19 A. Yes, sir.

20 Q. Okay. And we went over it and we went over the section
21 that addresses sprinklers and attics and when they can be
22 omitted, correct?

23 A. Yes, sir.

24 Q. Okay.

25 MR. ADKINS: I guess I can mark this a Court exhibit.

1 (WHEREUPON, Court's Exhibit 3, NFPA, was marked for
2 identification.)

3 Q. We have got marked a copy of NFPA 13D which is referenced
4 as you will recall in the contract for WC Services as the fire
5 sprinkler subcontractor. And we recall reading the applicable
6 provision on attics that was contained in there. I am going
7 to read this to you and ask you if this is -- your
8 recollection is an accurate ---

9 A. As long as you read it correctly, yes, sir.

10 Q. Sure. It says -- and I will give it to you. So you can
11 verify I have done that. I don't have my glasses. I better
12 get my glasses.

13 It is really 8.65 is the section in NFPA 13D. And it
14 reads as follows, according to my reading: A sprinkler shall
15 not be required in attics, crawl spaces, and other concealed
16 spaces that are not used or intended for living purposes.

17 A. Yes, sir.

18 Q. Is that an accurate as far as you remember the operative
19 language from the NFPA 13D, 2002 edition, which would have
20 been applicable at the time of this project?

21 A. I apologize, what section -- what section is -- oh, okay.
22 I'm sorry.

23 Q. 8.6.5. I turned it to it for you. It has got a flag out
24 there pointing right at it for you too. There you go. Yeah.

25 A. Yes, sir.

1 Q. Read that to me -- read it to us again to make sure I got
2 it right.

3 A. Sprinklers -- excuse me, sprinklers shall not be required
4 in attics, crawl spaces and other concealed spaces that are
5 not used or intended for living purposes.

6 Q. Okay. Are these attics intended for living purposes in
7 your opinion?

8 A. No, sir.

9 Q. Okay. That's all I have for you. Thank you, sir. I
10 appreciate your time.

11 THE COURT: All right. Any redirect?

12 MR. BUCKLEY: None, Your Honor.

13 THE COURT: All right.

14 Mr. Williams, is there a question you wanted to ask? Did
15 you stand up? Okay, just checking.

16 All right. Mr. Smits, you can step down.

17 THE WITNESS: Thank you, Your Honor.

18 THE COURT: Thank you very much.

19 The plaintiffs may call their next witness.

20 MR. LUCEY: Mark Alan Poyner, Your Honor.

21 (WHEREUPON, the witness was duly sworn.)

22 THE CLERK: For the record will you please state your
23 full name and then spell your last name.

24 THE WITNESS: Mark Alan Poyner. P-O-Y-N-E-R.

25 **DIRECT EXAMINATION BY MR. LUCEY OF MARK POYNER:**

1 A. I have not, no.

2 Q. And the proposal itself says it is only good for 30 days?

3 A. Yeah, most proposals say that.

4 Q. Well, that one does for sure; doesn't it?

5 A. Uh-huh. Yes.

6 Q. Okay. So right now you really don't have a current
7 number that someone has provided you even in your revised
8 estimate of what sprinkler installation in those attics would
9 cost and what they would be willing to do it for, correct?

10 A. Correct.

11 Q. Okay. You have yourself as the contractor worked with
12 fire code officials, fire marshals?

13 A. Some, yes.

14 Q. Okay. And it has been your experience that when it comes
15 to issues of fire code application, interpretation,
16 enforcement, that sort of thing, the resident fire marshal,
17 the authority having jurisdiction, is the person you go to?

18 A. Or the engineer on the project.

19 Q. Or the engineer who sealed those plans for that type of
20 work?

21 A. That is correct.

22 Q. Okay. And it would be an obvious source if you have as a
23 contractor an issue or problem of ambiguity to seek out that
24 person or someone with that office and say, hey, clarify this
25 for me?

1 A. Right, usually you would start with the engineer.

2 Q. Okay.

3 A. And the engineer would contact the fire marshal?

4 Q. Okay. Have you ever actually worked with a fire marshal
5 or his office on a project yourself or sprinklers?

6 A. I have dealt with the fire marshal before. I mean we
7 have to on final inspections.

8 Q. Okay.

9 A. I mean that is typically when you are involved.

10 Q. Right. As a matter of fact if they said -- until the
11 fire marshal and the building code official sign off on the
12 plans for the structure, the building, you can't get your
13 permit?

14 A. That is typically the process, yes.

15 Q. Okay. You have been in these attics. You have seen
16 photographs. These attics in your estimation are not intended
17 for human occupancy, are they?

18 A. No, I would not think; so no.

19 Q. Okay. You have never received any information from any
20 source to suggest of what the parameters or the extent of any
21 issues or problems are with the fire sprinklers; like I said,
22 you are relying on Doug Smits basically?

23 A. That is correct.

24 Q. Now when you were deposed -- I want some clarification on
25 this one. When you were deposed back October, November 2016,

State of South Carolina) In The Court of Common Pleas
County of Charleston) Ninth Judicial Circuit
2015-CO-10-0955

Palmetto Pointe at Peas Island)
Condominium Property Owners)
Association, Inc.; and Jack)
Love, Individually, and on)
behalf of all others similarly)
situated,)

Plaintiffs,)

vs.)

Island Pointe, LLC., et al,)

Defendants.)

Transcript of Record

May 13, 14, 15, 16, 2019
Charleston, South Carolina

B E F O R E:

The Honorable Jennifer B. McCoy, Judge, and a jury

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Circuit Court Reporter

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22				
23				
24				
25				

1 to be repaired.

2 A. Yes.

3 Q. It's just recently you're abandoning what your
4 recommendations are for those repairs?

5 A. Yes. I've agreed with Mr. Smits's methodology.

6 Q. Okay. So, you backed off of your recommendation about
7 what you were deposed extensively on May the 2nd, and
8 you're now saying, well, I think Mr. Smits's methodology
9 for fixing those penetrations is acceptable?

10 A. Yes. I find it essentially equivalent.

11 Q. Okay. With regard to the penetrations, when we, when
12 we look at the magnitude of those roof tenders and we look
13 at the 2 x 4s that both penetrate and then parallel,
14 creating breaches within the firewalls, as I recall in
15 those photographs, I didn't see any evidence of any fire
16 sealant that had been applied in those area. Is that
17 correct? Is that your recollection?

18 A. My recollection in the attic, that's correct, no
19 colored fire sealant. You'll typically see that to be a
20 reddish color.

21 Q. In fact, there was -- I don't think I saw any of the
22 fire sealant for plumbing pipes, correct?

23 A. Correct.

24 Q. I didn't see any fire sealant for the -- any
25 electrical penetrations through the firewalls.

1 A. Correct.

2 Q. Correct? And there were a few fire sprinkler pipes,
3 and there was no sealant around those either, was there?

4 A. Correct.

5 Q. So, this isn't like a, a case that, that someone made
6 an attempt at one or all these. It's fair to say there was
7 no attempt at all to seal any of these penetrations, was
8 there?

9 A. Not with fire sealant. There are some that have
10 better, better joint compound and tape around them than
11 others.

12 Q. Okay. Would that be the 2 x 4s?

13 A. That would typically be the cross blocking pieces,
14 yes.

15 Q. Part of the frame, roof frame?

16 A. Right, where the -- on the fourteen buildings where
17 the trusses run parallel to the tenant separation wall you
18 have blocking, cross blocking that crosses the tenant
19 separation wall.

20 Q. Now, what you have, I believe you've given -- you've
21 written several reports, three or four, I believe, in the
22 course of this lawsuit. Is that correct?

23 A. Yes.

24 Q. You've offered three or four with scopes of repairs
25 addressing various issues.

1 A. Yes.

2 Q. You talk about ---

3 A. Might be six. Yeah, it might be.

4 Q. Okay. All right, and you've addressed some of the
5 areas you addressed today: decks, roofs, siding. We've
6 heard a lot of that, and that's what you basically have in
7 these reports, correct?

8 A. Yes.

9 Q. You also throughout the time that you had available to
10 you, one of the items you had was the March 31, 2016,
11 report of Doug Smits, right?

12 A. Yes.

13 Q. And you had that throughout the time that you've made
14 these drafts of your reports and changes in your reports,
15 correct?

16 A. Yes.

17 Q. At no time have you adopted in any of your reports the
18 installation of fire sprinklers in attics of the
19 residential buildings, correct?

20 A. Correct.

21 Q. You've also had an occasion in September of 2017 to
22 speak over the phone with George Tittle. Is that correct?

23 A. Yes.

24 Q. And you understand George Tittle to have been the fire
25 marshal, City of Folly Beach, on this project?

1 A. Yes.

2 Q. Okay, and despite that information, again through six
3 iterations of your report, you have never expressed an
4 opinion ---

5 MR. LUCEY: Objection, Your Honor. He's implying the
6 hearsay testimony of a phone conversation in the question
7 that follows, the two questions regarding the phone call
8 and regarding the deck, and it's improper.

9 THE COURT: All right, I'll allow him testify as to
10 his understanding of the conversation.

11 Please don't ask him question which would require him
12 quote ---

13 MR. ATKINS: Your Honor, I'm not asking him to tell us
14 what George Tittle said.

15 THE COURT: Thank you.

16 BY MR. ATKINS:

17 Q. Based on what you had before you -- your report, the
18 information of Mr. Smits, all the things you've talked
19 about, your conversations with the fire marshal, all these
20 things -- you have still not recommended the fire
21 sprinklers be installed.

22 MR. LUCEY: Objection. Foundation, Your Honor.
23 There's been no showing that he performed any investigation
24 as to the sprinkler system.

25 MR. ATKINS: He just testified ---

1 MR. LUCEY: Or the ---

2 THE COURT: Overruled. Thank you.

3 Go ahead.

4 MR. ATKINS: Thank you, Your Honor.

5 BY MR. ATKINS:

6 Q. Let me, let me repeat that. Based on the things you
7 testified to here today, okay, Doug Smits's report, okay,
8 your various six reports that you've done, your
9 conversation in September with the fire marshal, you still
10 have not in any of those reports made a recommendation that
11 fire sprinklers be installed in the attics of the forty
12 residential units.

13 A. That's ---

14 Q. Is that correct?

15 A. That's correct. My, my scope does not -- the intent
16 of my scope is not to cover the fire sprinkler because I
17 knew Mark Lazo, Mr. Lazo was the expert in the fire
18 sprinklers. So, I was looking to Mark Lazo for his -- and
19 I defer to Mark Lazo on the fire sprinkler installation in
20 the attic.

21 Q. Okay, and Mark Lazo is the man who is assisting me
22 representing W.C. Services, correct?

23 A. Yes.

24 Q. Okay. Didn't you say at one time in your deposition
25 that you don't take any issue? in fact, you would not

1 characterize the absence of fire sprinklers in the attics
2 as a code violation.

3 MR. LUCEY: Objection. Improper use of deposition.

4 A. I can't remember.

5 Q. Okay.

6 THE COURT: Overruled. Continue.

7 MR. ATKINS: Okay.

8 BY MR. ATKINS:

9 Q. And you have not recommended that Mr. Watkins, who's
10 preparing an estimate in this case on behalf of Complete
11 Building Corporation, you've not instructed him to place
12 sprinklers in the attics of these buildings, have you?

13 A. I have not.

14 MR. ATKINS: Thank you, sir. Nothing else.

15 THE COURT: All right, any cross-examination?

16 MR. LUCEY: Your Honor.

17 CROSS-EXAMINATION BY MR. LUCEY:

18 Q. Mr. Schweickhardt, good morning. How are you doing?

19 A. Good morning. How are you?

20 Q. I'm good. Jury have had the benefit of hearing from
21 you, I guess it was Tuesday morning?

22 A. Yes, sir.

23 Q. And I called you as a witness.

24 A. Yes, sir.

25 Q. And, what, we spent about an hour and fifteen or

1 Okay. All right.

2 Okay, Mr. Lucey, anything else?

3 MR. LUCEY: No, Your Honor.

4 THE COURT: Okay. I didn't think so.

5 All right, you can step down, Mr. Poyner.

6 No, did you indicate you wanted to ask questions?

7 MR. ATKINS: No, no. I've got some witnesses.

8 THE COURT: Oh. Okay. I want to make sure we're not
9 jumping the gun on you, Mr. Atkins.

10 MR. ATKINS: I didn't want to be left out completely.

11 THE COURT: No, just wanted to get him off the witness
12 stand. That's all.

13 (THE WITNESS EXITS THE STAND.)

14 (A PAUSE.)

15 THE COURT: All right, Mr. Cole, do you have any other
16 witnesses you would like to call at this time?

17 MR. COLE: That was my last witness, Your Honor.

18 THE COURT: All right. Next in line is Mr. Atkins.

19 MR. ATKINS: Thank you, ma'am.

20 THE COURT: Call your first witness.

21 MR. ATKINS: Your Honor, at this time W.C. Services
22 calls Chad Christopher as a witness.

23 CHAD CHRISTOPHER, BEING DULY SWORN,
24 TESTIFIES AS FOLLOWS:

25 CLERK OF COURT: Please state your full name and spell

1 your last name for the record.

2 WITNESS: Chad Christopher, C-h-r-i-s-t-o-p-h-e-r.

3 DIRECT EXAMINATION BY MR. ATKINS:

4 Q. Mr. Christopher, where did you come from to join us
5 today?

6 A. Greenville, South Carolina.

7 Q. Is that where you live?

8 A. Yes, sir.

9 Q. How long you been living up there?

10 A. My whole life.

11 Q. Okay.

12 A. So, forty-six years.

13 Q. You go to high school up there?

14 A. Yeah.

15 Q. Where did you go?

16 A. Travelers Rest High School.

17 Q. Okay. Do you have family up there?

18 A. Yeah. I'm a single dad with two kids and my parents.

19 Q. Okay. Are they still alive and with you?

20 A. Yeah.

21 Q. Okay. Tell us a little bit about your background, a
22 little bit, particularly after you got out of high school.
23 If you could bring us forward?

24 A. Uh-huh.

25 Q. You're currently employed, correct?

1 A. Yes.

2 Q. Who you work for now?

3 A. BMW, Greenville-Spartanburg Airport.

4 Q. Okay.

5 A. Cargo division.

6 Q. Okay. Let's go back to when you got out of high
7 school. Tell us, bring us forward from high school what
8 you've, what you've done.

9 A. I took drafting in high school. Got into AutoCAD.
10 Went to ITT Technical Institute. Got into a small,
11 family-owned company called McCrary Automatic Sprinkler in
12 South Carolina, Greenville, South Carolina. Worked with
13 them for about a year and then met Bucky Chapman, the owner
14 of W.C. Services, through Bo McCrary, and that's how I met
15 Bucky.

16 Q. Okay, and Bucky Chapman, who is he?

17 A. He's the owner of W.C. Services, located in Mt.
18 Pleasant.

19 Q. Okay.

20 A. He was a friend of my boss, Bo McCrary.

21 Q. Okay, and what did you do for McCrary Auto Sprinkler
22 Company?

23 A. I was the AutoCAD draftsman.

24 Q. Okay.

25 A. The designer.

1 Q. Would you do design of water, of ---

2 A. I didn't have ---

3 Q. --- sprinkler systems?

4 A. --- my NFSA certification with them, and they would
5 bring me in and, you know, did head layout, hydraulic
6 calculations through HydroCAD, secondary program.

7 Q. Okay, but you actually did installation while you were
8 there as well?

9 A. Yeah.

10 Q. And we're talking about sprinkler systems?

11 A. Yeah.

12 Q. Fire sprinkler systems?

13 A. Yeah. Schedule 10, schedule 40.

14 Q. Okay.

15 A. You know, threaded pipe.

16 Q. The kind that -- would that be in the same category as
17 what we've got at Palmetto Pointe?

18 A. No. That was residential PVC pipe.

19 Q. Okay. All right. So, you met Bucky Chapman. You
20 were working at McCrary at that time?

21 A. Yeah.

22 Q. Is -- was that meeting what brought you down here?

23 A. Yeah. We got to know him working with a couple of
24 jobs, and he just asked if I could come down there and help
25 him out with a project or two, so.

1 Q. Okay, from the design standpoint?

2 A. Yes, sir.

3 Q. So, did you actually come on down to Charleston and,
4 and do design work for W.C. Services, Palmetto Pointe?

5 A. Yes, sir.

6 Q. Was, was your work limited to design? Did you go --
7 as far as Palmetto Pointe's concerned, you didn't do any
8 kind of bidding or anything like that with the project?

9 A. No. They just gave me the, you know, proposal
10 drawings to do the sketch, the preliminaries to get the --
11 put the bid in.

12 Q. Did you have any involvement in contract negotiations
13 or anything with CBC, the general contractor?

14 A. None at all.

15 Q. Did you have anything to do with installation?

16 A. None at all.

17 Q. Okay. Did you see the design through?

18 A. No.

19 Q. Did you see the design through to the submission to
20 the, to the authorities?

21 A. To the fire marshals, yes, I did, and the engineers.

22 Q. Did you work with anyone on the design of the fire
23 sprinkler system at Palmetto Pointe?

24 A. Just with Chris Constantine, engineer, submit our
25 sketches and our plans.

1 Q. Okay. So, tell us how that worked. How did you and
2 Chris Constantine, the engineer -- now Chris Constantine,
3 was he -- he was the engineer for some other entity that
4 was also working on Palmetto Pointe?

5 A. Yes.

6 Q. Do you happen to know what entity he was working for?

7 A. No.

8 Q. Okay.

9 A. It's been too long.

10 Q. All right. Tell us about the relationship between
11 your work as the designer with W.C. Services and Chris
12 Constantine. Who was -- who, who did what? What was the
13 back and forth?

14 A. We would get the preliminary drawings, footprints of
15 the buildings, the proposed floorplans, you know,
16 construction plans, and we would -- had to go by the NFPA
17 13 codes and standards for the industry. We would do the
18 system layout, the pipe layout where their heads would be
19 placed per codes, per those standards. The engineer would
20 give us the guidelines on what codes to follow through the
21 NFPA 13 where we needed coverage or did not need coverage
22 and such things like that.

23 Q. Okay.

24 A. So.

25 Q. Was there back and forth revisions, redrafts, that

1 type of thing, a process to get to something that was
2 finally acceptable ---

3 A. Yes.

4 Q. --- with the engineer?

5 A. There always is, yeah.

6 Q. Would the engineer dictate to you what codes, what
7 standards were applicable in your design?

8 A. Yes.

9 MR. BUCKLEY: Object to the leading, Your Honor.

10 THE COURT: Rephrase. Thank you.

11 MR. ATKINS: Okay.

12 BY MR. ATKINS:

13 Q. So far as codes and standards are concerned, what
14 guidance did you get about what to apply to your design?

15 A. He would tell us the code. NFPA 13 has different
16 things, residential D dwellings, just what dwelling, type
17 of dwelling it was, if it needed, like, attic sprinklers
18 and stuff, which it didn't, tie ins we needed, just simple
19 things like that. We had our own copy that we would go
20 through and make sure that we adhere to those codes.

21 Q. And you say he would tell you. Would that be Mr.
22 Constantine, the engineer?

23 A. Yes.

24 Q. Okay. So, when you would sit down and do your work to
25 come up with -- and you'd actually do the drawing, right?

1 A. Uh-huh.

2 Q. Is that correct?

3 A. Yes, sir.

4 Q. And you were ultimately trying to get a set of
5 drawings that Mr. Constantine would accept?

6 A. Yes.

7 Q. Okay. When you sit down and do the drawings and you'd
8 send them to Mr. Constantine periodically.

9 A. Uh-huh.

10 Q. He would give you feedback?

11 A. Yes.

12 Q. Were there -- we've got something that's been marked
13 as 705. It's about the only drawing that we've come up
14 with in this project. I want to ask you to take a look at
15 that.

16 A. Yes, sir.

17 Q. And tell me if you recognize that as the type of
18 thing, when you talk about drawing, that would be, that
19 would be done based on Mr. Constantine's input. Is that
20 the type of product you would develop for him?

21 A. Yes.

22 Q. And then he would look that over and give you his
23 feedback?

24 A. Uh-huh.

25 Q. Now, that drawing there is -- I believe it's really

1 small print. I hope you can see it. I've got glasses and
2 I'll share them if you want them.

3 A. Yeah.

4 Q. But what's the date on that drawing? Can you see it
5 in the right-hand corner?

6 A. Barely. I need glasses myself.

7 Q. There you go.

8 A. Forty years old.

9 Q. You're breaking my heart.

10 A. It says June 7, 2006.

11 Q. Okay. At that point in time, had you received --
12 obviously received guidance from Mr. Constantine as to what
13 he wanted?

14 A. Yes.

15 Q. Did that guidance include a directive that there would
16 be no sprinklers in the attic?

17 A. Yes.

18 Q. Is that reflected on 705?

19 A. Yes.

20 Q. Okay, and that would have been, that would have been
21 by the June 7th, and you're working with Mr. Constantine.
22 He was already directing you in that regard?

23 A. Uh-huh.

24 Q. Is that correct?

25 A. That's correct.

1 Q. Okay, and you continued to communicate with him over
2 the course of the back and forth we're talking with client
3 design?

4 A. Uh-huh.

5 (LETTER MARKED AS DEFENDANT'S EXHIBIT NUMBER 4 FOR
6 IDENTIFICATION.)

7 MR. ATKINS: Let me share this with the others.

8 (A PAUSE.)

9 BY MR. ATKINS:

10 Q. First, do you recognize Exhibit Number 4, Mr.
11 Christopher?

12 MR. BUCKLEY: So, we don't continue the problem, I
13 think that the last exhibit that Mr. Cole marked should
14 have actually been number 4.

15 THE COURT: I thought so, too.

16 COURT REPORTER: The 3 you referred was not moved into
17 evidence.

18 MR. BUCKLEY: Okay.

19 MR. ATKINS: Okay.

20 MR. COLE: So, wait. What? Saying the one I had was
21 not moved into evidence?

22 MR. BUCKLEY: No.

23 COURT REPORTER: There was one earlier discussed in
24 testimony. It was not moved in. This one was.

25 MR. COLE: Okay, but my 3 was?

1 COURT REPORTER: Your 3 was.

2 MR. COLE: Okay.

3 COURT REPORTER: Somebody else's 3 was not.

4 THE COURT: If we have to, go back later and mark it
5 3.A. For now, she's marked it Defense 4, Mr. Atkins.

6 MR. ATKINS: Yes, ma'am.

7 THE COURT: Okay. Please continue. At this point, is
8 it admitted without objection?

9 MR. ATKINS: It is not.

10 THE COURT: Do you want it admitted?

11 MR. BUCKLEY: No, I don't have any objection to it,
12 no.

13 MR. ATKINS: All right.

14 THE COURT: Thank you.

15 (LETTER MARKED INTO EVIDENCE AS DEFENDANT'S EXHIBIT
16 NUMBER 4.)

17 BY MR. ATKINS:

18 Q. Exhibit number 4 which is now evidence, do you
19 recognize that? Here. I don't have a copy of it. Do you
20 recognize that document?

21 A. Yes.

22 Q. Is, that, is that the type of communication that you
23 would receive from Mr. Constantine about what he wanted the
24 plans to reflect?

25 A. Yes, sir.

1 Q. And what's the date of that communication? Is it
2 direct to you?

3 A. To my attention, yeah.

4 Q. Right, and what's the date of it?

5 A. June 20, 2006.

6 Q. And there are several items listed on that. It's not
7 really an email. It's not a memo. It's not a letter.
8 It's just a list of things.

9 A. Uh-huh.

10 Q. That he wanted you to be aware of and he wanted in the
11 plans, right?

12 A. Yes, sir.

13 Q. What was item 6? Could you read that to us?

14 A. It says: Indicate on drawings the attic and garage
15 below are not required to be sprinklered.

16 Q. Okay. So, he's still consistent. June 7th, we saw in
17 705, Exhibit 705 no sprinklers in the attics, and now he's
18 telling you June 20th ---

19 A. Yes, sir.

20 Q. --- same thing?

21 A. Yes, sir.

22 Q. Okay. The ultimate goal with Mr. Christopher was
23 what? What did you want from Mr. Christopher as W.C.
24 Services so far as design is concerned?

25 A. Just to provide the drawings per the codes. Once we

1 get those done and established, then we get our certificate
2 of compliance or we don't get paid.

3 Q. Okay.

4 A. So.

5 Q. And when you say certificate of compliance, is that
6 something that has to be submitted to an authority?

7 A. Yes.

8 Q. What authority does that have to be submitted to?

9 A. The engineer signs off on it. Then we have to submit
10 it to the fire marshal, the AHJ authority having
11 jurisdiction, and the State of South Carolina fire marshal
12 for approval.

13 Q. Okay, and would that certificate -- what did you call
14 it?

15 A. The certificate of compliance.

16 Q. Compliance?

17 A. Yeah.

18 Q. Would it also include anything about the system
19 itself, specifications or anything of that nature? Would
20 that also be part of the package?

21 A. Somewhat, yeah.

22 Q. Okay, and if you did not get that, if you do not
23 receive that from the engineer, what would happen?

24 A. Nothing. We couldn't proceed with anything.

25 Q. So, you had to have that to submit to the authority?

1 A. Yeah.

2 Q. In order to get approval to go on?

3 A. To get approval, yeah, so our job could be complete.

4 (A PAUSE.)

5 MR. ATKINS: This would be number 5, and I believe it
6 is in evidence, Your Honor.

7 MR. BUCKLEY: No objection.

8 THE COURT: Defendant's 5.

9 MR. ATKINS: I think that's the next one.

10 THE COURT: No, no objection to it being admitted from
11 counsel?

12 MR. BUCKLEY: No Objection.

13 THE COURT: Is that correct?

14 MR. KENDALL: No objection.

15 THE COURT: All right. Defendant's 5 admitted without
16 objection.

17 (CERTIFICATE OF COMPLIANCE MARKED INTO EVIDENCE AS
18 DEFENDANT'S EXHIBIT NUMBER 5.)

19 BY MR. ATKINS:

20 Q. You were talking about what you, what you needed to
21 receive from Mr. Christopher -- or, I'm sorry, Mr.
22 Constantine for submission and approval. We've got Exhibit
23 Number 5, and take a look at that, if you would. Then tell
24 me if you recognize that document.

25 A. Yes.

1 Q. What is that document?

2 A. It's a fire sprinkler system certificate of
3 compliance.

4 Q. And is that sealed and signed by the engineer?

5 A. Yes, sir.

6 Q. Now, how does that work? Does he, does he do that and
7 then give it back to you and you have to submit it?

8 A. Yeah. I submit it to the state fire marshal.

9 Q. Okay.

10 A. And the local fire marshal as well.

11 Q. And it's got two sheets, and one is certificate of
12 compliance and one is certificate of whatever it is,
13 specifications or specs. Is that correct?

14 A. Yes, sir.

15 Q. So, what do the specs do? Is that basically -- what
16 is that, what is that communicating to the fire marshal's
17 office?

18 A. It's the hazard classification for which we decided
19 what guidelines and codes to use, if it's ordinary hazard,
20 extra hazard somewhat. Then we have design parameters of
21 the square footage that we're designing and we have to
22 hydraulically calculate the area with the water supply,
23 that we have enough water to suppress a fire. It has to be
24 hydraulically proven to do so. All that has to be outlined
25 and proven before the system can even be signed off on and

1 put in.

2 Q. So, that's a specification?

3 A. Uh-huh.

4 Q. And by that, the seal of the engineer for that is
5 representing that this system meets these specifications?

6 A. Yes, sir.

7 Q. Okay, and certificate of compliance, what is that
8 telling -- what is the purpose of that aspect of the
9 certification?

10 A. It's just letting the fire marshal know that we've
11 adhered to all the specifications per the engineer, per the
12 codes, and everything that we needed to do, that needed ---

13 Q. Does it reference ---

14 A. --- to be included.

15 Q. --- the specific guidelines or codes that you are
16 certifying you complied with?

17 A. Yeah. It tells the NFPA 13-D what standards we're
18 going by and that that's what we adhere to during the
19 design process.

20 Q. So, Exhibit 5 references and is sealed and certified
21 by the fire marshal that NFPA 13-D is what was, was used
22 for the design of this system?

23 A. Correct.

24 Q. Does it reference any other code or ordinance or
25 anything else?

1 A. No.

2 Q. At any point before you left -- I understand you were
3 just there for the design, correct?

4 A. Yeah. Yes, sir.

5 Q. This was pretty much at the end of your job?

6 A. Uh-huh.

7 Q. Is that correct?

8 A. Yes, sir.

9 Q. Okay. Did you ever get any, any feedback from anybody
10 that there ever arose an issue about whether sprinklers
11 should have been in these attics?

12 A. No. Not at all.

13 Q. Okay. Have you, have you heard from Bucky Chapman?

14 A. I hadn't heard about Bucky until I got word of his
15 death, so, but...

16 Q. Anybody else contact you about this project?

17 A. No, sir.

18 Q. Okay.

19 MR. ATKINS: All right, that's all I have for you.

20 Thank you, Mr. Poyner.

21 WITNESS: All right. Thank you.

22 MR. ATKINS: You can keep the glasses. You might need
23 them.

24 WITNESS: Oh, yeah. I'll give them back to you.

25 THE COURT: Go ahead. Cross-examination?

1 MR. KENDALL: Nothing from me.

2 THE COURT: Okay.

3 MR. COLE: It's not my issue. I'm not going to ask
4 anything.

5 THE COURT: Thank you.

6 MR. COLE: No questions.

7 THE COURT: I appreciate that.

8 All right, let's switch sides.

9 MR. BUCKLEY: Thank you, Your Honor.

10 THE COURT: Yes, sir.

11 MR. BUCKLEY: May it please the court?

12 CROSS-EXAMINATION BY MR. BUCKLEY:

13 Q. Mr. Christopher, you and I have never met, have we?

14 A. No, sir.

15 Q. My name's Ed Buckley, and I represent owners at
16 Palmetto Pointe.

17 A. Yes, sir.

18 Q. And among the people we're suing are W.C. Services.
19 Have you ever met Stephanie Drawdy, who's sitting right
20 there with the laptop on her lap?

21 A. No, sir.

22 Q. Do you remember that Ms. Drawdy had you served with a
23 subpoena back in May of 2018 to appear for a deposition?

24 A. Yeah.

25 Q. Did you show up?

1 A. May 18th?

2 Q. 2018.

3 A. No.

4 Q. Why didn't you show up?

5 A. Don't remember. I think it was in Greenville. My son
6 has hemophilia, so it was a misunderstanding.

7 Q. It was a misunderstanding?

8 A. Yeah. When I got this one, I just showed up, yeah.

9 Q. You got a subpoena to be here?

10 A. Yeah.

11 Q. You're aware you can't be compelled to come down here
12 from Greenville, South Carolina, by subpoena?

13 A. No.

14 Q. You weren't aware of that?

15 A. No.

16 Q. When's the first time you talked to W.C. Services's
17 attorney, Mr. Atkins?

18 A. It was several months ago.

19 Q. And you weren't aware that we were trying to take your
20 deposition since May of 2018?

21 A. No, sir.

22 Q. He never told you that?

23 A. No, sir. I just ---

24 Q. He ever ask you, did he ever ask you ---

25 MR. ATKINS: Your Honor, can we get a sidebar on this?

1 THE COURT: Sure.

2 (OFF-THE-RECORD BENCH CONFERENCE.)

3 BY MR. BUCKLEY:

4 Q. In any event, you have never met anybody in this case,
5 any lawyers in this case other than Mr. Atkins, right?

6 A. Correct.

7 Q. Okay. You, I think, testified that you were not
8 involved in the contractual matters between W.C. Services
9 and Complete Building Corporation's general contractor,
10 right?

11 A. Correct.

12 Q. Were you aware that this project was being built on
13 Folly Beach, South Carolina?

14 A. Yes.

15 Q. Were you aware that Folly Beach has its own fire
16 sprinkler ordinance that is different from an NFPA 13-D?

17 A. Yeah. We had spoke with the fire marshal, and he had
18 told us primarily the same thing.

19 Q. Okay. Let me ask you this. Look at Exhibit 705.

20 MR. BUCKLEY: Can you pull it up?

21 Q. If you look at Exhibit 705 -- I'm going to need you to
22 actually stand up, and I'll give you a pointer.

23 A. Uh-huh.

24 Q. We're going to talk about that a little bit. I'm
25 going to have you point at some things.

1 A. Okay.

2 Q. Where does the sprinkler controls go in that drawing?

3 A. It's a little hard to see from here. This is just a
4 preliminary layout from where the tie in comes in from each
5 side of the ball valves. That's just for the information
6 and to get the approval for the drawings.

7 Q. Okay. So, the, the sprinkler system would enter the
8 building on the outside wall of the left-hand unit and then
9 the outside right-hand wall of the right-hand unit?

10 A. As per this design, yes.

11 Q. Okay, and you see a faint yellow line down the middle
12 between the two units?

13 A. Yes, sir.

14 Q. You understand that's a firewall?

15 A. Uh-huh.

16 Q. And if your plan as shown on Exhibit 705 was installed
17 as drawn, there wouldn't be any sprinkler lines penetrating
18 the firewall, right?

19 A. Correct.

20 Q. That's a good idea, isn't it?

21 A. Uh-huh.

22 Q. Is that a yes?

23 A. Yes.

24 Q. Okay, and you would never install a fire sprinkler
25 system where the piping itself ran up through the firewall

1 from bottom to top, would you?

2 A. In certain circumstances you may have to, but ---

3 Q. But here you don't, right?

4 A. These, these, these were the preliminary. They're not
5 the as-built drawings.

6 Q. Okay, but here -- as far as you know, that plan never
7 changed, right?

8 A. Well, my time there it didn't, no.

9 Q. Okay, and the certificate of compliance that we --
10 that Mr. Atkins went through with you.

11 A. Uh-huh.

12 Q. To the best of your knowledge, he was certifying that
13 the plan -- the installation as shown on Exhibit 705 is
14 what he was certifying, correct?

15 A. That they'd met the codes and parameters in, in the
16 NFPA 13-D, yeah.

17 Q. Right, and if something completely different was
18 built, then his certificate of compliance would be
19 completely irrelevant, right?

20 A. No. Even if there's changes in the field due to
21 different construction parameters, it still has to be
22 inspected by the local fire marshal to get approval to make
23 sure that they meet the guidelines.

24 Q. Have you seen any -- you haven't seen any inspections
25 by the fire marshal ---

1 A. I wasn't ---

2 Q. --- for this project, have you?

3 A. --- present at any, no.

4 Q. Okay. Have you ever seen the Folly ordinance?

5 A. I may have. I don't recall. It's been so long.

6 Q. Okay, and, of course, you never saw any variance that
7 was issued by the town or the City of Folly Beach which
8 allowed all omission of sprinklers in the attics after a
9 hearing involving the fire marshal, the building code
10 official, and a person in the industry appointed by city
11 council, have you?

12 A. I'm not aware of any of that, no.

13 Q. Okay. Who made the decision that NFPA 13-D would be
14 the only requirement for this system?

15 A. We get our information from the engineers who we
16 contract through.

17 Q. Okay, and do you know whether the contract with W.C.
18 Services required that you comply with the Folly ordinance
19 as well?

20 A. I do remember Bucky Chapman meeting with the fire
21 marshal for Folly Beach, and we were given, you know, those
22 parameters, follow through the NFPA D.

23 Q. Okay.

24 A. Yeah.

25 Q. But you don't know whether there's any other

1 requirement under the Folly ordinance because you've never
2 read it, right?

3 A. No.

4 MR. BUCKLEY: That's all I have.

5 THE COURT: Any follow-up questions?

6 MR. ATKINS: Just one follow up.

7 REDIRECT EXAMINATION BY MR. ATKINS:

8 Q. Mr. Christopher, the first time you and I met, where
9 was that?

10 A. Greenville, Spartanburg, Greenville.

11 Q. The Greenville ---

12 A. Airport.

13 Q. Airport?

14 A. Uh-huh.

15 Q. Okay, and you were there because you received what?

16 A. Phone calls and notices to come, you know.

17 Q. For a deposition?

18 A. Deposition, yeah.

19 Q. Okay, and was anybody else there other than me?

20 A. No.

21 Q. Okay.

22 MR. ATKINS: Thank you.

23 RECROSS-EXAMINATION BY MR. BUCKLEY:

24 Q. Was that in May of 2018?

25 A. I'm not really sure of the dates, so.

1 Q. It was in connection with that deposition I asked you
2 about?

3 A. Yeah, I guess. He just called, told me to -- that I,
4 I may be called by him in the future.

5 MR. BUCKLEY: Thank you.

6 THE COURT: All right.

7 MR. ATKINS: No other questions, Your Honor.

8 THE COURT: Nothing else?

9 All right, you can step down, sir.

10 WITNESS: All right. Thank you.

11 THE COURT: Thank you so much.

12 (THE WITNESS EXITS THE STAND.)

13 THE COURT: Mr. Atkins, who do you have next?

14 MR. ATKINS: I have one witness. Should be pretty
15 quick.

16 THE COURT: Okay.

17 MR. ATKINS: If you'd like to.

18 THE COURT: I think we can do it.

19 MR. ATKINS: Let's do it. Thank you, Your Honor.

20 Call Chris Constantine to the stand.

21 CHRISTOPHER J. CONSTANTINE, BEING

22 DULY SWORN, TESTIFIES AS FOLLOWS:

23 CLERK OF COURT: Please state your full name and spell
24 your last name for the record.

25 WITNESS: Christopher John Constantine. It's a long

1 one, C-o-n-s-t-a-n-t-i-n-e.

2 DIRECT EXAMINATION BY MR. ATKINS:

3 Q. Greek heritage, I suppose. Let me ask you, Mr.
4 Constantine. What do you do for a living?

5 A. I'm a professional engineer in the State of South
6 Carolina.

7 Q. Okay, and do you have your own firm currently?

8 A. I do.

9 Q. And what's the name of your current firm?

10 A. Constantine Engineering Associates, LLC.

11 Q. Okay. Did you do business or did you have a different
12 firm back when Palmetto Pointe was in construction, design
13 construction?

14 A. We did. We had a partnership at that time; it was
15 named CRG Engineering.

16 Q. Okay. You've heard Mr. Christopher testifying about
17 Palmetto Pointe and talking about Constantine Engineering.
18 Are you Constantine Engineering?

19 A. I am ---

20 Q. Okay.

21 A. --- a Constantine, but yes.

22 Q. All right. Okay. Where are you from originally? Are
23 you from Charleston?

24 A. I grew up in Charleston.

25 Q. Okay. All right, and you've -- your office is still

1 here in Charleston?

2 A. In West Ashley, yes, sir.

3 Q. West Ashley?

4 A. Uh-huh.

5 Q. All right. The Palmetto Pointe project, tell us what
6 you did with regard to the design of the sprinkler systems,
7 what your input and involvement was, if you would, on that
8 project.

9 A. Sure. I'd be happy to. The, the process by which
10 fire sprinkler systems in the State of South Carolina are
11 engineered, designed, and installed come from the state
12 fire marshal's office, and they mandate a process that is
13 sort of three, three phased.

14 So, the first phase would be someone like me, a
15 registered professional engineer in the state, would
16 prepare what's called a fire sprinkler system specification
17 sheet, FSSSS for short, and that sheet would, as Mr.
18 Christopher alluded to earlier, that sheet would define the
19 applicable, applicable codes or standards. It would give
20 information with regard to available water pressure
21 on-site, and that specification sheet is just a one-page
22 document, gives the designer of the system sufficient
23 information to go about preparing his sprinkler design,
24 which I think you saw an earlier version on the screen
25 earlier.

1 Q. Okay. So, does that ultimately culminate in a cert,
2 certification authority of the final specifications?

3 A. Well, we have to be careful when we talk about
4 specifications. We didn't prepare any written
5 specifications other than that specification sheet, the
6 fire sprinkler system spec sheet that I mentioned earlier.
7 The designer then goes about the process of running his
8 hydraulic calculations, laying out his heads, laying out the
9 piping to make sure that the system functions as it should
10 in compliance with the codes that we've specified.

11 Once he finishes that, then we would take those
12 drawings, review them, and issue I think what Mr. Atkins is
13 referring to as a certificate of compliance. And again,
14 that's sort of the third step in this process whereby we
15 review the design drawings from the sprinkler installer
16 that he prepares. And then we sign and seal a certificate
17 that essentially says we believe this complies with the
18 applicable codes for this project.

19 Q. All right. Now, the fire sprinkler, FSSSS, whatever
20 it was, that document, you, you authored that document,
21 correct?

22 A. Yes.

23 Q. And in that document, you're, you're providing the
24 designer that you're referring to as W.S. Services,
25 correct, W.C. Services? Is that accurate?

1 A. Correct.

2 Q. You're, you're directing them as to what you want to
3 be applied code standardize wise to what you produce?

4 A. Yes, that's correct.

5 Q. To the, the contractor?

6 A. Yes.

7 Q. And in your FSSSS, whatever, what was the code? What
8 was the standard that you were calling out to them to
9 design?

10 A. We called for a standard NFPA, which, by the way,
11 stands for National Fire Protection Association, NFPA 13-D,
12 which is a subset standard of NFPA 13.

13 Q. And why NFPA 13-D?

14 A. Well, NFPA 13, there are actually three NFPA 13
15 standards that could be applied. 13 really applies to
16 commercial buildings. 13-R and 13-D apply to residential
17 buildings. 13-R is used more for multifamily type
18 projects. 13-D would be the standard that you apply to
19 buildings three stories or less in height and buildings
20 that would have -- I believe it's up to two, two families
21 within one buildings. So, it was really -- this project
22 was really the perfect application of NFPA 13-D.

23 Q. Okay, and was, was the call on that code and standard
24 application your call, in terms of determination, your
25 determination?

1 A. Well, I am the one that specifies which code to use,
2 but the codes within their own body and in conjunction with
3 the international building code, of which the international
4 fire code is a subset, all those really through their own
5 language dictate which one is appropriate for which use.

6 Q. Okay. All right. You've heard some talk about a, a
7 ordinance, Folly Beach ordinance?

8 A. Yes.

9 Q. Both in Mr. Christopher's testimony, and I believe
10 you've looked at some of that documentation as well. Is
11 that correct?

12 A. That's correct.

13 Q. You did not instruct Mr. Christopher to do his
14 designer work and incorporates that ordinance. Is that
15 accurate?

16 A. Yes. That's correct.

17 Q. Why is that?

18 A. Well, I think two reasons. Number one, at the outset
19 of the project, I think early on we frankly just did not
20 realize that there was a fire ordinance in the town of
21 Folly Beach. That did come up later, and through a series
22 of discussions, it was our understanding that the fire
23 chief for Folly Beach was going to allow the application of
24 13-D without the requirement for ---

25 MR. BUCKLEY: Your Honor, object to the hearsay. It

1 sounds like it double hearsay because he says it's
2 understanding through discussions.

3 MR. ATKINS: Let me rephrase.

4 THE COURT: Maybe you can just rephrase it.

5 MR. ATKINS: I will.

6 THE COURT: Thank you.

7 BY MR. ATKINS:

8 Q. Did you, did you talk, once you heard about this
9 ordinance, did you have conversations with any authorities,
10 local authorities about that topic?

11 A. It was a long time ago, but, but let me tell you what
12 I, what I think my, my recollection at this point -- the
13 best I can recall is that there were discussions between us
14 and Bucky Chapman, who was the owner of W.C. Services, and
15 I think there may have been at least one discussion between
16 us, Bucky Chapman and the fire chief.

17 Q. All right, and as a result of those conversations, did
18 you change your design criteria for the sprinklers at
19 Palmetto Pointe, or did you remain in NFPA 13-D as your
20 design standard?

21 A. No, because the consensus was that the application of
22 13-D ---

23 Q. That's all right.

24 A. --- was appropriate.

25 Q. Okay. Okay.

1 MR. BUCKLEY: Your Honor, I move to strike.

2 THE COURT: Jury, please disregard the last half
3 sentence out of the witness's mouth. Thank you so much.

4 MR. ATKINS: Okay.

5 BY MR. ATKINS:

6 Q. So, as a result of the, the work that you performed,
7 you ultimately provided W.C. Services with a sealed and
8 signed certification of compliance?

9 A. Yes.

10 Q. Okay, and you gave that back, that back to them, and
11 it was their obligation then to submit that to the fire
12 marshal's office?

13 A. That's correct.

14 Q. Okay. Do you have an understanding as far as the
15 process goes of once that is submitted what transpires, and
16 is, is that something that has to be approved? You got to
17 get approval as a contractor before you can begin work or
18 what? I mean, what's the significance of submitting that
19 to a code official?

20 A. Yes. It's, it's just like, it's just like the
21 permitting process. The drawings, my specifications, spec
22 sheet, and the certificate of compliance are all bundled by
23 -- in this case W.C. Services. They go to the authority
24 having jurisdiction, and that's sort of a broad term that
25 relates to the reviewing authority. And in this case, it

1 was the fire chief for Folly Beach. Those documents go to
2 him. He reviews them, and then he issues authorization to
3 initial construction.

4 Q. All right, and after you had completed that process,
5 after you had done your job as the engineer and certified
6 -- obeyed certification compliance and, and, and the
7 specification sheet that was submitted both under your seal
8 and your signature, from that point forward, did you have
9 any other work or do any other work, design work on the
10 fire sprinkler system at Palmetto Pointe?

11 A. No.

12 Q. Did you -- were you ever asked by anyone to make any
13 revisions of any sort?

14 A. No, not that I recall.

15 Q. Okay.

16 A. And, and just to clarify, we would not have revised
17 drawings in any event.

18 Q. Okay.

19 A. It would have been a, it would have been a repeat of
20 the certificate of compliance as part of a review process.

21 Q. Okay. You would have been involved in that review
22 process, though, correct?

23 A. We would have hoped so.

24 Q. Okay. All right, but to your knowledge, did anyone at
25 any point come back and say wait a minute. This

1 certificate of compliance is wanting; it's lacking in some
2 way or some fashion. We need something else added to this
3 from the standpoint of the standard of code.

4 A. No.

5 Q. Okay. On this project, a project of this size -- and
6 I understand you folks were hired by the architect, as a
7 consultant to them, Tommy Smith?

8 A. Are you speaking specifically about the fire
9 protection portion?

10 Q. Well, no. I thought generally you were, you were a
11 consultant to SGM.

12 A. Well, at that time CRG Engineering was engaged in
13 civil structural, mechanical, and electrical engineering.

14 Q. Okay.

15 A. And I believe that the contract really came through
16 the civil side of the business.

17 Q. Okay.

18 A. And I believe it was directly with the, with the
19 developer.

20 Q. Okay. All right.

21 A. Now, there was some other ancillary work that may, may
22 have contracted through Tommy Smith. I was not the project
23 manager in our office. So, those details ---

24 Q. Who was the project manager?

25 A. --- are a little -- Kirk Richards, who was the ---

1 Q. Okay.

2 A. --- civil principal in the firm.

3 Q. Okay, and at any point during the project -- I mean,
4 you were, you were still with CRG throughout this Palmetto
5 Pointe, correct?

6 A. Yes. yes. Correct.

7 Q. Okay, and Kirk was your contact guy on the project?

8 A. That's right.

9 Q. He was the principal guy. At any point, did you ever
10 receive any feedback of any issues or problems associated
11 with the fire sprinkler systems at Palmetto Pointe, and
12 these are the residential villas we're talking about,
13 correct?

14 A. Correct.

15 Q. At Palmetto Pointe concerning design?

16 A. No, sir.

17 Q. Okay.

18 MR. ATKINS: Thank you very much.

19 WITNESS: Yes, sir.

20 MR. KENDALL: No questions.

21 MR. BOYD: No questions.

22 MR. BUCKLEY: I assumed that.

23 CROSS-EXAMINATION BY MR. BUCKLEY:

24 Q. Mr. Constantine, you and I go back farther than
25 probably anybody else's else in this courtroom, don't we?

1 A. Yes, sir, Mr. Ed, I think we do.

2 Q. I used to drive your school bus on occasion.

3 A. You're, you're not going to tell that story, are you?

4 Q. I'm not.

5 A. Thank you.

6 Q. And you're not either? And you're not either?

7 A. No, sir.

8 Q. You mentioned a guy named Kirk Richards, right?

9 A. Yes, sir.

10 Q. And Kirk Richards is a civil engineer. You are a
11 mechanical engineer, right?

12 A. Yes, sir.

13 Q. Okay, and you met with Stephanie Drawdy and I in your
14 office probably about two weeks ago now?

15 A. That's right.

16 Q. Right, and you really, you really at that time had no
17 recollection to speak of about how this whole thing evolved
18 back in 2006 some thirteen years ago, right?

19 A. That's correct.

20 Q. And you told us that you would not have been in
21 involved in the fire sprinkler side because that was Kirk
22 Richards's bailiwick, right?

23 A. No, I don't recall saying that because I ---

24 Q. Well, you told us that we needed to go to Kirk
25 Richards about the sprinkler system, right, because that

1 would have been his job?

2 A. No, no. I think -- not to be contrary, but I think
3 that discussion had to do with who was attending regular
4 meetings with regard to the construction phase of the
5 project and the permit and the permitting phase and all
6 that. And I guess my response at that time was that Kirk
7 was really the day-to-day person on the ground from our
8 office. I didn't attend those, I didn't attend those
9 meetings ---

10 Q. Okay.

11 A. --- that were being referenced.

12 Q. So all those, all those conversations you were talking
13 about would have been with Kirk Richards from your office
14 and whomever he was talking to at W.C. Services, right?

15 A. No. I did have some conversations with Bucky Chapman,
16 I believe. Now, we worked on other projects together as
17 well, but he and I knew one another and, and I believe we
18 probably had some phone conversations. But I was never, as
19 I recall, in a meeting with, with any group to discuss
20 this.

21 MR. BUCKLEY: Okay, let's pull up 705, please.

22 Q. Let me ask you this first. Do you remember we sent
23 you a subpoena a few years ago in this case?

24 A. I do not remember.

25 Q. Do you remember you were sued in this case?

1 A. No, I don't.

2 Q. You don't remember that?

3 A. Mm-mm. I do not.

4 Q. It's funny how you forget things, isn't it?

5 A. Well, some things you'd like to forget, I imagine.

6 Q. You, you aware we dismissed you from this case?

7 A. I found that out recently from, from defendant
8 counsel.

9 Q. How in the world could you forget that but remember
10 everything about this project?

11 A. I don't remember everything about this project. It's
12 very fuzzy.

13 Q. Yeah.

14 A. Very hazy.

15 Q. I bet it is.

16 A. It is.

17 Q. Stand up, please, and would -- and there a pointer.
18 You have it in your hand?

19 A. Yes, sir.

20 Q. Show the jury where the fire sprinkler system would
21 enter the building on either side, left and right, of the
22 two units in that photograph or in that drawing.

23 A. Well, it appears this would be the general location.

24 Q. And that's ---

25 A. On this side and similar on the other side.

1 Q. And that's on the outside wall on the left side of the
2 left unit, and the outside wall on the right side of the
3 right unit, right?

4 A. That appears to be, yes, sir.

5 Q. And if that sprinkler system were drawn in accordance
6 with the plans you approved and certified, there wouldn't
7 be a single fire sprinkler pipe penetrating the fire walls
8 in the attic, correct?

9 A. Correct.

10 Q. And if, in fact, the sprinkler system is built so that
11 both systems right and left are located directly under the
12 firewall at the -- just outside the garage of these units,
13 then the firewall and the firewall used as a chase, then at
14 every floor level the, the sprinkler system would have to
15 penetrate the floor to go in both directions, right?

16 A. That's correct.

17 Q. Okay, and you never approved that system, did you?

18 A. Not that I recall. I don't ever remember seeing it.

19 Q. Okay. So, your certificate of compliance doesn't
20 certify compliance of any system that penetrates the
21 firewall, correct?

22 A. I don't believe so.

23 Q. That's right. Let's talk about some things that were
24 in your file.

25 A. Do you need me to continue standing?

1 Q. No. No. I'm sorry.

2 A. Thank you.

3 Q. When we got your file, there were several things that
4 were not in it, and one of those things that wasn't in it
5 was the contract between W.C. Services and Complete
6 Building Corporation. Do you -- you probably don't
7 remember ever reading that contract, do you?

8 A. We would not have been privy to that, I imagine.

9 Q. Okay.

10 MR. BUCKLEY: Pull up Exhibit 203, please.

11 (A PAUSE.)

12 Q. That's Exhibit 203. We've redacted some of the
13 information that's not relevant to what we're doing here.

14 MR. BUCKLEY: Go ahead and pull that up, if you would.

15 (A PAUSE.)

16 MR. BUCKLEY: Do you have another copy, Jim, that's
17 redacted?

18 MR. ATKINS: I do.

19 BY MR. BUCKLEY:

20 Q. I'm going to put this subcontract -- you see the date
21 on this subcontract that's at the very top? It's 22nd day
22 of May 2006?

23 A. Yes, sir.

24 Q. And it's between W.C. Services, Incorporated, and
25 Complete Building Corporation?

1 A. Yes.

2 Q. Okay, and if you go on down to section 2, it says:

3 Scope of work. Subcontractor and the contractor
4 agree that the materials to be furnished and the
5 work to be done by the subcontractor are to
6 furnish all material, labor, and equipment
7 necessary to complete all fire sprinkler systems
8 and related work in accordance with the City of
9 Folly Beach's fire sprinkler system requirements.
10 Copy of letter from the City of Folly Beach
11 official dated March 6, 2006, attached.

12 See that?

13 A. I do.

14 Q. And then it also says in paragraph 1 that:

15 The scope of work is to specifically include but
16 not be limited to providing and installing the
17 interior fire protection system based on NFPA
18 13-D fire sprinkler system.

19 Parenthesis complete. Right?

20 A. Yes.

21 Q. So, both the City of Folly Beach requirements as
22 reflected in the March 6, 2006, attached letter and NFPA
23 13-D were agreed to be followed by W.C. Services with
24 Complete Building Corporation, right?

25 A. It seems that way.

1 Q. But nobody told you that?

2 A. No.

3 Q. Amazing. It's amazing, and then let's look at what
4 the March 6th -- sorry about that. That's almost too
5 small. You've never seen this letter either. It's the
6 March 6th letter from Tommy H. Hall to Mr. Brown, Tom,
7 Tommy Brown, the developer?

8 A. I don't recall seeing this at the time.

9 Q. And, and you've never seen it since, have you?

10 A. The language sounds familiar to me but I -- no, I
11 can't say that I have seen this letter specifically.

12 Q. Okay. If any ---

13 A. Since then.

14 Q. If anybody showed it to you, it was probably me,
15 right?

16 A. Correct.

17 Q. Okay. It says:

18 This letter is to recap our meeting February 14,
19 2006. The meeting was scheduled by you and was
20 for clarification of the City of Folly Beach's
21 fire sprinkler system requirements. Present at
22 on -- present at this meeting was chief -- Fire
23 Chief George Tittle; Tommy Hall, building
24 official; Chris Union; and yourself. 90.a of the
25 City of Folly Beach code of ordinances covers the

1 city's requirements for fire sprinkler systems.

2 Your project requires the following.

3 And it says:

4 Number 1, that each unit will be equipped with

5 NFPA 13-D fire sprinkler systems.

6 That tells you what kind of equipment you have to

7 have, right?

8 A. Correct.

9 Q. And then paragraph 2, 90.3(c), I think we all agree
10 that really is a typo. That should be 90.08(c):

11 You may omit the garage area where there is a
12 one-hour fire rated, fire assembly separated
13 dwelling from the garage, and the clubhouse must
14 also be sprinklered in accordance with the
15 primary use, and the area around the entrance
16 gate must be widened.

17 So, they're talking bout several things here, and the
18 last thing is obviously just fire truck access, right?

19 A. Right.

20 Q. Okay. The last paragraph says:

21 I am enclosing a copy of our ordinance for your
22 reference. If I may be of further assistance,
23 call me.

24 So, there's a lot of information in that short letter,
25 isn't there?

1 A. Yes.

2 Q. And that short letter was part of the contract with
3 W.C. Services, wasn't it?

4 A. It appears to.

5 MR. ATKINS: Your Honor, I -- he doesn't know the
6 contract or the terms of the contract. He, he read words
7 in the Exhibit 203.

8 THE COURT: He can answer to the best of his ability,
9 if he knows. Thank you.

10 BY MR. BUCKLEY:

11 Q. Wasn't it?

12 A. It appears to be referenced in this cover letter, yes.

13 Q. And it says that the work is going to be:

14 Work in accordance with the City of Folly Beach's
15 fire sprinkler system requirements.

16 Right?

17 A. I'm sorry, what, what ---

18 Q. In the, in the ---

19 A. --- Paragraph are you referencing?

20 Q. In the first paragraph below section, section 2, the
21 first full paragraph before you get to the numbered
22 paragraphs.

23 A. Yes. Correct.

24 Q. Okay, and whoever had that letter that is Exhibit 679,
25 the letter from the building code official, Mr. Brown, also

1 could read that the ordinance itself had been enclosed,
2 right?

3 A. As attached to this letter.

4 Q. Yeah.

5 A. Correct.

6 MR. BUCKLEY: Pull up Exhibit 141, please.

7 Q. Have you ever read this ordinance? It's section 90.08
8 entitled Sprinkler Systems with the Town of Folly Beach?
9 Go to A first, please.

10 A. I think only in reference to this, to this case.

11 Q. And the only time you would've read it would've been
12 probably talking to me or Mr. Atkins, right?

13 A. Correct.

14 Q. Okay. Prior to you ever getting involved in, in this
15 project and at any time after this project, you've never
16 seen that ordinance, right?

17 A. I don't recall ever seeing this, no.

18 Q. Okay, and nobody ever brought your attention to the
19 fact that this ordinance had to be followed for this
20 project, did they?

21 A. I don't believe so.

22 Q. Okay, and if they had, you would've, wouldn't you?

23 A. Absolutely.

24 Q. Okay. First paragraph A says:

25 Notwithstanding any provision to the contrary and

1 the national or any other applicable code,
2 automatic fire sprinkler systems shall be
3 installed and maintained in all new commercial
4 and multifamily construction.

5 Duplexes come under that definition, right,
6 multifamily?

7 A. Yes.

8 Q. Okay.

9 A. I think that's, I think that's fair.

10 Q. And then subparagraph C:

11 Subject to the approval of the fire chief,
12 sprinklers may be omitted from buildings where
13 sprinklers are considered undesirable due to the
14 contents or the nature of the contents, or in
15 rooms or areas which are noncombustible
16 construction with noncombustible content.

17 Right?

18 A. Yes.

19 q. Next page, And there's a chart that's part of
20 paragraph C, and it says: Acceptable areas of omission.
21 And it's got a column for single family and a column for
22 two family, right?

23 A. Yes.

24 Q. And in the single family, you can omit sprinklers in
25 virtually any of those areas that has an X in them, right?

1 A. Yes, I think so.

2 Q. And then with carports and similar attached
3 structures, there's an asterisk. You see that?

4 A. Yes.

5 Q. And both single family and two family, the asterisk
6 leads you to additional information, right?

7 A. Yes.

8 Q. And that additional information says:

9 If attached structure is separated from dwelling
10 units by minimum one hour fire-rated
11 construction.

12 So, if your carport is separated by a minimum one hour
13 fire-rated construction, then just as the building code
14 official Mr. Hall stated, you can eliminate sprinklers from
15 that garage, right?

16 A. It seems correct, yes.

17 Q. Okay, and look at attics not used living, living or
18 storage. There's no exception for that whatsoever, is
19 there?

20 A. Doesn't appear to be, no.

21 Q. Okay, and go to paragraph D, please:

22 Variances to this section may be granted after a
23 hearing by the fire chief, building official, and
24 member of the building industry appointed by the
25 city council.

1 You've never seen any variance for this job, have you?

2 A. No. Not in writing, no.

3 Q. Now, you never attended any hearing?

4 A. I did not. However, I, I would make the simple
5 comment that by virtue of acceptance of the proposed
6 design, I would consider that ---

7 MR. BUCKLEY: Objection, Your Honor.

8 A. --- an inherent variance.

9 MR. BUCKLEY: Objection, Your Honor. That's
10 nonresponsive. I asked if he attended a hearing.

11 WITNESS: Well.

12 THE COURT: Well, he's answering your question. I'll
13 allow him to go on.

14 BY MR. BUCKLEY:

15 A. I apologize. I thought the question was was I aware
16 of any variance, and I was just explaining that ---

17 Q. No. The question was did you attend a hearing.

18 A. The, the ---

19 Q. And the answer is ---

20 A. The prior question?

21 Q. And the answer is what?

22 A. No, I did not ---

23 Q. Okay.

24 A. --- attend the hearing.

25 Q. And if a -- if the owners today were to add sprinklers

1 in the attics at these units, you used a term when we met
2 as to whether or not there would be sufficient what to, to
3 service that?

4 A. Density.

5 Q. Density, right.

6 A. I believe that's the term you're referring to.

7 Q. It was. It would be a complex matter to add
8 sprinklers to the attics of these units at this point in
9 time, wouldn't it?

10 A. I think it would be difficult, yes.

11 Q. Expensive, too, wouldn't it?

12 A. Likely, yes.

13 MR. BUCKLEY: That's all I have.

14 REDIRECT EXAMINATION BY MR. ATKINS:

15 Q. Mr. Constantine, you were just asked by Mr. Buckley,
16 he commented that NFPA 13-D tells you the type of equipment
17 necessary, and you said yes. It says more than that,
18 doesn't it?

19 A. Yes, it does.

20 Q. It actually has a provision on attics and whether they
21 have to or can -- should or should not be sprinkled,
22 correct?

23 A. I believe it does, yes.

24 Q. Okay. Rather than ask you to quote it for me, I'll
25 ask you to read it for me. NFPA 13-D, this is the 2002

1 edition. That would have probably been about the edition
2 applicable back in the 2006 time period maybe?

3 A. I, I think so, yes.

4 Q. Okay. 8.6.5 talks about sprinklers in attics. Would
5 you read to us what NFPA 13-D says about sprinklers in
6 attics on one and two-family dwellings?

7 A. Sprinklers shall not be required in attics,
8 crawlspaces, and other concealed spaces that
9 are not used or intended for living
10 purposes.

11 Q. Do you have any reason to believe the attics at
12 Palmetto Pointe are intended for living purposes?

13 A. No, sir.

14 Q. Okay. You were also shown a March 6, 2006, letter
15 from Tommy Hill, the code official, to Tommy Brown, the
16 developer, copied to the fire marshal and fire chief and a
17 guy named Robert Wise, and it referenced 90.8 and it
18 referenced a fire rating of one hour. If you got it
19 separation, you don't have to sprinkle. NFPA doesn't
20 require sprinkling of the garage at all, does it?

21 A. Correct. It does not.

22 Q. Okay. There is actually nothing stated in the March
23 letter about sprinkling attics, is there?

24 A. No.

25 Q. In fact, couldn't that letter just as well be the very

1 variance that we've been talking about?

2 MR. BUCKLEY: Objection.

3 Q. Documentation of it?

4 MR. BUCKLEY: He's leading him, Your Honor.

5 THE COURT: You might need to rephrase. I'm not sure
6 about -- it sounds like a speculative -- calls for a
7 speculative answer.

8 BY MR. ATKINS:

9 Q. You've, you've, you've testified that it appears to
10 have been part of a contract, W.C. Services, which you saw
11 for the first time today, correct?

12 A. Correct.

13 Q. What else could that letter represent?

14 MR. BUCKLEY: Calls for speculation, Your Honor.

15 Q. Let me rephrase it. The letter doesn't say anything
16 about putting sprinklers in attics, does it?

17 A. It does not.

18 Q. It references a one hour, if you've got a one hour
19 rating, you can delete sprinklers in the garage, correct?

20 A. That's correct.

21 Q. Which is not part of NFPA 13-D, correct?

22 A. Correct.

23 Q. Do you know if that one hour rating, if you got it,
24 you don't have to sprinkle, if that's part of the Folly
25 Beach ordinance?

1 A. I believe it is based on what Mr. Buckley showed me
2 earlier.

3 Q. Okay. So, the inclusion of that might indicate that
4 we intend to enforce that?

5 A. I would think so, yes.

6 Q. But it doesn't say anything about sprinklers in the
7 attics, does it?

8 A. It does not.

9 MR. ATKINS: Thank you.

10 RECROSS-EXAMINATION BY MR. BUCKLEY:

11 Q. NFPA 13-D is incorporated into the 2003 IRC, right?

12 A. Yes, I would think so in terms of adoption, yes.

13 Q. Okay, and the 2003 IRC is the applicability code for
14 this project, and I want you to read for the jury, publish
15 for the jury what paragraph, what section R102.2 of the
16 applicable building states about local law.

17 A. R101.2:

18 Other laws. The provisions of this code shall
19 not be deemed to nullify any provisions of local,
20 state, or federal law.

21 MR. BUCKLEY: That's all I have.

22 MR. ATKINS: No other questions, Your Honor.

23 THE COURT: You can step down from the witness stand.

24 Thank you very much.

25 (THE WITNESS EXITS THE STAND.)

1 THE COURT: Any objection to this witness being
2 released from the subpoena from the plaintiff?

3 MR. BUCKLEY: No, Your Honor.

4 THE COURT: From the defense?

5 MR. KENDALL: None, Your Honor.

6 THE COURT: All right, you are released, sir. Thank
7 you very much.

8 WITNESS: Thank you.

9 THE COURT: All right, ladies and gentlemen, it's
10 5:15. All right, so we'll resume tomorrow morning at 9:00.
11 We'll see you at 9:00 in the morning, and have a good
12 evening. Please don't discuss the case.

13 (THE JURY EXITS AT 5:13 P.M.)

14 THE COURT: Thank you. Tomorrow -- please be seated,
15 everybody. I'm sorry. Tomorrow's order of business, we'll
16 begin -- do you have any other witnesses?

17 MR. ATKINS: One more.

18 THE COURT: You have one more? Will be first up?

19 MR. ATKINS: Will be first.

20 THE COURT: He or she will be first up in the morning.

21 After that, we'll switch over to Mr. Reeser. How many
22 witnesses do you anticipate calling at this time?

23 MR. REESER: At this point, maybe none.

24 THE COURT: All right, and at that point in time, we
25 will move on to the final phase of the trial. And in that

1 vein, my clerk is getting ready to email you all just a
2 draft of some jury charges at this point in time. It's a
3 working draft. I anticipate we'll have some charging
4 conference.

5 I know some attorney says it's going to be lengthy.
6 Let's try and cut down. That's why I'm sending it to y'all
7 tonight. I really would appreciate it if you all could
8 communicate with each other as good as you possibly can at
9 this point to try and hone this down. I really don't like
10 reading seventy pages of a jury charge to a jury. Nobody
11 can really process that much information. I don't find it
12 to be useful. However, obviously I want to incorporate
13 what's pertinent and, and relevant ---

14 MR. COLE: Your Honor.

15 THE COURT: --- to claims in this trial.

16 So, yes, sir.

17 MR. COLE: Just for us, did you just take everything
18 we sent and do you put it in one big document, or did you
19 already cull that down some?

20 THE COURT: We've culled it down considerably.

21 MR. COLE: Okay.

22 THE COURT: But we have considered all submissions,
23 but that's not to say -- like I say, it's a working draft.
24 We may have left something out. I want you to look at it
25 and tell us. We'll talk about it tomorrow, okay?

1 So, do that tonight so that at the close of the
2 testimony tomorrow, we can push forward as quickly as
3 possible. I'd really like to close and charge tomorrow; I
4 don't see why we couldn't. I really don't. So, let's move
5 in that direction, okay? All right.

6 MR. BUCKLEY: One matter, Your Honor.

7 THE COURT: Yes, sir.

8 MR. BUCKLEY: Exhibit 141 is the ordinance we just
9 went through. We had stipulated that it is in the record
10 but it's not going back to the jury.

11 THE COURT: Yeah. I recall that.

12 MR. BUCKLEY: And, and what I wanted to make sure is,
13 is that could mark it as a court's exhibit.

14 THE COURT: Separately?

15 MR. BUCKLEY: Separately.

16 THE COURT: Sure.

17 MR. BUCKLEY: I thought it had been.

18 THE COURT: 141.

19 MR. BUCKLEY: I thought it had been but it hadn't.

20 (COUNSELORS CONFER.)

21 THE COURT: We will mark it. What's the next court's
22 exhibit, Madame Court Reporter?

23 COURT REPORTER: 10.

24 THE COURT: Court's Exhibit 10. It can be marked as
25 far as out of an abundance of caution.

1 (A PAUSE.)

2 THE COURT: Mr. Reeser's exhibit will be Defendant's
3 3.

4 BAILIFF: Order in the court.

5 THE COURT: I need a little bit of order, everybody.

6 BAILIFF: Order in the court.

7 THE COURT: I know it's been a long day. I need to be
8 able to hear what's going on up here.

9 Mr. Reeser's exhibit, I believe, was the stack of
10 invoices. That was initially what we had labeled
11 Defendant's 3 during the course of the trial. He did not
12 move at the time for those to be admitted. I think there
13 was some discussion and somebody said no objection, but
14 they were never actually moved into admission. He would
15 like to do so at this time.

16 (A PAUSE.)

17 THE COURT: All right, that will be 3.

18 (A PAUSE.)

19 (INVOICES PREVIOUSLY MARKED AS PART OF DEFENDANT'S 3
20 FOR IDENTIFICATION MARKED INTO EVIDENCE AS DEFENDANT'S
21 EXHIBIT NUMBER 3.A.)

22 THE COURT: All right, the other thing that I need to
23 discuss with you gentlemen is that we have discussed a
24 verdict form. I think we've gotten one proposed, but it
25 didn't seem to be a collective collaboration, so.

1 MR. KENDALL: We have been circulating one amongst
2 ourselves, and if you will allow us tonight to send you
3 what we agreed to?

4 THE COURT: Oh, yeah, yeah. That's fine. Just maybe
5 come tomorrow prepared with a proposed form and your
6 charges or any changes to my charge.

7 MR. ATKINS: The verdict form that I emailed to your
8 clerk.

9 THE COURT: That was before several parties were out.

10 MR. ATKINS: Yeah, that was still -- but -- and I just
11 didn't make copies because my copier wouldn't work. I was
12 doing it from home, but I did provide Mr. Kendall with a
13 copy.

14 THE COURT: That's fine. Just come tomorrow with
15 something. How's that?

16 MR. ATKINS: Okay.

17 MR. KENDALL: Come tomorrow prepared.

18 THE COURT: Come tomorrow with something. More than a
19 blank page. How's that? All right.

20 You look puzzled, Mr. Lucey. What can I do for you?

21 MR. LUCEY: I didn't know that I received a verdict
22 form from anybody else on the case.

23 THE COURT: I haven't actually seen it.

24 (COUNSELORS CONFER.)

25 THE COURT: I haven't seen it. They didn't send it

1 directly to me, so did it go to you?

2 (COUNSELORS CONFER.)

3 THE COURT: If you could both just come with whatever
4 you have tomorrow. Deal with it tomorrow.

5 (ORDINANCE PREVIOUSLY MARKED AS PLAINTIFF'S 141 FOR ID
6 MARKED INTO EVIDENCE AS COURT'S EXHIBIT NUMBER 10.)

7 (NFPA 13-D MARKED INTO EVIDENCE AS COURT'S EXHIBIT
8 NUMBER 11.)

9 (WHEREUPON, THE CASE IS AT EASE.)

10 *WEDNESDAY, MAY 15, 2019*

11 (COURT RESUMES AT 9:02 A.M.)

12 THE COURT: Thank you. Please be seated. Welcome.

13 Okay, I have received several emails from you all and
14 look forward to continuing to review those while we get
15 through the last portion of the testimony this morning, and
16 who do we have next?

17 MR. ATKINS: Mark Lazo, Your Honor.

18 THE COURT: Okay, and he's your witness?

19 MR. ATKINS: Yes, Your Honor.

20 THE COURT: Last witness?

21 MR. ATKINS: He's my last witness.

22 THE COURT: And then we'll move over to Mr. Reeser.
23 Do you expect to call anybody else at this time or anyone
24 at all?

25 MR. REESER: Maybe one.

1 THE COURT: Maybe one, okay.

2 (A PAUSE.)

3 THE COURT: Okay. Well, if the jury's all here, is
4 everybody ready?

5 MR. COLE: Yes, Your Honor.

6 MR. ATKINS: Yes, ma'am.

7 THE COURT: All right. Thank you very much. You can
8 bring them in.

9 (THE JURY ENTERS AT 9:04 A.M.)

10 THE COURT: Please be seated, everybody. Thank you
11 once again for being so prompt this morning. I believe
12 we're ready to begin.

13 Mr. Atkins, you can call your next witness.

14 MR. ATKINS: Yes, ma'am. W.C. Services calls Mark
15 Lazo to the stand.

16 MARK A. LAZO, BEING DULY SWORN,
17 TESTIFIES AS FOLLOWS:

18 THE COURT: Please have a seat. State your full name,
19 and spell your last name for the record.

20 WITNESS: Mark Anthony Lazo. It's L-a-z-o.

21 VOIR DIRE EXAMINATION BY MR. ATKINS:

22 Q. Good morning, Mr. Lazo.

23 A. Good morning.

24 Q. Let me ask you first of all that you tell us a little
25 bit about your background. You're currently employed?

1 A. Yes, I am.

2 Q. Where are you employed?

3 A. CEMS Engineering and Architecture.

4 Q. What type of -- CEMS Architecture, what type of
5 organization is that?

6 A. We're an architectural engineering firm. We do
7 facility design.

8 Q. Okay.

9 A. And consulting.

10 Q. Okay, and how long have you been working with them?

11 A. Six years, a little over six years.

12 Q. Okay. Who were you working for previously?

13 A. Prior to that, I worked for a company called O'Brien
14 and Gere Engineers.

15 Q. Okay.

16 A. They were based out of Syracuse. We had an office
17 here in Charleston.

18 Q. All right. Was that also an engineering design type
19 organization?

20 A. Yes.

21 Q. Okay.

22 A. Architectural engineering firm as well.

23 Q. We've heard during the course of trial -- and you were
24 here -- at one time you worked for ABS?

25 A. I did, yes.

1 Q. When was that?

2 A. That was back in the 2006 to 2008 timeframe.

3 Q. Okay, and as it turned out, based on project
4 documents, it appeared you were actually out at Palmetto
5 Pointe during construction?

6 A. Yes, I was. We were, we were asked by the architect
7 to come out and do a window test evaluation for, just for
8 an installed window. We did -- we set up a, a, a, a test
9 assembly and sprayed water on the window to, to determine
10 whether or not the installed construction would resist
11 water penetration.

12 Q. Was that the limits of your involvement back in the
13 2006 timeframe?

14 A. Yes.

15 Q. Okay. You didn't look at any fire sprinkler systems
16 or anything like that?

17 A. No. I didn't -- actually didn't even know at the time
18 they were putting sprinklers in the buildings.

19 Q. Okay. All right. Please continue. Where are you
20 originally from?

21 A. I'm from Maryland originally.

22 Q. Okay. Did you go to school in Maryland?

23 A. I did. Attended the University of Maryland. I got a
24 Bachelor of Science degree in fire protection engineering.

25 Q. Now, explain to me. We've got all kind of engineering

1 degrees. Mechanical, people do mechanical, civil, that
2 sort of thing. What does a fire protection engineer do?

3 A. So, a fire protection engineer applies math, science
4 principles to protect people and property from the damaging
5 effects of, of fire. Throughout my career, I, I basically,
6 I read code. I interpret code standards. I pull out
7 requirements from those standards related to fire
8 suppression systems, fire alarm systems, building life
9 safety, means of egress, making sure people can get out of
10 the building safely. I take those requirements and if I'm,
11 if I'm actually doing the design, then I take those
12 requirements and put them into my design documents, whether
13 that's drawings or specifications.

14 And then I also once, once the, the design is
15 complete, you know, in, in the case, in the -- an instance
16 of, like, fire sprinkler systems, my design documents will
17 be sent to fire -- or a fire sprinkler contractor, who will
18 then develop what they call shop drawings or construction
19 drawings which lays out -- they lay out their sprinkler
20 heads, their pipe. Then they'll submit those for us to
21 review. We review them and if it, if it meets our design
22 documents, it meets the industry standards and the
23 applicable codes, then we will indicate that we reviewed
24 it, we've accepted it, and send it back to the contractor
25 to then go through the process of getting their permits to

1 install it. Once that system is installed, we will go out
2 and, and we'll, we'll witness testing, inspections, that
3 sort of thing.

4 The sprinkler system has to undergo what's called a
5 hydrostatic test where they make sure there's no leaks in
6 the system. So, they, they will pump the system up to 200
7 pounds of pressure per square inch, and then it has to sit
8 there for two hours and no visible leaks have -- can occur,
9 and there should be no drop in pressure and ---

10 Q. Mr. Lazo.

11 A. Sorry.

12 Q. You, you've been involved in, as a fire protection
13 engineer, in the -- as far as fire protection engineer,
14 coming up with what's required for a particular
15 application?

16 A. Yes.

17 Q. Okay. You also have experience in the process of
18 coming up with what works for a given structure, what type
19 of design, design systems?

20 A. Yes.

21 Q. You've done that, and that's part of your job?

22 A. Yes.

23 Q. In designing, you have also had to account for and
24 identify applicable standards, fire standards, fire codes,
25 things of that nature?

1 A. Yes. That's correct.

2 Q. In the process of the design, you've also worked with
3 code officials, building code fire officials?

4 A. Yes, I have.

5 Q. And that's part of your job?

6 A. It is, yes.

7 Q. And besides working with code officials, you actually
8 are in the field as a third party at whatever, overseeing
9 the installation of the system that you've designed?

10 A. Yes. If we, if we've been hired to do so, we will.

11 Q. That's what you will do?

12 A. Yes.

13 Q. And as a engineer in fire protection, have you worked
14 your adult life since college in that field?

15 A. Yes, sir.

16 Q. That's all you've done?

17 A. That's all that is -- well, take that back. So, in
18 my, my short period of time with Applied Building Sciences,
19 I did -- I was there as a fire protection engineer to
20 handle, you know, fire protection matters that came in to
21 the office. There weren't a lot of those cases or those,
22 those matters that came in the office. So, during that
23 timeframe, 2006, 2008 timeframe, I, I was also charged with
24 the nondestructive testing group of that, of that firm.
25 But other than that, my entire career has been fire

1 protection engineer.

2 Q. How many years is your career along?

3 A. I'm going on twenty-six years now.

4 Q. Okay. Are you a professional engineer?

5 A. I am, yes.

6 Q. Have you taken the test and you've passed it? You're,
7 you're P.E. registered in South Carolina?

8 A. Yes. I, I took and passed the fire protection
9 engineers specific discipline examination by the National
10 Council of Engineering Examiners.

11 Q. Okay.

12 MR. ATKINS: Your Honor, at this time we would tender
13 Mr. Lazo as an expert as a fire protection engineer in fire
14 protection engineering. I would also tender him in the
15 fire protection design code and standard applications for
16 fire protection, as well as fire protection construction
17 and, and third-party oversight construction.

18 THE COURT: All right, any voir dire from the
19 plaintiffs?

20 MR. EVANS: No objection, Your Honor.

21 THE COURT: All right, ladies and gentlemen, once
22 again this witness will be qualified in the area of fire
23 protection engineering, design code, and what was it?
24 Third-party construction?

25 MR. ATKINS: Yeah, construction, third-party oversight

1 construction.

2 THE COURT: And he will be allowed to give opinion
3 testimony in that area. Of course you don't have to accept
4 his opinions, but it's information for you to use as any
5 way that you see fit.

6 Thank you very much, Mr. Atkins.

7 MR. ATKINS: Thank you.

8 DIRECT EXAMINATION BY MR. ATKINS:

9 Q. Your Honor -- I mean, Mr. Lazo, you -- tell the jury
10 how you came to be involved in this particular case.

11 A. Okay. So Mr. Atkins, he contacted me by, by phone and
12 mentioned that he was representing a fire sprinkler
13 contractor in a, in a, in a lawsuit, this lawsuit. And
14 there had been some alleged deficiencies with the
15 installation of the fire sprinkler system, and I was asked
16 to basically go out and take a look at the, the system and
17 determine whether or not there were any deficiencies.

18 Q. Okay. In the process of doing your, your job and
19 assisting me to represent my client, what kinds of things
20 did you look at what? What kind of things did you review?
21 What kind of -- who did you talk to, those types of things?
22 What did you do in your investigation?

23 A. So, first I, I went out to the, to the site back in --
24 I think it was 2017 and -- well, I, I received your -- I
25 received the reports from the, the plaintiffs' experts and

1 reviewed those first before going out to the site, to the,
2 to the site to see what the issues were that they were
3 claiming were a problem.

4 Q. Would that be the reports of Mr. Smits?

5 A. That was Mr. Smits, Mr. Green, and I think that was,
6 that was it primarily.

7 Q. Did you have some photographs as well?

8 A. I did have some photographs in their reports.

9 Q. Okay. Did you have photographs by others like Mr.
10 Mease and folks like that?

11 A. Yes. There were other things like that, yeah.

12 Q. Go ahead.

13 A. So from the review, review of those reports, I found
14 that they were claiming that sprinklers were missing in the
15 attics and the garages, and there was a, an issue with,
16 with how the insulation in the attic was installed around
17 the sprinkler piping.

18 So, from there I went and did my field investigation
19 with -- there was a group of other, other engineers and
20 architects out there as well as different attorneys and
21 their representatives. You -- as we went from building to
22 building, I think we did, like, seventeen, some...

23 Q. So, you went out and looked at the buildings?

24 A. Went out and looked at the buildings.

25 Q. Took some photographs?

1 A. Took some photographs.

2 Q. Okay.

3 A. I went into the attics and, and looked. You know,
4 there, there were no sprinklers in the attics, and I
5 didn't, really didn't expect to see any sprinklers in the
6 attics because ---

7 Q. You're talking about the residential buildings?

8 A. The residential buildings, yes. Talking about ---

9 Q. You also looked at the clubhouse?

10 A. I did look at the clubhouse as well. That was on a
11 later, later site visit.

12 Q. Okay.

13 A. But, yeah, I went into the attics. I didn't see any
14 sprinklers in the attics. I wasn't expecting to see any
15 sprinklers in the attics.

16 Q. Why were you not expecting to see sprinklers in the
17 attics?

18 A. Because it's -- these are and one and two-family
19 dwelling units and NFP 13-D is the, the standard for
20 installation of sprinklers in one and two-family dwelling
21 units, and it doesn't require sprinklers in the attics or
22 the garage.

23 Q. Well, a certain type of attic, right?

24 A. No. Just an attic that's not intended for, for living
25 purposes.

1 Q. That's, that's the certain type of attic.

2 A. Yeah, yeah. Sorry. I did not quite understand what
3 you were saying.

4 Q. Go ahead.

5 A. So following the, the site visits, I then started
6 diving into the documents that, that the different experts
7 had provided, the different attorneys had provided and ---

8 Q. What type of documents? Did you have project
9 documents?

10 A. I -- we -- I asked, I asked to -- if there were any
11 drawings available, and we were provided some sprinkler
12 drawings that were developed by W.C. Services. I asked for
13 the State of South Carolina's fire sprinkler specification,
14 fire sprinkler system specification sheet. That's four Ss,
15 yeah, as well as the certificate of compliance, which,
16 which is required to be developed prior to installing the
17 system.

18 Q. You heard Mr. Constantine talking about his
19 development of those documents?

20 A. I did, yes.

21 Q. You did? Fine. Now, did you ever, did you ever
22 receive -- have you ever seen final plans, and I'm, I'm
23 talking about final plans for fire sprinklers or site plan.

24 A. I have not seen any plans that are stamped reviewed or
25 approved or anything to that effect.

1 Q. So, all you've had is the one set of plans you talked
2 about for the sprinklers that was not stamped, marked
3 approved or anything?

4 A. Correct.

5 Q. Okay. All right. Continue, please.

6 A. So -- excuse me. So, okay, so I was reviewing
7 documents. I reviewed the, the W.C. Services contract a
8 little further. So, now I hadn't, I hadn't reviewed their,
9 their contract completely. I had just, you know, noticed,
10 okay, put the sprinkler system in. I saw it had NFPA 13-D.
11 I'm, like, okay. So, that's what I'll follow.

12 Q. Did you learn something different? That there was
13 some other contention regarding the subcontract of what was
14 or was not required?

15 A. So, then there, there was mention of a March 6, 2006,
16 letter from the, the town -- or the City of Folly Beach.

17 Q. Was it the building code official?

18 A. That was -- yes, and I reviewed, reviewed that.
19 That's the letter. I think we saw it yesterday during ---

20 Q. The one that Mr. Buckley read to the jury?

21 A. Yes.

22 Q. Okay.

23 A. Yeah, and it, it, it was written by the, the town of
24 -- the City of Folly Beach building official and present
25 was the fire chief, and it spelled out, you know, that

1 provided 13-D system. And then you're also to provide --
2 also that sprinklers can be omitted from the garages as
3 long as there's a one-hour fire rating between the garage
4 and the, the living unit.

5 COURT REPORTER: Speak up, please.

6 WITNESS: I'm sorry.

7 Q. All right. So, you, you reviewed that letter in the
8 course of your investigation. Did you form an opinion as
9 to whether that letter was providing any design criterias
10 for these fire sprinklers?

11 A. My, my understanding and, and my interpretation of
12 that letter was that the, the fire sprinkler system was to
13 be designed in accordance with NFPA 13-D. That was, that
14 was called out explicitly in that letter.

15 Q. That letter also references an ordinance, does it not?

16 A. It does reference the Folly ordinance.

17 Q. And the reference is the sprinklers in the garage if
18 you don't have a one-hour separation?

19 A. Correct.

20 Q. Where does that come from? Is that in the NFPA 13-D?

21 A. No. NFPA 13-D doesn't require sprinklers in garages
22 at all. There's no stipulation for a one-hour separation
23 or anything like that.

24 Q. So, where did that come from?

25 A. That came from the, the Folly Beach ordinance.

1 Q. And the Folly Beach ordinance as far as sprinklers in
2 attics, do you recall generally what the language is of
3 that?

4 A. There's a table in the, in the ordinance and it, it,
5 it lists out single-family homes and multifamily homes and
6 it -- that, that table is basically where, where sprinklers
7 can be omitted. And there, there are checkmarks, X marks
8 in, in boxes where they can be omitted.

9 Q. Okay, and does it also have in C, talk about you can
10 be waived or omitted by the fire chief, attics that are
11 made of combustible material or store combustible,
12 something along those lines?

13 A. It's something along those lines that it can be
14 omitted by...

15 Q. The letter that you saw, March 6, 2006, that you
16 testified to -- it was read to us yesterday; that's in
17 evidence -- does that letter by the building code official,
18 copied to the fire marshal and others, including, I think,
19 Seabolt, who was the fire chief of James Island?

20 A. Yes.

21 Q. Okay, and a guy named Robert Wise?

22 A. Yes.

23 Q. Okay. Does that letter in, in the enumeration of
24 ordinance provisions that are to be followed, does it say
25 anything about attics?

1 A. No.

2 Q. Okay.

3 A. My understanding is they were relying on in NFPA
4 13-D ---

5 Q. Okay.

6 A. --- requirements for that, specifically stuff ---

7 Q. In the course of ---

8 A. --- like that.

9 Q. --- your investigation of that, did you speak with any
10 folks that were involved at the time of the design and
11 construction?

12 A. I contacted Chief Tittle.

13 Q. You actually spoke to Chief Tittle?

14 A. I did speak with Chief Tittle.

15 Q. Did you understand him to be the fire marshal and the
16 authority having jurisdiction on the construction and
17 design?

18 A. Yes, I did.

19 Q. At Palmetto Pointe?

20 A. Yes.

21 Q. Okay.

22 A. He was -- I was -- he was identified on the -- in that
23 letter as the fire chief.

24 Q. Okay. Did -- after that conversation, did you change
25 your opinion? Did that impact your opinion as to whether

1 or not sprinklers were required in the attics in the
2 original construction and design of this project?

3 A. Actually no. It affirmed my, my position that, that
4 sprinklers were not required in the attic because Mr.
5 Tittle had indicated that NFPA 13-D ---

6 MR. EVANS: Objection, Your Honor.

7 Q. Let me ask you this. Talking with code officials ---

8 THE COURT: Wait a minute. Hold on.

9 What's your objection?

10 MR. EVANS: Hearsay. He's saying hearsay.

11 THE COURT: Oh, I didn't hear. I'm sorry.

12 MR. ATKINS: I'm sorry. Let me, let me rephrase.

13 THE COURT: Rephrase the question. Thank you.

14 MR. ATKINS: Put the foundation in.

15 BY MR. ATKINS:

16 Q. In, in doing your investigation, folks, people of your
17 expertise doing this type of work, do you rely -- is it
18 reasonable to rely upon input from code officials, people
19 involved in the project during construction, those types of
20 sources of information in order to formulate your opinions?

21 A. Yes.

22 Q. Is it common and reasonable for folks, in your
23 expertise, to take that information from the code officials
24 and folks who were there in, in, in coming up and
25 formulating opinions?

1 A. Yes.

2 Q. Did you do that in this case?

3 A. Yes.

4 Q. Did Dr. -- did Mr. Tittle's information, George
5 Tittle's information to you constitute part of the facts
6 upon which you relied?

7 A. Yes.

8 Q. For your opinion?

9 A. Yes.

10 Q. Now, after talking with George Tittle, did that impact
11 or change your opinion in this instance that fire
12 sprinklers were never, never required by anyone in design
13 or construction of Palmetto Pointe?

14 A. That was my understanding, that there was no intention
15 to put sprinklers in the attic.

16 Q. And I misspoke. That's in the residential buildings,
17 correct?

18 A. That's in the residential buildings, yes.

19 Q. Because the residential buildings are, are ---

20 A. One and two-family ---

21 Q. --- subject to ---

22 A. NFPA 13-D.

23 Q. --- 13-D?

24 A. Yes.

25 Q. You also missed mentioned at a later time you came

1 back and you went into the clubhouse?

2 A. Yes.

3 Q. Okay.

4 A. That's a different occupancy.

5 Q. Like what -- did you go in the attic at the clubhouse?

6 A. I did, yes.

7 Q. What did you find in the attic at the clubhouse?

8 A. Sprinkler system.

9 Q. I thought you said NFPA 13-D didn't require attics in
10 clubhouse -- in, in attics?

11 A. It doesn't require them in attics in one and
12 two-family dwellings. The clubhouse is not a one and
13 two-family dwelling because it's an assembly occupancy.
14 So, it falls under the over -- the all encompassing NFPA
15 13-D standard for installation of sprinkler systems, and
16 that, that's for your commercial buildings and, and you can
17 actually use 13 for residential buildings as well. There's
18 just a little more stringent requirements.

19 Q. Now, NFPA 13-D applied to the clubhouse ---

20 A. It did.

21 Q. --- is what you're saying, and it's kind of a pyramid.
22 You got at the top of the pyramid NFPA 13, and then you got
23 D and different ---

24 A. That's correct.

25 Q. --- variations of that standard?

1 A. Yes. NFPA 13-D and then sub, substandard is the NFPA
2 13-D, and then that, that's for your one and two-family
3 dwellings which we're doing with here. And then you have
4 NFPA 13-R, which is for your, your multifamily residential
5 up to four stories like apartment buildings, condominiums,
6 and that sort of thing.

7 Q. So, NFPA 13 would have been the standard applicable to
8 the clubhouse?

9 A. Yes.

10 Q. Does NFPA 13-D require sprinklers in the attic in the
11 clubhouse?

12 A. Yes.

13 Q. And the reason is why?

14 A. Because of the, the type of construction.

15 Q. Okay. Is it because of its use?

16 A. And its -- well, yeah, and its use because it's again,
17 as I said, it's an assembly occupancy, so.

18 Q. It's where people gather?

19 A. Yeah, for gathering, yeah.

20 Q. Okay. All right. You also -- in looking at this
21 project for me, did you look at the photographs and
22 materials that have been generated by others showing
23 penetrations of firewalls in these attics?

24 A. I did, yes.

25 Q. Okay. Did you find or did you note whether there was

1 any evidence of any sealant that had been applied to any of
2 these penetrations?

3 A. No, I did not see any, anything in those photos.

4 Q. Were you able to -- did you look to see who -- or if
5 it was more than one, whom, I don't know -- was tasked with
6 the responsibility in this project to seal those
7 penetrations?

8 A. I, I looked through the, the project manual. I looked
9 through the W.C. Services's contract, and I didn't see, I
10 didn't see where it tells you who is responsible for
11 firestopping. I saw a spec for firestopping which tells
12 you how to do it, but I didn't see it referenced in W.C.
13 Services's contract. I didn't see it. Really I didn't see
14 anyone, anyone telling W.C. Services that you are
15 responsible for putting firestopping in.

16 Q. You see anything that referenced anyone being told to
17 do that?

18 A. No.

19 Q. Okay. You were here when the question was raised with
20 this set of plans, the only ones we were able to come up
21 with, June 7, 2006, set of plans?

22 A. Yes.

23 Q. For fire sprinklers?

24 A. Yes.

25 Q. That they were not signed or sealed or anything where

1 they were stamped as final or anything, correct?

2 A. Correct.

3 Q. There's been -- and you heard the testimony yesterday,
4 cross-examination, Mr. Buckley of Mr. Constantine and, and
5 Mr. Christopher, about layout, water connections, riser
6 locations, things of that nature?

7 A. Yes, I did.

8 Q. The variation between the as-built conditions that we
9 see at Palmetto Pointe and that set of unsealed, unsigned,
10 unapproved final approval plans that we had up on the board
11 over there yesterday?

12 A. I did see those.

13 Q. You did? Do you have any opinions on, on the
14 variation between those as-built plans such as we had and
15 the, the conditions as-built? Let me, let me put it this
16 way. As-built, where are the risers located, the, the fire
17 sprinkler risers or cabinets?

18 A. They're, they're located in the, the front of the
19 buildings, in, like, right out in front of the garage
20 areas.

21 Q. Okay, and in those drawings, it didn't show where they
22 were located, correct?

23 A. Well, it shows, it shows 1 inch pipes. On, on the
24 drawings it shows 1, 1 inch pipes on either side of the
25 building. I, I call it plan, plan east -- plan, plan east,

1 plan west.

2 Q. Okay. Coming in the side of the units, constitute the
3 building?

4 A. Correct.

5 Q. Okay. Would the water -- given where the risers are
6 now, would, would -- do the water pipes come in the front?

7 A. My understanding from, from -- that's, that's what,
8 that's what I could surmise is that the water lines come in
9 -- the water lines from the, the street come in from the
10 front rather than coming in from the sides.

11 Q. I mean, would it make sense to put a riser somewhere
12 other than on the line of the water that's coming into the
13 building?

14 A. No.

15 Q. Okay.

16 A. Typically, typically you -- your, your sprinkler
17 contractor picks up where the underground contractor leaves
18 off. So, the underground contractor will install their,
19 their water line coming to the building, and then from that
20 point the sprinkler contractor will, will take that supply
21 line and, and start running their, their piping.

22 Q. In your experience that you've talked about here and
23 told us about, between preliminary plans, final plans, and
24 even after-final plans, can and do changes occur in the
25 field with regard to the layout and supply of water for

1 fire sprinkler systems?

2 A. Yeah, they do all the time.

3 Q. Okay, and if those changes occur, they've got to be
4 approved?

5 A. Yes.

6 Q. Right?

7 A. Yes.

8 Q. Okay. So, when you've got a set of certified
9 compliance, you've got a certified compliance and certified
10 specifications such as we had in this case that Mr.

11 Constantine say he sealed, gave back the to fire sprinkler
12 subcontractor W.C. Services to submit, that doesn't mean
13 that that's set in concrete, that it can't change?

14 A. Correct, because you're right. There's, there's
15 things that, like -- that, that assumes that construction
16 will be installed exactly as shown and ---

17 Q. You ---

18 A. --- that changes.

19 Q. You encounter things in the field?

20 A. You encounter, yeah, you encounter differing,
21 differing site conditions.

22 Q. Have you, have you -- in looking for documentation,
23 have you found anything that suggests that there was any
24 approval or any inspections, any changes that occurred with
25 regard to the layouts of the pipe access and the risers?

1 A. Say that again?

2 Q. Yeah. Have you found any documentation, product
3 documentation of any inspections, above-ground pipe
4 inspections that would indicate that there was approval?

5 A. Yeah. I, I did find the, the, the NFP 13 certificate
6 of material and testing of the above -- excuse me -- of
7 above-ground piping. That's a, that's a form that's
8 required by NFPA 13 to be completed by the sprinkler
9 contractor and then also signed off by a representative of
10 the owner or the building official. That -- when I was
11 talking earlier about the hydrostatic test, that, that's
12 the form that they, they fill out to basically document
13 that they, they tested the system and there were no
14 presence of leaks. And in order to -- for, for that to --
15 for someone to sign off on that, they actually have to
16 physically, they physically inspect the piping while it's
17 at pressure and make sure there's no, no leaking or
18 anything like that.

19 Q. And that would be you put piping into the sprinkler
20 riser or cabinet?

21 A. That's piping in the, in the riser cabinet, piping in
22 the -- inside the building all the way out to the sprinkler
23 heads.

24 Q. Do you recall approximately what timeframe that you --
25 that this inspection occurred, what timeframe in -- that it

1 occurred?

2 A. From what I recall on the, the inspections sheets, it
3 was in the February, February 2007 timeframe.

4 Q. Okay. All right, and the official that was signing
5 off on the inspection of the piping, looking for leaks,
6 that type of thing, was that Tommy Hall that signed off on
7 that?

8 A. That looked like -- the signature was a little sloppy,
9 but it -- the last name I can make out. Hall.

10 Q. Hall?

11 A. In the last name, so.

12 Q. Hall.

13 A. I'm assuming that was Tommy Hall.

14 Q. And he was approving? He was saying that he, he -- on
15 that occasion, that inspection, that there were no leaks
16 detected?

17 A. Correct.

18 Q. Okay.

19 A. And then he -- and that, again, no leaks detected,
20 being that he inspected the piping installation and found,
21 and found no issues.

22 Q. All right. In conclusion, when I called you, I asked
23 if you could help me in telling me what my client did
24 wrong. Do you have an opinion to a reasonable degree of
25 certainty in your field of expertise whether or not W.C.

1 Services, based on all the information you reviewed, all
2 the folks you talked to, all the documentation that you've
3 seen, your expertise, your knowledge of code and standards,
4 is there anything you found that W.C. Services did wrong?

5 A. I did not see anything wrong with the installation.

6 MR. ATKINS: Thank you.

7 THE COURT: Any cross-examination by the other
8 defendants?

9 All right, over to the plaintiffs' side, Mr. Evans.

10 MR. EVANS: Thank you, Your Honor.

11 CROSS-EXAMINATION BY MR. EVANS:

12 Q. Good morning, Mr. Lazo.

13 A. Good morning.

14 Q. Let's get some housekeeping matters out of the way
15 first, if you don't mind. You and your firm, you don't do
16 residential fire sprinkle work, correct?

17 A. Our firm does not do that, no.

18 Q. And you don't, correct?

19 A. I don't currently, no.

20 Q. And you worked on Folly before with regard to
21 residential fire sprinkler systems?

22 A. That's correct.

23 Q. You never worked on a two-family dwelling under the
24 IRC, the code provisions that, that are relevant for
25 Palmetto Pointe where fire sprinklers were omitted from the

1 attic, correct?

2 A. That's correct.

3 Q. You're not, nor have you ever been, a code enforcement
4 officer, correct, under the IRC?

5 A. Under the IRC, no.

6 Q. You're not, nor have you ever been, a fire marshal,
7 correct?

8 A. That's correct.

9 Q. You know any experts in this case that have these
10 credentials?

11 A. Pardon?

12 Q. You know any experts in this case that have these
13 credentials?

14 A. I believe Mr. Smits had those at one time.

15 Q. Let's talk about the firewalls first.

16 A. Okay.

17 Q. You've been in several Palmetto Pointe attics,
18 correct?

19 A. Yes.

20 Q. And you, as you testified with Mr. Atkins, you saw a
21 number of penetrations in those attics, correct?

22 A. Yes.

23 Q. I'm going to hand you what's been marked for
24 identification purposes only as Plaintiff's Exhibit 1039, a
25 series of photographs, and if you'd just flip through those

1 for me real quick and tell, tell us. Do those look like
2 the conditions that you observed in the attic?

3 A. Yes.

4 Q. They were accurate -- they accurately represent the
5 conditions as you saw them on your site inspection where
6 you went into a number of attics, correct?

7 A. Yes.

8 MR. EVANS: Plaintiffs move 1039 into evidence.

9 THE COURT: Any objection to 1039?

10 MR. KENDALL: I, I don't have a -- I don't, I don't
11 have a copy of it.

12 THE COURT: Well, make sure everybody's got a copy and
13 knows what we're talking about first.

14 MR. KENDALL: Can I see the documents?

15 (A PAUSE.)

16 MR. KENDALL: Yeah. No, without objection.

17 THE COURT: Okay, 1039, Mr. Evans, is that what you
18 said?

19 MR. EVANS: Yes, ma'am.

20 THE COURT: All right, 1039, 1039 will admitted
21 without objection.

22 (PHOTOGRAPHS - LOWCOUNTRY HOMES MARKED INTO EVIDENCE
23 AS PLAINTIFF'S EXHIBIT NUMBER 1039.)

24 MR. EVANS: Would you put 1039 on the screen, please,
25 and photo 2, please?

1 BY MR. EVANS:

2 Q. And, Mr. Lazo, you turn -- well, there you go on the
3 screen. Is this one of those penetrations that you've seen
4 in the attic?

5 A. Yes.

6 Q. And in this instance, we've got a wood member actually
7 diving into, penetrating the firewall, correct?

8 A. If that is the firewall, yes.

9 Q. Well, are there any other instances that you, that
10 you'd see drywall in an attic other than to form a
11 firewall?

12 A. Probably not.

13 Q. Okay.

14 MR. EVANS: Photo 4, please.

15 Q. Another condition with wood penetrating the attic, but
16 here, rather than a single penetration of a 2 x 4 or a 2 x
17 6 going in, we've got wood imbedded longways in the wall,
18 correct?

19 A. That's what it appears to be, yes.

20 MR. EVANS: Photo 5, please.

21 Q. Here we've got a fire sprinkler penetrating a
22 firewall, correct?

23 A. That's correct.

24 Q. Photo ---

25 A. Can I say something?

1 Q. Sure.

2 A. So, you can also notice that the drywall is cut out
3 around that pipe at the bottom. That leaves me to believe
4 that the drywall was installed after the sprinkler pipe was
5 put in.

6 Q. Gotcha. Turn to photo 7, please. This ---

7 A. That's a bad tape job.

8 Q. Bad tape job?

9 A. Sorry.

10 Q. You're with me. Bad tape job, and we shouldn't be
11 able to see those screws, should we?

12 A. Correct.

13 MR. EVANS: Photo 28, please, and for the record, I'm
14 just referring to the last two digits of a 847 digit.

15 Q. Photo 8 -- excuse me, photo 28, we've got both
16 electrical lines and plumbing stacks intruding on the
17 firewall, correct?

18 A. That's correct.

19 Q. We also have a void at the bottom of the firewall
20 where the two pieces of lumber stop on either side of that
21 plumbing penetration, correct?

22 A. That's what that looks like, yes.

23 MR. EVANS: Photo 72, please.

24 Q. Here we're got pieces of firewall material just laid
25 up against the firewall, correct?

1 A. That's, that's what it looks like. I don't see any
2 fasteners or anything.

3 Q. No fasteners, no tape, and penetrations by truss
4 members, correct?

5 A. Correct.

6 Q. It looks like they're just leaned up against the wall,
7 at least that third one over from the left, correct?

8 A. Yes.

9 Q. You can see it leaning backwards off the wall?

10 A. It is, yes.

11 MR. EVANS: Photo 93, please.

12 Q. We've got a sprinkler pipe in the wall and all of the
13 drywall physically removed from around it, correct?

14 A. Correct.

15 Q. And, and you haven't found any evidence that a racoon
16 did that, did you?

17 A. No.

18 MR. EVANS: Photo 154, please.

19 Q. HVAC duct intruding on the firewall, correct?

20 A. Correct.

21 Q. Just about everybody that set foot in this attic, in
22 these attics at Palmetto Pointe damaged the firewalls,
23 didn't they?

24 A. I mean, other than, like, as I said, the sprinkler
25 contractor's pipe appeared to be installed already, so.

1 Q. Right. It was intruding on the firewalls. Let me,
2 let me re-ask the question. Just about everybody that set
3 foot in these attics at Palmetto Pointe intruded on the
4 firewalls?

5 A. Correct.

6 Q. Every one of those intrusions of the firewall, whether
7 it be from a HVAC duct, plumbing pipe, electrical line, or
8 HVAC line, or a sprinkler, a fire sprinkler, would be a
9 code violation, correct?

10 A. It would require firestopping to maintain the
11 integrity of the wall.

12 Q. Can you put firestopping around CPVC pipe?

13 A. You can put a firestopping system, yes.

14 Q. And what would a firestopping system be?

15 A. It would be -- they, they call it, like, a collar, a
16 collar system where the, the firestopping is what they call
17 an intumescent material: that when it heats up, it expands.
18 Plastic piping, which, which CPVC is and regular PVC is, if
19 it catches fire, it will melt away, and then that leaves
20 the, the opening of the, the pipe still passing through the
21 wall.

22 And collar-type system, you put that intumescent
23 material inside of -- it's like a metal collar that fastens
24 to the wall and goes around the pipe. And when the fire
25 impinges upon the firestopping, even if that pipe melts

1 away, the collar forces the, the firestopping material over
2 the, the pipe opening if the, if the pipe melts away.

3 Q. That sleeve or collar, it would go on the pipe before
4 the pipe was connected at either end, correct?

5 A. No. It can go on after, after installation. They're
6 designed that way.

7 Q. You've reviewed the contract with -- between W.C.
8 Services and CBC, Complete Building, correct?

9 A. I did, yes.

10 Q. And you're aware that the specific term of that
11 contract attached as, as referenced is that March 2006
12 letter, correct?

13 A. Yes.

14 Q. And that March 2006 letter, Plaintiff's Exhibit 679,
15 makes specific reference to the City of Folly Beach code of
16 ordinances, correct?

17 A. That's correct. They had to reference that.

18 Q. And, and attaches that ordinance -- a copy of this
19 ordinance is attached for your records, correct?

20 A. Yes. They had to, they had to attach that because the
21 IRC in 2003 doesn't require sprinklers in these dwellings.

22 Q. Sure, but the contract does, right?

23 A. Yes.

24 Q. And the contract includes Plaintiff's Exhibit marked
25 for identification only 141, correct?

1 A. Yes.

2 Q. And 141 is attached to 679 and 679 is a part of the
3 contract, right?

4 A. Yeah, 1 -- you're saying 141 is the 90.08?

5 Q. Correct.

6 A. Yes.

7 MR. EVANS: Plaintiffs move 141 into evidence, Your
8 Honor.

9 THE COURT: Any objection?

10 MR. ATKINS: Yes, Your Honor. We object to the
11 introduction of the law to be going back to the jury in the
12 course of the case. If he likes ---

13 THE COURT: Is 141 the letter we discussed earlier?

14 MR. EVANS: 141 is the ordinance ---

15 MR. ATKINS: 141 is the ordinance that is ---

16 MR. EVANS: --- itself.

17 THE COURT: Oh, that is ---

18 MR. EVANS: That is ---

19 THE COURT: Yeah, we discussed this earlier.

20 MR. EVANS: That is incorporated by reference
21 specifically into the contract.

22 MR. ATKINS: I think it was, it was marked before ---

23 MR. EVANS: They said this was the scope of work.

24 THE COURT: It was, yeah, was marked for ID only
25 earlier. It will continue to be marked for ID only over

1 the objections of plaintiff.

2 BY MR. EVANS:

3 Q. Sir, you'd agree with me that Plaintiff's 141, marked
4 for ID only, the ordinance is a part of the contract,
5 correct?

6 A. Correct.

7 Q. Confirm for me that that's what I set in front of you
8 there.

9 A. okay. Yes, that's what you provided.

10 Q. And as discussed yesterday with Mr. Constantine, you
11 heard -- and you've reviewed this and seen -- that
12 sprinklers may be omitted in attics in single-family homes,
13 correct?

14 A. Based on the table, yes.

15 Q. Right. In order to do that in a single-family home,
16 the variance has to be granted after a hearing of the fire
17 chief, the building official, and a member of the building
18 industry appointed by city council, correct?

19 A. You're talking about single family?

20 Q. Right.

21 A. You don't need a variance for single family. It is in
22 the table; the table provides an omission.

23 Q. And it doesn't allow for the omission in two-family
24 dwellings, correct?

25 A. That's correct.

1 Q. And two-family dwellings are what we have at Palmetto
2 Pointe, right?

3 A. That's correct.

4 Q. So, in order to vary that, you believe that a meeting
5 has to occur between the fire chief, the building official,
6 and member of city council, correct -- excuse me, a member
7 of the building industry appointed by city council,
8 correct?

9 A. Correct, and that's kind of my understanding of this
10 March 2006 letter.

11 Q. Who were the, who were the folks on this letter, and
12 where do they say you don't have to put them in the attics?

13 A. They -- by, by reference NFPA 13-D, they don't have to
14 put them in attics because ---

15 Q. Take, take ---

16 A. --- of the ---

17 Q. Take the time to read 679 and tell me where the word
18 attic shows up.

19 A. 679?

20 Q. Yeah.

21 A. Where are you talking about?

22 Q. The letter, the March letter, the one that's on the
23 screen. Tell me where the word attic is in there.

24 A. It doesn't, it doesn't appear in there.

25 Q. Okay, but what it does say is you have to follow the

1 city ordinance, correct?

2 A. It does, but you also -- it also says you have to
3 follow NFPA 13-D.

4 Q. Sure, and when we've got two things that conflict,
5 we've got a code and a city ordinance that conflict or
6 potentially have, have, have differing information, what
7 does the building code say you have to do?

8 A. You would follow the most stringent criteria or ---

9 Q. Which is ---

10 A. --- what the ---

11 Q. Which is the most stringent?

12 A. Would be the, the table.

13 Q. The city ordinance?

14 A. Right.

15 Q. Right, and the city -- the building code actually
16 says:

17 The provisions of this code shall not be deemed
18 to nullify any provisions of local state or
19 federal law.

20 A. Right.

21 Q. Folly ordinances is the local law, right?

22 A. Right.

23 Q. Folly ordinance requires you to put attic, put attic
24 -- put sprinklers in the attics, correct?

25 A. It, it does say that.

1 Q. Right.

2 A. But the, the building official and the fire chief did
3 not require them. Otherwise, the, the sprinkler plans
4 would not have been accepted by the city.

5 Q. Well, let's talk about ---

6 A. They would not have signed off on the installation
7 from the -- on those test certificates.

8 Q. You bring up a good point. Let's talk about another
9 section of the IRC, the building code applicable for
10 construction at Folly Pointe. Are you familiar with
11 section R1-10.1?

12 A. That talk about building officials' duties?

13 Q. Yeah, that's the one that talks about use and
14 occupancy and getting a certificate of occupancy. It also
15 says, quote:

16 Issuance of a certificate of occupancy shall not
17 be construed as an approval of a violation of the
18 provisions of this code or any other ordinances
19 of the jurisdiction.

20 End quote.

21 A. Yes. I understand that.

22 Q. Stated differently, just because the building official
23 didn't catch them failing to put the sprinklers in the
24 attics as required by the ordinance doesn't mean it's okay,
25 right?

1 A. That's correct, but the building official told them --
2 didn't tell them to put the sprinklers in the attic.

3 Q. No. The ordinance did.

4 Let's talk about the plans for a second. You've not
5 seen any fire sprinkler plans which show the fire sprinkler
6 pipes running up through the firewall cavity, correct?

7 A. That's correct.

8 Q. In, in fact, the only plans you've seen have the
9 sprinkler pipes entering the residences on the exteriors,
10 correct?

11 A. Yeah. That would be the sprinkler pipe -- or, I'm
12 sorry, the water lines.

13 Q. And those have been marked previously as Plaintiff's
14 Exhibit 705. You heard testimony on those yesterday,
15 correct?

16 A. I did, yes.

17 MR. EVANS: Plaintiffs move 705 into evidence.

18 THE COURT: What is 705, Mr. Evans?

19 MR. EVANS: Plans of the sprinkler layout.

20 THE COURT: Okay. Any objection to 705?

21 MR. ATKINS: Your Honor, albeit that's our only set of
22 plans, we've had testimony that it was, at best,
23 preliminary. We couldn't tell whether it was the final
24 set. I mean, it really -- we don't know. We just don't
25 know.

1 THE COURT: Okay, any objection to them being admitted
2 at this point in time?

3 Has he viewed these plans?

4 MR. EVANS: Yeah.

5 THE COURT: Did you already lay a foundation?

6 MR. EVANS: Yeah.

7 THE COURT: I'm going to let them in at this point in
8 time. They will be admitted, 705.

9 (FIRE SPRINKLER DRAWINGS MARKED INTO EVIDENCE AS
10 PLAINTIFF'S EXHIBIT NUMBER 705.)

11 BY MR. EVANS:

12 Q. In fact, Mr. Lazo, the only plans you've seen have the
13 sprinkler pipes running up the exterior, correct?

14 A. Yeah, and that corresponds to what the plumbing
15 drawings show.

16 Q. Okay, but that's not what's out there.

17 A. Correct.

18 Q. Plan -- the fire sprinklers run right up through the
19 chase that forms the firewall between the units, correct?

20 A. I, I would, I -- well, I would assume so because I, I
21 haven't seen inside the wall. So, I assume it goes up that
22 direction.

23 Q. You've seen where the riser location is, and you've
24 see those pipes penetrating the attic?

25 A. Yes.

1 Q. The firewall attics?

2 A. Yes.

3 Q. And it makes sense to have the lines run up on the
4 outside rather than the inside because having them on the
5 inside naturally creates numerous locations where the
6 sprinklers have to penetrate the firewall, correct?

7 A. Yes.

8 Q. It's got to do it in between the first floor and the
9 second floor?

10 A. Yes.

11 Q. It's got to do it again in the attic, correct?

12 A. Yes.

13 Q. And each one of those locations creates a code
14 violation, correct?

15 A. Create -- yes, it's creates a penetration that needs
16 to be firestopped.

17 Q. In fact, the whole systems is a code violation because
18 it deviates from the only plans that are in existence,
19 correct?

20 A. It, it's only a code violation if it deviates from the
21 approved plans.

22 Q. And you don't have any testimony to provide us, any
23 evidence that these are not the plans that got approved,
24 correct?

25 A. I can't, I can't say whether they were the approved

1 plans or not.

2 Q. Well, you see a stamp on these plans from Mr.
3 Constantine, correct?

4 A. I see his seal on there.

5 Q. Right, and you heard testimony from Mr. Constantine
6 yesterday that he's unaware of any other plans, correct?

7 A. I did, yeah.

8 Q. And you heard testimony yesterday from Mr.
9 Christopher, the guy that actually drew the plans, that he
10 didn't prepare any other plans, correct?

11 A. Correct.

12 Q. So, the only evidence in this case is that these are
13 the final plans, right?

14 A. These are, these are plans, yeah.

15 Q. That these are the final plans. These the only plans.

16 A. I can't say whether they're final plans or not.

17 Q. You can't say that there are any others.

18 A. I can't say that there any others, correct.

19 Q. And if, in fact, these are the final plans, then the
20 entire system as installed at Palmetto Pointe is a code
21 violation, correct?

22 A. Only inasmuch as amended plans were not provided.

23 Q. And ---

24 A. Because you are allowed, you are allowed to make field
25 changes during construction that would then -- then they --

1 those field changes then get submitted again for approval.

2 Q. But you haven't seen any of those, correct?

3 A. I have not.

4 Q. And, and you mentioned earlier with Mr. Atkins that
5 you believe the riser locations are where they are because
6 of where the water tap, the main tap coming in is, correct?

7 A. Correct.

8 Q. Could an installer have run the sprinkler lines from
9 that riser location out to the perimeter and up?

10 A. They would have had to have done it underground.
11 That's -- underground work is typically not in a sprinkler
12 contractor's ---

13 Q. Is there ---

14 A. --- order.

15 Q. Is there any reason it couldn't have been run through
16 the driveunder drivers?

17 A. That would have been challenging because there's no
18 heat in the garages.

19 Q. There's no heat in the attics.

20 A. Right, but the, the -- that's what the insulation is
21 for.

22 THE COURT: Make sure you ask questions. Don't
23 statements, Mr. Evans.

24 Q. Are there any site conditions that prevented them from
25 moving the sprinkler lines to the perimeter walls, to the

1 outer perimeter walls?

2 A. I can't say. I wasn't there when they, when they got
3 on-site to do, to do the construction.

4 Q. Running sprinkler pipes up through that firewall
5 cavity creates a chimney for fire to accelerate and spread,
6 correct?

7 A. If it -- if the penetrations are not firestopped, yes.

8 Q. Have you seen evidence or heard evidence that they're
9 stopped in the garage?

10 A. I haven't, I haven't seen anything. I, I didn't hear
11 anything about the garages, though.

12 Q. If the, if the firewalls are not firestopped in the
13 garage, that's the worst-case scenario, correct, because
14 now we're got air blowing fire all the way up into the
15 attic, correct?

16 A. That's, that's potential, yes.

17 Q. And into every one of those penetrations in between
18 the floor lines, correct?

19 A. That's correct.

20 Q. And your job and the job of any, anyone involved in
21 fire sprinkler systems is to protect people and property
22 from fire, correct?

23 A. Correct.

24 Q. And as installed, you've got a lot of problems with
25 this system, correct?

1 A. Only inasmuch as the firestopping is not completed.

2 Q. And the system as designed deviates 180 degrees from
3 what was initially -- excuse me, as installed deviated 180
4 from what was initially designed, correct?

5 A. Only as far as the pipe routing goes.

6 Q. And that pipe routing, routing is what creates the
7 potential for fire problems, correct?

8 A. Correct, but it doesn't need to be changed.

9 Q. Are you aware that the W.C. Services used Rain Bird
10 lawn irrigation parts in the system?

11 A. I have not -- I did not I see any of those in anything
12 I, I've looked at.

13 Q. You didn't see photographs of lawn irrigation parts in
14 the riser cabinets?

15 A. Not on the sprinkler risers.

16 Q. Not -- excuse me?

17 A. Not on the sprinkler risers.

18 Q. That's the same stuff you might use, you or I might
19 use on our lawn, right?

20 A. Rain Bird, yeah, that's, that's a lawn sprinkler name
21 I'm familiar with.

22 Q. Yeah, and it'd be an improper use of code violation to
23 use it in a fire sprinkler system, correct?

24 A. If it's not listed and approved for sprinklers, yeah,
25 but again I didn't see any of those on -- when I did my

1 site visit.

2 MR. EVANS: Thank you, Mr. Lazo.

3 THE COURT: All right, redirect?

4 REDIRECT EXAMINATION BY MR. ATKINS:

5 Q. On that last point, Mr. Lazo, you talked about when
6 you went out in the field and did inspections, you took a
7 series of photographs?

8 A. I did.

9 Q. And you took photographs of, of risers of several
10 units?

11 A. Yes.

12 Q. And, in fact, when they, they deposed you, those were
13 marked as exhibits ---

14 A. Correct.

15 Q. --- at your deposition, correct?

16 A. Yes.

17 Q. Several unit, several pictures of risers. Was there
18 ever a Rain Bird piece of equipment associated with any of
19 the fire sprinkler risers that you saw?

20 A. I did not see any in, in them.

21 Q. You've seen a lot of the photographs taken by other
22 folks?

23 A. Yes.

24 Q. In this case as well. Have you, have you -- do you
25 recall seeing any riser that had a irrigation system

1 component attached to it?

2 A. Not the sprinkler riser, no.

3 Q. Do you have any information -- assuming it exists
4 because I've seen some photo -- I've seen some photographs.
5 I'll admit I've -- they produced some photographs that
6 shows in one rise a Rain Bird back flow preventer, okay?
7 But do you have any information when they might have been
8 installed, by whom, or what conditions?

9 A. I do not.

10 Q. Okay. You were asked if you had any evidence that
11 Exhibit 705, the unsealed, unsigned, un, unstamped for
12 approved plans were, in fact, not the final plans. You
13 remember being asked that?

14 A. Yes.

15 Q. You also testified about the code official and doing
16 the inspection in February of 2007. You recall talking
17 about that?

18 A. Yes.

19 Q. And that the code official who's inspecting in
20 February of 2007 is looking at the as-built condition,
21 correct?

22 A. Correct.

23 Q. So, the risers would have had to have been in the
24 location they are today, which is in the garage area like
25 you discussed?

1 A. Right. That's what it says on the test form.

2 Q. Did you find anything in that report, that inspection,
3 any notation by the code official, wait. Hold on. It may
4 not be leaking but doggone, this isn't where it's supposed
5 to be. See anything like that?

6 A. No.

7 Q. Okay. Did you see any document, document or anything
8 from the code officials to that effect?

9 A. No, I did not.

10 Q. Okay. you also -- Mr. Evans seems to be, in reference
11 to the letter of March the 6th, 2006 -- I can't see. I
12 believe it's Exhibit 679. I believe that's what he
13 referred to. He seems to be implying that the absence of a
14 specific reference to the ordinance in that letter, the
15 absence means that it should have been enforced. Is that
16 what you gathered from what he's saying?

17 A. That's what I believe he was, he was alleging.

18 Q. Okay.

19 A. Indicating.

20 Q. The ordinance is -- there is a portion of the
21 ordinance that is, is called out and is specified in that
22 letter, isn't it?

23 A. Yes.

24 Q. And that's the one dealing with garages ---

25 A. Correct.

1 Q. --- correct?

2 A. Correct.

3 Q. And so that was something that the officials were
4 requiring from the ordinance?

5 A. Yes.

6 Q. But they didn't say anything about requiring anything
7 from the ordinance about attics, did they?

8 A. That's correct. It's because NFPA 13-D does not
9 require it on that.

10 Q. And they weren't superseding that by referencing that
11 code, that ordinance reference to attic sprinklers?

12 A. Correct.

13 Q. Okay.

14 MR. ATKINS: Thank you very much.

15 RECROSS-EXAMINATION BY MR. EVANS:

16 Q. Mr. Lazo.

17 A. Yes, sir.

18 Q. Code officials missed thousands of violations on this
19 project, didn't they?

20 A. It appears so, yes.

21 THE COURT: All right, Mr. Lazo, you can step down
22 from the witness stand.

23 WITNESS: Thank you.

24 THE COURT: Thank you very much.

25 Any objection to this witness being released from

1 subpoena?

2 MR. EVANS: None from me, Your Honor.

3 THE COURT: All right, you are free to go.

4 WITNESS: Thank you.

5 THE COURT: Thank you, sir.

6 WITNESS: Thank y'all.

7 (THE WITNESS EXITS THE STAND.)

8 THE COURT: Mr. Atkins, call your next witness.

9 MR. ATKINS: Your Honor, that would be the case for
10 W.C. Services.

11 THE COURT: All right.

12 Mr. Reeser, any witnesses you'd like to call at this
13 time?

14 MR. REESER: Your Honor, I have no witnesses.

15 THE COURT: All right.

16 All right, at this point, ladies and gentlemen, we're
17 going to take a short morning break.

18 MR. BUCKLEY: Your Honor.

19 THE COURT: Yes, sir.

20 MR. BUCKLEY: We do have one rebuttal witness by
21 deposition.

22 MR. REESER: I believe that may need...

23 THE COURT: A matter of law we need to take up?

24 MR. REESER: Taken up outside their presence.

25 THE COURT: All right.

1 (THE JURY EXITS AT 11:46 A.M.)

2 THE COURT: Thank you very much. Please be seated.
3 Okay, heard all the evidence the attorneys are going to
4 present in this case, and the defendants rested prior to
5 the rebuttal witness which was called from the plaintiff.
6 I'm happy to entertain any motions from any parties at this
7 point in time.

8 MR. LUCEY: Yes, Your Honor. The plaintiff moves for
9 a directed verdict on both its causes of action for
10 negligence and for implied warranty against all defendants.
11 I'm putting up for the court to see Plaintiff's Exhibit
12 826, which is a lengthy list of code violations, of breach
13 of industry standards, and breach of manufactures'
14 installation instructions which all experts agreed are,
15 again, a breach in the building code because the code
16 requires you to follow the manufacturers' installation
17 instruction.

18 To a man, every witness in this courtroom has conceded
19 the defects, and they haven't just conceded negligence
20 defects. They've conceded defects where there is an
21 absence of any care whatsoever. For instance, flashing
22 locations where the problem is not that the flashing is
23 short. The problem is the flashing doesn't exist. And,
24 Your Honor, this, these defects have been pervasive, and
25 all the experts conceded proximate cause as to the water

1 intrusion and the damage, the building code violation, and
2 dealing, dealing with -- the court will recall, of course,
3 this was undisputed from the first hour of this trial. We
4 called the defense expert as our, as our witness, and
5 conceded these violations in the first hour. And then
6 repeatedly, time after time after time, every expert, every
7 witness, even Mr. Poyner, the only defendant that took the
8 stand, so to speak -- he's not really a defendant; his
9 company is -- but the only defendant that took the stand.
10 And he conceded the violations -- the gaps, the missing
11 flashing, and the damage -- and the need to fix the leaks.
12 It's just overwhelming; it's just undisputed.

13 What they did in their defense, they got up here, and
14 they put up some fancy rulers and tried to show that the
15 roof was 3 and a half and 12 instead of 3 and 12 or
16 something like that. They didn't link anything up to any
17 defects; no witness up there denied the defects. They
18 didn't try -- they, they pointed fingers, but nobody,
19 nobody denied it.

20 And what's interesting, Your Honor, is they never even
21 put up a picture of a properly flashed post. They didn't
22 contest that a lot of posts aren't flashed or are badly
23 flashed or are only half wrapped. They didn't contest
24 that. They never even put up one picture to show it was
25 done right anywhere on the property, a total absence of

1 correct application.

2 And, Your Honor, then the motion for a directed
3 verdict applies equally to the self-described oddball
4 defendant W.C. Services. Clearly they violated the
5 building code and the ordinance, and they can't explain it
6 away. Mr. Lazo today, he wants to take a letter that
7 predates the job and say this is a variance on the building
8 code. No. The letter, by its very terms, says this is how
9 you need to design your system. Here's what you got to pay
10 attention to, and here's our ordinance, and you got to do
11 everything.

12 And all the witnesses, all the expert witnesses that
13 testified on that fire issue agreed that IRC provides two
14 things that are really important here. One, in the event
15 there is a local ordinance, the building code does not
16 supersede it. The building code yields to the more
17 stringent standard and to the local ordinance. So, for two
18 reasons it yields to that ordinance.

19 Additionally, Your Honor, the building code, it
20 clearly provides that the issuance of a certificate of
21 occupancy is not an approval and cannot be construed as an
22 approval of a nonconforming condition. That is why when
23 you have exceptions to the building code, the code itself
24 requires -- you must call those exceptions out to the
25 building official. If you don't call them out, there's no

1 way for anybody to know whether the building official
2 actually ever saw the violation or he was focused on
3 something else.

4 Nowhere in any evidence in this courtroom is there
5 any, any evidence of any kind that the self-described
6 oddball defendant called out their intent to violate the
7 Folly Beach ordinance to the fire marshal or to the
8 building official. So, we ask for a directed verdict, Your
9 Honor, against all defendants on both the implied warranty
10 and on the negligence, and obviously my argument has
11 focused more on the negligence. Everything that we allege
12 is negligent is also a breach of the implied warranty. And
13 numerous witnesses admitted that the workmanship was
14 pathetic. There were violations of industry standards.

15 And the court will probably -- is probably more aware
16 than I am. The only difference between the two causes of
17 action, the only practical difference in this context is
18 that the implied warranty does not require a sharing of
19 fault. Either you flashed it or you didn't; either your
20 construction job worked or it didn't. Clearly there's no
21 evidence that the job worked here, and so we're entitled to
22 a directed verdict on both those causes of action against
23 all defendants.

24 And I would also remind the court that Mr. Constantine
25 was apparently the design engineer on the fire system. He

1 was never shown the W.C. Services's contract which required
2 them to comply with local ordinances. That was never
3 brought to his attention. Nobody was able to testify that
4 they had a variance from a properly convened Folly Beach
5 committee meeting to put in a fire system that did not
6 comply with the building code. Even to the extent that
7 there remains any question whatsoever about the sprinklers
8 in the attic being a violation of the ordinance, the only
9 plans in evidence show separate fire systems that do not
10 violate the fire separation assembly between these units.

11 The uncontroverted testimony is is that W.C. Services
12 did not comply with the only plans in evidence, I believe
13 is Exhibit 705. They instead inserted their, their riser
14 pipes up through the fire separation assembly, creating a
15 chimney chase, a, a hot -- heightened risk of fire in the
16 middle of all these units. And we know -- we got Mr. Al
17 Schweickhardt on day one to tell us that he had looked for
18 the firestopping at the base of this wall and never found
19 it. And the evidence is is that because they ran this up
20 through the center, they then violated the fire assembly in
21 every unit they went by. So, even if there remains a
22 question about the Folly Beach ordinance, W.C. Services
23 violated the plaintiffs anyway and they violated the, the
24 assembly, they violate UL 341 which was specified for this
25 job by the architect. And, and Constantine said he did not

1 do any other plans. So, the only plan is the best evidence
2 we have the plaintiffs were violated.

3 THE COURT: Thank you very much.

4 Who would like to respond?

5 MR. KENDALL: I'll start, Your Honor. Thank you.

6 Rett Kendall for Complete Building.

7 We, we need to just bring focus to what it is we're
8 talking about in the negligence claim. This is not strict
9 liability. It's not -- *res ipsa loquitur* is not allowed to
10 be used as a substitute for proof of fault. So, we can't
11 just look at the situation as it has been presented at the
12 end of what's going on here without also considering how it
13 got there.

14 Now, the how it got there is the question that is in
15 dispute in this case. There has been because of -- for a
16 lot of reasons, there's a, a -- there is limited evidence
17 but there is evidence that the general contractor engaged
18 in a manner of conducting this job that could be construed
19 by this jury as having been appropriate levels of
20 supervision and oversight. There are numbers of -- the
21 meetings that were held, the consults with the architect,
22 the, the RFI process. All of those things indicate that
23 the general contractor in performing the job function
24 responsibilities that it has did carry on those
25 obligations.

1 One of the things we also have to be sure, this is
2 also not vicarious liability. The general contractor is
3 not liable as a matter of law for the negligent acts of its
4 subcontractors. They are independent. These are delegable
5 duties, and so it goes to what -- no one has actually
6 testified what the standard of care for a general
7 contractor is in specifics -- I think it's been implied in
8 a number of ways -- to meet the building code in those
9 things. But why we didn't meet the building code has not
10 been an answered questioned.

11 And so, Your Honor, there is sufficient evidence to
12 suggest here that we did perform the supervision oversight
13 coordination, quality control activities. That this jury
14 should have the chance to decide that question. And we
15 also had protective provisions within our contracts that
16 said our subcontractors were to monitor continuously their
17 own work on the job.

18 As to the -- what's in dispute in the case, I go back
19 again as to the items. Mr. Lucey has lumped everything as
20 though it's one pile, and it is not. We have multiple
21 issues that are being contested in this case. The, the
22 sprinkler contractor has put up a defense to -- a very
23 clear defense to its issues. The roof -- and expert
24 testimony was presented that the roof, the manner in which
25 the roof was attached over the field of the roof was not

1 negligent and it was, it was permissible. The deck
2 coatings shown -- we were shown diagrams of deck coatings
3 and how those were -- the manufacturers directed that those
4 be installed, and that there was actually -- the evidence
5 was that it was, it was, in fact, installed that way.

6 And then the railings that have been raised in this
7 case, there has been no evidence as to what those nailing
8 -- why those railings have -- the base has cracked. There
9 has been -- there was some evidence, there was some
10 suggestion the screws that were used not holding to the
11 wall. There was some talk, testimony about manufacturing
12 defect, but there's no -- there was certainly not clear
13 testimony that any negligence on the part of the general
14 contractor caused that to occur, certainly not enough
15 evidence to take it out of the hands of the jury to decide
16 these issues.

17 I'm certain that I have not listed all of the elements
18 that have been raised in the case but, Your Honor, this --
19 I don't think the judge -- that, that you will be able to
20 later -- maybe, maybe you can craft this, but it would be
21 very challenging to say you could direct a verdict on this
22 issue but not on this issue, this issue and not on that
23 issue when it comes to the pieces and parts of this case.
24 And so, Your Honor, all of this should go to the jury to be
25 considered by them. Thank you.

1 MR. COLE: Your Honor, for Tri-County, reiterate with,
2 you know, obviously a slightly different perspective for us
3 from Complete Building, and we'd just state what Rett said
4 for us as well because we're in sort of the hybrid
5 situation where we're both the person who's in charge, and
6 we also have subs underneath us to, to deal with that.

7 I just want to hit some highlights off of that, first
8 with saying that I'm not conceding that their contract
9 creates any liability for me. We'll deal with that
10 separately. But then also just from the suggestion that if
11 the defendants didn't put up a single photograph that
12 showed that something was right, that then that means we're
13 essentially admitting that everything is wrong is
14 incorrect. To me, I believe that's an attempt to try to
15 shift the burden of proof from the plaintiffs, who have to
16 prove their case and have to prove all of the different
17 elements instead of relying on, you know, us not proving
18 his case for him. And so I, I would just raise that.

19 And that, you know, from the position, you know, we
20 have not doubted that there is a resulting issue. It's not
21 entirely clear as to what exactly those initial causes
22 were, but we're still missing that big chasm in the middle
23 of where do you go from point A to point D with the
24 negligence and with the breach of warranty. That it's
25 convenient and it's easier, it might be easy to deal with,

1 but we're not here for convenience or being easy. We're
2 here to try to make sure that we get the law correctly and
3 make sure that the jury has everything that is before them
4 that they can deliberate on. So, I would use that as my
5 sort of support for the statements by Mr. Kendall and
6 against the plaintiffs.

7 MR. ATKINS: May it please the court? Your Honor, on
8 each of the elements mentioned by counsel for plaintiff,
9 ordinance, Folly Beach ordinance, plan variance, attic fire
10 wall penetrations, every one of those are hotly contested.
11 There's been more evidence presented in contradiction to
12 those assertions in the direct case and then in the case --
13 testimony of Mr. Constantine, Mr. Christopher, and Mr. Lazo
14 that each of those, there is, there is no responsibility,
15 no liability. There was nothing done by my client that was
16 wrong with respect to any of those elements. It is not
17 undisputed. It is hotly contested. So, I bring that to
18 the court's attention.

19 THE COURT: All right.

20 MR. REESER: Your Honor, at this point we would join
21 in with Mr. Kendall's arguments and Mr. Cole's argument. I
22 think it's pretty clear, based on the testimony presented,
23 there are certain issues as to causation. For example, if
24 the siding comes off, is it because it was the wrong
25 siding? Does it matter whether the nails were -- how they

1 were installed? All that is, is debatable in this case.
2 The caulk around the windows, we've heard it is a code
3 violation. What are the damages? Your Honor, for all
4 these, all these need to go to the jury for the jury to
5 make a determination on this claim as a whole, and not just
6 as to the negligence claim but as to the breach of warranty
7 claim -- breach of implied warranty claim, Your Honor.

8 MR. LUCEY: Your Honor, almost all the defendants'
9 arguments go to the amount of our damages, not whether or
10 not there was negligence on the property site by every
11 defendant, not whether or not there was a breach of implied
12 warranty on this property site by every defendant. We've
13 shown every defendant violated their duties. How bad and
14 extensive those violations are go to the damages. We did
15 not move directed verdict on the amount of damages. That's
16 obviously been reserved for the jury.

17 Your Honor, for the general contractor to stand before
18 you and say that they're not responsible for the
19 subcontractors is disingenuous. Any party can assume a
20 duty, even it was not already imposed upon them by law,
21 which the building code is imposed upon everybody. Anybody
22 can assume a duty by contract.

23 The court heard the engineer Schweickhardt, I believe
24 it was, read into the record the requirements of the
25 agreement in the general contractor's contract and the

1 general conditions where he agreed to be responsible for
2 every act and omission of every one of his subcontractors.
3 He can't now argue that doesn't hold so for him.

4 As to the master sub, as, as to Mr. Cole's client,
5 what, what is in evidence but the court may not have heard
6 much about is that the master sub-subcontract in evidence,
7 Exhibit Number 9, and this project specifications that is
8 in evidence, Exhibit Number 340, they both also incorporate
9 by reference the general conditions that Al Schweickhardt
10 read to the jury from the CBC contract. They incorporate
11 that obligation to be responsible for every act and
12 omission of his subcontractors, and that he is not allowed
13 to rely upon any design problem in, in -- for -- to -- for
14 -- to relieve himself of responsibility for any defective
15 work that he did, that he takes responsible --
16 responsibility for everything he does. And again, Al
17 Schweickhardt read both of those provisions to the jury.

18 The counsel for the second-tier subs raises allocation
19 questions in opposition to a directed verdict. That
20 doesn't change the fact that his witness admitted on the
21 witness stand, his client admitted on the witness stand
22 under oath that he violated the building code, that he
23 didn't do anything right. It doesn't matter that, that the
24 damages for replacement siding might be both because he
25 nailed it wrong and because it's the wrong size. He nailed

1 it, nailed it wrong. It's negligence and it's a breach of
2 his implied warranty, and he doesn't -- he conceded that in
3 his deposition.

4 And lastly, Your Honor, we mentioned briefly the
5 building code. There's been no precedent shown to this
6 court by any defendant that they can delegate their
7 obligations under the building. To the contrary, every
8 expert up there said everybody has to comply with the
9 building code.

10 I asked Mr. Elkin. Stand up, please, sir, and show
11 the jury where in the building code it says that the master
12 sub doesn't have to comply with it. He says you know that
13 doesn't exist. I did the same thing with the alleged
14 second-tier subs later on. He says you know that doesn't
15 exist. You cannot delegate your obligation to comply with
16 the building code, and so that's, that's not an argument
17 the court should entertain. Thank you, ma'am.

18 THE COURT: All right.

19 MR. KENDALL: There was one new, sort of new thing
20 raised there I want to comment on is the terms of the
21 contract. The contract that's been just mentioned just now
22 was the contract between the developer, Island Pointe, and
23 CBC. Those duties were created between them, and there's
24 no third-party beneficiary status that's been suggested or
25 proven that would make it flow to others.

1 So, the duties that he's alleged here are negligence.
2 They're not contract. They're breach -- implied warranties
3 and so the analysis of the liability and the fault, it, it
4 prevails -- I mean, it stands. And, and we would cite the
5 court to the case of *Fields vs. Haynes Waters Builders* --
6 excuse me, J. Haynes Waters Builders, that is 376 South
7 Carolina 545 2008 decision from the Supreme Court that says
8 that: Fields argued that in South Carolina, a general
9 contractor is automatically responsible for the negligence
10 of the subcontractor. And the Supreme Court says we
11 disagree.

12 THE COURT: All right. Well, I've heard the arguments
13 of counsel. I've obviously heard the evidence that was
14 presented during the trial. It's probably as close a call
15 of a directed verdict I've seen in a while, but I am not
16 going to direct a verdict. I think there is still an issue
17 that is properly before the jury as to causation.

18 Ultimately, that's the largest issue that I think the
19 jury is going to have to determine: did, in fact, these
20 alleged acts of negligence and breach of warranty cause the
21 damages that the plaintiffs allege. And that's ultimately
22 the main reason I am going to respectfully decline your
23 motion for directed verdict at this point in time, Mr.
24 Lucey.

25 So, we'll move on to any other motions the attorneys

1 need to bring before the court at this time.

2 MR. LUCEY: Yes, Your Honor. Referring to plaintiff's
3 email to the court last night, plaintiff is dismissing
4 their claims against Island Pointe, LLC, and we will not
5 need to charge the jury.

6 THE COURT: Okay.

7 MR. KENDALL: Your Honor, we filed a cross-claim
8 against Island Pointe. They did answer, and so we do not
9 think it's appropriate to remove them from the verdict from
10 at this point. We will -- we'd also make at the
11 appropriate time, we'll make a motion for default to be
12 entered against them, but they are, they are not --
13 plaintiff should not be able just to throw them out of the
14 case. We're saying Rule 41 requires consent. Of course,
15 the court can order around that, but just to state we're
16 objecting to their dismissal.

17 THE COURT: Okay.

18 MR. BOYD: In addition, Your Honor, there has been
19 evidence presented from which a jury could conclude that
20 the developer contributed. They were at the head of the
21 chain. They had the -- they held the financing. They
22 determined what they wanted. They were the ones, in
23 conjunction with the architect, that had to answer the
24 RFIs, the change orders. The plaintiffs testified that
25 they ran the HOA. There's no evidence the developer

1 residence. So, regardless of whatever the extent of the
2 consequential damages, the homeowners have to fix the
3 defect no matter what.

4 (A PAUSE.)

5 THE COURT: We've made all the other requested changes
6 by the plaintiff in these jury charges.

7 MR. LUCEY: Thank you, ma'am.

8 THE COURT: Move over where I'm pulling up the
9 residential property condition disclosure statement charge
10 that you proposed now to review the language. Do y'all
11 have an extra copy of that? This was your proposed charge
12 36 from the plaintiffs. Thank you.

13 (A PAUSE.)

14 THE COURT: Okay, we'll add it. I don't, I don't
15 mind. I have no problem adding plaintiffs' request to
16 charge number 36.

17 MR. LUCEY: They, ma'am.

18 MR. COLE: Your Honor, I haven't had the benefit of
19 reading request to charge number 36.

20 MR. LUCEY: It was included in what we served last
21 week with ---

22 MR. COLE: What is it?

23 THE COURT: Residential property condition disclosure
24 statement.

25 MR. BOYD: Oh, okay, that argument.

1 THE COURT: Relatively short. It just started, that
2 the:

3 South Carolina law requires an owner of real
4 property to provide a purchaser with a written
5 disclosure statement, which must include the
6 following characteristics and conditions of the
7 property. List three specific portions that must
8 be disclosed pursuant to South Carolina Code
9 127-50-40.

10 MR. BOYD: I, I, I think that some of this is somewhat
11 confusing in that Columbia Electrical Heating and Cooling
12 Mechanical are not in the case.

13 THE COURT: Okay.

14 MR. BOYD: I, I still think the charge as a whole is,
15 is rather confusing because this seems to go toward what
16 duties the seller has to put purchasers on, on notice of
17 conditions they're aware of so that the purchaser can make
18 a complete and, and knowing purchase. I don't really think
19 we had a lot of testimony on that really.

20 THE COURT: I guess, Mr. Lucey, is this kind of going
21 towards your diminution of value argument essentially, the
22 property? You said Mr. Schweickhardt testified regarding
23 the seller's duty to disclose.

24 MR. LUCEY: No. He testified that a defect without
25 consequential damage doesn't need to be fixed if there's no

1 damage. This shows there is damage as a matter of law. We
2 don't object to deleting paragraph 3, just charging
3 paragraph 2 and 4.

4 THE COURT: It is a little odd in this context. I
5 mean, normally this is something that would be charged in a
6 different context.

7 MR. BOYD: I don't think they give up anything by the
8 other charges to argue negligence and damages by not having
9 this in here. I, you know, I think it's confusing.

10 MR. COLE: They, they start out, Your Honor, by saying
11 we want to fix this and we're going to have to move out and
12 be reimbursed for that, and they didn't say anything about
13 this in ---

14 THE COURT: Yeah, I don't know that there's evidence
15 in the record to really support it in this context. While,
16 I mean, I agree with you that's the law, I'm not sure that
17 it's really applicable to the causes of action, negligence
18 and breach of implied warranty.

19 MR. LUCEY: In the interest of moving on, Your Honor.

20 THE COURT: We'll just forget that one. Is that all
21 right?

22 MR. LUCEY: We'll withdraw it, yes, ma'am.

23 THE COURT: Thank you, Mr. Lucey.

24 All right. So other than that, I believe we've
25 addressed all the concerns or additions proposed from the

1 plaintiffs, and then we'll move over to the defense. We
2 tried to change things and word them as you requested, but
3 I'll start with CBC. Anything sticking out to you?

4 MR. BOYD: Yes, ma'am. The first charge I would like
5 to object to is that portion of the -- it's found in the
6 nondelegable duty charge. First, I think nondelegable
7 duties under the law and in the cases cited in the
8 plaintiffs' charge really dealt with things like hospitals
9 and that sort of thing, and that's where that was drawn
10 from. So, I don't think the law applies, nondelegable, to
11 this situation.

12 Secondly, the title itself is misleading. It says
13 nondelegable duty, and then it goes on to say: Builders and
14 subcontractors may delegate the duties imposed upon them.

15 Finally, I think it's objectionable and we ask that
16 the statement: The builder remains liable for the negligent
17 act of its subcontractors. And just renew all the prior
18 arguments we made at the directed verdict stage at the
19 close of all evidence under the case of *Fields vs. Jay*
20 *Haynes*. The court was dealing with jury charges in that
21 case.

22 Under the standard care of a general contractor, the
23 plaintiff attempted to get in a jury charge that
24 essentially would have told the jury or, or inferred to the
25 -- made the jury infer that in South Carolina, general

1 contractor's automatically responsible for the negligence
2 of a subcontractor, and the court overturned that charge.
3 And so I think, I think that statement there is, is not in
4 tune with the law and ask that it be taken out.

5 MR. LUCEY: In the interest of time, Your Honor, we'll
6 withdraw the paragraph that says therefore, but we do
7 believe that the first paragraph is appropriate statement
8 of the law.

9 MR. BOYD: I'd be fine with that, Your Honor, as long
10 as we change the title to delegable and nondelegable
11 duties.

12 MR. LUCEY: Is the court planning on reading titles?
13 A lot of times ---

14 THE COURT: No, but I am giving them a copy of the
15 charge. So for that reason, we will change -- yeah, take
16 that paragraph out. We'll change it to
17 delegable/nondelegable duties. How's that, Mr. Boyd?

18 MR. BOYD: Yes, ma'am.

19 THE COURT: All right.

20 MR. BOYD: That would be great.

21 THE COURT: Next comment.

22 MR. BOYD: The next one is an objection under
23 negligence per se, specifically under the portion that
24 talks about proof of violation of statute, ordinance, or
25 regulation is -- constitutes negligence per se, and I think

1 the paragraph I'm -- let me get to it, Your Honor:

2 Municipalities in South Carolina are charged by
3 statute with adopting and implementing building
4 codes. If a building code has been adopted as a
5 statute, any violation of that building code
6 constitutes negligence per se. If you find that
7 the defendants violated.

8 And it goes on to say what it says, that you find that
9 it violated those adopted statutes and it proximately
10 caused, you know, then you can find negligence per se.

11 The objection there is while we heard a ton of
12 testimony on the, on building code violations, what we did
13 not hear at all was that the local, applicable governing
14 authority had adopted any codes except specifically for
15 some fire codes. That was put into evidence.

16 The -- as to all the other building code violations,
17 the experts admitted that there were building code
18 violations, but that is inadequate. Under the case of
19 *Kincaid vs. The Landing Development Corporation*, 289 South
20 Carolina 89 1986 344 S.E. 2d 869, this was a case where
21 homeowners had brought a negligence, a breach of warranty
22 claim against a developer, contractor, and others. One of
23 the issues was the charge, and court in that case held
24 that:

25 Local ordinances are not subject to judicial

1 notice, and absent proof that standard building
2 code was adopted by local authority, violation of
3 building code was not negligence per se.

4 We've heard no testimony that I recall that, that the
5 City of Folly Beach had adopted all of these building codes
6 that were referenced by plaintiff. There were -- we
7 concede numerous testimony that building code violations
8 existed and that certain types of construction were, in
9 fact, building code violations. But except for the fire
10 ordinances that were discussed, there was no evidence from
11 anybody on the witness stand that the City of Folly Beach
12 has, in fact, adopted this building code that has been
13 violated by any of these defendants.

14 In fact, the court went on to say that it was:

15 An erroneous charge that violation of alleged
16 standard building code was negligence per se.

17 They only found it was not reversible error where the
18 trial court had previously directed verdict for homeowners
19 on the question of liability, which is not the case here:

20 And where the trial court carefully instructed
21 the jury that violation of alleged building code
22 was not recklessness, willfulness, or wantonness
23 per se.

24 Again, we move to strike that portion of ---

25 THE COURT: That paragraph that begins municipalities?

1 MR. BOYD: Yes, ma'am.

2 THE COURT: Okay. Mr. Lucey.

3 MR. LUCEY: Yes, Your Honor. The court just heard
4 counsel reference the standard building code. The reason
5 that's significant is because the *Kincaid* case they're
6 relying on is clearly outdated. The standard building code
7 hasn't been in effect in this case since before the year
8 2000. Back then, codes were local and you had to prove
9 them locally. In approximately the year 2000, the State of
10 South Carolina enacted a statute mandating every
11 jurisdiction adopt the international codes. Since that is
12 now a state code, it's entitled to judicial recognition.
13 You do not need to prove it locally. And every expert on
14 that witness stand, specifically including defense expert
15 Elkin, confirmed that the blue book that I carried around
16 in the courtroom, the *International Residential Building*
17 *Code*, 2003, was, in fact, the building code that was
18 applicable to the construction of Peas Island and that it
19 had the force of law.

20 THE COURT: I recall that as well, so that's why it's
21 in there. We're going to leave it in there over the
22 objection of defendant counsel.

23 What's next, Mr. Boyd?

24 MR. BOYD: Bear me, ma'am, just a minute, please. I
25 haven't had a chance to compare your current revised charge

1 with the prior charge. There was a statement in, in the
2 section on damages that the repair cost could include the
3 expense necessary to perform the repairs to existing
4 building codes. Was that, was that brought current?

5 MR. KENDALL: I don't see it now.

6 MR. BOYD: You don't see it? Okay, if that's not in
7 there ---

8 THE COURT: We took it out. Yeah, we took that out.

9 MR. BOYD: Okay.

10 THE COURT: No, wait a minute. It's not out:

11 In this case, the general measure of damages
12 alleged by the plaintiff ---

13 This is on page 22.

14 --- is the cost of repair to include the expense
15 necessary to perform the repairs to existing
16 building codes and future loss of use.

17 MR. BOYD: That, that charge, I think, is designed to
18 deal with a situation where we're talking about ---

19 MR. LUCEY: May I can shortcut, maybe I can shortcut
20 this. We're okay with that sentence being dropped because
21 variance in building codes is not really an issue in this
22 case.

23 THE COURT: Okay. We'll just take out that sentence.

24 MR. BOYD: Thank you.

25 THE COURT: Taken out. Stricken. Thank you, Mr.

1 Lucey.

2 MR. BOYD: And I'm fine with plaintiff helping with
3 this one, too, if they've had a chance to look at it, is
4 the issue regarding to total loss versus partial loss of
5 the building removed.

6 THE COURT: That we took out.

7 MR. BOYD: Okay. Thank you.

8 THE COURT: Yeah, they consented to that as well.

9 MR. KENDALL: Sorry. We're still working through
10 this. Sorry for the confusion.

11 MR. BOYD: At this time, I have no further objections.

12 THE COURT: Anybody else?

13 (COUNSELORS CONFER.)

14 MR. COLE: Your Honor, I'm just reading through your
15 thing now if you'll give me a second.

16 MR. BOYD: Your Honor, one other, one other matter.
17 There's nothing here in the, the instructions on
18 apportionment allocation among the defendants. How do you
19 plan to deal with that because Mr. Kendall didn't move for
20 allocation among the defendants in the case. And I thought
21 I heard Your Honor to say that you did not want to use the
22 two-step process referred to in that statute but just to
23 send it all back ---

24 THE COURT: We've done it on the verdict form. I
25 believe we've taken care of that.

1 MR. ATKINS: Your Honor, addressing that issue on the
2 verdict form and then the concurrent causes of joint
3 tortfeasors, that's where I have some confusion at best
4 about how -- the language you're using, joint tortfeasors,
5 how that fits and comports with the allocation statute, and
6 which I assume the charge is based upon -- I mean, the
7 verdict form is based upon.

8 MR. LUCEY: Defendants are not entitled to an
9 allocation if there's a finding of gross negligence.
10 They've got to get past the gross negligence question
11 before it becomes relevant.

12 MR. ATKINS: I think, if I recall, the statute says in
13 tort, if two or more are concurrently caused and they
14 determine one is less than 50 percent, they're entitled to
15 allocation.

16 (A PAUSE.)

17 THE COURT: Mr. Kendall, you sent a proposed form that
18 did not seek to allocate damages. Is that correct?

19 MR. KENDALL: No, ma'am, mine does. It has one point
20 in there. I can't -- let me see if I've got my draft.

21 THE COURT: The plaintiffs' proposed verdict form
22 allocates only as to punitive damages. Is that correct,
23 Mr. Lucey?

24 MR. LUCEY: Yes, ma'am.

25 THE COURT: And not as to the two causes of action.

1 Defendants are seeking to have the two causes of action
2 allocated as well. Is that correct, Mr. Atkins? What is
3 it you're asking me to do?

4 MR. ATKINS: What I'm asking is the charge seems to be
5 consistent with what you're going to be charging -- or, or
6 the verdict form ---

7 THE COURT: The verdict form.

8 MR. ATKINS: --- the jury is going to see.

9 THE COURT: Okay.

10 MR. ATKINS: I mean, you're talking about joint
11 liability as if it's a joint and several liability.
12 There's no, no language at all about to what extent, if
13 any, there -- to the two concurrently causes of injury are
14 liable ---

15 THE COURT: So, the fact that I'm even allowing them
16 to choose who was negligent you think is inconsistent with
17 the charge?

18 MR. ATKINS: My, my recollection of, of the allocation
19 statute is that -- and it's in tort. It speaks in terms of
20 tort is my recollection, for what that's worth. And it
21 says if in determining that two or more concurrently cause
22 a singular accident or injury, damage, and they determine
23 one or more are less than 50 percent, then that individual
24 is entitled to some kind of an allocation under the
25 statute. And I don't know how to -- I don't know how it

1 fits, but it certainly is consistent with joint and
2 several. If you got to be in for a penny, you're in for a
3 pound.

4 MR. LUCEY: Your Honor, I have a copy of the statute,
5 if it pleases the court.

6 THE COURT: Sure.

7 MR. LUCEY: I'd be happy to hand it up. The final
8 paragraph of the anti-joint and several liability statute,
9 as we referred to it, paragraph F says:

10 This section does not apply to a defendant whose
11 conduct is determined to be willful, wanton,
12 reckless, grossly negligent, or intentional; or
13 conduct involving the use, sale, possession of
14 alcohol; or illegal use, sale, or possession of
15 drugs.

16 So, unless they get past the gross negligence question
17 on the verdict form, they're not entitled to allocation. I
18 can hand this up to the court.

19 Now the allocation is unnecessary as the plaintiff has
20 proposed the jury verdict form now because the only
21 incident question is is Mr. Kendall's client entitled to
22 any recovery on its cross-claims, and we've put questions
23 in there as to that and that amount.

24 MR. KENDALL: Your Honor, I didn't know we, we were
25 ready to switch over to the verdict form. You asked me a

1 question ---

2 THE COURT: Well, they go hand-in-hand.

3 MR. KENDALL: They do. They do, certainly. The --
4 we, on page -- on the first page of the little template
5 that we provided does have an allocation in terms of the
6 defendants.

7 In response to Mr. Lucey, I believe that he has read
8 this correctly. We do -- if there is a finding of gross
9 negligence against us, we would not be entitled to
10 apportionment. However, because we are seeking to
11 streamline this process, I would suggest that if -- that --
12 allow them to consider all of this. And if they find gross
13 negligence, then Your Honor will just disregard the
14 apportionment aspect of it. I think it just would fit the
15 process that you're trying -- streamline the process you're
16 trying to engage in.

17 THE COURT: I can do that even -- if I find the
18 verdict to be inconsistent, I can...

19 MR. KENDALL: I think you can just do it as a matter
20 of law and ---

21 THE COURT: Essentially, right.

22 MR. KENDALL: --- strike that.

23 THE COURT: As a matter of law, I can make it
24 consistent, so that's how I'll deal with that, to answer
25 that question. So, essentially the verdict form is still

1 going to say -- it's going to give them the option of
2 finding the various defendants on their own negligent, not
3 negligent, in breach or not in breach. We're not going to
4 get to the apportionment of damages yet unless, unless it's
5 necessary. Essentially if they ---

6 MR. BOYD: So, are you going to charge ---

7 THE COURT: --- do not find gross negligence -- what
8 now?

9 MR. KENDALL: Are you going to charge joint and
10 several liability?

11 THE COURT: What's in there now?

12 MR. BOYD: It's just joint and several liability.

13 THE COURT: Let's see.

14 MR. ATKINS: If you, if you read it, if two or more --
15 one's in for a penny, is in for the full amount.

16 MR. BOYD: Yeah, but that would seem to be premature,
17 too, until we know whether it's any one or all defendants
18 are grossly negligent or not.

19 (A PAUSE.)

20 THE COURT: Does anybody object to me just taking the
21 joint tortfeasors section out of the jury charge?

22 MR. BOYD: What page is that, Your Honor?

23 THE COURT: I have in on my 16. It's entitled joint
24 tortfeasors.

25 MR. LUCEY: As long as concurrent causes stays in,

1 plaintiffs acquiescence to that, Your Honor.

2 (A PAUSE.)

3 THE COURT: In my understanding, what's the, what's
4 the problem? Say it again, Mr. Atkins. I don't know that
5 I understand your argument. So if I leave these in, you
6 think it's contradictory to put in a verdict form where
7 they're allowed to ---

8 MR. ATKINS: Well, it's ---

9 THE COURT: --- choose between ---

10 MR. ATKINS: --- contradictory ---

11 THE COURT: --- the defendants?

12 MR. ATKINS: --- to the allocation statute. Under
13 allocation, do an allocation. Attempting to comply with,
14 with the fact these, these buildings were post-2005 when
15 the allocation statute applies, not 2007. And that's what
16 we're trying to do in the verdict form. And I'm thinking
17 that these charges are contrary to that intent.

18 It just seems inconsistent to say, look, if you got
19 two that cause a single injury, both are liable to 100
20 percent regardless of, of, of how much either one
21 contributed to the, to the injury. The allocation statute
22 says otherwise.

23 MR. LUCEY: The allocation statute deals with parties
24 that are in the case. The joint tortfeasor charge applies
25 equally to the parties that are out of the case.

1 They have spent a lot of this case trying to say
2 various inspectors were on-site. They should have caught
3 it; it was their fault. It's not my guy's fault. All my
4 guy did was provide the labor. The joint -- excuse me, the
5 joint tortfeasor instruction addresses that situation.

6 MR. ATKINS: I don't -- I didn't recall anybody trying
7 to say that they should allocate blame on a code official
8 or anything like that.

9 MR. LUCEY: They blame the other trade for failure to
10 seal their penetrations in the drywall in the fire assembly
11 in the attic.

12 THE COURT: I'm leaving it. I'm leaving it in there.
13 I think it's appropriate. I'm leaving it in there, and I'm
14 going to leave the verdict form.

15 MR. REESER: Your Honor, if I may just for the record?

16 THE COURT: Please. Go ahead.

17 MR. REESER: I have -- there were, there were two
18 thoughts, maybe not quite objections, but in the negligence
19 section of the charge, there is reference made to
20 recklessness and gross negligence. I understand that's a
21 separate charge. I believe it's in numbers 2 and 3. I
22 don't necessarily think that needs to be there, but I
23 wanted to see if the court had any reason for putting that
24 in.

25 THE COURT: I'm sorry, are you looking at the one we

1 just sent or the one ---

2 MR. REESER: Yes, Your Honor, the one -- because in
3 that, it has the numbers 1, 2, 3, 4 for the elements.

4 THE COURT: Yes.

5 MR. REESER: And then discuss recklessness. We've,
6 we've got a separate gross negligence charge. I'm just
7 wondering why that's in there.

8 THE COURT: You're wondering why what's in the gross
9 negligence charge?

10 MR. REESER: Is that ---

11 MR. BOYD: Are you saying it's confusing to have
12 recklessness discussed in the negligence ---

13 MR. REESER: Yes.

14 THE COURT: --- paragraph?

15 MR. REESER: Right there, number 2:

16 For the defendants' involvement, construction was
17 negligent or careless, grossly negligent, or
18 reckless, willful, and wanton.

19 And we have a separate gross negligence charge.

20 THE COURT: Okay, let me look at that.

21 MR. REESER: And then the same with, with number 3.

22 THE COURT: Wait a minute.

23 MR. BOYD: What page?

24 THE COURT: It's page 10 as I have it right now under
25 the heading negligence.

1 (A PAUSE.)

2 THE COURT: I'm going to leave it as is. All right,
3 what's next?

4 MR. REESER: And, Your Honor, I noticed there was a
5 charge on workmanship and implied warranty of workmanlike
6 service. It appears to be duplicate information. I
7 wanted to see if the judge, if the, if the court has a
8 reason for ---

9 THE COURT: I think one defines workmanship and the
10 other one goes into what it means in terms of the actual
11 cause of action.

12 MR. REESER: As, as I understand it, the court's not
13 going to be reading captions. The jury will just see --
14 the jury will just hear one going into the other. There
15 are not going to be headings.

16 MR. COLE: You said you're giving the jury your -- the
17 copy of the charge though.

18 THE COURT: Yeah.

19 MR. COLE: Okay. Well, that's another objection.

20 THE COURT: Yeah. I am.

21 MR. COLE: So, note that as well. I join the other
22 objections he's raised.

23 THE COURT: No problem.

24 MR. BOYD: Complete Building joins in his objections
25 as well.

1 MR. REESER: Your Honor.

2 THE COURT: Noted.

3 MR. REESER: And we would as well, and my last
4 objection is similar to Mr. Atkins's in that we object to
5 the concurrent cause and the joint tortfeasor and the
6 entitlement to full recovery from tortfeasor charges in
7 this case.

8 Your Honor we contend this case has been tried -- this
9 case has not been tried as an indivisible injury. This is,
10 this is not a car wreck case.

11 THE COURT: Right.

12 MR. REESER: This is not one incident. It might be
13 one project, but the jury has heard testimony and evidence
14 about windows and about removing HVAC ducts.

15 THE COURT: Right.

16 MR. REESER: And, no offense to Mr. Atkins, they've
17 heard a lot about sprinklers.

18 THE COURT: Yeah.

19 MR. REESER: In the past few days, and my client
20 certainly had nothing to do with that.

21 I believe the proposed verdict form Your Honor was
22 referencing earlier was mine. And I, I, I had no
23 allocation and, and I think our position is that each
24 defendant should have a separate verdict on damages, not
25 just negligence but also damages because this is not an

1 indivisible injury case where this would apply.

2 The allocation statute in the first paragraph says
3 this, this applies to indivisible injuries. And, Your
4 Honor, you could -- for those reasons, I don't think any of
5 those should be charged in this case. It's not like...

6 THE COURT: Well, I think that, you know, we have
7 water intrusion. We have all sorts of different people
8 saying what the cause is. But I think evidence presented
9 is is that it's the result of all of these convening acts
10 of alleged negligence that have caused this water
11 intrusion. Could you separate it out? You know. Go
12 ahead.

13 MR. REESER: Well, and then, Your Honor, there's been
14 water intrusion at these posts. And I would agree that if
15 we were all general contractors, if, if we were five
16 general contractors and we all had duties to oversee this
17 project and be responsible for this project, then okay, but
18 that's not the case that was presented to the jury.

19 THE COURT: Okay.

20 MR. REESER: And if this was a water intrusion at post
21 case, okay, but it is not and that's not how it's been
22 tried. And, Your Honor, for those reasons, we would, we
23 would object to all those charges going in to the jury, and
24 of course those objections stand as far as the verdict
25 form.

1 MR. LUCEY: Just so the record's clear, the defendants
2 presented a single repair estimate; they all adopted that
3 repair estimator and estimate. They, themselves, have
4 treated this as a single damage case.

5 THE COURT: Yeah, and I didn't mean to minimize it to
6 a water intrusion. I know there's a lot more than water
7 intrusion issues at stake. It's negligent construction
8 overall, so yes.

9 MR. ATKINS: The, the comparison of the defense has
10 nothing to do with water sprinklers. It's got nothing to
11 do with sprinklers, and I would join the arguments that Mr.
12 Reeser has put on the record as well.

13 THE COURT: All right.

14 MR. REESER: And, Your Honor, if I, if I may?
15 Actually there was a case filed, 2017-CP-10-4940. There
16 was a reference made in Mr. Mease's examination as to an
17 affidavit that had been filed in that case. That case is
18 still pending, and that case is the same plaintiffs against
19 Curry Engineers. They're seeking the same damages, the
20 same problems that there are in this case. We don't have
21 everybody here, Your Honor. So, I think that, you know, we
22 can't have it if you have all these multiple cases for the
23 same thing and then, and then plaintiffs put this one large
24 number that includes all these various things that
25 defendants may or may not have worked on.

1 So, Your Honor, I think, I think that goes to our
2 arguments to why the joint tortfeasors allocation simply
3 does not apply in this case because this is indeed not an
4 indivisible, indivisible injury.

5 THE COURT: Okay. What, Mr. Cole?

6 MR. COLE: All right, first I just join in the
7 arguments that have, that have come before. And then I, I
8 want to raise as an additional issue that we've discussed a
9 little bit already with regard to parties that have either
10 settled out or were dismissed without settlement from the
11 case.

12 We talked about Island Pointe, LLC, who was
13 technically sitting in the courtroom with us the entire
14 time until this morning, and that I believe that is -- it
15 is incumbent on the court to allow us to allocate to these
16 nonpresent defendants, that we should be able to put them
17 on the jury verdict form. It's a due-process violation to
18 not have these people on, on the verdict form who have
19 shared in the responsibilities that, that have been
20 discussed in the case here. And so I, I would raise that.

21 And I can go through some case law and things like,
22 like the *Smith vs. Tiffany* case and some others about --
23 that the court, when it talked whether or not you should
24 try a case with an empty chair but didn't say that you were
25 not able to actually put the nonparty -- or, excuse me, the

1 nonpresent defendants on the jury verdict form because
2 that's what the statute allocates.

3 Now, if plaintiffs can prove the gross negligence and
4 that changes the, the, the makeup of the jury verdict form
5 somewhat, but barring that, which they have not
6 demonstrated right now because the jury hasn't made that
7 decision, we do have these other parties that have shared
8 in the overall joint responsibility for the construction of
9 Palmetto Pointe. That, you know, we've got the architect.
10 We've got the engineers. We have the other case that was
11 brought up of another engineer who participated in this.

12 We have -- in fact, there were a total of thirty-five
13 named defendants that have been involved in this lawsuit,
14 from a first-tier party down to a sub, sub, sub, sub, sub,
15 however many we have in that, that have played some role in
16 this entire process. That goes to both the total damages
17 the plaintiffs are seeking, as well as to the cross-claim
18 damages, because for all of those thirty-five parties that
19 were involved in it, at least to some point when we talk
20 about the claimed damages and the claimed attorneys fees,
21 et cetera, that Complete Building is putting up, there is
22 some component of each of those that -- for example, in the
23 cross-claims, they spent time defending against claims for
24 these other people that then should not be tied on to me.
25 So, I bring that up.

1 MR. REESER: And, Your Honor, I join in Mr. Cole's
2 motion, and state on the record that if, if a party hasn't
3 received a nonsuit, they're still parties in this case
4 under the rule, and there's no reason why they shouldn't be
5 on the, on the verdict form.

6 MR. BOYD: Complete Building joins.

7 MR. ATKINS: Likewise, Your Honor, for W.C. Services.

8 THE COURT: Thank you. All right, your motion to have
9 all parties on the verdict form is denied. All right.

10 MR. COLE: I have, I have one more, Your Honor.

11 THE COURT: Okay.

12 MR. COLE: If we go to the cross-claim section in the
13 jury charge.

14 THE COURT: Yes.

15 MR. COLE: I would like to, on behalf of Tri-County,
16 formally withdraw my cross-claim for equitable indemnity
17 against Vasquez and Mr. Sales. And so I would like to have
18 those portions of that cross-claim that reference that I
19 have an equitable indemnity cross-claim against them
20 withdrawn.

21 MR. LUCEY: It's not on ours, Your Honor. I didn't
22 see that.

23 THE COURT: I didn't see anything about that.

24 MR. COLE: The one I pulled up has that on there, so.

25 THE COURT: Is it on there?

1 MR. COLE: It says that: In this case, cross-claims
2 have been against general contractor. And then it says ---

3 THE COURT: You know what page it's on, Mr. Cole?

4 MR. COLE: I'm on page 18.

5 THE COURT: 18.

6 MR. COLE: It's the second sentence. It says: A
7 cross-claim has also been filed by Tri-County.

8 THE COURT: You want that sentence removed?

9 MR. COLE: I, I, like I said, I want to withdraw my
10 equitable claim ---

11 THE COURT: Great.

12 MR. COLE: --- against Vasquez and Sales.

13 THE COURT: All right.

14 MR. LUCEY: No objection.

15 THE COURT: I think it's in one more spot, too. Is
16 that right?

17 MR. COLE: I, I don't remember. That's where I saw
18 it. I think just delete that second sentence there.

19 THE COURT: That's it right there. It was also under
20 burden of proof, so we'll remove it both places.

21 MR. COLE: Okay. Thank you.

22 All right, what else?

23 MR. REESER: We still on charges?

24 THE COURT: We're on it all.

25 MR. REESER: Is there a -- can, can ---

1 THE COURT: Got about five minutes, everybody. Then
2 I'm bringing the jury back in.

3 MR. REESER: Yes, Your Honor. Is there a, is there a
4 verdict form that we can see that the court is inclined to
5 adopt at this time?

6 THE COURT: Yeah, the one that was most recently
7 submitted by the plaintiff.

8 MR. KENDALL: Your Honor, I just want to make
9 exceptions to that, if I may?

10 THE COURT: Sure.

11 MR. KENDALL: First of all, I did think it should
12 include the apportionment under the negligence statute.
13 And again, Your Honor can correct if it turns out they're
14 not entitled to that. You can just mark that off.

15 Number, item number 4, I would ask that -- a couple
16 changes in, in that item.

17 THE COURT: All right, wait a minute.

18 MR. KENDALL: I'm sorry.

19 THE COURT: Number 4, okay.

20 MR. KENDALL: I would just ask that because there are
21 different standards of proof, that they be reminded here of
22 that and just state if you find through clear and
23 convincing evidence.

24 THE COURT: Sure. I have no problem adding that.

25 MR. KENDALL: And then when one deletion after you --

1 when you're ready.

2 (A PAUSE.)

3 THE COURT: Okay, I've got the ---

4 MR. KENDALL: And then I would ---

5 THE COURT: --- clear and convincing language in.

6 What's next?

7 MR. KENDALL: Recommend removing: The truth or so

8 that ---

9 THE COURT: Oh yeah, yeah. I agree with that, yeah.

10 Okay.

11 MR. KENDALL: So it just reads: Disregard for

12 plaintiffs' rights.

13 THE COURT: Yeah. I agree with that. I'll take that

14 out.

15 MR. KENDALL: Thank you, Your Honor.

16 THE COURT: All right.

17 (A PAUSE.)

18 MR. REESER: Your Honor, I would just restate our

19 objection earlier as to number 3. Again, our claim is that

20 this is not an indivisible injury. Because of that, we'd

21 request that the jury be asked to make a damage award,

22 actual damages as to each defendant.

23 THE COURT: All right, objection noted for the record.

24 MR. REESER: Thank you, Your Honor.

25 THE COURT: I think we have you all numerous times on

1 this joint tortfeasor issue, so you are well protected for
2 purposes of the record on that issue. Everybody is.

3 MR. COLE: That's just -- I'm jointly joining in
4 the ---

5 THE COURT: Yes.

6 MR. COLE: --- joint tortfeasor thing, Your Honor.

7 THE COURT: Absolutely.

8 All right, who's delivering closing arguments this
9 afternoon?

10 MR. LUCEY: I'll do the opening and closing, and Mr.
11 Buckley will do the closing.

12 THE COURT: Okay.

13 MR. KENDALL: Does that mean in reply? You're going
14 to close in full?

15 MR. LUCEY: Close in full and then reply.

16 THE COURT: Mr. Buckley is going to do the reply.

17 MR. BUCKLEY: Understood. I'll be closing for
18 plaintiff completely.

19 THE COURT: And I assume we're going to be going in
20 the same order: Mr. Kendall, Mr. Cole, Mr. Reeser, Mr.
21 Atkins, or who ---

22 MR. ATKINS: Mr. Atkins.

23 THE COURT: Mr. Atkins, Mr. Reeser.

24 MR. ATKINS: Yes, ma'am.

25 THE COURT: Got it. Okay, great. We are printing

1 this verdict form off now, and we will be printing my
2 charge.

3 (A PAUSE.)

4 MR. REESER: Your Honor, for the record, I did not
5 join in the objection regarding Your Honor's giving the
6 charges back to the jury. I just wanted to put the
7 objection on the record.

8 THE COURT: Yeah, I'm sorry. I thought everybody did,
9 but yes, Mr. Reeser, I will note that objection to the
10 charge going back to the jury.

11 (A PAUSE.)

12 THE COURT: Are we ready for the jury?

13 MR. LUCEY: Yes, ma'am.

14 THE COURT: Please bring them in.

15 We will likely -- and the court reporter asked me to
16 -- and just for y'all's planning purposes, we will be
17 taking a, probably a little brief recess between your
18 closings and the court's charge because I'm sure those
19 arguments might be lengthy, and everybody will need a
20 little break. So, we will plan on taking one at that time.

21 (THE JURY ENTERS AT 2:54 P.M.)

22 THE COURT: Ladies and gentlemen, the parties have
23 presented their evidence in this case. It's now time for
24 these attorneys to make their closing arguments to you.
25 The arguments of the attorneys are not evidence in this

1 back and said I want to make sure we didn't miss something.
2 She went back and she looked and said okay, there was an
3 issue in 2008, but nobody called us after that. And then
4 we had two owners that called in 2014 that said we have a
5 repair. Repair is not a warranty. They didn't say we put
6 the roof on, and then they didn't -- one of them didn't
7 call us back and the other one said, oh, it's been fixed.
8 Don't worry about it. And then they get a lawsuit and no
9 -- none of the other owners say anything. That's not
10 right.

11 So, I ask you when you go back there and be reasonable
12 when you look at the numbers. We're not standing up here
13 saying there's no number that you should award the
14 plaintiffs. Instead, we want you to be reasonable and look
15 at, look at the actual way to fix this, not just a big
16 pie-in-the-sky number that allows the plaintiffs to go
17 build another Palmetto Pointe if they want to so they can
18 have a third home. And I ask you also to not allow
19 Complete Building to get away scott free by trying to
20 transfer their, their money that they might owe in this
21 thing to Tri-County Roofing. Thank you very much.

22 THE COURT: Mr. Atkins.

23 MR. ATKINS: May it please the court?

24 THE COURT: Yes.

25 MR. ATKINS: Ladies and gentlemen, I am so pleased to

1 be in front of you right now, and you are so pleased to be
2 hearing my voice. Let me tell you the one thing that does
3 please me is that I can come to you right now after my
4 opening statement to you and tell you I kept my promise. I
5 kept every one of the promises I made you in opening
6 statement about this case and the evidence that would be
7 presented, what it would show and what it would not show.
8 I was true to my word, and I mean to be true to my word in
9 this closing as well.

10 Fact of the matter is and simply, simply stated is
11 Mark Lazo, when I asked him to come help me, tell me what
12 my, my client did wrong, he concluded after doing all the
13 research that he did, and talking to all the code people he
14 talked to, and getting all the information, he concluded,
15 his opinion was W.C. Services did nothing wrong. Couldn't
16 find a thing that they did wrong, and I told you that in
17 the opening statement. I told you this oddball was going
18 to come back to you and he was going to ask you for a
19 defense verdict.

20 Nobody else on that side of the room is going to ask
21 you for a defense verdict because the evidence doesn't
22 justify it perhaps. But the evidence that you heard in
23 this case about the fire sprinkler systems and W.C.
24 Services's work justifies it. It warrants the return of a
25 verdict for W.C. Services. They don't owe anybody a penny

1 for what they did out there. They don't owe the plaintiffs
2 anything, and they sure don't owe -- pass the buck up on
3 the indemnity claims, cross-claims of the general
4 contractor. They don't.

5 Let's think about what we heard. I told you in the
6 opening statements, I said you will not see a bit of
7 evidence that suggests the that fire sprinklers at Palmetto
8 Pointe are contributing in any way to any moisture
9 intrusion in any buildings at that location at Peas Island.
10 You didn't hear a word, you didn't see a piece of paper
11 from anyone that said those fire sprinkler pipes are
12 contributing to water damage at the decks, at the roofs,
13 you know, at the siding, you name it, that they had
14 anything to do with that. Not one, not one shred of
15 evidence.

16 What's the other element that I told you I was going
17 to come to you with and tell you that the evidence would
18 show that W.C. Services did nothing wrong? Penetrations of
19 firewalls in attics. I told you in the opening statement
20 there would be no evidence presented in this case that W.C.
21 Services was tasked, was responsible for any sealing of any
22 penetrations, whether it be fire sprinkler pipes or
23 otherwise, and you heard no evidence. In fact, the
24 evidence is it appears nobody was given that
25 responsibility, nobody. It's not like we've got 2 x 4

1 framing that people tried to seal. There's no evidence of
2 any sealing of those gaps in those attic firewalls, and
3 there's nothing in the contract which y'all have with you
4 of W.C. Services which says you will seal penetrations for
5 fire sprinkler pipes or otherwise. You will not see a word
6 about that being with no scope of responsibility.

7 Now, what they've done is they've twisted a little bit
8 on the penetration issue by saying, well, you know, the
9 as-built condition is not per the plans and, therefore,
10 there were some penetrations created that would not have
11 been there but for if you'd stuck to the plans, right? Set
12 aside for a moment that we still don't have anything that
13 says W.C. Services is responsible for sealing any
14 penetrations. Set that aside for a moment. The evidence
15 that you have on those plans was it came from Constantine,
16 Chris Constantine. It came from Chad Christopher. They
17 came from Mark Lazo as well, but what occurred is that
18 those plans weren't sealed. They weren't stamped. They
19 weren't final. We couldn't find any of the plans. You
20 know, there's a lot of documents that couldn't be found in
21 this case, a whole bunch of documents that couldn't be
22 located, and one of them was a set of sealed plans, not
23 just for water sprinklers but civil plans, electrical
24 plans, structural plans. No sealed plans were found.

25 Now, you know, you're talking about what? Ten, twelve

1 years now. You know, that happens. Documents get lost
2 with the passage of time. People's memories fade with the
3 passage of time. People die. Buckey Chapman passed away,
4 the owner of the company, W.C. Services. That's what
5 happens when you have a long period of time between the
6 issues at hand in a, in a lawsuit and when the lawsuit's
7 actually brought. Things get stale. You lose stuff. I'm
8 sure there were documents out there at some point. Folly
9 Beach doesn't have them anymore. We couldn't get them
10 there; we couldn't get them anywhere. We couldn't find
11 them. I couldn't find them because W.C. Services doesn't
12 exist. I didn't know who I could go to to ask for
13 documents.

14 But these plans that have been put up in this case
15 were not final plans, and it's not uncommon, and you heard
16 it from Chad Christopher, you heard it from Mr.
17 Constantine, and you heard it from Lazo, people who have
18 experience in working with construction and fire protection
19 issues and the installation of fire systems that it is not
20 uncommon between the time the plans get certified to the
21 fire marshal for approval that things happen in the field,
22 and there are revisions made in the field. Now, they have
23 to be approved. They should be approved, but we couldn't
24 find any documents.

25 The only document we could find that suggests that

1 they were approved was a inspection by Tom Hall, the
2 building code official, in February of 2007. You heard Mr.
3 Lazo talk about this document. He went out to inspect
4 as-built -- because it had to be as-built -- the piping for
5 a fire sprinkler system to make sure it didn't leak, and
6 that means they've got to be right where they are now, and
7 he didn't raise a flag. He didn't raise a fuss. There was
8 nothing said about the location of those fire sprinkler
9 cabinets at the front as opposed to on the side. Something
10 happened. Something changed in the field, but it was
11 approved. Every indication was it was approved. It had to
12 be approved.

13 The only other possible explanation you've got is the
14 code officials just ignore it, just ignored it. They
15 didn't ignore it. Everybody who got off their tail and
16 went out to talk to people who were involved to find out,
17 you know, what was going on out here because the records
18 were a little thin, they had to go to the source. Everyone
19 who took that effort and made that effort talked to George
20 Tittle, the fire marshal, among others. Every one of those
21 people have not recommended -- in fact, have said fire
22 sprinklers are not required in these buildings. Even Al
23 Schweickhardt, who had that conversation, did not change
24 his scope of work, did not incorporate fire sprinklers,
25 didn't do anything. He didn't change a thing. That's what

1 you do if you want to find out the truth. You investigate,
2 and if you have to talk to people, that's what you do.

3 I told you at the beginning of the trial that contrary
4 to that, what the plaintiffs were going to bring to you,
5 what the plaintiffs' attorneys were going to bring to you
6 was a fellow who had a theory, a fellow who had interpreted
7 a letter. Kind of a twisted, convoluted interpretation to
8 get there, but it supported his theory. He didn't talk to
9 anybody that was involved in the design or construction or
10 approved the design or construction. He didn't, he didn't
11 do anything except devise a theory based on his reading of
12 the March 6, 2006, letter, and that's what he rests his
13 opinion upon, and it's Doug Smits.

14 And the judge is going to give you an instruction on
15 experts. And, you know, just because somebody is declared
16 an expert in a trial doesn't mean they know what they're
17 talking about. It's going to be your responsibility to say
18 is that opinion really based on something reliable? Does
19 that opinion show someone has gone out there and based it
20 on facts and information that is reliable and, therefore,
21 that opinion has some reliability, or is it lacking?

22 In this instance, what we've got is we have a theory
23 that's not only not supported by the facts. It is
24 contrary. It's contrary to the facts. Everyone, everyone
25 who went out and looked and talked and spoke to the people

1 who were, who were making the decisions at the time are
2 going in this direction, and the man that's sitting alone
3 over here in his chair coming up with a theory is by
4 himself. And his interpretation -- and you'll have the
5 letter back there. You'll have that March 6, 2006, letter.
6 It's Exhibit 679, and you'll be able to read it, and it's,
7 it's clear. It's not -- there's no ambiguity here. This
8 letter says -- and the operative portions -- and it was
9 read before by Mr. Buckley, and I want -- I'm sorry. It
10 says: Your project. Talking to the developer. This is
11 from the code official, building code official to the
12 developer, copied to the fire marshal, copied to the chief
13 of the fire department in Folly -- James Island, and a guy
14 named Robert Wise. Says: Your project requires the
15 following. Then it lists four things:

16 Four things that are required for your project.

17 One, each unit will be equipped with NFPA 13-D
18 fire sprinkler systems.

19 Now, we know, we know over and over again from
20 everybody it's not disputed. NFPA 13-D, the fire sprinkler
21 standard, the fire sprinkler standard used nationwide for
22 design and installation of fire systems did not require
23 sprinklers in those attics. It didn't require sprinklers
24 in the garages, which is the important point when you get
25 to number 2. Number 2 goes back to the ordinance that

1 you've been hearing about because the ordinance requires
2 sprinklers in the garages if you didn't have a one-hour
3 fire separation, in contrast to NFPA 13-D. So, that's why
4 in number 2 it says -- 90.8(c), it should be 8(c) -- you
5 may omit the garage sprinklers if you have a one-hour fire
6 separation. That's the code; that's the ordinance. That
7 differs from NFPA 13-D, so that's why it's in there. We're
8 enforcing the ordinance, and you're required to do that.

9 Then they say:

10 The third element that is required of your
11 project is that the clubhouse must be sprinklered
12 according to its primarily occupancy.

13 And you heard from Mr. Lazo, who is the only person
14 who went in the attic of the clubhouse to see what the
15 situation was, that it was -- it's categorized as a
16 assembly building, and it has to be sprinklered in the
17 attic and it is sprinklered in the attic.

18 It's incredible if you think about it. You've got
19 twenty buildings, twenty-one buildings and if you believe
20 what Mr. Smits and the plaintiffs' attorneys are telling
21 you, W.C. Services just got it right one out of twenty-one
22 times. Really? No. They knew what they were doing, and
23 they were following the instructions of those above them
24 when they did it. So, you got to sprinkler the clubhouse,
25 and then you got to widen your entrance to accommodate a

1 fire truck, and that is it. That's what's required for
2 your project, according to the code official writing the
3 folks involved who would have been involved in a variance
4 decision.

5 This is confirmation because it does not list as being
6 required the ordinance requirements for sprinklers in the
7 attics. It doesn't reference that. NFPA 13-D
8 is the, is the guiding standard in this letter for the
9 sprinklers in the attics, which are not required.

10 When we look at some of the other elements in this
11 case, now the costs that have been provided -- and Mr.
12 Kendall spent a lot of time talking about costs. I'm not
13 going to belabor that except to say that when Mr. Handegan
14 was, was talking about his estimate, you remember when it
15 came to fire sprinklers within the attics, he was relying
16 on a quote proposal from -- I think it was DSC Fire and
17 Security. They gave him a proposal dated June of 2016, I
18 believe it is, and it's an exhibit. You'll, you'll have it
19 back there to look at, and that has a quote of about
20 \$378,000, and then you got some more add ons and Mr.
21 Handegan's estimate that brings that, that figure up a
22 little higher to put sprinklers in the attics. But the DSC
23 proposal is only good for thirty days, and it says it on
24 the proposal. It's only good for thirty days, and Mr.
25 Handegan's done nothing to update it. He doesn't really

1 have a real number that he can rely on putting sprinklers
2 in those attics, which is neither here nor there because
3 W.C. Services, there was no -- there is no requirement to
4 do that. There was no requirement to do that. There was
5 nothing to require anybody to put sprinklers in those
6 attics.

7 Chris Constantine didn't require it of W.C. Services.
8 Jack Christopher in his submittals, he, in fact, told him
9 don't put sprinklers. Show the plans without sprinklers in
10 the attics. Show the plans without sprinklers in the, in
11 the garage because they were going to do one-hour
12 separation, and that's exactly what W.C. Services did.

13 The only other issue that I might want to go back to
14 is the penetrations, and this shows kind of the absurdity,
15 I think, of, of the position that you heard from the
16 plaintiffs and their experts. There was a torn section of
17 gypsum along a run, horizontal run of the sprinkler. It's
18 going to be one photograph that's back there for you. That
19 was unit 1635 to help you locate it. And Mr. Mease says,
20 well, gee. That tear is about the same length as that
21 pipe. Ergo, I suspect that the fire sprinkler installer
22 tore that gypsum. And when I suggested other possibilities
23 just as practical and just as possible, well, he didn't,
24 you know, he didn't want to go there. He didn't want to
25 give any consideration to that. That was good enough for

1 him. Mr. Smits sat in his chair reading and thinking, came
2 up with a theory that it was good enough for him.

3 It's not good enough for you. It's not good enough
4 for you as jurors. You took an oath, and you'll execute
5 your oath. You're going to listen to this evidence, and
6 you've heard this evidence, and you're going to do the
7 right thing. You're going to deliberate. You're going to
8 consider all the evidence on W.C. Services, and you will
9 return a verdict for W.C. Services.

10 There are places on the verdict form where you will
11 accomplish that. The questions say do you find for the
12 plaintiffs against any defendants on negligence, and they
13 list the defendants. One is W.C. Services. You'll circle
14 no, no. Same on breach of warranty. For the plaintiff
15 against any defendants listed, yes and no. Circle one or
16 the other for each defendant. W.C. Services, no. Do you
17 find any of the defendants were grossly negligent? Again,
18 a list of defendants on this verdict form. W.C. Services
19 will be there. Circle yes or no. No.

20 And on the cross-claim, you're not going to, you're
21 not going to tell W.C. Services that it should pick up the
22 tab for errors and omissions and misconduct on the part of
23 the general contractor. You're not going to let them pass
24 that buck, and on that question again you're going, you're
25 going to say no.

1 That's all the plaintiff and that's all the general
2 contractor should expect from you based on the evidence in
3 this case. That's all they should expect, and I'm here to
4 tell you that that's exactly what W.C. Services is asking
5 you to do. Thank you.

6 THE COURT: All right, at this point in time, ladies
7 and gentlemen -- I'm sorry, Mr. Reeser -- it's been
8 requested that we take a very brief restroom break, so we
9 will do that.

10 I will also tell you as a matter of housekeeping that
11 we have two more closing arguments that will take place,
12 and then I will charge you on the law. I would anticipate
13 my charge at least lasting about half an hour. I would ask
14 you during this break if y'all could kind of reach a
15 consensus with each other and decide if you want to press
16 on in the next few hours tonight and stay, or if you would
17 rather come back in the morning for me to read my charge on
18 the law and then come back. I'm going to leave that
19 entirely up to y'all to try to reach a consensus over this
20 break. So, we'll be at ease for about five minutes, all
21 right? Thank you so much.

22 (THE JURY EXITS AT 5:02 P.M.)

23 (OFF THE RECORD.)

24 THE COURT: Thank you. Please be seated. Over the
25 break, we received a note from the foreperson, which we

1 exhibit that you'll see that you've been through today.

2 But if you circle yes, that's what you're telling -- that's
3 what the plaintiff wants you -- the plaintiff wants you to
4 tell Mr. Vasquez, Mr. Sales, and Miracle Siding that that's
5 what y'all want them to pay for. Doesn't matter what they
6 did. Doesn't matter whose fault it was. They just want
7 them to pay that number.

8 Now, whenever you're back there thinking about it,
9 just remember Mark Poyner would hire them all to do it
10 again. Thank y'all for your time and attention.

11 MR. BUCKLEY: May it please the court?

12 THE COURT: Yes, sir.

13 MR. BUCKLEY: Ladies and gentlemen, Ed Buckley, and
14 I'm glad, I know y'all are glad that I'm the last lawyer
15 y'all got to listen to.

16 I want to talk first about the oddball, W.C. Services.
17 Who did we hear from with the W.C. Services situation who
18 we had actually sued in this case? CRG Engineers Chris
19 Constantine. And you heard that I used to drive his school
20 bus. The reason I mentioned that is because W.C. Services
21 threw him under the proverbial bus. Here's how they did
22 it.

23 Remember I asked him isn't it true there are three key
24 documents missing from your file that W.C. Services never
25 provided to you? You were asked to design a system that

1 complied only with NFPA 13-D. They didn't give you their
2 contract. And their contract is Exhibit 203, and the
3 contract very clearly says you have to comply with the
4 Folly ordinance and NFPA 13-D, and it attached the March 6,
5 2006, letter to it, and that letter from Tom Hall attached
6 the Folly ordinance. And he testified that if he had those
7 documents, what he approved and certified would have been
8 very different because he would have had to include
9 sprinklers in the attics.

10 This is the chart that's the law of Folly Beach. That
11 is no exception. Attics not used for living or storage,
12 you have to have sprinklers. The only way to get out from
13 under that is to have a variance after a hearing with the
14 building code official, the fire marshal, and a person in
15 the industry appointed by city council. There's no
16 evidence that happened here. Mr. Constantine testified
17 there's no evidence that happened here.

18 Mr. Constantine wrote his certification on the 22nd of
19 June 2006. The plans that were drawn by Chad Christopher
20 were dated June 7, 2006. Chad Christopher testified he
21 never drew any other plans. That's not what was built.

22 This is what was drawn. The sprinkler systems come in
23 here, run up this wall on the outside that's not a
24 firewall, run out the other side, run up the other side
25 that's not a firewall. Instead, somebody figured the, the

1 wall comes in from right here from the street. So, we can
2 save pipe and just run it right under here and go right up
3 through that firewall. Every bit of that system is a code
4 violation. Give me a break.

5 Rain Bird as your backflow preventer on a life safety
6 feature of your house, that's a code violation times forty.
7 W.C. Services built a code compliant dangerous system.
8 They created problems that the sprinkler system can't even
9 address because the sprinkler system doesn't reach inside
10 the firewall. When you enter a verdict against W.C.
11 Services, it's around \$829,000 that Mr. Handegan gave you
12 as the cost of redoing the sprinkler system. That includes
13 costs associated with moving it.

14 In addition, don't let it stop there. Send a message
15 to W.C. services and everyone who does business like this
16 that when you hire an engineer, tell him the truth. Give
17 him the full story so that when he does his job as a
18 professional engineer licensed in this state, he does it
19 right. Award punitive damages against them at least in the
20 amount of 829,000.

21 Complete Building Corporation, I got to go through
22 this just a little bit. This Exhibit 677, it wasn't
23 introduced by us. You notice that? There's a good reason
24 for that. It was modified and replaced by an estimate
25 prepared more recently. Why was the estimate prepared more

1 THE COURT: Good morning. How are y'all?

2 MR. LUCEY: Good morning. Yourself?

3 THE COURT: Fine. We got your email, and I made that
4 small change. Appreciate you finding that. That is a
5 correct change to make. It is referenced as or in the
6 other parts of the charge regarding punitive, so that's
7 proper to change that and to an or on page 26. So, we have
8 made that change

9 MR. LUCEY: Thank you, ma'am. One other matter.

10 THE COURT: Another one?

11 MR. LUCEY: We were double checking the exhibit list,
12 Your Honor.

13 THE COURT: Oh, okay.

14 MR. LUCEY: 739 and 705 went into evidence. 705 is
15 the fire sprinkler drawings; 739 was the attic photographs
16 that went in through Mr. Lazo.

17 MR. COLE: 1039.

18 MR. LUCEY: 1039, excuse me.

19 THE COURT: Okay.

20 MR. LUCEY: So, 705, 1039, and we just wanted to make
21 those two corrections to the exhibit list.

22 THE COURT: Okay. Any information contrary to that?
23 I think I remember those going in. Okay, you can make
24 those adjustments.

25 (A PAUSE.)

1 MR. COLE: Your Honor, before the jury comes in, I
2 just want to make sure. I, I honestly am not sure if we
3 actually talked -- I think you addressed some of it, but I
4 wanted just on the jury charges to go over a couple of
5 things.

6 THE COURT: Okay.

7 MR. COLE: To make sure they weren't missed.

8 Under the negligence charge on page 9 of the version
9 that you have with negligence in your second numbered
10 paragraph starts talking about grossly negligent, reckless,
11 willful, wanton conduct, when you're just talking about ---

12 THE COURT: Wait a minute. I'm sorry. What page are
13 you on?

14 MR. COLE: Page 9 of your charge under negligence.

15 THE COURT: Okay, I thought it was page 10. Okay.

16 MR. COLE: Okay. All right. Maybe -- yeah, page 10,
17 you're right. 9 and 10 is where they go.

18 Where in the second paragraph you reference the gross
19 negligence, recklessness, willfulness, and wantonness, I
20 don't remember if this was addressed before, but I think
21 since that's talking about simple negligence and you later
22 talk about punitive damages, damages where you talk about
23 those terms, I think it's confusing to have the
24 recklessness, recklessness language in both sections here
25 and would just -- I don't, I don't...

1 THE COURT: So, your proposed change would be that
2 number 2 would say that: The defendants involved in the
3 construction were negligent or careless.

4 MR. COLE: Right, and then ---

5 THE COURT: In the performance of that construction
6 work.

7 MR. COLE: Yes, ma'am.

8 THE COURT: Is that how it would read?

9 MR. COLE: Yes.

10 THE COURT: That's probably ---

11 MR. LUCEY: No objection, Your Honor.

12 THE COURT: I think that's appropriate, so we'll make
13 that change. Okay.

14 MR. COLE: And then this is kind of a -- well, I think
15 you already said you were putting negligence per se in.

16 THE COURT: Yes.

17 MR. COLE: Okay. Just for the record, if I didn't say
18 it before, I disagree that negligence per se is -- I think
19 it's just evidence of but...

20 THE COURT: Okay.

21 MR. COLE: I understand your ruling on that. Also,
22 since Your Honor ---

23 MR. LUCEY: Your Honor, if I may for the record? We
24 object to any, anything other than typographical errors
25 being considered after we've already argued to the jury.

1 THE COURT: Yeah.

2 MR. LUCEY: He's waived his opportunity on this.

3 THE COURT: And I would agree that we sort of have
4 already had the charge conference, but in his defense, they
5 did bring up that one change that I agreed to make
6 yesterday, so.

7 MR. COLE: And then this one is kind of a
8 typographical thing.

9 THE COURT: Okay.

10 MR. COLE: When I was reading through it, reading this
11 charge, I noticed that on some sections there are
12 quotations and other sections there's not quotations, and I
13 know Your Honor said you want to send this to the jury.
14 And other than, like, terms of art that are in quotations
15 because it makes sense to set them apart.

16 THE COURT: Okay.

17 MR. COLE: Like if you read the section on the
18 comparative ---

19 THE COURT: Contractual indemnity?

20 MR. COLE: Right, the contractual indemnity.

21 THE COURT: Is that the only one that has quotations?

22 MR. COLE: I think so.

23 THE COURT: It should be.

24 MR. COLE: I think some of the others have it, but
25 it's -- I think the others are basically setting apart a

1 term of art.

2 THE COURT: Okay.

3 MR. COLE: But in that contractual one, if it's going

4 ---

5 THE COURT: The contractual one is the only one that
6 has -- really uses quotation marks. We can remove those.

7 MR. COLE: Okay.

8 THE COURT: And I would state for the record. I
9 didn't say this yesterday. I made this change before the
10 charge that was most recently sent to y'all.

11 Under the contractual indemnification paragraph, I
12 removed what had been proposed as the last paragraph and a
13 half. I found it was really more of a commentary and
14 overly suggestive for the jury. I removed the part that
15 said:

16 Typically, courts will construe an
17 indemnification contract in accordance with the
18 rules for the construction of contracts
19 generally.

20 I don't think that's applicable to this evidence in
21 this case. And then most specifically the last paragraph I
22 found overly suggestive. It stated:

23 Indemnity comports with our state court's
24 long-standing regard for parties' freedom to
25 contract. An indemnity agreement is an ideal

1 method for businesses to allocate costs and
2 expenses that may arise in future litigation.

3 Once again, this court found that language to be
4 overly suggestive and really had no bearing on the jury's
5 instructions. So, those were removed. I would assume
6 that's okay with Mr. Cole and Mr. Reeser that I removed
7 that language, and Mr. Atkins.

8 MR. COLE: I'm fine with that. Also I was looking on
9 the negligence. Both paragraph 2 and 3 has that extra
10 language you said you'd remove.

11 THE COURT: All right. Wait a minute.

12 MR. REESER: And, Your Honor, just so everyone agrees,
13 that all objections raised on, on charges still remain with
14 this last set.

15 THE COURT: Yes. There's no need to renew those.

16 You said what, Mr. Cole?

17 MR. COLE: The gross negligence language that you said
18 you were going to remove is both under paragraph 2 and 3.
19 I, I just, just saw that.

20 THE COURT: All right.

21 MR. COLE: It's just the same language is repeated.

22 (A PAUSE.)

23 THE COURT: Okay. So, it will just read that:
24 Negligence or carelessness of the defendants in performing
25 that construction.

1 MR. COLE: Yes, Your Honor.

2 THE COURT: All right. That's the second change.

3 Okay. All right, ready to proceed? Plaintiffs ready?

4 MR. LUCEY: Yes, Your Honor.

5 THE COURT: Defense ready?

6 MR. KENDALL: Yes, Your Honor.

7 THE COURT: The better question is is the court ready,
8 and I'm ready. Let's get the jury in. Bring them in.

9 (THE JURY ENTERS AT 9:07 A.M.)

10 THE COURT: Good morning. Please be seated.

11 *JURY CHARGE*

12 THE COURT: Good morning, ladies and gentlemen. We
13 are now reaching the final stage of the trial. Mr.
14 Foreperson, members of the jury, you have heard the
15 testimony, the evidence, and the arguments of the
16 attorneys. I remind you that during this trial, you and I
17 have had certain duties to perform. As the trial judge,
18 it's been my responsibility to preside over the trial of
19 this case, and I also have the duty to rule on the
20 admissibility of the evidence offered during this trial.

21 You are to consider only the evidence which has been
22 before you. If there was any testimony ordered stricken
23 from the record during this trial, you must disregard that
24 testimony. You are to consider only the testimony which
25 has been presented from this witness stand, any exhibits

1 which have been made a part of the record in this case, and
2 any stipulations of counsel.

3 You should remember that the statements made by
4 counsel are not evidence. In presenting their arguments,
5 counsel often refer to the evidence. However, you should
6 base your verdict on the evidence as you remember it.
7 Therefore, if there are any conflicts between the
8 recollection of counsel about the evidence and your own
9 recollection, you should rely on your own understanding of
10 the evidence.

11 You are the judge of the facts, and I am the judge of
12 the law. You have heard me rule on objections during the
13 trial. This is a normal process during the course of a
14 trial. It is normal and proper for the attorneys to make
15 these objections, and my rulings on these objections were
16 typically in your presence. The fact that an attorney made
17 an objection or my ruling should not be considered by you.

18 In fact, this is probably the best example of how you
19 and I work together to resolve this dispute. If I had
20 ruled as a matter of law that the testimony or evidence is
21 admissible, it now shifts to you as the sole judge of the
22 facts to determine whether the evidence is credible or
23 believable, and if so, how strongly you believe the
24 evidence. If, on the other hand, I do not allow evidence
25 or testimony, you should not consider that or speculate as

1 to what the testimony would have been or why it was not
2 allowed.

3 The fact that I allowed or did not allow evidence
4 admitted should not affect you. I ruled on the evidence as
5 a matter of law and not the credibility of the evidence.
6 It is up to you to determine if the evidence has any
7 credibility whatsoever in the case.

8 I have the additional duty now to charge you the law
9 applicable to this case. It is your duty as jurors to
10 accept and apply the law as I now state it to you. If you
11 think you have any idea as to what the law is or what the
12 law ought to be and it does not agree with what I tell you
13 the law is, you must forget that idea because you are sworn
14 to accept the law and apply the law exactly as I state it
15 to you.

16 In every case tried in this court before a jury, the
17 jury becomes the sole and exclusive judge of the facts. A
18 trial judge cannot comment on or make any statement about
19 the facts in a case. Since you are the sole judges of the
20 facts, do not think by anything I have said during the
21 trial that I have any opinions about the facts in this
22 case. The law does not allow me to have an opinion about
23 the facts.

24 You are also the judges, the sole judges of the
25 credibility or the believability of the witnesses who have

1 testified and of the evidence presented in this case. You
2 may believe everything a witness says or only part of it or
3 none of it. In deciding what to believe, you may consider
4 a number of factors, including the following. Number one,
5 the opportunity and ability of a witness to see or hear or
6 know the things the witness testified to. Number two, the
7 quality of the witness's understanding and memory. Number
8 three, the manner of the witness while testifying, or how
9 they act on the witness stand. Number four, whether the
10 witness has an interest in the outcome of the case or any
11 motive, bias, or prejudice. Number five, whether the
12 witness is contradicted by anything the witness said or
13 wrote before trial or by other evidence. Number six, how
14 reasonable the witness's testimony is when considered in
15 light of other evidence that you believe. And finally
16 number seven, any other factors that bear on believability.

17 The weight of the evidence to prove a fact does not
18 necessarily depend on the number of witnesses who testify.
19 What is more important is how believable the witnesses were
20 and how much weight you think their testimony deserves.

21 You are to consider only the evidence before you. You
22 are to consider only the testimony which has been presented
23 from this witness stand, along with any exhibits which have
24 been made a part of the record, and any stipulations of
25 counsel.

1 The rules of evidence ordinarily do not permit
2 witnesses to testify to opinions or conclusions. An
3 exception to this rule exists for witnesses we call expert
4 witnesses. A witness who, by education and experience, has
5 become an expert in some art, science, or profession may
6 give an opinion as to the subject the witness claims to be
7 an expert in and may also give the reasons for the opinion.

8 You should consider any expert opinion given by a
9 witness, and like any other evidence, give it the weight
10 you think it deserves. If you decide that an expert
11 witness's opinion is not based on sufficient education and
12 experience, or if you decide that the reasons given in
13 support of the opinion are not sound, or that the opinion
14 is outweighed by other evidence, you may disregard the
15 opinion entirely.

16 An expert witness's testimony is to be given no
17 greater weight than that of any other witness's simply
18 because the witness is an expert. And you do not have to
19 accept an expert's opinion even though it is
20 uncontradicted.

21 In this case, you may have heard conflicting testimony
22 by various expert witnesses. To that end, you may weigh
23 the opinion of one expert against that of another, and you
24 consider the reasons given by one as compared with those of
25 the others. You should consider the relative credibility

1 and knowledge of the experts who have testified.

2 Thereafter, you should determine which expert testimony is
3 entitled to the greater weight.

4 Testimony was presented to you by depositions. A
5 deposition is a document containing sworn testimony given
6 by a witness outside of court in the presence of lawyers
7 for each party who may ask questions of the witness. This
8 testimony is entitled to the same consideration and is to
9 be judged as to credibility and weighed by you in the same
10 way as if the witness were present and gave the testimony
11 from the witness stand. It is then for you, the jury, to
12 determine the effect, value, weight, and truth of the
13 testimony given in depositions.

14 There are two types of evidence which are generally
15 presented during a trial: direct evidence and
16 circumstantial evidence. Direct evidence is testimony by a
17 witness about what the witness personally saw or heard or
18 did. Circumstantial evidence is indirect evidence. That
19 is proof of one or more facts from which one can find
20 another fact.

21 You are to consider both direct and circumstantial
22 evidence. The law permits you to give equal weight to
23 both, but it is for you to decide how much weight to give
24 any evidence.

25 The plaintiff claims the defendants committed acts of

1 negligence and breach of implied warranty. The defendants
2 deny each of these claims and further assert as an
3 affirmative defense that the claims of the plaintiff were
4 filed after the running of the statute of limitations.
5 Additionally, defendant Complete Building Corporation has
6 filed cross-claims against its subcontractors, Tri-County
7 Roofing and W.C. Services. The plaintiff has the burden of
8 proving its claims. The defendants have the burden of
9 proof as to any asserted defense and cross-claims.

10 The law places upon the plaintiff the burden of
11 proving its claims against the defendants by preponderance
12 of the evidence. A preponderance of the evidence simply
13 means the greater weight of the evidence. It is evidence
14 which, as a whole, shows that the fact sought to be proved
15 is more likely true than not true.

16 This can be best illustrated by imagining a set of
17 scales. When the case begins, the scales are evenly
18 balanced. After all of the evidence has been presented, if
19 the scales should remain even or if they tip even slightly
20 in favor of the defendants, then the plaintiff has failed
21 to meet this burden of proof, and your verdict would be for
22 the defendants as to each claim the plaintiff has failed to
23 prove. If, on the other hand, should the scales tip even
24 slightly in favor of the plaintiff, the plaintiff will have
25 met the burden of proof and would be entitled to recover

1 damages on any claim proven by the preponderance of the
2 evidence.

3 The preponderance of the evidence is not determined by
4 the number of witnesses. Instead, it must be determined by
5 the greater weight of the evidence. The mere fact that the
6 plaintiff has instituted this lawsuit is not evidence that
7 it is entitled to recover anything from the defendants, nor
8 does the mere bringing of a lawsuit create any presumption
9 favorable to the plaintiff. Further, the fact that the
10 plaintiff may have suffered some damages standing alone
11 does not mean that the defendants are liable in any way.

12 The plaintiff bears the burden of proving all the
13 elements of each claim against the defendants by the
14 greater weight or a preponderance of the evidence. Unless
15 you find that the plaintiff has carried its burden
16 successfully, you must return a verdict in favor of the
17 defendants.

18 There have been some stipulations entered into this
19 case. A stipulation is an agreement as to a fact. Once a
20 fact is stipulated to, that fact becomes established for
21 purposes of the case and cannot be questioned or
22 contradicted.

23 In South Carolina, no distinction is made between
24 corporations and individuals. A corporation is a person in
25 the eyes of the law. The fact that a corporation is a

1 party must not prejudice you in your deliberations or in
2 your verdict. You may not discriminate between
3 corporations and natural individuals. Both are persons in
4 the eyes of the law, and both are entitled to the same fair
5 and impartial consideration and to justice by the same
6 legal standards. Further, a corporation can only act
7 through its agents or employees. Therefore, a corporation
8 is responsible for any negligent acts or omissions of its
9 agents or employees while they are acting within the scope
10 of their employment which proximately caused injury to
11 another person.

12 A corporation may also act through another corporation
13 where the second corporation is its agent and the negligent
14 acts or omissions occur within the course and scope of the
15 agency. A limited liability company or LLC is the
16 equivalent of a corporation and can only act through its
17 employees or agents.

18 This action was brought by Palmetto Pointe at Peas
19 Island Condominium Property Owners Association and Jack
20 Love individually and on behalf of all others similarly
21 situated. This lawsuit seeks damages for repairs and
22 future loss of use, including any other related costs
23 incidental thereto.

24 The plaintiff has asserted several claims against the
25 defendants. The plaintiff alleges negligence or gross

1 negligence and breach of the implied warranty of
2 workmanlike service against all defendants.

3 The plaintiff alleges that the defendants negligently
4 constructed Palmetto Pointe at Peas Island. Negligence is
5 the failure to exercise the degree of care which a person
6 or entity of ordinary reason and prudence would exercise
7 under the same or similar circumstances as exist in this
8 case. Carelessness and negligence mean the same thing.

9 To establish negligent construction, the plaintiff
10 must prove four essential elements. Number one, that there
11 was an undertaking to construct one or more buildings by
12 the defendants. Number two, that the defendants involved
13 in the construction were negligent or careless in the
14 performance of that construction work. Or stated another
15 way, that the defendants did not perform the work in a
16 good, workmanlike manner. This would include the duty to
17 oversee the construction to make sure the construction
18 conformed to the requirements of the building code and good
19 construction practices. Number three, that the negligence
20 or carelessness of the defendants in performing that
21 construction work was the proximate cause of any damages
22 sustained by the plaintiff. And number four, the resulting
23 damages must be shown.

24 A builder has three legal duties; number one, a legal
25 duty to comply with applicable building codes; number two,

1 a legal duty to comply with industry standards; and number
2 three, a legal duty to refrain from constructing housing
3 that it knows or should know will pose serious risk of
4 harm.

5 Builders and subcontractors to may delegate the duties
6 imposed upon them by law to an independent contractor.
7 However, the liability flowing from the negligent acts of
8 that independent contractor may not be avoided just because
9 the duties were delegated.

10 I charge you that a party can create an affirmative
11 legal duty by contract. The duty of care exists
12 independently from the contract, so it does not matter
13 whether the plaintiff was a party to the contract. When an
14 act is voluntarily undertaken, the party then assumes the
15 duty to use due care in carrying it out. Where there is no
16 duty to act but an act is voluntarily undertaken, the actor
17 assumes a duty to use due care in this regard.

18 South Carolina law provides that one who undertakes
19 gratuitously or for consideration to render services to
20 another which he should recognize as necessary for the
21 protection of a third person or his things is subject to
22 liability to that third person for physical harm resulting
23 from his failure to exercise reasonable care to perform his
24 undertaking if (a) his failure to exercise reasonable care
25 increases the risk of harm, (b) he has undertaken to

1 perform a duty owed by the other to the third person, or
2 (c) harm is suffered because of reliance on the other third
3 person upon the undertaking.

4 Stated differently, when someone undertakes the
5 performance of services, he is duty bound to perform those
6 services with due care, given the kind of undertaking. It
7 is the undertaking itself that gives rise to this duty, not
8 whether there is a contract to pay for services in place.

9 A person must exercise due care in all undertakings
10 not to cause injury to another or to create a dangerous
11 situation in which injury is foreseeable. This premise
12 covers acts of omission and requires that a complete job be
13 done whenever a job is undertaken.

14 Negligence is not actionable unless it proximately
15 causes the plaintiff's damages. As such, the plaintiff
16 must prove by a preponderance or greater weight of the
17 evidence that the damages were proximately caused by the
18 negligence of a defendant.

19 Proximate cause is something that produces a natural
20 chain of events which, in the end, brings about the
21 damages. It is the direct cause of the damages. To prove
22 that the negligence of the defendant proximately caused the
23 plaintiff's damages, the plaintiff must first prove
24 causation in fact. This is proven by showing that the
25 damages would not have occurred but for a defendant's

1 negligence.

2 The plaintiff must also prove legal cause. Legal
3 cause is proven by showing that the damages were
4 foreseeable. This means that the damages occurred as a
5 natural and probable consequence of a defendant's
6 negligence. The plaintiff must prove that some damages
7 from a defendant's negligence were foreseeable but does not
8 have to prove that the particular damages that occurred
9 were foreseeable. However, a defendant cannot be
10 responsible for something which could not be expected to
11 happen.

12 Proximate cause does not mean the only cause. A
13 defendant's act can be a proximate cause of the plaintiff's
14 damages if it was at least one of the direct, concurring
15 causes of the damages.

16 Where there is a duty arising from a statute,
17 ordinance, or regulation and the plaintiff shows the
18 defendant violated the statute, ordinance, or regulation,
19 such violation is negligence per se. The violation of any
20 of the provisions of a statute, ordinance, or regulation is
21 negligence per se. That is, negligence in an of itself,
22 negligence as a matter of law. Negligence per se simply
23 means you, the jury, need not decide if a defendant acted
24 as would a reasonable person or entity under the same
25 circumstances. The statute, ordinance, or regulation fixes

1 the standard of conduct required of a defendant, leaving
2 you merely to decide whether the defendants breached the
3 statute, ordinance, or regulation.

4 If the defendants did, this failure to take due care
5 is established as a matter of law. The only issue then
6 left for you to determine is whether the defendant's
7 conduct proximately caused damage to the plaintiff.
8 According, proof of a violation of a statute, ordinance, or
9 regulation is, in fact, proof of negligence. Thus, your
10 only concern then would be whether such violation of the
11 statute, ordinance, or regulation was the proximate cause
12 of the damages to the plaintiff.

13 The violation of a statute, ordinance, or regulation
14 does not constitute recklessness, willfulness, and
15 wantonness per se, yet such violation, if shown, is
16 evidence of recklessness, willfulness, and wantonness and
17 may be considered in connection with all other facts and
18 circumstances surrounding the case.

19 In determining whether the defendants have been
20 reckless, willful, and wanton, municipalities in South
21 Carolina are charged by statute with adopting and
22 implementing building codes. If a building code has been
23 adopted as a statute, any violation of that building code
24 constitutes negligence per se. If you find that the
25 defendants violated a statute, ordinance, or regulation,

1 your verdict may support a recovery of damages if such
2 violation proximately caused or proximately contributed to
3 the damages alleged by the plaintiff.

4 There may be more than one cause of an injury, and
5 more than one person may be responsible for the injury. If
6 the negligence of two or more persons combines to cause an
7 injury, each person involved may be held responsible as if
8 that person alone caused the injury. Causes are concurrent
9 if the individual acts of negligence combine to cause the
10 injury.

11 If an injury occurs through the concurrent negligence
12 of two or more persons and would not have happened without
13 the negligence of either person, then negligence is the
14 proximate cause of the injury and both people are
15 responsible. If the acts happen one after the other but
16 were not related to each other, they would not be the
17 concurring causes. In that case, only the person whose
18 negligence actually caused the injury would be responsible.

19 If the concurrent or successive negligent acts or
20 omissions of two or more persons or entities, although
21 acting independently of each other, are in combination the
22 direct and proximate cause of a single injury to the
23 plaintiff, and it is impossible to determine in what
24 proportion each contributed to the injury, all are said to
25 be responsible for the whole injury even though one person

1 or entity's act alone might not, might not have caused the
2 entire injury. Or the same damage might have resulted from
3 the act of other tortfeasors.

4 Where an entity holds itself out as specially
5 qualified to perform work of a particular character, there
6 is an implied warranty that the work which it undertakes to
7 do shall be of proper workmanship and reasonably fitted for
8 its intended purpose. In conformity with this concept,
9 there is an implied covenant of good workmanship or
10 workmanlike service in every reconstruction project. One
11 who builds a dwelling warrants that the work will be
12 undertaken in a careful, diligent, and workmanlike manner.
13 Every contract involving the rendering of services included
14 -- includes the implied promise to perform these services
15 with reasonable care, skill, and safety.

16 Building and construction contracts contain either an
17 expressed or implied warranty that the work will be
18 sufficient for a certain purpose and will be performed in a
19 skillful, careful, diligent, and workmanlike manner. The
20 contract is not performed until the work accomplishes the
21 agreed result. The rationale supporting the imposition of
22 a liability for a breach of an implied warranty of
23 workmanlike services is that the purchaser is forced to
24 rely on the skill of the professional builder.

25 A builder and any subcontractors who contract to

1 construct a dwelling impliedly warrants that the work
2 undertaken will be performed in a careful, diligent,
3 workmanlike manner. This is known in South Carolina as the
4 implied warranty of workmanlike service. The implied
5 warranty of workmanlike service provides that in
6 constructing a home, a builder and any subcontractors
7 warrant that the home is fit for its intended use as a
8 dwelling, that the home was constructed in a workmanlike
9 manner, and that the home is free of latent defects.

10 The implied warranty of workmanlike services arises
11 from the construction or repair of a structure itself, and
12 the duty it imposes extends from the builder and any
13 subcontractors to the buyer and any subsequent buyers. To
14 establish a claim for breach of the implied warranty of
15 workmanlike services, the plaintiff must show that the
16 builder failed to perform its work in a careful, diligent,
17 and workmanlike manner.

18 In this case, a cross-claim has been filed by the
19 general contractor Complete Building Corporation against
20 its subcontractors, Tri-County Roofing and W.C. Services.
21 The only difference is that the claim is being made by one
22 defendant against another defendant or defendants. The law
23 which I have already explained to you is the same for the
24 cross-claim as for the complaint made by the plaintiff. As
25 you apply the law, keep in mind that for purposes of the

1 cross-claim, the cross-complainant is like the plaintiff
2 and the cross-defendant is like the defendant.

3 The general contractor, Complete Building Corporation,
4 has asserted cross-claims against its own subcontractors,
5 Tri-County Roofing and W.C. Services, which means that to
6 the extent you find that there are building defects
7 proximately causing injury to the plaintiff, then the
8 general contractor argues that if you find that
9 responsibility -- excuse me, responsible, then its
10 liability should be transferred to its subcontractors based
11 on indemnity provisions in the subcontract agreements in
12 which the subcontractors agreed to indemnify Complete
13 Building Corporation.

14 Indemnity is that form of compensation in which a
15 first party is liable to a second party for loss or damage
16 the second party incurs to a third party. A right to
17 indemnity may arise by contract, expressed or implied, or
18 by operation of law as a matter of equity between the first
19 and second party. Contractual indemnity involves the
20 transfer of risk for consideration, and the contract itself
21 establishes the relationship between the parties.

22 The defendants have raised the affirmative defense of
23 the statute of limitations against the plaintiffs' claims
24 in this lawsuit. South Carolina law requires that a party
25 who has a claim that could be brought in a lawsuit bring

1 those claims within a certain period of time. A three-year
2 statute of limitations applies to the claims asserted by
3 the plaintiff in this case. Under the discovery rule, the
4 applicable statute of limitations begins to run on the date
5 the plaintiff either knew or should have known of an
6 underlying injury. Thus, the statute of limitations starts
7 ticking on the date the injured party either knows or
8 should have known by the exercise of reasonable diligence
9 that a cause of action arises from the wrongful conduct.
10 This determination is subjective rather than objective. As
11 such, the question is not whether the particular plaintiff
12 in this case actually knew he had a claim. Instead, the
13 jury must decide whether the circumstances of the case
14 would put a person of common knowledge and experience on
15 notice that some right of his has been invaded, or that
16 some claim against another party much exist.

17 I charge you further than the burden of establishing a
18 statute of limitations bar lies with the party asserting
19 it, and in this case it is the defendants. And when the
20 testimony is conflicting on the question, it becomes an
21 issue for you, the jury, to decide. There is often more
22 than one reasonable inference as to when one knows or
23 should have known that he or she has a claim. Although
24 there may be evidence to support an injured party's filing
25 a claim at an earlier date, the limitations period does not

1 begin to run until the injury rises to a level substantial
2 enough so as to put the insured party on notice that they
3 are being wronged.

4 If the plaintiff has proven a cause of action, your
5 next step is to determine the amount of money to which the
6 plaintiff is entitled. We call such a monetary award
7 damages. Damages are divided into two categories: actual
8 damages and punitive damages. Actual damages are properly
9 called compensatory damages, meaning to compensate, to make
10 the damaged party whole, to put the party in the same
11 position it was, it was in prior to the damage received
12 insofar as this is monetarily possible. In other words,
13 actual or the compensation damages include compensation for
14 all damages which are naturally the proximate result of the
15 alleged conduct of the defendants.

16 Actual damages are awarded to a litigant in
17 compensation for the party's actual loss. Actual damages
18 are such as will compensate the party for losses sustained.
19 They are such damages as will simply make good or replace
20 the loss caused by the wrong. Actual damages are damages
21 in satisfaction of or in recompense for a loss or damage
22 sustained. The goal is to restore the damaged party as
23 nearly as possible through the payment of money to the same
24 position it was in had the damage not occurred.

25 The basic measure of actual damages is the amount

1 needed to compensate the plaintiff for the losses
2 proximately caused by a defendant's alleged wrong so that
3 the plaintiff will be in the same position it would have
4 been in if there had been no wrongful damage. Actual
5 damages include compensation for all damages which are
6 naturally the proximate result of the alleged wrongful
7 conduct of a defendant.

8 With regard to cost of repair, the plaintiffs are not
9 required to prove that the repairs have actually been made.
10 A competent estimate of the cost of repairs is sufficient
11 to create a factual issue for you to determine damages.

12 With regard to loss of use, if you find that the
13 plaintiff was or will be unable to use its property for a
14 period of time because of a defendant's wrongful conduct,
15 you should award the plaintiff compensation for this loss
16 of use only if you believe the loss of use was proximately
17 caused by a defendant's conduct.

18 The plaintiff bears the -- excuse me -- the burden of
19 proving by the preponderance of the evidence the nature and
20 extent of actual damages. The existence, the existence,
21 causation, or amount of damages cannot be left to
22 conjecture, guesswork, speculation, or the possibility of a
23 windfall. Your verdict should include an amount to cover
24 any damages that the evidence shows will be reasonably
25 certain to occur in the future.

1 Proof of amount of loss with absolute or mathematical
2 certainty is not required. Damages must be proven to a
3 reasonable degree of certainty. Future damages need not be
4 proven to a mathematical certainty and often must be
5 approximated. Any future damages must be reduced to its
6 present-day value. The evidence presented by the plaintiff
7 must enable you, the jury, to determine what amount is
8 fair, just, and reasonable.

9 The cost of repair or restoration is a valid measure
10 of damages for injury to a building. When determining the
11 amount of damages, if any, you may consider a competent
12 estimate of the cost to repair to a building.

13 A landowner who is familiar with his property and its
14 value is allowed to give his estimate as to the value of
15 the land and damages thereto even though he is not an
16 expert. The right of a landowner to give testimony as to
17 his property arises as a matter of law. This is true even
18 where a landowner has no real knowledge of the value of
19 surrounding properties and whose opinion as to the land's
20 worth is exactly the same as that of his realtor. A
21 landowner may also testify to his land's diminishment in
22 value and to the value of land surrounding his land.

23 If you find that the plaintiff proved its right to
24 recover on multiple causes of action, then plaintiff is
25 entitled to receive a full set of damages on each

1 individual cause of action so proven. The trial judge will
2 ensure the plaintiff does not receive a double recovery.
3 In other words, although plaintiff is entitled to receive a
4 full set of damages for each individual claim, a plaintiff
5 will only recover once.

6 In this case, the plaintiff seeks punitive damages in
7 addition to actual damages. Punitive damages, also known
8 as exemplary damages, are imposed as punishment. They are
9 not intended to compensate. Punitive damages are allowed
10 in the interest of society and the nature of punishment and
11 as a warning, an example to deter the wrongdoer and others
12 from committing like offenses in the future. Moreover,
13 they serve to vindicate a private right by requiring the
14 wrongdoer to pay money to the damaged party.

15 Punitive damages serve at least three important
16 purposes: punishment of a defendant's grossly negligent,
17 reckless, willful, wanton, or malicious conduct; deterrence
18 of similar future conduct by a defendant or others; and
19 compensation for the reckless or willful invasion of the
20 plaintiff's rights. The paramount purpose for awarding
21 punitive damages is not to compensate plaintiff but to
22 punish and set an example for others.

23 What would justify an award of punitive damages? As
24 you consider the issue of punitive damages, the highest
25 burden of proof known to the civil law is applicable.

1 Section 15-13-135 of the South Carolina code provides that
2 in any civil action where punitive damages are claimed, the
3 plaintiff has the burden of proving such damages by clear
4 and convincing evidence.

5 Clear and convincing evidence is an elevated standard
6 of proof which lies between the lesser standard of
7 preponderance of the evidence used in most civil cases and
8 the higher standard of beyond a reasonable doubt, which is
9 regarding criminal cases. Clear and convincing evidence is
10 that degree of proof which will produce in the mind of you,
11 the jury, a firm belief as to the allegations sought to be
12 established. Such measure of proof is intermediate, more
13 than a mere preponderance but less than required for proof
14 beyond a reasonable doubt. It does not mean clear and
15 unequivocal.

16 Clear and convincing evidence requires that the
17 evidence must be found to be credible. The facts to which
18 the witness, witnesses testify must be distinctly
19 remembered, the testimony must be precise and explicit, and
20 the witnesses must be lacking of confusion as to the facts
21 and the issue. The evidence must be of such weight that it
22 produces in the mind of you, the jury, a firm belief or
23 conviction and without hesitancy as to the truth of the
24 allegations sought to be established.

25 When the law places on a party a burden of proof by

1 clear and convincing evidence, the law means that the
2 evidence is not ambiguous, doubtful, equivocal, or
3 contradictory, but the evidence is pointed to the issue and
4 satisfactory in the sense that the source from which it
5 comes is one in which you, as jurors, can place credence.

6 Punitive damages can only be awarded where the
7 plaintiff proves by clear and convincing evidence that a
8 defendant's actions were willful, wanton, malicious, or in
9 reckless disregard of the plaintiff's rights, or where
10 defendant's actions were so grossly negligent as to imply a
11 willfulness or wantonness.

12 A conscious failure to exercise due care constitutes
13 willfulness. It is the present consciousness or wrongdoing
14 that justifies the assessment of punitive damages against
15 the wrongdoer. Punitive damages will be allowed even when
16 a defendant does not realize it is invading the plaintiff's
17 rights so long as the act is committed in such a manner
18 that a person of ordinary prudence would conclude it was
19 done in reckless disregard of the rights of others.

20 The plaintiff cannot recover punitive damages based on
21 negligent conduct alone. To recover punitive damages, the
22 plaintiff must prove by clear and convincing evidence that
23 the actions of a defendant were willful, wanton, or
24 reckless, so grossly negligent as to imply a willfulness or
25 wantonness.

1 The words recklessness, willfulness, or wantonness are
2 synonymous. The terms are used to describe a conscious
3 failure to exercise and observe reasonable or due care.
4 Recklessness is distinguished from negligence. Negligence
5 is the failure to use due care. Negligence is
6 carelessness. Negligence is failure by omission or
7 commission to exercise due care as a person of ordinary
8 reason and prudence would exercise in the same
9 circumstances.

10 Recklessness is a higher degree of culpability and
11 responsibility. Recklessness signifies a conscious failure
12 to exercise due care. Recklessness is a conscious
13 indifference to the rights of the plaintiff or reckless
14 disregard of the rights of the plaintiff. Recklessness is
15 an awareness of wrongful conduct and continuation to act
16 regardless of the consequences.

17 Gross negligence is the intentional conscious failure
18 to do something which is incumbent upon one to do, or the
19 doing of a thing intentionally that one ought not to do.
20 Negligence is the failure to exercise due care, while gross
21 negligence is the failure to exercise even the slightest
22 care.

23 Gross negligence is a relative term and means the
24 absence of care that is necessary under the circumstances.
25 Punitive damages are recoverable for negligence so gross or

1 reckless of consequences as to imply or to assume the
2 nature of wantonness, willfulness, or recklessness. But
3 punitive damages may not be awarded for mere negligence.

4 I charge you that where you find the builder's actions
5 are grossly negligent, punitive damages may be sought. The
6 test for determining whether a tort may be deemed reckless,
7 willful, or wanton is whether it has been committed in such
8 a manner and under such circumstances that a person of
9 ordinary reason or prudence would have been conscious of it
10 as an invasion of the rights of the party suffering
11 damages.

12 There is no formula or standard that can be used as a
13 measure for assessing punitive damages. However, factors
14 relevant to your consideration of punitive damages are as
15 follows. Number one, the character of the defendant's act.
16 Number two, the nature and extent of the harm to the
17 plaintiff which the defendant caused or intended to cause.
18 Number three, the defendant's degree of culpability.
19 Number four, the punishment that should be imposed. Number
20 five, the duration of the conduct. Number six, the
21 defendant's awareness or concealment. Number seven, the
22 existence of similar past conduct. Number 8, the
23 likelihood that an award will deter the defendant and
24 others from like conduct. Number nine, whether the award
25 is reasonably related to the harm likely to result from

1 such conduct. And finally number ten, defendant's wealth
2 or ability to pay.

3 The existence of similar past conduct may be
4 considered as a factor, but you may not punish a defendant
5 for conduct of others who are not a party to this lawsuit.

6 The financial condition of a defendant is a factor you
7 should consider in awarding punitive damages. However,
8 there is no requirement that a defendant be a person or
9 entity of means before you are justified in awarding
10 punitive damages. While the wealth of a defendant is a
11 relevant factor in assessing punitive damages, it is not
12 necessarily controlling. In other words, the financial
13 worth of a defendant is a fact properly to be considered by
14 you in determining the amount to be awarded as punitive
15 damages. But evidence of net worth is not a prerequisite
16 to a punitive damage award.

17 Before you can award punitive damages, you must find
18 that plaintiff is entitled to actual or nominal damages.
19 There must be an award of actual or nominal damages for a
20 verdict of punitive damages to be supported. This rule is
21 premised on the fact that liability must be established
22 before a plaintiff can seek punitive damages. Accordingly,
23 if you should find that the plaintiff is entitled to
24 recover punitive damages in addition to actual damages, it
25 would be your duty to include such damages in your verdict

1 and award such amount as you may deem reasonable and proper
2 in light of the facts and circumstances.

3 A party who has suffered damages from the actionable
4 conduct of another is under a duty to make all reasonable
5 efforts to minimize the damages occurred. To the extent
6 that the damaged party reasonably could have so minimized
7 those damages and failed to do so, it is not entitled to
8 recover from the other party. In other words, one cannot
9 recover any damages that might have been avoided by the use
10 of reasonable care and diligence. The failure of a
11 plaintiff to mitigate damages allows defendants to avoid
12 only those damages that reasonably could have been avoided
13 by the plaintiff. A damaged party is required to do that
14 which an ordinary, prudent person would do under similar
15 circumstances to mitigate his or her damages. However, the
16 damaged party is not required to reasonably exert itself or
17 incur substantial expense in an effort to mitigate damages.

18 The party who claims damages should have been
19 minimized has the burden of proving the damages could have
20 been avoided or reduced.

21 I am required to charge you the law as I have done
22 through these instructions now being given to help guide
23 you to a just and lawful verdict. Whether some of the
24 instructions should apply will depend upon what you find to
25 be the facts. The fact that I have instructed you on

1 various subjects in this case, including damages, must not
2 be taken as indicating an opinion of this court as to what
3 you should find to be the facts or as to what your verdict
4 should be.

5 You may have taken notes during the trial of this
6 case. However, please remember some people are better note
7 takers than others. Juror notes should not be given any
8 greater weight than the recollection of other jurors. The
9 recollections of individual jurors should be considered as
10 reliable as notes taken by any other jurors.

11 You have been chosen and sworn to give the parties in
12 this case a fair and impartial trial, and when you have
13 done so, you will have complied with your oath, and no one
14 will have a right to criticize your verdict. You must not
15 be influenced by opinions or expressions of opinion you
16 have heard outside the courtroom, but rather you should
17 base your verdict only on the testimony of the sworn
18 witnesses who took the stand, the exhibits received into
19 evidence, and facts which have been stipulated to or agreed
20 to by parties. Your verdict in this case must be supported
21 by a rational and reasonable view of the evidence and bear
22 a reasonable relationship to the character and extent of
23 the evidence presented in this case.

24 You should not be swayed by passion, prejudice, or
25 improper sympathy for or against any of the parties in this

1 case. Circumstances in this case may arouse sympathy for
2 one party or the other. Sympathy is a common human
3 experience. The law does not expect you to be free of such
4 normal reactions. However, the law and your oath you took
5 as jurors require you to disregard sympathy and to prevent
6 it from influencing your verdict.

7 You must not be influenced by a consideration of
8 sympathy or prejudice. It is your duty to weigh the
9 evidence, to decide the disputed questions of fact, and to
10 apply the instructions to your findings, and to render your
11 verdict accordingly.

12 In fulfilling your duty as jurors, your efforts must
13 be directed toward arriving at a fair and just verdict.
14 Remember you have no friends to reward or enemies to
15 punish, and all parties are entitled to a fair and
16 impartial trial at your hands.

17 Now, you may have noticed I have read these
18 instructions. I do so to give you the law as accurately as
19 possible. I will give you a copy of these instructions to
20 have in the jury room. You may refer to these instructions
21 to assist you in your deliberations. Please return to the
22 instructions to the bailiff when you finish your
23 deliberations.

24 Mr. Foreman, it will be your duty to preside over the
25 deliberations of the jury. If during your deliberations

1 you should desire to communicate with the court, please
2 reduce your message or question to writing, signed by your
3 foreperson, and pass the note to the bailiff, who will
4 bring it to my attention. I will then respond as promptly
5 as possible either in writing or by having you return to
6 the courtroom so that I can address you orally. I caution
7 you, however, with regard to any message or question you
8 might send that you should never state or specify your
9 numerical division at the time.

10 Again, any verdict you reach must be a unanimous one.
11 That is it must be agreed to by all twelve of you. When
12 you have reached a unanimous verdict and have completed the
13 verdict form, you may knock on the door and we will take
14 the verdict.

15 So, please retire now to the jury room, but do not
16 begin to discuss the case until you have received a copy of
17 the jury charge, the verdict form, and the exhibits. Once
18 you receive these things, that will be your signal to begin
19 deliberating. Once you begin deliberating, you will
20 deliberate until you have reached a verdict as to each
21 claim, at which time you will knock on the door, advise the
22 bailiff, and we will bring you out to receive your verdict.
23 Thank you very much. You are free to leave.

24 (THE JURY EXITS AT 9:47 A.M.)

25 THE COURT: Thank you. Please be seated. Any

1 objections or exceptions other than those previously stated
2 as to the charge read by the court from the plaintiff?

3 MR. LUCEY: No, Your Honor.

4 THE COURT: Any additional from the defense?

5 MR. KENDALL: Nothing new. We renew the same.

6 MR. COLE: Nothing new as long as we're renewing what
7 we had before, Your Honor.

8 THE COURT: I said in addition to ---

9 MR. COLE: Yes, ma'am.

10 THE COURT: --- anything previously stated.

11 MR. COLE: The -- I just want to raise that you, you
12 -- we didn't take out the term express warranty from the
13 charge. I noticed that when we read through it. I,
14 honestly, I'm just raising because we forgot to take it
15 out, but I don't know that it had any impact because you
16 didn't talk about express warranty other than raising it
17 once.

18 The second, what I said before about the quotation
19 exhibits going back. I notice there were the additional
20 quotation in the statute of limitations language.

21 THE COURT: I saw that, too.

22 MR. ATKINS: Your Honor, may it please the court? Can
23 I get some clarifications? All I'm asking. I assumed that
24 yesterday's argument by plaintiffs' counsel that allocation
25 is not available unless you clear the gross negligence

1 come in here and hear anything, but if there's an objection
2 from the attorneys, let me hear that now.

3 MR. LUCEY: No objection, Your Honor.

4 MR. KENDALL: No, no objection.

5 THE COURT: Okay.

6 MR. COLE: None, Your Honor.

7 THE COURT: All right. Thank you so much. Appreciate
8 it. We'll be back at ease, and we'll honor that request.

9 (OFF THE RECORD.)

10 THE COURT: Mr. Boyd is here now. You ready to
11 proceed?

12 MR. BOYD: Yes, Your Honor.

13 THE COURT: All right, you can bring the jury in.

14 (THE JURY ENTERS AT 3:09 P.M.)

15 THE COURT: Thank you. Please be seated.

16 Mr. Foreman, I understand the jury has reached a
17 verdict. Is that correct?

18 FOREPERSON: We have, Your Honor.

19 THE COURT: Thank you. You can pass that verdict form
20 to the bailiff, who will then pass it up to me. Thank you.

21 (A PAUSE.)

22 THE COURT: All right, I'll pass this verdict form to
23 the deputy clerk for publication.

24 *VERDICT*

25 CLERK OF COURT: State of South Carolina, County of

1 Charleston, in the Court of Common Pleas, Ninth Judicial
2 Circuit, case number 2015-CP-10-0955, *Palmetto Pointe at*
3 *Peas Island Property Owners Association, Inc., and Jack*
4 *Love, individually and on behalf of all other similarly*
5 *situated, plaintiffs vs. Complete Building Corp., et al.,*
6 *defendants, we, the jury, find for the plaintiffs against*
7 *the following defendants on the cause of action for breach*
8 *of implied warranty: Complete Building Corporation, yes;*
9 *Tri-County Roofing, yes; W.C. Services, no; Wilson Lucas*
10 *Sales, DBA Miracle Siding, yes; Eloy Vasquez, yes.*

11 We, the jury, find for the plaintiffs against the
12 following defendants on the cause of action for negligence:
13 Complete Building Corporation, yes; Tri-County Roofing,
14 yes; W.C. Services, no; Wilson Lucas Sales, DBA Miracle
15 Siding, yes; Eloy Vasquez, yes.

16 If the answer to any of the subparts of the following
17 -- of the forgoing two questions is in favor of the
18 plaintiffs, set forth below your award of damages to the
19 plaintiffs: \$6,504,000.

20 If you find through clear and convincing evidence that
21 any of the defendants acted with gross negligence or with
22 conscious of reckless disregard for plaintiffs' rights,
23 indicate by circling yes below: Complete Building
24 Corporation, yes; Tri-County Roofing, yes; W.C. Services,
25 no; Wilson Lucas Sales DBA Miracle Siding, no; Eloy

1 Vasquez, no.

2 If your answer to the following question before was
3 yes, how much do you award against the specified defendants
4 in punitive damages? Complete Building Corporation,
5 500,000; Tri-County Roofing, 500,000.

6 Do you find that Complete Building Corp. is entitled
7 to indemnity from Tri-County Roofing? Yes. If yes, how
8 much do you award Complete Building Corp. on its
9 cross-claim against Tri-County Roofing? 1,000. Do you
10 find that Complete Building Corp. is entitled to indemnity
11 from W.C. Services? No.

12 Dated May 16, 2019, Foreperson -- is it Walter?

13 FOREPERSON: Doan.

14 CLERK OF COURT: Walter Doan?

15 FOREPERSON: Yes, ma'am.

16 Ladies and gentlemen ---

17 THE COURT: All right.

18 CLERK OF COURT: I'm sorry.

19 THE COURT: Go ahead.

20 CLERK OF COURT: Ladies and gentlemen of the jury, if
21 this is your verdict, please raise your right hand.

22 (JURORS COMPLY.)

23 FOREPERSON: May I clarify, please?

24 THE COURT: Yes. I was getting ready to ask you. Go
25 ahead.

1 FOREPERSON: When you read 6,504,000, I apologize.

2 My, my zeros are funny.

3 CLERK OF COURT: Okay.

4 FOREPERSON: It should be 6,500,000.

5 CLERK OF COURT: 6,500,000.

6 FOREPERSON: Yes, ma'am.

7 CLERK OF COURT: Will you be able to clarify his
8 zeros?

9 THE COURT: Yes. He just draws a line through his
10 zeros.

11 CLERK OF COURT: Okay. Okay.

12 THE COURT: But it's fine.

13 CLERK OF COURT: Thank you.

14 FOREPERSON: Yes, ma'am.

15 THE COURT: With the clarification, Mr. Foreperson, is
16 that your verdict?

17 FOREPERSON: Yes, it is.

18 THE COURT: Is that still your verdict?

19 FOREPERSON: Yes, Your Honor.

20 THE COURT: And, ladies and gentlemen of the remainder
21 of the jury, is that your verdict? Indicate by saying yes.

22 JURORS: (*EN MASSE*) Yes.

23 THE COURT: Is it still your verdict?

24 JURORS: (*EN MASSE*) Yes.

25 THE COURT: Okay. All right. At this point in time,

1 ladies and gentlemen, I'm going to ask that you retire back
2 to your jury room. I'm going to speak with these attorneys
3 one more time, and then we will let you know where we go
4 from here, okay? So, thank you very much.

5 (THE JURY EXITS AT 3:14 P.M.)

6 THE COURT: Thank you. Okay, moving on to
7 post-verdict motions, I suppose I need to hear motions from
8 the attorneys at this point in time. Has everyone had time
9 to process the verdict form? I know we provided copies to
10 you all so you could follow along. Does everybody have the
11 requisite information they need right now?

12 MR. KENDALL: Your Honor, is this limited to whether
13 or not there would be an apportionment hearing?

14 THE COURT: If that's necessary or not. It's going to
15 have to be on motion from the attorneys, if they make the
16 motion for it.

17 MR. KENDALL: Obviously I don't think we have standing
18 for that motion.

19 THE COURT: Right.

20 MR. KENDALL: And so we're not.

21 THE COURT: All right, going through the verdict form,
22 it appears that Wilson Lucas Sales, DBA Miracle Siding, and
23 Eloy Vasquez appear to be the only defendants who would
24 have standing to assert a motion for apportionment of
25 damages at this point in time.

1 MR. REESER: Yes, Your Honor. We move to make that
2 motion for apportionment of damages at this time.

3 THE COURT: Okay. All right.

4 MR. LUCEY: And the plaintiffs would oppose that
5 motion, Your Honor, whenever the court wants to hear it.

6 THE COURT: Yeah. I'm happy to hear from you. Sure.

7 MR. LUCEY: Yes, Your Honor. The uncontroverted
8 evidence is that Tri-County didn't do any work. All its
9 work was by the subcontractors, Vasquez and Miracle Siding.
10 As such, because of the relationship and the fact that
11 Tri-County asserted an equitable indemnity claim against
12 these defendants until, until just before the verdict, as
13 such they should be grouped together and they should not be
14 entitled to an apportionment. The three parties,
15 Tri-County, Miracle, and Vasquez, should be treated as one
16 party for purposes of allocation. And therefore, the
17 subcontractor would not be entitled to an apportionment of
18 the verdict.

19 THE COURT: You want to respond to that?

20 MR. REESER: Yes, Your Honor. I think it's really
21 fairly clear from the statute. The statute applies to an
22 indivisible injury. In this case, there may be similar
23 scopes of work, but there's no evidence in this record
24 that, for example, Vasquez did any siding or Wilson did any
25 roofing. And additionally, the evidence that went before

1 the jury, both in argument and in the exhibits, was
2 certainly much more expansive than that. For example, W.C.
3 Services, there's no evidence that my clients did any of
4 that work for Tri-County.

5 And, Your Honor, I think these -- I think from the
6 verdict, we can tell that the jury has divided this injury.
7 So, Your Honor, I, I think per, per the sheet there is no
8 evidence there was any joint, joint action or joint concert
9 in this case. And certainly you could have parties acting
10 in concert with each other and have two divisible injuries.
11 That's not a -- just, just if the argument that parties are
12 acting in concert has nothing to do with the injuries that
13 are caused in the case, Your Honor. So, I certainly don't
14 think that would apply and believe that my clients would be
15 entitled to an apportionment based on their scopes of work
16 and what's been argued.

17 MR. LUCEY: Your Honor, he brings up a different angle
18 in his argument than the plaintiff approached. In fact,
19 his argument actually supports the inability to apportion
20 even more than the plaintiffs' original argument.

21 The uncontroverted testimony at trial was that most of
22 this leaking was taking place at the intersection, at the
23 joint between Miracle and Vasquez's work. As such, Your
24 Honor, they actually are in concert. They both stopped
25 right of the joint, and they should not be able to seek an

1 allocation.

2 And the acting in concert is clearly relevant. We
3 briefed that to the court earlier today.

4 THE COURT: So, Mr. Lucey, you're looking at under the
5 code section, which is 15-38-15, you're looking under
6 subpart (c)(3)(a)?

7 MR. LUCEY: Yes, where it required -- it actually says
8 court must group people as one, as a single defendant for
9 purposes of allocation if they're related by contract or
10 they're acting in concert, or there's other reason that
11 they should be treated as a single group. In this case,
12 both these subcontractors and their, their master
13 subcontractor, Tri-County, satisfied it. They should be
14 treated as a group.

15 And I, I didn't get a chance to respond to the comment
16 about W.C. Services and this, this defendant not being
17 liable for those type of damages. There are no W.C.
18 Services damages in this verdict. That's been removed; the
19 jury has removed all prior damages from the verdict. So,
20 what's left principally is the, the siding, the roofing,
21 the decking, the intersection between those two trades, all
22 which these three defendants acted in concert in
23 installing.

24 THE COURT: Mr. Reeser, how do you think I need to
25 proceed? In other words, okay, now what?

1 MR. REESER: As for apportionment, Your Honor?

2 THE COURT: Right, in terms of what the next verdict
3 form would look like and all that. Guide me as to what
4 you ---

5 MR. REESER: I, I think ---

6 THE COURT: --- argue is appropriate.

7 MR. REESER: At this point, I think it's, I think it's
8 clear that there has been evidence on many things that have
9 gone to the jury.

10 THE COURT: I'm asking you logistically ---

11 MR. REESER: Yes, Your Honor.

12 THE COURT: --- speaking. I'm talking about ---

13 MR. REESER: That ---

14 THE COURT: --- what would a form look like and all
15 that kind of stuff. What do you see?

16 MR. REESER: I, I...

17 THE COURT: Who's thought this many steps ahead? Sir?

18 MR. REESER: I might need to think about that for a
19 moment.

20 THE COURT: Okay. Yeah.

21 MR. REESER: If possible, Your Honor.

22 MR. LUCEY: The one thing, Your Honor, I would add to
23 the court, another reason they should be treated as the
24 same is they're here in court with the same attorney. They
25 are acting as one in this court.

1 THE COURT: Those two, right, Sales and Wilson Lucas
2 -- I mean, and Vasquez.

3 MR. LUCEY: Yes.

4 THE COURT: Right.

5 MR. LUCEY: Everybody else ---

6 THE COURT: A minute ago, you were arguing that they
7 were really just a subpart of Tri-County, so.

8 MR. LUCEY: Well, the three of them should be grouped
9 anyway because they did all Tri-County's work, and as such
10 the court should treat them as one, and there wouldn't be
11 an allocation.

12 But separate from that, they acted in concert, the
13 joints that leak, and they're here in court being
14 represented by a single attorney, and they have spoken with
15 a single voice throughout the trial. Clearly they're
16 acting in concert, and they're not entitled to an
17 apportionment.

18 MR. REESER: Your Honor, I think we discussed this.
19 If this was a post case -- it's not. Those -- that's the
20 portion that Mr. Lucey brings up because he's focused on
21 the intersection, but this, this case wasn't about the
22 posts and postings. It was about much more than that.
23 Much more than that went to the jury.

24 MR. LUCEY: I'd also remind the court that the
25 entirety of the defense table put up a single estimate.

1 They acted in concert on that, too.

2 THE COURT: Well, I'm trying to give credence to the
3 jury verdict, and the jury verdict form obviously that was
4 provided from plaintiffs' counsel does separate out these
5 parties. They are different parties. I understand they
6 were represented by one attorney. And for one reason or
7 another, neither one of the actual parties were present
8 during the trial, but I'm not sure that any of that bears
9 on whether or not they should be deemed as separate parties
10 or single parties for purposes of the apportionment
11 statute.

12 I mean, reading closely the subsection (a), and it
13 says:

14 For this purpose, the court may determine that
15 two or more persons are to be treated as a single
16 party. Such treatment must be used where two or
17 more defendants acted in concert, or where by
18 reason of agency, employment, or other
19 relationship, the defendant is vicariously
20 responsible for the conduct of another defendant.

21 I'm not sure that we -- I mean, was there evidence
22 that they acted in concert? I mean, I just don't honestly
23 remember. Am I missing something?

24 MR. REESER: No, Your Honor. We, we contend there was
25 no evidence presented they acted in concert.

1 MR. LUCEY: Your Honor, they are jointly responsible
2 for that intersection. They stopped their work right there
3 short of the intersection, and that meant they acted in
4 concert. Neither one of them ---

5 THE COURT: Were they separate, were they, I mean,
6 were they separate legal entities? What is the
7 relationship of the two parties? Did I miss it? Are they
8 just entirely separate parties?

9 MR. REESER: Yes, Your Honor, they have none.

10 COURT REPORTER: Repeat that, please.

11 MR. REESER: I said yes, Your Honor, they have none.

12 THE COURT: You have to say it. You have to be
13 louder. I know it's hard.

14 MR. REESER: Yes, Your Honor, they have none.

15 MR. KENDALL: They have none.

16 MR. REESER: They have no relationship is what I said.

17 THE COURT: Thank you. I couldn't hear none.

18 MR. REESER: My apologies, Your Honor.

19 THE COURT: That's okay.

20 Subsection (b) goes on to say:

21 After the initial verdict awarding damages is
22 entered and before the special verdict on
23 percentages of liability is rendered, the parties
24 shall be allowed oral argument, with the length
25 of such argument subject to the discretion of the

1 trial judge on the determination of the
2 percentage attributable to each defendant.

3 However, no additional evidence shall be allowed.

4 The statute is a little unclear, each defendant. I'm
5 assuming each defendant as to who we are trying to allocate
6 apportionment to.

7 MR. KENDALL: My understanding is we would not
8 participate any further.

9 THE COURT: No. My understanding as well.

10 MR. COLE: That's not necessarily my understanding,
11 but I understand the direction of the court.

12 MR. BOYD: The statute's not clear.

13 THE COURT: I think, to me, the statute contemplates
14 each defendant. My question would be what does the form
15 look like that they get next, and what is my instruction to
16 them?

17 MR. REESER: Your Honor, I think, I think that's made
18 a little bit difficult by the, the verdict form that was
19 submitted being this one number. But we can -- I, I
20 believe we can work through that as far as apportionment.
21 I mean, it's clear the jury has made an apportionment as
22 about each party, tried to.

23 THE COURT: To me, I want to ask them what percentage
24 of the 6.5 million do you attribute to Sales and Vasquez.

25 MR. REESER: Yes.

1 THE COURT: And I don't think their percentage is
2 necessarily -- obviously they're not going to equal 100
3 percent.

4 MR. REESER: No, Your Honor.

5 THE COURT: And I think that's my instruction to them.
6 I just need to ask them to what -- of what percentage of
7 this actual damage award do you assess to Vasquez and leave
8 a blank, and then Wilson Sales, DBA Miracle Siding, and
9 leave a blank and instruct them that these percentages do
10 not necessarily have to equal 100 percent.

11 MR. REESER: Yes, Your Honor.

12 THE COURT: Any objection to that?

13 MR. REESER: No objection.

14 THE COURT: I understand the plaintiffs probably have
15 any objection. Go ahead, Mr. Lucey.

16 MR. LUCEY: Well, no. I would say the court is
17 proceeding over our objection to allocation.

18 THE COURT: Right. Correct.

19 MR. LUCEY: But, but that said, I don't think the last
20 clause of what the court said needs to be said to them,
21 that they don't have to give 100 percent. I think all that
22 has to be said, all that has to be asked, how much of the
23 \$6.5 million be attributed to A, be attributed to B, end.

24 THE COURT: Okay.

25 MR. LUCEY: It can either be an amount or percentage.

1 THE COURT: And again, the statute doesn't really give
2 us a whole lot of guidance on that.

3 MR. COLE: You're plowing new ground, Your Honor,
4 because this is not been tested at this point.

5 MR. REESER: Your, Your Honor, I believe that -- I
6 believe they do need to be instructed the, the amount or
7 the percentage doesn't add up to the whole because clearly
8 there's been a verdict as to other parties. So, it's clear
9 the jury is contemplating that Wilson Lucas Sales, Sales
10 and Mr. Vasquez are not, are not subject to a verdict for
11 the whole. I don't want to mislead the jury and think that
12 there's some suggestion that they would be after they've
13 already rendered this verdict as given on this form.

14 THE COURT: I think I need to ask for a percentage
15 based on the statute's language.

16 MR. REESER: Yes, Your Honor.

17 THE COURT: And in section (a), they do contemplate
18 the percentages. So, I will ask for a percentage. I don't
19 think it's necessary for me to say your percentages don't
20 necessarily have to add up to 100. To me, that might be
21 commenting too much; it might be overly suggestive. If
22 they ask me do they have to add up to 100 ---

23 MR. REESER: Well, and one thing ---

24 THE COURT: --- I think I could say no, but ---

25 MR. REESER: --- they may not have understood is in

1 reaching this verdict, do they understand that allocation
2 may happen after? So, I don't know they necessarily know
3 that.

4 THE COURT: No, but they're going to upset that
5 they're going to have to come back and do something else.

6 MR. REESER: Yes.

7 THE COURT: Of course. We know that.

8 All right, let's -- my able clerk has been drafting a
9 verdict form. So, let's see how we can word it. She has
10 right now:

11 Please indicate what percentage of the \$6.5
12 million of actual damages awarded to the
13 plaintiffs is attributable to the following
14 defendants: Wilson Lucas Sales, Eloy Vasquez.

15 And a blank and percentage sign after each one. To
16 me, nothing about that implies that they need to equal 100
17 percent. So, I don't think we need to, like, specify on
18 there. Okay, so we just need to put a caption on that, and
19 we'll entitle it special verdict form.

20 Now, Mr. Reeser.

21 MR. REESER: Yes, Your Honor.

22 MR. COLE: He's reading the statute, Your Honor.

23 THE COURT: Good. Read the statute. Read along with
24 me. It says you:

25 Shall be allowed oral argument. The parties ---

1 Of course the plaintiff, too.

2 ---- shall be allowed oral argument ---

3 With the length of such argument subject to my
4 discretion.

5 --- on the determination of the percentages
6 attributable to these defendants. However, no
7 additional evidence shall be allowed.

8 So, I will let you gentlemen argue. You know, we've
9 had a lot of time from this jury. I'm going to ask that
10 you don't argue too long. I can't imagine that you would
11 need too long, given that we're down to these two, but how
12 much time do you think you need, Mr. Lucey or Mr. Buckley?

13 MR. LUCEY: Five minutes.

14 THE COURT: Five minutes.

15 MR. REESER: Five minutes.

16 THE COURT: That's more than reasonable. So, we'll
17 get this verdict form printed off. I'll let you gentlemen
18 look at it.

19 (A PAUSE.)

20 MR. LUCEY: Your Honor, before Mr. Atkins departs, the
21 plaintiffs will have post-trial motions as to him and his
22 client, unless the court would like to just establish now
23 that that would be a ten-day period and we can do it in
24 writing.

25 MR. ATKINS: A week or ten days.

1 THE COURT: Yeah, I'm happy for y'all to take the
2 ten-day period. And I'm mostly here, so if we need to come
3 back and argue, we can certainly accommodate ---

4 MR. ATKINS: So, we ---

5 THE COURT: --- the time to do that. That's kind of
6 up to y'all's schedules.

7 MR. ATKINS: So, it will be ten days for post-trial
8 motions.

9 THE COURT: All right, print it off. Let's see what
10 it sounds like.

11 MR. COLE: Your Honor, just ten days falls on Sunday.
12 So, that would be Monday the 20th?

13 THE COURT: Yes, by 5 p.m.

14 MR. COLE: All right. Oh, no, I'm sorry. I counted
15 wrong. Monday the 27th, right? Seven days gets us to the
16 23rd.

17 (A PAUSE.)

18 MR. LUCEY: Your Honor, procedurally while she's doing
19 that, do you envision telling them the question they're
20 going to have to answer, we argue for five minutes each,
21 then they get the question in writing? They're going to
22 need to know why we're talking to them.

23 THE COURT: Yeah. No, I think -- I'm glad you bring
24 that up. You know, I'm not armed with a standard charge on
25 this type of situation, so.

1 MR. REESER: I'm not aware of a charge in the bench
2 book.

3 MR. LUCEY: I would just, I would just suggest we say
4 there's two more -- one more question we need you to
5 answer.

6 THE COURT: I think that's ---

7 MR. LUCEY: This is going to be the question. These
8 attorneys get five minutes each to talk to you, and then
9 we're going to send you back.

10 THE COURT: I think that sounds like a fabulous plan.

11 MR. COLE: Your Honor, you can read subpart (b) if you
12 want because that basically ---

13 MR. LUCEY: I oppose any legalese. I think just a
14 simple instruction from the court will suffice.

15 THE COURT: Yeah, I'm just going to basically ---

16 MR. COLE: All right.

17 THE COURT: --- read the verdict form and then let you
18 gentlemen talk, and send them back with this piece of
19 paper. I think that's -- it speaks for itself.

20 (A PAUSE.)

21 MR. COLE: And then for the ten days, did I calculate
22 correct the second time, 5 p.m. Monday the 27th?

23 THE COURT: I haven't counted them, but I'll take your
24 word for it.

25 (A PAUSE.)

1 THE COURT: Just so I have an idea to --
2 realistically, how long do you think we're going to need to
3 argue post-trial motions?

4 MR. BOYD: We will need some time.

5 MR. KENDALL: Are you looking for a separate date for
6 that? I would, I would set aside couple hours, an hour.

7 THE COURT: Great.

8 MR. KENDALL: I mean, I don't -- you, you know the
9 issues. We don't have to brief you extensively ---

10 THE COURT: No.

11 MR. KENDALL: --- on the facts. We've talked about
12 most of them already.

13 MR. LUCEY: Would you like us to approach to look at
14 it?

15 THE COURT: Sir?

16 MR. LUCEY: Would you like us to approach to look at
17 it, the verdict form?

18 THE COURT: Oh, yeah, I'm going to let y'all look at
19 it. Yeah, please. Come up. Of course. Look at it
20 together.

21 (OFF-THE-RECORD BENCH CONFERENCE.)

22 THE COURT: All right, let's bring the jury back in.

23 (THE JURY ENTERS AT 3:39 P.M.)

24 THE COURT: Thank you. Please be seated.

25 All right, ladies and gentlemen, you thought you were

1 finished but not quite. Getting close. Pursuant to South
2 Carolina Code 5-38-15, there is one more question that we
3 need to ask you, and that is we are going to ask you what
4 percentage of the \$6.5 million of actual damages do you
5 award to the -- that you have awarded to the plaintiff is
6 attributable to the following defendants: Wilson Lucas
7 Sales, DBA Miracle Siding, and then Eloy Vasquez.

8 I'm going to allow the attorneys for each -- for the
9 plaintiffs and those defendants to give you very brief
10 argument as to what would be appropriate. And at that
11 point in time, we'll give you this one other special
12 verdict form and let you fill that out and come back to us,
13 all right?

14 So, Mr. Lucey.

15 MR. LUCEY: Yes, ma'am.

16 THE COURT: You can proceed.

17 MR. LUCEY: Your actual damage award is \$6.5 million.
18 The way you completed the verdict form clearly shows what
19 you thought about the responsibilities this job site, who
20 you thought was more responsible, who you thought was less
21 responsible for that \$6.5 million, and the homeowners
22 respect that.

23 So, here's what the homeowners propose for you to do
24 on your allocation. We know that \$6.5 million, almost all
25 of it is attributed to these two subcontractors. Almost

1 all the building code violations, almost all the damages,
2 almost all of it. But we get that the jury has spoken, and
3 the general contractor should have known better and the
4 master subcontractor should have known better.

5 These guys should, too. Miracle Siding should have
6 known better, and the roofer should have known better, too.
7 All of them should have known better.

8 So, almost all of that \$6.5 million is their work. We
9 propose, plaintiffs propose, plaintiffs request that you
10 allocate 16 and a half percent to Miracle Siding and 16 and
11 a half percent to the roofer and decker. That will be a
12 total of one-third of that \$6.5 million.

13 Plaintiffs' thinking is at least a third of that
14 ownership belongs to the general contractor, a third of
15 that ownership belongs to the master subcontractor, and the
16 two second-tier subcontractors should split the last third.
17 It's all their work. It's all their damage. It's all
18 their code violations. But, yes, the general contractor
19 and the master subcontractor should have done a much better
20 job themselves.

21 So restating it, court's going to ask you to allocate
22 what portion of that verdict is attributable to those two
23 subcontractors. The homeowners request that you attribute
24 16 and a half percent to each one for a total, if my math's
25 right, a total of 33 percent, just less than one-third.

1 Thank you.

2 THE COURT: Mr. Reeser.

3 MR. REESER: Ladies and gentlemen of the jury, I
4 understand that Mr. Lucey has a recommendation for you
5 based on how he sees the case. We've talked about this
6 twice now, and we think this is very clear.

7 This table, these are not the only people here. Those
8 architects, those engineers, those code officials, those
9 manufacturers' reps, everyone else had a piece of this pie,
10 and that's what's been put back to you. Supervision,
11 specifications, how you do it, instructions ---

12 MR. LUCEY: Objection, Your Honor. The allocation is
13 between parties in this case, not third parties.

14 THE COURT: Pursuant to code, I'll let him continue.

15 MR. REESER: And because we've talked about it, I
16 think it is clear that with all these people involved, if
17 you are going to allocate, we would request that you
18 allocate, include all those folks. It doesn't matter if
19 they're here. These are all the folks who touched it.

20 Mr. Sales didn't pick the siding, and it didn't matter
21 how Mr. Sales put it up. Could have hit every single stud.
22 Doesn't matter. Mr. Mease didn't have to check the
23 fasteners; he didn't have to check the spacing of them. He
24 knew that didn't work. That was the architect.

25 So, we, we trust that -- it is clear that y'all

1 understood the evidence and the testimony, and we would ask
2 that you make an allocation as to both, understanding what
3 they did and what they didn't do.

4 So, we're not going to ask you for a number. We're
5 going to ask you to be fair, based on your analysis of this
6 case, understanding every single one of these moving parts
7 we've talked about these past two weeks. Thank y'all for
8 your time.

9 THE COURT: All right, thank you very much. And I
10 will hand this verdict form to Mr. Ladson and discharge the
11 jury back to your jury room for this final question. Thank
12 you very much.

13 (THE JURY EXITS AT 3:44 P.M.)

14 (WHEREUPON, JURY DELIBERATIONS RESUME.)

15 THE COURT: Thank you, and for the record, it's
16 subsection D which specifically states:

17 A defendant shall retain the right to assert that
18 another potential tortfeasor, whether or not a
19 party, contributed to the alleged injury or
20 damages and/or may be liable for any or all of
21 the damage alleged by any other party.

22 So for that basis, I allowed Mr. Reeser to continue
23 over your objection. All right.

24 MR. LUCEY: Yes, Your Honor.

25 THE COURT: Wait. Sit tight.

1 MR. KENDALL: Thank you, Your Honor.

2 MR. LUCEY: If it comes up again, it was our
3 understanding that's a codification of the right of
4 defendants to continue to argue an empty chair during the
5 trial. But when you get the allocation, you can only
6 allocate between parties.

7 THE COURT: Think so? Okay.

8 MR. LUCEY: Thank you.

9 THE COURT: All right.

10 MR. KENDALL: We've argued unsuccessfully, Judge, that
11 you should put all those people on that allocation form,
12 regardless of who's left in the courtroom. We lost that
13 issue every time.

14 THE COURT: I understand that. Right. Okay.

15 (OFF THE RECORD.)

16 THE COURT: All right, you can bring the jury back in.
17 Thank you.

18 (THE JURY ENTERS AT 3:58 P.M.)

19 THE COURT: Thank you very much. Please be seated.

20 Mr. Foreman, once again you have reached a special
21 verdict on the issue we asked you to address?

22 FOREPERSON: We have, Your Honor.

23 THE COURT: Thank you so much, and if you will hand
24 that up to the bailiff, once again he will hand that to me
25 and we will publish that.

SPECIAL VERDICT

CLERK OF COURT: In The Court of Common Pleas, Ninth Judicial Circuit, case number 2015-CP-10-0955, *Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.*; and *Jack Love, individually and on behalf of all others simply situated, plaintiffs, vs. Complete Buildings, Corp, et al., defendants.* Please indicate what percentage of the \$6.5 million actual damages awarded to the plaintiff is attributable to the following defendants: Wilson Lucas Sales, DBA Miracle Siding, 5 percent; Eloy Vasquez, 5 percent. Dated May 16, '19 signed foreperson.

Ladies and gentlemen of the jury, is this your verdict? Please raise your right hand.

(JURORS COMPLY.)

CLERK OF COURT: Thank you.

THE COURT: The record will reflect all jurors raised their right hands.

All right, anything else from the plaintiff before I release the jury?

MR. EVANS: No, Your Honor.

THE COURT: Anything else from the defense?

MR. KENDALL: No, Your Honor.

MR. REESER: No, Your Honor.

MR. COLE: No, Your Honor.

1 THE COURT: All right, thank you very much, ladies and
2 gentlemen. You have truly been such a wonderful jury to
3 have the past two weeks. I know I speak on behalf of all
4 the attorneys in the courtroom, and I appreciate you
5 sincerely for your time and consideration.

6 I never comment on a verdict, but I will just comment
7 on how appreciative we are of your time and how much we
8 appreciate you being on time. I think all the court staff
9 and I agree you're the most prompt jury we've ever seen.
10 So, we certainly appreciate that for what it's worth, and
11 you are officially released from jury duty. Thank you very
12 much.

13 (THE JURY EXITS AT 4:00 P.M.)

14 MR. KENDALL: Your Honor, just want to assume they've
15 been advised to leave all their notes behind.

16 THE COURT: Yeah. The bailiffs always tell them ---

17 MR. KENDALL: Okay.

18 THE COURT: --- to leave all those. Yes, they leave
19 the notebooks.

20 Okay, we'll be adjourned. All post-trial motions will
21 be due within ten days of today. I think we deemed that to
22 be the day after Memorial Day by 5:00.

23 MR. COLE: Yes, ma'am.

24 THE COURT: If necessary, we'll arrange a time to hear
25 arguments on those very soon after that, okay?

1 MR. BOYD: Your Honor, Your Honor, could I bring up
2 one thing? One of the issues obviously that we're going to
3 deal with is the setoffs. Plaintiffs are going to argue
4 that we're not entitled to them. We're going to argue that
5 we are entitled to them. But I believe that one thing we
6 need in order to facilitate those arguments are copies of
7 all of the settlement agreements that have been reached by
8 the parties that are not here that the plaintiffs entered
9 into. So, I just request that we have those so that we can
10 properly prepare for the, the briefing and the arguments.

11 THE COURT: Will that be fine?

12 MR. BUCKLEY: We'll get it to them.

13 THE COURT: Okay.

14 MR. BUCKLEY: We produced -- some of them are brand
15 new.

16 MR. COLE: And I think, I think, to be fair, I think
17 that, that, you know, Complete has all that probably. I
18 don't know that everybody else can share with ---

19 (COUNSELORS CONFER.)

20 MR. KENDALL: We'll talk. We'll work it out.

21 THE COURT: Okay, thank you very much. Court is
22 adjourned.

23 --- END OF TRANSCRIPT OF RECORD ---