



THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Civil Action No. 2015-CP-10-00955

Appellate Case No. 2019-001790

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; 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 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,

of which Palmetto Pointe At Peas Island Condominium Property Owners Association, Inc. and
Jack Love, individually, and on behalf of all others similarly situated are the Respondents,

and

Tri-County Roofing, Inc..... Appellant.

RECORD ON APPEAL (FINAL)

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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.	)	
	)	PLAINTIFFS' MOTIONS IN LIMINE
ISLAND POINTE, LLC, et al	)	
	)	
Defendants.	)	

Comes now, Plaintiffs, above named, and move this Court for the following Orders in Limine:

(1) For an Order to prevent any party from presenting evidence, testimony, or any reference related to the *November 5, 2018 3M Fire Protection Product's Engineering Judgment* regarding the property at issue in this matter. Specifically, such evidence, testimony, or reference is hearsay, unqualified and should be excluded pursuant to Rules 403 and 802, South Carolina Rules of Evidence.

(2) For an Order barring cumulative testimony by experts Al Schweickhardt PE, SE, and L. Edward Polk, RRC, RRO. It is apparent that Mr. Schweickhardt & Mr. Polk have worked in tandem in this matter, and they should not be allowed to bolster one another.

(3) For an Order in Limine deeming Defendants to have waived any objections to Plaintiffs' offered trial exhibits for asserting blanket objections and failing to comply with the May

1, 2019 exhibit objection deadline in any meaningful way in an obvious attempt to delay and obfuscate the resolution of the case.

(4) For an Order in Limine to prevent the testimony of J. David Horne, P.E. This Motion is based upon the untimely April 26, 2019 designation of Mr. Horne as an expert witness by Defendant Stanley's Vinyl Fence Designs. See Exhibit A attached. Despite the extensive summaries of opinions to which Mr. Horne is expected to testify to, no materials, file, or published opinions have been produced by Mr. Horne or his designating Defendant's counsel. Therefore, as Plaintiff is unfairly prejudiced by this untimely expert designation, Mr. Horne's testimony should be excluded.

(5) For an Order in Limine to prevent the testimony of the following witnesses designated by Defendant W C Services, Inc.:

- Kirk R. Richards, P.E. [Named 4/26/19];
- Buddy Hilton [Named 4/29/2019];
- Chad Christopher [Named 4/29/2019]; and
- Alan Hudson [Named 4/29/2019].

These witnesses were untimely named. Despite the extensive summaries of opinions to which each witness is expected to testify to, no materials, file, or published opinions have been produced by the witnesses or their designating Defendant's counsel. Further, Richards, Hilton, Christopher, and Hudson's proposed testimony is at least in part expert testimony, and W C Services has failed to answer Plaintiffs' discovery requests regarding these experts. This testimony will also be cumulative as WC Services has already named an expert, Mark A. Lazo, P.E., who was deposed long ago. Therefore, as Plaintiffs are unfairly prejudiced by these untimely designations, Mr. Richards, Mr. Hilton, Mr. Christopher and Mr. Hudson's testimony should be excluded.

(6) For an Order in Limine to prevent the testimony of the following witnesses designated by Defendant W C Services, Inc.:

- Brian Pucel [Named 4/1/19];
- Tim Rooks [Named 4/1/19];
- Christopher Constantine, PE [Named 4/1/19];

These witnesses were untimely named. Despite the extensive summaries of opinions to which each witness is expected to testify to, no materials, file, or published opinions have been produced by the witnesses or their designating Defendant's counsel. Further, their proposed testimony is at least in part expert testimony, and W C Services has failed to answer Plaintiffs' discovery requests regarding these experts. This testimony will also be cumulative as WC Services has already named an expert, Mark A. Lazo, P.E., who was deposed long ago. Therefore, as Plaintiff is unfairly prejudiced by these untimely designations, Mr. Pucel, Mr. Rooks, and Mr. Constantine's testimony should be excluded.

(7) For an Order in Limine to prevent Defendants from presenting any evidence or making any reference to the fact that other parties were previously named as defendants in the case or have been dismissed from this case in those cases where the resolution of the prior claim resulted in issue preclusion, e.g., interior hand rails, sole negligence of HVAC subcontractors, window manufacturing defects. Since these issues have been removed from the case, and are no longer part of Plaintiffs' claim, there is no justification for Defendants attempting to deflect blame for any remaining defects on these settled parties.

(8) For an Order in Limine to prevent Defendants from presenting any evidence or making any reference to the fact that other parties were previously named as defendants in the case or have been dismissed from this case in those cases where the resolution of the prior claim has not resulted in issue preclusion, other than the fact that the prior claim once existed and that its' now resolved. Any further reference or evidence of these prior claims will 1) require Plaintiffs to introduce evidence that Defendants Complete Building Corporation and Tri-County Roofing

originally sued these other defendants as third-party defendants which will be too confusing for the jury; and 2) require Plaintiffs to introduce evidence that these former defendants paid substantial consideration to resolve the claims against them. Defendants can still argue an empty chair defense, but they should not be able to reference the empty chairs as former defendants. Their status as former defendants is irrelevant.

(9) For an Order preventing Complete Building Corporation from mentioning or in any way implying that its client's absence from the court room and/or witness stand is due to any scheduling by the Court. This trial was scheduled approximately six (6) months ago; Complete Building Corporation owner Vic Apat's planned absence was not announced until approximately one (1) month before trial, at which time Complete Building Corporation announced its intentions to perpetuate Mr. Apat's testimony. Despite cooperation from Plaintiffs' counsel, Complete Building Corporation cancelled the perpetuation deposition and failed to respond to Plaintiffs' counsel's offer to arrange for and pay for a video deposition anywhere in the world.

Respectfully submitted,

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By:


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Attorneys for the Plaintiffs

May 3, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading
was emailed to all counsel of record in this proceeding
this 3rd day of May, 2019.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

C.A. No.: 2015-CP-10-955

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; 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.; CERTAINTED CORPORATION;)
KELLY FLOORING PRODUCTS, INC.)
D/B/A CARPET BAGGERS;)
CONRNERSTONE 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.;)

**DEFENDANT STANLEY VINYL FENCE
DESIGNS FIRST SUPPLEMENTAL
DISCOVERY RESPONSES
TO ALL PARTIES**



MOSELY CONCRETE; HAND A
FRAMING CONSTRUCTION, LLC
A/K/A H&A FRAMING
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.

AMERICAN RESIDENTIAL
SERVICES, LLC,

Third-Party Plaintiff,

vs.

VICTOR HUGO HERNANDEZ;
HERNANDEZ ELECTRIC, LLC;
LILIANA ROJAS FLORES; MARTIN
BARR d/b/a PORT CITY STRUCTURED
WIRING; KELLER ELECTRIC, LLC;
JOHN TOOLIN d/b/a JOHN F. TOLLIN
HEAT AND AIR; RUSSELL "RUSTY"

HILL d/b/a RUSTY'S HEATING & AIR;)
and WARREN ANDERSON,)
Third-Party Defendants.)

TO: ALL COUNSEL OF RECORD:

Defendant Stanley's Vinyl Fence Designs, by and through their undersigned counsel, supplements all prior Answers to Interrogatories and Responses to Requests for Production with the following additional witness who may be called as a witness at the trial of this case:

J. David Horne, P.E.
Engineering Design & Testing Corp.
Post Office Box 50368
Summerville, SC 29485

See attached Curriculum Vitae (STANLEY 106-112)

If called as a witness at trial Mr. Horne is expected to testify as to the installation and design of the vinyl rail systems at the subject property, as well as other facts as may be material and relevant to this action.

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STANLEY'S VINYL FENCE DESIGNS

Mt. Pleasant, South Carolina
April 26, 2019

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

C.A. No.: 2015-CP-10-955

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; COMPLETE)
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COUNTY ROOFING, INC.,)
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BUILDING CONSTRUCTION)
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CONSTRUCTION SERVICES, INC.;)
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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.; CERTAINTED CORPORATION;)
KELLY FLOORING PRODUCTS, INC.)
D/B/A CARPET BAGGERS;)
CONRNERSTONE 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.;)

CERTIFICATE OF SERVICE

MOSELY CONCRETE; HAND A)
FRAMING CONSTRUCTION, LLC)
A/K/A H&A FRAMING)
CONSTRUCTION, LLC AND D/B/A H)
AND A FRAMING, LLC, H&A)
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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.)

AMERICAN RESIDENTIAL)
SERVICES, LLC,)

Third-Party Plaintiff,)

vs.)

VICTOR HUGO HERNANDEZ;)
HERNANDEZ ELECTRIC, LLC;)
LILIANA ROJAS FLORES; MARTIN)
BARR d/b/a PORT CITY STRUCTURED)
WIRING; KELLER ELECTRIC, LLC;)
JOHN TOOLIN d/b/a JOHN F. TOLLIN)
HEAT AND AIR; RUSSELL "RUSTY")

HILL d/b/a RUSTY'S HEATING & AIR;)
and WARREN ANDERSON,)
)
Third-Party Defendants.)

I hereby certify that on this 26th day of April, 2019 a copy of **DEFENDANT STANLEY VINYL FENCE DESIGNS FIRST SUPPLEMENTAL DISCOVERY RESPONSES TO ALL PARTIES** has been e-mailed to all counsel of record as follows:

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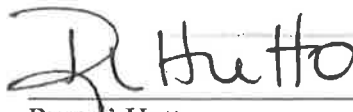
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Paralegal to G. Troy Thames

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EDUCATION:

1996	Bachelor of Science, Civil Engineering University of Central Florida, Orlando, Florida
1993	Associate of Art Valencia Community College, Orlando, Florida
1982	Associate of Applied Science Tri-Cities Technical Institute, Blountville, Tennessee

EXPERIENCE:

October 2000 To Present	Engineering Design & Testing Corp. Charleston, South Carolina Consulting Engineer. Specialized consulting in the area of structural engineering for commercial, industrial, and residential structures including cause and origin of collapsed structures, wind, flood, fire and settlement damage, construction losses, analysis of costs to repair or replace, evaluation and analysis of construction disputes. Provide investigations to determine the cause and origin of fires.
September 1996 To October 2000	Bowen Engineering Corp. Orlando, Florida Structural Engineer and Project Manager. Performed conceptual and detailed structural design and detailed structural analysis for multimillion dollar commercial, educational, and residential projects.

CONTINUING EDUCATION:

Vibration Damage – Is It all it's cracked up to be?, EDT Corp., 2019

No Tears Veneers – Keeping Water Out of Walls, EDT Corp, 2019

A Forensic Engineer's Guide to Geotechnical Field Analysis, EDT Corp., 2019

Introduction to Wood Connection Analysis, EDT Corp., 2018

Fire Retardant Treated Wood, EDT Corp., 2018

Pressure Treated Wood, EDT Corp., 2018

Heat, Air, and Moisture Components of Building Envelopes, EDT Corp., 2018

Design of Commercial – Industrial Guardrail Systems for Fall Protection,
PDHengineer.com, 2018

Introduction to World Class Machine Maintenance Methods, PDHengineer.com, 2018

OSHA Personal Protective Equipment, PDHengineer.com, 2018

Preventative of Shoreline Erosion – Coastal Defense Schemes, PDHengineer.com, 2018

Engineering Analysis of Failure: Determination of Cause in a Legal Environment,
Engineering Design & Testing Corp., 2017

MSE Retaining Walls – Design and Analysis, Engineering Design & Testing Corp., 2017

Ballast Water Management: Background, Practice and Legislation,
Engineering Design & Testing Corp., 2017

Technological Review of Unmanned Aerial Vehicles (UAVs) and Their Uses,
Engineering Design & Testing Corp., 2017

Florida State Board of Engineers Rules, Laws and Ethics,
provided by Failure & Damage Analysis, Inc., 2017

Marine, Cargo and Stock Throughput Insurance, Engineering Design & Testing Corp., 2016

A Primer Regarding Blast Loads on Structures, Engineering Design & Testing Corp., 2016

March 2019

STANLEY 107

BCD420 International Building Code (IBC) Essentials for Wood Construction Based on the 2015 IBC, American Wood Council, 2016

BCD302 Prescriptive Residential Wood Deck Construction, American Wood Council, 2016

Earthquakes – Key Concepts to Aid in Damage Evaluation,
Engineering Design & Testing Corp., 2015

Non-Invasive Structural Repairs and Retrofit – Utilization of Carbon Fiber Reinforced Polymers for Structural Enhancements, Engineering Design & Testing Corp., 2015

On Thin Ice – Building Failures During Winter, Engineering Design & Testing Corp., 2015

Federal Rules of Civil Procedure (FRCP) Rule 26 – Expert Reports,
Engineering Design & Testing Corp., 2015

Americans with Disability Act and Resulting Accessibility Standards,
Engineering Design & Testing Corp., 2015

Florida Laws and Rules for Engineers, PDHLibrary.com, 2015

OSHA 10 Hour Construction Program [V14.1], RedVector.com, 2015

Fall Protection in Construction, Decatur Professional Development, LLC, 2014

Vapor Barriers Under Concrete Slabs – How to Select and Locate,
Decatur Professional Development, LLC, 2014

Design of Commercial – Industrial Guardrail Systems for Fall Protection,
Decatur Professional Development, LLC, 2014

Building a Storm-Resistant Safe Room, CED Engineering.com, 2014

Silica Exposure in Sandblasting, Construction and Other Occupations,
CED Engineering.com, 2014

OSHA Fatal Facts: Fatalities Caused by Improper Work Practice,
CED Engineering.com, 2014

Safety on the Job, Engineering Design & Testing Corp., 2013

Social Networking and the Consulting Engineer, Engineering Design & Testing Corp., 2013

March 2019

STANLEY 108

R-0478.15

Filing Rules in a Judicial System, Engineering Design & Testing Corp., 2013

Changes in the Wind Provisions of the ASCE 7 Standard,
Engineering Design & Testing Corp., 2013

Walkway Safety, Engineering Design & Testing Corp., 2013

Florida Laws and Rules for Engineers, PDHLibrary.com, 2013

Prevention of Shoreline Erosion – Coastal Defense Schemes, PDHengineer.com, 2013

Construction Defect Investigation (Presenter), Engineering Design & Testing Corp., 2012

Estimating for Civil/Structural Engineers – All About the Process,
Engineering Design & Testing Corp., 2012

The Daubert Decision: Where Have We Come Since 1993?,
Engineering Design & Testing Corp., 2012

Hydrology – A Look at Storm water, Drainage and Flooding,
Engineering Design & Testing Corp., 2012

What Do Engineers and Architects Need to Know about the Americans with Disabilities Act?, PDH Center, 2012

Residential Deck Construction, PDH Center, 2011

Concrete Deterioration, PDH Center, 2011

Coastal Terminology and Geologic Environments, PDH Center, 2011

Engineering Ethics Seminar, Engineering Design & Testing Corp., 2011

Asphalt Composition Roof Coverings, Engineering Design & Testing Corp., 2011

Earthquakes – Key Components to Aid in Damage Evaluation,
Engineering Design & Testing Corp., 2011

Geological Engineering Basics for Non-Geotechnical Engineers,
Decatur Professional Development, LLC, 2010

Wood Decay vs. Termite Damage (Presenter), Engineering Design & Testing Corp., 2010

March 2019

STANLEY 109

- Tile Flooring Installation and Inspection*, Engineering Design & Testing Corp., 2010
- Florida Laws and Rules for Professional Engineers*, ActivEngineer.com, 2010
- Alternate Means and Methods as Provided by the ICC (Presenter)*,
Engineering Design & Testing Corp., 2009
- You Can Judge a Roof by Its Cover*, Engineering Design & Testing Corp., 2009
- Florida Laws and Rules for Engineers*, Decatur Professional Development, LLC, 2009
- Bearing Capacity of Shallow Footings and Construction of Residential Buildings in Coastal Areas*, Decatur Professional Development, LLC, 2008
- Building Codes*, Lorman Education Services, 2008
- Damage Assessment – Electronic Theodolite Applications*,
Engineering Design & Testing Corp., 2008
- Pedestrian Falls*, Engineering Design & Testing Corp., 2008
- Spontaneous Ignition and Pyrolysis*, Engineering Design & Testing Corp., 2008
- Concrete Petrography*, Engineering Design & Testing Corp., 2007
- Post Toasting – Post Fire Structural Surveys and Investigations*,
Engineering Design & Testing Corp., 2007
- Lean on Me – Temporary Construction Bracing*, Engineering Design & Testing Corp., 2007
- Hail Testing of Residential Roofing Materials*, Engineering Design & Testing Corp., 2006
- Who is Fellenius and What Can He Tell Us About Unsuitable Soils*,
Engineering Design & Testing Corp., 2006
- Hurricane Damage Evaluation Procedures*, Engineering Design & Testing Corp., 2006
- An Introduction to Infrared Thermography*, Engineering Design & Testing Corp., 2005
- Windows: Performance and Testing*, Engineering Design & Testing Corp., 2005
- Variations between the Florida Building Code and the International Building Code*,
Engineering Design & Testing Corp., 2005

March 2019

Legal Issues for South Carolina Professional Engineers,
HalfMoon, LLC, Columbia, SC, 2005

Avoiding Design Blunders, PDH Center, 2005

Confined Space Entry Compliance, training provided by the Safety and Health Council of
North Carolina, 2004

Reinforced Modular Block Walls and Metal Roofing Systems,
Engineering Design & Testing Corp., 2004

NABIE Standards of Practice for Building Inspectors, PDH Center, 2004

*Moisture in Residential Crawlspace*s, Engineering Design & Testing Corp., 2003

EIFS Panel Discussion, Engineering Design & Testing Corp., 2003

Overview of the Structural Provisions of the IBC, Greenville, SC, 2003

Mold Remediation in Schools, PACE, 2003

Fire Sample Handling, Engineering Design & Testing Corp., 2002

Examination and Evaluation of Wood Roofs and Wood Decay vs. Termite Damage
(Presenter), Engineering Design & Testing Corp., 2002

Characteristics of Roofing Systems, Engineering Design & Testing Corp., 2001

DPIC's Professional Liability Education Program: Liability IQ for Architects and Engineers,
1999

PROBOLT, Structural Tie-down System, Mid-Florida Chapter of Building Officials,
(Presenter of technical data for the program), 1999

Light Gauge Steel Engineers Association's Cold Formed Steel Design Seminar on the
design and analysis of Light Gauge Metal Framing in commercial and residential projects,
1999

*Florida Concrete and Products Association Masonry Construction and Inspection
Certification Workshop*. A two-day seminar on the design, installation, and inspection of
masonry walls held in Orlando, Florida. Certified as Structural Masonry Inspector, 1997
(expired 9/20/99)

March 2019

STANLEY 111

ACI seminar on *Tilt-up Construction and Slabs on Grade*. The seminar addressed the design and proper construction practices for Concrete Tilt- up Walls and Structural Slabs on Grade, Orlando, Florida, 1997

Concrete Mix Selection and Proper Placement,

Florida Concrete and Products Association Seminar, 1996

REGISTRATIONS and CERTIFICATIONS:

Registered Professional Engineer in South Carolina (#21673)
Registered Professional Engineer in Georgia (#PE028936)
Registered Professional Engineer in North Carolina (#030353)
Registered Professional Engineer in Florida (#63362)
Registered Professional Engineer in West Virginia (#018303)
Registered Professional Engineer in Alabama (#32056-E)
Commercial Building Inspector, International Code Council
Building Plans Examiner, International Code Council

March 2019

STANLEY 112

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island Condominium
Association,
☐ Plaintiff

v.

Complete Building Corporation, et al.,
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-10-00955

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Justin O'Toole Lucey
Address: 415 Mill Street, Mt. Pleasant, SC 29464
Phone: (843) 849-8400 fax:
e-mail: jlucey@lucey-law.com

Defendant's Attorney:
Brandon T. Reeser
Address: P.O. Box 13177, Charleston, SC 29422
Phone: (843) 762-4567 fax: (843) 762-2345
e-mail: breeser@wilsonheyward.com

- ☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Special Verdicts

Estimated Time Needed: 15 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order:

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 3, 2019

SECTION III: Motion Fee

- ☒ PAID – AMOUNT: \$25.00
☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
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, LEONARD T. BROWNE,)
COMPLETE BUILDING CORPORATION, TRI-)
COUNTY ROOFING, INC., CREEKSIDE, INC.,)
AMERICAN RESIDENTIAL SERVICES, LLC D/B/A)
ARS/RESCUE ROOTER CHARLESTON,)
ANDERSON WINDOWS, INC., ATLANTIC)
BUILDING CONSTRUCTION SERVICES, INC.,)
CHRISTOPHER N. UNION, 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., CERTAINTED CORPORATION, KELLY)
FLOORING PRODUCTS, INC. D/B/A)
CARPETBAGGERS, CORNERSTONE)
CONSTRUCTION AND MARK MALLOY D/B/A)
CORNERSTONE CONSTRUCTION, MIRACLE)
SIDING, LLC, WILSON LUCAS SALES D/B/A)
MIRACLE SIDING, LLC, MARK PALPOINT A/K/A)
MICAH PALPOINT, ELOY ALONZO VASQUEZ,)
ALDERMAN CONSTRUCTION, STANLEY'S VINYL)
FENCE DESIGNS, COHEN'S DRYWALL, AND)
MOSELEY CONCRETE, AND CHRIS A/K/A JOHN)
DOE 61, MOSELEY CONCRETE, HAND A)
FRAMING CONSTRUCTION, LLC A/K/A H&A)
FRAMING CONSTRUCTION, LLC AND D/B/A H)
AND A FRAMING, LLC, H&A CONSTRUCTION,)
AND HAND A CONSTRUCTION, JMC)
CONSTRUCTION, INC., JMC CONSTRUCTION,)
LLC, AND JOE DOE 1-15,)

DEFENDANTS,)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2015-CP-10-955

**DEFENDANTS WILSON LUCAS SALES
D/B/A MIRACLE SIDING, LLC AND
ELOY ALONZO VASQUEZ'S MOTION
FOR SPECIAL VERDICTS PURSUANT
TO RULE 49, SCRPC**

FILED
2019 MAY -6 PM 4:24
JULIE J. ARMSTRONG
CLERK OF COURT
RY

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,	)
_____	)

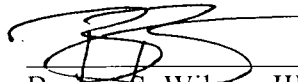
TO: ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendants Wilson Lucas Sales d/b/a Miracle Siding, LLC and Eloy Alonzo Vasquez, by and through undersigned counsel, hereby move for an Order from this Court pursuant to Rule 49, SCRCP to instruct the jury to return as many special verdicts as may be necessary to separate any awards/elements of damages as between the various subcontractor and sub-subcontractor Defendants on the grounds that a single general verdict would not be appropriate as logic and the construction process dictate that all subcontractors and sub-subcontractors cannot be responsible for every element of damages and/or items of repair sought by Plaintiffs and/or Cross-Claimants in the present case.

[Signature Page to Follow]

Respectfully submitted,

WILSON & HEYWARD, LLC



Bonum S. Wilson, III

Brandon T. Reeser

P.O. Box 13177

Charleston, South Carolina 29422

(843) 762-4567

bwilson@wilsonheyward.com

breeser@wilsonheyward.com

ATTORNEYS FOR DEFENDANTS WILSON LUCAS
SALES D/B/A MIRACLE SIDING, LLC AND ELOY
ALONZO VASQUEZ

Charleston, South Carolina

May 3, 2019

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Motion has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 3 day of May, 2019.



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO.: 2015-CP-10-0955

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

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Island Point, LLC, Leonard T. Browne,
Complete Building Corporation, et al.)

Defendant.)

Plaintiff's Attorney:
Justin O'Toole Lucey, Bar No. _____
Address:
415 Mill Street
Mount Pleasant, SC 29464
Phone: 843-849-8400 Fax 843-849-8406
E-mail: jlucey@lucey-law.com Other: _____

Defendant's Attorney:
Everett A. Kendall, II, Bar No. 8450
Address:
4406-B Forest Drive
Columbia, SC 29206
Phone: 803-782-4100 Fax 803-782-4140
E-mail: rkendall@murphygrantland.com Other: _____

- ☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion in Limine

Estimated Time Needed: 30

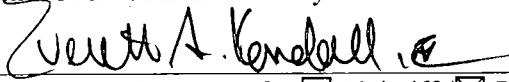
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby ~~move~~ for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

05/03/2019
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2015-CP-10-0955

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

Plaintiffs,

v.

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, *et al*

Defendants.

Tri-County Roofing, Inc.,

Third Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction, *et al*

Third Party Defendants.

Creekside, Inc.,

Third-Party Plaintiff,

v.

Christopher N. Union,

Third-Party Defendants.

FILED
2019 MAY -6 PM 3:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY

**COMPLETE BUILDING
CORPORATION'S MOTION IN LIMINE
TO EXCLUDE EVIDENCE RELATING
TO RELEASED CLAIMS**

TO ALL PARTIES:

YOU WILL PLEASE TAKE NOTICE that the Defendant Complete Building Corporation, by

and through its undersigned counsel, hereby moves before the Presiding Trial Judge *in limine* for an Order or ruling specifically excluding evidence relating to released claims.

Though executed Settlement Agreements, Plaintiffs have entered settlement with certain defendants against whom Complete Building Corporation had asserted cross-claims for contractual and/or equitable indemnification. As consideration for the release of the cross-claims, Plaintiffs agreed that claims and damages relating to the settling defendants' scopes of work would be removed from the case. These settling defendants include:

Andersen Windows – window manufacturer, products only

Alderman Construction – interior handrails

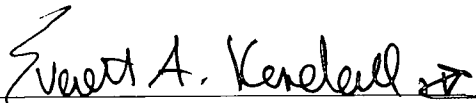
ARS and its subcontractors – HVAC and electrical

Builder Services Group dba Gale – fireplaces

Kelly Flooring dba Carpet Baggers – flooring

As a result of these settlements, no claims or damages associated with these scopes of evidence should be admitted in the trial of this case.

MURPHY & GRANTLAND, P.A.

BY:  *Everett A. Kendall*

Everett A. Kendall, II

Brent M. Boyd

4406B Forest Dr.

Columbia, SC 29206

(803) 782-4100

rkendall@murphygrantland.com

Attorney for Complete Building Corporations

2015-CP-10-955

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Murphy & Grantland, P.A., attorneys for **Defendant Complete Building Corporation**, do hereby certify that I have served a copy of the foregoing motion in connection with the above-referenced case via electronic mail to the following address:

Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Joshua F. Evans, Esquire
415 Mill Street
Mount Pleasant, South Carolina 29464
jlucey@lucey-law.com
sdawdy@lucey-law.com
jevans@lucey-law.com

FILED
2019 MAY -6 PM 3:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY

AND

Edward D. Buckley, Jr., Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
ebuckley@ycrlaw.com

ATTORNEYS FOR PLAINTIFF

David A. Anderson, Esquire
Jasmine Wyman, Esquire
Richardson Plowden & Robinson, PA
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jwyman@richardsonplowden.com

Counsel for Mosely Concrete

Bonum S. Wilson, III, Esquire
Brandon T. Reeser, Esquire
Wilson & Heyward, LLC
Post Office Box 13177
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bwilson@wilsonheyward.com
breeser@wilsonheyward.com

**Counsel for Miracle Siding, LLC and
Wilson Lucas Sales d/b/a Miracle Siding, LLC**

Andrew N. Cole, Esquire
Christopher M. Adams, Esquire
Collins & Lacy, P.C.
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Columbia, SC 29211
acole@collinsandlacy.com
cadams@collinsandlacy.com

Counsel for Tri County Roofing

S. Markey Stubbs, Esquire
Baker, Ravenel & Bender, LLP
Post Office Box 8057
Columbia, SC 29202
mstubbs@brblegal.com

Counsel for Creekside, Inc.

Christopher M. Ramsey, Esquire
The Bostic Law Group, PA
2236 Ashley Crossing Drive
Charleston, SC 29414
cramsey@bosticlaw.com

**Counsel for Island Pointe, LLC
and Christopher N. Union**

G. Troy Thames, Esquire
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
tthames@wjlaw.net

Counsel for Stanley's Vinyl Fence Designs

James A. Atkins, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144
jatkins@clawsonandstaubes.com

Counsel for W.C. Services, Inc.

R. Michael Ethridge, Esquire

Suzanne E. Deters, Esquire

Ethridge Law Group, LLC

Post Office Box 20969

Charleston, SC 29401

methridge@ethridgelawgroup.com

sdeters@ethridgelawgroup.com

Counsel Cornerstone Construction,

Mark Malloy d/b/a Cornerstone

Construction, and Liliana Rojas Flores

Leonard T. Browne

1112 Quiet Rd.

Mount Pleasant, SC 29464

Counsel for Pro-Se Third-Party Defendant (CBC)

Greg Horton, Esq.

Womble Bond Dickinson (US) LLP

PO Box 999

Charleston, SC 29402

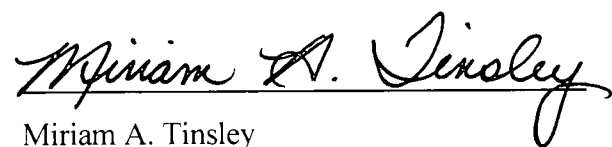
Counsel for Andersen Windows, Inc.

Andrew N. Cole, Esquire

P.O. Box 12487

Columbia, SC 29211

Counsel for JMC Construction, Inc.; JMC Construction, LLC


Miriam A. Tinsley

Columbia, SC

May 3, 2019



MURPHY & GRANTLAND, P.A.

Everett A. Kendall, II
Direct dial 803-454-1232
rkendall@murphygrantland.com

May 3, 2019

Honorable Julie J. Armstrong, Clerk
Charleston County Clerk of Court
100 Broad Street - Suite 106
Charleston, SC 29401

Re: **Palmetto Pointe Peas Island Condominium v. Complete Building Corporation et al.**
Civil Action No.: 2015-CP-10-00955 / Appellate Case No. 2019-000238
Our File No.: 6000-0007

Dear Ms. Armstrong:

Enclosed please find one original and one copy of the Defendant Complete Building Corporation's Motion in Limine to Exclude Evidence Relating to Released Claims in the above-referenced matter. Please file the original and return a filed copy to me in the pre-addressed envelope provided for your convenience.

If you have any questions or need any further information from me, please do not hesitate to call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'E. Kendall'.

Everett A. Kendall, II

EAK/mat

Enclosure

cc: All counsel via email

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO.: 2015-CP-10-0955

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

MOTION AND ORDER INFORMATION

Plaintiff,)

FORM AND COVERSHEET

vs.)

Island Point, LLC, Leonard T. Browne,
Complete Building Corporation, et al.

Defendant.)

Plaintiff's Attorney:

Justin O'Toole Lucey, Bar No. _____

Address:

415 Mill Street

Mount Pleasant, SC 29464

Phone: 843-849-8400 Fax 843-849-8406

E-mail: jlucey@lucey-law.com Other: _____

Defendant's Attorney:

Everett A. Kendall, II, Bar No. 8450

Address:

4406-B Forest Drive

Columbia, SC 29206

Phone: 803-782-4100 Fax 803-782-4140

E-mail: rkendall@murphygrantland.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Joinder of Pre-Trial Motions

Estimated Time Needed: 30

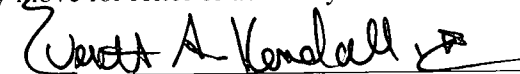
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.



Signature of Attorney for ☐ Plaintiff / ☒ Defendant

05/03/2019

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2015-CP-10-0955

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

Plaintiffs,

v.

Island Pointe, LLC, Leonard T. Browne,
Complete Building Corporation, *et al*

Defendants.

Tri-County Roofing, Inc.,

Third Party Plaintiff,

v.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction, *et al*

Third Party Defendants.

Creekside, Inc.,

Third-Party Plaintiff,

v.

Christopher N. Union,

Third-Party Defendants.

**COMPLETE BUILDING
CORPORATION'S JOINDER OF PRE-
TRIAL MOTIONS**

FILED
2019 MAY -6 PM 2:58
JULIE J. ARMSTRONG
CLERK OF COURT
RY

TO ALL PARTIES:

YOU WILL PLEASE TAKE NOTICE that Complete Building Corporation by and through its undersigned counsel, hereby joins in the following Motions filed by other parties to this action:

By Tri-County Roofing

- Motion to Publish Pleadings
- Motion for Special Verdict
- Omnibus Motion in Limine
- Motion to Change Venue

By JMC Construction

- Motion to Publish Pleadings
- Motion for Special Verdict
- Omnibus Motion in Limine
- Motion to Change Venue

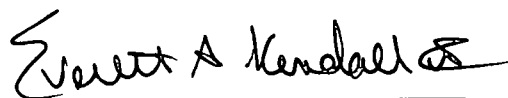
By Stanley's Vinyl Fence

- Motion in Limine

By Vasquez-Sale-Miracle Siding

- Motion for Special Verdicts
- Omnibus Motions in Limine

MURPHY & GRANTLAND, P.A.

BY: 

Everett A. Kendall, II

Brent M. Boyd

4406-B Forest Dr.

Columbia, SC 29206

(803) 782-4100

rkendall@murphygrantland.com

Attorneys for Complete Building Corporations

2015-CP-10-955

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Murphy & Grantland, P.A., attorneys for **Defendant Complete Building Corporation**, do hereby certify that I have served a copy of the foregoing Joinder of Pre-Trial Motions in connection with the above-referenced case via electronic mail to the following address:

Justin O'Toole Lucey, Esquire
Stephanie D. Drawdy, Esquire
Joshua F. Evans, Esquire
415 Mill Street
Mount Pleasant, South Carolina 29464
jlucey@lucey-law.com
sdrawdy@lucey-law.com
jevans@lucey-law.com

FILED
2019 MAY -6 PM 2:58
JULIE J. ARMSTRONG
CLERK OF COURT
NY

AND

Edward D. Buckley, Jr., Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
ebuckley@ycrlaw.com

ATTORNEYS FOR PLAINTIFF

David A. Anderson, Esquire
Jasmine Wyman, Esquire
Richardson Plowden & Robinson, PA
Post Office Box 7788
Columbia, SC 29202
danderson@richardsonplowden.com
jwyman@richardsonplowden.com
Counsel for Mosely Concrete

Bonum S. Wilson, III, Esquire
Brandon T. Reeser, Esquire
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and Christopher N. Union**

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Mark Malloy d/b/a Cornerstone

Construction, and Liliana Rojas Flores

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Counsel for JMC Construction, Inc.; JMC Construction, LLC

Miriam A. Tinsley
Miriam A. Tinsley

Columbia, SC

May 3, 2019



MURPHY & GRANTLAND, P.A.

Everett A. Kendall, II
Direct dial 803-454-1232
rkendall@murphygrantland.com

May 3, 2019

Honorable Julie J. Armstrong, Clerk
Charleston County Clerk of Court
100 Broad Street - Suite 106
Charleston, SC 29401

Re: **Palmetto Pointe Peas Island Condominium v. Complete Building Corporation et al.**
Civil Action No.: 2015-CP-10-00955 / Appellate Case No. 2019-000238
Our File No.: 6000-0007

Dear Ms. Armstrong:

Enclosed please find one original and one copy of the Defendant Complete Building Corporation's Joinder of Pre-Trial Motions in the above-referenced matter. Please file the original and return a filed copy to me in the pre-addressed envelope provided for your convenience.

If you have any questions or need any further information from me, please do not hesitate to call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'E. Kendall'.

Everett A. Kendall, II

EAK/mat
Enclosure
cc: All counsel via email

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

☐ Plaintiff,

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, Andersen
Windows, Inc., Atlantic Building Construction Services,
Inc. n/k/a Atlantic Construction Services, Inc.,
Christopher N. Union, Builder Services Group, Inc. d/b/a
Gale Contractor Services, Novus Architects, Inc. f/k/a
SGM Architects, Inc., Tallen and Sons, Inc., WC
Services, Inc., CRG Engineering, Inc., Certainteed
Corporation, Kelly Flooring Products, Inc. d/b/a Carpet
Baggers, and John Doe 1-60

☐ Defendant.

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

check box above indicating submitting party

Name, S.C. Bar No. and address of plaintiff's attorney:
telephone: fax:
e-mail: other:

Name, S.C. Bar No. and address of defendant's attorney:
Andrew N. Cole, Esquire
Post Office Box 12487
Columbia, SC 29211
telephone: 803.256.2660 fax: 803.771.4484
e-mail: acole@collinsandlacy.com other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Tri-County's Motion in Limine
Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

- ☒ Written motion attached
☐ Form Motion -

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

		CODE: _____	Date: _____
CLERK'S VERIFICATION			
Collected by: _____ (print name)		<u>DATE FILED</u>	
☐ MOTION FEE COLLECTED: \$			
☐ CONTESTED – AMOUNT DUE: \$			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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; COMPLETE
BUILDING CORPORATION; TRI-COUNTY
ROOFING, INC.; CREEKSIDE, INC.;
AMERICAN RESIDENTIAL SERVICES,
LLC D/B/A ARS/RESCUE ROOTER
CHARLESTON; ANDERSON 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.; CERTAINTED
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 H AND A FRAMING, LLC,
H&A CONSTRUCTION, AND HAND A
CONSTRUCTION; JMC CONSTRUCTION,

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-10-00955

**TRI-COUNTY ROOFING, INC.'S
OMNIBUS MOTIONS IN LIMINE**

FILED
2019 MAY -6 AM 9:34
JULIE J. ARMSTRONG
CLERK OF COURT

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.	)
	)
AMERICAN RESIDENTIAL SERVICES,	)
LLC,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
VICTOR HUGO HERNANDEZ,	)
HERNANDEZ ELECTRIC, LLC, LILIANA	)
ROJAS FLORES, MARTIN BARR D/B/A	)
PORT CITY STRUCTURED WIRING,	)
KELLER ELECTRIC, LLC, JOHN TOOLIN	)
D/B/A JOHN F. TOOLIN HEAT AND AIR,	)
RUSSELL "RUSTY" HILL, D/B/A RUSTY'S	)
HEATING & AIR, AND WARREN	)
ANDERSON,	)
	)
THIRD-PARTY DEFENDANTS.	)

TO: ALL PARTIES AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that Defendant Tri-County Construction, Inc. (hereinafter “Tri-County”), by and through its undersigned counsel, files the following Motions in Limine, and in support thereof, avers as follows:

Tri-County requests this Court to order that Plaintiffs and Cross-Claim Plaintiffs, as well as their attorneys, and all other persons involved in this case on their behalf, be instructed not to mention or bring before the jury, either directly or indirectly, upon *voire dire*, opening statements, interrogation of witnesses, argument, objections before the jury, or any other means or manner inform the jury or bring to the jury’s attention any of the matters set forth in the paragraphs below, unless and until such matters have been first called to the Court’s attention, out of the presence and/or hearing of the jury, and a favorable ruling has been received as to the admissibility and relevance of such matters.

Tri-County requests this Court to order that Counsel for Plaintiffs and Cross-Claim Plaintiffs be instructed to inform all witnesses called by them not to volunteer, disclose, state or mention to the jury any of the below-enumerated matters, unless specifically questioned thereon after a prior ruling by this Court.

Tri-County requests this Court to order that the violation of any of these instructions would constitute harm and deprive Tri-County of a fair and impartial trial, and instruct Counsel for Plaintiffs and Cross-Claim Plaintiffs that the failure to abide by such order may constitute contempt necessitate a mistrial.

Tri-County requests this Court instruct jurors not to conduct any independent research, specifically including, but not limited to, internet research regarding allegations, testimony, parties or exhibits while this trial is ongoing.

These specific actions and/or matters which Tri-County requests this Court include within the Order in Limine are as follows:

I.

1. Settlements or Negotiations:

The parties should be instructed to refrain from mentioning or asking any questions regarding any settlement demands, offers or negotiations between the parties in an effort to resolve this dispute. Such evidence is inadmissible. Additionally, any questions or statements regarding other parties' settlement, including settlement sums, to Plaintiffs, is likewise inadmissible. *Rule 408, SCRE. See also Hunter v. Hyder*, 236 S.C. 378 (1960).

2. Settlement Amounts Obtained From Other Parties:

The parties should be instructed to refrain from mentioning or asking any questions regarding any settlement amounts paid by other parties. It is well-settled law in South Carolina that where there are no questions of fact concerning the settlement agreement for the jury's determination, evidence thereof should be excluded from consideration of the jury, and credit shall be applied by the court. *Powers v. Temple*, 250 S.C. 149, 155 (1967).

Generally a "trial [court] should not intimate to the jury any opinion on the facts of a case, whether intentionally or unintentionally." *Sierra v. Skelton*, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992). In a case tried before a jury, the jury is the judge of the facts in the case. *Day v. Kilgore*, 444 S.E. 2d 515 (1994). To allow the disclosure of the settlement amounts received by the Plaintiffs would have a prejudicial effect on Tri-County.

It would cloud the facts of the case. It is contrary to the SC Rules of Evidence and SC ADR Rules. Further, it would suggest that the Plaintiffs claims are valid when the reason the settled defendants settled could have been settled for other reasons (cost of defense, etc.). Finally, it

creates the potential for the jury to conclude on their own, or for Plaintiffs' Counsel to argue, that all of the other defendants have 'done the right thing' and paid for the damages that they caused and Tri-County's refusal to do so is the only reason that the Jury's time is 'being wasted' by this trial. *Powers v. Temple*, 250 S.C. 149, 155 (1967); *Sierra v. Skelton*, 307 S.C. 217, 225, 414 S.E.2d 169, 174 (Ct. App. 1992); *Day v. Kilgore*, 444 S.E. 2d 515 (1994); SCRE 403.

3. Failure to Call Equally Available Witnesses:

The parties should be instructed to refrain from making any suggestion or argument to the jury that Tri-County may be considered liable merely because it has not called any witness equally available to both parties. *Helms v. T&L Building Contractors, Inc.*, 287 S.C. 605, 607, 340, S.E.2d 548, 549 (1989).

4. Testimony of Unavailable Witnesses:

The parties should be instructed to refrain from making any reference or suggestion to the probable testimony of a witness who is not called to testify in this case merely based on their unavailability. *See generally Rule 3.4(e), Rules of Professional Conduct, Rule 407, SCAR.*

5. The Clubhouse at Palmetto Pointe:

The parties should be instructed to refrain from mentioning or asking any questions regarding the Clubhouse at Palmetto Pointe and from referencing the Clubhouse in exhibits, repair estimates, etc. whether the Clubhouse is specifically named or used to create. There is no evidence that any party to this case worked on the Clubhouse. Plaintiffs have advanced no testimony, documentation, or facts that the Clubhouse was constructed by any of the Defendants named in this case, and, therefore Plaintiffs should not be allowed to use the Clubhouse as a basis for any liability or damages. The Clubhouse was an existing structure on the island. The twenty buildings (40 units) in the present litigation are all new structures that that were all completed in 2007. The

design and look of the clubhouse is different from the twenty buildings in litigation. The Clubhouse is clad with beaded siding. No other building at Palmetto Pointe is clad in beaded siding. Although, the Clubhouse is part of the HOA regime, like the two buildings (4 units) that Plaintiffs excluded from the litigation, the Clubhouse should not be referenced during the trial of this case.

6. Evidence of Loss of Use Damages:

The parties should be instructed to refrain from making any suggestion to the jury that Plaintiffs have or will have in the future any damages for the loss of use of their units because there is no supporting evidence in the record of any claim for lost use. No study of loss of use or estimate of loss of use damages has been produced. Plaintiffs' counsel have not identified an expert witness to testify on loss of use damages. Further, none of the witnesses Plaintiffs' counsel have identified to testify on other subjects are qualified to offer testimony on loss of use. Any testimony that Plaintiffs might attempt to enter regarding loss of use would be based on pure speculation and would ask the jury to speculate about Plaintiffs' damages as well.

7. Damages Not Previously In Evidence Via Discovery

The Court should prohibit all parties from offering any evidence regarding their alleged damages at trial which has not been properly disclosed, produced or testified to prior to the trial of these matters and/or as may have been required by the Scheduling Orders issued in this case.

8. Reference to Other Lawsuits or Other Projects That Have Been Or Are In Litigation Relative to Tri-County:

Any reference in the presence of the jury to the existence of such other lawsuits and other projects in litigation must be excluded pursuant to Rules 401 and 402, SCRE, on the grounds that such evidence is not relevant and has no tendency to make the existence of any fact that is of consequence to the determination of this action more or less probable. Evidence of other lawsuits will be highly and unfairly prejudicial to Tri-County. Any probative value the Court may find to

exist with respect to evidence of other projects in litigation is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. As a result, such evidence must be excluded pursuant to Rule 403, SCRE, because it would have the tendency to persuade the jury to decide this case based on the claims and allegations affecting other unrelated properties instead of whether Plaintiffs have proven its construction defect allegations relating to the subject property – the only property that is at issue in this action. Therefore, evidence of other projects in litigation relative to Tri-County would be highly prejudicial and must be excluded.

Furthermore, evidence of prior or similar acts is not admissible to show action in conformity therewith. Rule 404(b) provides that evidence of other crimes, wrongs or acts is not admissible to show action in conformity therewith. Accordingly, evidence of other lawsuits against Tri-County is not admissible to show that the construction at Palmetto Pointe is defective. South Carolina courts have long recognized that “[e]vidence of similar acts has the potential to be **exceedingly prejudicial**.” *Branham v. Ford Motor Co.*, 390 S.C. 203, 230, 701 S.E.2d 5, 19 (2010) (emphasis added). To that end, the test for admissibility of similar acts has been defined by the South Carolina Supreme Court as a “stringent standard for admissibility.” *Id.* “Accordingly, a plaintiff must present facts showing the other acts were substantially similar to the event at issue.” *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). The facts of this litigation are different from and not substantially similar to those of any other lawsuits and other projects in litigation. Among other things, the design and exterior features of Palmetto Pointe would be different from other projects that Tri-County worked on. Other projects would have been developed and constructed at different time periods and were exposed to different maintenance conditions, and any alleged construction defects or alleged problems at other projects are not substantially similar to those purportedly experienced at Palmetto Pointe. As a result, Plaintiff

cannot meet the threshold “stringent standard” for admissibility of evidence with respect to similar acts, and such evidence must be excluded.

9. Close-Up Photographs of Damage at the Palmetto Pointe Buildings During Plaintiffs’ Opening Arguments and Before a Proper Foundation has Been Laid:

The Court should prohibit Plaintiffs’ counsel from showing the jury close-up photographs of damage at Palmetto Pointe in their opening statements and before Plaintiffs’ expert has laid a proper foundation and been permitted to testify about his investigation and findings. Neither the Court nor the parties know what evidence, including photographs, ultimately will be admissible until formally offered into evidence at trial. Photographs cannot be offered as evidence during openings statements and, therefore, should not be presented to the jury or otherwise used at that time. Further, photographs of damage may portray portions or conditions of the Palmetto Pointe buildings which do not accurately depict the actual conditions present throughout the entire project. Pursuant to Rule 403 of the South Carolina Rules of Evidence, it would be unfairly prejudicial to Tri-County for Plaintiff to show photographs of graphic damage before a foundation has been laid as it would leave the jury to speculate regarding the location and alleged cause of the damage.

10. Plaintiffs’ Cost of Repair Estimate Should be Edited to Remove any Line Items in Totality or Reduce the Price of Line Items for Which Plaintiffs Have Settled or Executed Issue Releases:

Plaintiffs have settled with a significant number of prior defendants whose scopes of work differ from the remaining defendants. Due to these differing scopes of work, Plaintiffs’ estimated cost of repair now includes line items that Plaintiffs have been compensated for. Further, some of the line items’ costs should significantly lower because less work is now required to be considered by the jury. An unedited repair estimate on its face is ripe for the Plaintiffs to receive duplicative compensation for the same alleged injury or loss. Therefore, Plaintiffs should be required produce

a new edited cost of repair estimate. Simply redacting the already produced cost of repair estimate will not accurately or completely inform the jury.

11. Filing This Motion:

The parties should be instructed to refrain from making any reference or suggestion that this Motion was filed or ruled upon by the Court. Opposing Counsel should be instructed not to suggest to the jury, directly or indirectly, that Tri-County has sought to exclude any matter from evidence at trial.

II.

In addition to the foregoing, Tri-County requests the following:

12. Tri-County requests that the jury be given an opportunity to inspect the property first hand, including individual units pursuant to S.C. Code Ann. § 14-7-1320:

Tri-County proposes that the jury be permitted to walk the grounds and tour 3 units of the Plaintiffs' choosing and 3 units of the Defendants' choosing pursuant to S.C. Code Ann. § 14-7-1320, which reads in full:

The jury in any case may, at the request of either party, be taken to view the place or premises in question or any property, matter or thing relating to the controversy between the parties when it appears to the court that such view is necessary to a just decision, if the party making the motion advances a sum sufficient to pay the actual expenses of the jury and the officers who attend them in taking the view, which shall be afterwards taxed like other legal costs if the party who advanced them prevails in the suit.

“The purpose of a jury view is to enable the jury better to understand the evidence presented in the courtroom. Viewing the premises is not regarded as the taking of evidence. Under Section 14-7-1320, a request to allow the jury to view the place in controversy is addressed to the discretion of the trial judge.” *City of Columbia v. Jennings*, 288 S.C. 79, 80–81, 339 S.E.2d 534, 535 (Ct. App. 1986)(internal citations omitted). Construction defect actions, like the instant action, involve

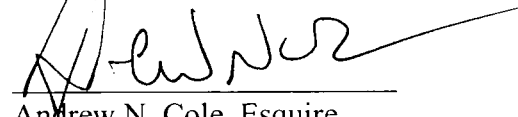
the requisite subject matter to transport the jury to the site at issue to allow personal viewing. *See Kincaid v. The Landing Developing Corp.*, 344 S.E.2d. 869 (Ct. App. 1986).

Tri-County requests that, during trial, the jury be transported to Palmetto Pointe to personally view the conditions of the structures at issue. Such a site visit will allow the jury to better understand the evidence that has been, and will be, presented in the courtroom. In this action, the videos, photographs, and other evidence that will be offered in the courtroom will not be sufficient for the jury to make a “just decision” as contemplated by S.C. Code Ann. § 14-7-1320.

Again, this action involves forty (40) individual units contained in twenty (20) buildings. Showing the jury all of the areas of these buildings at issue during trial with pictures and videos will not allow the jury to fully comprehend and appreciate the issues of this case. Plaintiffs will show photographs that were carefully chosen to isolate and zoom in on only the issues Plaintiffs want the jury to see. In contrast, the defendants will have to show hundreds, if not thousands, of pictures evidencing all the different areas of the buildings that have no damage. To show this many pictures back to back to the jury, will be so mundane, and take so long, that not even the most attentive juror will be able to fully appreciate the larger picture painted by all the individual pictures.

Respectfully submitted,
COLLINS & LACY, P.C.

By:

A handwritten signature in black ink, appearing to read 'Andrew N. Cole', written over a horizontal line.

Andrew N. Cole, Esquire
acole@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR TRI-COUNTY
CONSTRUCTION, INC.

May 3, 2019
Columbia, South Carolina

2015 - CP-10 - 955

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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Stephanie Drawdy, Esquire
Joshua F. Evans, Esquire
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Counsel for Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, LLC

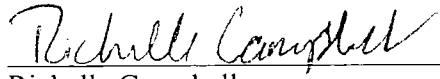
James A. Atkins, Esquire
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Counsel for W.C. Services, Inc.

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Counsel for Island Pointe, LLC and Christopher N. Union

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Jasmine D. Wyman, Esquire
Richardson Plowden & Robinson, PA
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jwyman@richardsonplowden.com

FILED
2019 MAY -6 AM 9:35
JULIE J. ARMSTRONG
CLERK OF COURT
SC

PLEADING: TRI-COUNTY ROOFING, INC.'S OMNIBUS MOTIONS IN LIMINE

A handwritten signature in cursive script, reading "Richelle Campbell", is written over a horizontal line.

Richelle Campbell

Columbia, South Carolina

May 3, 2019

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

☐ Plaintiff,

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, Andersen
Windows, Inc., Atlantic Building Construction Services,
Inc. n/k/a Atlantic Construction Services, Inc.,
Christopher N. Union, Builder Services Group, Inc. d/b/a
Gale Contractor Services, Novus Architects, Inc. f/k/a
SGM Architects, Inc., Tallen and Sons, Inc., WC
Services, Inc., CRG Engineering, Inc., Certainteed
Corporation, Kelly Flooring Products, Inc. d/b/a Carpet
Baggers, and John Doe 1-60

☐ Defendant.

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

check box above indicating submitting party

Name, S.C. Bar No. and address of plaintiff's attorney:
telephone: fax:
e-mail: other:

Name, S.C. Bar No. and address of defendant's attorney:
Andrew N. Cole, Esquire
Post Office Box 12487
Columbia, SC 29211
telephone: 803.256.2660 fax: 803.771.4484
e-mail: acole@collinsandlacy.com other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Tri-County's Motion for Special Verdicts

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

- ☒ Written motion attached
☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: \$

☐ EXEMPT:
(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

		CODE: _____	Date: _____
CLERK'S VERIFICATION			
Collected by: _____ (print name)		<u>DATE FILED</u>	
☐ MOTION FEE COLLECTED: \$			
☐ CONTESTED – AMOUNT DUE: \$			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

PALMETTO POINTE AT PEAS ISLAND)
CONDOMINIUM PROPERTY OWNERS)
ASSOCIATION, INC. AND JACK LOVE,)
INDIVIDUALLY AND ON BEHALF OF)
ALL OTHERS SIMILARLY SITUATED,)

CIVIL ACTION NO: 2015-CP-10-00955

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; ANDERSON 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.; CERTAINTED)
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 H AND A FRAMING, LLC,)
H&A CONSTRUCTION, AND HAND A)
CONSTRUCTION; JMC CONSTRUCTION,)

**TRI-COUNTY ROOFING, INC.'S
MOTION FOR SPECIAL VERDICTS
PURSUANT TO RULE 49 OF THE
SOUTH CAROLINA RULES OF CIVIL
PROCEDURE**

FILED
2019 MAY -6 AM 9:38
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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.	)
	)
AMERICAN RESIDENTIAL SERVICES,	)
LLC,	)
	)
THIRD-PARTY PLAINTIFF,	)
	)
VS.	)
	)
VICTOR HUGO HERNANDEZ,	)
HERNANDEZ ELECTRIC, LLC, LILIANA	)
ROJAS FLORES, MARTIN BARR D/B/A	)
PORT CITY STRUCTURED WIRING,	)
KELLER ELECTRIC, LLC, JOHN TOOLIN	)
D/B/A JOHN F. TOOLIN HEAT AND AIR,	)
RUSSELL "RUSTY" HILL, D/B/A RUSTY'S	)
HEATING & AIR, AND WARREN	)
ANDERSON,	)
	)
THIRD-PARTY DEFENDANTS.	)

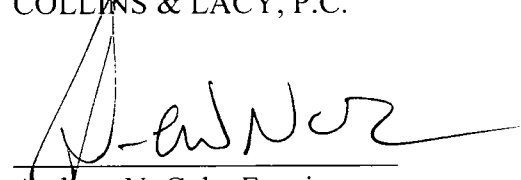
TO: ALL PARTIES AND THEIR COUNSEL:

YOU WILL PLEASE TAKE NOTICE that Defendant Tri-County Roofing, Inc. (hereinafter "Tri-County"), by and through its undersigned counsel, will move before the Court, at such time and place as the Court may deem appropriate, for an order pursuant to Rule 49, SCRCP instructing the jury to return as many special verdicts as may be necessary to separate the elements of damages as appropriate among the various defendants. The basis of this motion is that a general verdict would not be appropriate because the construction process dictates that all subcontractors cannot be responsible for every element of damages or item of repair sought by Plaintiffs.

Respectfully submitted,

COLLINS & LACY, P.C.

By:


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ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

May 3, 2019
Columbia, South Carolina

2015-CP-10-955

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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FILED
2019 MAY -6 AM 9:38
JULIE J. ARMSTRONG
CLERK OF COURT

**PLEADING: TRI-COUNTY ROOFING, INC.'S MOTION FOR SPECIAL VERDICTS
PURSUANT TO RULE 49 OF THE SOUTH CAROLINA RULES OF
CIVIL PROCEDURE**



Richelle Campbell

Columbia, South Carolina
May 3, 2019

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS.

COMPLETE BUILDING CORPORATION;
ET AL.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-10-00955

TRI-COUNTY ROOFING, INC.
POST-TRIAL MOTIONS FOLLOWING
THE TRIAL ON MAY 6-16, 2019

FILED
JULIE J. ARMSTRONG
CLERK OF COURT
2019 MAY 28 PM 2:34

This construction defect matter was tried before the Honorable Jennifer B. McCoy from Monday, May 6 through Thursday, May 16, 2019. Based on the settlement of one party during the case, various directed verdict motions argued before the Court, the dismissal of one party at the close of Plaintiffs' case, as well as Plaintiffs' informing the Court that they were withdrawing their claims against Island Pointe, LLC, there were two causes of action, for negligence and breach of implied warranties, that were submitted to the jury against five remaining Defendants: (1) Complete Building Corporation (hereinafter "CBC"), (2) Tri-County Roofing (hereinafter "Tri-County"), (3) Wilson Lucas Sales d/b/a Miracle Siding (hereinafter "Sales"), (4) Eloy Alonso Vasquez (hereinafter "Vasquez"), and (5) WC Services, Inc. (hereinafter "WC Sercies"). Two parties that started the trial were dismissed from the case. Defendant Stanley's Vinyl Fence Designs (hereinafter "Stanley's") settled with Plaintiffs during the trial and were then dismissed from the case. Defendants JMC Construction, LLC and JMC Construction, Inc. (together, hereinafter "JMC") were dismissed by directed verdict at the close of Plaintiffs' case.

On Thursday, May 16, 2019, the jury began deliberating. The jury came back after approximately four hours and fifty minutes with their verdict. The jury gave a defense verdict to WC Services. The jury found for the Plaintiffs on both the negligence and breach of implied warranty claims against CBC, Tri-County, Sales, and Vasquez. The jury awarded actual damages in the amount of \$6,500,000.00. The jury found gross negligence against CBC and Tri-County and awarded punitive damages of \$500,000 each against CBC and Tri-County. Since the jury did not find gross negligence against Sales or Vasquez, pursuant to S.C. Code Sec. 15-38-15, Plaintiffs and Sales and Vasquez argued for an allocation of a percentage of fault. The jury filled out the Special Verdict form allocating five percent (5%) liability allocation each to Sales and Vasquez.

Following the publication of the jury verdict on Thursday, May 16, 2019, Judge McCoy confirmed that she was giving the parties ten (10) days to file their post-trial motions. Because of the weekend and Monday being the Memorial Day holiday, Judge McCoy provided the deadline of 5:00 pm on Tuesday, May 28, 2019 for the post-trial motions to be filed.

I. JUDGMENT NOTWITHSTANDING THE VERDICT

A judgment notwithstanding the verdict is a renewal of a directed verdict motion. Roland v. Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992).

In the instant case, Tri-County jointed with the other Defendants on various motions at the directed verdict stage. Tri-County renews its directed verdict motions regarding the Plaintiffs' failure to articulate the standard of care to find negligence, the lack of proof for a breach of implied warranty claim, that the claims for lost use were speculative and not properly allowed in front of the jury, and that the statute of limitations should bar Plaintiffs' claims in total or at least in regards to the siding based on the express testimony from Plaintiffs' defect expert, Russell Mease, that the siding was clearly erroneous from the first day it was installed. Tri-County denied the assertions

regarding the siding, but from Plaintiffs' perspective, via their expert, they were on notice of problems with the siding more than three years before they filed their original summons and complaint. Tri-County states that these issues were exacerbated when the Court charged the jury on *res ipsa* regarding violations of the building code over the objections of the Defendants.

To the extent it is still applicable for Tri-County, Tri-County states that the statute of repose bars the claims for units 1653, 1655, 1637, 1639, and 1641 Folly Creek Way.

Tri-County renews its objections to the Plaintiffs' use of the deposition of Wilson Lucas Sales as their rebuttal witness at trial. A party wishing to designate excerpts from a deposition must provide notice to the Court and the parties, at the same time, at least one day prior to offering the excerpts. See Rule 32(a)(5), SCRCF. In this case, Plaintiffs sent an email with some page and line designations to just the Court on the morning of Tuesday, May 14, 2019 while the parties were still in the courtroom. Tri-County acknowledges that Plaintiffs resent the email to all counsel later the same afternoon to the Court and Counsel, but again this was sent while the parties were in the courtroom. The next day, while the parties were again in the courtroom, Plaintiffs forwarded a revised designation via email. At no point did Plaintiffs acknowledge in the courtroom that they were designating lines from the Wilson Sales deposition when it was more convenient and when the attorneys were ten feet from each other. Tri-County submits that an email sent during trial is not proper service of the page and line designations. This prejudiced Tri-County at trial. This prejudice is apparent because of Plaintiffs' argument that the reason for the designation was to provide rebuttal testimony to the testimony of Mark Poyner, Tri-County's principal witness.

Lastly, Tri-County renews its motion to dismiss the cross-claim asserted by CBC because the language of the contract is not "clear and unequivocal" to allow recovery. Tri-County renews its arguments based on the case of Concord & Cumberland Horizontal Property Regime v. Concord

& Cumberland, LLC, 819 S.E.2d 166, 173-174 (S.C. Ct. App. 2018). The language that CBC sought to enforce was not sufficient for CBC to compel Tri-County to pay for CBC's own negligence, concurrent negligence, or to apply any indemnity.

When reviewing the denial of a motion for directed verdict, the Trial Court must consider the evidence in the light most favorable to the non-moving party. Brady Dev. Co. v. Town of Hilton Head Island, 312 S.C. 73, 439 S.E.2d 266 (1993). When deciding a motion for directed verdict, the evidence and all reasonable inferences that may be drawn from it must be viewed in the light most favorable to the non-moving party. If the evidence yields more than one inference, the motion for directed verdict should be denied. Substation II v. Oliver, 307 S.C. 166, 414 S.E.2d 141 (1992); Bonaparte v. Floyd, 291 S.C. 427, 354 S.E.2d 40 (Ct. App. 1987); see also Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993) (stating that a directed verdict should not be granted unless only one reasonable inference can be drawn from the evidence); Steinke v. S.C. Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999) (holding the trial court must deny a directed verdict motion when the evidence yields more than one inference or its inference is in doubt). When considering the motion, the Trial Court does not have the authority to decide credibility issues or to resolve conflicts in the testimony in evidence. Garrett v. Locke, 309 S.C. 94, 419 S.E.2d 842 (Ct. App. 1992).

In the instant case, although there was testimony regarding building code violations, there was also testimony that a building cannot be constructed completely free of building code violations. However, Plaintiffs did not articulate the specific standard of care for the Defendants.

II. NEW TRIAL ABSOLUTE

The trial judge must grant a new trial absolute if the amount of the verdict is grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was

the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and, on appeal, this court will grant a new trial absolute. Id.

In the instant case, the jury's verdict of \$6.5 million dollars in actual damages was grossly excessive in light of the evidence presented at trial. As demonstrated in the closing arguments, the Plaintiffs' repair estimate which yielded the \$6.5 million dollar verdict was excessive and inflated. Furthermore, Plaintiffs' repair estimator Jerry Handegan, acknowledged that his estimate was prepared under a defunct company that would not be able to perform the work if asked to do so. Mr. Handegan testified that he would like to do the work, but he testified he did not have plans or the final scope to actually submit a bid for the work and, since he is not an owner of his current employer, Trident Construction, he cannot enter a contract binding his current employer for such an expensive bid. This makes Plaintiffs' damages number speculative. Moreover, such inflation of the figures and lack of an ongoing business entity to perform the work shows that the jury's verdict was a product of passion, caprice, prejudice, partiality, or some other improper motive.

III. NEW TRIAL *NISI REMITTITUR*

The Trial Judge has the power to grant a new trial *nisi* when it finds the amount of the verdict to be excessive. As asserted above, the \$6.5 million dollar verdict awarded to Plaintiffs was excessive. The verdict should be reduced to the sum of One Million Eight Hundred Ninety-Eight Thousand One Hundred Sixty-Three and 27/100s (\$1,898,163.27) Dollars, which represents the accurate repair figure prepared on behalf of the Defendants rather than the excessive figure proposed by the Plaintiffs.

Additionally, although the jury found that CBC's cross-claim for indemnity was valued at only \$1,000.00, this verdict is also excessive since CBC did not actually put up any testimony or arguments that it was entitled to the cross-claim damages. No witness discussed the terms of the contract that referenced indemnity. The testimony referencing the contract merely pointed out the general concepts that one is supposed to perform the work that they were hired to perform. In this case, Tri-County followed the design, direction, and oversight by CBC, the engineers, and the architect. CBC did not prove its case for the contractual indemnity language. CBC did not even prove that Mark Poyner was authorized to bind Tri-County with any of the contract terms. Instead, CBC relied on the jury reading the terms of the subcontract agreement between CBC and Tri-County without any guidance except for a general charge explaining what indemnity is.¹ Tri-County respectfully states that CBC's cross-claim should be reduced to zero.

IV. COMPLETE BUILDING CORPORATION'S CROSS-CLAIM SHOULD BE DISMISSED

In anticipation of some post-trial arguments by CBC, Tri-County addresses the cross-claim for contractual indemnity separately here. First, as noted above, Tri-County re-asserts its arguments that the cross-claim asserted by CBC against Tri-County should have been dismissed pursuant to the case and reasoning of Concord & Cumberland, supra. CBC asked the jury to interpret the contract language with absolutely no context, testimony, or guidance. The only discussion about the contract was in closing arguments and in the jury charges on page 18 titled "Cross-Claim" and "Contractual Indemnity and Indemnity in General," which charges Tri-County objected to. Tri-County respectfully submits that the Court should have dismissed the cross-claim in toto. Without waiving these arguments, Tri-County discusses the cross-claims further below.

¹ The charge, on page 18., was captioned "Contractual Indemnity and Indemnity in General."

Again, it cannot be overstated that CBC asked the Court to submit its cross-claim to the jury. CBC even submitted a proposed charge to the jury regarding its cross-claim. Therefore, CBC should be bound by the factual determination by the jury that the cross-claim should be valued at \$1,000.00. Tri-County asserts that the value of the cross-claim should have been zero because it was entitled to a directed verdict motion on this claim. Nonetheless, Tri-County supports the well-reasoned decision by the jury with regard to the cross-claim.

Furthermore, CBC submitted an affidavit for attorneys' fees and costs dated May 13, 2019 where its counsel sets forth his fees and expenses he estimates CBC incurred in its defense of this case through trial. Tri-County questions whether CBC has incurred these fees and expenses. Tri-County is informed that Plaintiffs received a partial settlement from CBC's original insurance carrier at the first mediation in this case that took place on January 31, 2018. As a result of this partial settlement, CBC's original attorney, David Cobb, was replaced with its current attorney, Rett Kendall. Also, Tri-County understands that CBC was given a covenant not to execute by Plaintiffs as part of the consideration for this partial settlement. That is, for over the past fifteen (15) months, CBC itself has not incurred any costs or expenses defending this action.

The Trial Court is required to scrutinize the sufficiency of any award of attorneys' fees. Moreover, the party seeking attorney's fees must prove it is entitled to any such award. Here, CBC provided a total figure for its fees and expenses, but as of the writing of this brief there has been no attempt to articulate what portion of the attorneys' fees and costs would be attributable to Tri-County. By its own admission at trial, CBC was one of the primarily responsible parties for the construction of the Palmetto Pointe project. At one time or another, a total of thirty-three (33) Defendants participated in this case. Seven (7) Defendants were present at the start of the trial of this case and five (5) were on the jury verdict form. Although WC Services won a defense verdict,

it was clear that Plaintiffs sought to attribute a significant portion of their claimed repair damages and punitive damages to WC Services. It is incumbent on CBC to express what portions of its attorneys' fees and costs might be allocated to Tri-County. To the extent that CBC attempts to allocate 100% of its fees and costs to Tri-County, this is in violation of statute, the Concord & Cumberland case, and is an attempt by CBC to transfer even the damages it should be solely responsible for.

Although Tri-County does not believe that CBC should be entitled to any fees and costs, as a matter of argument only, Tri-County states that the Court should look to the determination by the jury for a basis of the fees and costs award. The jury decided that the value of the cross-claim was \$1,000.00. This is the success the jury articulated that CBC manifested compared to the award of actual damages. Applying this success of 0.01538% of the cross-claim award to the actual damages award, a reasonable attorney's fees award to CBC of no more than sixty-nine and 21/100s (\$69.21) dollars is warranted.

V. PUNITIVE DAMAGES

Tri-County renews its objection to the jury charge on negligence *per se*, found on page 14 of the jury charge, as this charge improperly suggested that the jury had to decide the case in favor of the jury and had to award punitive damages. Furthermore, although the parties discussed the building code, there was no testimony that the building code had been adopted as a common statutory authority.

Furthermore, the Trial Court is required to review any punitive damages award. The Trial Court is required to at least review the guideposts first articulated in the case of BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). See Mitchell v. Foris Insurance Co., 385 S.C. 570, 686 S.E.2d 176 (2009). The items the Court must review include

“(1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Mitchell at 585 (citing Gore at 575, 116 S.Ct. 1589). And although not required as a separate analysis, the Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991) elements “remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the Gore guideposts.” Mitchell at 587, 686 S.E.2d at 185. The Gamble considerations include: “(1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate.” Mitchell at 587, 686 S.E.2d at 185 (citing Gamble, 305 S.C. at 111–12, 406 S.E.2d at 354).

In this case, Tri-County submits that the case is not proper for punitive damages. Plaintiffs focused a significant portion of their case on the problems with the intersection of the posts, roofs, and balconies. Despite the Plaintiffs’ attempts to state otherwise, they acknowledged that the issue was merely repeated at the similar locations. Unfortunately, there are a lot of locations where the posts, roofs, and balconies intersect, but this is really one issue. The jury heard testimony that the problem with this intersection was due to the design of the architect and engineers and as supervised by CBC. The jury also heard testimony from the witnesses for the defendants that all of these intersections were included in the defense repair scope. There was no showing of any intentional conduct to try to harm the Plaintiffs. On the contrary, the testimony showed that the Defendants were trying to complete the work according to the design. This was a specialized

design for Palmetto Pointe—there is no evidence that this design was or will be used in the future. Tri-County respectfully submits that applying the Gore guidelines, as further supported by the Gamble factors, does not support a finding of punitive damages against Tri-County.

VI. SETOFF

With one important category exception, the Defendants in this action are entitled to a setoff of all settlement amounts previously tendered and/or agreed to between the Plaintiffs and the other, additional, and previously named Co-Defendants or any other parties that settled before or after trial that also worked at Palmetto Pointe. The parties at trial included CBC, the general contractor in charge of the entire project; Tri-County, who was described by Plaintiffs as the “Master Subcontractor” responsible for the siding, roofs, and waterproof decks; Vasquez, Tri-County’s roofing sub-subcontractor who was sued by Plaintiffs directly; Sales, Tri-County’s main siding sub-subcontractor who was sued by Plaintiffs directly; and WC Services, the fire sprinkler installer. One of Plaintiffs’ arguments in opening, during the trial, and in closing was that they needed a “complete repair” of the project. Plaintiffs also argued the distinction between what issues had been resolved completely and which issues were still included in the trial. Stated another way, Plaintiffs did not include in their trial certain categories of items that are considered “issue releases.” The issue releasees included claims for: the window product itself; HVAC; interior floors; and interior handrails. These issues releases were discussed in pre-trial motions and Plaintiffs’ acknowledged that they would not put any issue release items up during their case in chief. These issue releases are the only exceptions to the set off funds that should be applied to the jury verdict.

Plaintiffs claimed two types of related injuries: the cost to repair Palmetto Pointe and the lost use the Plaintiffs may experience during these repairs. These injuries are interrelated because

they both relate to the timing and duration of the contemplated repairs at Palmetto Pointe. Both of these injuries were tried before the jury. Indeed, over the objections from the defendants that the testimony was speculative, Dr. Love and Mrs. Fitch testified about their claimed lost use that they may incur during future repairs. Mr. Handegan, Plaintiffs' repair estimator, provided a general timeline for the duration of his contemplated repairs. Upon information and belief, both of these claimed injuries were contemplated with every settlement reached in this case.

Applying set off is mandatory. "[I]n the absence of bad faith, the function of the trial court is limited to applying the settlement credit pursuant to §15-38-50." Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App.1999). Therefore, "[w]hen a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: (1) it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor." S.C. Code Ann. §15-38-50.

In its initial discovery served on Plaintiffs, Tri-County requested copies of all settlement agreements reached by the Plaintiffs with any parties involved with Palmetto Pointe. Tri-County renewed this request after the jury rendered its verdict in this case. Tri-County renewed this request again via email a few days after the jury rendered its verdict. However, as of the writing of these post-trial motions, Tri-County has not received any settlement documents. Nonetheless, Tri-County is informed, upon information and belief, about a covenant entered into between Plaintiffs and the first insurance carrier for CBC as well as at least twenty-two (22) settlements

Plaintiffs reached with other parties.² Tri-County is informed that the total settlements reached by Plaintiffs prior to trial was four million five hundred twenty-two thousand five hundred and No/100s (\$4,522,500.00) dollars. Tri-County is informed that subsequent to the verdict, but before the post-trial motions were to be submitted, Defendants Sales and Vasquez both reached a settlement agreement with Plaintiffs for the amount of their respective five percent (5.00%) allocation by the jury of the actual damages verdict. Therefore, to date, upon information and belief Plaintiffs have received total settlements of at least five million one hundred seventy-two thousand five hundred and no/100s (\$5,172,500.00) dollars. Tri-County is aware that defendant Andersen Windows settled with Plaintiffs a few days before trial, but Tri-County does not know the amount or terms of this settlement. Although the Andersen Windows settlement is confidential, the settlement was an issue release, meaning none of the window product issues were presented at trial. Indeed, Plaintiffs' counsel clarified during trial that while the window product was not an issue in the case, the installation of the windows was part of the case. As noted in the introductory paragraph, the issue releases for the window product, HVAC, interior floors, and interior handrails were not presented to the jury. Since Tri-County is not aware of the amount of the Andersen Window settlement, that figure is not included in the settlement numbers above; however, Tri-County is informed that the total settlement amount of the HVAC, interior floors, and interior handrail issues was nine hundred thousand and no/100s (\$900,000.00) dollars. Tri-County acknowledges that the issue releases should not be included in the set off analysis. Therefore, the total amount of set off to be applied against the jury verdict in the present case for Plaintiffs' claimed damages for construction repairs and related lost use claimed to take place

² Tri-County will bring a table listing all of the settlements reached in this case to the hearing with Judge McCoy on these post-trial motions.

during the repairs is four million two hundred seventy-two thousand five hundred and no/100s (\$4,272,500.00) dollars.

“A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.” Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Hawkins v. Athology Associates of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, ___ (Ct. App. 1998). “The reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him.” Welch at 312, 536 S.E.2d at 425; Smalls v. South Carolina Dep’t of Educ., 339 S.C. 208, 219-220, 528 S.E.2d 682, 688 (Ct.App.2000) (Citing Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 406-407 (Ct.App.1998) for the reference that “[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid to him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong.”); Truesdale v. S.C. Hwy. Dep’t, 264 S.C. 221, 213 S.E.2d 740 (1975); Atlas Food Systems and Services, Inc. v. Crane Nat’l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) (“South Carolina’s setoff rule rests on the almost universally held principle that there can be only one satisfaction for an injury or wrong.” (citing Truesdale; internal quotations omitted)); See also Collins v. Bisson Moving and Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998) (Case distinguishing between a setoff and payments from a collateral source). Moreover, “[w]hen the settlement is for the same injury, the nonsettling defendant’s right to a setoff arises by operation of law.” Smith v. Widener, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App.2012).

The amount of the setoff is a determination for the Court and not the jury. (See Welch at 313, 536 S.E.2d at 425–426 (a setoff is equitable in nature); Hawkins at 113, 498 S.E.2d at ____ (“the jurisdiction of the court to setoff one judgment against another is equitable in its nature, and should be exercised so as to do justice between the parties”). The non-settling defendant is entitled to a dollar for dollar setoff of any monies paid by the settling defendants to the plaintiff. Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) (since “one tortfeasor is entitled to credit for the amount paid by another tortfeasor, the amount of setoff is the amount actually paid rather than the lifetime value of a structured settlement.”); Lloyd’s, Inc. v. Good, 306 S.C. 450, 412 S.E.2d 441 (Ct. App. 1991) (the amount of the damages recoverable against the non-settling tortfeasor is reduced by the total amount of consideration paid for a release of a joint tortfeasor); Smith, at 471, 724 S.E.2d at 190 (“There can be only one satisfaction for an injury or wrong.”); Atlas Food Systems and Services, Inc. v. Crane Nat’l Vendors, Inc., 99 F.3d 587, 596 (4th Cir. 1996) (“Under South Carolina law, a non-settling defendant is entitled to a *pro tanto* reduction of a judgment in a same cause of action.” (citing Powers and Ward)).

Moreover, the set off amount should apply to both the compensatory damages as well as the punitive damages award. See Smith v. Widener, 397 S.C. 468, 473, 724 S.E.2d 188, 191 (Ct.App.2012) (noting “a plaintiff’s claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15-38-50(1).”) As a general rule, “[a] nonsettling defendant is entitled to credit for the amount paid by another defendant who settles.” Smalls v. S.C. Dep’t of Educ., 339 S.C. 208, 219, 528 S.E.2d 682, 688 (Ct.App.2000). And although set off is mandated by statute, “[t]he trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.” Id. (citing Hawkins.) “A set-off is not necessarily founded upon any statute

or fixed rule of court, but grows out of the inherent equitable jurisdiction of the court; therefore, such motions are addressed to the sound discretion of the court—a discretion which should not be arbitrarily or capriciously exercised.” Id. (citing Rookard v. Atlanta & Charlotte Air Line Ry., 89 S.C. 371, 376, 71 S.E. 992, 995 (1911)). Therefore, South Carolina has over a century of precedence where the court exercised its inherent equitable powers to ensure that a Plaintiff does not receive multiple compensations for the same injury.

The Court of Appeals addressed equitable set off when evaluating a settlement allocated among multiple claims by the plaintiff and the settling defendants in Riley v. Ford Motor Co., 408 S.C. 1, 757 S.E.2d 422 (Ct.App.2014). In Riley, the settling parties allocated the majority of settlement funds to a survival action, which action the plaintiff withdrew prior to the jury’s verdict. In post-trial proceedings, the trial court did not grant any set off. The Court of Appeals reversed the trial court and remanded for a determination on the amount to be set off. Riley confirms the court’s inherent authority to prevent the Plaintiffs from trying to manipulate set off allocation through creative language included in settlement agreements. The set off is determined by Plaintiffs having received settlement funds for the same injury. In Palmetto Pointe, the injury Plaintiffs sought was for their repair costs and the related claim for lost use that would be incurred when the repairs are planned to take place. Except for the issue releases already discussed above, all of Plaintiffs’ claims at trial were seeking the same damages that Plaintiffs reached with the prior settling parties. Tri-County is entitled to the full amount of the set off described above. Tri-County should not be bound by any creative drafting in the settlement documents that attempt to allocate the settlements to other categories of damages. Tri-County was not a party to the prior settlement agreements and cannot be bound by those attempted allocations. See Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 426 (Ct.App.2000) (Noting that the appellant, Dr. Epstein, was

not a party to the settlement reached three days prior to trial between Plaintiff's personal representative and a co-defendant referred to as "Doe" and therefore Dr. Epstein is not bound by the settlement agreement's allocation of the majority of the settlement to the survival claim rather than the wrongful death claim.)

Tri-County expects that Plaintiffs will argue that the case of The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App.2017) either bars or drastically reduces the amount of set off applicable in the present case. Such an argument is incorrect. First, Tri-County points out that the law for set off discussed above is affirmed by The Oaks court. Next, it is clear from the facts in The Oaks that the defendants in that case were trying to get credit for prior settlements of issues that were never part of the trial. As discussed above, the issue releases were specifically not included in the Palmetto Pointe trial. For this reason, all of the issue released settlements are not included in the final set off number that should be applied in this case. Plaintiffs may argue that the Defendants have already received a reduction in the claims at trial because Plaintiffs' damages estimate was reduced. This argument fails as well since the only items that Plaintiffs removed from the damages estimate were the same items included in the issue releases as well as the repairs to the Club House that should not have been included in the estimate in the first place and which Plaintiffs put up no evidence that Tri-County even worked on the Club House. Finally, Plaintiffs may argue that Tri-County cannot take advantage of the set offs since it did not settle out of the case. This argument ignores the clearly stated precedence that "[t]here can be only one satisfaction for an injury or wrong." Smith, at 471, 724 S.E.2d at 190. This argument also ignores the fact that Tri-County was unable to settle its claims with Plaintiffs because of the cross-claim that was asserted by CBC against it. The Oaks case is distinguishable from the facts in Palmetto Pointe.

As an additional aside, Tri-County is informed, upon information and belief, that when CBC agreed to dismiss its cross-claims against the parties that settled out of this case before trial it negotiated a guaranteed set off amount that the Plaintiffs would honor. Except for the issue releases discussed above, the prior settlements were for issues that the Plaintiffs tried against CBC. As Plaintiffs argued, the damages they sought at trial were to fix the buildings at Palmetto Pointe and for the related lost use damages when these repairs would be performed. There were no separate product issues or other distinguishable issues at trial. If Plaintiffs entered into these guaranteed set off amounts, then Plaintiffs already recognize that set offs are required as a matter of law. It would be fundamentally unfair for Plaintiffs to guaranty set offs for the general contractor of Palmetto Pointe and then argue the opposite and deny the same set offs to Tri-County. This is especially true since, upon information and belief, CBC has no personal liability from this trial since Plaintiffs and CBC entered into a covenant not to execute after the first insurance carrier tendered its limits.

[T]he rule is almost universally followed that one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue. There is considerable conflict, however, as to the proper manner of allowing such credit, that is, whether the credit should be allowed by the jury in assessing the injured party's damages, or by the court. We are convinced from a study of these authorities that the sounder and preferable method... is for evidence thereabout to be excluded from the consideration of the jury, and for credit to be given by the court.

Smalls, at 220, 528 S.E.2d at 688 (quoting Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759, 761 (1967)).

Therefore, in order to prevent Plaintiffs from getting multiple recoveries for its claimed damages to make repairs to the Palmetto Pointe project and to reimburse the Plaintiffs for the related claim of lost use that may occur during the repairs, the actual damages verdict awarded by

the jury should be reduced by the full amount of the settlements discussed above.³ Again, the set-off figure discussed here expressly does not include the amount of the settlements that were part of issue releases for issues that were not tried before the jury. Tri-County respectfully submits that the jury verdict should be *reduced to* the amount of two million two hundred twenty-seven thousand five hundred and no/100s (\$2,227,500.00) dollars. This revised verdict amount is based on the prior settlements plus the post-trial settlements by Vasquez and Sales in amounts that are known, upon information and belief, by Tri-County. Tri-County reserves the right to revise this figure if and when the actual settlement agreements are disclosed by Plaintiffs.

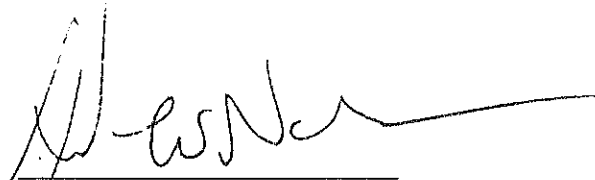
CONCLUSION

Tri-County respectfully requests the relief regarding new trial and reduction of the original jury verdict as discussed above. Additionally, Tri-County respectfully requests a remittitur of the jury verdict amount by applying the total set off amount discussed above, which would reduce the verdict amount to two million two hundred twenty-seven thousand five hundred and no/100s (\$2,227,500.00) dollars. The set off reduction will ensure that the Plaintiffs do not receive multiple recoveries for their claimed damages to make repairs to their property. Lastly, Tri-County respectfully requests that the cross-claim by CBC should be reduced to zero and that CBC's claim for fees and costs should be dismissed, but the reasonable attorney's fees should be determined to be no more than the sum of sixty-nine and 21/100s (\$69.21) dollars since this is a reflection of the jury's award of 0.01538% of the total actual damages claim compared to the jury's award on CBC's indemnity claim against Tri-County.

Respectfully submitted,
COLLINS & LACY, P.C.

³ As referenced above, Tri-County will bring a chart of the known and understood settlement figures to the hearing arguing these post-trial motions before Judge McCoy.

By:



Andrew N. Cole, Esquire
acole@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)
ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

May 28, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

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Stephanie Drawdy, Esquire
Joshua F. Evans, Esquire
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Counsel for Plaintiffs

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Counsel for Plaintiffs

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Bonum Wilson, Esquire
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*Counsel for Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC*

Everett A. Kendall, II, Esquire
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rkendall@murphygrantland.com
Counsel for Complete Building Corporation

FILED
2019 MAY 28 PM 2:34
JULIE J. ARMSTRONG
CLERK OF COURT
BY

PLEADING: TRI-COUNTY ROOFING, INC.'S POST TRIAL MOTIONS

Richelle Campbell
Richelle Campbell
Columbia, South Carolina
May 28, 2019

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

☐ Plaintiff,

vs.

Island Pointe, LLC, Complete Building Corporation, Tri-
County Roofing, Inc., et al.

☒ Defendants.

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Name, S.C. Bar No., and address of plaintiff's attorney:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Lucey Law Firm
415 Mill Street
Mt. Pleasant, SC 29464
telephone: (843) 849-8400 fax:
e-mail: jlucey@lucey-law.com other:

Name, S.C. Bar No., and address of defendant's attorney:

Andrew N. Cole, Esquire (SC Bar No. 68384)
Post Office Box 12487
Columbia, SC 29211
telephone: 803.256.2660 fax: 803.771.4484
e-mail: acole@collinsandlacy.com other:

- ☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Post Trial Motions

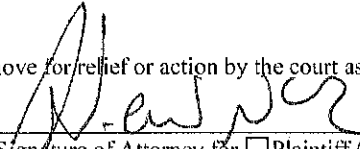
Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

- ☒ Written motion attached
☐ Form Motion -

I hereby move for relief or action by the court as set forth in the attached proposed motion.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 28, 2019

Date submitted

SECTION III: Motion Fee

- ☒ **PAID - AMOUNT: \$25.00**
☐ **EXEMPT:** (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status
☐ Sexually Violent Predator Act
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:
- ☐ State Agency v. Indigent Party
☐ Post-Conviction Relief
☐ Motion for Execution (Rule 69, SCRPC)

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

- ☐ MOTION FEE COLLECTED: \$
☐ CONTESTED - AMOUNT DUE: \$

SCCA 233 (11-03)

R-0545

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS.

COMPLETE BUILDING CORPORATION;
ET AL.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-10-00958

**TRI-COUNTY ROOFING, INC.'S
NOTICE OF MOTION AND MOTION
TO COMPEL SUPPLEMENTAL
DISCOVERY RESPONSES
FROM PLAINTIFFS'**

FILED
2019 MAY 28 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

TO: JUSTIN O. LUCEY, ESQUIRE, STEPHNIE DRAWDY, ESQUIRE, JOSHUA F. EVANS, ESQUIRE, AND EDWARD D. BUCKLEY, JR., ESQUIRE, ATTORNEYS FOR PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE THAT Defendant Tri-County Roofing, Inc. ("Tri-County"), by and through its undersigned counsel, hereby moves pursuant to Rule 37, SCRCP for an order compelling Plaintiffs to further respond to Tri-County's First Set of Interrogatories and Requests for Production of Documents to Plaintiff. This motion is based on the South Carolina Rules of Civil Procedure, a memorandum which may be presented to the Court prior to the hearing on this matter, the arguments of counsel, and the following:

1. On April 23, 2015, Tri-County served its First Set of Interrogatories and Requests for Production upon Plaintiff requesting, *inter alia*, at interrogatory number 16 that Plaintiffs "[i]dentify the terms of any settlement agreements that have been reached with any parties to the litigation" and at request for production number 12 for "[c]opies of any settlement agreements reached with any parties involved in the construction or repairs of the Palmetto Pointe at Peas Island project." (See Exhibit "A")

2. On or around December 3, 2015, Plaintiffs answered Tri-County's initial interrogatory number 16 and requests for production number 12 with the response: "None at this time."

3. To date, Plaintiffs have provided fifty-nine supplemental discovery responses generally in response to various parties' interrogatories and requests for production directed to the Plaintiffs; however, in none of these supplemental discovery responses has any of the requested information been produced.

4. This case was tried from Monday, May 6 through Thursday, May 16, 2019. After the jury rendered its verdict Judge McCoy discussed the ten-day deadline for the parties to submit their post-trial motions. At that time, counsel for Tri-County again requested copies of any settlement agreements that Plaintiffs have entered in this case. Plaintiffs' counsel informed the Court that they would provide copies of the settlement documents.

5. On May 21, 2019, counsel for Tri-County once again requested via email that Plaintiffs provide copies of any and all settlement agreements reached in this litigation. Plaintiffs' counsel responded that they would compile the requested settlement agreements and provide them. (See Exhibit "B").

6. As of the date of filing this Motion, the undersigned counsel has not received the requested settlement documents. As referenced in the introductory paragraphs included with the initial interrogatories and requests for production served on Plaintiffs more than four years before this case was tried, and as specifically stated in Rule 26(e) of the South Carolina Rules of Civil Procedure, the initial discovery requests are deemed to be continuing and Plaintiffs were obligated to timely respond to the discovery requests.

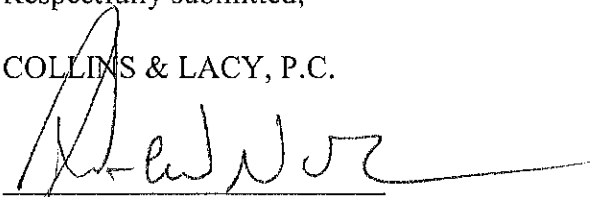
WHEREFORE, Tri-County Roofing, Inc. respectfully prays that the Court:

- a. Enter an Order Compelling Plaintiff to further respond to Tri-County Roofing, Inc.'s Discovery Requests;
- b. Award Tri-County Roofing, Inc. reasonable expenses and attorneys' fees incurred in connection with this Motion pursuant to Rule 37 of the South Carolina Rules of Civil Procedure; and
- c. Provide such other and further relief as the Court deems just and proper.

Respectfully submitted,

COLLINS & LACY, P.C.

By:



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803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

May 25, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Joshua F. Evans, Esquire
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Counsel for Plaintiffs

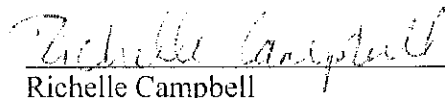
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Counsel for Plaintiffs

FILED
2019 MAY 28 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

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Counsel for Complete Building Corporation

**PLEADING: TRI-COUNTY ROOFING, INC.'S NOTICE OF MOTION AND MOTION TO
COMPEL SUPPLEMENTAL DISCOVERY FROM PLAINTIFFS**


Richelle Campbell
Columbia, South Carolina
May 28, 2019



Andrew N. Cole | D: 803.255.0433 | E: acole@collinsandlacy.com

April 23, 2015

Edward D. Buckley, Jr., Esquire
Joshua Cantwell, Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, SC 29402

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.,
and Kathy Milner, individually, and one behalf of all others similarly situated v.
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
Civil Action No. 2015-CP-10-955
Claim No. THA10396
C&L File No. 001083-00167

Dear Ed and Josh:

Enclosed and by service upon you please find Tri-County Roofing, Inc.'s First Set of Interrogatories and Requests to Produce to Palmetto Pointe at Peas Island Condominium Property Owners Association, and Tri-County Roofing, Inc.'s First Set of Interrogatories and Requests to Produce to Kathy Milner, Individually and on behalf of all others similarly situated, in the above-referenced matter. Please do not hesitate to contact me if you have any questions.

With warmest regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew N. Cole", written over a horizontal line.

Andrew N. Cole

Enclosures
cc/enc: S. Markey Stubbs, Esquire



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.

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

vs.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction; Gutter
Works, Inc. and Michael L. Segars d/b/a
Gutter Works; Mr. Gutter; Litchfield
Seamless Gutters & Windows, LLC and
Thomas Litchfield d/b/a Litchfield Seamless
Gutters; Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC;
Mark Palpoint a/k/a Micah Palpoint; Eloy
Alonzo Vasquez; and Chris a/k/a John Doe
61,

Third-Party Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) Civil Action No.: 2015-CP-10-955

) **DEFENDANT AND THIRD-PARTY**
) **PLAINTIFF TRI-COUNTY ROOFING,**
) **INC.'S FIRST INTERROGATORIES TO**
) **PLAINTIFF KATHY MILNER,**
) **INDIVIDUALLY, AND ON BEHALF OF**
) **THOSE SIMILARLY SITUATED**

TO: EDWARD D. BUCKLEY, JR., ESQUIRE AND JOSHUA P. CANTWELL,
ESQUIRE, ATTORNEY FOR PLAINTIFFS:

YOU ARE HEREBY served the following Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.'s ("TriCounty") First Set of Interrogatories to be answered by Plaintiff Kathy Milner, individually, and on behalf of all others similarly situated (hereinafter "Milner") separately and in writing within thirty (30) days from the date of service hereof, pursuant to and in accordance with the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

I. DEFINITIONS

Unless the context indicates otherwise, the following words and phrases are defined and used herein as follows:

A. "Plaintiff", "you" and "your", or "Milner" means Kathy Milner, individually, and on behalf of all others similarly situated, Edward D. Buckley, Jr., Esquire and Joshua P. Cantwell, Esquire, and all attorneys or other persons acting, or purporting to act on behalf of Palmetto Pointe.

B. "Defendant and Third-Party Plaintiff," or "Tri-County" means Defendant and Third-Party Plaintiff Tri-County Roofing, Inc., and any present or former employees, agents, or other persons or entities acting, or purporting to act on behalf of Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.

C. The term "document" is used in its broadest sense, and shall include any written, printed, typed, recorded, electronic, digital, computer data or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, in any form, including, but not limited to, letters, correspondence, e-mail, telegrams, memoranda, records, minutes, contracts, agreements, leases, communications, microfilm, bulletins, circulars, pamphlets, tests, studies, reports, notices, diaries, summaries, books, messages, instructions, work assignments, notes, notebooks, drafts, data sheets, data compilations, computer records (including printouts, disks or magnetic storage media) worksheets, statistics, speeches, tapes, tape recordings, and other writings, magnetic, photographic, electronic, and sound recordings. The term "document" includes each copy or reproduction which is not identical to the original or any other produced copy.

II. INSTRUCTIONS

A. These Interrogatories shall be deemed continuing, and you shall promptly provide supplementary answers for any information unavailable to you at the time you submit your responses hereto, but which subsequently becomes available to you or to any of your attorneys, agents, or representatives. Furthermore, you shall promptly supplement your answers to these Interrogatories if your answers are in any way inconsistent with the initial answer.

B. If you object to, or otherwise decline to answer any portion of any Interrogatory, specifically set forth each and every reason for such objection. Furthermore, you should provide a response to that portion of the Interrogatory to which you do not object, or to which you do not decline to provide a response. If you object to an Interrogatory on the grounds that it is too broad, provide a response to that portion which is concededly relevant.

C. If in responding to any of these Interrogatories, you reasonably encounter any ambiguity in construing the Interrogatory or a definition or instruction relevant to it, set forth the matter deemed ambiguous and the construction selected or used in answering the Interrogatory.

D. If in response to an Interrogatory you do not know all facts necessary to provide a complete and specific answer, you should provide an answer to such portion of the Interrogatory as you can, and provide such facts as are known to you and any estimates, approximations or beliefs should be clearly denoted as such, and the basis for your belief in their reliability should be explained.

E. The terms "and," and "or," shall be interpreted conjunctively and shall not be interpreted to exclude information otherwise within the scope of the Interrogatory.

F. References to the singular shall include the plural, and references to the plural shall include the singular. Also, the past verb tense shall include the present, and the present verb shall include the past.

III. PRIVILEGE

Whenever an Interrogatory calls for information pertaining to a communication claimed by you to be privileged, supply a privilege log of sufficient factual detail to enable the Court to determine whether or not such communication is entitled to a claim of privilege, including (1) the date or dates of the communication; (2) the name and position of each person who participated in the communication, and such persons' respective roles; (3) the general subject matter of the communication; and (4) the basis for the claim of privilege.

INTERROGATORIES

1. Give the names and addresses of persons known to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of Plaintiff that relates to Plaintiff's claims set forth in the Complaint.

3. For each person known to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

4 List the names and addresses of any expert witness(es) whom Plaintiff proposes to use at the trial of this case and a complete summary of the testimony expected from the expert including:

- (a) the field in which Plaintiff intends to qualify the expert;
- (b) the subject matter to which the expert is expected to testify;
- (c) the substance of the opinions to which the expert is expected to testify
- (d) a summary of the underlying facts upon which the expert grounds his or her opinions;
- (e) state whether the expert has issued a written report.

5. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Plaintiff. Also provide a detailed description of the manner by which you calculated or arrived at your damages figure.

6. Identify all person(s) and/or entity(ies) contracted by you or your representatives to perform any construction, repairs, maintenance to any individual units and limited common areas, and set forth the nature, scope and location of the work performed by such individual or entity on the subject property.

7. Identify any individual or entity who has performed repairs or maintenance on the property including all repairs and maintenance to individual units and limited common areas and set forth the nature and location of the work performed by such individual or entity.

8. Describe in detail all laws and acts having the force and effect of law, codes, regulations, and legal principals, standards, customs, or usage, including building codes and/or other codes, which you contend are applicable to the issues involved in this action.

9. Set forth with specificity any errors and/or omissions which the party alleges occurred in Tri-County's work on the subject property and the basis of such allegations.

10. Provide a detailed description, per your knowledge and understanding, of Tri-County's scope of work at the subject property and the origin of that understanding. Include in your answer the specific building number and unit number(s) you allege Tri-County performed work on during construction.

11. Identify and provide a listing of all individual unit owners and co-owners/spouses at the property and set forth for each when they purchased the unit and from whom.

12. Identify the property manager(s) (past and present) who oversaw the subject property and set forth the names of all individuals and employees who have knowledge of the maintenance or other work at the subject property during their employment.

13. Identify all units which are used as rental property or otherwise leased to non-owners.

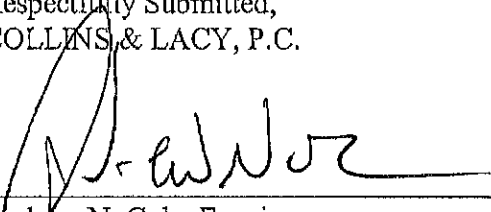
14. Identify any assessments or special assessments levied on unit owners and indicate the purpose for the assessment, the amount of assessment, date of the assessment, and any unit owner who failed or refused to pay the assessment.

15. Identify all persons who assisted in any way with the preparation of the answers to the within Interrogatories.

16. Identify the terms of any settlement agreements that have been reached with any parties to the litigation.

These Interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorney obtain further information between the time the answers are served and the time of trial.

Respectfully Submitted,
COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire
Christopher M. Adams, Esquire
Post Office Box 12487
Columbia, SC 29211
803.256.2660

ATTORNEYS FOR TRI-COUNTY ROOFING

Columbia, South Carolina
April 23, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc., and Kathy Milner,
individually, and one 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.

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

vs.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction; Gutter
Works, Inc. and Michael L. Segars d/b/a
Gutter Works; Mr. Gutter; Litchfield
Seamless Gutters & Windows, LLC and
Thomas Litchfield d/b/a Litchfield Seamless
Gutters; Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC;
Mark Palpoint a/k/a Micah Palpoint; Eloy
Alonzo Vasquez; and Chris a/k/a John Doe
61,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-955

**DEFENDANT AND THIRD-PARTY
PLAINTIFF TRI-COUNTY ROOFING,
INC.'S FIRST REQUESTS FOR
PRODUCTION TO PLAINTIFF KATHY
MILNER, INDIVIDUALLY, AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED**

**TO: EDWARD D. BUCKLEY, JR., ESQUIRE AND JOSHUA P. CANTWELL,
ESQUIRE, ATTORNEY FOR PLAINTIFFS:**

Unless the context indicates otherwise, the following words and phrases are defined and used herein as follows:

A. "Plaintiff," "you," and "your" or "Milner" means Kathy Milner, individually, and on behalf of all others similarly situated, and all attorneys or other persons acting, or purporting to act on behalf of Plaintiff Kathy Milner, individually, and on behalf of all others similarly situated.

B. "Defendant and Third-Party Plaintiff," or "Tri-County" means Defendant and Third-Party Plaintiff Tri-County Roofing, Inc., and any present or former employees, agents, or other persons or entities acting, or purporting to act on behalf of Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.

C. The term "person" means a natural person, a group of natural persons acting as individuals, a group of natural persons acting in a collegial capacity (e.g., as a committee, board of directors, etc.), a corporation, a partnership, a joint venture, a government or governmental agency, and/or any other incorporated or unincorporated business, government, or social entity.

D. The term "document" is used in its broadest sense, and shall include any written, printed, typed, recorded, electronic, digital, computer data or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, in any form, including, but not limited to, letters, correspondence, e-mail, telegrams, memoranda, records, minutes, contracts, agreements, leases, communications, microfilm, bulletins, circulars, pamphlets, tests, studies, reports, notices, diaries, summaries, books, messages, instructions, work assignments, note, notebooks, drafts, data sheets, data compilations, computer records (including printouts, disks or magnetic storage media) worksheets, statistics, speeches, tapes, tape recordings, and other writings, tapes, magnetic, photographic, electronic, and sound recordings. The term "document" includes each copy or reproduction which is not identical to the original or any other produced copy.

E. The phrase "possession, custody, or control", means a documents in your physical custody; or, that you own in whole or in part; or, have a right by contract, statute, or otherwise to use, inspect, examine, or copy such document on any terms; or have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or you have, as a practical matter, the ability to use, inspect, examine, or copy such document.

F. The terms "and" and "or" shall be interpreted conjunctively and shall not be interpreted to exclude information otherwise within the scope of the production request.

G. A document that "relates to" any given subject means any document that in whole or in part constitutes, contains, embodies, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including without limitation, documents concerning the preparation of other documents.

H. To "produce" means to permit the inspection of originals, and to supply complete copies or to permit copying at a convenient facility.

II. PRIVILEGE

Whenever a Request calls for information pertaining to a communication claimed by you to be privileged, supply a privilege log of sufficient factual detail to enable the Court to determine whether or not such communication is entitled to a claim of privilege, including (1) the date or dates of the communication; (2) the name and position of each person who participated in the communication, and such persons' respective roles; (3) the general subject matter of the communication; and (4) the basis for the claim of privilege.

III. REQUESTS

1. Any and all documents related to the allegations, claims, and defenses set forth in Plaintiffs' Complaint.

2. All photographs, diagrams, drawings, contracts, correspondence, agreements, inspections, reports, notes, memoranda, video imagery (whether analog, videotape, digital, photographic, or otherwise) or other similar material, and/or tangible things relating to the allegations, claims, and defenses set forth in the Complaint.

3. All statements of possible witnesses, whether written, or oral, summarized or otherwise produced in any manner relating to the allegations, claims, and defenses set forth in the Complaint.

4. Any and all documents provided to, or received from, any expert witness, including each and every report, opinion or finding of any expert in this case.

5. Any and all documents identified in, or referred to in answering, your responses to Tri-County's First Interrogatories to Plaintiff.

6. All documents received as a result of any subpoena issued in this case.

7. Any other documents or materials which you intend to introduce at the trial of this case.

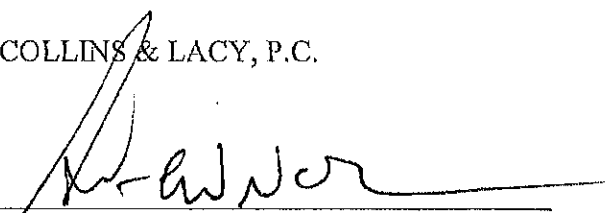
8. A copy of the entire maintenance or repair files maintained by the association and individual unit owners.

9. A copy of all express warranties you allege were given for the property.
10. A copy of all association minutes (i.e., Board of Directors notes, annual meeting minutes, and/or subcommittee minutes).
11. A copy of all work orders, invoices or repair requests relating to the subject property.
12. Copies of any settlement agreements reached with any parties involved in the construction or repairs of the Palmetto Pointe at Peas Island project.

These Requests shall be deemed continuing so as to require supplemental responses if you or your attorney obtain further information between the time the responses are served and the time of trial

Respectfully Submitted,

COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire
Christopher M. Adams, Esquire
Post Office Box 12487
Columbia, SC 29211
803.256.2660

ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

Columbia, South Carolina
April 23, 2015

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Edward D. Buckley, Jr., Esquire
Joshua P. Cantwell, Esquire
PO Box 993
Charleston, SC 29402
Counsel for Plaintiffs

S. Markey Stubbs, Esquire
Baker Ravenel Bender
PO Box 8057
Columbia, SC 29202
Counsel for Creekside, Inc.

PLEADING:

**TRI-COUNTY ROOFING, INC.'S FIRST SET OF INTERROGATORIES AND
REQUESTS TO PRODUCE TO KATHY MILNER, INDIVIDUALLY AND ON
BEHALF OF THOSE SIMILARLY SITUATED**

Richelle Campbell

Columbia, South Carolina
_____, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island
Condominium Property Owners
Association, Inc., and Kathy Milner,
individually, and one 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.

Tri-County Roofing, Inc.,

Third-Party Plaintiff,

vs.

Cornerstone Construction and Mark Malloy
d/b/a Cornerstone Construction; Gutter
Works, Inc. and Michael L. Segars d/b/a
Gutter Works; Mr. Gutter; Litchfield
Seamless Gutters & Windows, LLC and
Thomas Litchfield d/b/a Litchfield Seamless
Gutters; Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC;
Mark Palpoint a/k/a Micah Palpoint; Eloy
Alonzo Vasquez; and Chris a/k/a John Doe
61,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-955

**DEFENDANT AND THIRD-PARTY
PLAINTIFF TRI-COUNTY ROOFING,
INC.'S FIRST INTERROGATORIES TO
PLAINTIFF PALMETTO POINTE AT
PEAS ISLAND CONDOMINIUM
PROPERTY OWNERS ASSOCIATION,
INC.**

**TO: EDWARD D. BUCKLEY, JR., ESQUIRE AND JOSHUA P. CANTWELL,
ESQUIRE, ATTORNEY FOR PLAINTIFFS:**

YOU ARE HEREBY served the following Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.'s ("TriCounty") First Set of Interrogatories to be answered by Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. (hereinafter "Palmetto Pointe") separately and in writing within thirty (30) days from the date of service hereof, pursuant to and in accordance with the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

I. DEFINITIONS

Unless the context indicates otherwise, the following words and phrases are defined and used herein as follows:

A. "Plaintiff", "you" and "your", or "Palmetto Pointe" means Plaintiff Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc., Edward D. Buckley, Jr., Esquire and Joshua P. Cantwell, Esquire, and all attorneys or other persons acting, or purporting to act on behalf of Palmetto Pointe.

B. "Defendant and Third-Party Plaintiff," or "Tri-County" means Defendant and Third-Party Plaintiff Tri-County Roofing, Inc., and any present or former employees, agents, or other persons or entities acting, or purporting to act on behalf of Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.

C. The term "document" is used in its broadest sense, and shall include any written, printed, typed, recorded, electronic, digital, computer data or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, in any form, including, but not limited to, letters, correspondence, e-mail, telegrams, memoranda, records, minutes, contracts, agreements, leases, communications, microfilm, bulletins, circulars, pamphlets, tests, studies, reports, notices, diaries, summaries, books, messages, instructions, work assignments, notes, notebooks, drafts, data sheets, data compilations, computer records (including printouts, disks or magnetic storage media) worksheets, statistics, speeches, tapes, tape recordings, and other writings, magnetic, photographic, electronic, and sound recordings. The term "document" includes each copy or reproduction which is not identical to the original or any other produced copy.

II. INSTRUCTIONS

A. These Interrogatories shall be deemed continuing, and you shall promptly provide supplementary answers for any information unavailable to you at the time you submit your responses hereto, but which subsequently becomes available to you or to any of your attorneys, agents, or representatives. Furthermore, you shall promptly supplement your answers to these Interrogatories if your answers are in any way inconsistent with the initial answer.

B. If you object to, or otherwise decline to answer any portion of any Interrogatory, specifically set forth each and every reason for such objection. Furthermore, you should provide a response to that portion of the Interrogatory to which you do not object, or to which you do not decline to provide a response. If you object to an Interrogatory on the grounds that it is too broad, provide a response to that portion which is concededly relevant.

C. If in responding to any of these Interrogatories, you reasonably encounter any ambiguity in construing the Interrogatory or a definition or instruction relevant to it, set forth the matter deemed ambiguous and the construction selected or used in answering the Interrogatory.

D. If in response to an Interrogatory you do not know all facts necessary to provide a complete and specific answer, you should provide an answer to such portion of the Interrogatory as you can, and provide such facts as are known to you and any estimates, approximations or beliefs should be clearly denoted as such, and the basis for your belief in their reliability should be explained.

E. The terms "and," and "or," shall be interpreted conjunctively and shall not be interpreted to exclude information otherwise within the scope of the Interrogatory.

F. References to the singular shall include the plural, and references to the plural shall include the singular. Also, the past verb tense shall include the present, and the present verb shall include the past.

III. PRIVILEGE

Whenever an Interrogatory calls for information pertaining to a communication claimed by you to be privileged, supply a privilege log of sufficient factual detail to enable the Court to determine whether or not such communication is entitled to a claim of privilege, including (1) the date or dates of the communication; (2) the name and position of each person who participated in the communication, and such persons' respective roles; (3) the general subject matter of the communication; and (4) the basis for the claim of privilege.

INTERROGATORIES

1. Give the names and addresses of persons known to be witnesses concerning the facts of this case and indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of Plaintiff that relates to Plaintiff's claims set forth in the Complaint.

3. For each person known to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

4 List the names and addresses of any expert witness(es) whom Plaintiff proposes to use at the trial of this case and a complete summary of the testimony expected from the expert including:

- (a) the field in which Plaintiff intends to qualify the expert;
- (b) the subject matter to which the expert is expected to testify;
- (c) the substance of the opinions to which the expert is expected to testify
- (d) a summary of the underlying facts upon which the expert grounds his or her opinions;
- (e) state whether the expert has issued a written report.

5. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by Plaintiff. Also provide a detailed description of the manner by which you calculated or arrived at your damages figure.

6. Identify all person(s) and/or entity(ies) contracted by you or your representatives to perform any construction, repairs, maintenance to any individual units and limited common areas, and set forth the nature, scope and location of the work performed by such individual or entity on the subject property.

7. Identify any individual or entity who has performed repairs or maintenance on the property including all repairs and maintenance to individual units and limited common areas and set forth the nature and location of the work performed by such individual or entity.

8. Describe in detail all laws and acts having the force and effect of law, codes, regulations, and legal principals, standards, customs, or usage, including building codes and/or other codes, which you contend are applicable to the issues involved in this action.

9. Set forth with specificity any errors and/or omissions which the party alleges occurred in Tri-County's work on the subject property and the basis of such allegations.

10. Provide a detailed description, per your knowledge and understanding, of Tri-County's scope of work at the subject property and the origin of that understanding. Include in your answer the specific building number and unit number(s) you allege Tri-County performed work on during construction.

11. Identify and provide a listing of all individual unit owners and co-owners/spouses at the property and set forth for each when they purchased the unit and from whom.

12. Identify the property manager(s) (past and present) who oversaw the subject property and set forth the names of all individuals and employees who have knowledge of the maintenance or other work at the subject property during their employment.

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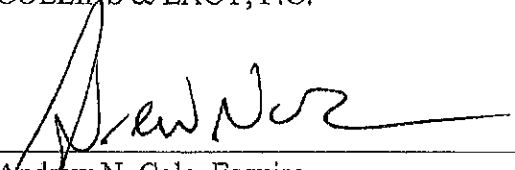
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15. Identify all persons who assisted in any way with the preparation of the answers to the within Interrogatories.

16. Identify the terms of any settlement agreements that have been reached with any parties to the litigation.

These Interrogatories shall be deemed continuing so as to require supplemental answers if you or your attorney obtain further information between the time the answers are served and the time of trial.

Respectfully Submitted,
COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire
Christopher M. Adams, Esquire
Post Office Box 12487
Columbia, SC 29211
803.256.2660

ATTORNEYS FOR TRI-COUNTY ROOFING

Columbia, South Carolina
April 23, 2015

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Palmetto Pointe at Peas Island
Condominium Property Owners
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individually, and one behalf of all others
similarly situated,

Plaintiffs,

vs.

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ARS/Rescue Rooter Charleston; and John
Doe 1-60,

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Tri-County Roofing, Inc.,

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d/b/a Cornerstone Construction; Gutter
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Seamless Gutters & Windows, LLC and
Thomas Litchfield d/b/a Litchfield Seamless
Gutters; Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC;
Mark Palpoint a/k/a Micah Palpoint; Eloy
Alonzo Vasquez; and Chris a/k/a John Doe
61,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-10-955

**DEFENDANT AND THIRD-PARTY
PLAINTIFF TRI-COUNTY ROOFING,
INC.'S FIRST REQUESTS FOR
PRODUCTION TO PLAINTIFF
PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC.**

**TO: EDWARD D. BUCKLEY, JR., ESQUIRE AND JOSHUA P. CANTWELL,
ESQUIRE, ATTORNEY FOR PLAINTIFFS:**

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B. "Defendant and Third-Party Plaintiff," or "Tri-County" means Defendant and Third-Party Plaintiff Tri-County Roofing, Inc., and any present or former employees, agents, or other persons or entities acting, or purporting to act on behalf of Defendant and Third-Party Plaintiff Tri-County Roofing, Inc.

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E. The phrase "possession, custody, or control", means a documents in your physical custody; or, that you own in whole or in part; or, have a right by contract, statute, or otherwise to use, inspect, examine, or copy such document on any terms; or have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or you have, as a practical matter, the ability to use, inspect, examine, or copy such document.

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3. All statements of possible witnesses, whether written, or oral, summarized or otherwise produced in any manner relating to the allegations, claims, and defenses set forth in the Complaint.

4. Any and all documents provided to, or received from, any expert witness, including each and every report, opinion or finding of any expert in this case.

5. Any and all documents identified in, or referred to in answering, your responses to Tri-County's First Interrogatories to Plaintiff.

6. All documents received as a result of any subpoena issued in this case.

7. Any other documents or materials which you intend to introduce at the trial of this case.

8. A copy of the entire maintenance or repair files maintained by the association and individual unit owners.

9. A copy of all express warranties you allege were given for the property.

10. A copy of all association minutes (i.e., Board of Directors notes, annual meeting minutes, and/or subcommittee minutes).

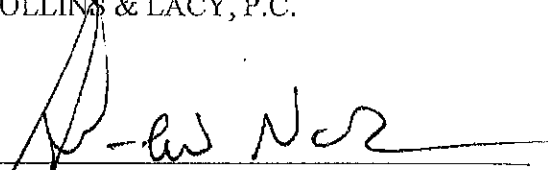
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These Requests shall be deemed continuing so as to require supplemental responses if you or your attorney obtain further information between the time the responses are served and the time of trial

Respectfully Submitted,

COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire

Christopher M. Adams, Esquire

Post Office Box 12487

Columbia, SC 29211

803.256.2660

ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

Columbia, South Carolina
April 23, 2015

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

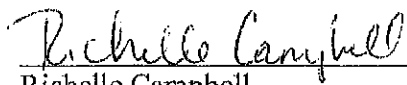
COUNSEL SERVED:

Edward D. Buckley, Jr., Esquire
Joshua P. Cantwell, Esquire
PO Box 993
Charleston, SC 29402
Counsel for Plaintiffs

S. Markey Stubbs, Esquire
Baker Ravenel Bender
PO Box 8057
Columbia, SC 29202
Counsel for Creekside, Inc.

PLEADING:

**TRI-COUNTY ROOFING, INC.'S FIRST SET OF INTERROGATORIES AND
REQUESTS TO PRODUCE TO PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS ASSOCIATION, INC.**



Richelle Campbell

Columbia, South Carolina
April 23, 2015

Andrew Cole

From: Justin Lucey <jlucey@lucey-law.com>
Sent: Wednesday, May 22, 2019 11:10 AM
To: Andrew Cole
Cc: laura knight
Subject: Re: Palmetto Pointe at Peas Island

andy I will get with Laura and get these together. Justin

On Tue, May 21, 2019 at 5:38 PM Andrew Cole <acole@collinsandlacy.com> wrote:

Justin and Ed:

As was discussed before Judge McCoy last Thursday, Please forward copies of the settlement agreements that Plaintiffs reached with all of the parties in this case. This should include the covenant settlement that Plaintiffs' reached with Completes' first insurance carrier.

Thank you.

- Andrew

Andrew Cole

Cell: 803-255-0480
Voice: 803-255-0887
Fax: 803-771-4424
Email: [download vcard](mailto:download_vcard)
Web: www.collinsandlacy.com



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

☐ Plaintiff,

vs.

Island Pointe, LLC, Complete Building Corporation, Tri-
County Roofing, Inc., et al.

☒ Defendants.

check box above indicating submitting party

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Name, S.C. Bar No. and address of plaintiff's attorney:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Lucey Law Firm
415 Mill Street
Mt. Pleasant, SC 29464
telephone: (843) 849-8400 fax:
e-mail: jlucey@lucey-law.com other:

Name, S.C. Bar No. and address of defendant's attorney:

Andrew N. Cole, Esquire (SC Bar No. 68384)
Post Office Box 12487
Columbia, SC 29211
telephone: 803.256.2660 fax: 803.771.4484
e-mail: acole@collinsandlacy.com other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Compel

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 28, 2019

Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

(print name)

☐ MOTION FEE COLLECTED: \$

☐ CONTESTED – AMOUNT DUE: \$

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC. AND JACK LOVE,
INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS,

VS.

COMPLETE BUILDING CORPORATION;
ET AL.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2015-CP-00055

**TRI-COUNTY ROOFING, INC.'S
NOTICE OF MOTION AND MOTION
COMPELLING PLAINTIFFS TO
ELECT REMEDIES BETWEEN ITS
WARANTY AND NEGLIGENCE
CLAIMS**

Comes now Defendant Tri-County Roofing, Inc. ("Tri-County"), by and through its undersigned counsel, and hereby moves for an Order compelling Plaintiffs to elect remedies between its warranty and negligence claims that were both submitted to the jury. "Election of remedies involves a choice between two or more different and coexisting modes of procedure or forms of relief awarded by law for the same injury." Harper v. Ethridge, 290 S.C. 112, 120, 348 S.E.2d 374, 379 (Ct.App.1986) (citation omitted). "Stated another way, election of remedies is the act of choosing between different remedies allowed by law *on the same state of facts*." Id. (citation and quotations omitted, italicized emphasis in original.) Here, Plaintiffs must elect whether they seek recovery under their claim sounding in contract or tort.¹ "Since the basic purpose of election of remedies is to prevent double recovery for a single wrong, application of

¹ Although both the doctrines applying election of remedies and set off are designed to prevent the Plaintiffs from recovering multiple times for the same injury, the doctrines are separate and each must be separately evaluated. Tri-County discusses the set offs applicable in this case under its post-trial motions. While the election of remedies discusses the application of differently stated causes of action seeking the same damages, the doctrine of set off prevents the Plaintiff from in fact receiving multiple and duplicate compensation for the same injury that the Plaintiffs may have sought under the alternative causes of action.

the doctrine should normally be confined to cases where double compensation of the plaintiff is threatened.” Harper at 121, 348 S.E.2d at 379 (citation omitted). “In many instances, this means the case can go to the jury on all causes of action supported by the evidence at trial, with election required after verdict but before judgment is entered.” Id. (citation omitted).

Background and Summary

This is a construction defect case that was tried before a jury from Monday, May 6 through Thursday, May 16, 2019. Based on the settlement of one party during the case, various directed verdict motions argued before the Court, the dismissal of one party at the close of Plaintiffs’ case, as well as Plaintiffs’ informing the Court that they were withdrawing their claims against Island Pointe, LLC, there were two causes of action, for negligence and breach of implied warranties, that were submitted to the jury against five remaining defendants: (1) Complete Building Corporation, (2) Tri-County Roofing, (3) Wilson Lucas Sales d/b/a Miracle Siding, (4) Eloy Alonso Vasquez, and (5) WC Services. Judge McCoy requested the parties submit a proposed jury verdict form. Because the parties did not reach a consensus regarding the language or format of the jury verdict form, on May 14th WC Services forwarded via email its proposed jury verdict form and on May 15th Plaintiffs, Complete, Tri-County, and Miracle/Vasquez forwarded their proposed jury verdict forms via email to Judge McCoy’s law clerk.

The jury verdict forms were similar, but they did contain some differences. The two most significant differences were Plaintiffs’ proposed verdict form first asked the jury to rule on the breach of implied warranty claim and then the negligence claim against each of the defendants and then the jury was instructed to fill in a single line for actual damages relating to the breach of implied warranty and negligence claims. Plaintiffs’ proposed verdict form then asked for an allocation from the general award for the part of the damages “relating to the fire

resistance/suppression components at Peas Island.” Finally, Plaintiffs’ proposed verdict form provided for separate findings of gross negligence against each defendant and then a separate line for each defendant for the jury to write in a punitive damages amount.

By contrast, all of the proposed verdict forms from the defendants separated the causes of action. Generally, the proposed verdict forms from the defendants asked the jury to decide whether the Plaintiffs proved their negligence claims against each of the defendants and asked for a damages amount for the negligence claim. Then the proposed verdict forms from the defendants asked the jury to decide whether the Plaintiff proved their breach of implied warranty claims against each of the defendants and asked for a damages amount for the warranty claim. Thus, the proposed verdict forms from the defendants would have allowed the jury to enter separate damages amounts on separate lines for the negligence and then then breach of implied warranty claim. The proposed verdict forms from the defendants also included a section allowing the jury to determine the question of gross negligence and punitive damages against each of the defendants. Lastly, the defendants’ versions included some form of allocation of a percentage of fault and/or liability between the defendants.

Judge McCoy used a verdict form similar to the version proposed by Plaintiffs. There were two significant edits from the Plaintiffs’ version. The first edit was Judge McCoy removed the question that would have asked the jury to allocate the actual damages between the “fire resistant/suppression components” from other issues in the case. The second edit was the addition of two similar questions that asked whether Complete proved its indemnity claims against Tri-County and WC Services plus provided a line to enter a damages amount on the indemnity claim. The defendants objected to the verdict form that Judge McCoy eventually submitted to the jury. Generally, the defendants argued that their own version of the jury verdict form should have been

used. When Judge McCoy charged the jury, she also discussed the format of the jury verdict form. One issue that Judge McCoy made clear to the jury was that she would act as the gatekeeper to ensure that the Plaintiffs did not get double recovery for their damages since the causes of action sounding in negligence and breach of implied warranty were both being submitted to the jury.

On Thursday, May 16, 2019, the jury began deliberating. The jury came back after approximately four hours and fifty minutes with their verdict. The jury gave a defense verdict to WC Services. The jury found for the Plaintiffs on both the negligence and breach of implied warranty claims against Complete, Tri-County, Sales/Miracle Siding, and Vasquez. The jury awarded actual damages in the amount of \$6,500,000.00. The jury found gross negligence against Complete and Tri-County and awarded punitive damages of \$500,000 each against Complete and Tri-County. Since the jury did not find gross negligence against Sales/Miracle Siding or Vasquez, pursuant to S.C. Code Sec. 15-38-15, Plaintiffs and Sales/Miracle and Vasquez argued for an allocation of a percentage of fault. The jury filled out the Special Verdict form allocating 5% each to Sales/Miracle Siding and Vasquez.

Discussion

Plaintiffs are required to elect whether they are seeking their damages under their tort or contract based claims. Plaintiffs cannot recover under both claims. Again,

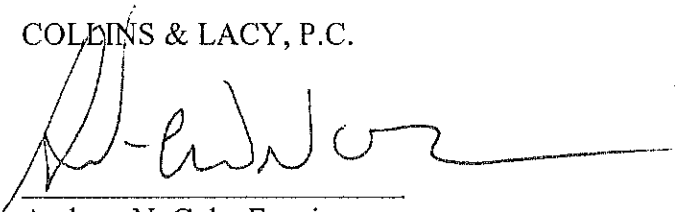
The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. Its purpose is to prevent double redress for a single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened. When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. The plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery. The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication.

Brown v. Felkel, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct.App.1995) (internal citations omitted).

While the trial court has some discretion regarding when the Plaintiff must elect its remedies, such an election is required after verdict but before the final judgment is entered. See Harper at 121, 348 S.E.2d at 379 (citation omitted). The post-trial motions are due by 5:00 pm on Tuesday, May 28, 2019 per the instructions from Judge McCoy to file within ten (10) days of the conclusion of trial.² Plaintiffs should elect whether they intend to seek their claims against Tri-County under tort or under contract.

Respectfully submitted,

COLLINS & LACY, P.C.

By: 

Andrew N. Cole, Esquire
acole@collinsandlacy.com
Post Office Box 12487
Columbia, SC 29211
803.256.2660 (voice)
803.771.4484 (fax)

ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

May 28, 2019
Columbia, South Carolina

² This deadline fell on Tuesday, May 28, 2019 because of the weekend and Monday being Memorial Day holiday.

CERTIFICATE OF SERVICE

The undersigned employee of Collins & Lacy, P.C., Attorneys at Law, Post Office Box 12487, 1330 Lady Street, Sixth Floor, Columbia, South Carolina 29211, does hereby certify that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

COUNSEL SERVED:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Joshua F. Evans, Esquire
Lucey Law Firm
415 Mill Street
Mt. Pleasant, SC 29464
jlucey@lucey-law.com
sdrawdy@lucey-law.com
jevans@lucey-law.com
Counsel for Plaintiffs

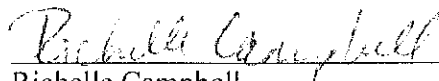
Edward D. Buckley, Jr., Esquire
Post Office Box 993
Charleston, SC 29402
ebuckley@ycrlaw.com
Counsel for Plaintiffs

Brandon T. Reeser, Esquire
Bonum Wilson, Esquire
Wilson & Heyward, LLC
Post Office Box 13177
Charleston, SC 29422
breeser@wilsonheyward.com
bwilson@wilsonheyward.com
*Counsel for Miracle Siding, LLC and Wilson
Lucas Sales d/b/a Miracle Siding, LLC*

Everett A. Kendall, II, Esquire
Murphy & Grantland, PA
Post Office Box 6648
Columbia, SC 29260
rkendall@murphygrantland.com
Counsel for Complete Building Corporation

FILED
2019 MAY 28 PM 2:36
JULIE J. ARMSTRONG
CLERK OF COURT

**PLEADING: TRI-COUNTY ROOFING, INC.'S NOTICE OF MOTION AND MOTION
COMPELLING PLAINTIFFS TO ELECT REMEDIES BETWEEN ITS WARRANTY AND
NEGLIGENCE CLAIMS**


Richelle Campbell
Columbia, South Carolina
May 28, 2019

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

☐ Plaintiff,

vs.

Island Pointe, LLC, Complete Building Corporation, Tri-
County Roofing, Inc., et al.

☒ Defendants.

check box above indicating submitting party

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Name, S.C. Bar No., and address of plaintiff's attorney:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Lucey Law Firm
415 Mill Street
Mt. Pleasant, SC 29464
telephone: (843) 849-8400 fax:
e-mail: jlucey@lucey-law.com other:

Name, S.C. Bar No., and address of defendant's attorney:

Andrew N. Cole, Esquire (SC Bar No. 68384)
Post Office Box 12487
Columbia, SC 29211
telephone: 803.256.2660 fax: 803.771.4484
e-mail: acole@collinsandlacy.com other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Compel

Estimated Time Needed: 30 minutes

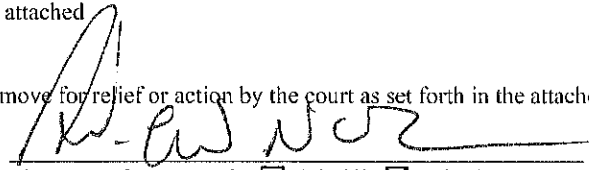
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion -

I hereby move for relief or action by the court as set forth in the attached proposed motion.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

May 28, 2019

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED: \$

☐ CONTESTED - AMOUNT DUE: \$

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PALMETTO POINTE AT PEAS ISLAND
CONDOMINIUM PROPERTY OWNERS
ASSOCIATION, INC.

Plaintiff,

vs.

ISLAND POINTE, LLC, ET AL

Defendant.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-10-0955

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney:

Justin Lucey, Bar No. _____

Address:

415 Mill Street, Mount Pleasant SC 29464

Phone: 843-849-8400 Fax _____

E-mail: jlucey@lucey-law.com Other: _____

Defendant's Attorney:

Everett A. Kendall, II, Bar No. _____

Address:

4406B Forest Dr., Columbia, SC 29206

Phone: 803-256-2233 Fax _____

E-mail: rkendall@murphygrantland.com

Other: _____

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant

June 4, 2019

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED – AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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; 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.; CERTAINTED
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,

) IN THE COURT OF COMMON PLEAS

)

) NINTH JUDICIAL CIRCUIT

) CASE NO. 2015-CP-10-0955

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FILED
2019 JUN -4 AM 10:52
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

**MOTION TO DISMISS
CERTAIN DEFENDANTS**

(DOES NOT END CASE)

LLC AND D/B/AH 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.)

AMERICAN RESIDENTIAL SERVICES, LLC,)

Third-Party Plaintiff,)

VS.)

VICTOR HUGO HERNANDEZ; HERNANDEZ)
ELECTRIC, LLC; LILIANA ROJAS FLORES;)
MARTIN BARR D/B/A PORT CITY)
STRUCTURED WIRING; KELLER)
ELECTRIC, LLC; JOHN TOOLIN D/B/A)
JOHN F. TOOLIN HEAT AND AIR; RUSSELL)
"RUSTY" HILL D/B/A RUSTY'S HEATING &)
AIR; and WARREN ANDERSON,)

Third-Party Defendants.)

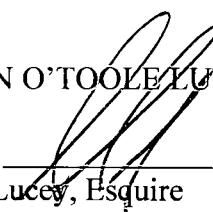
COMES NOW Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually and on behalf of all others similarly situated, and move the Court for an Order dismissing from this case with prejudice all claims, cross-claims, and counterclaims involving Defendants Creekside, Inc., Mosely Concrete, Andersen Windows, Inc., Complete Building Corporation, Eloy Alonzo Vasquez, Miracle Siding LLC, Wilson Lucas Sales d/b/a Miracle Siding, LLC, and Stanley's Vinyl Fence Designs, as further described hereunder and in the proposed Order of Dismissal with Prejudice attached hereto.

The grounds for such Motion and Order are that Plaintiffs have settled with Defendants Creekside, Inc., Mosely Concrete, Andersen Windows, Inc., Complete Building Corporation, Eloy Alonzo Vasquez, Miracle Siding LLC, Wilson Lucas Sales d/b/a Miracle Siding, LLC, and Stanley's Vinyl Fence Design for good, valuable, fair, and adequate consideration.

This motion will be supported by the pleadings and case record, applicable South Carolina law, and any oral presentation and/or documentation the Court so desires to consider.

WE SO MOVE:

JUSTIN O'TOOLE LUCEY, P.A.

BY: 

Justin Lucey, Esquire
Stephanie D. Drawdy, Esquire
415 Mill Street
Mount Pleasant, SC 29464

AND

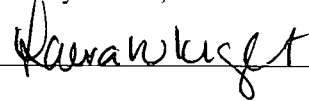
Edward D. Buckley, Jr., Esquire
Young Clement Rivers, LLP
P.O. Box 993
25 Calhoun Street, Suite 400
Charleston, SC 29402

Attorneys for Plaintiffs

Charleston, South Carolina
Dated: June 4, 2019

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading
was mailed to all counsel of record in this proceeding
this 4th day of June, 2019.



FILED
2019 JUN -4 AM 10:52
JULIE J. ARMSTRONG
CLERK OF COURT

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,	)	PLAINTIFFS' MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT TRI-
vs.	)	COUNTY ROOFING'S POST-TRIAL
	)	MOTIONS FOLLOWING
ISLAND POINTE, LLC, et al,	)	THE TRIAL ON MAY 6-16, 2019
	)	
DEFENDANTS.	)	
	)	

Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, Individually, and on behalf of all others similarly situated, ("Plaintiffs"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendant Tri-County Roofing, Inc's *Post-Trial Motions Following the Trial on May 6 to 16, 2019*.

SUMMARY OF ARGUMENT

The multiple *Post-Trial Motions* filed by Tri-County Roofing, Inc. ("TCR") should be denied, because:

- 1) The claims of negligence, gross negligence and breach of warranty of workmanlike service were supported by competent, substantial evidence, requiring submission of those claims to the jury;
- 2) The jury's verdict for actual and punitive damages is consistent with the evidence presented against TCR, and the verdict should not be disturbed;

- 3) TCR has failed to show how the jury's damage award – just under *half* of Plaintiffs' repair estimate – could be considered "excessive", such that a new trial should be mandated;
- 4) TCR mischaracterizes or misremembers the evidence presented at trial when it asserts the evidence does not support a punitive damages award. Plaintiffs presented overwhelming evidence of TCR's reprehensible conduct which supports the jury's award of punitive damages;
- 5) TCR bears the burden of proving its entitlement to setoff as a result of the prior settlements with other parties. The Plaintiffs, in order to avoid setoff, are free to allocate settlement funds as they see fit in order to apportion the proceeds in the manner most advantageous to them. *Riley v. Ford Motor Co.*, 414 S.C. 185, 197, 777 S.C.2d 824, 831 (2015);
- 6) TCR's statute of limitation defense was rejected by the jury which finding should not be disturbed by the Court;
- 7) TCR is unable to rely upon the statute of repose because the jury found it guilty of gross negligence;
- 8) TCR received the page/line designations for deposition excerpts to be used at trial on May 15 for use at trial on May 16. TCR proposed counter designations on May 16, all of which were published to the jury. TCR has not suffered prejudice as a result of this process, nor was the Court in error by allowing the publication. Additionally, disclosure of rebuttal witnesses is not required; and
- 9) For the many other reasons briefed herein.

For six days, a jury of TCR's peers was presented with substantial evidence to support Plaintiffs' claims and the damages that resulted from TCR's inadequate performance at this project. Based on that evidence, the jury justifiably rendered a verdict which included both actual and punitive damages.

TCR has renewed its unsuccessful Directed Verdict Motions in the form of Motions for Judgment Notwithstanding the Verdict/New Trial but has failed to meet its burden of demonstrating that the court erred in denying the Directed Verdict motions at trial. For each of these reasons and as discussed more fully below, each of these motions should be denied in full.

BACKGROUND

This case concerns the construction of 40 townhome style condominium units located in 20 buildings on Peas Island. The units are located on either side of a single roadway which runs the length of the island. The units on the southeastern side of the island face Folly Creek, while the units across the street are marsh front. The units were constructed in 2006-2007. The project was constructed by Complete Building Corporation ("CBC") and its subcontractors and sub-subcontractors.

In early 2015, the Palmetto Pointe Condominium Property Owners Association began to notice persistent roof leaking and hired Elite Development Group, LLC to investigate these leaks. After this initial investigation, an engineer was then hired by counsel to investigate the buildings, and he found the initial building code violations that prompted this suit.

On February 13, 2015, Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and (then) Class Representative Kathy Milner, initiated this construction defect suit. The suit sought compensation to remedy the defects at each of the forty (40) condominiums constructed as well as the common areas. Plaintiffs asserted causes of action for negligence/gross negligence and breach of warranty against the General Contractor, its subcontractors and their sub-subcontractors which performed the siding, roofing, flashing, framing, grading, concrete work, fire sprinklers, deck waterproofing, aluminum wrapping of pressure treated beams, soffit, fascia, hand and guard rails, mechanical/electrical and painting/caulking work. The Plaintiffs dismissed their claims against the Developer before the case went to the jury.

On Monday, May 6 through Thursday, May 16, 2019, this construction defect suit was tried before the Honorable Jennifer B. McCoy against seven present Defendants: (1) Complete

Building Corporation; (2) Tri-County Roofing, Inc.; (3) Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding; (4) Eloy Alonso Vasquez; (5) Stanley's Vinyl Fence Designs; (6) WC Services, Inc.; and (7) JMC Construction, LLC and JMC Construction, Inc.

During the trial, Defendant Stanley's Vinyl Fence Designs, the vinyl exterior railing installer, settled with Plaintiffs and was dismissed from the case. Defendants JMC Construction, LLC and JMC Construction, Inc. were dismissed by directed verdict at the close of Plaintiffs' case (this directed verdict is the subject of a separate motion).

On Thursday, May 16, 2019, two causes of action against the remaining defendants, negligence and breach of implied warranties, were submitted to the jury. The jury found for the Plaintiffs on both the negligence and breach of implied warranty claims, awarding actual damages in the amount of \$6,500,000.00. The jury made an express finding of grossly negligent, willful, and/or wanton conduct as to Tri-County Roofing, Inc. and Complete Building Corporation and awarded punitive damages of Five Hundred Thousand (\$500,000.00) Dollars separately against each of them. The jury returned a defense verdict in favor of WC Services, Inc.

Following the jury verdict of May 16, 2019, Plaintiffs have settled with Defendants Complete Building Corporation, Miracle Siding, LLC and Wilson Lucas Sales d/b/a Miracle Siding, and Eloy Alonzo Vasquez.

DISCUSSION

I. TCR's Motion for a Judgment Notwithstanding a Verdict Should Be Denied.

TCR has renewed numerous directed verdict motions that were denied at trial¹, but does not offer any substantive arguments as to why the Court should rule differently than it did two

¹ The way the motion and supporting memorandum is drafted, its unclear how many motions or grounds are actually being made/asserted. It appears that TCR renews its directed verdict motions as to: 1) Plaintiffs' alleged failure to articulate the standard of care to find negligence and proof for breach of implied warranty; 2) Plaintiffs' allegedly

weeks ago. Under the standard of review required for a JNOV, which TCR admits is the appropriate standard, the evidence viewed in the light most favorable to Plaintiffs mandates denial of these motions. *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Swicegood v. Lott*, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008); *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 287, 356 S.E.2d 123, 127 (Ct. App. 1987).

A motion for JNOV must be denied when the evidence yields more than one inference, or its inference is in doubt. *Id.*; *Steinke v. South Carolina Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999). Moreover, the jury's verdict may not be overturned if any evidence sustains the factual findings implicit in its decision. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.W.2d 408, 419 (Ct. App. 2000); *Smalls v. South Carolina Dep't of Educ.*, 339 S.C. 208, 215, 528 S.E.2d 682, 686 (Ct. App. 2000).

Plaintiffs presented the following evidence against TCR at trial:

- 1) The testimony of Alan J. Schweickhardt, PE, a forensic engineer hired by the general contractor [CBC], identified an extensive list of code violations and violations in connection with TCR's work, including siding size fails to meet wind loads for this location, improper nails, improper nail spacing, nails not installed in studs, decks with leaking post intersections of siding, shingles and deck membranes, excessive shingle overlap, lack of shingle starter strip, missing flashing, incorrect fasteners in fascia, aluminum coil stock wrapping treated lumber, reverse lapped weather barrier where flashing installed outboard of that barrier, trim in contact with shingles, and pump jacks fastened through shingles.
- 2) Notably, Movant TCR hired Applied Building Sciences, Inc., the same engineering firm as CBC; and CBC's expert Schweickhardt coordinated extensively with TCR's expert, his partner/associate L. Edward Polk, RRC. Mr. Schweickhardt testified that TCR's expert [Polk] shared substantially all of Mr. Schweickhardt's construction defect conclusions. This was later confirmed by the testimony of Mr. Polk when called to the witness stand by TCR in the defense case.
- 3) Plaintiffs' retained expert Russell Mease, P.E. reiterated and expounded upon the thousands of code violations attributable to TCR.

speculative loss of use claims and their presentation to the jury; 3) statutes of limitations and 4?) repose; and 5) compliance with the "one day" rule to offer deposition designations. (Motion at 2-3).

- 4) TCR's subcontract incorporates by reference the terms of Complete Building Corporation's contract with the Owner and the project specifications; both documents further incorporate the AIA General Conditions. Those documents required TCR to perform its work in a good and workmanlike manner, to have a competent superintendent on site while performing its work and to comply with all laws, ordinances and building codes. *The General Conditions also provided that TCR would be responsible for all acts and omissions of its subcontractors.*
- 5) The testimony at trial established numerous code and other violations by TCR, including:
 - a. Failing to use proper fasteners for the installation of the siding;
 - b. Failing to cause the siding to be fastened to the studs;
 - c. Overdriven fasteners;
 - d. Improper nail fastener pattern;
 - e. Failing to properly flash roof to column intersections;
 - f. Failing to properly flash deck to column intersections;
 - g. Failing to properly flash deck to roof intersections;
 - h. Failing to wrap the deck coating up the columns;
 - i. Failing to extend the deck condition out onto the roof decks;
 - j. Improperly fastened shingles;
 - k. Applying asphalt shingles over improper underlayment for low sloped roofs; and,
 - l. A myriad of other violations.
- 6) TCR's primary subcontractor, Wilson Lucas Sales d/b/a Miracle Siding, testified (by deposition publication) and directly contradicted TCR's claims that TCR supervised his work and that TCR provided Mr. Sales with the documents and/or instructions necessary for the proper installation of the materials he was using. Mr. Sales admitted that he did not properly install the siding. As the Court will recall, failure to install materials in accordance with the manufacturer's instructions is, in and of itself, a building code violation. The deposition excerpts for Mr. Sales were provided by email to all counsel on May 15, 2019 for use at trial on May 16, 2019. Counsel for TCR and CBC provided counter designations on May 16. All proposed designated excerpts were published to the jury on May 16. Rebuttal witnesses do not have to be disclosed; and TCR cannot demonstrate any prejudice resulting from that process.

(The foregoing list is a sampling of the evidence and is not intended to be comprehensive.) Clearly, the evidence supported the verdict.

TCR contends that the Plaintiffs' claims are barred by the applicable statute of limitations because Plaintiffs' expert realized during his initial visit to the site in 2015 that the siding was too wide for that location. If there was evidence that he or anyone else recognized that code violation more than three (3) years prior to the filing of this civil action, TCR's contention might have merit.

There is no such evidence in the record of this case. Plaintiffs filed suit within weeks of Mr. Mease's first visit. TCR tacitly admits that its statute of repose argument is specious, as it initiates its argument with the fatalistic realization that the statute bars recovery for units 1653, 1655, 1637, 1639 and 1641, "To the extent it is still applicable for Tri-County". TCR was found guilty of gross negligence. Therefore, the statute of repose is unavailable as a defense to TCR, pursuant to Section 15-3-670(A) S.C. Code.

II. TCR is Not Entitled to New Trial.

TCR's motions for new trial should be denied. TCR argues for a new trial based on its assertion that the jury's verdict is excessive and that Plaintiffs' damages number is speculative. However, a new trial is warranted only if the trial court determines the verdict is contrary to the fair preponderance of the evidence. *Dent v. Redd*, 270 S.C. 585, 243 S.E.2d 460 (1978). As discussed below, the evidence supports both the actual and punitive damages award by the jury.

Plaintiffs' repair cost expert, a licensed general contractor, prepared a cost estimate to perform the repair scope recommended by Plaintiffs' forensic engineer, Russell Mease, P.E. His estimate was prepared in the same manner as all estimates he has prepared during his career, using universally recognized software and verified unit costs. TCR's repair estimate, based on a limited scope consisting of a series of spot repairs, was rejected by the jury. The evidence supports the jury's actual damage award. "The jury's determination of damages is ... entitled to substantial deference." *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (1996) (*citing Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993)). Further, TCR did not move for a directed verdict on the grounds that Plaintiffs' damages number was speculative. Therefore, that ground was not preserved for review at this stage of the proceedings.

III. The Evidence Supports an Award of Punitive Damages.

TCR asserts punitive damages were inappropriate, because “[t]here was no showing of any intentional conduct to try to harm the Plaintiffs.” (Motion at 9). Proof of intent to harm the Plaintiffs is not required to support an award of punitive damages.² Reckless or grossly negligent conduct will suffice. *Id.* Evidence of violation of a statute is negligence per se and is evidence of recklessness, requiring the submission of the issue of punitive damages to the jury. *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978). The Court properly charged the jury that an award of punitive damages is proper as long as “a person of ordinary prudence” would have concluded his actions were “in reckless disregard of the rights of another”:

Punitive damages are allowed even when a defendant does not realize it is invading the Plaintiff’s rights so long as the act is committed in such a manner that a person of ordinary prudence would conclude it was done in reckless disregard of the rights of another. (Jury Charges at p. 26).

Where punitive damages are deemed appropriate, the jury is then under a duty to render such an award. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 364, 725 S.E.2d 112, 121 (Ct. App. 2012) (“If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances.”).

In support of its position, TCR refers to the issue of the improperly flashed post/roof/deck intersections. In its discussion, TCR fails to mention the trial testimony of numerous experts that this location did not leak because of the difficulty to flash at this location (as intoned by some defense counsel) – but rather because of the failure to attempt to flash at all. TCR also ignores the testimony of its Operations Manager, Mark Poyner who admitted that TCR issued a Request for

² This was charged to the jury without objection by TCR.

Information for instruction before proceeding with the flashing at one type of intersection and that TCR proceeded with its work despite *not receiving any timely* response to that RFI (Ex. 436 (attached as Ex. A), Ex. 437 (attached as Ex. B), Ex. 438 (attached as Ex. C), and Ex. 441 (attached as Ex. D)). Thus, TCR knowingly proceeded with work it had acknowledged in writing it was not sure how to perform. Poyner went on to agree that, if he had come around to supervise this job more often, he possibly might have seen these un-flashed posts.

TCR understandably fails to reference the testimony of its subcontractor, Wilson Lucas Sales d/b/a Miracle Siding. Mr. Sales confirmed he was given no guidance or supervision by TCR, even though he had no experience installing this type of siding and could not read or write English at the time. Mr. Sales also testified that he never received any installation instructions from TCR, which completely contradicted the trial testimony of Mr. Poyner who testified that he had given all manufacturer information to his subcontractors.

TCR is incorrect in stating there was “no testimony that the building code had been adopted as a common statutory authority”. (Motion at 8). Both sides’ experts, including J. Lawrence Elkin, PE, expert for Defendants Miracle Siding and Eloy Vasquez, testified the 2003 International Residential Code (“2003 IRC”) was, in fact, the building code book applicable to the construction of Palmetto Pointe. Douglas M. Smits, C.B.O. also testified that the 2003 IRC was the applicable building code for this project. Mr. Elkin testified further that the applicable code, the 2003 IRC, does not contain any provision which allows any subcontractor, including a Master subcontractor such as TCR, to deviate from its requirements.

Based on the overwhelming evidence presented, the jury found that “a person of ordinary prudence” would have concluded that TCR’s failure to e.g., supervise its subcontractors and its decision to proceed with flashing areas it was incompetent to flash were “in reckless disregard of

the rights” of future homeowners. TCR knew or should have known all the work of at least one of its subcontractors was suspect or improper. It either knew Mr. Sales had no prior experience with cementitious siding or failed to make any effort to determine his skill or experience. It made no effort to supervise the work of his subs. The degree of reprehensibility shown by this testimony as well as the hundreds of code violations attributable to TCR both justify and compel an award of punitive damages. Moreover, the \$500,000 punitive damage award against TCR is remarkably low in relation to the \$6.5 Million actual damage award.

IV. TCR Has Failed to Show Entitlement to Set Off.

TCR cites to authority that clearly states setoff is appropriate only for the “same injury”: “When the settlement is for the same injury, the non-settling Defendant’s right to a setoff arises by operation of law.” *Smith v. Widener*, 397 S.C. 468, 472, 724 S.E.2d 188, 190 (Ct. App. 2012). TCR has done nothing to show the setoff it seeks is for the same injury. Rather, most of the settlements obtained by Plaintiffs deal with issues for which TCR could not be held responsible, issues which were, in fact, not presented to the jury. The Plaintiffs settled with SGM, the architects, for professional negligence, a cause action inapplicable to TCR. The settlements with American Residential Services, LLC d/b/a ARS/Rescue Rooter Charleston (HVAC/Electrical), Stanley’s Vinyl Fence (guard rails), Mosely Concrete (driveways), Atlantic Building Construction Services, Inc. (framing), Tallent & Sons, Inc. (grading and paving work), CertainTeed Corporation (aluminum trim coil stock), Alderman Construction, H and A Framing Construction (framing), Kelly Flooring (flooring), Builder Services Group, Inc. d/b/a Gale Contractor Services (fireplaces), and Cohen’s Drywall Company, Inc. (insulation) involved issue releases. TCR was not held responsible for those issues. Therefore, setoff is inapplicable to those settlements.

A trial court's discretion to set off a judgment should only be "exercised when necessary to provide justice between the parties." *Rutland v. S.C. Dep't of Transportation*, 390 S.C. 78, 86, 700 S.E.2d 451, 455 (Ct. App. 2010), *aff'd as modified sub nom. Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012). The jury awarded \$6,500,000 against TCR based upon TCR's own actions and omissions. Plaintiffs' recovery is not duplicative of any funds received in connection with previous settlements and does not amount to any windfall. To the contrary, setoff of the damages the jury awarded Plaintiffs as a result of TCR's conduct would result in a windfall to TCR by allowing it to escape the ramifications of its wrongs. See, e.g. *Murphy v. United States*, 836 F. Supp. 350, 351 (E.D. Va. 1993) ("A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys a windfall.").

The South Carolina Supreme Court has made it clear that a plaintiff and a settling party may contractually agree to allocate, or apportion, settlement proceeds in whatever manner they see fit. *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 831 (2015) (finding a plaintiff and settling party's apportionment of settlement proceeds among causes of action to be valid and reversing the Court of Appeals' attempt to re-allocate based on the Court's perceived "reasonableness"). Settlement agreements are not intended to benefit a non-settling party; conversely, a plaintiff "gains a position of control and acquires leverage in relation to a non-settling defendant" and thus it is reasonable for a plaintiff to allocate the proceeds in a manner most favorable to it. *Id.* at 831 ("Settling parties are naturally going to allocate settlement proceeds in a manner that serves their best interests."); see also *Lard v. AM/FM Ohio, Inc.*, 387 Ill.App.3d 915, 327 Ill.Dec. 273, 901 N.E.2d 1006, 1018 (2009) ("If the position of a non-settling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant

who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.”).

Additionally, because of the way the case was tried, TCR is not entitled to a setoff for most prior settling parties. *The Oaks at Rivers Edge Property Owners Ass’n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017) (When Plaintiff reduces his damage claim to account for prior settling parties, Defendant is not entitled to a second reduction by setoff).

And, where the prior settling Defendant’s duties arose from a different source, the Defendants are not joint tortfeasors and the Defendant is not entitled to set off. *Atkinson v. Orkin Exterminating Company, Incorporated*, 361 S.C. 156, 159-60, 604 S.E.2d 385, 387 (2004) (because Orkin and Terminix’s duties arose out of different contracts, their breaches did not make them joint tortfeasors, and remaining Defendant was not entitled to a setoff for prior settling defendant’s payment.) Of course, *Atkinson* makes sense; TCR certainly can’t claim, e.g., that it shared in the architect’s professional liability negligence – when the architect’s duties arose out of a different contract and code of conduct.

Essentially, *The Oaks* and *Atkinson* eliminate all or nearly all pretrial setoffs in this matter; and Riley eliminates the rest as Plaintiffs have exercised their rights to allocate these settlements to other damages and causes of action. The only setoffs available to TCR are CertainTeed (\$35K); Creekside (\$150K); and Cornerstone (\$150K). Judgment should be entered for \$6.165M in actual damages and \$.5M in punitive damages for a total judgment of \$6.665M.

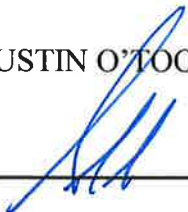
CONCLUSION

This Court should deny Defendant Tri-County Roofing's Post-Trial Motions for the reasons set forth above and enter judgment against Tri-County Roofing in the amount of six million, six-hundred, and sixty five thousand dollars (\$6,665,000.00)

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

By: _____


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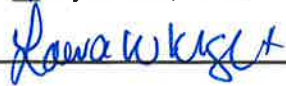
-and-

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Attorneys for the Plaintiffs

June 7, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was emailed to all counsel of record in this proceeding this 7 day of June, 2019.



Complete Building Corp. - Palmetto Point

October 19, 2006

Meeting Agenda

1. Progress Update - D&S Plumbing
- ✓ 2. Progress Update - Tallent & Sons '
3. Progress Update - WC Services
a. Mock-up on Riverbirch *** Review Gary's Action List
- ✓ 4. Progress Update - Bishop & Sons
a. Schedule
5. Progress Update - ARS Mechanical
6. Progress Update - ARS Electrical
- ✓ 7. Progress Update - Tri-County Roofing
8. Progress Update - Atlantic
9. RFI's
 - a. See attached log, page 7.
10. Pending Change Orders
 - a. Venting of microwaves - approved on 10/16 - Cost \$ 8,280.
 - b. Elevator shaft painting - \$ 250. Per unit.
 - c. Revised roofs with larger ' valley saddles ' - \$ 2,200 per unit
 - d. Flame sealant - \$ 2,420. (\$ 100 per Building)
 - e. P&P Bond credit on site - < \$ 4,141. >
 - f. Outlet structures = \$ \$ 727.
 - g. Lay 6" H.D.P.E. pipe & build box w/slab and grate = \$ \$ 3,799
 - h. Fireplace detail = \$ 880. Per unit
10. SGM / Owner - open items / issues
 - a. Tank size, location and circuits for generator. (Owner)
 - b. Color selection for deck coating. (Owner)
 - c. Revised directive on chandelier rough-in location. (SGM)
 - d. Revised screen wall details (SGM)
 - e. Mildew
11. CBC - open items / issues
 - a. Hardware selection (Owner)
 - b. Diamond windows - sample
 - c. Trim - Pre install conference.
12. Schedule -

Tallent
1550P
with
CRG

R-0601





October 19, 2006

TO: All Attendees **FROM:** Buddy Hilton

PROJECT: Palmetto Point

RE: Progress Meeting Notes

In Attendance: Tommy Smith, SGM
Sara Lybrand, SGM
Legare Porcher, SGM
Tommy Browne, Island Point LLC
Gary Stanley, CBC
Joe Brown, CBC
Buddy Hilton, CBC
Scott Tallent, Tallent & Sons
John Brooks, Atlantic
Tanya Taylor, Buck Lumber
Mark Poyner, Tri-County Roofing

Items Discussed:

1. **WC Services** (Fire Protection) **DID NOT ATTEND TODAY'S MEETING**
Mock-up on Riverbirch to be complete by Friday, 10/20.
2. **D&S Plumbing** – **DID NOT ATTEND TODAY'S MEETING**
3. **Bishop & Sons** (Site Utilities) – **DID NOT ATTEND TODAY'S MEETING.**
Revised schedule e-mailed to SGM. Discussed height of meter at pump station. Issue between SCE&G and James Island PSD.
4. **Tallent & Sons** (Grading & Paving)
Reviewed change orders for 6" HDPE pipe and the change between old and new outlet structures. CBC not involved with these changes. Scope of work discussed on site between Scott Tallent and Tommy Browne. Copies of Tallent's Proposals given to SGM for review.
5. **ARS Electrical** – **DID NOT ATTEND TODAY'S MEETING**
CBC to contact ARS to get pricing on waterproof covers – open.
6. **ARS Mechanical** – **DID NOT ATTEND TODAY'S MEETING.**
Decision made to vent microwaves. Cost to be included in next owner change order.
7. **Tri-County Roofing** (Shingles, siding and deck coating)
Still need a detail from SGM on finishing the roof to wall area at decks. RFI # 37 dated 10/3/06. Requested additional colors on deck coating.
8. **Atlantic Builders** (Framing)
No SGM issues per John Brooks.
9. **RFI's** – reviewed log. Open: #'s 37, 38 and 39.

1525 Ashley River Road • Charleston, SC • 29407 • (843) 763-2463 • Fax (843) 766-4659
www.completebldg.com

10. SGM / Owner – open items

Generator Tank Size/ Location and Circuits – Tommy Browne to provide – open

Deck Coating – Tri-County installing standard finish for owner's review on Unit # 1643. Need additional color selections for Seal-O-Flex and Hydro-Stop.

Garage Doors – Per Tommy Smith, 9'x9' doors are to be installed on every unit. CBC to confirm final pricing with ACME.

Screen Walls – SGM working on revised details. – open.

Surround Sound – Lay out sketch received from SGM on 10/11.

Revised Chandelier Rough-In – SGM to provide new detail on location.

Paint Under Units – CBC directed to proceed with Sherwin-Williams product that includes a mildew inhibitor.

11. CBC – open items

Hardware Selection – Tommy Browne to provide – open.

Diamond Window – Gary to provide sample for review. Reviewed today. Need to re-work with trim applied for final review.

Pre-Installation Conference on Trim – Samples of base, casing, stool and crown given to SGM at today's meeting. Discussed treads / risers being pine. Discussed TV cabinet framing and trim cost. CBC to provide stair post and rail samples. Trim work in place to be reviewed after today's meeting.

12. Pending Change Orders:

- a. Venting of microwaves – Approved on 10/16
- b. Painting of elevator shafts - \$ 250 per unit. (several units complete to date)
- c. Valley Saddles - \$ 2,200 per bldg. (NOTE – Revised price received on 10/20 of \$ 3,200 per building.
- d. Flange sealant caulking - \$ 2,420 (\$ 100 per unit for material only, no labor)
- e. Bishop P&P Bond credit - < \$ 4,141. >
- f. Outlet structure - \$ 727
- g. Lay 6" H.D.P.E. pipe / build box w/slab & grate - \$ 3,799
- h. Fireplace detail - \$ 880 per unit (NOTE – Revised on 10/20. – TV cabinet frame and trim cost = \$ 0.00, if mantle and marble surround deleted.) complete in 6 units.

* Schedule – Discussed the Casework Group, cabinet subcontractor, who advised CBC this week that they were no longer in business and will not be able to perform the work. Schedule to be revised / updated when this issue is resolved.

NOTICE TO ATTENDEES: This Report Is Assumed To Be A True And Accurate Account Of This Meeting Unless Written Notification To The Contrary Is Received Within Seven (7) Days.

Cc: 601 – File 3A

Complete Building Corp. - Palmetto Point

October 19, 2006

Meeting Agenda

1. Progress Update – D&S Plumbing
2. Progress Update – Tallent & Sons
3. Progress Update – WC Services
 - a. Mock-up on Riverbirch

*** Review Gary's Action List
4. Progress Update – Bishop & Sons
 - a. Schedule
5. Progress Update – ARS Mechanical
6. Progress Update – ARS Electrical
7. Progress Update – Tri-County Roofing
8. Progress Update – Atlantic
9. RFI's
 - a. See attached log, page 7.
10. Pending Change Orders
 - a. Venting of microwaves – approved on 10/16 – Cost \$ 8,280.
 - b. Elevator shaft painting - \$ 250. Per unit.
 - c. Revised roofs with larger ' valley saddles ' - \$ 2,200 per unit
 - d. Flame sealant - \$ 2,420. (\$ 100 per Building)
 - e. P&P Bond credit on site - < \$ 4,141. >
10. SGM / Owner– open items / issues
 - a. Tank size, location and circuits for generator. (Owner)
 - b. Color selection for deck coating. (Owner)
 - c. Revised directive on chandelier rough-in location. (SGM)
 - d. Revised screen wall details (SGM)
11. CBC – open items / issues
 - a. Hardware selection (Owner)
 - b. Diamond windows – sample
 - c. Trim – Pre install conference.
12. Schedule –

Complete Building Corp. - Palmetto Point

October 26, 2006

Meeting Agenda

1. Progress Update - D&S Plumbing

2. Progress Update - Tallent & Sons

3. Progress Update - WC Services

*** Review Gary's Action List

4. Progress Update - Bishop & Sons

5. Progress Update - ARS Mechanical

6. Progress Update - ARS Electrical

- a. Elevator call button
- b. Cost for waterproof box

7. Progress Update - Tri-County Roofing

- a. Detail on wall to deck finish

8. Progress Update - Atlantic Construction

9. RFI's - open # 37

10. Pending Change Orders

- a. Venting of microwaves - approved on 10/16 - Cost \$ 8,280.
- b. Elevator shaft painting - \$ 250. Per unit.
- c. Revised roofs with larger ' valley saddles ' - \$ 3,200 per building
- d. Flame sealant - \$ 2,420. (\$ 100 per Building)
- e. P&P Bond credit on site - < \$ 4,141. >
- f. Outlet structure - \$ 727 **COMPLETE**
- g. 6" H.D.P.E pipe / box & grate - \$ 3,799 **COMPLETE**
- h. Entry Door Allowance Credit - < \$ 10,780 > (Allow. = \$ 700, Actual = \$ 455.)
- i. Elevator call buttons - \$ 200 per unit (16 completed)
- j. Marble fireplace surround / hearth - \$ 440 per unit
- k. Building # 9 - remove / re-frame roof - \$ 5,000
- l. Building # 3 - Extend / re-frame screen wall @ rear porch - \$ 1,200
- m. Building # 4 - Remove / re-frame 1/2 gable to hlp - \$ 5,000

check on this one →

11. SGM / Owner - open items / issues

- a. Tank size, location and circuits for generator. (Owner)
- b. Color selection for deck coating. (Owner)
- c. Revised directive on chandelier rough-in location. (SGM)
- d. Revised screen wall details (SGM)

12. A. CBC - open items / issues

- a. Hardware selection (Owner)
- b. Diamond windows - sample
- c. Trim - Pre install conference.
- d. Stair Posts - Style
- e. Hearth Detail
- f. Cabinets - Upgrade Information

13. A. Schedule - Revised schedule to be sent out after cabinet issue resolved.

R-0605



Complete BUILDING C O R P.

October 26, 2006

TO: All Attendees **FROM:** Buddy Hilton

PROJECT: Palmetto Point

RE: Progress Meeting Notes

In Attendance:	Legare Porcher, SGM Tommy Browne, Island Point LLC Gary Stanley, CBC Joe Brown, CBC Buddy Hilton, CBC John Brooks, Atlantic Mark Poyner, Tri-County Roofing

Items Discussed:

1. **WC Services** (Fire Protection) **DID NOT ATTEND TODAY'S MEETING**
Per Gary, Charleston Water Service has looked at the mock-up on the Riverbirch. They require the backflow preventor to be between 12" and 36" above the garage floor. The box will need to be dropped 4 feet. Tom Hall and the Fire Marshall will be on site today to look at the mock-up.
2. **D&S Plumbing** – **DID NOT ATTEND TODAY'S MEETING**
Per Gary, work progressing ok. Installing tubs in 33-35, 29-31 and 37-39. Three crews, 25 men on site today.
3. **Bishop & Sons** (Site Utilities) – **DID NOT ATTEND TODAY'S MEETING.**
Per Gary, all sewer tests have been completed – all passed. CRG has requested as-builts. Legare to contact CRG.
4. **Tallent & Sons** (Grading & Paving)
Work on owner requested change orders complete. No longer on site.
5. **ARS Electrical** – **DID NOT ATTEND TODAY'S MEETING**
CBC provided SGM with pricing on water proof covers. Per Gary, Tom Hall said that 2 switches and 1 receptacle ok to be weatherproof, not waterproof. If more required, they must be waterproof. Also, Tom requested copies of the elevation certificates.
Discussed stair can being angle device. Light fixture needs to be selected.
Need pricing on site electrical.
6. **ARS Mechanical** – **DID NOT ATTEND TODAY'S MEETING.**
No SGM issues.
7. **Tri-County Roofing** (Shingles, siding and deck coating)
Per Mark, siding set to start on building 1641-1643 next week. Roof to start on building 1625-1627 next week. Working on hydro-stop on 1645-1647.
Finish coat of hydro-stop to be installed on unit 1643 for SGM / Owner review.
Per Mark, still needs answer to RFI on wall to deck finish.

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8. **Atlantic Builders** (Framing)

No SGM issues per John Brooks.

9. **RFP's** - reviewed log. Open: # 37

10. **SGM / Owner** - open items

Generator Tank Size/ Location and Circuits - Tommy Browne to provide.

Deck Coating - Tri-County installing standard finish for owner's review on Unit # 1643. Owner to provide color selections for Seal-O-Flex and Hydro-Stop.

Revised Screen Wall Details - SGM to provide to CBC for pricing.

Revised Chandelier Rough-In - SGM to provide new detail on location - open.

Attic Access Stairs - CBC to install.

Gas Piping - Per Tommy Browne, pipe to fireplace only and add coupling for future tie-in.

Raccoons - Tommy Browne wants the raccoons to stay out of his unit. Gary to discuss with next raccoon he sees going toward the unit.

11. **CBC** - open items

Hardware Selection - CBC to e-mail Chris regarding catalog / cut sheets.

Diamond Window - Gary to provide sample for review. Reviewed today. Need to re-work with trim applied for final review. Determined CBC sample / mock-up will not work. SGM to provide other options to CBC for pricing.

Interior Trim - Discussed stair posts and rails. Decision made to use profile submitted by Buck. ***** NOTE - after review of plans, no post or newels required. Rail mounts to wall.***

Hearth Detail - Discussed pricing other options; tile or slate for surround. SGM to provide detail to CBC for pricing.

Cabinets - CBC still waiting on Jeff Palmer (Casework Group) to provide summary list of owner upgrades. Information required before pricing can be finalized with Cabinet Concepts.

12. **Pending Change Orders:**

- a. Venting of microwaves - Approved for \$ 8,280. To be included in change order # 4.
- b. Painting of elevator shafts - open, \$ 250 per unit. (several units complete to date)
- c. Valley Saddles - \$ 3,400 per building - open
- d. Flame sealant caulking = \$ 2,420 - SGM to provide detail on draft stop.
- e. Bishop P&P Bond credit = < \$ 4,141. > open
- f. Outlet structure = \$ 727 - work complete - open
- g. Lay 6" H.D.P.E. pipe / build box w/slab & grate work complete - open \$ 3,799
- h. Fireplace surround = \$ 400 for marble. SGM to provide additional options.
- i. Elevator call button = \$ 200 per unit (16 units completed to date) - open
- j. Units 1625-1627 - Remove / Re-frame roof \$ 5,000 - open - shingles starting next week
- k. Entry door allowance credit = Deduct < \$ 10,780 >

- l. Building # 3 – Extend / re-frame screen wall @ rear porch = \$ 1,200
- m. Building # 4 – Remove / re-frame ½ gable to hip = \$ 5,000
- n. Column wrap = \$ 63,474. ** railings scheduled to start week of 11/6.
- o. Front deck plywood / treads = \$ 32,200.

- Schedule -- Schedule to be revised / updated when CBC receives owner upgrades from The Casework Group and is able to finalize pricing with Cabinet Concepts.

NOTICE TO ATTENDEES: This Report Is Assumed To Be A True And Accurate Account Of This Meeting Unless Written Notification To The Contrary Is Received Within Seven (7) Days.

Cc: 601 – File 3A

10/26/06

SOM:

①

- 1033/1035/1031/1039/1087 } D&S Plumbing
tidy up loose
ends.

Talent - off site
• performed work on change orders

WC Services:

- CWS - looked @ mockup & did not like it
- Dale Strong - Backflow preventers
need to be 12" ~~up~~ 30" above the floor
(concrete slab of garage)
- 4" male connect's
- Backflow to drop 4'-0"
- Tommy Browne had wanted it
- Tom Hall & Fire Marshall was not
come yet to check backflow
preventer

Sewer has passed the WIPSD inspection

• DHEC

CRG (Kirk) needs as built for DHEC

• need survey.

• contact Kirk Richards

ARS Electrical

- CBC gave price for water proof covers
- • Wants cut of the angled can for sloped
sides.
- Tom Hall requiring flood certificates for close out
- Court was not at elevations of first row
units already.

②

APS etc.

Elevator call button for units that do not
have call button (10i.) - Elevator call buttons
roughed-in

Thi County:

- SGM needs to get edge detail @
Roof without parapet wall
- 1641/43 staks siding
- hydostop drip needs to be installed (once docks)
to water proof to protect dy wall - 1645/1647
working on the decks

Atlantic

- needs to install windows.

↓ wants to
Roof 1625/1627

- 1625 (#9) see
06-0833-C01

Item 10L:

Item 10L: 1201/200 to
Remove screen wall
@ repair ponds.

Item 10M: Bldg (#4) Dogwood
1647

Item 10C: price last year
was quoted incorrectly it's
\$3200/bldg.
- More expensive than
the modified.

RPI #9 -

~~RPI~~ RPI #37

10A: Appraised
10B: Open
10C:
10D: Atlantic
10E: credit (will accept 2)
10F:
10G:
10H: OK

11A - Tommy Browne
11B: open
11C: 48" opening - Tommy Browne wanted.
11D: REUSED SCREEN WALL DETAILS

12A: CHRIS UNION to SEND CUTS

12B. BUDDY SAID THAT ONCE TRIMMED THAT IT WOULD COST WHAT THE \$800 ANDERSON WOULD BE. TOMMY BROWNE SAID ~~THAT~~ THAT HE WOULD CHECK ON THIS.
• CAN SOME SUBSTITUTE A "SPECIAL" WINDOW TO REPLACE THAT ONE.

- TREADS ARE OAK, NOT PINE
- NO DECISION ON WRAPPING COLUMNS YET.
- BUDDY GAVE CUT OF NEWEL, PICKET. &
HANDRAIL
• OAK TREADS

ELEC:

- DISCUSSED THE FLOOD PLANE
- 1 WATERPROOF RECEPTAC
- 1 WEATHER PROOF RECEPT
- REST UP HIGH ABOVE FLOOD PLAIN.
- CHECK ON SWITCHES

(4)

- SAME AS OCEAN POINT FOR NEWEL, PICKETS, & HANDRAIL.
 - SUGGESTED NATURAL
 - TOMMY BROWNE ~~SAID~~ SAID GO WITH NATURAL.
- TOMMY BROWNE ASKED FOR BLACK SLATE PRICING FOR FIREPLACE RATHER THAN MARBLE
 - SGM TO DRAWING OF FIREPLACE WITH # OF PIECES FOR SLATE.
- CABINETS
 - JEFF PALMER (P CASEWORK SOLUTIONS) SAID HE WOULD GET PAPERWORK TO BUDDY HILTON THIS AFTERNOON
 - BUDDY ASKED IF TOMMY BROWNE & CHILS UNION WANTED TO TALK TO ~~THE~~ NEW CABINET COMPANY ABOUT UPGRADES.
 - TOMMY BROWNE ~~BE~~ DIDN'T WANT TO GET INVOLVED WITH THIS
- TRIM
 - ALDERMAN STARTED PUTTING DOWN IN THE LOOMS ON MISTAKE
 - WILL STAY UP IN ROOM WHERE HE STAYED.
 - SGM TO DO
- CARP DOOR ARE GOING WITH 9x9
 - GET CUT ON DOORS
- DISAPPEARING STAIRS IN HALLWAY, HIDEING SPRINKLERS
 - OPENINGS IN CLOSETS WE HAVE DONE

WE WILL KEEP
13 BUT NO NEW ONES.
• NO STAIRS IN THE
CLOSET

(3)

~~Case~~ • ATTIC STAIR.

- RIVERBIRCH HAS STAIR IN WRONG PLACE.
- IF IT DOESN'T WORK IN CLOSET, PUT IT IN THE HALL.

• Tommy Browne wants the racoon problem to be eradicated.

- Tommy does not want them detecting or uniting in the units
- No

• Remove piped gas to the padges ~ only

pipe gas to the fireplace

• leave the ones on the padges.

→ • how much would a coupling for future grille line.

• FIRST 4 BUILDINGS TO REMAIN WITH 4'0" DOORS (DRIVARCT) TO REMAIN - 'NEW' ONES TO BE 3'0"

• BUDDY to GET TOMMY BROWNE LETTER EXPLAINING THE BALANCE ERROR



• BANDING 3/4" OF 1/2" MATERIAL AROUND BUILDING - WHAT ARE WE USING?

→ ASK TOMMY SMITH.

- 50' minimum Buy SCE \$60

→ CHAIR ORDER #4

Complete BUILDING

C O R P.

November 2, 2006

TO: All Attendees **FROM:** Buddy Hilton**PROJECT:** Palmetto Point**RE:** Progress Meeting Notes

In Attendance: Jim McGuire, SGM
 Tommy Browne, Island Point LLC
 Gary Stanley, CBC
 Joe Brown, CBC
 Buddy Hilton, CBC
 John Brooks, Atlantic
 Mark Poyner, Tri-County Roofing

Items Discussed:

1. **WC Services (Fire Protection) DID NOT ATTEND TODAY'S MEETING**
 Cost Proposal to add sprinkler head in Laundry Room forthcoming. Discussed whether or not this should be a change order to the owner. WC Services will talk to Tom Hall to see if he will allow the deletion of one head in the Living Room area which could be used in the Laundry area. If allowed, there will be no additional cost for this change which was requested by the Town of Folly Beach's Fire Department. CBC will pay to install the additional heads in the first 4 buildings so as not to delay the project.
2. **D&S Plumbing - DID NOT ATTEND TODAY'S MEETING**
 No SGM issues.
3. **Bishop & Sons (Site Utilities) - DID NOT ATTEND TODAY'S MEETING.**
 Cards provided to Bishop by CRG. Bishop to fill out requested information and return to Kirk. Per Tommy, Covert has provided the elevation certificates but has not provided the as-builts, which are required for close out. Tommy now using Anderson & Assoc. for surveying work.
4. **Tallent & Sons (Grading & Paving)**
 Need CRG approval on pending change orders # 10 f and # 10 g. These will be included in Owner Change Order # 5.
5. **ARS Electrical - DID NOT ATTEND TODAY'S MEETING**
 Proposal received on site electrical. Cost is \$ 44.00 per L.F. Tommy asked Gary to confirm the L.F measurements for the tie-ins required to wells and pumps.
6. **ARS Mechanical - DID NOT ATTEND TODAY'S MEETING.**
 No SGM issues.
7. **Tri-County Roofing (Shingles, siding and deck coating)**
 Per Gary, Tommy Browne directed him not to wrap the columns at the cost quoted. Response to RFI # 37, dated 10/3, is still open. Proceeding on arches as shown on drawings. Additional siding crew will be starting on 1641-1643 next week. SGM to check on brackets and advise. (Per Tommy, wants the brackets as shown.) Reviewed final coat of hydro-stop on unit # 1643 after the meeting. Per Tommy,

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R-0614

finish coat is acceptable. Discussed handling on an individual basis if an owner objects to the finish coat. Tommy said he might ask the siding crew who worked on the Clubhouse to price wrapping the columns. Also, talked about the painter being responsible for filling the cracks in the 6x6 posts. Per Buddy, this would not fall under 'painter caulk' and the painting sub will not perform this work. Discussed asking the painter for a proposal to perform this work, if SGM provides spec. data on what to use to fill the large cracks in the posts.

8. Atlantic Builders (Framing)

Waiting for decisions on 10d, 10 l, and 10m. SGM to check king truss. Discussed the bank not funding past building # 12. Per John, this will mean downsizing the framing crews. Beams are on building # 13 and building # 14 was in production. Six additional framing crews are available and would have been sent to Palmetto Point, had the bank not taken this action. Tommy said he would check with Regions and see if they are willing to fund building # 13 on the next pay request.

9. RFI's - reviewed log. Open: # 37 since 10/3.

10. SGM / Owner - open items

Generator Tank Size/ Location and Circuits - Per Tommy, the information was e-mailed to Chris Wilhite at ARS.

Deck Coating - Owner to provide additional color selections for Seal-O-Flex and Hydro-Stop. Per Tommy, will probably go with the blue or gray standard color. Standard finish coat on unit # 1643 approved by Tommy after the meeting.

Revised Screen Wall Details - SGM to provide detail to CBC.

Revised Chandelier Rough-In - SGM to provide new detail on location - open.

11. CBC - open items

a. Owner Change Orders # 3 and # 4 - CBC needs executed copies.

12. Pending Change Orders:

- a. Venting of microwaves - Approved for \$ 8,280.
- b. Painting of elevator shafts - \$ 250 per unit. Per Tommy, prime only.
- c. Valley Saddles - \$ 3,400 per building - open
- d. Flame sealant caulking = \$ 2,420 - SGM to provide detail on draft stop.
- e. Bishop P&P Bond credit = < \$ 4,141. > per Tommy, add to next change order.
- f. Outlet structure = \$ 727 - work complete - open
- g. Lay 6" H.D.P.E. pipe / build box w/slab & grate work complete - open \$ 3,799
- h. Fireplace surround - \$ 285 for slate. CBC to provide color cut sheets / samples.
- i. Elevator call button = \$ 200 per unit CBC to provide electrical scope.
- j. Units 1625-1627 - Remove / Re-frame roof \$ 5,000 - per Tommy, do not change.
- k. Entry door allowance credit = Deduct < \$ 10,780 > per Tommy, add to next change order.
- l. Building # 3 - Extend / re-frame screen wall @ rear porch = \$ 1,200. - per John, Atlantic needs the height and width detail for the framing on the future units.
- m. Building # 4 - Remove / re-frame 1/2 gable to hip = \$ 5,000 Revised detail forthcoming from SGM.
- n. Column wrap = \$ 63,474. PER Tommy, do not wrap.
- o. Front deck plywood / treads = \$ 32,200 - open.
- p. Hardware credit = < \$ 14,092 >
- q. Waterproof outlet covers - Cut sheet and pricing provided to SGM / Owner.

- Schedule – Cabinets, 3 to 4 week delivery. Earliest possible date, 11/27. Based on this date, final completion on first 4 units would be the week of 12/15. CBC offered additional money to try and have the order moved up, but manufacturer said this was not an option.

NOTICE TO ATTENDEES: This Report Is Assumed To Be A True And Accurate Account Of This Meeting Unless Written Notification To The Contrary Is Received Within Seven (7) Days.

Cc: 601 – File 3A

R-0616



November 30, 2006

TO: All Attendees

FROM: Buddy Hilton

PROJECT: Palmetto Point

RE: Progress Meeting Notes

In Attendance:

Tommy Browne, Island Point LLC
Gary Stanley, CBC
Joe Brown, CBC
Buddy Hilton, CBC
Mark Poyner, Tri-County Roofing
Jim McGuire, SGM
Seth Robertson, BPA

Items Discussed:

1. **WC Services** (Fire Protection) **DID NOT ATTEND TODAY'S MEETING**
No SGM issues.
2. **D&S Plumbing** – **DID NOT ATTEND TODAY'S MEETING**
No SGM issues.
3. **Bishop & Sons** (Site Utilities) – **DID NOT ATTEND TODAY'S MEETING.**
Discussed action required for CWS commissioning. Items as follows:
 - a. Repair 3 road cuts across Peas Island Road.
 - b. Mark curb for water and sewer connections.
 - c. Raise meter boxes up to grade.
 - d. Repair erosion at valve box on Peas Island Road.
 - e. Conduct 2 bacteriological tests.
 - f. Sewer easement needs to be approved by DOT.
4. **Tallent & Sons** (Grading & Paving)
On site next week to perform Bishop's repairs and to work on walking paths.
5. **ARS Electrical** – **DID NOT ATTEND TODAY'S MEETING**
Per Tommy Browne, has not received response from ARS on generator.
6. **ARS Mechanical** – **DID NOT ATTEND TODAY'S MEETING.**
No SGM issues.
7. **Tri-County Roofing** (Shingles, siding and deck coating)
Discussed radius arches in front of units. Need SGM to provide larger plan to scale, or lay out the arches in the field.
8. **Atlantic Builders (Framing)**
No SGM issues.
9. **RFI's**
Reviewed log. Open: # 37 – need written response from SGM.

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R-0617

10. SGM / Owner – open items

Deck Coating

Color chart e-mailed to SGM and Owner for review of beige color.

Screen Walls

SGM still working on revised details for pricing. Per Buddy, any additional work at this area will not be performed until after the first units are closed. Open since 10/5.

Paint at Street Side Elevation

Discussed additional areas under the units that Tommy Browne wants painted. Areas in question did not call for painting on the SGM plans or finish schedule. Jim McGuire brought the architect's rendering of the project for review which showed the areas Tommy would like to have painted. CBC will require a request for pricing if this work is to be done.

Toilet Accessories

CBC to provide samples of chrome and white for review. Decision made to use spring loaded shower rods.

Dimmers

To be installed per Chris Union / Premier Lighting lay out.

Decorative Porch Brackets

Waiting on revised locations and size from SGM. Open since 11/2.

Attic Access

Access stairs will not fit in locations shown on plans. CBC has been waiting on truss repair detail from SGM / BPA since Tommy Smith reviewed on site. At today's meeting, Seth advised that this design should come from Atlantic, not BPA. ** Location of attic access panels first discussed on August 3, 2006, and as of today, still not finalized. CBC to check on other types of access stairs. Jim suggested using something similar to a ship's ladder.

Stair Can Light

Discussed using a surface mounted fixture, which would allow the light to be centered. SGM to issue directive to CBC. First 4 units will have to be retrofitted.

Shower Doors

CBC to provide cut sheets / catalog, or showroom location, for owner to review types / styles of doors. Cost in estimate is \$ 395 EA per unit.

Drywall Material Cost

CBC to contact Cohen's Drywall on material costs to date.

Stored Material Back-Up

CBC to provide back-up invoices and insurance certificates to SGM on flooring and tops, billed for in pay app. # 8.

Hardware

SGM to provide keying information to CBC.

Elevator Call Button Pre Wire

Need decision on whether or not to continue pre-wiring the units.

11. Pending Change Orders / CBC Open Issues

Need revised selection sheet on Unit # 1639

Microwave venting = \$ 8,280 - CO # 5

EPDM = \$ 18,144 - CO # 5

Bishop P&P Bond = < \$ 4,141 > - CO # 5

Outlet structure = \$ 727 - CO # 5

6" H.D.P.E. pipe = \$ 3,799 - CO # 5

Entry door allowance credit = < \$ 10,780 > CO # 5

Hardware credit = < \$ 14,092 > CO # 5 * note - credit may vary depending on keying.

Front deck plywood / exterior 5/4 treads = \$ 16,100 (1/3 of total cost) - CO # 5

Stick frame roof (front dormer on bldg. # 11 = \$ 1,550 - pending

Move kitchen walls 3" in 8 buildings per SGM = \$ 2,400 - CO # 5

Cost to frame fireplace per revised SGM sketch = \$ 650 per unit - CO # 5

Cost to trim fireplace / TV cabinet per revised SGM sketch = \$ 350 per unit - CO # 5

NOTE - Above change orders to be included in pay request # 9.

* Schedule - CBC waiting for confirmation date on cabinet delivery.

NOTICE TO ATTENDEES: This Report Is Assumed To Be A True And Accurate Account Of This Meeting Unless Written Notification To The Contrary Is Received Within Seven (7) Days.

Cc: 601 - File 3A

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

☐ Plaintiff,

vs.

Island Pointe, LLC, Leonard T. Browne, Complete
Building Corporation, Tri-County Roofing, Inc.,
Creeside, 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.,
Christopher N. Union, Builder Services Group, Inc. d/b/a
Gale Contractor Services, Novus Architects, Inc. f/k/a
SGM Architects, Inc., Tallen and Sons, Inc., WC
Services, Inc., CRG Engineering, Inc., Certainteed
Corporation, Kelly Flooring Products, Inc. d/b/a Carpet
Baggers, and John Doe 1-60

☒ Defendants.

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NUMBER: 2015CP1000955

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

check box above indicating submitting party

Name, S.C. Bar No. and address of plaintiff's attorney:

Justin O. Lucey, Esquire
Stephanie Drawdy, Esquire
Lucey Law Firm
415 Mill Street
Mt. Pleasant, SC 29464
telephone: (843) 849-8400 fax:
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Name, S.C. Bar No. and address of defendant's attorney:

Andrew N. Cole, Esquire (SC Bar No. 68384)
Post Office Box 12487
Columbia, SC 29211
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e-mail: acole@collinsandlacy.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 30 minutes

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion –

I hereby move for relief or action by the court as set forth in the attached proposed motion.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

August 5, 2019

Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: \$25.00

☐ EXEMPT:
(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ Sexually Violent Predator Act

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

☐ State Agency v. Indigent Party

☐ Post-Conviction Relief

☐ Motion for Execution (Rule 69, SCRCP)

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
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, 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.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015CP1000955

**TRI-COUNTY ROOFING, INC.'S RULE
59(e), SCRCP MOTION TO RECONSIDER
THE FORM 4 ORDER
FILED JULY 23, 2019.**

2019 AUG -5 PM 4: 14
JULIE J. ARISTON
CLERK OF COURT

FILED

Pursuant to Rule 59(e), SCRCP, Defendant Tri-County Roofing, Inc. (the "Tri-County"), hereby moves for reconsideration of the Court's Form 4 Order that was filed on July 23, 2019, but counsel for Tri-County did not receive an electronic copy of the Form 4 Order until Wednesday, July 24, 2019. The present motion addresses the portion of the Court's Form 4 Order regarding the post-judgment setoff allocation; nonetheless, Tri-County does not abandon its other post-trial arguments and, to the extent necessary, incorporates the other arguments here as if restated here verbatim.

BACKGROUND

This case was tried before the Honorable Jennifer B. McCoy May 6 through 16, 2019. The case commenced against seven defendants, but because of a settlement reached between Plaintiffs and Stanley's Vinyl Fence Designs (vinyl railing installer) on the second day of trial and the

dismissal of JMC Construction, Inc. and JMC Construction, LLC (minor siding repair) by directed verdict after the close of Plaintiffs' case, the case went to the jury against five defendants. The jury found in favor of Plaintiffs against four defendants (Complete Building Corporation, the general contractor; Tri-County, siding, roofing, and waterproofing; Wilson Lucas Sales d/b/a Miracle Siding, LLC, siding; and Eloy Vasquez, roofing and waterproofing) and gave a defense verdict to WC Services, Inc. (fire sprinklers). Judge McCoy allowed the parties to file post-trial motions by ten days which, because of the weekend and a State holiday, on May 28, 2019, Tri-County moved the Court *inter alia* to setoff the jury verdict entered against Tri-County. Complete, Miracle, and Vasquez reached settlements with the Plaintiffs post-verdict but before the post-trial motions were argued.

On June 7, 2019, the Court held a hearing and heard arguments from Tri-County's Counsel and Plaintiffs' Counsel regarding the post-trial motions. Also at this hearing Complete acknowledged that it dismissed its indemnity cross-claim against Tri-County when it settled its claims with Plaintiffs. On July 24, 2019, Tri-County's counsel received electronic copies of the filed verdict form, which was retroactively file stamped on May 16, 2019, and the Form 4 Order which is the subject of the present motion to reconsider.

ARGUMENT

Tri-County respectfully states that the Form 4 Order should be reconsidered and that the Court should allocate the setoff proposed by Tri-County at the post-trial motions hearing on Friday, June 6, 2019. In the Form 4 Order, Judge McCoy granted, in part, Tri-County's motion for setoff, but she stated in the Form 4 Order that the allocation was "in accordance with the Plaintiffs' proposed allocations and setoff amounts." The Form 4 Order allocates total setoffs and a reduction on the verdict against Tri-County of \$1,670,000.00 for a total judgment against Tri-County of

\$5,330,000.00. Apparently, this setoff amount came from a supplemental email that Plaintiffs sent to Judge McCoy on Monday, June 10, 2019. Although Tri-County welcomes the additional setoff acknowledged by Plaintiffs over the weekend, the Plaintiffs' position on Friday and on Monday is inconsistent. For example, on Friday Plaintiffs' took the position that no portions of the post-verdict settlements paid by Miracle or Vasquez, which are two subcontractors of Tri-County, should be allocated for setoff. On Monday, Plaintiffs correctly recognized that their prior setoff arguments regarding Miracle and Vasquez were incorrect. Plaintiffs gave other concessions on Monday, which implicitly acknowledges that their arguments on Friday were incorrect. But the concessions also highlight Plaintiffs' mis-interpretation of the law regarding setoff.

Tri-County argued in its briefs and at the motions hearing setoff based on relevant case law, statutory law, and equitable principles. A non-settling defendant is entitled to a dollar for dollar setoff of any monies paid by the settling defendants to the plaintiff. Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) (since "one tortfeasor is entitled to credit for the amount paid by another tortfeasor, the amount of setoff is the amount actually paid rather than the lifetime value of a structured settlement."). Applying set off is mandatory. "[I]n the absence of bad faith, the function of the trial court is limited to applying the settlement credit pursuant to §15-38-50." Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App.1999). The court has no discretion to ignore applying a setoff and, when the settlement is for the same injury as a matter of law, the right to setoff arises as an operation of law. See Huck v. Oakland Wings, LLC, 422 S.C. 430, 437, 813, S.E.2d 288, 291 (Ct.App. 2018), cert. den. (Aug. 3, 2018) (citations and internal quotations omitted). "A non-settling defendant is entitled to credit for the amount paid by another defendant who settles." Welch v. Epstein, 342 S.C. 279, 312, 536 S.E.2d 408, 425 (Ct. App. 2000) (citing

Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967); Hawkins v. Athology Associates of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, ___ (Ct. App. 1998).

At trial, Plaintiffs argued that Complete, the general contractor responsible for the whole project, was a joint tortfeasor with Tri-County, a subcontractor to Complete that was responsible for the majority of the work on the project by installing the siding, roofs, and deck waterproofing. The sub-subcontractors Miracle and Vasquez were in turn responsible for their scopes of work under Tri-County. The jury found in its verdict that Complete, Tri-County, Miracle, and Vasquez were joint tortfeasors. Indeed, with the finding of gross negligence against Complete and Tri-County, the effect was that either of these defendants could be responsible for up to one hundred percent of the total verdict determined by the jury. Of course, this verdict would be reduced by all applicable setoffs from prior settlements. At trial, there were only a few categories of issues that the jury was explicitly not asked to consider. Both the Plaintiffs and the defendants at trial acknowledged that certain issue releases were taken out of the case and that the jury should not consider during its deliberations. These issues were HVAC, the window product, grading and paving, interior flooring, interior trim and railings, and concrete. At trial Plaintiffs clarified that only the window product was removed from the case, not the window installation problems.

All of the issue release items were settled before trial commenced in this case. Therefore, trial commenced without any of the issue release items being sought at trial. Complete reached a settlement with Plaintiffs *after* the jury rendered its verdict. Subsequently, Plaintiffs drafted a settlement agreement that for the first time allocated all the settlement funds paid by Complete. On Friday, June 6th when the post-trial motions were argued, Plaintiffs argued that none of the monies paid in settlement by Complete should be allocated to setoff. That is, Plaintiffs argued that none of the settlement funds paid by Complete after the verdict had anything to do with the nearly

two-week trial. Nonetheless, the jury treated Tri-County and Complete as jointly and severally liable by issuing a single verdict for the causes of action at trial, thus finding them liable for the same injury. Notably, Plaintiffs requested the verdict form that went to the jury, which resulted in a single decision for a single injury. That is, Plaintiffs' agreed when the case went to the jury that there was a single injury for which they were seeking compensation.

On Monday, June 10th, Plaintiffs acknowledged only \$137,500.00 for "exterior railings" out of a total settlement paid by Complete of \$2,137,500.00 for setoff. But Plaintiffs explicitly excluded from their Monday setoff revision other items that were tried before the jury which Plaintiffs describe in their June 6, 2019 settlement agreement with Complete as including "fire separation penetrations other than those caused by the location of the fire sprinkler distribution system within the fire rated wall separating the units within each building.... framing work to provide code-compliant access to HVAC equipment [and].... punitive damages." Plaintiffs want Tri-County to pay for these items that were tried and partially settled by Complete, which inherently and explicitly results in Plaintiffs getting multiple recoveries for the same injury.

Plaintiffs' arguments regarding setoff are summarized as a Plaintiff can allocate any settlement any way that they choose, and the Court should merely rubber-stamp the allocation by the Plaintiffs. This is not a correct application of the law. Plaintiffs cite the cases of Atkinson v. Orkin Exterminating Company, Inc., 361 S.C. 156, 604 S.E.2d 385 (2004) and Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) in support of their position. The Court's reliance on the Plaintiffs' interpretation of these cases is an error of law.

Plaintiffs state Atkinson stands for the proposition that there can be no setoff because different contracts were entered between different parties for the original construction of the Palmetto Pointe project. This argument is Plaintiffs' attempt to argue for the first time after the

verdict was rendered by the jury that the defendants at trial were not joint tortfeasors. Joint tortfeasors are “two or more tortfeasors who contributed to the claimant’s injury and who may be joined as defendants in the same lawsuit.” Black’s Law Dictionary, p.1497 (7th Ed. 1999). Although they settled out prior to trial, other defendants that contributed to the Plaintiffs’ alleged damages are also joint tortfeasors when setoff should be applied.

Atkinson does not apply to the current case or facts. As the heading to the second part of the Atkinson case notes, that case deals with the collateral source rule. In Atkinson, two termite companies had entered into two separate contracts to provide termite monitoring and treatment for the same homeowner. Both companies had a separate and independent obligation to find and treat for termites. The two termite companies were not joint tortfeasors—they did not combine to cause the homeowner harm. By contrast, and as was argued at the Palmetto Pointe trial, all of the defendants at trial as well as other parties that were part of the original construction of Palmetto Pointe joined in the construction of the project and, therefore, were and are joint tortfeasors. Some of these parties settled out before trial, but that in no way diminishes that the joint liability requires a complete setoff of the settlement funds paid by the settling parties.

Next, Plaintiffs advocate that the Riley case allows them to allocate any settlements in any way they chose and with no oversight by the Court. This is an erroneous reading of this case. In Riley, the plaintiff allocated a \$25,000.00 settlement with \$20,000.00 for a survival claim and \$5,000.00 for a wrongful death claim. The only claim that went to trial was the wrongful death claim. In post-trial motions, the parties argued over the allocation of the settlement funds. The Court of Appeals re-allocated the apportionment, but the Supreme Court reversed and let the original allocation stand. The Supreme Court reached this conclusion based on the “totality of the circumstances,” the reasonableness of the allocation to the survival claim, and the evidence in the

record of the deceased's pain and suffering. This case does not stand for the proposition that the Plaintiff can allocate setoffs in any manner they chose, but instead confirms the requirement that the Court must review a proposed allocation for reasonableness and a good faith allocation.

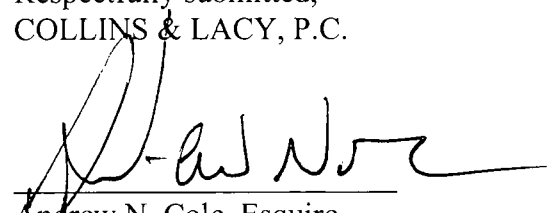
Tri-County respectfully requests Judge McCoy reconsider her Form 4 Order and allocate the setoff in accordance with the setoff spreadsheet that counsel timely presented to the Court at the post-trial motion hearing on Friday, June 7, 2019, and re-submitted by email on Monday June 10, 2019. (Another copy of this spreadsheet is attached to this motion as Exhibit "A") The total setoff that should be applied in this case is \$5,415,000.00, which would reduce the final verdict against Tri-County to \$1,585,000.00. Although Tri-County and all the settling defendants like Complete, Miracle, and Vasquez had different and/or varying scopes of work, they all worked together for the original construction of the Palmetto Pointe project. That is, their contributions made them joint tortfeasors for the original construction of the Palmetto Pointe project. At trial, Plaintiffs asked for one injury and the jury awarded one verdict amount for the claims alleged at trial. However, now in the post-verdict proceedings Plaintiffs asked the Court to ignore the joint tortfeasors and to ignore the clear law regarding setoff. Plaintiffs' position inherently results in a multiple recovery for the same injury claimed at trial. Tri-County requests the Court's reasoning and explanation whether it is applying the incorrect readings of the Atkinson and Riley cases for the final setoff allocation. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 (S.E.2d 716, 724 (2000)) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.").

WHEREFORE, the Tri-County makes this motion asking the Court to reconsider and reduce the judgment in accordance with Tri-County's proposed allocations and setoff amounts

which are based upon relevant case law, statutory law, and equitable principles. Tri-County respectfully requests the Court issue an order stating its reasoning for only setting off the judgment in accordance with Plaintiffs' proposals and not Tri-County's proposals, in order to preserve this issue for future appeal.

Respectfully submitted,
COLLINS & LACY, P.C.

By:

A handwritten signature in black ink, appearing to read "Andrew N. Cole", written over a horizontal line.

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ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

August 5, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE
(2015CP1000955)

The undersigned employee of Collins & Lacy, P.C., hereby certifies that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail and/or by electronically filing via the Court's electronic filing system, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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FILED
2019 AUG -5 PM 4:15
JULIE J. ARMSTRONG
CLERK OF COURT

**PLEADING: TRI-COUNTY ROOFING, INC.'S RULE 59(e), SCRCP MOTION TO
RECONSIDER THE FORM 4 ORDER FILED JULY 23, 2019**



Columbia, South Carolina
August 5, 2019

EXHIBIT "A"

Under seal, per confidentiality order

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,	)	PLAINTIFFS' MEMORANDUM IN
	)	OPPOSITION TO DEFENDANT TRI-
vs.	)	COUNTY ROOFING'S MOTION TO
	)	RECONSIDER THE COURT'S FINAL
ISLAND POINTE, LLC, et al,	)	ORDER
	)	
DEFENDANTS.	)	

Plaintiffs Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc. and Jack Love, individually, and on behalf of all others similarly situated ("Plaintiffs"), by and through their undersigned counsel, respectfully submit this Memorandum in Opposition to Defendant, Tri-County Roofing, Inc.'s ("TCR"), Motion to Reconsider the Court's Final Order filed July 23, 2019 ("Final Order").

SUMMARY OF ARGUMENT

This Court should deny TCR's Motion to Reconsider because the Court properly allocated and set off all applicable settlements. The Court's settlement allocation, which resulted in TCR receiving an additional \$1,670,000 reduction to an already reduced jury award, is reasonable, fair and supported by both the record and South Carolina law.

TCR is not entitled another setoff for many reasons, including: (1) TCR fails to show that the Court unfairly allocated any settlement; (2) TCR seeks to reapportion agreed-upon allocations solely to benefit itself; (3) TCR fails to show that settling defendants paid for the same injury

awarded against TCR; (3) TCR is not entitled setoff based on *The Oaks* decision; (4) TCR already asked the jury to allocate fault and damages amongst different issues; and, (5) setoff is not necessary to provide justice between these parties.

PERTINENT FACTS

A. Overview

This is a construction defect case concerning the Palmetto Pointe Condominiums (“Palmetto Pointe”) located on Peas Island. In 2015, Plaintiffs brought this action seeking compensation to remedy defective conditions existing within a variety of building components at each of the 40 condominiums that comprise Palmetto Pointe. Plaintiffs asserted negligence and breach of warranty claims against the Developers, Island Pointe, LLC, Christopher Union, and Leonard Brown;¹ the General Contractor, Complete Building Corporation (“CBC”); the Architect, Novus Architects, Inc.; the Engineer, CRG Engineering, Inc.;² several manufacturers and material suppliers; and, various subcontractors who also participated in construction (collectively “Defendants”). The work performed by Defendants at Palmetto Point is different and involved distinct building components. For example:

- Alderman Construction (“Alderman”) installed interior trim and railings;
- American Residential Services, LLC (“ARS”) and its subcontractors³ installed HVAC and electrical systems;
- Atlantic Building Construction Services, Inc. (“Atlantic”) and H and A Framing Construction, LLC (“H and A”) installed framing;
- Builders Service’s Group (“BSG”) installed fireplaces;
- Carpet Baggers (“Carpet”) installed carpet and wood flooring;
- Cohen’s Drywall (“Cohen”) installed drywall and insulation;
- Cornerstone Construction (“Cornerstone”) and Miracle Siding, LLC (“Miracle”) installed siding and flashing;
- Creekside, Inc. (“Creekside”) painted and installed caulking and trim;
- Eloy Alonzo Vasquez (“Vasquez”) installed roofing, flashing and deck waterproofing;

¹ Plaintiffs dismissed their claims against Developers before the case went to the jury.

² Plaintiffs dismissed their claims against CRG long before trial.

³ These subcontractors include: Hernandez Electric, LLC; Liliana Rojas Flores; Port City Structured Wiring; Keller Electric, LLC; John F. Tooling Heat and Air; and Warren Anderson.

- JMC Construction, Inc. and JMC Construction, LLC (“JMC”) performed some siding replacement;
- Mosley Concrete (“Mosley”) installed concrete driveways;
- Stanley’s Vinyl Fence Design (“Stanley”) installed exterior railings;
- Tallent and Sons, Inc. (“Tallent”) graded and paved the property;
- Tri-County Roofing, Inc. (“TCR”) installed roofing, siding, and waterproofing membranes; and,
- WC Services, Inc. (“WC”) installed fire sprinklers.

B. Pre-Trial Settlements and Issue Releases

The pre-trial settlements in this case fall within three categories: (1) pre-trial settlements that resulted in issue releases which excluded a Defendants’ scope of work from trial; (2) pre-trial settlements that resulted in the exclusion of portions of a Defendants’ scope of work or related damages at trial; and, (3) pre-trial settlements that did not result in the exclusion of a Defendants’ scope of work at trial.

1. The pre-trial settlements that resulted in full issue releases include:

Defendant	Scope Released from Trial	Settlement Amount
Alderman	Interior Handrails	\$75,000
Andersen	Window Product	\$200,000
ARS	HVAC and Electrical	\$795,000
BSG	Fireplaces	\$22,500
Carpet Baggers	Flooring	\$25,000
Mosley	Concrete	\$95,000
Tallent	Drainage	\$195,000

2. The pre-trial settlements that resulted in partial issue preclusion include:

Defendant	Scope Not Presented at Trial or Resulting Damage Not Included Estimate	Settlement Amount

Atlantic	Shear Walls Window Installation Deflecting Floors Framing Defects	\$700,000
CBC	HVAC Concrete Flooring Interior Handrails Fireplaces Drainage	\$1,000,000
H and A	Shear Walls Window Installation Deflecting Floors Framing Defects	\$500,000

3. The pre-trial settlements that did not result in full issue releases include:

Defendant	Scope Included at Trial	Settlement Amount
CertainTeed	Roof Product	\$35,000
Cornerstone	Siding	\$150,000
Creekside	Painting	\$150,000
Novus	Design	\$650,000

C. Trial

Between May 6-16, 2019, the case proceeded to trial against seven Defendants who had not fully settled: (1) CBC; (2) TCR; (3) Miracle; (4) Vasquez; (5) Stanley; (6) WC; and, (7) JMC. During trial, Stanley (exterior railing installer) settled with Plaintiffs for \$295,000;⁴ and, JMC (performed minor siding repairs) was dismissed by directed verdict at the close of Plaintiffs' case.

The two causes of action against the remaining four Defendants, negligence and breach of implied warranties, were submitted to the jury. The jury found for the Plaintiffs on both claims, awarding actual damages in the amount of \$6,500,000. The jury made an express finding of grossly

⁴ Plaintiffs credited TCR with the full amount of Stanley's settlement in their allocation chart; and, this Court setoff the total amount in its Final Order.

negligent, willful, and/or wanton conduct as to TCR and CBC; and, awarded punitive damages in the amount of \$500,000 separately against each of them. The jury returned a defense verdict in favor of WC.

Following the jury verdict of May 16, 2019, three of the last four Defendants settled with Plaintiffs in the following amounts: CBC (\$1,137,500); Miracle (\$325,000); Vasquez (\$325,000).⁵ This left TCR as the only Defendant who has not settled with Plaintiffs.

D. Post-Trial Motions and Final Order

On May 28, 2019, TCR filed several post-trial motions, including a motion seeking to set off the jury's total \$7,000,000 award. On June 7, 2019, this Court heard TCR's set-off motion, during and after which the parties submitted separate allocation charts. According to Plaintiffs' allocation chart, TCR was entitled a \$1,670,000 setoff. *See* Plaintiffs' Allocation Chart attached hereto as Exhibit A. This Court agreed with Plaintiffs' allocation; and, on July 23, 2019, this Court issued its Final Order which setoff the judgment against TCR by \$1,670,000, for a final judgment against TCR in the amount of \$5,330,000.

E. Motion to Reconsider

On August 5, 2019, TCR moved for reconsideration of the Final Order. In its Motion, TCR argues that the judgment against it should be reduced by an additional \$3,745,000, for a total setoff of \$5,415,000. TCR argues that it is only obligated on \$1,585,000 of the jury's verdict because it is owed a dollar-for-dollar setoff for every settlement dollar paid by any settling defendant to Plaintiffs.

⁵ Ultimately, Plaintiffs did not contest TCR receiving a setoff equaling the totals of the Miracle and Vasquez settlements. Plaintiffs provided TCR a \$137,500 setoff as to the CBC settlement because only this portion of CBC's settlement potentially overlapped with the jury's award based on the contractual allocation included in this settlement agreement. *See* Section II(a) for the CBC allocation.

As explained below, TCR is not entitled to an additional reduction in the judgment against it; this Court's Final Order properly setoff the judgment against TCR.

ARGUMENT

I. This Court Correctly Allocated and Setoff Defendants' Settlements

This Court did not err in finding that TCR was entitled a \$1,670,000 setoff based on Plaintiffs' allocation of Defendants' settlements. Plaintiffs' allocation and the Court's corresponding setoff are reasonable, fair and supported by both the record and South Carolina law. TCR's reconsideration arguments do not prove otherwise and do not show how TCR's allocation is fairer than Plaintiffs' allocation. *See, e.g., In re Wells*, 43 S.C. 477, 21 S.E. 334, 337 (1895) (finding the party seeking departure from the application of standard set-off rules bears the burden of proof and must be "prepared to justify such [reallocation] as fair, bona fide, and just," particularly where "there is an executed contract between [the parties], which is not contested as between them but which is sought to be invalidated by third parties"). As such, TCR has not met its burden and its Motion must be denied.

II. TCR is Not Entitled to a \$5,415,000 Setoff; and, is Only Entitled a Setoff of \$1,670,000.

TCR claims it is entitled a \$5,415,000 setoff based on the total of twelve settlements which equal \$5,415,000: (1) CBC (\$2,137,500); (2) Creekside (\$150,000); (3) Atlantic (\$700,000); (4) BSG (\$22,500); (5) Novus (\$650,000); (6) CertainTeed (\$35,000); (7) Cornerstone (\$150,000); (8) Miracle Siding (\$325,000); (9) Vasquez (\$325,000); (10) Stanley (\$295,000); (11) Cohen (\$125,000); and, (12) H and A (\$500,000). Six of these twelve settlements (Cornerstone, Stanley, Creekside, Miracle, Vasquez, and CertainTeed) are not in dispute because TCR received a setoff for their total amounts (\$1,280,000). This leaves six settlements and corresponding setoff amounts that TCR disputes:

Defendant	Settlement Amount	Injuries Covered by Settlement	Injuries Considered by Jury and Included in Plaintiffs' Reduced Damage Estimate	Setoff Provided
Atlantic	\$700,000 ⁶	Shear Walls Window Installation Deflecting Floors Framing Defects	Arguably None	\$75,000
BSG	\$22,500	Fireplaces	None	\$0
CBC	\$1,000,000	HVAC Concrete Flooring Interior Handrails Fireplaces	None	\$0
CBC	\$1,137,500	HVAC Framing Fire Separations Punitive Damages Exterior Handrails	Exterior Handrails	\$137,500
Cohen	\$125,000	Drywall Insulation	Drywall	\$62,500
H and A	\$500,000	Shear Walls Window Installation Deflecting Floors Framing Defects	Arguably None	\$50,000
Novus	\$650,000	Prof. Negligence All Design Errors	Arguably None	\$65,000

None of the foregoing setoff amounts require this Court's reconsideration as explained below:

A. The CBC Settlement was Contractually Allocated

TCR asks this Court to reallocate and setoff CBC's two settlements totaling \$2,137,500 in their entirety just because the allocations Plaintiffs and CBC agreed to benefit Plaintiffs as opposed to TCR. However, this fact alone is insufficient to warrant reallocation by this Court. *Riley v. Ford Motor Co.*, 414 S.C. 185, 196, 777 S.E.2d 824, 831 (2015). As explained by our Supreme Court in *Riley*,

A plaintiff who enters into a settlement with a defendant gains a position of control and acquires leverage in relation to a nonsettling defendant. This posture is reflected

⁶ Plaintiffs' allocation chart incorrectly indicates that Atlantic settled for \$750,000 when the settlement was actually \$700,000. Regardless, TCR received the \$75,000 indicated.

in the plaintiff's ability to apportion the settlement proceeds in the manner most advantageous to it. Settlements are not designed to benefit nonsettling third parties. They are instead created by the settling parties in the interests of these parties. If the position of a nonsettling defendant is worsened by the terms of a settlement, this is the consequence of a refusal to settle. A defendant who fails to bargain is not rewarded with the privilege of fashioning and ultimately extracting a benefit from the decisions of those who do.

Id. (citations and quotations omitted). Thus, a Court cannot “disturb the settling parties’ agreed-upon allocation solely because the apportionment may have been advantageous to [Plaintiff].” *Id.*

Here, Plaintiffs and CBC contractually allocated its \$2,137,500 settlement as follows:

- CBC’s initial \$1,000,000 settlement (by the first exhausting insurance carrier) was allocated between HVAC, concrete, flooring, interior handrails, and fireplaces.
- CBC’s subsequent \$1,375,000 settlement was allocated between exterior railings (\$137,500); fire separations (\$100,000); HVAC framing (\$400,000); and punitive damages (\$500,000).

Of these items, the record reflects that only the \$137,500 allocated to exterior railings related to a damage issue tried in front of the jury. *See, e.g.,* (TCR Motion, p. 4) (TCR acknowledging that HVAC, window product, grading, paving, flooring, interior trim and railings and concrete issues “were taken out of the case” and not before the jury). This Court agreed and provided TCR a \$137,500 setoff to account for this possible overlap. This determination is reasonable and supported by the facts of this case. On the contrary, allowing TCR to setoff the remaining proceeds that CBC and Plaintiffs contractually allocated (and which does not overlap with TCR’s actual damage) is unreasonable and conflicts with South Carolina precedent.

B. The Atlantic, BSG, Cohen, Novus, and H and A Settlements are Not for The Same Injury

TCR next asks this Court to setoff the Atlantic, BSG, Cohen, Novus, and H and A settlements because it is entitled “a dollar for dollar setoff” of all monies paid by all settling defendants. (TCR Motion, p. 3). This is incorrect. In South Carolina, setoff only “arises

automatically by operation of law” when: (1) a non-settling defendant qualifies as a “joint tortfeasor”; and, (2) a settling defendant compensated the “same plaintiff on the same claim for the same injury” for which the jury awarded damages to the non-settling defendant. *See, e.g.*, S.C. Code Ann. § 15-38-50; *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012) (“A settlement by a joint tortfeasor reduces the claim against the other to the extent of any amount stipulated by the release or covenant. . .so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the non-settling defendant’s right to setoff arises by operation of law.”) (citations omitted) (emphasis added); *Hawkins v. Pathology Assocs. of Greenville, P.A.*, 330 S.C. 92, 114-15, 498 S.E.2d 395, 407 (Ct. App. 1998) (holding when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law).

Here, the Atlantic, BSG, Cohen, H and A, and Novus settlements involve different injuries and claims that do not overlap with the actual damages awarded against TCR. For example, the Atlantic and H and A settlements were framing-related and covered two principle issues: (1) shear walls and (2) window installation. These issues were not presented to the jury at all. The record shows the only possible framing scope litigated that might relate to TCR’s “siding work” was the installation of the windows’ caulk joint. Plaintiffs’ allocation accounted for this potential overlap; and this Court reduced the final judgment against TCR by \$125,000 [Atlantic (\$75,000) and H and A (\$50,000)] to account for the same.

Cohen’s settlement involved drywall and insulation issues. Drywalls issues were litigated at trial; however, insulation issues were not. Plaintiffs allocated Cohen’s \$125,000 settlement equally between the drywall and insulation so that each was attributed \$62,500. This Court reduced the final judgment against TCR by \$62,500 due to the potential of drywall overlap.

BSG's settlement involved fireplaces. Fireplaces were not litigated at trial and do not potentially relate to TCR's roof and siding work that was litigated. As a result, this Court correctly determined that TCR was not entitled to set off any portion of BSG's \$22,500 settlement.

Novus' settlement concerned Plaintiffs' claim for professional negligence, a cause action inapplicable to TCR, as well as several design errors involving different building components that were not litigated at trial such as non-code compliant sheathing nailing patterns. As a result, Plaintiffs' allocated \$65,000 or 10% of Novus' settlement to account for any potential overlap between Novus' and TCR's roles. This Court agreed and further reduced the final judgment against TCR by another \$65,000.

This Court committed no error in finding TCR was only entitled to setoff the foregoing amounts. TCR's arguments to the contrary are unavailing.

First, TCR repeatedly claims Plaintiffs recovered for "the same injuries and claims" without any supporting evidence. This argument ignores the fact that its TCR's burden to prove what amount of the judgment compensates Plaintiffs for the "same injuries or claims" already compensated. How do any of the settlements totaling \$5,415,00 compensate Plaintiffs for "roofs" "siding" or "loss of use"?⁷ What amount of the shear wall, concrete, HVAC, fireplace, fire separation, window, insulation, and flooring settlements overlap with what the jury awarded Plaintiffs? TCR cannot answer these questions so it repeats its "same injury" and "same claim" phrases in hopes this Court will take the bait. This Court should not.

⁷ No settlement paid Plaintiffs for loss of use – a "different" injury Plaintiffs asked the jury to include in its verdict. Thus, loss of use could make up most, if not all, of the jury's entire award. Neither BFS nor this Court can dissect the jury's verdict to find out. . See, e.g., *Residence Owners v. Hiller*, 392 S.C. 172, 191, 708 S.E.2d 787, 797 (Ct. App. 2011) ("Appellants waived appellate review [trial court's failure to submit a special verdict form to the jury] because they failed to request a special interrogatory when the deciding jury was available and in place to review such a matter.").

Second, TCR cites no South Carolina authority that supports its claim that settlements compensating an association for the repair of one building component is the “same” as a jury compensating the association for the repair of another building component. In fact, prevailing South Carolina precedent indicates the opposite. In *The Oaks*, for example, the South Carolina Court of Appeals recently addressed setoff in the construction defect context and its analysis considered the cost to repair different building components as different injuries. *The Oaks at Rivers Edge Property Owners Ass’n, Inc. v. Daniel Island Riverside Developers, LLC*, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017) (citations omitted). *The Oaks* Court ultimately determined that defendants were not entitled to setoff settlements that compensated an association for certain building components because the damages awarded at trial addressed repairs of other building components. The same is true here – the damages awarded at trial address repairs of building components independent of those addressed by settlement.

Third, Plaintiffs did not ask the jury to limit its award to “one injury” by using a general verdict form. Plaintiffs asked the jury to return “one verdict” based on all the evidence presented at trial which included different injuries than the injuries settled prior to trial. This does not mean that TCR is automatically entitled to setoff all settlements against this verdict – rather, TCR still must prove that these settlements overlap with what was awarded such that Plaintiffs would receive a “windfall” recovery. TCR has not done that here.

C. TCR is Not Entitled Setoff based on *The Oaks*

TCR is not entitled setoff because Plaintiffs excluded many, settled issues from trial and reduced the damages it presented to jury. In *The Oaks*, our Court of Appeals recently found setoff was inappropriate in this instance.

The Oaks involved the defective construction of a condominium complex. Prior to trial, plaintiffs settled with several defendants, including the window manufacturer, window installer, caulking subcontractor and framer. The remaining defendants proceeded to a bench trial and were found jointly and severally liable for negligence, gross negligence, and negligent misrepresentation, as well separately liable for various other causes of action. The court awarded the plaintiffs \$7,934,704.06 in damages for the cost of repair. Thereafter, defendants moved for setoff. The trial court denied the motion, and an appeal followed. *The Oaks*, 420 S.C. at 432-35, 803 S.E.2d at 479-81. On appeal, defendants argued the evidence presented at trial established the damages were for items that were the responsibility of the defendants who settled before trial, and the trial court's failure to set off the verdict by the prior settlement amounts resulted in a double recovery. *Id.* at 436, 803 S.E.2d at 481. The Court of Appeals disagreed, finding:

On appeal, defendants argued they were entitled to set off the amount of damages awarded with the amount already paid for the replacement of windows, doors, and brickwork as well as damage to sheathing in a settlement with the window manufacturer, installers, and framers. However, the trial court's order includes repairs independent of those addressed by the settlement for the issues relating to the windows. . . . [T]he damages estimate that was presented. . . by the plaintiffs excluded the windows. . . [Because plaintiffs] removed from their claim the repairs necessitated by the damage caused by the window installation, [defendants] have already received a reduction in claims as contemplated by [the setoff statute]. . .

Id. at 439-42, 803 S.E.2d at 483-84 (emphasis added) (internal quotations omitted).

The Oaks holding makes sense and should be applied here to ensure the same, fair result. To hold otherwise would chill settlements and clog the courts by establishing a rule that the plaintiff must always prove a full set of damages in a multi-party complex, no matter how circumscribed the remaining unsettled issue/damage.⁸

⁸ Stated differently, if the plaintiff still must prove i.e., HVAC defects, the incentive the settle with the HVAC installer is reduced.

Here, like *The Oaks*, Plaintiffs reduced their repair estimate at trial by over three million, and also, further limited their presentation to include defects and damages related to the work performed by the seven Defendants which remained in the case at that time. By virtue of Plaintiffs' reduced claim for damages at trial (\$12,000,000), the jury's further reduction in their verdict (-\$5,500,000), and an even further reduction by this Court post-trial (-\$1,670,000), TCR has received the setoff it is entitled. The relief TCR now seeks would result in a double, or even triple setoff, which is not contemplated either by South Carolina law or principles of equity.

D. TCR Tried Damage Allocation to The Jury

Similarly, the Court should not setoff a verdict that a defendant already argued to the jury should be reduced because other people paid plaintiff. A verdict simply cannot be reduced both because of damage caused by others and for amounts paid by others.

In *McCurry versus Keith*, this Court confronted a scenario in which a circuit court awarded a setoff based upon how the case was ultimately presented at trial 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997). The case, brought by the plaintiff for recovery of video poker gambling losses incurred at defendants' poker establishment, concluded with the trial court finding plaintiff sustained gambling losses of \$8,560, but also earned gambling winnings of \$5,000. *Id.* at 443, 481 S.E.2d at 167. Therefore, the circuit court awarded plaintiff \$3,560. *Id.* Plaintiff made a Rule 59(e) motion requesting the circuit court reconsider its order, arguing the circuit court erred by providing the defendants a setoff of \$5,000 when the defendants failed to formally request setoff. *Id.* The circuit court denied the motion, holding plaintiff "waived her right to contest that any type of setoff should be allowed" because "she brought up her winnings and testified about her winnings without any objection." *Id.* This Court agreed:

[W]e believe McCurry waived her right to object to the trial judge's consideration of her winnings. The Keiths' attorney mentioned McCurry's winnings in her

opening statement and questioned McCurry about her winnings without objection. This constituted a waiver of the right to contest McCurry's winnings on appeal. *See State v. Somerset*, 276 S.C. 220, 221, 277 S.E.2d 593, 594 (1981) (noting that party objecting to course of argument must object). Moreover, McCurry's counsel questioned McCurry about her winnings on direct examination. If gross losses had been the only issue, winnings would not have been relevant. Finally, even had we accepted Appellant's argument that the \$5,000 setoff should have been pled, we would have held the issue tried by implied consent pursuant to Rule 15(b), SCRPC.

Id. at 446, 481 S.E.2d at 168-69 (emphasis added); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (denying setoff because a prior settlement "was understood by the parties" to cover different damages than the damages sought at trial.).

Here, like *McCurry*, damage allocation was tried to the jury. The jury understood Plaintiffs experienced multiple defects and damages because Plaintiffs' initial \$15,000,000 repair estimate, introduced and discussed at length by CBC's counsel, and Plaintiffs' reduced \$12,000,000 repair estimate that they presented at trial both evidenced the many, varied defects existing at Palmetto Pointe. TCR did not object to CBC introducing Plaintiffs' initial \$15,000,000 estimate or to CBC dissecting the estimate item by item in closing, pointing out items in that estimate for which Plaintiffs were paid through prior settlements. CBC argued in closing, apparently successfully, that the prior settlements reduced Plaintiffs' uncompensated damages to \$6,500,000, exactly what the jury awarded in actual damages.

The Court will recall that the jury asked for 12 copies of Plaintiffs' \$12,000,000 estimate during deliberations. When the jury was told that it was not in evidence,⁹ they requested and were provided 12 copies of the \$15,000,000 estimate which Defendants attacked in closing.

⁹ Plaintiffs did not enter their reduced \$12,000,000 into evidence and did not testify to, or otherwise discuss, irrelevant or overlapping portions at trial. TCR, on the other hand, allowed the introduction of Plaintiffs' \$15,000,000 estimate into evidence, consented to CBC discussing unpaid and paid portions of this estimate, and effectively asked the jury to decide setoff.

At the end of the day, the jury knew Plaintiffs suffered damages of over 15 million dollars, the jury knew other parties already paid Plaintiffs portions of this figure, and with this knowledge, the jury did exactly what Defendants asked the jury to do – to compensate Plaintiffs for what they had not already been paid. In other words, the jury’s \$6,500,000 damage award against is in addition to any amount received from prior settlements and this is supported by the overwhelming evidence in record. After receiving the benefit of prior settlements in the jury’s award, TCR received another \$1,670,000 benefit based on these settlements plus the settlements reached during and after trial. There is no basis for another setoff under these circumstances. TCR agreed to allow the jury to allocate fault and damages; and, allowing TCR to again take credit for settlements paid by other parties result in a triple reduction for TCR which should not be permitted.

III. SETOFF IS NOT NECESSARY TO PROVIDE JUSTICE BETWEEN THE PARTIES

Another “equitable” setoff is also inappropriate here because the setoffs TCR has already received are fair. *Rutland v. S.C. Dep’t of Transportation*, 390 S.C. 78, 86, 700 S.E.2d 451, 456 (Ct. App. 2010), *aff’d as modified sub nom.*, *Rutland v. S.C. Dep’t of Transp.*, 400 S.C. 209, 734 S.E.2d 142 (2012) (When viewed through the lens of equity, a trial court’s discretion to set off a judgment should only be “exercised when necessary to provide justice between the parties.”) (emphasis added). Further, Plaintiffs’ recovery is not duplicative of any funds received in connection with previous settlements and does not amount to any windfall. To the contrary, setoff of the damages the jury awarded Plaintiffs as a result of TCR’s conduct would result in a windfall to TCR by allowing it to escape the ramifications of its wrongs. *See, e.g. Murphy v. United States*, 836 F. Supp. 350, 351 (E.D. Va. 1993) (“A plaintiff who receives a double recovery for a single tort enjoys a windfall; a defendant who escapes, in whole or in part, liability for his wrong enjoys

a windfall.”). Simply put, set off is not required to provide justice between these parties because justice has been provided.

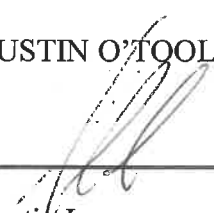
CONCLUSION

Based upon the foregoing, this Court should deny TCR’s Motion because this Court’s allocation and setoff of other settlements is correct; and, TCR failed to meet its burden in showing otherwise.

Respectfully submitted,

JUSTIN O’TOOLE LUCEY, P.A.

By: _____


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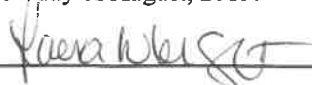
-and-

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Attorneys for the Plaintiffs

August 15, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was emailed to all counsel of record in this proceeding this 15th day of August, 2019.



RELEASE CHART						
Tab from TCR Notebook	Date	Defendant	Entitled to Set Off	Excluded either due to Issue Release or not submitted to jury at trial	Scope	Additional Comments
13	07/09/18	Alderman		\$ 75,000.00	Interior Handrails	Issue Release: Issue and Related Damage Not Presented to Jury
3	04/23/19	ARS		\$ 795,000.00	HVAC/Electrical	Issue Release: Issue and Related Damage Not Presented to Jury
9	01/25/19	CarpetBidders		\$ 25,000.00	Flooring	Issue Release: Issue and Related Damage Not Presented to Jury
18	04/30/19	Anderson		\$ 200,000.00	Window Product	Issue Release: Issue and Related Damage Not Presented to Jury
16	06/06/19	Mosley		\$ 95,000.00	Driveways	Issue Release: Issue and Related Damage Not Presented to Jury
5	07/19/18	Gale		\$ 22,500.00	Fireplaces	Issue Release: Issue and Related Damage Not Presented to Jury
10	03/28/18	Cornerstone	\$ 150,000.00		Siding	
14	05/07/19	Stanley	\$ 295,000.00		Guardrails	
2	06/06/19	Greenside	\$ 150,000.00		Painting/Caulking	
11	06/06/19	Miracle Sales	\$ 325,000.00		Siding	
12	06/06/19	Vasquez	\$ 325,000.00		Roofing/Decks	
8	07/12/18	CertainTeed	\$ 35,000.00		Materials	
15	07/12/18	Cohen's	\$ 62,500.00	\$ 62,500.00	Drywall/Insulation	Insulation Not Litigated; Only Drywall/Firewall Issues Litigated
7	02/22/19	Tallent		\$ 195,000.00	Site Drainage	Not litigated
4	04/12/19	Atlantic	\$ 75,000.00	\$675,000.00	Framing*/+/-	1) Principal Issue Settled was Shear Walls - from Dec. 2017 Britt Peters Depositions - Sheer Wall repair was not litigated and was never in Estimate; 2) Second Principal Issue Settled - Window Installation - Not Litigated; Only Window Trim Caulk Joint, a Siding Issue, was Litigated; 3) Deflecting Floors discussed at trial, but Not Included in Damage Estimate (same as above)
17	01/31/18	H&A Framing	\$ 50,000	\$ 450,000.00	Framing*/+/-	Different Duties Arising Out of Diffent Contracts. <i>Atkinson versus Orkin Exterminating Company, Incorporated</i> , 361 S.C. 156, 159-60, 604 S.E.2d 385, 387 (2004)
6	02/02/18	Novus/SGM	\$ 65,000	\$ 585,000.00	Architect +/-	Allocated Issues and Related Damage Not Presented to Jury. See <i>Riley v. Ford Motor Co.</i> (See Page 5 of 6/6/19 Release)
1	07/10/18	CBC		\$ 1,000,000.00	General Contractor	Allocated Pursuant to <i>Riley v. Ford Motor Co.</i> 414 S.C. 185, 196, 777 S.E.2d 824, 831 (2015) (See Page 5 of 6/6/19 Release)
1	06/06/19	CBC	\$ 137,500.00	\$ 1,000,000.00	General Contractor**	
TOTAL			\$ 1,670,000.00	\$ 5,180,000.00		

*Repair of consequential damages to framing caused by e.g., leaky decks was included, but framing defects were not included. It was shown at trial that the required balcony slope was created by the framer; it was the drip edge and high fascia and sub-fascia below the drip edge that caused the lipping at edge of balconies

** Portion allocated to exterior railings included in setoff

+/- On these three settlements, 10% of the settlement has been allocated to setoff to account for any inadvertent overlap in issues.

Gross Verdict	\$7,000,000.00
Less Set Off Amount	\$1,670,000.00
Judgment	\$5,330,000.00



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
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, 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.

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

Civil Action No.: 2015CP1000955

**TRI-COUNTY ROOFING, INC.'S
RETURN TO PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO
THE MOTION TO RECONSIDER**

FILED
2019 AUG 26 PM 12:40
JULIE J. ARMSTRONG
CLERK OF COURT

Tri-County Roofing, Inc. ("Tri-County") files this Return to Plaintiffs' memorandum in opposition to the motion to reconsider that Tri-County filed on August 5, 2019. Plaintiffs emailed their memorandum to The Honorable Jennifer B. McCoy on August 15, 2019. Tri-County has not received or seen a filed copy of Plaintiffs' memorandum but, out an abundance of caution, Tri-County files this Return to assist Judge McCoy with her ruling on the pending motion to reconsider.

Plaintiffs' arguments and explanations contained in their most recent memorandum are incorrect and, when you review their supporting citations, the law is either misstated or misleading. Plaintiffs essentially ask the Court to construe all prior settlements as collateral sources while using setoff language. The underlying action is a construction defect lawsuit where the Plaintiffs sought damages ultimately to repair their condominiums. These are the same types of damages that

Plaintiffs sought from every defendant that was joined at one time to the case. These are the same types of damages that Plaintiffs could have pursued against every contractor, subcontractor, architect, engineer, or repair company that was involved with the original construction of the Palmetto Pointe condominiums. Tri-County was an alleged tortfeasor in Plaintiffs original complaint. A tortfeasor is “one who commits a tort; a wrongdoer.” Black’s Law Dictionary p.1497 (7th ed., 1999). By definition: every contractor, subcontractor, architect, engineer, or repair company that was involved with the original construction at Palmetto Pointe is a potential joint tortfeasor¹ to the Plaintiffs’ claims, whether they were named in the case or not.

Tri-County was not the only party that constructed the Palmetto Pointe condominiums. Tri-County was not the only party that was sued in the underlying lawsuit. Tri-County was not the only defendant when this case went to trial on May 6 through 16, 2019. Tri-County was not the only defendant that received a verdict against it from the jury. In fact, in these post-trial setoff arguments, the Court is asked to overlook the fact that Complete Building, the general contractor, was one of the co-defendant tortfeasors at trial that received the same verdict against it that the jury assessed against Tri-County. In its post-trial motions and in its motion to reconsider, Tri-County asks the Court to consider the *entire* case that was tried before the jury and to allocate a complete setoff commensurate with the items that were not removed from the jury’s deliberations.

As counsel for Tri-County argued at the post-trial motions hearing on Friday, June 7, 2019, the items referenced during trial as “issue releases” are not included in Tri-County’s setoff figures. In fact, the discussion of what were considered issue releases came up numerous times at trial by all of the attorneys representing the parties at trial. The parties at trial agreed that the jury would not be asked to award damages for the following issue release topics:

¹ A “joint tortfeasor” is “two or more tortfeasors who contributed to the claimant’s injury and who may be joined as defendants in the same lawsuit.” Black’s Law Dictionary, p. 1497 (7th ed., 1999).

- HVAC installation claims;
- Window product claims;
- Grading and paving claims;
- Interior flooring claims;
- Interior trim and railing claims; and
- Concrete claims.

The settlement amounts for these issue releases totals \$1,385,000.00. Tri-County did not ask for these settlements as setoffs. Tri-County conceded that these issues were not tried in front of the jury. In fact, both the Plaintiffs and the parties at trial made it clear to the jury that the damages for these issue releases should not be included in the final jury verdict. This is supported by the case of The Oaks at Rivers Edge Property Owners Association, Inc. v. Daniel Island Riverside Developers, LLC, 420 S.C. 424, 803 S.E.2d 475 (Ct. App. 2017), reh’g den. (Oct. 19, 2017). In The Oaks, the Plaintiffs’ total repair estimate was approximately \$13M but, because of issue release settlements, the Plaintiffs only asked for approximately \$9M in damages at trial. Post-trial, Daniel Island asked for a setoff of the \$4M difference between the total cost estimate and the Plaintiffs’ demand at trial, but the court of appeals agreed with the trial court that Daniel Island “already received the benefit of the [\$4M] settlements” when the Plaintiffs only asked for the reduced \$9M at trial. See Id. at 442, 803 S.E.2d at 484. The issue releases referenced in the Palmetto Pointe trial are similar to the \$4M settlements referenced in The Oaks case.²

Plaintiffs’ cost estimator, Mr. Handegan, testified that he modified his original repair cost estimate by subtracting out the issue releases and then adding in additional costs for additional fire wall and fire sprinkler damages. The Plaintiffs’ revised estimate total was \$13,428,826.00. This was a net deduction from Plaintiffs’ full cost estimate of \$1,828,686.00. In his closing arguments,

² Plaintiffs discuss The Oaks case in their memorandum. Plaintiffs also provide a block quote of the Court of Appeal’s “finding” in The Oaks. Tri-County merely requests that the Court read the full opinion in The Oaks and not rely on Plaintiffs’ edited citation to the case. Plaintiffs pick-and-choose and bundle together approximately 12% of the words actually written in The Oaks over the span of three pages in the S.C. publication of the case.

Plaintiffs' counsel restated the \$13M figure and then told the jury he was taking out the clubhouse damages and the window product issues and then adding back in lost use damages for a revised request to the jury for \$12.8M. Stated another way, Plaintiffs claimed at trial that their total damages when the issue released items were taken out was \$12.8M. Tri-County is not asking for a setoff of the settlements for the issue releases that reduced Plaintiffs' demand at trial from more than \$15M to \$12.8M. Tri-County is asking for a setoff of all of the claims *other than the issue releases* that were tried before the jury.

The non-issue release settlements received by the Plaintiffs add up to \$5,415,000.00. This is the amount that should be setoff from the verdict handed down by the jury. The jury determined that the non-issue release damages claimed by the Plaintiffs was \$6.5M in actual damages plus an assessment against both Tri-County and Complete Building of \$500,000.00 each in punitive damages. Importantly, the jury's verdict included all the claims that Plaintiffs sought against Complete Building, the general contractor. This includes the siding, roofing, and waterproofing work that was part of Tri-County's scope of work as well as, among other items, the claims regarding the fire walls, fire sprinklers, exterior railings, painting, framing, architectural plans used by the general contractor, overall project supervision, and window installation. However, Plaintiffs acknowledge only select pieces of these matters at trial for setoff.

Plaintiffs reference Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015) for the proposition that a Plaintiff can use settlements as leverage against non-settling defendants. The Riley court references an Illinois Court of Appeals case that discusses how a non-settling defendant should not benefit from the settlements reached by prior settling parties. Prior to trial, Riley's estate settled with a defendant and allocated most of the settlement to the survival claim and a smaller portion to the wrongful death claim. After trial, Ford moved to reallocate the settlement.

The Court of Appeals reallocated the settlement, but the Supreme Court reversed and let the original allocation stand. The Supreme Court found that the “totality of the circumstances” in the case, and because there was evidence in the record of Riley’s conscious pain and suffering, the court should not have reallocated the settlement. But Riley does not support the argument that a Plaintiffs’ settlement allocation should never be reviewed by the court.

Plaintiffs reference the Court of Appeal’s opinion in Rutland v. S.C. Dep’t of Transp., 390 S.C. 78, 700 S.E.2d 451 (Ct. App. 2010) (Rutland I). The Rutland I court acknowledges that “[t]he trial court’s jurisdiction to set off one judgment against another is equitable in nature and should be exercised when necessary to provide justice between the parties.” Id. at 82, 700 S.E.2d at 453-454 (quoting Welch v. Epstein, 342 S.C. 279, 313, 536 S.E.2d 408, 425 (Ct. App. 2000)).³ The Supreme Court affirmed as modified Rutland I. See Rutland v. S.C. Dep’t of Transp., 400 S.C. 209, 217, 734 S.E.2d 142, 146 (2012) (Rutland II). Notably, both the Rutland I and the Rutland II courts found that it was proper to reallocate the prior settlement allocation between claims for wrongful death and survivorship. The total settlements paid prior to trial added up to \$305,000. After trial against SCDOT for wrongful death, the jury returned a verdict for \$300,000. SCDOT then made a motion for setoff and asked that the entire settlement be allocated to the wrongful death action, which would result in Rutland receiving a zero-dollar judgment at trial. The appellate courts found that the proposed allocation was improper because there was no evidence of conscious pain and suffering suffered by the deceased and, therefore, no basis to allocate any of the prior settlement funds to the survivorship claim. “Compensatory damages are intended to make the plaintiff whole, not to punish the tortfeasor.” Rutland II at 217, 734 S.E.2d at 146.

³ Plaintiff modifies this citation in its memorandum by adding the word “only” in the parenthetical to suggest a more limited application of setoff.

“Where reallocation of damages furthers that policy, we do not believe the result is inequitable.”

Id.

The risk to the non-settling defendant at trial is the Plaintiffs may prove their damages in an amount higher than the monies they received in settlement. Asking the court to setoff the prior settlements against the verdict is not a windfall for the non-settling defendant. There is no heightened standard requiring Tri-County to prove a fair and just allocation or setoff. Plaintiffs’ reliance on In re Wells, 43 S.C. 477, 21 S.E. 334 (1895) is misplaced and misleading. Wells addresses the question whether one judgment should be set off by a separate judgment that was assigned to another party. The Wells court states that when the assignee of a judgment wishes to execute on the judgment or use it to setoff payment owed on a separate judgment, “such assignees must always be prepared to justify such assignments⁴ as fair, bona fide, and just claims.” Id. at 337, 21 S.E. at 337. Indeed, it is established law that a non-settling defendant is entitled to a dollar for dollar setoff of any monies paid by the settling defendants to the plaintiff. Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992). Applying set off is mandatory. “[I]n the absence of bad faith, the function of the trial court is limited to applying the settlement credit pursuant to §15-38-50.” Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271 (Ct. App.1999). The court has no discretion to ignore applying a setoff and, when the settlement is for the same injury as a matter of law, the right to setoff arises as an operation of law. See Huck v. Oakland Wings, LLC, 422 S.C. 430, 437, 813, S.E.2d 288, 291 (Ct. App. 2018), cert. den. (Aug. 3, 2018) (citations and internal quotations omitted). “A non-settling defendant is entitled to credit for the amount paid by another defendant who settles.” Welch, 342 S.C. at 312, 536 S.E.2d at 425 (citations omitted).

⁴ Plaintiffs substitute the word “reallocation” for the word “assignments” in the original text. This changes the meaning of the cited passage. The terms “reallocation,” “allocation,” or “allocate” are not included anywhere in the text of Wells.

Only one of the settlement agreements entered between Plaintiffs and a settled party includes a specific setoff allocation. The settlement agreement entered between Plaintiffs and Complete Building was entered on June 6, 2019, which is approximately one month after the case was tried and the morning the post-trial motions were argued. Plaintiffs' other settlement allocations were stated in Plaintiffs' memorandum in response to the post-trial motions and were revised in Plaintiffs' email to Judge McCoy on Monday, June 10, 2019. Plaintiffs now seek to maximize their recovery by minimizing the setoff that should be awarded. This inherently leads to a multiple recovery by Plaintiffs. Plaintiffs claim the damages at trial are different from the non-issue release settlements reached before, during, and after the trial. Plaintiffs reference the case of Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (2012), as support of their claims. The appellate court in Widener reversed the trial court and found that a setoff was warranted. The court found no distinction between a settlement trying to distinguish between claims for actual verses punitive damages arising out of a claim against a deferred compensation program. The court found that the two types of claimed damages arose out of the same claim for determining setoff. Widener supports Tri-County's arguments.⁵

⁵ Plaintiffs reference only part of the paragraph in Widener where the court outlines the applicable law. The full, unedited paragraph reads as follows:

"[T]here can be only one satisfaction for an injury or wrong." Hawkins v. Pathology Assocs. of Greenville, P.A., 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998) (internal quotation marks omitted). *A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant."* S.C.Code Ann. § 15-38-50(1) (2005). Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, *so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury.* Hawkins, 330 S.C. at 113, 498 S.E.2d at 406-07. *When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law.* Ellis v. Oliver, 335 S.C. 106, 112, 515 S.E.2d 268, 271-72 (Ct.App.1999). Under this circumstance, "[s]ection 15-38-50 grants the court no discretion ... in applying a set-off." 335 S.C. at 113, 515 S.E.2d at 272; *see also Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct.App.2008).

Widener, 397 S.C. at 471-472, 724 S.E.2d at 190 (italicized emphasis is the language cited in Plaintiffs' memorandum).

The appellate court in Hawkins v. Pathology Associates of Greenville, 330 S.C. 92, 498 S.E.2d 395 (Ct.App. 1998), reh'g dismissed (March 17, 1998), analyzed the "same cause of action" requirement for setoff. At different times, Mrs. Hawkins was a patient of a doctor in South Carolina and a doctor in Georgia. Independently, both doctors missed the detection of cervical cancer, which Mrs. Hawkins subsequently died from. She settled with her Georgia doctor and tried the case against her South Carolina doctor. The appellate court found that the Georgia wrongful death statute contained different elements from the South Carolina wrongful death statute, and therefore, the settled claim and the claim that was tried were different and not susceptible to setoff. This is distinguishable from Palmetto Pointe. In Palmetto Pointe, the Plaintiff was seeking recovery for the repairs to the property, which is the same claim against all of the parties involved with the original construction of the project.

In McCurry v. Keith, 325 S.C. 441, 481 S.C.2d 166 (Ct. App. 1997), reh'g den. (Feb. 20, 1997), cert. denied (Dec. 5, 1997), the appellate court found setoff was proper. Plaintiff was able to recover her gambling losses pursuant to an applicable statute, but she argued that her gambling winnings should not be used to reduce the total award at trial. At trial, Plaintiff was cross examined with the specific amount of her gambling winnings. It was on this basis that the appellate court concluded that the Plaintiff "waived her right to object to the trial judge's consideration of her winnings." See Id. at 446, 481 S.E.2d at 169. This case does not stand for the proposition that the Palmetto Pointe jury already allocated setoff. The Palmetto Pointe jury only heard testimony of the issue release settlements that were taken out of the case and should not be used in deliberations.

The case of Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795 (U.S. 1971), is an antitrust lawsuit between two large electronics companies. The third part of this opinion discusses the effect of a release that was executed between Zenith and other parties

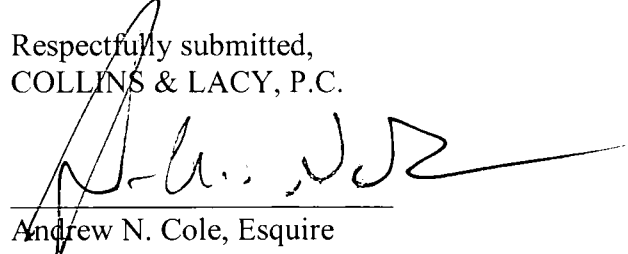
described as co-conspirators with Hazeltine. The court found that Hazeltine was not a beneficiary of the release. The court then discussed whether any portion of the settlement monies paid in consideration of the release of the co-conspirators should be setoff in the current matter between Zenith and Hazeltine. “It is settled that entirely apart from any release, a plaintiff who has recovered any item of damage from one coconspirator may not again recover the same item from another conspirator; the law, that is, does not permit a plaintiff to recover double payment.” *Id.* 401 U.S. at 348, 91 S.Ct. at 811. The court, however, found a specific exception in this case because of a clear understanding between Zenith and Hazeltine. “[t]he record below indicates that a defense of payment could not here be sustained for, while the 1957 release did extend to future damages, the undisputed and unimpeached testimony of Zenith’s witnesses was that the \$10,000,000 settlement *was understood by the parties* as compensation only for Zenith’s damages up to the date of the release.” *Id.* (italicized emphasis is the quoted section in Plaintiffs memorandum). That is, the Zenith court applies an exception to the general setoff rule based on a finding that the parties clearly understood that the settlement was not going to be used for setoff. The only settlements that this exception could apply to in Palmetto Pointe are the issue release settlements. There certainly was no meeting of the minds between Plaintiffs and Tri-County regarding the non-issue release settlements.

The case of Murphy v. U.S., 836 F.Supp. 350 (E.D.Va. 1993) is a collateral source case. In fact, the section cited by Plaintiffs in their memorandum is taken directly from a block quotation discussing the collateral source rule. The Murphy court found that medical bills that were paid by the government because of benefits the Plaintiff earned while serving in the Navy were similar to payments by an insurance company paying medical bills. These payments were collateral sources and not subject to setoff.

CONCLUSION

The issue release settlements were for issues and damages that were not presented to the jury in the Palmetto Pointe trial. However, all other items that were not otherwise covered by the issue releases were included in the trial. The parties at trial, which included the Plaintiffs and the defendants that were part of the jury verdict sheet (Complete Building, Tri-County, WC Services, Miracle Siding, and Eloy Alonzo Vasquez), agreed which items were considered issue releases. Now that Tri-County is the sole non-settling defendant, there is a disagreement regarding the remaining issues that were before the jury. To avoid Plaintiffs from recovering more than once for damages that they have already received in settlements from the non-issue release items, a full and proper setoff should be applied. Tri-County respectfully states that the total setoff that should be applied in this case is \$5,415,000.00, which would reduce the final verdict against Tri-County to \$1,585,000.00.

Respectfully submitted,
COLLINS & LACY, P.C.

By: 

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ATTORNEYS FOR TRI-COUNTY
ROOFING, INC.

August 23, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE
(2015CP1000955)

The undersigned employee of Collins & Lacy, P.C., hereby certifies that (s)he has served the following named individual(s) with a copy of the pleading(s) indicated below via electronic mail and/or by mailing a copy of same to them in the United States mail and/or by electronically filing via the Court's electronic filing system, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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Charleston, SC 29402

Attorneys for Plaintiffs

**PLEADING: TRI-COUNTY ROOFING, INC.'S RETURN TO PLAINTIFFS'
MEMORANDUM IN OPPOSITION TO THE MOTION TO RECONSIDER**



Columbia, South Carolina
August 23, 2019

2019 AUG 20 11:11 AM
JULIE J. ARMSTRONG
CLERK OF COURT

2019 AUG 26 PM 12:41
JULIE J. ARMSTRONG
CLERK OF COURT

FILED



Richelle Campbell | D: 803.255.0479 | E: rcampbell@collinsandlacy.com
Legal Secretary

August 23, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: Palmetto Pointe at Peas Island Condominium Property Owners Association, Inc.,
et al. v. Tri-County Roofing, Inc., et al.
Civil Action No. 2015CP1000955
Claim No. R&A THA10396
C&L File No. 001083-00167

Dear Ms. Armstrong:

Enclosed for filing please find the original and one copy of Tri-County Roofing, Inc.'s Return to Plaintiffs' Memorandum in Opposition to the Motion to Reconsider regarding the above matter. Please file the original and return a clocked-in copy to me.

With warmest regards, I am,

Very truly yours,


Richelle Campbell
Legal Secretary

Enclosures

cc/enc: The Honorable Jennifer McCoy
Edward D. Buckley, Jr., Esquire
Stephanie Drawdy, Esquire
Joshua F. Evans, Esquire
Justin O. Lucey, Esquire
(via e-mail only)

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:

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Joshua F. Evans

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G. Troy Thames
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R-0661

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	---
29	Tri-County Roofing Change Order	95	---
36	Tri-County Roofing Change Order	95	---
46	Drawing by Tri-County	95	---
48A	Amended and Restated Master Deed	95	---
55	Email Poyner	95	---
111	Plans	95	413
128	Andersen 200 Ser. Narroline	95	349
141	Folly Beach Code	95	---
148	Mease Construction Photolog	95	---
157	Tri-County Contract #6972	95	---
164	Sales Subcontractor File	95	---
169	Sealoflex Warranty to Poyner	95	---
170	Sub Vasquez Invoices & Form	95	---
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 (WHEREUPON, on record 5/6/2019, 11:08 a.m., pre-trial.)

2 THE COURT: All right. So attorneys just state your
3 names for the record and who you represent. We are happy to
4 hear from you.

5 MR. BUTLER: Good morning, Your Honor. I am Drew Butler.
6 I am an attorney with the Richardson Plowden firm here in
7 Charleston. I have been retained to represent Mosley Concrete
8 in the present case.

9 I am just putting on the record today that we were able
10 to resolve our claims with plaintiff's counsel and with the
11 general contractor prior to today's trial. We were able to
12 secure a settlement that resolved all claims, all pending
13 claims against my client. We are working on the release
14 language now. We will have that exchanged and have a
15 stipulation of dismissal filed shortly.

16 THE COURT: Okay. Sounds good.

17 Anybody else? Mr. Lucey, you need anything -- you need
18 to add on that ---

19 MR. LUCEY: No, ma'am.

20 THE COURT: Okay.

21 MR. LUCEY: We have a signed agreement.

22 THE COURT: Perfect. Thank you very much.

23 Well, I appreciate you being here.

24 MR. KENDALL: Well, I think I just -- it also involved a
25 release of our cross-claim ---

1 THE COURT: Sure. Right.

2 MR. KENDALL: --- in exchange for an issue release which
3 is part of the agreement being circulated.

4 THE COURT: Thank you, Mr. Kendall.

5 MR. BUTLER: Thank you, Your Honor.

6 THE COURT: Thank y'all. Have a good week.

7 (WHEREUPON, Mr. Butler exits the courtroom.)

8 (WHEREUPON, break awaiting jury panel 5/6/19, 11:10 a.m.)

9 (WHEREUPON, resume 5/6/19, 11:25 a.m.)

10 THE COURT: Good to see you. My name is Jennifer McCoy.
11 I will be presiding over a trial that will take place in this
12 courthouse this week involving these attorneys that are
13 sitting before you.

14 The name of this case, ladies and gentlemen, is Palmetto
15 Pointe at Peas Island Condominium Property Owners Association,
16 Inc., and Jack Love trustee on behalf of the Love-McKim Living
17 Trust versus Island Pointe, LLC, Complete Building Corp.,
18 Tri-County Roofing, Stanley's Fence, and W.C. Services.

19 Ladies and gentlemen, this case has to do with some
20 alleged claims of construction defects at Palmetto Pointe at
21 Peas Island in Charleston, South Carolina. Peas Island is
22 located on Folly Road on the left or northeast side
23 approximately a mile before Folly Road ends at Folly Beach.

24 Has any member of the jury panel heard anything or does
25 any member know anything specifically about the claims

1 trial of this case. All right.

2 And with that I will turn you over to the bailiffs and I
3 will see you back tomorrow morning at 9:30. Thank y'all very
4 much.

5 (WHEREUPON, jury exits 5/6/19, 1:15 p.m.)

6 THE COURT: Please be seated. I understand we have
7 several motions we need to get into this afternoon. I would
8 like to eat lunch. I am sure y'all would too. Is this a good
9 time to do that for everybody?

10 (WHEREUPON, counselors confer.)

11 THE COURT: Anything anybody needs to put on the record
12 before we eat lunch? All right. What time is it -- 1:15.
13 Y'all be back by 2:30; is that okay?

14 DEFENSE COUNSEL: Yes.

15 THE COURT: All right. Thank y'all. See y'all at 2:30.

16 (WHEREUPON, lunch break 5/6/19 1:16 p.m.)

17 (WHEREUPON, Plaintiff's Exhibits pre-marked for identification
18 as follows: 5A, 9, 22, 29, 36, 46, 48A, 55, 111, 121, 128,
19 141, 148, 157, 164, 169, 170, 189, 203, 259, 272, 340, 342,
20 478, 583, 619, 669, 670, 671, 677, 679, 705, 710, 713, 722,
21 726, 751, 764, 689, 822-827, 828, 852, 853, 854, 889, 891,
22 893, 895, 931, 961-1000, 1003-1012, 1040-1043, 1049-50.)

23 (WHEREUPON, resume 5/6/19, 2:36 p.m., following lunch.)

24 THE COURT: We have a couple of motions for summary
25 judgment as I understand it and some pretrial motions, several

1 motions in limine. I am happy to address these in whatever
2 fashion the attorneys deem most efficient.

3 MR. LUCEY: Yes, Your Honor. Plaintiff's motion in
4 limine I believe it was filed first and if we did it in
5 chronological order we would proceed. First the motion --
6 does the court need a courtesy copy or does the court already
7 have a copy? We had emailed these in on Friday.

8 THE COURT: Yeah, I am just making sure. If you have a
9 copy that is great. I can give it back to you. I just -- if
10 you don't, don't worry about it. Oh, wait. I have it, Mr.
11 Lucey. I'm sorry. Yes, go ahead. I have it.

12 MR. LUCEY: Ma'am, the first motion in limine presents a
13 question regarding a document called an engineering judgment.
14 Your Honor, we are down to perhaps five or six major issues in
15 this case, and one of them relates to fire protection.

16 THE COURT: Okay.

17 MR. LUCEY: And the fire protection has three or four sub
18 issues. And in a multi-family house or complex like this
19 typically the residential units have to be separated by what
20 is called a UL approved fire assembly. And in this case the
21 architect specified UL Assembly 341. And that is what
22 everybody on the site was to follow.

23 Well, 341 does not allow -- the typical attic firewall,
24 so the court may be aware, it is drywall on both sides just to
25 slow a fire down. UL341 does not allow wood to penetrate that

1 again I find that -- I don't know of any rule that says you
2 can do that.

3 THE COURT: We will just have to weigh the prejudice at
4 the time of the trial. But certainly your objection is
5 preserved for the record. And when we get to the point if it
6 become necessary for me to make a ruling we will do it. All
7 right.

8 MR. LUCEY: Ma'am, that covered five and six.

9 THE COURT: Okay.

10 MR. LUCEY: And seven, we have agreed to issue preclusion
11 in about half of the settlements where we have actually
12 removed the damage amount and crossing that damage item out of
13 our estimate and we are not presenting evidence as to that
14 defect.

15 One of the best examples is interior handrails, okay.
16 With an issue precluded the defendant there is no longer a
17 causal connection for any remaining defendant to say that
18 issue preclusion defendant caused my damages. They should not
19 be able to refer to any defendant upon which issue of
20 preclusion has been granted.

21 The only purpose of referring to the prior defendants is
22 to impeach us, say that we blame somebody else for their
23 damages. We didn't. We only blame them for the damages that
24 were removed from the case, and we would ask that the
25 defendants not be permitted to refer to the four or five

1 settlements that resulted in issue of preclusion at their
2 request.

3 THE COURT: Okay. Who would like to be heard on an empty
4 chair issue?

5 MR. KENDALL: I honestly think that it is correct if they
6 don't raise the issue and try to tag us with it then there
7 is -- then it is not even relevant to the case, and we don't
8 intend to be coy about it so.

9 THE COURT: Okay. All right. It has been brought to my
10 attention. We will deal with it if it becomes an issue.

11 Yes, sir?

12 MR. COLE: This touches on I think the motion in limine
13 that some of the defendants have that goes to -- we know that
14 Justin has removed some issues because he has gotten some
15 releases that are issue releases for those. But I haven't
16 seen what that update is. So we really actually don't know
17 yet what that final number is that Justin is coming to because
18 he hasn't outlined that to us.

19 And I think just as a matter of fairness we need to know
20 what plaintiff's damages are intended to be when they want to
21 show it up.

22 You know, a year and a half ago we knew what they were
23 because we deposed their expert. But then that has been
24 amended somehow with -- I am not sure exactly how it is
25 amended. We have got new numbers out there.

1 But I am not sure how plaintiffs are going to present it.
2 So I think just in fairness we need to know what they are
3 saying. And, you know, we know we can cross out things
4 ourselves, but we don't know if that is what they are
5 intending.

6 MR. LUCEY: Plaintiffs have three million in
7 issue-preclusion damages. Fifteen million less three million
8 is twelve million going to trial. There will be several
9 million additional of set-offs at least for the general
10 contractor. The applicability of set-offs to other defendants
11 remains to be seen.

12 But so -- but that would be a post-trial reduction. So
13 we are going to trial on twelve million dollars plus loss of
14 use, Your Honor. Thank you.

15 THE COURT: Does that answer your question?

16 MR. COLE: In part. I guess we will have to see what
17 happens when we are in trial so.

18 THE COURT: Okay. All right. Let's so -- Number 8.
19 Does that ---

20 MR. LUCEY: Your Honor ---

21 THE COURT: --- kind of go hand in hand with seven it
22 looks like?

23 MR. LUCEY: It is the opposite side of the coin. There
24 are settlements that did not result in issue of preclusion.

25 We get that they get to make a brief reference to this

1 empty chair. Any more than that we will have to go into the
2 fact that the third-party plaintiff had claims and they also
3 released those claims. I am not sure that is something that
4 is starting to get a little complicated for the jury.

5 We are just bringing it to the court's attention that we
6 believe that there is a point in which they open that door too
7 far and we start litigating those settled issues again
8 ourselves.

9 THE COURT: Okay.

10 MR. KENDALL: I agree with that is fair. But, you know,
11 names will come up because the issues are still in, you know,
12 who did that work; that kind of thing. But I think you are
13 right, to say there have been -- that part of it is over with.
14 I don't think that ---

15 MR. LUCEY: And as I think I have put in this motion --
16 Your Honor, unless I am instructed otherwise I will refer to
17 those claims as simply resolved claims.

18 MR. KENDALL: That is a good word.

19 THE COURT: Is there any word -- any problem with
20 resolved?

21 MR. KENDALL: That is a good word.

22 THE COURT: Okay. Great. Glad we can agree on that.

23 All right. Finally, Number 9.

24 MR. LUCEY: Number 9, Your Honor. This court scheduled
25 this trial about six or seven months ago. About four weeks

1 ago, five weeks ago, we got a notice from the defendant
2 general contractor that its principle witness and owner Vic
3 Apac would be out of country and we would need to perpetuate
4 that deposition.

5 We began working with them to schedule that. The order
6 for the stay came out. The general contractor unilaterally
7 canceled the perpetuation of that deposition.

8 We wrote the general contractor -- I don't know if this
9 was during the stay or once it got lifted. We said we will
10 pay to have his deposition taken by video anywhere in world,
11 let us know when and where. We have never had a response to
12 that offer.

13 At this point we just don't want the contractor to
14 somehow imply that his witness or his owner not being here,
15 his client not being here, is in any way the fault of the
16 court or scheduling or anything else. They knew seven months
17 ago this trial was going forward on May 6th.

18 THE COURT: Okay.

19 MR. KENDALL: Your Honor, I don't intend to blame the
20 court for anything. I did -- I obviously raised that issue
21 with the court and as a prejudice lifting the stay. I will
22 rest on that as far as my disagreement with Your Honor.
23 Certainly I am not going to blame the court in front of the
24 jury.

25 But he won't be here. He -- for what it is worth, he

1 declined the offer to participate. I did extend that offer.

2 THE COURT: Okay. All right. Not going to be here.
3 Won't make references.

4 All right. What else?

5 MR. KENDALL: As long as I am talking, Your Honor, the
6 second motion is by CBC regarding the class allegations. The
7 court may recall plaintiff stipulated about six months ago in
8 front of Your Honor that we were proceeding on the assignments
9 instead of the class allegations.

10 We did make a motion to amend. In fact filed an amended
11 complaint on point. Some other parties objected that they
12 hadn't been in the loop or something. So that never got
13 formalized. But we are not intending to proceed on a class
14 certification or the class allegation. Our clients have
15 assignments to the HOA, and we have an exhibit prepared with
16 every client's signature ready to put into evidence.

17 THE COURT: Okay.

18 MR. KENDALL: Your Honor, the way I recall that
19 conversation -- and I don't recall we ever got a motion -- or
20 a complaint that mirrored it. But anyway, that is water under
21 the bridge. So if those allegations are being removed and
22 there won't be references to class status or anything of that
23 nature then thank you.

24 THE COURT: Okay.

25 MR. LUCEY: There may be an inadvertent reference to the

1 homeowner as a group or a class ---

2 MR. KENDALL: Oh, sure.

3 MR. LUCEY: But it's -- but not saying there is a
4 certified class or anything like that.

5 MR. KENDALL: Right. I understand. They are a group.

6 THE COURT: Okay.

7 MR. LUCEY: That is all from the plaintiff, Your Honor.

8 THE COURT: All right.

9 MR. KENDALL: Your Honor, Rhett Kendall again. We had
10 one other motion that we had filed, and it mirrors what Mr.
11 Lucey has already raised in terms of the issue of preclusion.

12 So we have -- we listed out the ones that we have. I
13 think there is a little bit of difference from the list that
14 he had: Andersen products. Alderman on interior Handrail.
15 ARS and all of its subcontractors on HVAC and electrical.
16 Builder Services Group, DBA Gayle were fireplaces. And Kelly
17 Flooring was a limited issue.

18 And we probably ought to talk to each other in advance to
19 make sure we don't step on each other. I think we probably
20 have an agreement in spirit. We generally do. But we will
21 get together and figure that one out.

22 But I wanted to raise to the court that my list was just
23 slightly different than the list that he had.

24 THE COURT: Okay.

25 MR. KENDALL: But and I hope we can work everything

1 through.

2 MR. LUCEY: Yes, Your Honor, if I may clarify the list
3 for both of our benefits. As to Andersen Windows what is
4 settled is any allegation of manufacturing defect. As to ARS
5 and its subcontractors what is settled is any defect that is
6 the sole liability of ARS and its electricians and its HVAC
7 subs.

8 The actual HVAC repair and electrical repair line --
9 and the estimate is growing out the window. There is a
10 semi-related HVAC related area which is that the framer didn't
11 build access to the HVAC units. The framing issue is still in
12 the case. That has nothing to do with the HVAC subcontractor.

13 THE COURT: Okay. All right. What else?

14 MR. LUCEY: Number 4 would be Tri-County's motion to
15 publish the pleadings, Your Honor.

16 THE COURT: Okay.

17 MR. COLE: Well, let me find where it is in my notebook
18 here, Your Honor.

19 THE COURT: Take your time.

20 MR. COLE: And I have copies of all of these things that
21 we -- since we were in Columbia we decided it would be faster
22 to drive down here and file these things this morning so I
23 could hand up what we've got.

24 THE COURT: I have Tri-County's motion to publish
25 pleadings.

1 MR. COLE: Okay. All right. Well, the Clerk's Office is
2 on the ball.

3 THE COURT: If it was emailed to my clerk then I have it.
4 Yes.

5 MR. COLE: Yeah, we -- yeah, we emailed them so.

6 THE COURT: Yes, then I have got it.

7 MR. COLE: So you just don't have the stamp on it. So I
8 have got the stamp now.

9 It is simply, Your Honor, I mean it is under the rules we
10 are allowed to publish the pleadings for any reason. I just
11 want to make sure that we are able to do that and are not
12 going to be restricted from it. We need to use it during the
13 course of our case.

14 THE COURT: Sure, well, is there a problem with that?

15 MR. LUCEY: Well, the rule actually reads - and he quoted
16 it in his motion - that he may publish his pleading. He is
17 asking to publish our pleading.

18 We -- generally speaking -- I mean that is an archaic
19 method of getting anything to the jury. So we don't
20 experience it very much.

21 We do have a couple of criteria we think should be
22 addressed which is, one, issue precluded portions of the
23 pleadings should not be published; two, he wouldn't publish
24 class pleadings; three, he won't cherry pick what he
25 publishes; four, he does it -- it is traditionally as I

1 understand it back in the day, and this probably predates me,
2 but back in the day you published it in either your opening or
3 your closing. So as long as he is using his time to do that
4 and not all of our time we are fine with it.

5 There is some legal ease in the pleadings, Your Honor,
6 which is in part estoppel from pleading in the statute of
7 limitations or the statute of repose. We are not sure of the
8 benefit of publishing that kind of stuff to the jury. I think
9 we may be going backwards on that.

10 There is no strict liability claim left in the case. So
11 that would not be published. And by my statement right now
12 plaintiff is dropping the final cause of action which is the
13 DJ reformation cause of action. So that shouldn't be
14 published either.

15 THE COURT: Okay. Certainly within the parameters of the
16 rules it can be allowed. So we will just take it as it comes.

17 MR. COLE: Thank you, Your Honor.

18 THE COURT: See what you intend to publish and at what
19 time and ---

20 MR. COLE: Got no interest in increasing their case, so I
21 am not going to bring any of that stuff in.

22 THE COURT: All right. What is next?

23 MR. LUCEY: Tri-County's motion for special verdicts
24 pursuant to Rule 49 would be next, Your Honor. And I will say
25 it in advance, I think it is untimely. I think it is not

1 ripe. But I think we have to see what evidence comes in.

2 MR. COLE: I don't disagree with that. I just want to
3 make sure -- that is not a tested thing that we have with the
4 court system now of what we do with the special verdicts. And
5 I think we need to start thinking about that because I know
6 that a number of the defendant would like to make sure that we
7 have a proper apportionment of damages.

8 THE COURT: Did you submit a proposed verdict form?

9 MR. COLE: I do not have a proposed verdict form.

10 THE COURT: Why don't -- that is your homework, Mr. Cole.

11 MR. COLE: All right.

12 THE COURT: And all of your other comrades over there on
13 that side. Maybe y'all can get together tonight or sometime
14 in the next day or two and see what you like -- I always like
15 you to come up with the solution and tell me what, you know,
16 you want me to do.

17 MR. COLE: Okay.

18 THE COURT: And we will deal with it then. How about
19 that?

20 MR. COLE: That is fine, Your Honor.

21 THE COURT: All right. Instead of in the abstract.

22 MR. LUCEY: The next motion, Your Honor, would be
23 Tri-County's omnibus motion in limine. And plaintiff's filed
24 a return on that. And I have an extra copy if the court would
25 like it.

1 MR. KENDALL: And by the way, Your Honor, just while they
2 are flipping, I will say that Complete has joined in these
3 motions and just I am not going to speak unless I am asked to.

4 MR. COLE: I think these are fairly standard, Your Honor.
5 Just for minors for mostly for the different parts that we
6 make sure people don't get into. I think some of them have
7 already been discussed.

8 THE COURT: Okay.

9 MR. COLE: For example, the first one talking about
10 settlement negotiations that that should not be part of the
11 case which is, you know, one of the rules.

12 I think Mr. Lucey has already essentially conceded that.
13 The second one is discussing the settlement amounts obtained
14 by other parties. That goes kind of to the same point that,
15 you know, we don't want plaintiff to prove their case by
16 saying, well, look at all of that other money we already got
17 to, you know, suggest for some reason that the defendants are
18 guilty just because someone else decided they were going to
19 resolve the case. That is an inappropriate way of addressing
20 it. So we would like to make sure that that kind of testimony
21 is not put into the case. That is the second part.

22 Do you want me to wait for Mr. Lucey or do you want me to
23 keep going?

24 THE COURT: I think you can keep going.

25 MR. COLE: Okay. The next one is -- or I guess the next

1 THE COURT: Some time to ---
2 MR. KENDALL: --- tomorrow to respond.
3 THE COURT: Why don't we just take it up in the morning.
4 MR. KENDALL: Thank you.
5 THE COURT: Can I do that?
6 MR. WILLIAMS: Yeah, that is fine.
7 MR. KENDALL: And can you -- can you send me another copy
8 just to be sure?
9 MR. WILLIAMS: Yes.
10 MR. KENDALL: Because I just don't have record of it.
11 THE COURT: Yeah, that is not a problem.
12 MR. KENDALL: Thank you, Your Honor.
13 THE COURT: Okay.
14 MR. REESER: Your Honor, if I may for the record. My
15 apologies. We did also file a motion for special verdict in
16 accordance with TCR's motions. So we would join in handling
17 that as the court has already asked us.
18 THE COURT: Sure. That would be great. I appreciate
19 that.
20 All right. What else do we have here?
21 MR. LUCEY: Stanley Vinyl's motion in limine, Your Honor.
22 THE COURT: Thank you.
23 MR. THAMES: Thank you, Your Honor. Troy Thames for
24 Stanley Vinyl's Fencing. I will be very brief. We filed a
25 motion in limine last week. It is specific to a set of

1 Who is left, so that I read the right caption?

2 MR. COLE: He is still in, Your Honor ---

3 THE COURT: He is still in, but in terms of that claim.
4 Okay. We were talking -- Okay. All right. Everybody ready?

5 MR. LUCEY: Yes, ma'am.

6 THE COURT: Okay. You can bring the jury in. Thank you
7 very much.

8 (WHEREUPON, awaiting jury 5/7/19, 10:00 a.m.)

9 (WHEREUPON, jury enters 5/7/19, 10:01 a.m.)

10 THE COURT: Good morning. You may all be seated, ladies
11 and gentlemen. Thank you very much to the jury and everybody
12 else. Thank you very much.

13 THE BAILIFF: All jurors are present, Your Honor.

14 THE COURT: Thank you. Thank you very much.

15 All right. Ladies and gentlemen, good morning. Thank
16 you all for being here this morning and for being prompt. We
17 certainly appreciate that. It is my understanding we are
18 ready to begin.

19 We are getting ready to try the case of Palmetto Pointe
20 at Peas Island Condominium Property Owners Association, Inc.
21 versus Island Pointe, LLC, Complete Building Corp, Tri-County
22 Roofing, Stanley Fence, and WC Services.

23 Before we begin this trial I am going to ask that the
24 clerk of court swear our jury in.

25 (WHEREUPON, jury sworn.)

1 THE COURT: Thank you very much. All right. Ladies and
2 gentlemen, before we begin this trial I want to tell you that
3 this is going to be very different from what you might expect.
4 Many people don't have the chance to attend actual court
5 sessions as you are doing now. They may think from watching
6 TV or movies or reading books that courtrooms are always full
7 of intense drama or riveting circumstances. While these
8 things may be true at times, this trial it not for
9 entertainment. It is a fundamental part of our democracy and
10 it is a search for truth in an effort to make sure that
11 justice is done between the parties before you.

12 Searching for the truth and making sure justice is done
13 is often slow, deliberate, and repetitive, the opposite of
14 what you have seen on TV or movies.

15 This courtroom is a place of honor dedicated to the
16 protection and preservation of citizen's rights through what
17 many have called the greatest justice system ever created.

18 The attorneys appearing before you are advocates for the
19 parties they represent, but first and foremost they are
20 officers of this court. They have taken an oath to uphold the
21 integrity and the fairness of our judicial system and to help
22 you in the search for the truth.

23 You should expect them to be professional, competent, and
24 ethical in the representation of their clients. Remember that
25 you have just taken an oath to try this case and reach a fair

1 and just verdict and that you are also expected to be
2 professional, reasonable, and ethical.

3 We appreciate you accepting this important responsibility
4 of jury service and for your contribution today to our justice
5 system.

6 Now, ladies and gentlemen, the first thing that will
7 occur is that the attorney for the plaintiff - the plaintiff
8 is the person or persons who have brought this action - their
9 attorney will make an opening statement which will be followed
10 by a similar statement by the attorneys for the defendants.

11 These opening statements are not arguments at this point,
12 ladies and gentlemen. Those arguments will come at the
13 conclusion of the trial.

14 The purpose of these opening statements is for each party
15 to outline their claims and the evidence which they intend to
16 present in support of these claims.

17 Following the opening statements each side will present
18 their own evidence with the plaintiff once again going first.
19 Evidence can take many forms. It might be testimony,
20 documents, models, photographs or the like.

21 You should pay close attention to all of the evidence
22 which is presented by each party. You the jury are the sole
23 finders of the facts in this case and no one else will be
24 permitted to weigh the evidence and render a verdict based
25 upon it.

1 After all the evidence has been presented the attorneys
2 will make their closing arguments. Unlike the opening
3 statements these final remarks will be true arguments. That
4 is each side will emphasize certain portions of the evidence
5 and try to persuade you to agree with their version of the
6 facts.

7 Keep in mind that the opening statements as well as the
8 closing arguments of the attorneys do not represent evidence
9 in this case. Please give the attorneys your undivided
10 attention but keep in mind that what they say is not evidence.

11 After the arguments are finished I will explain to you
12 the law which applies to the case. You will then retire to
13 the jury room and consider the facts and law, and once you
14 have done so you will return a verdict in favor of one side or
15 the other.

16 During the course of the trial the plaintiff has the
17 burden of proving their claim. The plaintiff must meet this
18 burden by proving these claims by the greater weight or the
19 preponderance of the evidence.

20 Now what we mean by the greater weight of the evidence
21 could be illustrated by envisioning a set of scales. When the
22 case begins the scales are even. After all the evidence has
23 been presented if the scales should remain evenly balanced or
24 if they should tip even slightly in favor of the defendant
25 then the plaintiff would have failed to meet their burden of

1 proof and your verdict would be for the defendant.

2 If on the other hand the scales should tip even slightly
3 in favor of the plaintiff then they will have met their burden
4 of proof and your verdict would be for the plaintiff.

5 I would like to make a few additional comments before we
6 begin this case. First, as I mentioned earlier, although I am
7 the only person who can tell you what the law is, you are the
8 only ones who can determine the facts. I do not have the
9 right to indicate how I may feel about the evidence that will
10 be presented, and throughout this trial my intention will be
11 to act impartially toward each party in this courtroom.

12 Secondly, from time to time an attorney will object to
13 some bit of testimony or evidence which the other side is
14 seeking to present. As in sports or business or any other
15 activity there are certain rules that both sides have to obey
16 in presenting evidence. These rules have the purpose of
17 insuring that the information you receive is the most
18 trustworthy and reliable evidence available.

19 An objection is the procedure that is used for an
20 attorney to call a possible violation of the rules to my
21 attention as the judge of this court, and for this reason you
22 should not hold an attorney's objection against their client
23 nor should you conclude from my ruling on the objection one
24 way or the other that I favor one side or the other.

25 Finally, I would ask that you pay close attention to all

1 of the evidence presented to you. It is you the jury who will
2 determine the facts in this case; and as a result you will
3 have to evaluate the credibility, which means the
4 believability, of each witness who testifies in this matter
5 from that witness stand right there.

6 You are participating in a time-tested system, and it is
7 extremely important for each of you to listen carefully to all
8 the evidence presented. You may take notes during the trial
9 of this case. We will provide you with notebooks and pens
10 momentarily.

11 Please remember, however, that the notes you take are for
12 your purposes only and they should not be discussed with
13 anyone. I would warn you that you must not allow the taking
14 of the notes to keep you from listening to and observing the
15 witnesses as they testify.

16 I am sure each of you will perform your duties
17 accordingly. And if there is nothing else from the plaintiff
18 or the defendant we will begin this trial.

19 Any exceptions or objections to the statements as given
20 by the court, from the plaintiff?

21 MR. LIZZI: No, Your Honor.

22 THE COURT: Any from the defense?

23 MR. KENDALL: None, Your Honor.

24 THE COURT: All right. Mr. Lucey.

25 MR. LUCEY: May it please the court.

1 THE COURT: Yes.

2 (WHEREUPON, opening statements, 5/7/19, 10:08 a.m. as
3 follows:)

4 **OPENING BY MR. LUCEY:**

5 Many people take having a dry roof over their heads,
6 secure walls around them, and a safe and secure home for
7 granted. But the homeowners at Peas Island, the homeowners at
8 Palmetto Pointe at Peas Island, the owners of 40 residences
9 there, they don't have that luxury. Their roofs leak. Their
10 decks leak. Their walls leak. Their shingles blow off.
11 Their siding blows off.

12 And they don't just leak in a couple of places. The
13 evidence is going to show they leak at the edge of the roofs
14 where the temporary scaffolding was incorrectly attached and
15 the holes are buried and hidden. They leak at different edges
16 where the roofer improperly attached what are called toe
17 boards.

18 The evidence will show that there are random leaks in the
19 roof that nobody can identify the source or causation. They
20 are just there.

21 On the decks, the decks are missing something called
22 flashing. When you have two dissimilar materials that meet
23 you have got to protect that joint. The way it is commonly
24 done in the construction industry is a construction term or
25 item called flashing.

1 Think of your shower curtain in your home bathroom. If
2 you leave the shower curtain outside of the bathtub when you
3 take a shower, what happens? Water gets between the tub and
4 the curtain, right?

5 If you put it inside of the tub when you take a shower
6 that shower curtain channels all of that water into the tub,
7 right, and your floor stays dry.

8 Well, your flashing on the exterior of your home does the
9 same thing. It channels the water out. It keeps it from
10 getting inside of the home.

11 Well, the flashing -- they knew that flash- -- because we
12 are going to show you all kinds of partial flashing. They
13 knew to flash. But they didn't use the proper flashing. And
14 they didn't use enough flashing. They would flash half a
15 post. Well, flash half a post? And they would use two-inch
16 flashing when the building code requires four-inch flashing.

17 And this occurs on the joints around the posts on the
18 deck. It also occurred where each one of these decks
19 intersects with a sloped roof next to it. It is not flashed
20 properly.

21 The deck material -- the evidence will show the deck
22 material the deck material installer knew to wrap his material
23 up the post to partially waterproof it, because he did it.
24 The problem is he just did it half way. And so if you look
25 under these joints what do you see? You see holes. Well,

1 guess what? Water leaks under joints. Water finds its way.

2 Now the decks leak. The roofs leak. And the walls leak.
3 But the evidence will show that we can't tell you the exact
4 number of leaks because they are slow, they are latent. The
5 damage is behind the cladding. The cladding looks good. The
6 cladding looks fine. Handsome homes.

7 Here is 1623 (display photo). Handsome home. Can't tell
8 a thing wrong with it, can you? Because it has what is called
9 a hidden leak and latent damage. If you open up the trim on
10 that exact same location, this is what you see (display
11 photo).

12 The homes are rotting from the inside out. And you don't
13 know where the water is getting in until the latency period is
14 over. In other words, the amount of time it takes the water
15 to do enough damage that some symptom finally shows up that
16 gives a homeowner or an inspector some sort of trigger, some
17 sort of notice, that they need to go investigate. And then
18 low and behold what do they find all of a sudden.

19 Now this first came about in early 2015. This lawsuit is
20 a little over four years old. In late 2014 the homeowners
21 noticed that they had had more than one roof leak.
22 (WHEREUPON, break for counsel to turn off Apple watch.)

23 MR. LUCEY: I apologize.

24 So in late 2014, early 2015, the homeowners who had just
25 gotten control turned over to them in 2014 from the

1 developers, the homeowners noticed they had several roof
2 leaks. And they did what -- the new board did what would be
3 prudent. They hired an investigator to go up and do a survey
4 and see what is going on with the roofs.

5 Well, on January 11th, 2015, they got a report. They got
6 a report regarding what I call the temporary scaffolding
7 holes. The evidence is going to show you there is something
8 in construction called pump jacks. Instead of putting the
9 scaffolding that we are used to down on city streets that we
10 see all the time with four corners, instead of putting
11 scaffolding like that up a building, they put planks on two
12 poles. And you can put them up or down for elevation. You
13 can go up and down the side of a building.

14 Well, you have got to tie the pump jacks off at the top.
15 You do it at the roof. For safety and everything else. Well,
16 the evidence will show that you are supposed to tie those off
17 under shingles. You don't pierce your shingles. That is not
18 what happened. They pierced the shingles.

19 So they got the survey in January of 2015, January 11th,
20 which showed this random and some pattern of pump jack holes.
21 And they say to themselves, well, maybe we should just look a
22 little further, maybe we should make sure everything is good
23 before we just go fix those holes.

24 And what did they find? They found a home with interior
25 damage. They found the first home. Now these homes were

1 built in 2006 and 2007. So by the time we get to 2015 that is
2 an eight year latent period. And that is when they discovered
3 their first latency inside of a home. That kind of damage.
4 But whereas I am showing it to you on the outside of the home,
5 they found it inside of a home. And the engineers will tell
6 you about that.

7 Since that occurred, two to three times a year another
8 one of these latent damages from long-term leaks surfaces.
9 Somehow it manifests itself. And the homeowners would call an
10 engineer out to investigate it. And that is what they find.
11 That has been occurring now during the four-and-a-half year
12 period of this litigation.

13 We are going to show you that nine of the forty homes
14 have leaked to the inside with severe damage. Excuse me, nine
15 interior leaks. Seven homes. Nine interior leaks. Two were
16 double -- different places, same house.

17 And we are going to show you that all of these homes have
18 experienced deck leaks. Leaks on the front and leaks on the
19 back.

20 And it is still happening. The evidence will show that
21 in just March of this year that the homeowners, the
22 plaintiffs, gave the defendants notice, hey, we have another
23 problem area, come out and see it before we try and repair it.
24 The evidence will show that that has happened regularly now
25 for the last four-and-a-half year. And it can be expected to

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 These decks, by the way, they are fenced in for safety;
2 right? Life safety. Who wants to fall off of a deck? Well,
3 they installed -- we will talk about who did what over here at
4 the defense table.

5 They installed a plastic handrail system. They installed
6 it with 3/4 inch or 5/8 inch screws. So the brackets -- the
7 screws for the brackets didn't even make it past the
8 HardiePlank. They attached the safety rails to the
9 HardiePlank. The engineers will show you that is a building
10 code violation. The brackets themselves, they break. They
11 are all breaking. The rails do not serve their intended
12 function. And we will look at some more issues relating to
13 the rails.

14 We will show you hurricane straps that aren't properly
15 attached. We will show you rusted components throughout these
16 buildings; because they didn't use the proper hardware, in
17 violation of the building code.

18 And, sure, a rusted nail head, that starts cosmetically;
19 right? Yeah. But when it finishes rusting it is not holding
20 the piece of wood up anymore. It becomes a structural
21 problem. And that is why the building code -- the engineers
22 will tell you that is why the building code requires certain
23 types of finishes and components just for the long-term safety
24 of these residences. And it is not there.

25 There's going to be other violations that we will show

1 you.

2 Some shingles were installed wrong, nailing patterns,
3 overhangs, etc. And we are going to show that while there was
4 a lull in Charleston's weather for a little while during the
5 early years of these houses, that since about the time this
6 suit was filed we have had at least one minor storm a year
7 during the four years this suit has been pending.

8 And, yes, like I said earlier, because of improper
9 installation the shingles blow off. The siding blows off.
10 You just get piles of it out in the yards. And we will show
11 you pictures of those piles.

12 Which brings to mind I forgot to mention that the
13 engineers are all going to testify that the entire siding
14 installation of this complex is a building code violation. It
15 wasn't done right. It wasn't done right for four different
16 reasons: The wrong size siding for our wind zone, the
17 fastener pattern is wrong, the pullout strength is wrong, and
18 they didn't nail it into the studs. Four violations the
19 engineers will tell you about.

20 We have at the defense table today six -- I will call it
21 six-and-a-half parties. One is technically over there, but
22 they are not here, which is the developer Island Pointe, LLC,
23 which is no longer in business.

24 The second defendant we have over there is a company
25 called Complete Building Corporation. They were the general

1 contractor on this job. Their role among other things was to
2 coordinate the trades.

3 What do I mean by that, the trades? Well, the deck
4 tradesmen and the siding tradesmen; two different
5 subcontractors, they needed to be coordinated. Because they
6 come together at those deck posts on the decks that aren't
7 flashed. That is the intersection between the two trades that
8 is not flashed. And the general contractors role, the
9 engineer will tell you, is to coordinate between those trades
10 so that it does get flashed.

11 Besides Complete Building Corporation we have what I will
12 refer to as a master subcontractor named Tri-County Roofing.
13 Why do I use the term master subcontractor? Because they
14 didn't just do the roofing. They actually hired additional
15 subcontractors that did three trades on this job. They did
16 the roofing, the shingle roofings, and -- I forgot about the
17 shingles when I was telling you about the blow offs and some
18 of the other problems and leaks.

19 All of the lower roofs on this building, shingled roofs,
20 are code violations. They are shingled with inadequate
21 underlayment for the slope. In other words, sometimes you
22 have steep roofs and you shingle them one way; sometimes you
23 have roofs that are almost flat and the building code requires
24 you to shingle them another way.

25 Well, there's two versions of the flat that the engineers

1 will tell you about. Really flat like I think one to two
2 percent and -- or actually two and twelve or less is really
3 flat. Two inches vertical, twelve horizontal. Or between two
4 and twelve and four and twelve is posi-flat. Those two
5 roofing conditions the building code has specific special
6 requirement for, none of which occurred during the
7 construction of Peas Island.

8 But back to the master subcontractor, Tri-County Roofing.
9 They did the roofing. They did the decks, the deck covers.
10 And they did the siding, through their what we call second
11 tier subs, the additional subs that they hired.

12 And the evidence will show that in violation of
13 manufacturer's specifications, in addition to everything that
14 I've already told you, that Tri-County and it's decking sub
15 mixed products when they surfaced the decks. They mixed
16 Sealoflex with Hydrostop, violating both manufacturer's
17 requirements in the installation of those decks.

18 So Tri-County is like a master sub, because it has three
19 more subs under it. Two of which are here in the courtroom.
20 So like the general contractor, the engineers will tell you
21 that the master sub had a duty to coordinate the trades under
22 the master sub.

23 In other words, Tri-County, like the general contractor,
24 had to coordinate the intersection between the siding sub and
25 the decking sub where so many of these leaks were occurring.

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 grossly negligent construction.

2 And it is not my job to tell you the law. That is the
3 judge's job. And she is going to do that at the end of the
4 case. But I am allowed to give you a bit of a roadmap as to
5 what the plaintiff is going to try and show you so that you
6 can follow our evidence until the judge gives you those legal
7 instructions.

8 And it is the plaintiff's belief that at the close of the
9 case she will inform you that you are entitled to consider a
10 building code violation as evidence of - you are not required
11 to, but that you can consider a building code violation as
12 evidence of recklessness and/or gross negligence. And that is
13 what plaintiffs are going to focus on.

14 The majority of the defects we are going to show you, the
15 engineers will tell you are going to be building code
16 violations. But there are also what are called violations of
17 industry standard and violation of manufacturers product
18 instructions that the engineers will tell you about.

19 We also expect that the judge will give you some law
20 about the issue of joint causation, what happens when one or
21 more trades or one or more people cause the same damage.

22 And we believe that -- and what we will be trying to show
23 you, we believe that if both trades materially contribute to
24 that damage that plaintiff is entitled to sue them both for
25 the entirety of their loss.

1 And the evidence will show that many of these joints - we
2 have talked about the joints between different trades - that
3 it was more than one subcontractor or contractor that
4 contributed to the damage.

5 For instance, I am going to have an engineer tell you --
6 I am going to have an engineer tell you that it is against the
7 standard of care for pump jacks to be attached through
8 shingles. The way you are supposed to do it up there on the
9 roof is you lift the shingle and you attach it to the sub
10 straight. It may be over the top of the felt paper. That is
11 okay. But you attach it to the sub straight.

12 And this is a plate that is getting attached up there,
13 like a triangle type of plate to hold it in place, the
14 fasteners. And that everybody on the job site, anybody who
15 walked the scaffolding or did the quality control on this job,
16 would have seen the attachment on top of the shingles in
17 violation of industry standard and set up under the shingles.

18 And that that -- and the defense engineer will tell you
19 this too, and that that would include the general contractor.
20 This would have been obvious to the general contractor that
21 the pump jacks were piercing the future homeowner's shingles
22 and they shouldn't have been.

23 The true issue that it is going to come down to in this
24 case, the true issue, plaintiffs are going to show you I am
25 going to say probably two, three thousand defects, different

1 types of defects. The issue is going to be the scope of
2 repair. The issue is are you going to have the defendant
3 suggest to you a limited scope, that they can come in and
4 surgically repair homes that are rotting from the inside out;
5 or do we need to take those sidings off, the flashings off,
6 the shingles off, start over and do it right? Standard scope
7 of repair.

8 And I am going to have the defense engineer tell you what
9 I am holding up in front of you, Exhibit 827 and 828. All of
10 these colored dots, those are areas that the defense concedes
11 have to be repaired. But they want you to stop four feet
12 outside of each colored dot and not check the next post to see
13 if the flashing is there or not.

14 The plaintiff's engineer is going to tell you why only a
15 comprehensive reclad and reroof in compliance with the
16 building code will satisfy the needs of these houses. Got to
17 stop these houses from rotting from the inside out.

18 My name is Justin Lucey. Ed Buckley, Josh Evans and I,
19 appreciate your patience this week. Thank you.

20 THE COURT: Thank you, Mr. Lucey.

21 Mr. Kendall, will you be delivering the first
22 opening statement?

23 MR. KENDALL: I will. Thank you. May it please the
24 court.

25 THE COURT: Yes, sir.

1 MR. KENDALL: Good morning.

2 **OPENING BY MR. KENDALL:**

3 We agree with the homeowners of Palmetto Pointe that
4 there are problems in the construction of their buildings. We
5 agree that they -- these problems need to be addressed and
6 need to be fixed.

7 The reason you are here and the reason we are all here is
8 as has already been highlighted is we do have a disagreement
9 on what that is going to take.

10 We have been -- done investigation. We have considered
11 the problems from an engineering perspective. We have had
12 opportunities to discuss this, and we have not agreed. And so
13 that is why we need you. We need you to help us find that
14 reasonable solution to solve the problem that the homeowners
15 confront.

16 Because the goal of all of us is to allow the homeowners
17 at Peas Island, Palmetto Pointe at Peas Island, to have a home
18 that provides them the luxuries that they intended to have,
19 that provides them the protection from the elements and the
20 protection from fire that they intended to have and that will
21 last in fact the length of time that these materials were
22 intended to last. Which isn't forever. But they do have a
23 lifespan.

24 And we need to work to together to figure out what is it
25 that it will take to do that in a reasonable manner.

1 I am Rhett Kendall. And I represent Complete Building
2 Corporation. I am assisted by my partner Brent Boyd. And he
3 will be working with some -- with the witnesses with y'all
4 later in the trial.

5 Complete Building Corporation is a general contracting
6 firm -- or was a general contracting firm here in Charleston
7 for about 30 years. In 2016 Mr. Apat, Vic Apat, retired and
8 has moved on. His brother Steve left the business and moved
9 to Florida.

10 The guy who was our superintendent on the job, Gary
11 Stanley, has passed away. And Mr. Buddy Hilton changed
12 companies. But he is in the area. And so we are going to be
13 able to have Mr. Buddy Hilton who was the project manager at
14 this job come and testify from the perspective of the
15 corporation.

16 But this presents the first of the challenges that we are
17 going to face in this case, and that is this -- these
18 buildings were built in 2006 and 2007. The information that
19 you all are going to hear about the conditions at the
20 building, as you have already heard, surfaced in 2015.

21 With the passage of time, the fading of memories, the
22 loss of documents, some of that history is very difficult to
23 recreate. So there's going to be gaps in what can be
24 presented to you. There's going to be lapses in memory that
25 is going to be exposed to you. And that is just one of the

1 challenges of trying this case at this point in time.

2 Complete Building Corporation contracted with the general
3 -- with the owners, the developer corporation, to build 20
4 townhomes -- excuse me, 40 townhomes in 20 buildings out here
5 on Peas Island. And, as I said, that was completed in about
6 2007. They came on line at different times.

7 We did -- as you have already heard - and I won't belabor
8 this - but we sub -- we worked with the developer's team which
9 included an architect, structural engineers, roofing
10 consultants, waterproofing consultants, manufacturer
11 representatives, and all a number of other people as part of
12 the design process. And that relationship and discussions
13 continued throughout the job.

14 There was subcontractors. In addition to the ones that
15 are here there were others. And those meetings were held and
16 reports were done, investigations were done, and as this
17 process unfolded.

18 So, in other words, what we had at the time in 2006,
19 2007, was a team effort to bring this project to a successful
20 conclusion. And for many years it was believed that the
21 project had been successful. And in 2015 we found out about
22 the errors that had been made.

23 A second problem -- or a challenge I guess with this kind
24 of a case, is that the plaintiffs get to go first and they do
25 present their case and their evidence first.

1 Now there will be some evidence that they will present
2 that are actually our experts. And, as you have heard, our
3 experts have created the information that is going to be used
4 -- that was used to create these charts that show the work
5 that they were intended to do.

6 But the stories don't get told in a back-and-forth
7 fashion. They get told one story at a time, and then we get
8 to respond.

9 So the challenge for you is to keep an open mind until
10 you have heard all of the evidence. Keep an open mind about
11 the case until the judge has instructed you on what the law of
12 the case is and then sends you back into the room to
13 deliberate. It is then and only then that you should begin to
14 make decisions about the case.

15 The evidence that you are going to be presented in this
16 case is going to come in forms of pictures, documents. I
17 think there is some video available. Lots of different forms.

18 One of the questions you are going to have to struggle
19 with is -- that we have talked about is ultimately -- our
20 ultimate goal, how do we fix these problems in a most
21 reasonable way that provides the goals that we have, that they
22 have a home that does not leak, that is durable over time, and
23 that is safe for them.

24 Or you may ask how did things get this way, how did that
25 happen. You are going to hear, as I said, some evidence from

1 some people who were there at the time. But it is hard to
2 find them all. You are going to see document that have some
3 information.

4 But one of the things that is going to be clear as you
5 consider all of this evidence is it all happened out in the
6 open with a lot of people talking about it. There were a lot
7 of people looking at the situations as they arose over time.

8 But even still there were mistakes that were made. Some
9 of them were just workmanship errors, just sloppy work. Some
10 of them were decisions that were made that turned out not to
11 be the right decision, as time has shown. And others were
12 things that just got overlooked and we don't honestly know the
13 reasons why at this point.

14 So what we are trying to focus on is the solution to the
15 problems, how do we bring this back and restore this
16 usefulness and this lifecycle that we -- the areas that have
17 been highlighted already. The roofing, we have looked at the
18 roofing. We see that there are places where nails are wrong.
19 We can fix that. There are other issues with the roof. These
20 12-year old roofs can be repaired instead of being removed and
21 replaced entirely. So we are going to have a discussion about
22 that.

23 The siding, again there has been -- we have found out
24 that the siding is not correctly installed. There is a way to
25 fix that without ripping it all off and throwing it in the

1 landfill. It can be -- the nails can be added that will
2 provide the security. And the engineers will explain how that
3 works and what the results will be.

4 These water infiltration issues that have been -- that
5 have been highlighted already have been looked at extensively.
6 Virtually every patio and every porch -- and what you are
7 going to find out along the way is that there are in fact
8 patterns among these homes. There are certain models that
9 have been built multiple times. And so once you have
10 evaluated one of them you understand the potential problems;
11 you can address that and then apply that solution throughout.

12 And one of those areas, as we are going to learn about,
13 is this -- is this area up here (pointing) where this post
14 comes in on this deck with this roof next to it. That was --
15 the engineers will concede that was a challenging engineering
16 design principle there. It didn't get done right. But it can
17 be addressed now. That has resulted in water coming down into
18 this area here (pointing), which can be repaired.

19 The maps that have been -- that have been demonstrated to
20 you show you the counts of how many post-deck intersections,
21 how many post-deck roof intersections, we intend to fix it.
22 And it is all the ones that have indicated this pattern, this
23 -- the manner in which it was built, we are going to fix all
24 of those. We are going to fix the roofs that are really flat
25 and the ones that are sort of flat. Those are going to be

1 fixed. The areas where the bolts have corroded, we don't know
2 why they have corroded; but we are going to replace them.

3 The handrails that have broken, we are going to fix the
4 handrails. All of the things that you are going to hear as
5 being called a problem, we have developed a solution for it.
6 And we believe that is the difference of why we are here today
7 is we don't agree on what that solution should be.

8 So as we are coming to the end of the case and as you get
9 the case, you are going to have to go back to the room and
10 decide what is the reasonable approach to this.

11 The great thing about a jury system is it allows us to
12 turn that over to reasonable members of our citizenship. We
13 are members of the community. We have a sense of the
14 sensibilities of what needs to take place in situations like
15 this.

16 You are not going to be asked to check common sense at
17 the door. You are going to be asked to bring your life
18 experiences, bring your common sense to bear on this question,
19 what will it take to bring these homeowners a home that what
20 they should have received in 2007 which is a home that does
21 not leak, that shingles don't blow off, that siding does not
22 blow off, that railings are not cracked, and water doesn't
23 infiltrate. That's our goal, and that's what we are asking
24 you to help us evaluate.

25 So I appreciate the time that you have spent with me

1 already. We are going to be spending a lot of time together.
2 We hope we will all be patient together.

3 And now the other folks will have maybe some additional
4 comments. But thank you very much for allowing me.

5 THE COURT: Thank you, Mr. Kendall.

6 Mr. Cole.

7 MR. COLE: Thank you, Your Honor. May I approach?

8 THE COURT: Yes.

9 MR. COLE: Not approach. The podium.

10 THE COURT: Go for it.

11 (WHEREUPON, podium adjusted.)

12 **OPENING BY MR. COLE:**

13 Ladies and gentlemen of the jury, I am not going to
14 spend a lot of time up here talking to you. You will
15 hear a similar story I think from the defendants of us
16 introducing our clients and introducing what we believe
17 the case is about. And I think it was adequately
18 discussed from the initial counsel to explain that.

19 If you have never built a house before, if you have
20 never been a part of this process, there is a little bit
21 of a learning curve that we have to make sure that you
22 all understand.

23 Mr. Lucey started by talking about flashings and
24 other things like that. You are going to hear other
25 terms as well that we will get out here so that you know

1 what we are talking about. Because there is a little bit
2 of a vocabulary with it. But it boils down to there is a
3 team that tries to build these units and the goal of the
4 team is to create something that people can live in.

5 I was thinking about this. And I have gone a little
6 off script from what I wanted to do. But I wanted to get
7 a little perspective of what we are talking about. We
8 are talking about units that people have been living in
9 since they purchased their units back in 2007. And so
10 they have been occupied all that time. Except for a few
11 units that have sold.

12 In fact, some units have sold within the last six
13 months or less. And when we look at the comparison of
14 when they purchased the units back in 2007 to what they
15 are getting now, the units are going up in price. And in
16 fact, 17 of these units were actually purchased after the
17 lawsuit was started.

18 So there are issues out there. They are being
19 addressed. But there are also homeowners out there that
20 realize that these can be fixed. And it is not going to
21 take a complete overhaul. That when we get to the
22 numbers Mr. Lucey's numbers to repairs these things, they
23 could knock them all down and rebuild them because it is
24 more expensive than what the original construction costs
25 were. That is just to give a little perspective of what

1 we are talking about here.

2 And so we are trying to make sure that we can get
3 these houses so that the people can use them and can
4 still live in them the way that they intended.

5 My client in this one is Tri-County Roofing. It is
6 correct we did roofing out there which is in our name.
7 We did the siding. And we did the decks that are out
8 there.

9 I am not going to get into any of those particulars
10 right now. But those are the parts that we did. And we
11 used subcontractors to do all of that work.

12 We used subcontractors that we had used before and
13 that we -- you know, unfortunately some are not around
14 anymore, so we don't use them. But we use the
15 subcontractors.

16 I have in the courtroom today with me the founder of
17 the company, Dale Hawkins, and his wife who have been
18 doing this since the 70's. I think 1973 is when he
19 started the company. And he takes a lot of pride in his
20 work. And he wants to make sure that the job is done
21 correctly.

22 But you will also hear testimony that when issues
23 came up, when we were talking about issues here, the
24 owner didn't go and ask like Tri-County to make a repair
25 at that time. They got other people do try to address

1 it. But there was a gap between when he was finished in
2 the 2007 time period and when we have the problems in
3 2014, 2015, when you had a bunch of storms, you had
4 possible damage to things because of these storms on this
5 island that is out towards the coast and so it gets beat
6 up by this weather. And there was not a call to do
7 anything there.

8 And we will debate about what that means. But from
9 our perspective it means you didn't give us the
10 opportunity to try to fix it and now we are here because
11 the experts that we have said we went out here and did a
12 comprehensive review.

13 In fact, they went out multiple times. There were
14 times that new things came up and so the experts went out
15 there and looked at it with the point being that at the
16 end of the day that the defense repair scope can say we
17 are going to address everything that is out there. And
18 that is what we intend to do. We just don't want to, as
19 Mr. Kendall said, tear everything up and throw it in the
20 landfill because that is just wasteful.

21 And so I will be here for a while as well. And
22 other defendants are going to do their openings as well.
23 Thank you for your service. And we will see you as we
24 progress.

25 THE COURT: Who would like to go next?

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 thing, I want to big high because I want to work on those
2 buildings; but I don't want to pay that much to do it,
3 because that is a good deal.

4 And then to do that they get the cheapest labor
5 possible. And if that labor is not around 13 years after
6 these buildings are built, that's okay.

7 And so when something goes wrong, you know, all
8 these people involved, these architects, these engineers,
9 general contractors, primary subcontractors, code
10 officials, general contractors, any subcontractor they
11 hire, any consultant they hire, and then you have got the
12 labor at the very bottom, when something goes wrong the
13 architect says that wasn't my choice, that was the
14 developer's choice. The developer says that wasn't my
15 choice, that was the general contractor's choice. The
16 general contractor says that wasn't my choice, that was
17 my subcontractor's choice. And at that bottom the
18 subcontractor says that wasn't my choice, that was my
19 cheap temporary labor.

20 Now, ladies and gentlemen of the jury, I represent
21 Wilson Lucas Sales, this company Miracle Siding, LLC, and
22 Eloy Elonzo Vasquez. They are part of that cheap labor
23 that the Tri-County folks at this table over here are
24 going to try to tell you worked at this project.

25 Now everyone at the plaintiff's table is going to

1 try to tell you that no one in their right mind could
2 have possibly have supervised every single thing that
3 happened in this project.

4 And that might be true. You have heard a lot of
5 people talk about a lot of folks today. Again,
6 architects, engineers, general contractor, subcontractor,
7 product representative, code officials, all these folks.
8 And they were out there watching these buildings come up.
9 And there were plenty of them. And then at the bottom
10 you have labor.

11 Now I don't expect anyone to have a ton of
12 experience building condos. But many of you may have
13 some experience with lawns. Many of us do. If you want
14 your lawn mowed and you are going to hire a landscape
15 company to do it you might get a foreman and he will pull
16 up in his big truck and his big trailer and get out a
17 zero-turn mower. He will mow your yard. He will trim
18 the driveway. He will trim your hedges. He might even
19 weed your beds.

20 But if you call Billy down the street and you say
21 Billy come over to my house, I am going to leave my mower
22 out and I want you to trim my yard, you might get your
23 grass cut. You might not get your driveway edged. You
24 might not get your hedges trimmed. He might not fiddle
25 with the mower and put gas in it. He might not change

1 the oil. He might not sharpen the blade. The grass
2 might not be at the right height that you want it to be.
3 But your grass is going to be cut. Because he does
4 exactly what you tell him to with what you give him.

5 Now you are going to hear more as this trial goes on
6 about what Mr. Sales and Miracle Siding and Mr. Vasquez
7 did. But basically Ms. Sales and Miracle Siding put up
8 aluminum trim. They put up fiber cement trim. They put
9 up siding. Tri-County will testify that Mr. Vasquez
10 rolled out deck waterproofing, did some punch work on
11 some shingles, installed some shingles.

12 But it doesn't matter, because in every single case
13 these folks did exactly what Tri-County told them to with
14 what they were given. Every single case.

15 And like I said, it takes a lot of people to put one
16 of these projects like Palmetto Pointe together. And
17 there are a lot of things my folks are not paid to do.
18 They were paid to show up, like Billy in the
19 neighborhood, and do exactly what they were told when
20 they were told to do it.

21 They were not paid to ask questions. They were not
22 paid to make recommendations. And if they didn't do what
23 they were told, when they were told to do it, how they
24 were told to do it, they were not getting paid. They
25 were not getting paid.

1 So the question is, if they were doing what they
2 were told to do when they were told to do it, what about
3 everybody else?

4 These are the folks who were designing these
5 buildings, figuring out how you are going to put them
6 together; architects, engineers, code officials, general
7 contractor, subcontractor. They need to be looking at
8 these things. They should, anyway.

9 And you are going to hear testimony from Larry Elkin
10 who is a licensed practicing engineer. He doesn't just
11 observe problems. He draws up plans. He stamps them.
12 He says you need to fix this, I'm going to watch you fix
13 this. He does contract administration. When he comes up
14 and he makes sure that all of these people are doing
15 their job right. He knows the expectations that you have
16 all along that line.

17 Because I can tell you right now Tri-County was not
18 paying Mr. Sales, Miracle Siding, or Vasquez to look at
19 products of notes, to look at architectural details, to
20 evaluate products, to determine if you are going to put
21 in flashing how are you going to put it. That is not
22 what he got paid to do. Every single thing that these
23 folks put on was ordered for them and they did it just as
24 they were told.

25 Let's take a look at the siding. Y'all have heard a

1 lot about the siding already today. The issue is that
2 siding is too big for this wind zone. Now what does that
3 mean? That means that Palmetto Pointe is in an area, on
4 an island, by itself, with a bunch of condos stuck on it,
5 as it is expected under the building code to receive a
6 certain amount of wind.

7 Now that is not such a -- that is not such a hidden
8 thing. Anybody can go up and look at say this siding is
9 that big. If somebody was doing their job why didn't
10 anybody catch it if it was such a big deal? Nobody;
11 architect, engineer, general contractor, subcontractors.

12 And I will tell you why. Because that siding that
13 is on there that doesn't meet wind requirements, that's
14 what the architect wanted to put on there. That is what
15 Tri-County asked him to put on. That is what they
16 ordered. That is what they delivered to the site. And
17 that is what Mr. Sales drew on those buildings. Nobody
18 asked him his opinion. Not a single person.

19 Now Mr. Elkin also saw, as you have seen, plenty of
20 issues at, for example, these deck column intersections.
21 Now the roof line is here (pointing). You have heard a
22 lot about deck, column, roof intersections. There's a
23 lot of them out here. And they are not simple. It is
24 not like a flat roof, column, deck. There are angles
25 upon angles all coming down to this edge right here

1 (pointing).

2 And whenever Mr. Elkin went on the site to look at
3 it to see if there was a problem, he could see. You have
4 got the water proofer on this deck. He rolls out his
5 work.

6 You have got the roofer on the other side. He does
7 his work. They both stopped at the end of their work.
8 Do you know why that is? That is because nobody was
9 taking any responsibility to make sure that all of these
10 trades, not just my clients, not just subcontractors over
11 here (pointing), everyone involved, the framers, HVAC,
12 all of these folks that are involved in building
13 buildings, they weren't making sure that these trades
14 were coordinated and doing everything together.

15 The general contractor is not swinging a hammer.
16 The general contractor's most important job is to make
17 sure the people he has got working out there do
18 everything together so it comes together and you don't
19 have these problems.

20 And, again, you are going to hear plenty of
21 testimony. You are going to see documents. You are
22 going to hear testimony from the stand. These people are
23 out there. These people were out there.

24 Now that is not to say that Mr. Elkin is not going
25 to say that these can be fixed. They can. That is what

1 he does for a living. But that is also not to say that
2 the only thing that we are discussing in this case is the
3 number. Because it is not. It is not.

4 What we are going to be asking y'all to do is to
5 determine who is responsible for these issues, who is
6 responsible for this, in addition to the numbers.

7 Now the plaintiffs have an answer for all of this.
8 And it is that if you perform work then you have a
9 responsibility to know your product inside and out, you
10 need to know if it qualifies under the building code, you
11 have got to know if the installation procedure you are
12 asked to use is proper, you need to be an expert in these
13 things.

14 Well, ladies and gentlemen, that is not how the
15 world works. Not everybody has architectural training,
16 degrees. Not everyone is an engineer. Not everyone is a
17 licensed general contractor required to know the building
18 code. Some people are temporary labor. And that
19 expectation is unreasonable in how this world works.

20 Because let's take a look at something very simple.
21 This siding is held on by nails. This wood could be held
22 on by nails. This trim could be held on by nails. Nails
23 serve a particular purpose. They are going to hold that
24 wood to a substrate.

25 Now if you want to figure out what nail you want to

1 put on that siding what do you do? Can you look at a
2 simple installation sheet that comes with the siding?
3 No.

4 It takes -- you have got to know where you are, what
5 wind zone you are in, how much wind pressure you are
6 going to experience at a particular location. How is
7 this sheathing behind here, this sheathing here, how is
8 it nailed; are there enough nails in there. That affect
9 how much holding force these nails are going to have.

10 You have got to use calculations that involve things
11 like tributary area and force that took Mr. Elkin the
12 better part of a day to figure out. And he is going to
13 tell you about that.

14 You know, labor is not -- labor is not paid to talk
15 to the architect. Labor is not paid to make those
16 decisions. You will see during this trial that it is
17 clear the architect is out there, the engineers are out
18 there. They are making the decisions. They are getting
19 recommendations.

20 And it is not for Mr. Sales. It is not for Miracle
21 Siding. And it is not from Elonzo Vazquez.

22 Go again. Everyone behind me, they might say, look,
23 you know, I wasn't swinging a hammer, I wasn't there, so
24 all of these problems, that is a labor problem because
25 they were the ones who did it. That is a pretty good

1 deal for them.

2 And the folks at this table (pointing), they want
3 you to give them new siding, new trim, new aluminum coil,
4 new shingles. They want you to pay for mill licenses.
5 They want you to pay for utilities. They want you to pay
6 for rental costs for the property. And they want to tell
7 you that if it wasn't for Mr. Sales, Miracle Siding, and
8 Mr. Vasquez they wouldn't be here. It is a pretty good
9 deal for them too.

10 So, ladies and gentlemen, let me end by saying that
11 this system could not work without you. It could do
12 without me. It could do without the judge. But your
13 role in this process is so important. That has been a
14 part of the Constitution of this country for two hundred
15 and some odd years.

16 So thank y'all so much for this opportunity, for
17 your patience. We look forward to working with you in
18 this case with these folks. And I appreciate your
19 attention, just like everyone behind me. Thank y'all.

20 THE COURT: Thank you.

21 Mr. Thames.

22 MR. THAMES: Thank you, Your Honor.

23 **OPENING BY MR. THAMES:**

24 Ladies and gentlemen, I know you have been here a
25 while. We have all been here a while. I know you are
26

1 getting tired. I am going to be real quick.

2 I am Troy Thames. I represent Floyd Stanley. Back
3 in 2006, that timeframe, Floyd was doing a business
4 called Floyd's -- or Stanley's Vinyl Fence Design
5 installing vinyl fences when he got connected with this
6 project. He, as you have already heard, these porches on
7 the homes that you have seen this picture here, the vinyl
8 railings are a -- or the railings are a plastic vinyl
9 railing system.

10 You are going to hear evidence from Floyd about what
11 his role was, what did he do. And what you are going to
12 hear from Floyd is he was hired to come install these
13 railings. He didn't order the material. He didn't
14 select the material. It came as a kit with the railings,
15 the brackets, the screws. He installed it.

16 You heard some -- from plaintiff's attorney at the
17 beginning about some of the problems that they have
18 identified with the railings. And you are going to hear
19 plenty of evidence and see plenty of pictures about it.
20 But one of -- the two big things he touched on were the
21 screws and the brackets.

22 And, again, you are going to hear from Floyd about
23 those, what he did and what the guys that worked for him
24 did, and that he was not involved in the selection of
25 that material.

1 What makes the claims against my client, Floyd
2 Stanley, who was a subcontractor of the general
3 contractor, even a little more easy to segregate, if you
4 will, because in the grand scheme of things there are,
5 you know, a lot of issues that are identified with the
6 buildings that relate to water intrusion and all of the
7 things you have heard talk about now for two hours. But
8 it's fairly easy to kind of segregate what relates to
9 Floyd's work.

10 And what is going to make that even a little bit
11 easier for you is you are going to hear from HOA
12 president and from a member of the HOA that they were
13 already as early as 2013 started replacing some of the
14 brackets on these porches and in the last year started
15 replacing all of the screws.

16 So when it comes to those particular issues it is
17 something that we can really identify. We can segregate
18 it. And so all I am asking you to do is listen to the
19 evidence. And I am going to ask you at the end whether
20 you believe the claims related to those vinyl railings
21 that Floyd installed if it is because of Floyd's work or
22 if it is from some other reason and somebody else is
23 responsible for the selection of it.

24 And at the end -- I appreciate your attention, but
25 that is what I am going to be asking for is that you

1 focus on my client with just the things that are alleged
2 against him. Okay. Thank you.

3 THE COURT: Thank you.

4 MR. WILLIAMS: May it please the court.

5 THE COURT: Yes, sir, Mr. Williams.

6 **OPENING BY MR. WILLIAMS:**

7 MR. WILLIAMS: JMC Construction, \$12,107.09, .001
8 percent. \$12,107.09 represents .001 percent of the total
9 cost of the project of original construction.

10 JMC Construction is my client. Their scope of work,
11 they were called out there after some siding had been
12 removed from the homes they worked on to look at, as you
13 heard discussed earlier, substrates underneath that
14 siding.

15 They were told put the siding and the trim back up.
16 It was the new product. But the product was there
17 waiting on them. They were hired by a company called
18 Atlantic Construction. They were told put this back up
19 the way the rest of it looks.

20 And like you have heard the theme about labor, that
21 is what they did. You do what your customer asks you to
22 do. That is how you survive.

23 Their scope out there, very limited. Throughout this
24 trial I just want you to keep the numbers in your head for
25 JMC Construction, \$12,107.09, .001 percent. Thank you.

1 THE COURT: Thank you. Is that everybody?

2 All right. Mr. Lucey, you can call your first witness.

3 MR. LUCEY: Yes, Your Honor. The plaintiff calls Al
4 Schweickhardt to the witness stand.

5 (WHEREUPON, the witness was duly sworn.)

6 THE CLERK: Will you please state your name. Spell your
7 last name.

8 THE WITNESS: Alan John Schweickhardt.

9 S-C-H-W-E-I-C-K-H-A-R-D-T.

10 **DIRECT EXAMINATION BY MR. LUCEY OF ALAN SCHWEICKHARDT:**

11 Q. Sir, you are a licensed engineer, correct?

12 A. Yes, sir.

13 Q. You practice here in Charleston?

14 A. Yes, sir.

15 Q. And you were hired by the defendant CBC to investigate
16 the plaintiff's allegations of construction defects at Peas
17 Island, correct?

18 A. Yes.

19 Q. And you were hired in 2016?

20 A. Yes.

21 Q. And you proceeded to go out to the property several times
22 during 2016, 2017; correct?

23 A. Yes.

24 Q. And you gave a deposition in this case late June of 2018,
25 correct?

1 A. Yes.

2 Q. And prior to issuing -- excuse me, prior to giving that
3 deposition you issued a report; correct?

4 A. Yes.

5 Q. And that report was based upon your various visits to the
6 property, correct?

7 A. That is correct.

8 Q. And the day before you gave your deposition in 2018 you
9 received the plaintiff's engineer's deposition from 2016,
10 correct?

11 A. Yes.

12 Q. And that would have been Russell Mease's deposition,
13 correct?

14 A. Yes.

15 Q. And you had in fact issued three versions of your report
16 prior to your deposition without reading the sworn testimony
17 of Mr. Mease from either 2016 or 2017, correct?

18 A. Correct.

19 Q. And the day before, in your deposition in the summer of
20 2018, when you received that Mease Volume II deposition you
21 decided to look at it; didn't you?

22 A. Yes.

23 Q. And when you looked at it you realized that you had had a
24 report from Mr. Mease, a photo log from Mr. Mease, in your
25 file from May 25th of 2016 that you had not had an opportunity

1 to look at; correct?

2 A. Right. It was a photo log.

3 Q. It was a photo log documenting leaking in the fronts of
4 these units, correct?

5 A. Specifically at the -- I think at the built-up column
6 below certain models of the unit, yes.

7 Q. And this photo log regarding leaking, looked at half a
8 dozen or a dozen residences; correct?

9 A. The photo log looked at, yeah, a half dozen residences.
10 There was numerous photo logs. There was four or five
11 different photo logs. And this particular issue was that one
12 unit right at that time.

13 Q. Okay. And prior to that you didn't think there was any
14 leaking on the front porches at Peas Island, did you?

15 A. That is right.

16 Q. So for a year-and-a-half, 18 months, Mr. Mease's evidence
17 of front porch leaking sat in your file unnoticed until the
18 day before your deposition; correct?

19 A. Correct.

20 Q. And at the time we showed you what we marked for purposes
21 of identification as Plaintiff's Exhibit 148 his March 23rd,
22 2016, log -- 25th, 2016, log; correct?

23 A. Can you just to make sure we are accurate on it can you
24 help me out on that?

25 Q. Do you have your file with you?

1 A. Yes, but I don't have the photo logs printed out.

2 Q. You don't have Mease's photo logs?

3 A. Not printed out, no.

4 Q. All right. I am going to move on from that until I put
5 them up on the screen for us, sir.

6 A. All right.

7 Q. I want to go forward. Now we took your deposition the
8 day after you received and learned about the front porch
9 leaking; do you recall that?

10 A. Yes.

11 Q. And at the end of your deposition you announced that you
12 wanted to go back out and do more investigation, correct?

13 A. Yes.

14 Q. And thereafter we made arrangements for you to go out on
15 August 21st and 22nd, 2018; correct?

16 A. Yes.

17 Q. And that was the first time in your two-and-a-quarter-
18 year engagement that you actually did destructive testing at
19 the property, correct?

20 A. Correct.

21 Q. And this destructive testing involved principally looking
22 at the deck-to-roof gap that Mr. Mease had documented on these
23 buildings, correct?

24 A. Right. We even went further than that. We looked at
25 additional locations on a side deck that Mr. Mease hadn't

1 looked at. So, yeah, we were responsive and even took it a
2 little bit further.

3 Q. I am going to -- look at Exhibit 812 which is your
4 photographs. And I am going to show you Plaintiff's Exhibit
5 812 which is your photographs from August 21st, 2018; correct?

6 A. Yes.

7 Q. And they are date-stamped on the face of the photograph?

8 A. Yes.

9 Q. And there is about one inch of photographs, a little less
10 than an inch of photographs; and they all have a JPEG, a file
11 number on the bottom of them for identification, correct?

12 A. Correct.

13 Q. And I see you are opening your file to your notes in your
14 binder?

15 A. Right. Yeah, I have notes for every site visit. Right.

16 Q. Okay. Do me a favor. If you decide to look at your
17 notes to answer a question will you tell us that first before
18 you speak from your notes?

19 A. Sure.

20 Q. Now these photos start at JPEG 6001 and go through 6133,
21 correct?

22 A. Yes.

23 MR. LUCEY: Plaintiff moves Plaintiff's 812 into
24 evidence.

25 THE COURT: Any objection to Plaintiff's 812 being

1 admitted?

2 MR. KENDELL: There has been no objection. No objection.

3 THE COURT: Admitted without objection.

4 (WHEREUPON, Plaintiff's Exhibit 812 was admitted into
5 evidence.)

6 Q. And the first residence you looked at was a Dogwood-B and
7 a Dogwood-A?

8 A. Essentially a Dogwood-B. I think 1615 is what we looked
9 at. That is a Dogwood-B.

10 Q. Okay. And let's go to -- let's go to the first photo,
11 6001. And just like your deposition I will occasionally just
12 refer to the photos by the last two or three digits rather
13 than adding the 6000.

14 A. Sure.

15 Q. And the two residences we just described are up on the
16 screen, correct?

17 A. Yes. 1615 is the Dogwood-B on the left. And that is
18 specifically where we were investigating, at that second-floor
19 front deck.

20 Q. Okay. And so this is a duplex, correct?

21 A. Two-family unit, yeah. Commonly known as a duplex, yes.

22 Q. And there's 20 of these out there?

23 A. Twenty buildings, yes.

24 Q. Okay. Twenty duplexes for forty residences?

25 A. Yes.

1 Q. And let's go -- did you tell the jury it is the left
2 building that you looked at?

3 A. It is the left unit, yeah.

4 Q. The left unit with the open second-floor porch?

5 A. Right. And on the Dogwood -- Dogwood there's three of
6 these type of buildings.

7 Q. Okay. Now let's go to Photo 7, please, if you would.
8 Now this photograph shows the jury its first code violation,
9 correct?

10 A. Yes. As it turns out the water gets through that gap
11 between the shingles and the deck. Yes. And if I recall,
12 this is a condition that Mr. Mease looked at, visualized. I
13 call it superficially. We investigated below it.

14 Q. Okay. So the jury is clear, I am going to hand you a
15 pointer. The gap at the base of -- will that work (electronic
16 pointer)? Sometimes it doesn't work on TV's.

17 A. No it looks like it doesn't work on TV.

18 Q. The gap at the base of the post, show that to the jury
19 please.

20 A. This gap here between the shingles as the shingles rise
21 up in the deck.

22 Q. Okay. And that was one of your purposes of this site
23 visit in August of 2018 was to investigate those gaps,
24 correct?

25 A. Right, because at the time I thought that the deck

1 coating possibly could go up behind it and flash that
2 intersection.

3 Q. Prior to investigating the gap you thought the deck
4 coating might go behind it and protect that intersection,
5 didn't you?

6 A. Right.

7 Q. But you learned differently?

8 A. Correct.

9 Q. You learned the deck coating does not protect that
10 intersection, correct?

11 A. Yes.

12 Q. You learned that there was a latent defect in that
13 picture, correct?

14 A. There was a hidden defect, correct.

15 Q. And hidden and latent would be very similar terms,
16 correct?

17 A. I think so, yes.

18 Q. Okay. And so that particular intersection you ended up
19 investigating a dozen or more of those around this complex as
20 a result of reading Mease's photo log, correct?

21 A. Of that particular intersection I mean specifically over
22 those two days I think it is four or five, yes.

23 Q. And you consistently found a building code violation that
24 the membrane from the flat deck, the fabric and the liquid
25 membrane, did not wrap up those posts and did not wrap over to

1 cover the OSP from the roof; correct?

2 A. That is correct.

3 Q. And as a result of that you would find decayed -- water
4 damaged or decayed OSB underneath those type shingles right
5 there, correct?

6 A. Varying degrees. Every intersection had different
7 degrees. Sometimes there was no damage to the roof sheathing.
8 The roof sheathing would be under the shingles. The deck
9 sheathing would be under the deck. And then you had I will
10 call it band sheathing.

11 So it was varying degrees of damage found at those
12 locations. Sometimes it was only stains. Sometimes it was
13 damage.

14 The condition of the built-up columns is a different
15 condition. But we will get into that, I'm sure.

16 Q. Okay.

17 MR. LUCEY: And back out on the photograph just a little
18 bit please.

19 (WHEREUPON, adjusted photo.)

20 Q. Now, sir, there is a second building code violation in
21 this photo that the jury can see; correct?

22 A. You will have to help me out there.

23 Q. Well, there is the excessive overhang of the shingles
24 over the top of the gutter?

25 A. Sure. Yes.

1 Q. Okay. They are not installed properly, correct?

2 A. Right.

3 Q. I mean every shingle manufacturer says basically you are
4 allowed to have a 3/4 inch overhang off of the deck, correct?

5 A. Yes, off an edge of a roof deck, 3/4 inches, right, is
6 standard.

7 Q. You want the shingles to hang over enough to create a
8 drip line beyond the roof decking, correct?

9 A. Yes.

10 Q. But you don't want them to hang over so much that they
11 fold like we see in this photograph, correct?

12 A. Correct.

13 Q. Because the fold creates several more risks of damage,
14 correct?

15 A. It -- well, it increases the possibility of uplift; and,
16 right, it increases wear on it.

17 Q. It increases wear where it is bending, and it makes the
18 shingles more exposed to wind upliftment in the event of a
19 storm; correct?

20 A. Yes.

21 Q. Both of which are bad for the shingle, correct?

22 A. Yes.

23 Q. Which is why all shingle manufacturers limit the overhang
24 to 3/4 of an inch, correct?

25 A. I would say most, yes.

1 Q. Okay. All that you and I are familiar with?

2 A. Pretty much, yes.

3 Q. Okay. Now let's go to Photo 7 -- excuse me, 8 please.

4 That is a similar intersection but on the opposite side of the
5 deck, correct?

6 A. Right. Still the same unit. If you recall from the
7 overview, there is a left side and a right side of that deck.
8 So this is the left side of the deck.

9 Q. And it has a similar gap, correct?

10 A. Correct.

11 Q. And you have looked at gaps on the other sides of these
12 decks regularly, correct?

13 A. Right.

14 Q. And you either find a gap for water to enter or evidence
15 that the water had already entered, correct?

16 A. Yes.

17 Q. And those were additional building code violations,
18 correct?

19 A. The same as the other side. But yes.

20 Q. Well, they are both -- on the left is a building code
21 violation and the right is a building code violation, correct?

22 A. Yes, under the same category. Yeah.

23 Q. They are similar but they are actually distinct
24 violations, correct?

25 A. Right. Yeah, they are separate. They are separate

1 locations.

2 Q. And let's go to Photo 10, please, where you are measuring
3 the gap. It comes out to seven-and-a-half inches, correct?

4 A. Well, seven-and-a-half inches I could go under -- stick a
5 stick rule under the shingle. That is kind of
6 inconsequential. It is there still could have been deck
7 coating back there. As it turns out, there wasn't. So I
8 don't think that measurement is of any consequence.

9 Q. Okay. Let's go to the next photo, please, Number 10,
10 please -- or 11. Okay. Now you here are just measuring the
11 drip edge along the edge of the porch deck, correct?

12 A. Right. And all I am doing again is taking photos for
13 documentation purposes, measuring so I know what the edge of
14 the deck is constructed of.

15 Q. And I am just showing this front photo. This is -- the
16 piece of metal you are measuring is the vertical piece of the
17 drip edge, correct?

18 A. Right. That is called the vertical edge of a drip edge.

19 Q. And I just want them to be familiar with that when you
20 and I go to the horizontal edge. Let's go to -- let's go to
21 Plaintiff 17, please.

22 This is a close-up of the gap on the left side of the
23 deck, correct?

24 A. Correct.

25 Q. And it just illustrates a little better for the jury how

1 easy it is for water to get in that gap, correct?

2 A. Right, as it turns out back beyond the limits of probably
3 vision you will find that that deck coating turns to bare
4 wood.

5 Q. Okay. And that bare wood gets exposed to the moisture,
6 correct?

7 A. Yes.

8 Q. And this can get exposed to water intrusion either by
9 wind-driven rain or by water overrunning the main deck,
10 correct?

11 A. Mostly by wind-driven rain. You've got that hump
12 there that might prevent most water running down it. But
13 wind-driven rain, yes, I would agree with that.

14 Q. And the wind-driven rain is a known risk of failure in
15 Charleston, South Carolina; correct?

16 A. It is a known environmental factor, yes.

17 Q. And it is known that if you don't plan for it it is a
18 risk of failure, correct?

19 A. There is a risk of water intrusion, yes; but if you flash
20 behind it even if you have wind-driven rain there is no -- you
21 limit -- you minimize your risk of exposure to excessive
22 moisture and its possible failure of the wood, yes.

23 Q. And you would agree with me that water intrusion is
24 failure, correct?

25 A. No. Water intrusion that is controlled by flashing is

1 not failure.

2 Q. Water intrusion that is controlled by flashing is not
3 water intrusion, is it?

4 A. No, it still could -- it's ---

5 Q. It's kicked backed in?

6 A. No, it's water intrusion behind your cladding, through
7 gaps. I will disagree and say failure is when your wood gets
8 systemic water intrusion or water exposure, excessive water
9 exposure, so that it gets up to a level where it can start
10 decaying. Or it can cause indoor environmental issues.

11 But simple water intrusion, there's durable materials.
12 You will find there is some pressure-treated lumber in
13 these -- in the construction of these buildings that is
14 resistant to water intrusion causing damage. So, no, I will
15 disagree that water intrusion is damage.

16 Q. And now go back to Photo 9 for just a moment, please.

17 A. Yes.

18 Q. I am letting the screen catch up for the jury from time
19 to time. This deck except for you bird dogging these holes as
20 a result of the Mease photo log from May 25, 2006, except for
21 that, this deck shows no signs of damage; correct?

22 A. Can you -- what do you mean by bird dogging?

23 Q. You were checking out those holes that Mease had
24 documented in his log?

25 A. Right.

1 Q. So except for you knowing, okay, I am going to go check
2 out Mease's holes, there is no damage on this deck; is there?

3 A. There is no visible damage at this time, right.

4 Q. Let's go to Photo 20 -- excuse me, 18 first. This deck
5 that didn't look damaged from the top. It was obviously
6 damaged from the bottom, correct?

7 A. That -- just so I can explain -- yes, I agree that --
8 this is the roof ---

9 THE COURT: I have a laser pointer, Mr. Schweickhardt, if
10 it would help you to reach so far across.

11 (WHEREUPON, laser pointer provided to witness.)

12 A. Yes, so this would be the -- when you are looking at the
13 building this would be the left post. So if you remember

14 THE COURT: Does it work on the screen (laser pointer)?

15 THE WITNESS: No, ma'am.

16 THE COURT: Okay. We tried.

17 A. But this is the roof deck. Just so we are clear. Oh,
18 okay. Yeah, I can -- I think I can -- but this OSB on the
19 slope is the roof deck that you saw directly adjacent to the
20 post. And then over -- not visible in this photo, but you
21 have got the horizontal deck deck.

22 Q. Okay. So on the left where the jury sees plywood between
23 the joists, that is under the deck. And the right where the
24 jury sees OSB between the joist, that is the shingled roof;
25 correct?

1 A. Correct.

2 Q. And we saw no damage to either the shingled roof or the
3 flat deck before we went underneath, correct?

4 A. Correct, before you opened up the soffit and looked;
5 right.

6 Q. Now that we are underneath we see damage to the OSB
7 roofing substrate on the right, correct?

8 A. Damage to the OSB substrate under the roof, yes.

9 Q. And it is black?

10 A. Yes, it is showing evidence of decay. And there is some
11 white. That is the fungus.

12 Q. And the white is to the right?

13 A. I think that is white fungus there on the right. Yeah.
14 I think we later looked and that was a hole in the roof
15 sheathing. Right, through the shingles. Yeah.

16 Q. Is that one of the random holes that you documented?

17 A. Yes, I think that is probably a pump jack hole.

18 Q. Well, let's come back to that a second.

19 A. Sure.

20 Q. First of all, that white fungus and the black on the OSB
21 demonstrates some sort of longer-term saturation of these two
22 locations; correct?

23 A. Right.

24 Q. So it is not like it happened the day before we got
25 there, right?

1 A. Right. No, that takes a little bit.

2 Q. And in fact it is kind of hard for you after the fact as
3 an engineer to sit here and say whether that has been going on
4 for one year or eight years, correct?

5 A. That would be correct.

6 Q. I mean it could be such a slow leak that that is all the
7 damage that you get after eight years, correct?

8 A. Yes.

9 Q. Or it could be a fast leak and that could be six months
10 worth of damage, correct?

11 A. Maybe six months. Possibly.

12 Q. That would be cutting it short?

13 A. Sure.

14 Q. Okay. And we just used the term random roof leak. If I
15 am not mistaken, you have documented at least three different
16 types of the roof leaks in the areas of the shingles: toe
17 boards, pump jacks, and holes that just had nothing to do with
18 either that were several feet away?

19 A. Right, that we couldn't determine what was causing. That
20 is ---

21 Q. And the reason we use random for those that are several
22 feet away is two-fold; one, we can kind of figure out which
23 holes are probably pump jack and toe board holes by their
24 location on the roof; correct?

25 A. Right, down at the eve or the edge of the roof.

1 Q. And secondly the reason we call them random is because it
2 was several feet away and there is no apparent indication as
3 to why it occurred, correct?

4 A. Right, in this case it is, you know, twelve inches away
5 from a post; but in others maybe it was a couple of feet, a
6 couple of three or four feet.

7 Q. Now in this particular photograph we have not only the
8 staining on the OSB but it appears almost separate from that
9 you have staining on the joists that are supporting the deck
10 posts, correct?

11 A. Correct.

12 Q. And is it your belief that at this location there is
13 likely two sources of water?

14 A. Yes. We know on the right is the roof shingle leak. And
15 on the left is coming around the post.

16 Q. But, sir, you had to remove some ceiling components to
17 actually get to see this damage; correct?

18 A. Yes, it is vinyl soffit material.

19 Q. So this damage is not like open and exposed to the
20 average homeowner, correct?

21 A. Right.

22 Q. And the vinyl soffit panels are somehow clipped or nailed
23 up into the ceiling?

24 A. Yeah, I think they have some sort of nails, yes.

25 Q. And, again, the reason you knew to investigate here is

1 because you had found the holes above, correct?

2 A. We looked here because Russ Mease said the gaps were
3 there. So we followed up with that. Right, the gaps. Right.

4 Q. Absent that information you wouldn't have known to look
5 in this particular porch ceiling, correct?

6 A. We were responsive to Mr. Mease's identifying those
7 locations.

8 Q. And then, sir, going to Photo 21, please. This is an
9 aluminum coil stock that you had taken off of the face of the
10 header underneath the first floor deck, correct?

11 A. Correct.

12 Q. And coil stock, if the jury is not familiar with it, it
13 is kind of a very thin aluminum that is used for covering some
14 wood; correct?

15 A. It is -- it is standard thickness aluminum. I think I
16 measured this somewhere in my notes. I think I have got a
17 photo there showing the gauge. But it is standard aluminum
18 that wraps ---

19 Q. And it bends easily which is why people use it?

20 A. Right.

21 Q. And protects?

22 A. Right. It somewhat protects. But it is more for looks.

23 Q. But the coil stock that is installed at Peas Island --
24 the jury didn't hear me talk about this during opening. The
25 coil stock that is installed at Peas Island, it is not

1 installed correctly is it?

2 A. It is -- it has got one possible deficiency in that it
3 doesn't meet industry standards and that it is not protected
4 from treated lumber by a membrane. It does have a coating,
5 but it doesn't have a membrane between the pressure-treated
6 lumber and the coil stock.

7 Q. The builders used this aluminum to wrap pressure-treated
8 lumber, correct?

9 A. Correct.

10 Q. And that is a violation of the pressure-treated lumbers
11 instructions and the manufacturer's instructions for the coil
12 stock, correct?

13 A. It is industry-standard to protect aluminum, unprotected
14 aluminum, from pressure-treated lumber because of different
15 materials of pressure-treated lumber can cause the aluminum to
16 corrode.

17 So I don't know who the manufacturer of the coil stock
18 is. I couldn't find specific directions. But real good
19 construction and probably industry standards would have you
20 wrap the pressure-treated lumber with a membrane to separate
21 it from the aluminum. The aluminum is painted. Some might
22 consider the aluminum paint to be the protection.

23 In the next photo you will see I -- this is not
24 corrosion there. That is just the wood tannins from the
25 pressure-treated lumber and the water. That is just staining.

1 You will see in the next photo I wiped it off.

2 So it is really not corroding from the inside at least in
3 this piece. It looks like the pitting might be originating on
4 the outside.

5 Q. Pressure -- the chemicals in pressure-treated lumber
6 corrodes aluminum, correct?

7 A. It can. Unprotected aluminum it can corrode it, right.

8 Q. And it can corrode it to the point where pitting occurs,
9 correct?

10 A. Right, unprotected aluminum is susceptible to corrosion
11 from the chemicals in pressure-treated lumber.

12 Q. And you saw pitting at Peas Island, correct?

13 A. Saw pitting. It is interesting; this piece had more
14 pitting on the outside and no pitting on the inside. So,
15 again, it is coastal. What else can cause pitting of aluminum
16 is the accumulation of salts.

17 Q. And, sir, Photo 33, please.

18 A. So, yeah, I am sorry to interrupt. I just found -- the
19 next -- Photo 23 shows it 24 gauge, which is standard
20 aluminum.

21 Q. Okay. Photograph 33, please.

22 A. I am there.

23 Q. You are using a moisture meter to check the moisture
24 content of this wood at this location, correct?

25 A. Right.

- 1 Q. And this is still underneath the deck posts from above?
- 2 A. Yes.
- 3 Q. And this is not showing a high moisture content, correct?
- 4 A. Right. There was no damage to that wood sheathing.
- 5 Q. It is apparent that ---
- 6 A. Plus there is -- it is dry. Yeah, it is apparent that
- 7 some moisture got onto that.
- 8 Q. And has dried out?
- 9 A. That lumber. And it is dried at this time, right.
- 10 Q. Okay. And do you know whether it rained the day before?
- 11 A. I can't remember.
- 12 Q. Let's go to Photo 34, please. In contrast, this moisture
- 13 meter shows that the wood is excessively wet, correct?
- 14 A. Yeah, which photo is this again?
- 15 Q. Thirty-four, sir.
- 16 A. Right. This was a 30 percent moisture reading and a
- 17 pressure-treated triple 2x10 deck beam. A pressure-treated
- 18 2x10 deck beam is not susceptible to damage from moisture.
- 19 Q. This beam is actually several pieces consolidated
- 20 together, correct?
- 21 A. Right, it is -- my notes, if I recall, it is a triple
- 22 2x10.
- 23 Q. Thirty percent moisture content is in excess of what you
- 24 would like to see, correct, sir?
- 25 A. It is pressure-treated. It is permissible to get some

1 moisture in it. Pressure-treated lumber if you take a
2 moisture meter to it will show elevated moisture readings due
3 to the chemicals. But there was probably some moisture
4 getting to it from that deck post intersection.

5 Q. You wouldn't expect to see 30 percent moisture content in
6 pressure-treated wood or otherwise if it was properly
7 protected, correct?

8 A. I can't say that. I can take moisture readings of
9 pressure-treated lumber and sometimes get up to 30. But again
10 I do think that was probably getting some additional moisture
11 from the posts. But the pressure-treated lumber was not
12 damaged.

13 Q. Okay. Let's go to Photo 37, please. This is damage in
14 the OSB and to the support framing?

15 A. The same location that we have already seen, just another
16 photo.

17 Q. Okay. This is not ---

18 A. And there is no damage -- no, there is no damage to the
19 support frame.

20 Q. There is water staining?

21 A. Water staining. But no damage. Just damage to the OSB
22 sheathing.

23 Q. Water staining is a part of a progression from wetting to
24 degradation, correct?

25 A. It has got to stay wet for a sufficient amount of time

1 for fungus to grow and eat the wood. So that is the water --
2 that would be water damage.

3 Q. Okay. And Photo 38, please. This moisture meter is what
4 is called pegging out, correct?

5 A. Right. Outboard of the triple 2x10 band is a layer of
6 oriented strand board sheathing. Wraps it. And that oriented
7 strand board sheathing is damaged and excessively wet. It is
8 not treated.

9 Q. Okay. And so we are clear on this for the jury, at this
10 location there's close to five members, five wood or wood-like
11 members; correct?

12 A. Specifically -- no, at this location there's three
13 2x10's. And then outboard of that is OSB. And then there is
14 a 1x10 trim. So the five members you are talking about are
15 above this.

16 Q. Okay. You described five members ---

17 A. No, I described ---

18 Q. Three 2x10's, one OSB, one trim; five pieces, right?

19 A. Five pieces, yes.

20 Q. In the middle of this is a piece of OSB, correct?

21 A. That is one of the pieces.

22 Q. And the OSB in the middle of this configuration is
23 pegging out, correct?

24 A. Correct. It has got as much moisture as the moisture
25 reader can read.

- 1 Q. Pegging out is a term of art for when a moisture meter
2 can no longer read the moisture because it is too excessive,
3 correct?
- 4 A. No, it just means it is greater than 40 percent.
- 5 Q. The peg -- the dial is all the way to the right, correct?
- 6 A. Right.
- 7 Q. It can't go any further, correct?
- 8 A. Correct.
- 9 Q. And you are familiar with the term pegging out, correct?
- 10 A. I mean it is a slang term. Sure.
- 11 Q. Let's go to Photo 42. Is this the same damage that we
12 have already seen?
- 13 A. This again is a closer view of the OSB roof sheathing
14 that we have already seen in previous photos.
- 15 Q. Let's go to Photo 51, please. This is a moisture
16 reading, correct?
- 17 A. Yes.
- 18 Q. And you are taking a moisture reading in an obviously
19 water damaged area, correct?
- 20 A. Correct.
- 21 Q. And your moisture reader is not showing a high moisture
22 content, correct?
- 23 A. Correct. That is because moisture reading is only one
24 indicator of what you look at. Sometimes the wood gets so
25 deteriorated the cellular structure won't hold moisture

1 anymore. And that is what is going on here.

2 But this again is the same location, damaged roof
3 sheathing that we have previously seen in the previous photos.

4 Q. So excessively damaged wood that loses its structural
5 integrity does not continue to hold moisture, correct?

6 A. There's varying degrees. But, yeah, at some point the
7 cellular structure doesn't hold moisture anymore.

8 Q. And some people loosely refer to that term as dry rot,
9 correct?

10 A. That is a good way to refer to it as, yes.

11 Q. Okay. Let's go to Photo 56, please. Is this a different
12 location of staining than we have seen before?

13 A. Fifty-six is still -- this is the deck side of that left
14 -- as you are facing the unit, to the left. So this is still
15 the left side, but the -- that is plywood. That is the
16 horizontal deck. And it was sound. Right.

17 Q. So it is the opposite side than what we were looking at
18 earlier?

19 A. No, I think still the same side. Oh, excuse me, it is 57
20 or 56? This is 56, so this is still the left side. We
21 haven't switched to the right side yet. That is Photo 57.

22 Q. All right. And Photo 59, please. This hurricane strap
23 is not installed in a workmanlike manner is it?

24 A. Right.

25 Q. It needs more nails, correct?

1 A. Probably. Yes. And it is bent in a fashion that is
2 shouldn't be.

3 Q. And it is loose, correct?

4 A. It is just the nature of it. Right, it is just not
5 installed in a workmanlike manner. I don't know if you could
6 say it is loose, but it could be more against the -- because
7 it is metal it is not really -- feels loose. But it could be
8 installed with more nails against the joist. Right.

9 Q. Let's go to photo -- let's go to Exhibit 813 which is
10 your next set of photos. Could you just look at this and
11 first confirm for us that this three-quarter of an inch set of
12 photos are yours?

13 A. They appear to be, yes.

14 MR. LUCEY: Plaintiff moves Exhibit 813 into evidence,
15 the Schweickhardt photos from August 21st, 2018.

16 THE COURT: Any objection?

17 MR. KENDALL: No objection.

18 THE COURT: Admitted without objection.

19 (WHEREUPON, Plaintiff's Exhibit Number 813 admitted into
20 evidence.)

21 THE COURT: Mr. Lucey, we will probably take - just for
22 your planning purposes - a lunch break in about ten minutes;
23 okay?

24 MR. LUCEY: Yes, ma'am.

25 Q. Sir, let's go to Photo 6172, please. This is a location

1 where you are about to do destructive investigation, correct?

2 A. Right. That is a Magnolia-A unit, 1628. Again,
3 similar -- similar second-floor, front-door post-to-roof
4 intersection. There's three of these type of units.

5 Q. Okay. And Photo 175 is your test on the right, correct?

6 A. Right.

7 Q. And let's go to Photo 177. Tell the jury what they are
8 seeing here, please.

9 A. Well, you see on this one you have got -- you have got
10 the treated posts. You have got deck coating that doesn't
11 extend up the post. You have got metal flashing that wraps
12 around. That is in general roof flashing that wraps around.
13 But the deck coating doesn't extend up the posts. And I think
14 when we uncover some of those shingles the deck coating may
15 not extend sufficiently back under the gap between the
16 shingles and the deck.

17 Q. And that deck coating is supposed to wrap several inches
18 up that post for waterproofing, correct?

19 A. Yes.

20 Q. And it is not there, correct?

21 A. Right.

22 Q. And if we go to Photo 180 we will see the gap that exists
23 between these three sets of materials, correct?

24 A. Right, there is a gap there. And you can see the bare
25 wood behind it.

1 Q. And that gap is -- will facilitate water intrusion,
2 correct?

3 A. Right.

4 Q. You don't want that gap there, correct?

5 A. Well, the gap is somewhat unavoidable if you look at the
6 geometry of how the shingles go up the wall. But what you
7 want behind it is some sort of flashing, peel and stick or
8 deck coating. It wasn't there.

9 Q. You want flashing to protect the gap and to prevent water
10 intrusion, correct?

11 A. To protect water intrusion that excessively wets the
12 wood, right.

13 Q. And it wasn't there, correct?

14 A. Right.

15 Q. And that was a consistent finding of yours, correct?

16 A. On these front, second-floor deck posts; yes.

17 Q. So even though the jury is seeing some flashing in these
18 photos, this post is not flashed properly at that gap;
19 correct?

20 A. There was an attempt to flash, but it is not complete.

21 Q. And the fact that there was an attempt to flash shows
22 that the installers knew that this location had to be flashed,
23 correct?

24 A. Right. Some -- whoever installed the metal flashing knew
25 that it had to be flashed.

1 Q. So we heard -- were you here at all for opening
2 statements?

3 A. No, just at the very last three defendant attorneys.

4 Q. Okay, well, there was some discussion on ---

5 MR. KENDALL: Your Honor, objection. Counsel's
6 statements were not evidence and shouldn't be used as
7 cross-examination of a witness.

8 THE COURT: Sustained.

9 Q. Sir, it is also evident that the subcontractor supplied
10 that worker with the flashing to use with that post; correct?

11 A. A worker installed that flashing is what I know. Right.

12 Q. And it is evident that there was flashing on the site,
13 correct?

14 A. Right.

15 Q. There was flashing available for workers to install,
16 correct?

17 A. There is roof flashing that was installed, right.

18 Q. And is this step flashing we are looking at?

19 A. It is a combination. It is apron, combo step flashing.
20 It is not your typical just L-piece of step flashing; but it
21 is bent around a complicated corner, so it is roof-to-post
22 flashing.

23 Q. And was there step flashing on site, sir?

24 A. I -- there was, this flashing must have been on site
25 since it was installed. Standard pieces of step flashing I

1 believe we saw standard pieces of step flashing installed.

2 Q. And, sir, that piece of flashing you said was bent around
3 the post, are you telling us that it was custom installed,
4 custom bent?

5 A. It must be custom bent for that post, right. The worker
6 or somebody bent it to wrap around that post.

7 Q. So they knew they had the challenge of coming around the
8 post and they just didn't meet the challenge?

9 A. Well, no, the metal flashing did. It is what needs to be
10 underneath it there needs to be peel and stick or the deck
11 coating needs to wrap onto the roof.

12 So for this particular location the roof flashing -- the
13 metal roof shingle-to-post flashing is there. The protection
14 behind it is not. Or protection under it is not.

15 Q. Okay.

16 MR. LUCEY: And Photo 190, please.

17 Q. Now this shows the mesh from the deck material being
18 wrapped up the post, correct?

19 A. Mesh and a base coat. Green base coat going up the post.
20 So a better condition than the -- that is the left side. So
21 the right side did not have this.

22 Q. Okay. Is there a gap at the base of the mesh where the
23 mesh meets the very end of the flashing?

24 A. Yeah, I think -- yeah, if you want to go to Photo 91 it
25 shows up in an awl. But, yeah, ---

1 Q. Ninety-one ---

2 A. --- I think that is what you are showing. Yeah, there is
3 a gap right here (pointing).

4 Q. There is the gap between the fabric and the decking where
5 the awl is placed?

6 A. Right.

7 Q. And the awl is demonstrating that gap, correct?

8 A. Correct.

9 Q. And that gap is not supposed to be there, correct?

10 A. Right.

11 Q. But the fact that the fabric is wrapped up the post with
12 a base coat shows that the installer knew how to properly wrap
13 a post, correct?

14 MR. WILSON: Object to the form, Your Honor.
15 Speculation.

16 THE COURT: Can you rephrase it?

17 Q. Yes, sir. Sir, the installer here partially applied the
18 deck coating to the post; correct?

19 A. Right.

20 Q. He didn't finish the job, correct?

21 A. Right.

22 Q. It appears as though he was headed in the right
23 direction, correct?

24 A. Right.

25 Q. But he stopped before completing the job?

1 MR. WILSON: Object to the form, Your Honor. Calls for
2 speculation.

3 THE COURT: Overruled.

4 Q. The top coat is missing, correct?

5 A. You don't necessarily have a top coat go up there. But
6 the base coat has gaps in it. I would say it is incorrect
7 either way.

8 Q. Well, let's go to 92. You demonstrate the gap a little
9 better at that location.

10 MR. LUCEY: Can you orientate the date for the witness,
11 please? It probably works either way.

12 (WHEREUPON, display adjusted for witness.)

13 Q. Is that 92; 92 is the awl -- yes, you can see the awl.
14 Now you can see that the width of the gap is wider than the
15 awl on the very corner; correct?

16 A. Right.

17 Q. And water will find a gap like that, correct?

18 A. Yes.

19 Q. And water flows down hill, correct?

20 A. Yes. And sometimes adheres and travels inward or up,
21 yeah.

22 Q. Okay. Now let's go to Photo 200 unless the court would
23 like me to ...?

24 THE COURT: Yeah, if you don't mind if you think this is
25 a good time for you to stop.

1 MR. LUCEY: Okay.

2 THE COURT: I think this is probably a good stopping
3 point. Ladies and gentlemen, we will take a lunch break at
4 this point in time. It is twelve o'clock. I would ask that
5 you be back at 1:30.

6 Once again, as I said yesterday, please don't discuss the
7 case at all. Certainly don't do any independent research
8 while we are on these breaks. And we will look forward to
9 seeing you all back here at 1:30. Thank you very much.

10 (WHEREUPON, instructions given to the jury for collection of
11 note pads.)

12 (WHEREUPON, jury exits courtroom 5/7/19, 12:01 p.m.)

13 THE COURT: All right. Thank you very much. We will be
14 at ease until 1:30.

15 Mr. Schweickhardt, I just ask during the break that you
16 not discuss the case.

17 (WHEREUPON, break from trial 5/7/19, 12:02 p.m.)

18 (WHEREUPON, resume following lunch 5/7/19, 1:39 p.m.)

19 THE COURT: All right. I understand the jurors are all
20 back. Is everybody ready to proceed?

21 MR. LUCEY: Yes, ma'am.

22 THE COURT: All right. You can bring them back in.

23 THE BAILIFF: Yes, ma'am.

24 (WHEREUPON, pause awaiting jury.)

25 (WHEREUPON, jury enters courtroom 5/7/19, 1:42 p.m.)

1 THE BAILIFF: All jurors are present.

2 THE COURT: Thank you. Can you pass around those
3 notebooks. I think they are labeled by juror numbers.

4 THE BAILIFF: Yes, ma'am.

5 THE COURT: Everybody can get those back. I appreciate
6 that.

7 (WHEREUPON, notebooks are distributed to jurors.)

8 THE COURT: All right. Has everybody got their own
9 notebook and a pen if they want one? Okay. Perfect.

10 Are we ready to proceed? All right. Mr. Lucey, have at
11 it.

12 MR. LUCEY: May it please the court.

13 Q. Mr. Schweickhardt, we are still on Exhibit 813. And we
14 are on Photo 156. If you would turn to that page for me. And
15 this is residence address 1628, just to refresh both of our
16 memories. Magnolia-A. These are your photographs from August
17 21st, 2018; correct?

18 A. Yes.

19 Q. Photo 156 is the underside of a deck. So it would be the
20 first floor -- the elevated first floor looking up at --
21 well, I will wait for a second for you to get there, sir
22 (pause).

23 Are you there?

24 A. Right.

25 Q. It is the underside of a second-floor deck, correct?

1 A. Underside of a second-floor deck to roof intersection.
2 This would be as facing the building on the left.

3 Q. Okay. And you found three leaks at this location,
4 correct?

5 A. You will have to refresh my memory. There is obviously
6 at least one. There's some stains on the deck sheathing.

7 Q. We will just shortcut it if you would like. I will just
8 hand you your deposition. This would be Volume 2.

9 MR. LUCEY: Permission to open the deposition, Your
10 Honor?

11 THE COURT: Yes.

12 (WHEREUPON, sealed deposition opened by Mr. Lucey.)

13 MR. LUCEY: May I have a court instruction to the jury as
14 to the significance of a deposition?

15 THE COURT REPORTER: May I mark that as Court's Exhibit
16 Number 1.

17 THE COURT: Court's Exhibit 1.

18 (WHEREUPON, Court's Exhibit Number 1, deposition of
19 Schweickhardt, was marked for identification.)

20 THE COURT: Are you seeking to have portions of it
21 published at this point, Mr. Lucey?

22 MR. LUCEY: This is refreshing his memory, Your Honor.

23 THE COURT: Okay. There is no additional instruction
24 needed at this time then.

25 MR. LUCEY: Thank you, Your Honor.

1 Q. At Page 286, sir, you will find that at Line 12 I asked
2 you how many locations were leaking in Photo 156. Do you see
3 that?

4 A. I see -- it says, the two -- my answer is: The two
5 locations related to a deck post and then what appears to be
6 on a roof we will get to that later. But 156 you see on the
7 left side you can see the deck sheathing and then we see the
8 vent in the roof sheathing. And then the right of the vent
9 you see another it looks like old deterioration due to a nail
10 hole through the shingles.

11 Q. Okay. And I again said to you: There's two to three
12 leaks here. And you corrected me and said there is three, at
13 Line 24; correct?

14 A. Right. And the answer there is three.

15 Q. Now this was a test cut you made, correct?

16 A. We removed soffit. Yeah, so test cut for sure. Right.

17 Q. And can you tell us, please, how many test cuts you made
18 at Peas Island over your four-year engagement?

19 A. I can estimate. Our test cuts were on August 21st and
20 22nd. Do you want me to count through them? It will take me
21 like ten minutes.

22 Q. Was it around six or so?

23 A. Yes.

24 Q. Five or six?

25 A. Yes.

1 Q. Okay.

2 A. Yes, six to seven maybe.

3 Q. Six to seven. We will go with that. And let's talk
4 about the number of days that you were on the site doing an
5 investigation as opposed to just being invited out to see a
6 new leak or something.

7 A. Right.

8 Q. You had two days in August of 2018, correct?

9 A. Two days in August, 2018, correct.

10 Q. And how many days did you have for your initial
11 investigation in 2016 or so?

12 A. We had visual observations on February 19th, 2006;
13 September 1st, December 1st, and December 2nd; April 25th --
14 of 2017 now. April 27th of 2017. Then, if I recall, we were
15 notified about a damage or leak investigation on November
16 16th, 2017. We were back there for May 8th, 2018. And then
17 August 21st and 22nd were our test cuts. And then October
18 5th, December 11th, January - of 2018 - were responsive to
19 some issues that were reported.

20 And then this year, this past year -- or, no, this year,
21 2019, January 29th and March 6th responsive to some issues
22 discovered.

23 Q. Okay. So I wrote down about a dozen visits.

24 A. Fourteen, yes.

25 Q. Okay. And about half of them were full days and half of

1 them are half days?

2 A. That sounds about approximately right, plus or minus,
3 yeah. You are right.

4 Q. And most of the half days were follow-up visits when a
5 new issue got discovered and everybody got invited out to see
6 it?

7 A. Right, and I think the first site visit may be due to
8 weather or something. There was occasions when there were
9 storms and such. So I think that first site visit in February
10 might have been four hours.

11 Q. And your most recent visit was March 6th, 2019?

12 A. Yes.

13 Q. And what were you invited to see that day, please?

14 A. Well, let me pull out my notes. But I think it was Unit
15 1621.

16 Q. Did it relate to getting an advanced look at some
17 conditions prior to an emergency repair taking place?

18 A. It was the right side, front deck. So the answer is I
19 believe so. I think some repairs were going to incur. Right
20 side, second-floor, front deck of Unit 1621.

21 Q. And do you have pictures from that visit, sir?

22 A. Yes.

23 Q. Are they in your file in front of you?

24 A. Not in my file. They are on my I-PAD.

25 Q. Okay. Going back then to Plaintiff's Exhibit 813,

1 please. Let's go on to exhibit -- excuse me, Photo 158. We
2 were on 156. We will go further to 158. Now this is you
3 documenting the moisture conditions in the same general
4 location, correct?

5 A. Right. This is saturated moisture reading and
6 deterioration under the -- I think this is under the right
7 post.

8 Q. And the pegging out show -- and the condition of the wood
9 shows that the deterioration has taken place -- or the water
10 intrusion has taken place for a period of time, correct; it is
11 not recent?

12 A. Water intrusion is occurring. Because of the wet
13 moisture reading. And then there was deterioration. So for
14 how long it has been going on, the white spot is fungus so at
15 least several months.

16 Q. Okay. Now the white spot, so that the jury is clear, the
17 white spot most of it is just to the right of the moisture
18 meter?

19 A. Right.

20 Q. And you are indicating that that is fungus and that
21 indicates at least several months of moisture, correct?

22 A. Right.

23 Q. Now ---

24 A. And being that this, again, is March, fungus like to grow
25 in the warmer months. So, you know, if you were to ask me to

1 more pinpoint it it would be, you know, earlier than just a
2 few months. So it would probably go back to the warm season
3 of at least 2017 -- or, no, I am sorry, I am getting mixed up.
4 This is August. So it has been warm so -- fungus grows in the
5 warm weather.

6 Q. And we discussed water flows down hill, correct?

7 A. That is one of the directions it flows, yes.

8 Q. And gravity, water flows down in a structure; correct?

9 A. Right.

10 Q. And you are looking at the underside of a leaking deck,
11 correct?

12 A. Second-floor deck, yes.

13 Q. You have not seen one of those water stain locations from
14 the top side, correct?

15 A. Do you mean from up above?

16 Q. Yes, sir.

17 A. No, you can't -- you don't typically see it through the
18 deck coating.

19 Q. You would imagine that it would evidence substantial
20 water staining and perhaps deterioration, correct?

21 A. Say that again. I'm sorry.

22 Q. You would imagine that the top, right underneath the
23 Sealoflex or the Hydrostop, whichever it is, would evidence
24 water staining and deterioration; correct?

25 A. Right, if one was to remove the deck coating you would --

1 there is probably staining on it.

2 Q. And back to the six or seven test cuts you have done,
3 those were all relating to front or front-side deck porches;
4 correct?

5 A. Right, front or front-right -- or front-side decks,
6 correct.

7 Q. On most of those six residences you tested or opened up
8 one or two posts upstairs and then moved some vinyl soffit
9 downstairs to see what was under those posts, correct?

10 A. Correct.

11 Q. You haven't done any water intrusion testing of any kind
12 on the back of these residences, correct?

13 A. Well, we have not opened up any soffit on the back deck,
14 no. There's been some openings in the stairwell inside of the
15 house that are under one of those rear posts that show some
16 water damage. And then there's some stains in the Gypsum
17 board under a rear -- typical rear post on certain units.

18 Q. So you have seen the photos of the water coming from
19 those posts into the living quarters, into the living room, at
20 the base of the stairs?

21 A. Right. One of the site visits was during a repair of one
22 of those posts where they opened up and pulled out wet
23 installation. And so an ABS personality pulled -- took photos
24 during that site visit.

25 Q. Now you would agree with me, sir, that the deck coating

1 on top of wet plywood substrate such as the jury sees in Photo
2 158 of Exhibit 813, it has a shortened expected life span
3 because of the saturated plywood that it is sitting on;
4 correct?

5 A. Saturated plywood will shorten the life span of deck
6 coatings, yes.

7 Q. Stated differently, it accelerates the degradation of the
8 deck coating; correct?

9 A. Yes.

10 Q. Sir, I am going to ask you to flip to Photo 208, 208
11 still in Exhibit 813. Now the yellow thing-a-ma-gig up there,
12 that is a level; right?

13 A. Right, a digital level.

14 Q. Okay. And it is showing that the roof slope is three-
15 and-a-half per twelve, correct?

16 A. Correct.

17 Q. So that is not a real low sloped roof, which is one to
18 two per twelve; but it is a medium-low sloped roof between two
19 and four?

20 A. Right.

21 Q. Okay. And now the building code requires that that slope
22 be treated underneath those singles by two layers of felt or
23 protective membrane, correct?

24 A. That is correct.

25 Q. And you had the opportunity to check one or more of those

1 locations to see if you could find those two layers, correct?

2 A. Right, lifting the edge of the shingles. And then there
3 was a repair on the rear. So only one has been found. One
4 layer of paper.

5 Q. Right. So those locations, those -- this one three-and-
6 a-half and twelve, those middle sloped locations that you have
7 looked at are all building code violations; correct?

8 A. Correct.

9 Q. And there is a similar location -- I am not going to take
10 the time to pull the picture up right at this second. But
11 there is a similar location on the rear of these houses where
12 it is less of a slope, it is maybe one in twelve or two in
13 twelve. Are you familiar with those locations?

14 A. Yeah, that -- that is at the location where the rear wall
15 has been shifted on three of the units.

16 Q. And ---

17 A. It is not very low.

18 Q. And those locations the building code requires that you
19 not use shingles, correct?

20 A. Right.

21 Q. But you found shingles?

22 A. Right.

23 Q. All those were building code violations, correct?

24 A. Correct.

25 Q. Thank you. And in this particular photo we once again

1 see that the shingle overhand is excessive, which is again a
2 building code violation; correct?

3 A. Yes.

4 Q. And if we go to Photo 209 we can show the jury one other
5 building code defect that you and I haven't discussed yet
6 today, correct?

7 A. Correct.

8 Q. The photo -- the shingle application in this photograph
9 is missing what is called a starter shingle, correct?

10 A. Correct.

11 Q. A starter shingle in effect - part of my lay
12 terminology - but in effect a starter terminal shingle adds a
13 little more weight and a little more adhesive to help the
14 shingle system to resist lift up from wind; correct?

15 A. Right. At the eaves, yep.

16 Q. And that is missing here, correct?

17 A. Right, it is installed incorrectly.

18 Q. And that is a building code violation?

19 A. Yes.

20 Q. And moving on to Photo 215 this is water intrusion at the
21 left post; and if we go to 216 we see the water intrusion at
22 the right post on the underside of this deck; correct?

23 A. Right.

24 Q. Now there was one leak on this deck that you knew existed
25 but you couldn't find the source, correct?

1 A. Again you will have to refresh my memory.

2 Q. Well, let's go to Photo 228. There is a leak in the
3 middle of the plywood information stamp on the underside here,
4 correct?

5 A. Oh, and that -- yeah, that is a roof location.

6 Q. And you couldn't find the nail hole?

7 A. That is correct, could not find a nail hole in the
8 shingles.

9 Q. Kind of hard to repair a leak you can't find, isn't it,
10 sir?

11 A. Well, the leak is found. It is at that location.

12 Q. You couldn't find the source of the water intrusion,
13 could you?

14 A. So part of the repair scope is that is included in the
15 repair scope to take up the shingles. That is very close to
16 the post. We are taking -- or this repair scope is to take up
17 the shingles. There is a certain allowance of roof sheathing
18 to repair.

19 At that point by process of elimination it has got to be
20 from the shingle locations.

21 Q. Sir, you found three or four random leaks like this where
22 you -- and they were in the field of the roof and you couldn't
23 find the source or causation, correct?

24 A. Maybe one or two. I can't recall specifically. But we
25 found holes at locations, holes in the shingles due to either

1 pump jack or toe board there at the eaves.

2 This, again, is at the eve. Was a shingle replaced at
3 some point? I don't know. But it could be a very old leak.
4 Again, I don't know. There was no obvious hole in the shingle
5 at that location.

6 Q. And, sir, we are going to move on to Plaintiff's Exhibit
7 814. It should also be in that notebook right in front of
8 you. This is your photos from your visit to the next
9 residence that day, correct?

10 A. Correct.

11 Q. Residence 1623 Oak-A?

12 A. Yes.

13 Q. Now Oak-A is one of the eight or so different floor
14 layouts?

15 A. There's seven models.

16 Q. And that 1623 is the same as this 1623 that is sitting
17 here in front of the jury, correct?

18 A. Yes, if that says 1623 on it -- yep, that is the same.

19 Q. It is the light blue -- the white blue residence on the
20 left, correct?

21 A. Yes, it is on the left.

22 Q. And when you got to 1623 your findings became rather
23 consistent; this was your third residence that day, correct?

24 A. Yes.

25 Q. I mean again you opened up some spots and you found some

1 water intrusions and some shorter missing flashing and the
2 same thing that you and I have looked at in the last couple of
3 residences?

4 A. Right. The main difference on this than the previous is
5 you can look and see the two built up columns below the second
6 floor deck columns instead of on the first floor the other had
7 a post at the middle. So slightly different condition.

8 Q. But the leaks and the flashing and whatever else, it
9 might look different but it is the same game; right?

10 A. The same situation with the second-floor decks.

11 Q. And if we flip to Photo 238, please. This shows the
12 pitting in the aluminum coil stock on the underside, correct?

13 A. Correct.

14 Q. And am I correct this is essentially beams underneath the
15 outside porch or deck that have been wrapped with this coil
16 stock?

17 A. Yes.

18 Q. And in the middle of the photograph there is a seam
19 between the coil stock where the wood tannins have leached out
20 of the beams inside of the coil stock, correct?

21 A. Right.

22 Q. And that is typically evidence of water passing through
23 those beams and leaching the tannin out, correct?

24 A. Yes.

25 Q. And if we go please to Photo 250. You are investigating

1 a similar hole on the second floor where the shingles meet the
2 decking at this location, correct?

3 A. Yes.

4 Q. And whereas you and I have previously twice or three
5 times now shown the jury the shingle overhang at the eave, at
6 the bottom of the roofs, this photo shows the excessive
7 shingle overhang on the side or the regular roof; correct?

8 A. A reg edge, yes.

9 Q. And again the -- even for the sides the manufacturing --
10 the specification is typically 3/4 of an inch, correct?

11 A. Yes.

12 Q. And the fold in that shingle shows you that it is not
13 proper, correct?

14 A. That is an indication that it is excessive, yes.

15 Q. And not only excessive but in fact another building code
16 violation, correct?

17 A. Similar -- yep, same condition as on the others, yes.

18 Q. And if we go to two -- excuse me, 257 please. Just like
19 the other buildings, we are seeing hurricane straps that are
20 loose and not fastened probably; correct?

21 A. Yes.

22 Q. Another building code violation, correct?

23 A. Yes.

24 Q. And if we go to Photo 261, please. We are seeing
25 something that you documented a number of times in your

1 photos, this strap is actually going up through the plywood on
2 the decks into the inside of those posts that aren't flashed
3 properly; correct?

4 A. They ---

5 Q. Or on the siding?

6 A. They probably go up the side -- right -- oh, those are
7 solid pressure-treated posts, so they have got to go up the
8 side; right.

9 Q. Okay. And often times the water that is getting past the
10 unflashed post base is coming down through the hurricane strap
11 slot which is why you see the water damage surrounding where
12 the hurricane strap emanates from above, correct?

13 A. Yes.

14 Q. And it is not anything different than the jury has seen
15 earlier; it is just a common manifestation of where and how
16 the water is getting through, correct?

17 A. Right.

18 Q. And -- and your awl, your awl, A-W-L, I believe, is
19 showing that the wood there is compromised, correct; you have
20 stuck it in?

21 A. Right. That is how I show that it is deteriorated.

22 Q. And if we go over to Photo 265 we will actually see other
23 degraded wood in a different part of this cavity, correct?

24 A. Two sixty-five, this is under the left post?

25 Q. Right.

1 A. Yeah, stains and deterioration on the deck plywood and
2 the roof sheathing OSB. So not on the framing. Stains on the
3 framing, but not damaged.

4 Q. Okay. There's black wood on the screen that the jury can
5 see. Can you see that?

6 A. Yes.

7 Q. And there is black wood both on the OSB and on the
8 structural member; do you see that?

9 A. Yes, that's ---

10 Q. And it is your testimony to the jury that the structural
11 member that is black is not damaged; is that correct, sir?

12 A. That is correct. It is treated.

13 Q. And this location -- this staining is different than what
14 the jury just saw at the hurricane strap. And we know that
15 for two reasons, both because the strap is not in the
16 photograph and this photograph has OSB placing it under the
17 shingle group, whereas 261 where the strap was, that had
18 plywood placing it under the second-floor deck; correct?

19 A. Right, the strap is on the other side of that framing
20 group. It is several inches away.

21 Q. And if we look at Photo 275, please. We will see a
22 different hurricane strap penetration location, correct?

23 A. Yes, this 275 is under the right post.

24 Q. And it is under the deck, correct; you can tell by the
25 plywood?

1 A. Right.

2 Q. And this strap, this different strap, is also improperly
3 attached?

4 A. Probably, yes.

5 Q. And it is another code violation?

6 A. Yes, the same as the previous.

7 Q. And the water intrusion has been coming through this same
8 location long enough that there is some white microbial growth
9 here too, correct?

10 A. Yes.

11 Q. Let's go to Photo 288, please. This is the OSB sheathing
12 or shingled decking underneath the shingles, correct?

13 A. Yes.

14 Q. We are in the same residence, so this would be adjacent
15 to one of those strap-post leaks that you and I just looked
16 at?

17 A. Yes. This is the left post, so the strap is around the
18 corner on the right side of that post. And this is around the
19 left side where the roof intersects.

20 Q. And the OSB at this location has lost all structural
21 integrity, correct?

22 A. Yes.

23 Q. It is disintegrating in your fingers, isn't it?

24 A. Yes, it is easy to penetrate.

25 Q. And once again we see that there is a partial deck

1 coating wrap on the post, correct?

2 A. Yes.

3 Q. So again the deck coating installer has started to do
4 what he was supposed to do but stopped before he finished the
5 job, correct?

6 A. Correct.

7 Q. It doesn't have anything to do with what materials are or
8 are not on the site, correct? Clearly there is wrap, there is
9 fabric, there is coating; he has what he needs to do the job,
10 correct?

11 A. I don't know how to answer that question, what was on the
12 site or what wasn't. All I can say from that is at this stage
13 there was no -- on the left side of the post there was no
14 metal flashing. And, yes, the deck coating is partial. So
15 what instructions were given, I don't know at this stage.

16 Q. And, sir, if we will go to Photo 295, please. And,
17 again, for the court reporter's record, we are dropping the
18 first digit on these numbers. This is actually 6295.

19 Here we are at the same location but we have a different
20 building code violation for the jury to see, correct?

21 A. Right, there is no metal flashing. No roof shingle to
22 post flashing.

23 Q. All right. And there is another building code violation
24 up there that they haven't heard about before, correct?

25 A. The ---

1 Q. At least not from you?

2 A. The trim being nailed with what looks like not hot-tipped
3 galvanized nails.

4 Q. Improper nails, correct?

5 A. Right.

6 Q. Or what we sometimes say improper fasteners?

7 A. Yes.

8 Q. And you just told the jury implicitly that the building
9 code in locations such as this require the use of hot-dipped
10 galvanized fasteners so that they last, correct?

11 A. They require with pressure-treated lumber hot-dipped
12 galvanized, stainless steel, or some proprietary coating.

13 Q. And this -- these fasteners are erroneous because they
14 are in pressure-treated wood?

15 A. Right.

16 Q. And the Hardie trim at this location has suffered water
17 damage, correct?

18 A. I can't say that from that photo. And that is not in my
19 notes. So I don't see that.

20 Q. And in case we don't go through all of these photos with
21 the jury, sir, the improper fasteners you have documented that
22 at three, four, five, six different types of locations on Peas
23 Island; correct?

24 A. Yes.

25 Q. There's improper fasteners in the fascia?

1 A. Yes, wherever we have connections to treated lumber we
2 found hot-tipped -- or non hot-tipped galvanized fasteners.

3 Q. And we saw improper fasteners in some of the wood post
4 trim, not the Hardie trim?

5 A. Well, this is -- when you said Hardie trim, this is --
6 Hardie trim and cement board trim, all the same. So, yes,
7 same as Hardie trim. I don't know if that is separate.

8 Q. And you documented improper fasteners in the
9 architectural wood angles above the rear decks on the second
10 floor of these residences, correct?

11 A. I can't recall.

12 Q. When they see the red dot in the wood they know that more
13 likely than not in these photographs we are looking at
14 improper fasteners, correct?

15 A. Most likely, yeah.

16 Q. Sir, we are moving to Photo 306, please. This shows a
17 gap, a ridge if you will, at the edge of the second-floor
18 deck; correct?

19 A. Yes, a ridge. Yes.

20 Q. And this ridge that you are showing here is about three-
21 sixteenth of an inch, correct?

22 A. Yes.

23 Q. And you have seen ridges as much as 5/8 of an inch or
24 more in your photographs, correct?

25 A. You will have to show me that again. I know we have got

1 three-sixteenths. Five-eighths I can't recall.

2 Q. Now on these upstairs decks your belief is that the only
3 requirement is that they be sloped, correct?

4 A. Yes, they need to have positive slope.

5 Q. To discharge water, correct?

6 A. Right.

7 Q. And are you aware that the design documents required
8 slope?

9 A. Yes, I believe so.

10 Q. Okay. And when the amount of slope was questioned by the
11 contractor he actually provided one-eighth inch per foot?

12 A. I can't -- I don't know the answer to that.

13 Q. At any rate, because slope was required the framer framed
14 the joists that are perpendicular to the front of this deck;
15 he framed those joists on a slope, correct?

16 A. Yes. In general where we exposed joists they had slope.

17 Q. But when they got to the end of the porch they didn't
18 continue the slope, they put the band boards level which
19 created the dip and the rise along with several other
20 components; correct?

21 A. Correct. We found 2x12 joists sloped anywhere from one
22 percent up to three point two percent. And then it hits a
23 2x12 band that is going to have the top one-and-a half inches
24 that is flat. And then the OSB sheathing another half inch.
25 And then three one-bys.

1 Q. So the last five-and-a-quarter inches of framing material
2 by the framer and trim material by the siding guy, that last
3 five-and-a-quarter inches is not sloped; correct?

4 A. Relatively flat. That is correct.

5 Q. And that along with the drip edge for the Sealoflex is
6 what is creating this dip that you are measuring here,
7 correct?

8 A. It creates a ridge. It contributes to the ridge, right.

9 Q. And the ridge prevents the water from free-flow draining
10 during and after storms, correct?

11 A. It inhibits the drainage, right.

12 Q. It creates a condition commonly referred to in our
13 industry as ponding, correct?

14 A. It can. I don't know if -- ponding, again, is 48 hours
15 worth of accumulation that hasn't evaporated. So there is the
16 potential for it.

17 Q. Okay. There is a potential for water to gather on the
18 deck and not immediately go away, correct?

19 A. At the last five inch or six inches, yes.

20 Q. And whether it is 24 hours or 48 hours, that water will
21 leave residue when it finally evaporates typically; correct?

22 A. Yeah, it can leave dirt and algae.

23 Q. Dirt or algae, correct?

24 A. Yeah, dirt or algae.

25 Q. And moving to Photo 308, please. Still in Exhibit 814.

1 This is where you went down on the first floor underneath some
2 of these deck leaks in this blue house that we have on the
3 poster board and you took off a piece of the trim to see what
4 you would find underneath there, right?

5 A. Yes.

6 Q. Now before you took this piece of trim off did you know
7 that the water had migrated all the way down here and done all
8 of this damage?

9 A. No, I don't think there was a telltale on this particular
10 unit; no.

11 Q. Is it what some people in our industry refer to as a
12 latent condition?

13 A. Yes.

14 Q. And if we go to Photo 312 we see that you have peeled
15 back the building paper and you are sticking your awl into the
16 degraded wood, correct?

17 A. Correct.

18 Q. And it is devoid of any structural capacity; it is gone,
19 right?

20 A. There is no quantifiable structural capacity, correct, to
21 that member.

22 Q. Sir, let's go to Plaintiff's Exhibit 815, please. It is
23 in the notebook in front of you. These are photos from that
24 same two-day site visit in August of 2018, correct?

25 A. Yes.

1 Q. And we are just going to look at a couple of these. But
2 first you do -- this is about an eighth of an inch of photos
3 in it that at four locations they are yours, right?

4 A. Yes.

5 MR. LUCEY: Plaintiff moves 815 into evidence. And in
6 case I forgot, I want to remove 814 into evidence.

7 MR. KENDALL: No objection.

8 THE COURT: Both admitted without objection.

9 (WHEREUPON, Plaintiff's Exhibit Number 815 admitted into
10 evidence.)

11 (WHEREUPON, Plaintiff's Exhibit Number 814 admitted into
12 evidence.)

13 Q. That is a different residence you looked at on the same
14 day, correct?

15 A. Eight-fifteen looks like it is labeled 1631 Palmetto-B
16 and 1647 Dogwood-B. So two residences.

17 Q. Okay. And we are going to flip to Photo 328, please.
18 This shows the jury another building code violation they have
19 not seen yet today, correct?

20 A. Yes, this is the post screws on the second-floor, side
21 deck not going into blocking.

22 Q. Okay. Now when you say post screws, as I understand
23 it - and of course I want you to correct me if I'm wrong -
24 there's two different types of posts on these decks; some are
25 wood, and some are vinyl, right?

1 A. Yes.

2 Q. And as I understand it, this would be the bottom of a
3 vinyl post?

4 A. That's right. This is a vinyl guardrail or rail post.

5 Q. So they have fastened through the waterproofing membrane
6 on the deck?

7 A. I don't know if they fastened through the waterproofing
8 membrane. I'm guessing so. It depends on if the rails were
9 installed first. We didn't lift up the base of the post rail.
10 But that is a good guess.

11 Q. And the reason it is a building code violation is because
12 a handrail is a life safety thing and you are supposed to
13 fasten them to structural members or to blocking, correct?

14 A. It has got to be fastened to more than just deck
15 sheathing, correct.

16 Q. And you found this at a number of locations in the
17 following photographs, correct?

18 A. Found it. There's two posts for the rails on the
19 second-floor side decks. And it was common at the two units
20 we investigated this for.

21 Q. And briefly please, we are going to just shoot over to
22 Photo 344. You are documenting more gaps in the flashing,
23 correct?

24 A. Yes. This is step-flashing that doesn't wrap around the
25 corner of the post.

1 Q. Which they could have continued to use step-flashing at
2 that location if they had carried it through and made what is
3 called a diverter or kick-out flashing, right?

4 A. Yes, it could have been extended.

5 Q. But you didn't see one shred of diverter or kick-out
6 flashing on Palmetto Pointe, did you?

7 A. I don't recall seeing that continuing as a diverter
8 flashing. It usually -- either it was missing or it ended
9 right at the corner or wrapped around the corner.

10 Q. And Photo 353 you are showing more gaps?

11 A. The same location. Just again this is the common
12 location of the deck, roof-deck-to-post intersection. Yeah,
13 there are gaps.

14 Q. The same with 359 more gaps?

15 A. That is the same location. So there's numerous photos at
16 the same location.

17 Q. And Photo 366 you are documenting water staining
18 underneath?

19 A. Yes. This is below the left post.

20 Q. Sir, I am going to hand you what has been marked for
21 identification as Plaintiff's 827 and 828. And these are
22 charts created by my office and shown to you during your
23 depositions, correct?

24 A. Correct.

25 Q. Let's look at Plaintiff's Exhibit 827 first. Plaintiff's

1 Exhibit 827 - and they have it on the screen too - is the
2 layout of Peas Island the 20 buildings with their addresses,
3 correct?

4 A. Yes.

5 Q. And each address has been stamped in red on the townhouse
6 it belongs to, right?

7 A. Yes.

8 Q. And the blue numbers are the number of posts or flashing
9 repairs you have called for on the rear of each of these
10 residences, correct?

11 A. The rear second-floor deck post, those are the numbers of
12 posts that exist.

13 Q. Okay. And you have not done any test cuts at any of
14 those rear second-floor deck posts, correct?

15 A. No, we observed again the conditions under the post that
16 is on a certain model - it is in my report - that falls over
17 the stairs. And that is -- and some of those models had some
18 staining on the ceiling. So again, a deduction would be that
19 post is leaking.

20 And then visual observations of some of those posts, they
21 lack the metal flashing. Some seeing -- you get to see some
22 bare wood.

23 And then based on our findings on the front elevation I
24 assume the rear elevation is similar.

25 Q. Okay. And you also looked at Mr. Mease's photographs,

1 correct?

2 A. Which are -- yeah, visual photographs. I think he has
3 view -- photos, of again a repair in a stairwell underneath a
4 particular rear post.

5 Q. And in addition to Mr. Mease's photographs you have had
6 an opportunity to see a few of these conditions opened up for
7 emergency repairs, correct?

8 A. Yes. There's been 1622 I think is the main one. Right.

9 Q. Well, you have mentioned 1622 for a moment. Let's come
10 back to that one second. First of all, on Plaintiff's Exhibit
11 827 where the blue number says for instance five at residence
12 1622, that means you have five repair locations on the rear;
13 correct?

14 A. Right.

15 Q. And, you know, where it says two it would be two
16 locations; right?

17 A. Right.

18 Q. And we checked this against the chart you had made, and
19 you told me it was accurate; correct?

20 A. As accurate as I could get it, right.

21 Q. And we will come back to 1622 in one second. But the
22 other exhibit, 828, is a recording of the front and side
23 locations that you have opined need to be repaired; correct?

24 A. Right. In the yellow is the front two posts. So
25 essentially every -- all the 20 units with the two second-

1 floor posts all have repairs. And then the ones in green are
2 the seven units with the built up columns below them. And
3 then the ones in blue are a front, side-deck condition.

4 Q. And stated differently, on exhibit -- excuse me, 828,
5 every colored location, yellow, blue or green, needs repairs;
6 correct?

7 A. Yes.

8 Q. And the majority if not all of those repairs are due to
9 building code violations?

10 A. Yes.

11 Q. And the same with all the repairs on Exhibit 827,
12 building code violations?

13 A. Right, at the post to roof to deck flashing.

14 Q. You would agree with me that that is a lot of building
15 code violations?

16 A. They're -- yes, they are all repeated ---

17 Q. And this is only ---

18 A. That is on 827, that's is all the same. Same building
19 code violation repeated. So numerous repeats of the same
20 building code violations.

21 Q. And these building code violations they are only three of
22 the several dozen defects that you have documented at this
23 complex, correct?

24 A. Yeah, I forget the exact number. But we have listed
25 them.

1 Q. Before we come back to that let me move Plaintiff's
2 Exhibit 827 and 828 into evidence.

3 THE COURT: Any objection?

4 MR. KENDALL: No objection.

5 THE COURT: Admitted without objection.

6 MR. LUCEY: Thank you.

7 (WHEREUPON, Plaintiff's Exhibit Number 827 and 828 was
8 admitted into evidence.)

9 Q. Now, sir, let's go back to 1622. Because there is
10 another building code violation there and at some of the
11 others similar units that we haven't told the jury about,
12 correct?

13 A. You will have to refresh my memory.

14 Q. The privacy wall.

15 A. The privacy wall is actually not 1622, but 24. And 1608
16 and 1651. So not 1622.

17 Q. Do 22 and 24 share a building?

18 A. They are -- building, but they are separated by a small
19 gap at that location.

20 Q. And there is a privacy wall between them?

21 A. Yes.

22 Q. Okay. And that privacy wall is what it sounds like, it
23 is a low wall on the back of the building to give each rear
24 porch a little bit of privacy on the first floor; correct?

25 A. Yes. There's several good overview photos of it if you

1 want to go to them. Yeah.

2 Q. And the privacy wall is a building code violation because
3 the top of the wall is not flashed or protected underneath the
4 top piece of wood, correct?

5 A. Right, at those three locations out of the forty the top
6 of that wall is not protected adequately.

7 Q. And how many privacy walls are at Peas Island?

8 A. I will have to go through. But there's only three of
9 these. Give me a second.

10 Q. No, I am going to keep moving on.

11 A. All right.

12 Q. I am to go ---

13 A. But this condition only occurs on three of the units.

14 Q. I want to show you Plaintiff's Exhibit 826. You have
15 seen that document before, correct?

16 A. Yes.

17 Q. And in fact you have some handwriting on Page 2?

18 A. Right.

19 Q. This was a list of all of the deficiencies that you
20 testified to in your first deposition, correct?

21 A. Right.

22 Q. And you and I went over in your second deposition to see
23 if I had accurately written them down, correct?

24 A. Yes.

25 Q. And I attempted to separate them, according to your

1 testimony, between code violations and violations of industry
2 standards and unallocated deficiencies that I didn't know;
3 correct?

4 A. Yes.

5 Q. And then you in your second deposition you helped me
6 correct some of these as to whether they were code violations
7 or manufacturer's violations, correct?

8 A. Yes.

9 Q. And the very first defect that you and I confirmed was
10 the installation of the Certain Teed siding, correct?

11 A. Yes.

12 Q. It had inadequate nails, they were the wrong size; the
13 nine-inch boards don't meet wind load, the sub-straight
14 fastening was inadequate to support the pullouts required by
15 Certain Teed, and the fasteners for the siding failed to
16 engage the framing underneath the wall sheathing; correct?

17 A. Yes; but to clarify, the nine-inch boards didn't meet the
18 wind load because they were nailed incorrectly. And the
19 substrate fastening was inadequate to fasten to the OSB
20 sheathing. But that kind of siding can be nailed -- can be
21 used if it was probably nailed.

22 Q. The siding was blind-nailed to the structures, correct?

23 A. Right.

24 Q. Blind nails when if you are putting your siding up coming
25 from the bottom you nail the top of each piece and then you

1 cover it with the next piece so you don't see the nails;
2 correct?

3 A. Correct.

4 Q. And the reason that fasteners are supposed to be placed
5 where the 2x4's or the 2x6 framing is, behind the sheathing,
6 is to have adequate pullouts strength for severe wind
7 conditions; correct?

8 A. For code prescribed wind conditions, right.

9 Q. And that didn't occur either, did it?

10 A. The nails -- this was review of Mr. Mease's photos --
11 right, the nailing didn't hit the studs on a regular basis.
12 And it was excessively spaced. And it was blind nailed. It
13 is not allowed to be -- blind nailing does not meet the wind
14 load conditions at this location.

15 Q. You also confirmed with me that the fire stopping in the
16 attic was a building code violation for three reasons,
17 correct?

18 A. The fire stopping in the attic was a building code
19 violation because it is not fire stopped, right. I mean the
20 penetrations in the fire-rated wall was not correctly fire
21 stopped. That is the violation.

22 Q. It had gaps, it had wood members perpendicular through
23 it, and it had ridge vent gaps above it in the top of the
24 roof; correct?

25 A. Right, that is part of -- the ridge vent is part --

1 contributes to a gap at the top, right.

2 Q. And just in case the jury has forgotten, you are the
3 engineer for the general contractor in this case; correct?

4 A. Yes.

5 Q. And your firm, your firm, is the engineer for what I call
6 the master subcontractor in this case; correct?

7 A. Correct.

8 Q. Eddie Polk is your partner or associate?

9 A. Associate, yes.

10 Q. And he is representing the master subcontractor?

11 A. He is working for the representation of Tri-County
12 Roofing, yes.

13 Q. And you were unaware that they had made claims against
14 each other?

15 A. I have learned that from your previous -- my previous
16 deposition.

17 Q. But they are using the same engineering firm?

18 A. Yes.

19 Q. Okay. So your firm -- and the master subcontractor has
20 two more subs working for him with three trades at least that
21 matter; decking, roofing, and siding; correct?

22 A. Yes, that is my understanding.

23 Q. So your firm is testifying on behalf of the decking,
24 roofing, and two -- one of the two decking roofing and siding
25 defendants, and the general contractor in this case?

1 A. I am here for Complete Building Corp and Eddie Polk's for
2 Tri-County. So I didn't keep track of all of the subs.

3 Q. And you already discussed with the jury that the front
4 decks are a building code violation, but you also agree that
5 the rear decks are building code violations; correct?

6 A. Yes.

7 Q. And Number 7, we have talked about the excessive shingle
8 overhang; correct?

9 A. Yes.

10 Q. We have eight: We have discussed the corroded nails,
11 that they were improper fasteners; right?

12 A. Yes.

13 Q. Number 9 we have agreed about and discussed the improper
14 low sloped roofs?

15 A. Yes.

16 Q. And missing flashing, Number 10?

17 A. Yes.

18 Q. Number 11, incorrect fasteners on fascia?

19 A. Yes.

20 Q. And this is all in the building code violation column,
21 correct?

22 A. Yes.

23 Q. And Number 12 was the attachment of the railing mounting
24 plate to siding; do you see that?

25 A. Yes.

1 Q. Now we showed the jury why the base plate was a building
2 code violation. Let's tell them why the handrail side plates
3 are building code violations.

4 The fastener that they used was somewhere between 5/8 of
5 an inch and 3/4's of an inch, correct?

6 A. Yes, there was some found that were too short and only
7 went into siding and not into the framing.

8 Q. You say some found. Do you happen to have a picture of
9 any fastener that found that complied with the building code?

10 A. No, I didn't pull all of the fasteners. Those were the
11 ones that easily came out.

12 Q. And where those short fasteners just fastened the hand
13 rails to the Hardie Plank or the Certain Teed, not to the
14 structure; correct?

15 A. Right.

16 Q. And that is the building code violation?

17 A. Right.

18 Q. And some of those are over tightened and so the base -
19 - that rail base just cracked, correct?

20 A. That's one of the hypotheses on the rails, right.

21 Q. All right. Number 13 we talked about the post rails
22 fastened through the deck. This says stair tread. You also
23 have photos of those vinyl posts fastening through stair
24 treads, correct?

25 A. Correct.

1 Q. And that is a building code violation?

2 A. Yes.

3 Q. Whether it is fastening through the side deck or the
4 stair tread, neither one of those qualify?

5 A. Right.

6 Q. And Number 14 was inadequate length rail-plate fasteners.
7 We have already covered that.

8 Violations of industry standards, you agree with me that
9 all of the above building code violation are also violations
10 of industry standards; correct?

11 A. Pretty much, yes.

12 Q. And the use of the coil stock adjacent to the pressure-
13 treated lumber was a violation of industry standards, Number
14 2; correct?

15 A. Probably, yes.

16 Q. Number 3 was improper shingle starter strip. But you
17 moved that into the building code violation category, correct?

18 A. Right, because it wasn't in accordance with the
19 manufacturer's instructions; right.

20 Q. That is your handwriting that says code next to Number 3,
21 right?

22 A. Yes.

23 Q. Number 4, reverse lap weather barrier at base of wall,
24 Z-flashing, is an industry-standard violation; correct?

25 A. Yes.

- 1 Q. The jury hasn't seen a photo on that. But rather than
2 take up time looking for one let's just use 1623. In the
3 middle of 1623 there are wall sections between the two decks.
4 Do you see that?
- 5 A. Yes.
- 6 Q. And that is called the base of wall, right?
- 7 A. Right.
- 8 Q. It is the bottom of the -- it is the top of the bottom of
9 the heated floor space?
- 10 A. Yes.
- 11 Q. Okay. And behind the siding on these walls is something
12 called building paper, right?
- 13 A. Right.
- 14 Q. It is that white Tyvek stuff we all see when we are
15 driving down the highway and a house is under construction,
16 correct?
- 17 A. Yes.
- 18 Q. And at the base of the wall there is aluminum or metal
19 Z-flashing, correct?
- 20 A. Right.
- 21 Q. And the Z-Flashing is basically a "Z" coming out from
22 behind the siding, under the bottom piece of the siding, and
23 slightly down the face of the wall to channel any water that
24 got behind the siding out to the outside; correct?
- 25 A. Correct.

1 Q. And the problem -- the violation of industry standard
2 that occurred at Peas Island is that the contractor failed to
3 lap the building paper over top of the Z-Flashing so that
4 water running down the building paper would kick from the wall
5 system instead of going down behind the Z-Flashing; correct?

6 A. Yes, but based on review of Mr. Mease's photos he looked
7 at this condition I understand at eight locations. Five of
8 them indicated that the building paper was properly weather
9 lapped over the Z-Flashing. So five out of the eight were
10 proper. Three out of the eight were improper.

11 Q. Which once again evidences that they knew how to do it,
12 they did it properly the majority of the time, and just
13 ignored the requirement three-eighths of the time; correct?

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

15 Q. You have no idea whether it was just random that they got
16 it right five-eighths of the time?

17 A. I don't know why they got it right five-eighths of the
18 time.

19 Q. And just so the jury understands that lap. It is just
20 like a shower curtain, whether you are directing the water
21 inside of a bathtub or letting it run outside of a bathtub;
22 right?

23 A. Yes.

24 Q. Okay. Now going further down to Number 5 on the industry
25 standards, the mixing of deck products between manufacturers.

1 You and I haven't told the jury about that yet, have you?

2 A. Right, you will have to refresh my memory.

3 Q. There is both HydroStop and Sealoflex used on the same
4 decks at Peas Island, correct?

5 A. That may be. I am not entirely sure.

6 Q. You reviewed that in Mr. Poyner's deposition?

7 A. I think I recall Mr. Poyner stating that so.

8 Q. Tell them who Mr. Poyner is.

9 A. He is with Tri-County Roofing.

10 Q. Okay. And it was on the same invoices, same day?

11 A. I can't remember.

12 Q. Assuming that is correct, it is a violation of both
13 manufacturer's instructions to mix systems; correct?

14 A. It is a violation to mix different deck coatings on the
15 same deck. Say though if one deck coating was used on one
16 deck and different deck coating, they are both the same family
17 of deck coatings; that would not be.

18 Q. And, sir, you have included it on this list with me under
19 industry standards, correct?

20 A. Yes.

21 Q. And Number 6 was attaching a pump jack -- pump jacks
22 through the shingles, correct?

23 A. Right. Yes.

24 Q. Violation of industry standard, right?

25 A. Without -- without sealing it.

1 Q. Number -- Number 7 ---

2 A. It was a terrible sealant, right.

3 Q. Pump jacks are supposed to be fastened under the shingle
4 on top of the felt, correct?

5 A. Right; through a protected part, right.

6 Q. And that is the violation is fastening through the
7 sealing -- the shingles instead of under the shingles,
8 correct?

9 A. Through the top shingle, right.

10 Q. You shouldn't have to fix it afterwards because you
11 shouldn't penetrate it to begin with?

12 A. Right, it should go underneath the shingles.

13 Q. And Number 7 was trim and contact with shingles. That is
14 a violation of industry standards and it is shown in your
15 photos, correct?

16 A. There are some locations where, yes, the trim is in
17 contact with the shingles and it should be a nominal distance
18 up.

19 Q. And there was some unpainted wood even that we found on
20 the top of the rear decks that you called a violation of
21 industry standards, correct?

22 A. Is that talking about behind the gaps where ---

23 Q. The upside down A-frame on top of the second-floor decks?

24 A. Right, I think -- right.

25 Q. And Number 11 was connector plate in contact with

1 pressure-treated wood corroding, strapping. Do you see that?

2 A. Right.

3 Q. And Number 12 was a lack of a sealant gap around the
4 window perimeter edge, correct?

5 A. That's the manufacturer's instructions, right.

6 Q. We haven't talked to the jury about that yet, so let's
7 just spend one moment here. The windows at this complex are
8 Anderson 200 Narroline windows, correct?

9 A. Correct.

10 Q. And like most manufacturers, Andersen has express
11 installation instructions; correct?

12 A. Yes.

13 Q. They want their windows installed a certain way so that
14 they function right, correct?

15 A. Correct.

16 Q. And one of the typical expressed window installation
17 instructions is for the installer to leave room for a sealant
18 joint around the window, correct?

19 A. Right, Andersen states to use a one-quarter inch sealant
20 joint between the trim and the window.

21 Q. And without us getting into a bunch of engineer stuff,
22 there's two or three reasons to have that joint there;
23 correct?

24 A. Right. One to protect up against water intrusion at that
25 gap. And two to allow for some movement.

1 Q. Allow for the expansion and contraction of building
2 materials?

3 A. Right.

4 Q. Which happens everywhere, correct?

5 A. Right.

6 Q. And that gap doesn't exist at Palmetto Pointe, correct?

7 A. A one-quarter inch gap doesn't exist. It's probably one-
8 eight inch or less.

9 Q. And you agreed with me that that was a violation of the
10 manufacturer's instructions which ---

11 A. Right, but I didn't observe any failed sealant joints.

12 Q. Which is also a violation of industry standards?

13 A. Right. Yes.

14 Q. And the unallocated deficiencies that you and I discussed
15 that day, the first one was a mid rail support rubbing the
16 deck. You and I haven't told the jury about that?

17 A. Right.

18 Q. At some of the longer plastic railing spans there is a
19 support in the middle just to hold it up, right?

20 A. Right.

21 Q. It doesn't pierce the deck, it just rests on the deck?

22 A. Right.

23 Q. And you ---

24 A. This condition I think was isolated to 1611 was where it
25 caused an issue.

1 Q. Okay. And at that location it caused a wear on the deck,
2 and you believe it caused some of the staining in the wood
3 down below?

4 A. Right. Mr. Mease has photos showing damaged -- or
5 staining down below and probable damage.

6 Q. And another condition the jury hasn't heard about yet is
7 Number 2 under unallocated, which is abrupt drip edge
8 transition creating gaps and water intrusion and damage. Do
9 you see that?

10 A. Yes.

11 Q. And do you recall at some places where the drip edge from
12 the front of the second-floor porch, the metal aluminum piece
13 that is horizontal and vertical, maybe two inches each way, it
14 travels under the shingle but causes a rise in the shingle
15 which contributes to the gap because of the way it is
16 installed?

17 A. Yes, isn't this -- I believe this is still the front
18 second-floor decks where the drip edge goes under the
19 shingles. So that condition we have seen the photos of today.

20 Q. Okay. And the next one was the unconfirmed fire stopping
21 at the bottom of the common wall, correct?

22 A. Correct.

23 Q. And you believe that to be a code violation, correct?

24 A. Right.

25 Q. Now before the first deposition you went under all of

1 these units and you looked up at the bottom of the common wall
2 looking for what you thought was the designed fire stopping,
3 correct?

4 A. Fire blocking.

5 Q. Fire blocking. Thank you.

6 A. Right.

7 Q. And the design fire blocking originally - not now, but
8 originally - was supposed to be at the top of a cavity between
9 like two 2x12's or 3x15's, two huge beams down there; right?

10 A. Right.

11 Q. And you went around and looked with your flashlight as
12 much as you could see up into each one of them to see if you
13 could find the designed fire blocking, correct?

14 A. Right, that said, there is -- there is a gap. There's
15 two walls. Each unit has a wall, and there is a gap between
16 them. Fire blocking means like a 2x4 put in there. Down at
17 the bottom, like you said, those are large parallel beams I
18 believe. So 15, 16, 17, 18 inch deep.

19 So most of that gap is covered with plywood. But right
20 at the ends where it intersects the timber pile there is a
21 gap. And looking up in there I really couldn't determine what
22 was up there.

23 Q. You could see above it but not far enough to see fire
24 blocking at the top, right?

25 A. Right.

1 Q. And then you learned from me that the fire blocking
2 design had been changed pursuant to Plaintiff's Exhibit 259
3 marked for identification only and that it was supposed to be
4 at the bottom of those gaps, correct?

5 A. Right.

6 Q. And since you were able to see part way up the gaps you
7 have been able to confirm for me that the as designed fire
8 blocking is not in the bottom of that cavity, correct?

9 A. It would appear that is correct.

10 Q. You haven't seen any evidence that it is at the top, and
11 you know that from your observations it is definitely not at
12 the bottom; correct?

13 A. Right.

14 Q. And that is a building code violation?

15 A. Yes.

16 Q. And can I have ---

17 MR. LUCEY: I move Plaintiff's Exhibit 259 into evidence.

18 THE COURT: Any objection?

19 MR. KENDALL: I haven't seen his copy yet.

20 THE COURT: That's okay.

21 MR. KENDALL: No, that -- it is without objection.

22 MR. LUCEY: Could I have it on the screen, please.

23 THE COURT: Admitted without objection.

24 (WHEREUPON, Plaintiff's Exhibit Number 259 was admitted into
25 evidence.)

1 Q. And, sir, the jury wasn't able to see this when you and I
2 were talking about it. This is the changed design detail
3 during construction which moved the fire block and went to the
4 bottom of that cavity, correct?

5 A. Right, the red cross-hatched rectangle is a two-by.

6 Q. And we know at the openings you were able to see, which
7 is where the pilings are, where the pilings interrupt those
8 huge beams, that there is no fire blocking at the bottom;
9 correct?

10 A. That is probably not there at that location.

11 Q. And that is a building code violation?

12 A. Yes.

13 Q. Number 4 under unallocated was the gaps in the front post
14 flashing. And you have already changed that in your
15 handwriting on this document to code violation, correct?

16 A. Right.

17 Q. Number 5 was open seams between deck coatings and post.
18 That was where it didn't wrap up the post properly at the
19 corners of the decks?

20 A. Yes.

21 Q. And you changed that from unallocated to a building code
22 violation, correct?

23 A. Correct.

24 Q. And everything on -- all this handwriting on Page 2 is
25 yours?

1 A. Yes.

2 Q. Number 6 is privacy walls which you called a code
3 violation?

4 A. Right, those three items.

5 Q. And Number 7 is ponding which you designated as a
6 violation of manufacture's specifications, correct?

7 A. Correct.

8 MR. LUCEY: Plaintiff moves Exhibit 826 into evidence.

9 MR. KENDELL: Your Honor, may I approach?

10 THE COURT: Of course.

11 (WHEREUPON, bench conference 5/7/19, 2:48 p.m. The Court will
12 allow Mr. Lucey to voice an objection more thoroughly at the
13 next break.)

14 THE COURT: All right, 826 will be used for reference
15 only at this point during the course of the trial. Thank you,
16 Mr. Lucey. You may continue.

17 MR. LUCEY: Thank you, ma'am.

18 Q. So now that we just went back through your list and went
19 over it with the jury, 14-odd code violations plus the ones,
20 eight or so industry violations, the seven or so unallocated
21 that we reallocated, roughly -- let's round it off to 30.
22 Roughly 30 violations. Can you please confirm for us that as
23 you and I started to discuss a few minutes ago, only three of
24 these thirty violations are marked up on Plaintiff's Exhibit
25 827 and 828 in front of the jury?

1 A. Well, let's go through it.

2 Q. Okay.

3 A. I think there's maybe more than three so.

4 Q. The post flashing on the front, post flashing on the
5 rear?

6 A. Well, hang on a second. Item 6 is six rear decks with
7 leaks at post intersection.

8 Q. Can we just agree less than half?

9 A. Probably, yeah.

10 Q. I don't want to take up the jury's time. Do you deny
11 telling me under oath in your deposition that Exhibit 827 and
12 828 only represent two or three of the twenty-five odd defects
13 addressed in your current report?

14 A. They -- well, yeah, part of that -- to take that in
15 context, yes, that is correct. Let me go through it. Eight
16 twenty-seven is Item Number 12 of my scope of repair which
17 addresses more than just one de- -- one of those defects. You
18 will see when we go through it Item Number 12 is going to
19 address some of the low sloped roof areas. Eight twenty-eight
20 is only Item 24 of the scope of repairs.

21 So I have got 25 items in the scope of repair. So two or
22 three of them are addressed. But there is the 20 or so
23 remaining scope of repairs we can go through.

24 So, yeah, this isn't the entirety of my scope of
25 repair, ---

1 Q. Sir, you are not ---

2 A. --- Exhibit 827 and 828.

3 Q. You are not able to identify a single residence, a single
4 residence at Peas Island without water intrusion damage;
5 correct?

6 A. It is more likely than not each one has at some point
7 some location of water intrusion damage.

8 Q. So you do not deny telling me under oath that you were
9 unable to identify a single residence at Peas Island that you
10 contend does not have water damage?

11 A. Right, and that is why every single one is being
12 addressed in the scope of repair.

13 Q. Sir, you would agree that at least a half dozen townhomes
14 at Peas Island would properly be categorized as, quote,
15 extensively damaged, suffering from extensive water intrusion,
16 end quote; correct?

17 A. Well, we know seven have that front probably more likely
18 than not the front buildup column damage. And probably every
19 one with that front deck has some amount of localized damage.

20 And at the rear decks there is I have allotted -- it has
21 been documented staining in the stairwell that is probably
22 damaged. So we can count those up. But, yeah, those are some
23 areas of damage.

24 Q. Sir, do you deny telling me under oath that there's a
25 half dozen townhomes at Peas Island that would be categorized

1 as, quote, extensively damaged, suffering extensive water
2 intrusion, end quote?

3 A. Right, that is -- I agree. Because I have got seven of
4 them that probably have the damage that is showing in that
5 photo. And that is, again, part of my repair scope. So that
6 is extensive damage. It is localized to those front built up
7 deck columns.

8 Q. Sir, I am going to show you what has been marked for
9 purposes of identification only as Plaintiff's Exhibit 148.
10 That is the May 25, 2016, Mease photo log that you and I
11 discussed in the first few minutes after you got on the
12 witness stand this morning; correct?

13 A. March 25th -- yeah, 2016, right.

14 Q. That is the one through which through his deposition, the
15 day before your deposition, you learned that there actually
16 was leaks on the front of these buildings; correct?

17 A. Right, at 1629; right.

18 Q. In your investigation in August of 2018, August 21st and
19 22nd, validated Mease's assertions in Exhibit 148; correct?

20 A. Yes, certain assertions; right.

21 Q. Okay. Is there an assertion you dispute in there?

22 A. Well, let's go through it.

23 Q. You did a water intrusion investigation based upon
24 Exhibit 148, right?

25 A. Right, but you said every single one of these. There's

1 other issues in this report that haven't been investigated.

2 Q. It validated his front water intrusion issue inclusions,
3 correct?

4 A. Right, the front second-floor deck water intrusion
5 hypotheses.

6 Q. Now, sir, the flashing, the flashing that is missing or
7 bad at so many of these locations, they are not in the design
8 documents; correct?

9 A. I don't recall the design documents being that specific,
10 right.

11 Q. And when that occurs, when there is a lack of a detail on
12 a drawing, a contractor has two choices in this industry;
13 correct?

14 A. I can think of a request for information. That is one
15 choice. And the second one is proceed without a request for
16 information.

17 Q. Right, they can request a design from the architect or
18 they can design it themselves; correct?

19 A. Right.

20 Q. In your industry if there's not a particular detail on
21 the blueprints it is considered to be delegated by the
22 engineer to the contractor, correct?

23 A. Say that question again.

24 Q. If in your industry if the design of the flashing is not
25 on the blueprints it is considered to be delegated to the

1 contractor to design, unless he submits an RFI, a request for
2 information; correct?

3 A. That sounds like a correct assumption. Yes, it is --
4 if there is something not designed by the architect or
5 engineer -- and it varies from condition to condition. But if
6 it is a substantial enough condition and the contractor
7 chooses to proceed, then he is probably taking on that
8 responsibility.

9 Q. And you and I discussed that we didn't find any requests
10 for information, RFI's, in the file relating to that bad and
11 missing flashing; correct?

12 A. Right. I don't recall seeing any.

13 Q. So by all appearances from what you and I have seen in
14 this file you would agree with me that with what we know today
15 the contractor and the subcontractor took it upon themselves
16 to design the flashing for that location?

17 A. For those locations; the deck locations, yes.

18 Q. And so that would be the contractor, CBC, Complete
19 Building, and its sub, Tri-County; correct?

20 A. Right.

21 Q. And Tri-County and its subs, the carpenter, the trim
22 carpenter, and the deck and roofing installer; right?

23 A. Right, they installed it; the construction as built.

24 Q. Now, sir, you would agree with me, and as we have shown
25 the jury, the vast majority of the damage you have found, if

1 not all, but at least the vast majority of it, was hidden or
2 latent damage; correct?

3 A. Right, of the damage was hidden; right.

4 Q. Given what you have seen after opening up just six or
5 seven locations do you would agree that it is reasonable to
6 infer that there are more locations with code violation,
7 correct?

8 A. Yes.

9 Q. And you have been a forensic engineer and doing this kind
10 of stuff for a long time, right?

11 A. Right.

12 Q. And you have observed that these repair jobs never shrink
13 in scope, they always expand in scope because of hidden and
14 latent code violations and damage; correct?

15 A. Right, you have to have some contingency, some allowance
16 for change orders.

17 Q. And you are aware also from your involvement in this
18 industry that it is always more expensive to repair than to
19 construct it property in the beginning of it; correct?

20 A. Yes.

21 Q. Thank you, sir.

22 THE COURT: Cross-examination?

23 MR. KENDALL: Well, I was thinking perhaps it might be a
24 good time for a break before ---

25 THE COURT: Yes, I am happy to do that.

1 MR. KENDALL: And to allow us to organize our thoughts a
2 little bit.

3 THE COURT: Sure. We will take about a 15-minute break.

4 Ladies and gentlemen, it is three o'clock. We will
5 resume at 3:15. Once again, please don't discuss the case
6 amongst yourselves. And if you would, just leave your
7 notebooks right there on that bar. Lay them across there. No
8 one will touch them. And we will make sure that it is easier
9 to find them when we come back in. Okay.

10 Thank you very much. We will be at ease for 15 minutes.
11 (WHEREUPON, jury exits courtroom 5/7/19, 3:01 p.m.)

12 THE COURT: Mr. Schweickhardt, you can step down.

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Once again, please don't discuss the case.
15 (WHEREUPON, recess 5/7/19, 3:01 p.m.)

16 (WHEREUPON, resume 5/7/19, 3:20 p.m.)

17 THE COURT: All right. Mr. Kendall, have y'all had a
18 chance to confer?

19 MR. KENDALL: We are ready to go forward.

20 THE COURT: You are ready. Okay.

21 As a matter of course, I know we had a juror inquire as
22 to what time we will generally stop each day. And everybody
23 has got different responsibilities at home. So my goal is to
24 stop at 5:00 every day, understanding there's going to be, you
25 know, a half hour or so give or take on that. But I

1 understand there is at least one juror with some child care
2 issues ---

3 MR. KENDALL: Understood.

4 THE COURT: --- if that would pose a problem. So just
5 for your planning purposes. And, you know, I just want you to
6 be aware of that.

7 MR. KENDALL: A long way to go to pace ourselves.

8 THE COURT: All righty. Okay. You can bring the jury
9 back in.

10 (WHEREUPON, jury enters 5/7/19, 3:21 p.m.)

11 THE BAILIFF: All jurors are present, Your Honor.

12 THE COURT: Thank you. Please be seated. Ladies and
13 gentlemen, just for your planning purposes, it is our goal to
14 stop each day right around five o'clock or so. We try not to
15 interrupt someone's train of thought. Obviously if it goes a
16 few minutes past then. But that is our goal every day, just
17 so that you know what to expect. Okay. All right.

18 Mr. Kendall.

19 MR. KENDALL: Your Honor, we are going to reserve our
20 right to ask Mr. Schweickhardt questions when our case in
21 chief is presented. So we have no questions at this time.

22 THE COURT: No questions at this time.

23 MR. KENDALL: Thank you.

24 THE COURT: Okay. Any other attorneys on this side?

25 MR. COLE: We all are going to do the same thing, Your

1 Honor.

2 THE COURT: Okay. Sounds good. All right.

3 Mr. Schweickhardt, at this point in time you can have a
4 seat back in the gallery or where ever ---

5 MR. KENDELL: And may I ask, Your Honor, that he may be
6 released from the subpoena that he is under. He is not ---

7 MR. LUCEY: No objection, Your Honor.

8 MR. KENDALL: --- needed any further. He is under a
9 separate subpoena from me, ---

10 THE COURT: I see.

11 MR. KENDALL: --- but it is for next week.

12 THE COURT: Okay. Sure. Mr. Schweickhardt, you are
13 released from that subpoena.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Thank you.

16 THE COURT: Mr. Lucey, you can call your next witness.

17 MR. LUCEY: Mr. Buckley.

18 THE COURT: Okay.

19 MR. BUCKLEY: Your Honor, we call Kathleen Fitch.

20 THE COURT: All right.

21 (WHEREUPON, the witness was duly sworn.)

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

24 THE WITNESS: Yes, my name is Kathleen Fitch. F-I-T-C-H.

25 **DIRECT EXAMINATION BY MR. BUCKLEY OF KATHLEEN FITCH:**

1 Q. Ms. Fitch, where do you live?

2 A. I live at 1607 Folly Creek Way.

3 Q. What was that address again?

4 A. 1607 Folly Creek Way at Palmetto Pointe.

5 Q. Okay.

6 MR. BUCKLEY: Alex, would you put up on the screen.

7 (WHEREUPON, document displayed on overhead screen.)

8 Q. Is that an aerial view of Palmetto Pointe at Peas Island
9 Development?

10 A. Yes, it is.

11 Q. And if you can actually go through and show the jury
12 where your unit is in the development so that we can get them
13 oriented as to how these numbers run, okay?

14 A. Sure. As you ---

15 Q. Go ahead -- go ahead inside of the door if you would ---

16 (WHEREUPON, witness positioned under display. Direction
17 displayed on overhead screen by video technician.)

18 Q. Oh, okay. There you go.

19 A. Yeah, as you come through and you make that right-hand
20 turn right ---

21 (WHEREUPON, direction displayed on overhead screen by video
22 technician.)

23 A. Ooh, you just passed us. Now come down.

24 (WHEREUPON, direction displayed on overhead screen by video
25 technician.)

1 A. Masonite.

2 Q. Have you ever lost any shingles or Masonite off of your
3 unit in Atlanta?

4 A. No.

5 Q. At any time ever during any storm?

6 A. We haven't, and our neighbors haven't.

7 Q. Has any -- has anybody in your neighborhood where you
8 live or where your husband lives in Atlanta ever lost shingles
9 or siding that you have been able to observe?

10 A. No.

11 Q. At your current residence in Palmetto Pointe have you
12 lost shingles or have your neighbors lost shingles?

13 A. Yes.

14 Q. Describe for the jury if you would, occasions during
15 which you observed shingles being blown off of your units at
16 Palmetto Pointe, you or your neighbor's units.

17 A. Pretty much any high winds. It doesn't have to be a
18 named storm. But definitely after a named storm. I have a
19 dog, so I am walking the property regularly. I am always
20 collecting the shingles or telling the board where they --
21 where I found them and then they investigative whose unit they
22 fell off of.

23 Q. And have you also observed siding that has blown off the
24 units at Palmetto Pointe?

25 A. Yes.

1 Q. Have you noticed any ponding on your balconies and decks?

2 A. It ponds every rain event.

3 Q. And I think Mr. Schweickhardt testified that ponding
4 according to his definition is water that remains on the deck
5 or on the surface for 48 hours. Have you on occasion allowed
6 the water to sit for up to 48 hours?

7 A. I do try to get it off. But, yes, it has -- it has
8 lasted that long if not longer until it naturally evaporates.
9 It won't drain off.

10 Q. Okay. During the course of moving into your unit did
11 you -- well, let me back up. Are you on the board at Palmetto
12 Pointe?

13 A. I am currently, yes.

14 Q. And how long have you been on the board?

15 A. Since January of this year.

16 Q. Who did you replace?

17 A. Bill Bowers.

18 Q. And Mr. Bowers was he here today?

19 A. He was earlier, yes.

20 Q. Is he up in age -- is he advanced in age?

21 A. Yes.

22 Q. Did Mr. Bowers resign from the board and then you took
23 his place, or how did that work?

24 A. He resigned from the board and I took his place.

25 Q. So you didn't run against him and beat him and push him

1 off the board?

2 A. No.

3 Q. Okay. Do you know why Mr. Bowers was getting off of the
4 board?

5 A. Yes. He had his unit up for sale, and he thought he had
6 it sold. So he was resigning because he was no longer going
7 to be a resident.

8 Q. And did he actually move out?

9 A. Yes, he did move out.

10 Q. And does he live there now?

11 A. He does.

12 Q. So apparently his sale didn't go through?

13 A. It did not go through.

14 Q. Okay. Do you know whether he had some problems with the
15 subfloor in his unit?

16 A. Yes, he did.

17 Q. And he had some extensive work done by engineers and
18 repair people?

19 A. Yes, he did.

20 Q. And did that cost thousands of dollars?

21 A. Yes, it did.

22 Q. And do you have similar problems in your unit?

23 A. They actually came and measured mine; and I think they
24 said I had about a quarter, meaning a quarter, 25-cent piece,
25 of sag. But, yes.

1 Q. Okay.

2 A. So I had some.

3 Q. Okay. But is that in an area where a wall comes down
4 onto the floor?

5 A. Yes, it is.

6 Q. And it has actually pushed the floor down?

7 A. Uh-huh.

8 Q. Is ---

9 A. Yes.

10 Q. --- that a yes?

11 A. Yes.

12 Q. Okay. As -- what is your position with the board at
13 Palmetto Pointe now?

14 A. I am treasurer.

15 Q. And do you have a list of all of the owners at Palmetto
16 Pointe?

17 A. I do.

18 Q. Okay. I am going to show you Exhibit 961. And I am
19 going to ask you to turn to that red tab. Is that -- just
20 read at the top what the heading of that -- of that tab page
21 says.

22 A. Sure. It says 2015 contingency fee agreement.

23 Q. Okay. And is that an agreement that you signed with my
24 firm and Mr. Lucey's firm?

25 A. Yes, it is.

1 Q. Okay. If anybody comes to visit you and you saw them
2 leaning against your railing what would you do?

3 A. I would stop them.

4 Q. Okay. You are an owner at Palmetto Pointe. Do you have
5 an opinion as to the fair rental value of your property?

6 A. I would say I would want to get -- I am not on the market
7 to rent it. But I guess if I were, I would say around 3,000
8 to 3,500.

9 Q. And let me ask you if you can turn to -- I don't have it
10 in front of me. Excuse me.

11 MR. BUCKLEY: Can you pull up 48A? You can't?

12 PLAINTIFF'S VIDEO TECH: I don't -- I do have it, yes.

13 MR. BUCKLEY: Because I can't. Even if I were there, I
14 couldn't.

15 Q. Look at 48A. And I will hand it to you. It is easier
16 this way.

17 (WHEREUPON, document presented to the witness.)

18 Q. Is that the master deed for Palmetto Pointe?

19 A. Yes.

20 Q. Okay. Turn to Page 24, please.

21 A. Okay.

22 Q. Paragraph 10.4.

23 A. Yes.

24 Q. And is there a restriction on rental of properties at
25 Palmetto Pointe?

1 A. Yes.

2 Q. What is that restriction?

3 A. We don't allow short-term rentals. You have to allow --
4 you have to rent for no less than 90 days or longer.

5 Q. So if you were going to rent your unit you couldn't rent
6 it out for less than 90 days?

7 A. That is correct.

8 Q. Okay. You have a neighbor named Mr. Matts who lives
9 several doors down in 1621?

10 A. Yes.

11 Q. Are you aware that he had damage discovered recently I
12 think in March of this year?

13 A. Yes, I am.

14 Q. And as a board member did you go down and observe that
15 damage?

16 A. I did.

17 Q. Describe the damage to the jury if you would.

18 A. There was a lot of water intrusion. It caused some
19 rotting of his pillars and his rails on the porch. And I
20 think it went in even deep into the subflooring of the porch
21 as well. It was pretty extensive.

22 Q. Before you saw the damage after the area had been opened
23 up, describe how that area looked if you just walked down the
24 street and looked at it or walked up to the door and looked at
25 it.

1 A. You never would have known that that was underneath that
2 beam, that column. Never would have known it.

3 Q. Thank you very much.

4 **CROSS-EXAMINATION BY MR. BOYD OF KATHLEEN FITCH:**

5 Q. Hello, Ms. Fitch. How are you today?

6 A. I am good. Thank you.

7 Q. My name is Brent Boyd, and I represent Complete Building
8 Corporation. I won't take up much of your time. I just
9 wanted to clarify a few things. When did you purchase your
10 townhome at Palmetto Pointe at Peas Island?

11 A. We bought it in March of 2016.

12 Q. Yes, ma'am. What did you pay for that unit?

13 A. Four hundred and forty-five.

14 Q. And the lawsuit had already been filed by then; is that
15 correct?

16 A. Yes.

17 Q. Okay. You were advised about the presence or the
18 existence of the lawsuit before you had a chance to purchase?

19 A. I did receive a letter. And I was aware that there was a
20 lawsuit.

21 Q. Yes, ma'am.

22 A. I didn't know the extent of it or the details.

23 Q. Did you get an opportunity to ask anyone?

24 A. I received the letter. And I -- I felt good about it. I
25 mean I didn't -- I didn't pursue it, and I didn't know how to.

1 Q. Thank you very much.

2 THE COURT: All right. You can step down. Thank you,
3 ma'am.

4 (WHEREUPON, witness steps down.)

5 THE COURT: The plaintiffs may call their next witness.

6 MR. EVANS: The plaintiffs call Russell Mease.

7 (WHEREUPON, the witness was duly sworn.)

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

10 THE WITNESS: My name is Russell Todd Mease. M-E-A-S-E.

11 MR. EVANS: Bear with me a second, Mr. Mease, while I get
12 a few things.

13 **DIRECT EXAMINATION BY MR. EVANS OF RUSSELL MEASE:**

14 Q. Good afternoon, Mr. Mease.

15 A. Good afternoon.

16 Q. Go ahead and introduce yourself to the jury, please.

17 A. As I said, my name is Russell Todd Mease. I am a
18 registered professional engineer in the State of South
19 Carolina. I have been registered since 2001.

20 I work primarily in this area of expertise. I do
21 forensic evaluations of structures and provide expert
22 testimony for these litigation proceedings.

23 Q. Let's back up a little bit. Where are you from?

24 A. I am a Carolinian. I was born in Columbia. But I grew
25 up around Ashville in the mountains of Western North Carolina.

1 (WHEREUPON, resume 5/8/19, 9:30 a.m.)

2 THE COURT: We are ready again whenever y'all are.

3 MR. THAMES: Your Honor, this is Troy Thames for Stanley
4 Vinyl Fence Design. We have a couple of things we would like
5 to put on the record this morning.

6 THE COURT: Sure.

7 MR. LUCEY: The plaintiff has settled its claims against
8 Stanley's Vinyl Fence Design for \$295,000. It is not
9 contingent on a resolution of the cross-claims against Stanley
10 by the general contractor.

11 The plaintiff has offered to give an unconditional set
12 off to the general contractor if it consents to the dismissal
13 of its cross-claims. Otherwise, if the general contractor
14 refuses to consent to dismissal of the cross-claims plaintiff
15 shall have the right under the settlement agreement to
16 allocate the settlement funds as they see fit in their sole
17 discretion.

18 THE COURT: All right.

19 MR. KENDALL: Your Honor, that is honestly the first I've
20 heard of that offer. Is that -- maybe I missed an email last
21 night. So I can't respond. It is something I would have to
22 talk to my client about.

23 THE COURT: Sure. I understand. Okay.

24 MR. THAMES: Your Honor, I would like to make one motion
25 before we get started in light of the recent developments.

1 THE COURT: Okay.

2 MR. THAMES: On behalf of Stanley's Vinyl -- Floyd
3 Stanley d/b/a Stanley's Vinyl Fence Design, I would move
4 pursuant to Rule 42(b) for an order to bifurcate the
5 cross-claims by defendant CBC against my client.

6 Essentially, Your Honor, we would ask for a separate
7 trial on the issues of indemnity. That is basically what the
8 remaining claims are in a cross-claim. They are either
9 equitable or contractual among the other -- myself and the
10 other defendants.

11 MR. LUCEY: And the plaintiff joins in that motion. And
12 the plaintiff would point out to the Court that CBC has
13 already made a point out of telling the Court that the
14 equitable claims are reserved for the Court and not for the
15 jury. So there will be a court proceeding and would
16 absolutely streamline the jury proceeding if that equitable
17 claim -- or that particular claim is just joined with that
18 bench proceeding. Thank you, Your Honor.

19 THE COURT: Okay.

20 MR. THAMES: Your Honor, I don't have anything further
21 based on that.

22 THE COURT: Yeah, and I mean obviously Mr. Kendall
23 can't -- hasn't had time to respond to that either. So Mr.
24 Thames, at this point in time I will take your motion under
25 advisement.

1 Q. What does the absence of a third-party test report mean
2 for the windows at Palmetto Pointe?

3 A. You would have to consider them to be in violation of the
4 code ---

5 MR. KENDALL: Objection, Your Honor. This -- the window
6 issue was settled in this case.

7 THE COURT: Thank you.

8 MR. EVANS: Approach, Your Honor?

9 THE COURT: Uh-huh.

10 (WHEREUPON, bench conference 5/8/19, 10:22 a.m.)

11 Q. Mr. Mease, did you investigate roofing conditions at the
12 property?

13 A. Yes.

14 Q. Did you hear discussion yesterday regarding pump jack
15 holes on top of the shingles?

16 A. Yes.

17 Q. Is that okay?

18 A. No.

19 Q. Why not ---

20 A. As Mr. Schweickhardt said.

21 Q. Why not?

22 A. It is not a great idea to poke holes in your shingles.
23 The nails should not penetrate the top shingle of a roofing
24 system.

25 Q. How should the pump jacks have been installed?

1 A. Shingles are sections. We have little -- a bunch of
2 shingles that cover a big roof. So these pump jacks, as was
3 described, are too large posts that stand next to the
4 building. They are sitting on the ground. And then at the
5 top there are these two metal brackets that reach out to the
6 roof and they connect them to the roof so that the poles stay
7 in place so they can work. Okay.

8 It is very simple to actually lift up a shingle, slide
9 this bracket beneath the shingle, put your fasteners into it,
10 and lay the shingle back down. That way the shingle is over
11 the nails. The lazy way to do it is to put the bracket on the
12 roof and just drive nails through it, which is what happened
13 at this location.

14 Q. Should that have been caught?

15 A. Yes.

16 Q. By who?

17 A. Anyone who was working on the project that had access to
18 those areas.

19 Q. Did you make observations of the fastener -- excuse me,
20 of the shingle fasteners themselves?

21 A. Yes, I did.

22 Q. And what did you observe?

23 A. This goes back to the same problem that we talked about
24 with the siding and the fact that the fasteners should not be
25 overdriven.

1 Q. Can you mix the two?

2 A. No.

3 Q. Were the two mixed?

4 A. Yes. And this is a kind of a tight picture. But if you
5 zoom in on this edge here you can see several distinct colors.
6 At the bottom where it meets the wood there is kind of an aqua
7 color. That is the color of HydroStop base coat material. If
8 you see that color you always know that you have HydroStop.

9 If you look up another layer you will see some pink.
10 Pink is Sealoflex base coat color. So we can tell here that
11 there were mixtures of materials applied to the deck.

12 Q. Is the mixing of materials a code violation?

13 A. Yes, insofar as it is not allowed by the manufacturer.

14 Q. Does the code address manufacturer's installation
15 instructions?

16 A. Yes, they tell us we must follow those guidelines.

17 Q. Were there also penetrations on the decks?

18 A. Yes. We talked about the handrails. Mr. Schweickhardt
19 pointed out yesterday examples where bolts had been screwed
20 through the decks for the handrails. We did see this through
21 destructive testing. And that was the primary penetration
22 that we saw.

23 Q. And did those penetrations result in damages?

24 A. Yes. It is similar to the nails through the shingles.
25 This is still a waterproof surface, so when you poke holes in

1 it water goes through and you get what is seen here on the
2 slide. It damages the material below.

3 Q. Were the damages limited to those outside of the home, so
4 to speak, like we see in these photos; or did any damages
5 related to posts and penetrations make it on the inside of the
6 homes as well?

7 A. The guardrail penetrations were pretty much to the
8 exterior, because they were on the edges of the deck. There
9 were structural posts, columns, that went through the deck
10 that were also penetrations that led to water intrusion to the
11 interior of the buildings. Yeah, two different varieties.

12 Q. Is this sort of the second variety you were talking
13 about?

14 A. Yes, it is.

15 Q. And tell us what we have got going on in this photo?

16 A. Well, yesterday we talked a lot about step flashing. If
17 you see this black metal flashing here, that is step flashing.
18 And they call it step flashing because you are required by the
19 code to put one piece of this flashing under each single as it
20 goes up the roof. That way you are shedding the water off of
21 the roof.

22 This is just a wood column. It is a six by six treated
23 column, square. All that they did that we saw - and this
24 again is pervasive. We saw this over and over again as Mr.
25 Schweickhardt said. This flashing was just pushed up against

1 light that you see is in the ceiling.

2 Q. And the stain is on the ceiling in the right corner,
3 correct?

4 A. Right. And if you think about that column, the column is
5 at the corner. That is where these showed up.

6 Q. Let's talk about integration for a moment. We have got a
7 number of different products, products and trades coming
8 together; don't we?

9 A. Yes.

10 Q. How should that have been dealt with in the field?

11 A. Well, Mr. Schweickhardt talked about this a lot yesterday
12 where these elements come together. And he was correct in his
13 assessment that coordination is necessary. That is a very
14 important thing.

15 General contractors typically hold the responsibility for
16 coordinating between the trades. The trades are responsible
17 for their work, but when their trade meets another trade there
18 needs to be communication to make sure each is getting what
19 they need in order to be successful. The coordination at
20 these intersections obviously was very poor.

21 Q. And has that poor coordination manifested itself?

22 A. Yes.

23 Q. How so?

24 A. Through water intrusion and damage that we have talked
25 about.

1 A. One of them has been eaten. The other one is in pretty
2 bad shape as well.

3 Q. What are we looking at here?

4 A. This is the same area where they are actually starting to
5 try to make some repairs and investigate what needs to be
6 done.

7 The important thing to realize is these repairs aren't
8 just spots. When you start digging in to making these fixes,
9 you have got to take the siding off. You have got to take all
10 of the building wraps and flashings off, the ceilings down, to
11 get to the actual elements that need to be fixed.

12 So there is a lot of destruction before you can go in and
13 actually repair something and bring it back to what it needs
14 to be.

15 Q. Let's talk about the guardrails on the property. We
16 discussed that there's two levels of living; but they are
17 above the garage, correct?

18 A. Yes.

19 Q. How high more or less is the second floor, the highest
20 floor's floor system?

21 A. It approaches probably 30 feet off the ground. It is up
22 there.

23 Q. You investigated the guardrails?

24 A. I did.

25 Q. What did you find?

1 A. Well, this is something that became apparent again the
2 first visit to the site. These guardrails have been a problem
3 everywhere on the property.

4 And, again, when we talk about these little elements you
5 have got to remember there are 40 different units out there.
6 And these problems that we are talking about pretty much are
7 in each one of them.

8 But these guardrails were failing because the brackets
9 were falling apart. And then we talked yesterday about the
10 three-quarter inch typical screw that was used to install the
11 bracket. You can see here in my hand that is that screw.

12 And what you have got to look at is on the far left of
13 the photograph here (pointing) is the structural column. That
14 is the big piece of wood that is strong. The thing that these
15 were screwed into is just trim. So the guardrails keeping you
16 from falling off of the building are screwed into trim, not
17 into the structure of the building.

18 The code gives some very specific requirements about the
19 strengths of these rails to protect life. I mean that is
20 really what we are doing. And everywhere we looked I mean
21 without very small exception we found these small nails -- or
22 screws, excuse me, and these brackets were failing everywhere.
23 They were cracking.

24 Q. Were there other issues with regarding the handrail
25 systems that you documented?

1 A. Yes, there were a couple of places where the rail just
2 did not have integrity. You can see here in the right side of
3 this photograph all I did was walk up to it and push on the
4 rail a little bit and the rail came apart. And this is the
5 second floor of the building. You can see how far it is to
6 the ground.

7 Q. With the amount of pressure that you put on that handrail
8 do you believe it is code compliant?

9 A. Oh, it absolutely is not.

10 Q. There was some discussion yesterday regarding corrosion,
11 primarily in the drive-under garages. What are we looking at?

12 A. These buildings are installed on piles that have been
13 driven into the ground. And they are preservative-treated
14 timber piles. And what we are seeing here is some of the
15 piles beneath the homes.

16 Q. And is this the corrosion that was discussed?

17 A. Yes, you can see that the connections for the bracing of
18 these piles have been suffering corrosion because of exposure
19 to these treated piles. They should have used a more robust
20 material.

21 And the code tells us if you put fasteners in contact
22 with pressure-treated lumber, just like Mr. Schweickhardt said
23 yesterday, they have to have specific protection. And these
24 appear not to have that.

25 Q. What is the long-term outlook for the bolts that don't

1 have the right corrosion protection?

2 A. Well, it is like anything that rusts. It eventually
3 turns to nothing. So over time it just deteriorates.

4 Q. What are we looking at here?

5 A. This is also affecting the wood itself. So the corrosion
6 that is going on in the metal is also affecting the integrity
7 of the piles. That is some wood that is flaking off in my
8 hand around this connection.

9 Q. Did you document the -- or how pervasive or consistent
10 was this corrosion issue?

11 A. It was in several units. I don't know an exact number.
12 It was not everywhere. But there was definitely evidence of
13 it.

14 Q. Let's talk about floor to flashing. And first describe
15 for the jury what deflection means generally.

16 A. Most people have seen an old bookcase that has books
17 sitting on it and over time that bookcase shelf starts to
18 bend. That is deflection, where we just have a settlement in
19 the framing that is supporting some load.

20 Q. Okay. And what did you document at the homes?

21 A. This was a problem that started to become apparent
22 probably about halfway through this process of my
23 investigation over the last four plus years. People began to
24 notice. And primarily in this one area on the first floor a
25 settlement in the floor system that is adjacent to the

1 entrance of the unit.

2 You can see these two levels that we have here coming in
3 two different directions on the wall. And I believe we have
4 some close-ups of the actual deflection. But we can measure
5 an amount of deflection on each side of these walls as this
6 floor began to sag just like a bookcase shelf.

7 And in this instance the silver level you can see it is a
8 little over an inch in about four feet.

9 Q. And did this occur at other homes as well?

10 A. Yes, we saw this in multiple units.

11 Q. Did you see cracked drywall around this deflection?

12 A. No. And that's the interesting thing. Drywall is a very
13 brittle finish. If it moves, it cracks. I mean it just
14 cannot -- it has no elasticity. It doesn't go with the flow
15 if something moves.

16 Q. How about the doors like we saw in the prior home and the
17 door in this home, tell us about those.

18 A. Again, this (pointing) is near the entrance of the unit.
19 And in fact if you see this door over to the left with a
20 wreath on it, that is the entry way into the home.

21 This door (pointing) is to a coat closet that is just
22 inside the entryway. And if you will look closely at the
23 bottom of this door you will notice that the gap on the right
24 side is significantly larger than the gap on the left side.
25 The door is level and square. So what that is showing you is

1 the floor is actually moving down as you go from left to right
2 in this photo.

3 Q. Does the absence of drywall cracking and the fact that
4 the door is square on three out of four sides tell you
5 anything?

6 A. Yes. When we construct a building there are two types of
7 loads that engineers have to concern themselves with. One is
8 dead load, which is actually just the weight of the building,
9 all of the materials used to build the building. And then
10 there are live loads; and that is people walking off floors,
11 wind pushing on buildings, earthquakes, so things that come
12 and go.

13 When I see deflections like this and doors that are in
14 this kind of fashion and the drywall is not cracked I really
15 am left with one conclusion, and that is this settlement
16 occurred early in the construction of the home. In other
17 words, when the dead load was put on the building it actually
18 caused things to move, and then the drywall and the doors were
19 put in. Because they are not really showing any evidence of
20 issues.

21 As we have gone through this four-year period this has
22 popped up several times because people are selling their
23 units. And home inspectors are finding, hey, there is a
24 deflection in the floor. And if you look at that door you can
25 see it is not that hard to find.

1 And I believe it was something that was early on in the
2 construction that has lived through beyond that time period.

3 Q. What is the fix?

4 A. It is difficult. As I mentioned, these buildings are on
5 piles. So they are way up in the air. So all of the floor
6 framing is up in the air. And the only real way to deal with
7 these deflections is to add support. You have got to make it
8 stiffer so it doesn't do this.

9 The problem we have with buildings that have had this
10 problem is you can't ever get all of it back out. You can
11 jack the floor a little bit. But when you think about it, if
12 you start jacking that first floor at some point you start
13 jacking up the whole building. And those joists and beams
14 aren't really designed to hold that much weight. So you will
15 get a certain amount of movement out of them and then
16 typically you will start damaging things. Which is not
17 desirable as well.

18 So it is not an easy repair. It would require a
19 significant evaluation structurally to determine the best
20 method.

21 Q. Let's talk for a moment about firewalls. We heard some
22 discussion about those yesterday. How many attics do you
23 think you went in out of the 40?

24 A. Probably close to 30.

25 Q. And since that time have you reviewed additional photos

1 from other folks ---

2 A. Yes.

3 Q. --- of attics?

4 A. Yes.

5 Q. Did you review the photos of an individual named Lewis
6 White?

7 A. I did.

8 Q. How many units did Mr. White get in?

9 A. It is reported through his photographs that he went to
10 every attic at the community.

11 Q. How did his photos correlate to yours?

12 A. He did see a lot of the things that I saw. He was a
13 little more inclusive. He looked very carefully. He also
14 found things that I did not see. We saw a lot of framing
15 penetrations going through the firewall.

16 Firewalls are critical. I mean this is how you protect
17 the units, occupants. If there is a fire in one you do not
18 want to end up affecting the other unit. Or at least give the
19 occupants in the other unit time to get out of the building.
20 That is why these firewalls are there. And they are very
21 important.

22 But we saw penetrations from the framing. I saw
23 penetrations from the sprinkler system. But he also
24 documented penetrations from plumbing piping and also some
25 duct work penetrations that I had not noticed.

1 Q. These first few photos, they are the wood in the
2 firewalls; correct?

3 A. Correct.

4 Q. What is this one?

5 A. That is a sprinkler pipe.

6 Q. Going through a firewall?

7 A. Yes.

8 Q. How about this one?

9 A. That is a typical plumbing pipe that is going through a
10 firewall.

11 Q. What is going on here?

12 A. This is the problem. You see all of these gaps. The
13 fire protection is the drywall. It is the Gypsum. It is like
14 what is what is right behind you on the wall.

15 Gypsum drywall is made out of dirt really. There is a
16 special kind of clay that they use to make it. And it doesn't
17 burn very readily. It gives you protection.

18 So if we put it over wood and we had a fire the Gypsum
19 will slow down the burn of the wall so that you have time to
20 leave the building.

21 That is all defeated if you have gaps. That is why the
22 United Laboratories Assemblies tell you don't penetrate the
23 firewalls. The code tells you don't penetrate the firewall
24 because we need to have that integrity. And this is an
25 example of those penetrations.

1 Q. What is going on in this photo?

2 A. That is ductwork that the firewall was fashioned around.

3 Q. How about here?

4 A. This was particularly concerning to me. If you look at
5 the orange piping on this photograph, that is the sprinkler
6 system. That is a sprinkler piping.

7 It just so happens that somebody busted out the firewall
8 pretty much the exact dimension of the sprinkler piping.
9 Which kind of leads me to believe that the sprinkler installer
10 was the guy who did this. It stops where the sprinkler piping
11 stops, and it begins where it begins. So this is a very
12 inappropriate thing to do.

13 Q. Let's talk about framing in the attic, HVAC access. Did
14 you document or observe defects with regard to the framing as
15 it relates to the attics?

16 A. Yes. In these attics are the air handlers which are the
17 air-conditioning systems. The code gives some very specific
18 requirements as to how much room you need around these units
19 to be able to do your job and to maintain them and repair
20 them.

21 The code says you have to have at least 30 inches clear
22 of the unit so that you can get to it and fix it if it has a
23 problem.

24 Q. Was 30 inches clear space available?

25 A. Not typically, no.

1 Q. What do we have -- what is the clear space we have here?

2 A. Well, you can see the right side of the photograph there
3 is a silver pan. That is a part of the air-conditioning
4 assembly. So we would start the measurement at the edge of
5 that pan. I believe there is about 11 inches of wood there,
6 of platform to stand on.

7 Q. No measurement here (displaying photo), but do you
8 believe that is less than 30 inches?

9 A. Yes, you can see that the truss framing is very close to
10 the unit as well.

11 Q. How about here (displaying photo)?

12 A. Similar. It just was not much room around the units.

13 Q. Okay. Before we -- before we move on to the next topic,
14 the guardrail systems that we discussed earlier, the vinyl
15 guardrail system, because that is a system does it have to
16 have a code compliance report like we discussed that exists
17 for the siding and shingles?

18 A. Yes.

19 Q. Did you see a code compliance report for this guardrail
20 system?

21 A. I have not.

22 Q. What does that mean?

23 A. If it doesn't have a report then I can't really -- I
24 would never use it as an engineer at a code compliant product.

25 Q. If it doesn't have a code compliance report does it in

1 and of itself violate the building code?

2 A. Yes.

3 Q. You talked to us earlier about how shingles and siding
4 has to have -- has to meet the manufacturer's installation
5 instructions so it stays on the building, right?

6 A. Yes.

7 Q. Did you find evidence that shingles and siding didn't
8 stay on the building?

9 A. Yes.

10 Q. Tell us about that.

11 A. I mentioned it a little bit earlier. But I think I was
12 called out to the project four different occasions when siding
13 and/or shingles had blown off the buildings.

14 Three of those were in association with named storms,
15 Hermine, Matthew, and Irma. And another time was just a
16 thunderstorm, just a typical summer thunderstorm.

17 Q. We can see the date on these photographs as 9/6/16; is
18 that correct?

19 A. Yes.

20 Q. Do you know if that -- if this documentation coincides
21 with a particular storm?

22 A. Yes, I am pretty sure that this is Hermine.

23 Q. And do you know if the maximum wind speed recorded was
24 for Hermine?

25 MR. COLE: Objection, Your Honor. Again, he is not

1 firewalls, were those code violations?

2 A. Yes.

3 Q. Of those conditions that you documented, how would you
4 describe their frequency or infrequency on the property?

5 A. We saw examples of each of these on each building. There
6 was no area where the installation's varied with any degree.

7 Q. Have you developed a scope of repair?

8 A. I have.

9 Q. Tell us about it.

10 A. Well, it is pretty simple when you get down to it. The
11 shingles are failing. They are installed improperly. So we
12 need to put a new roof on the building. There are flashing
13 elements that need to go along with that roof installation.
14 So we need to replace those as we repair the roof.

15 The siding on the buildings is failing. It is falling
16 off during wind events. And it should not have been used in
17 the way it was used, regardless.

18 When the gentleman showed up on site with that siding in
19 their truck with those boxes of nails there was no way they
20 could have installed it in a manner that met the requirement
21 of the code. They couldn't have done it. It didn't exist.

22 So the siding needs to come off of the buildings so that
23 we can make repairs and also put on a proper exterior
24 cladding.

25 The windows have failed. I know we haven't talked about

1 them. But they are going to have to come out of the walls as
2 well.

3 MR. KENDALL: Your Honor ---

4 THE COURT: All right.

5 MR. KENDALL: That issue has been resolved.

6 THE COURT: Thank you.

7 A. But those windows will have to be replaced. The deck
8 coatings are wrong. And the way the decks terminate are
9 wrong. So those decks are going to have to be reworked and
10 recoated. So they are going to have to be replaced.

11 The guardrails are failing all over the community as
12 well. It is a life safety concern, which is a big deal.
13 Those are going to have to be removed and replaced as well
14 with a system that it is going to actually do what the code
15 requires.

16 The firewalls are a big problem. And all of those
17 penetrations that are in the firewall are going to have to be
18 fixed so that they have the integrity that they are supposed
19 to have. Again to project life safety, to protect the
20 occupants.

21 The corrosion that exists with different fasteners around
22 the community, those are going to have to be replaced.
23 Because if we don't, they will corrode to nothing eventually.
24 So they are going to need to be replaced.

25 And the flashing issues in the walls, the weather

1 barriers, all of those elements are going to have to be
2 removed so that we can be put on a properly integrated
3 protection system for the building.

4 It is very important to realize having the right siding
5 installed correctly is not the only answer. We have that
6 secondary layer of protection that was mentioned yesterday by
7 Mr. Schweickhardt. That layer has to be integrated as well.

8 When you think about it now, it has a ton of holes in it
9 from all of these nails that have been put through everything,
10 so there is no way we can save those weather barriers, the
11 Tyvek that is on the walls. We need to pull that off as well
12 and put up new so that it is not perforated materials.

13 And I believe that is what I can remember for now.

14 Q. Have things changed for the project between your first
15 inspection and your last?

16 A. Absolutely. When I first went out to the project in 2015
17 and started looking at these issues -- it was like I never
18 left. Like I said, I have been out there 40 times. These
19 problems kept popping up repetitively. And not like there was
20 new stuff that was discovered really. It was just more
21 examples of the failure modes that I have mentioned occurring
22 over time.

23 It takes time for these things to fail. And so I kept
24 going back and back. And I think somebody mentioned earlier,
25 I actually went to the site this Monday. I was there Monday.

1 Found another ---

2 MR. KENDALL: Your Honor, that was the issue we talked
3 about on Monday ---

4 THE COURT: Okay.

5 MR. KENDALL: --- or Tuesday morning if we could have
6 time for that ---

7 THE COURT: Right, we will reserve the right ---

8 MR. KENDALL: --- since we haven't seen it.

9 THE COURT: Sure.

10 MR. KENDALL: Thank you.

11 THE COURT: And Mr. Evans, I understand you haven't been
12 able to discuss this with him. If you could just ---

13 MR. EVANS: Right.

14 THE COURT: --- get him to move on to the next portion.

15 Q. As a result of things progressing do you recommend a
16 contingency fund in a repair estimate?

17 A. Yes. Mr. Schweickhardt mentioned that yesterday. These
18 projects while we do our best to define everything that is
19 wrong, as I said yesterday we keep -- can't take the whole
20 building apart.

21 We are not going to find everything through our
22 investigation. There always has to be contingencies, like Mr.
23 Schweickhardt said, so that the things that we don't know
24 about yet will be able to be addressed as part of the repair
25 process.

1 Q. Why aren't you recommending a piecemeal or a
2 cut-and-paste repair?

3 A. I don't think it is appropriate for the owners. These
4 building have shown quite a few failure mechanisms. There is
5 no way to go onto the roof and lift up every shingle and add
6 new fasteners to hold them to the roof. There is no way to do
7 that.

8 Similarly with the siding, the defense is proposing that
9 they are going to add nails to the wall. Well, the
10 manufacturer doesn't allow that. And so I don't see that as
11 being an appropriate repair either.

12 The only way to do this correctly so that these buildings
13 last as intended is to remove these failing elements and put
14 on something that is actually installed correctly.

15 Q. Thank you, Mr. Mease.

16 THE COURT: All right. We will take about a five-minute
17 recess at this time. Ladies and gentlemen, please once again
18 don't discuss the case. See you back here in a few minutes.
19 Thank you very much.

20 (WHEREUPON, jury exits courtroom.)

21 (WHEREUPON, recess 5/8/19, 11:18 a.m.)

22 (WHEREUPON, resume 5/8/19, 11:30 a.m.)

23 THE COURT: All right. Mr. Thames, I believe you have a
24 matter you would like to put on the record; is that correct?

25 MR. LUCEY: Yes, ma'am.

1 The general contractor, CBC, has agreed to drop its
2 cross-claim against Stanley Vinyl Fences in return for
3 plaintiff agreeing to give a \$295,000 set off to the -- any
4 verdict against the general contractor the full amount that
5 Stanley Vinyl is paying in settlement.

6 THE COURT: Okay.

7 MR. KENDALL: That is correct, Your Honor, on behalf of
8 CBC.

9 THE COURT: Okay. Anything else you need to add?

10 MR. THAMES: No, Your Honor. Thank you.

11 THE COURT: All right.

12 MR. LUCEY: There is a second stipulation, Your Honor,
13 between the remaining parties. We are stipulating in the main
14 construction file in this matter which consists of the
15 subcontracts or parties that are in the case that have them,
16 the general contract, the plans, the specifications, and the
17 general conditions.

18 And we have just reviewed those numbers in advance of the
19 Court coming back in. And that will be Exhibit 5A, the CBC
20 contract; Exhibit 9, the Tri-County contract; Exhibit 583, the
21 general conditions to the contracts; Exhibit 340 which is the
22 project manual; Exhibits 111 and 619 which are two versions of
23 the plans, the bid set and the construction set; and finally
24 Exhibit 203 which is the WC Services subcontract.

25 That way all contracts will be in. It happens to be that

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 testing on buildings to see behind the skin?

2 A. Yes.

3 Q. And you do that commonly through -- on the buildings you
4 inspect?

5 A. Correct.

6 Q. And one of the most common areas where you have
7 significant water infiltration is around windows, correct?

8 A. Yes, that is a common problem area.

9 Q. And this building you did remove siding around number of
10 windows, did you not?

11 A. I did.

12 Q. And you didn't find any water infiltration around any
13 window, did you?

14 A. Not significant, no.

15 Q. Not significant that would require being mentioned in
16 your report or addressed in any repair, correct?

17 A. Correct.

18 Q. We talked just a little while ago a lot about the siding
19 issues. And I want to talk about those some more. You said
20 that this manufacturer does not allow double nailing; is that
21 correct?

22 A. It gives no provision for it in their code approval
23 document, correct.

24 Q. And I want to be specific as to what that document says.
25 It doesn't say you cannot double nail; it is silent on that

1 A. Yes.

2 Q. A cinder block is not intended to be pierced with a nail?

3 A. Generally, no.

4 Q. Right. So the idea of you hit this with a nail it is
5 going to shatter the way a cinder block would, that is not
6 correct; is it?

7 A. No, it is very much correct. I see it very regularly in
8 fact when I see these overdriven nails.

9 Q. When you see the overdriven nails it might chip out the
10 corner; but the point is this is not -- this has fiber in it
11 and it is made of a different composition of cement than a
12 cinder block?

13 A. Well, cement is the cement. But the materials mix to
14 make that border different than a cinder block. But that is
15 why the manufacturer tells us not to overdrive the nails.

16 Q. Right, but it is not -- it doesn't explode, I think to
17 use your words, or crumble, when a nail hits it?

18 A. If it is installed properly. If it is overdriven, yes, I
19 see crumbling very frequently.

20 Q. Let's talk about some of the other items that you
21 addressed this morning. And you talked about -- at the end
22 you were talking about the railings. And we agreed those
23 railings have got to be shored up. You are aware that the
24 homeowners have undertaken at least partially to replace the
25 brackets on those vinyl rails, right?

1 A. Yes, and this is an emergency repair. These are life
2 safety issues, so the HOA is trying to cobble the rails
3 together until they can be repaired.

4 Q. You didn't issue a letter back to them and say don't do
5 that, it is still a life safety hazard; did you?

6 A. I did notify the HOA that it was a life safety concern.
7 But I did not write a letter.

8 Q. And that -- but under your -- the ethics of engineering
9 if you thought there was a life safety issue present you have
10 to write a letter?

11 A. I have to notify the parties. I can't write a letter to
12 every homeowner, so I ---

13 Q. Oh, no, to the board.

14 A. --- notify the board so that they can ---

15 Q. You are supposed to write a letter to them?

16 A. The requirement says to notify.

17 Q. Notify in writing. Okay. So you are allowing that --
18 you are aware that that repair is going on and at this time.
19 But if -- but when you talked about that railing as though it
20 was somehow not originally adequate, you are aware the
21 architect specified that railing; correct?

22 A. I don't know.

23 Q. Well, you reviewed the project documents?

24 A. I saw that there was a rail on the plan. I don't know if
25 it was that specific product.

1 Q. You are aware that it was -- it would have gone -- been
2 reviewed by the structural engineer because that falls within
3 their ambit, correct?

4 A. If they were paid to do that work. I don't know. I
5 don't know if they were or not.

6 Q. You don't know -- those were documents that were in the
7 project file though?

8 A. I have not reviewed those. I have not seen those.

9 Q. And it's -- and once the product is actually delivered it
10 goes through an approval process, does it not, a submittal
11 process?

12 A. Typically.

13 Q. And that submittal process contains the kinds of
14 information about its certifications that the engineer will
15 rely on when it approves the use of that product, correct?

16 A. Well, it should.

17 Q. Right.

18 A. As I mentioned earlier, I had not seen or been made aware
19 of any code compliance report for that product.

20 Q. You haven't seen it. It doesn't mean it doesn't exist?

21 A. Well, I contacted the manufacturer and asked for it, and
22 they said they don't have it.

23 Q. The manufacturers misrepresented its product then to the
24 engineers, is that what we -- you are saying?

25 A. No, he told me they had one for a commercial product but

1 not for a residential product.

2 Q. Okay. And you don't know what was represented in the
3 product materials because you haven't seen those?

4 A. As I said, correct, I did not review that.

5 Q. Do you have a note about that call in your records?

6 A. No, it is just a phone call.

7 Q. You mentioned something about making phone calls, if we
8 had a question about how to install Certain Teed we could call
9 the manufacturer and they could give us guidance; correct?

10 A. Sure.

11 Q. It is not unusual for an engineer to reach out to a
12 manufacturer and ask whether its product will meet certain
13 performance expectations?

14 A. Yes, in my experience though when you make that request
15 as an engineer they provide you with the code compliance
16 documents because they have to submit them to the code
17 counsel. So they are usually available.

18 Q. We were talking about the Certain Teed. You mentioned if
19 there was confusion in the field or a question about how to do
20 something you could call the manufacturer and they would tell
21 you?

22 A. Sure.

23 Q. Okay. And that is common practice for an engineer if
24 they have a question?

25 A. Sure.

1 open them up, see if there's damage, fix it, and put it back
2 together the right way; that can be done?

3 A. Sure. I mean that is part of the repair process.

4 Q. Privacy walls, there were three of them that were
5 problematic; correct?

6 A. Yes.

7 Q. And some of them have been removed and rebuilt already;
8 is that correct?

9 A. Again, by necessity, yes.

10 Q. Okay. But that can be done is the point?

11 A. Sure.

12 Q. Okay. Because I think Mr. Schweickhardt indicated that
13 that was something that needed to be done or it could be done,
14 and you agree with that?

15 A. Yes.

16 Q. All right. The low sloped roofs and flat roofs, I am
17 going to -- we have talked about them as kind of low slope and
18 really low slope. But we will call them low slope and flat.
19 Those are often in the same areas as that strange
20 configuration of deck-post-roof, right?

21 A. They are. But there are also multiple locations in the
22 field of the roof on the upper roof where the same condition
23 occurs and those are also going to have to be addressed as
24 well.

25 What is creating these very low slope areas is the

1 meeting of different slopes that come together and they kind
2 of cancel each other out, if you understand what I am saying.

3 Q. Yes.

4 A. And it creates a spot that is just really flat.

5 Q. So the idea though -- because this is a very complicated
6 roofline on these buildings, isn't it, where you have ---

7 A. It is very ---

8 Q. --- these lines that come together and do strange things?

9 A. It is very architectural, as I like to say.

10 Q. Right.

11 A. There are lots of pieces to it.

12 Q. Well, we know why that happens, because they were seeking
13 to make these units look different so that it didn't all look
14 cookie-cutter from the street; right?

15 A. Correct.

16 Q. And that created some challenges that we have got to go
17 back and fix. And so what we can do on those low-slope roofs
18 is take up the shingles, put two papers -- two felts down, put
19 shingles back on them. Of course if there is any rot, replace
20 that. But that is how you approach that problem, correct?

21 A. In the two-and-twelve to four-and-twelve regions.

22 Q. That low-slope area?

23 A. Right.

24 Q. And in the flat areas that is below two percent, again,
25 take up the shingles and put a membrane type roofing in those

1 areas; correct?

2 A. Yes. There are other options, but we would have to
3 change the configuration.

4 Q. But it can be done; because those don't affect entire
5 roofs, they are isolated areas that we can address in that --
6 in those spaces; correct?

7 A. Right. But I want to be very clear it is not just
8 adjacent to these decks.

9 Q. I understand.

10 A. There's areas on the main roof as well.

11 Q. But they are in isolated areas; we can get to them and
12 make the corrections that need to be made?

13 A. Correct.

14 Q. We talked about the aluminum coil stock. That is just a
15 matter of taking it off, putting new on with protective liner
16 of some type; correct?

17 A. Correct; just like Mr. Schweickardt, yes.

18 Q. And as far as the bolts that are corroded that you saw --
19 and you said it wasn't everywhere and it kind of seemed a
20 little bit random as to which ones were corroded. Does
21 sometimes when you buy a box of those things maybe there is
22 some bad ones in the batch or something -- the hot-dipped
23 galvanizing process isn't perfect, is it?

24 A. Correct, but it was a little unusual as you saw the
25 slides that we were looking at. It wasn't like one bolt. It

1 was a column of bolts. So they were bad at the top. They
2 were bad at the bottom. There was ---

3 Q. So it might be more like the whole box that the guy
4 picked up was bad?

5 A. Right, there were some condition that was causing some of
6 the bolts to fail.

7 Q. Right, and so taking them out, if there is -- if you need
8 to solidify the wood a little bit or chip away the loose
9 stuff, it hasn't -- it hasn't yet caused any structural
10 challenge to the beams; it is just on the surface where the
11 touching is occurring, right?

12 A. Right, the piles seem to have good integrity. The
13 connection is the problem.

14 Q. So we just need to replace those bolts?

15 A. Yes.

16 Q. Okay. However many those might be, just replace those?

17 A. Correct.

18 Q. Okay. Now on the fire stopping you will defer to Mr.
19 Smits on how to approach that?

20 A. Mr. Smits has a lot more experience with fire systems.
21 Correcting the firewall is essentially following what the code
22 says.

23 Q. Right.

24 A. But I think he and I would both agree that they have to
25 have integrity. They've got to be complete and uninterrupted.

1 Q. Right. So we have got -- we have got to get the gaps out
2 of it?

3 A. Yes, and the penetrations.

4 Q. Well, that is where -- that is what is causing the gaps
5 in -- some of the gaps. Some of the gaps would need to be --
6 we need to go back and rework the sheetrock a little bit?

7 A. That is going to be a big job. Because it is -- it is in
8 the attic. And a lot of the structural elements that go
9 through it there is not really -- there is no good guidance in
10 the United Laboratories test information on how to accomplish
11 that. So I am still not sure exactly how those are going to
12 be handled.

13 Q. Okay. But Mr. Smits might have some guidance on that
14 that we can rely on. But the idea is we just -- we go up
15 there and, yes, it may be a challenge but if a contractor is
16 willing to undertake it for a given price then we can -- we
17 should rely on the contractor to perform the scope that he
18 agrees to perform; correct?

19 A. Yes, but I want to make sure that whatever detail is
20 provided is approved by the fire marshal.

21 Q. Understood.

22 A. Because, like I said, I have looked in my books. I don't
23 see guidance on how to deal with a piece of wood that goes
24 through a firewall. I don't see a clear way to do that. So
25 that would have to be priced after a detail was approved by

1 the fire marshal.

2 Q. Okay. I am sorry, I'm just checking my notes since we
3 got a lot of information this morning. I think that is all I
4 have got for now. Thank you.

5 A. Thank you.

6 THE COURT: Who would like to go next? Mr. Cole.

7 **CROSS-EXAMINATION BY MR. COLE OF RUSSELL MEASE:**

8 Q. I think you know my client, Tri-County Roofing and you
9 have already had some comments about what they did out there.
10 But I just have some follow-up questions to ask you about.

11 First, I think you testified earlier that products when
12 they are manufactured the manufacturer comes up with details
13 and suggestions and guidelines on how they want their products
14 to be installed, correct?

15 A. Yes.

16 Q. And you have already talked about some of that with some
17 of the siding installation, and you generally spoke about some
18 of the installations for the HydraStop or Sealoflex which are
19 a waterproofing component; correct?

20 A. Yes.

21 Q. I don't think we talked about how that goes down.
22 Basically you have got a piece of cloth that is kind of the
23 medium that holds everything in place and then you mop it on
24 or you roll it on and it is kind of like a paint. And I know
25 I am oversimplifying it. But it is like painting it on and

1 Teed, right?

2 A. No.

3 Q. You have never been employed by them?

4 A. No.

5 Q. Okay. And you gave some testimony about the siding that
6 is out there. You have said that although you don't like it
7 because it is not as pretty, you can face nail the siding;
8 correct?

9 A. It is allowed.

10 Q. Okay. Now do I understand your testimony that the first
11 second you showed up on the property you thought the siding
12 was wrong?

13 A. Yes.

14 Q. Okay. And then to confirm your suspicions you found that
15 ESR document you talked about, and you spent how many hours
16 trying to go through those tables and interpret it?

17 A. I didn't really need to. As you mentioned, I do this for
18 a living. I am very familiar with those documents.

19 So the only thing I had to do was go up and put my tape
20 measure on the wall and confirm the size of the siding. But
21 it was -- it was a condition I recognized right away.

22 Q. And that is -- the ESR document is an engineering
23 document, correct? I mean it helps to have some letters
24 behind your name to help understand what it means?

25 A. Yes, as I said, it is not easy to read. It is a

1 technical document that architects and engineers typically
2 would use or general contractors for that matter in selecting
3 materials.

4 Q. Okay. And in a typical construction job the architect is
5 is -- you know, they are making the thing look pretty, they
6 are making the buildings look pretty; correct?

7 A. I am sure that is part of what the design is.

8 Q. Right. And they are helping to make the selections of
9 what they want to go into the building that is being
10 constructed?

11 A. Correct.

12 Q. And then the engineer makes sure that that is going to
13 stay up, right, or it is going to work?

14 A. They are one of the parties that do that, yes.

15 Q. Okay. And you kind of gave us a little bit of an out for
16 the people that might actually install this that all they have
17 to do is call a 1-800 number to find out can I actually put
18 this on, that the architect and the engineer told me I should
19 put on the building; right?

20 A. Yes.

21 Q. Okay. And it sounds like it is just kind of easy to just
22 call up and Certain Teed will say, hey, yeah, no, don't put it
23 in Charleston County because you can't put that wide reveal
24 there; correct?

25 A. Well, that is what their document says.

1 A. That is me.

2 Q. And so you do the forensic investigations and the
3 testimony and things like that, correct?

4 A. Yes.

5 Q. But you don't get into contract administration?

6 A. No, and there's two reasons. Like is said, I am a
7 one-person office. The other thing is I don't carry the
8 insurance for that type of work. I don't take it on because
9 I'm not insured for it.

10 Q. Okay. And so if the plaintiffs decide to make repairs
11 out there you won't be involved with that repair process?

12 A. I have the knowledge; but, no, I will not be involved.

13 Q. Is contract -- or -- I have got to get my right term
14 here. Contract or quality assurance, is that something that
15 is kind of like a contract administration?

16 A. I mean they are essentially synonymous. When you are
17 doing contract administration which is -- or sometimes called
18 construction administration, in our industry what you are
19 doing is you are ensuring that things are installed correctly.
20 You are inspecting.

21 Q. And when you are doing quality assurance what would
22 somebody be doing if they were doing that, they would be
23 actually showing up at the job site and reviewing what is
24 going on?

25 A. If you do it correctly you'd begin the process at the

1 beginning when materials are selected, and you're making
2 decisions about what type of things are going to be
3 accomplished. And then you want to ensure that those products
4 are compatible. And then any good QA program is going to have
5 a meeting at the beginning where you get all of these
6 different trades to come together.

7 And very common in the industry now is to build a mockup.
8 You actually build one, a sample of it. Like they could build
9 this little deck corner as an example and show how everybody
10 is going to do their work so that it all works together. And
11 then once all of that is agreed upon, the work begins. You
12 would come back and verify that that was being followed.

13 Q. And the people that would be in charge of that quality
14 assurance, that would be the architects or the engineers,
15 right, the people that are designing this thing?

16 A. Typically, yes.

17 Q. Not the person that is hired to actually put it on; they
18 are not the ones that are showing up at the meeting and
19 saying, hey, I am going to run this thing?

20 A. No, but the contractors you have to remember on these
21 jobs are all licensed individuals. They have passed tests and
22 they have certified to the State that they understand what
23 they are doing. And they also whenever they pull a permit say
24 they are going to build in accordance with the code.

25 So it doesn't -- you don't give all of the responsibility

1 to the designers. It is also very -- a huge responsibility
2 for the actual guys doing the work to comply with the code.
3 In fact, that is what they have said they were going to do
4 with the State. So it is important that everybody is doing
5 the right thing so that we end up with the correct product.

6 Q. Okay. And as long as the people that are designing it
7 are able to observe this they can give direction to the people
8 that are actually installing it and at the end of the day if
9 you want to have a finished building that is going to work and
10 operate and the people can live in, right?

11 A. Right, but construction administration is a spot check.
12 It is never going to be an overall evaluation of everything,
13 because they can't stand there all day and watch the other
14 guys do their work.

15 It is incumbent upon the contractors to do quality work
16 in the meantime. And then the spot checks will happen
17 periodically to kind of verify the work that is being done.

18 Q. And the engineer -- or one of the engineers in this job
19 was Curry Engineering, right, and they were responsible for
20 quality assurance?

21 A. They did have some construction administration
22 responsibilities, yes.

23 Q. And you discussed a little bit before about this
24 component that everybody keeps talking about, those different
25 sections -- I guess it is here where we got the different

1 sections and we have got the notes and everybody is talking
2 about the notes, what is Mr. Schweickhardt actually talking
3 about on this.

4 On those things there we are talking about basically a
5 component where we have got the porch and a roof and a post
6 and that is all coming together. And you admitted already
7 that is a complicated area, right?

8 A. Sure.

9 Q. Okay. And you would admit with me -- or you would agree
10 with me that Curry Engineers was specifically responsible for
11 being part of that design of that particular location?

12 A. I don't believe they were in charge of design of that. I
13 think they were hired to oversee to do some quality checks for
14 it. If I remember correctly.

15 Q. Okay. So they may not have designed it but they were
16 specifically hired to show up and make sure that, yes, that is
17 what should be done?

18 A. I believe they had some responsibilities around that,
19 yes.

20 Q. And you are not going to tell the jury that somebody who
21 is doing the installation should second-guess the engineers,
22 are you?

23 A. Sure. They should. They always should. It is not very
24 hard to understand these instructions. So it is a group
25 effort. I mean to build any building it is a huge group of

1 people that come together to make it happen. Everybody has to
2 have input.

3 The people who deal with the products every day are the
4 people who install them. And as an engineer I can read it in
5 a book, but there may be some nuance that I don't get from a
6 book that a guy in the field actually can bring to the table
7 and help out the process.

8 Q. And I have one more question, I think. Let me just make
9 sure. I beg your indulgence a second. Oh, I guess my last
10 question is: The architect one of the things that the
11 architect provides are specifications, correct?

12 A. Typically, yes.

13 Q. And the specification on this particular job listed that
14 the width of the siding is the stuff that is actually
15 installed, correct?

16 A. I remember seeing on the plans that they called for
17 six-and-a-half-inch siding.

18 Q. Right. And that is another design for the architect.
19 But I am you asking about in the specifications itself it
20 calls for the nine-and-a-quarter boards, correct?

21 A. I don't remember that specifically. But if that is what
22 it says, that is what it says.

23 Q. All right. Thank you for saving the time so I don't have
24 to flip through this to find that one page in here. That's
25 all the questions I have. Thank you.

1 Palmetto Pointe?

2 A. No. Yeah, not specific to this community.

3 Q. Because that wasn't part of your assignment so you didn't
4 look at any of those areas?

5 A. I -- it was not part of my assignment. Because I did not
6 evaluate the sprinkler system itself. I looked at the
7 buildings but not the sprinkler system.

8 Q. And thus since it wasn't part of your assignment you
9 didn't do anything to further investigate that?

10 A. No, as I said.

11 Q. Okay. All right. Had you been assigned, you would have;
12 wouldn't you?

13 A. Yes, if I was asked.

14 Q. Okay. That's all I have. Thank you, sir.

15 A. Thank you.

16 **CROSS-EXAMINATION BY MR. REESER OF RUSSELL MEASE:**

17 Q. Mr. Mease, I know we have been over quite a bit of your
18 testimony today. And as part of your investigation did you
19 determine how many laborers Tri-County might have used to
20 perform work on Palmetto Pointe?

21 A. No.

22 Q. What about how many laborers any other subcontractor
23 might have used to put up work?

24 A. No, I don't have that information.

25 Q. Do you know how many subcontractors put up siding?

1 A. Not specifically.

2 Q. Do you know how many subcontractors put up roofing or did
3 the deck waterproofing?

4 A. I do not.

5 Q. And that is not -- that really has no bearing on your
6 opinions in this case, does it?

7 A. Correct.

8 Q. Because of all of your opinions regarding how things were
9 constructed out here is that they are systemic, correct?

10 A. Yes, based on the intrusive and visual observations that
11 I have made I only evaluate the work. I have not really
12 looked into who did the work. That is not really important to
13 me.

14 Q. So whether one person did all of this or twenty people
15 did all of this, it was all done in the same way in your
16 opinion; correct?

17 A. That is what my investigation showed, yes.

18 Q. And we take a look at Plaintiff's Exhibit 828. Have you
19 performed a review of the architectural plans in this case?

20 A. Yes.

21 Q. Now it appears that Palmetto Pointe all of these duplexes
22 are two units put together, correct?

23 A. Yes.

24 Q. How many floor plans are in this project?

25 A. I want to say there are seven.

1 Q. So the architect designed seven different floor plans for
2 all of these buildings?

3 A. Yes, and reversed them. There are some A and B
4 components depending on which side of the building they are
5 on.

6 Q. So basically you have got sets of individual plans for
7 individual building types that once things get put out here
8 you might have one unit slapped to the right side of another
9 unit; another unit reversed, slapped to the backside of
10 another unit; these all masked together, correct? And
11 actually they are not even next to each other, right; they are
12 kind of -- they are offset; one is set forward and back in
13 most of these buildings, isn't it?

14 A. Right, just the way they show on the plans.

15 Q. So -- well, the plans don't show you which -- which type
16 of unit goes next to another type of unit, correct?

17 A. But the units are very specifically designed in the
18 plans, yes.

19 Q. I understand that. Each individual being specifically
20 designed, not each duplex being specifically designed;
21 correct?

22 A. Right. And the understanding of that is the units are
23 essentially very consistent. There's a lot of changes on the
24 exteriors to make them look with some variability. But
25 essentially their floor plans are very consistent.

1 Q. And I noticed one of the first things you said in your
2 testimony - and Mr. Cole has asked you about this - is the
3 first day you pulled on the site you look at that siding and
4 you knew that siding shouldn't have been on that wall,
5 correct?

6 A. Yes.

7 Q. So it doesn't matter what investigation you did after
8 that, you would have said pull the siding down; correct?

9 A. Yes. It is not proper.

10 Q. And to come to that opinion regarding the siding you have
11 discussed some Certain Teed installation instructions and then
12 the ESR 1668 that everyone has been talking about and that you
13 hope the jury doesn't have to read, correct?

14 A. Yes.

15 Q. Are there any other engineering documents you had to rely
16 on to come to that opinion regarding the siding?

17 A. No, that is the source.

18 Q. Okay. And Mr. Cole had asked you if you had any
19 knowledge regarding Curry Engineers specifically. Do you
20 recall that testimony?

21 A. Yes.

22 Q. Do you believe that Curry Engineers did its job?

23 A. No, there was definitely some failures in areas where
24 they did do construction administration.

25 Q. And in what areas were those specifically, do you recall?

1 A. Primarily the roofs.

2 Q. Do you remember what areas of the roofs?

3 A. I can't sit here and quote the scope of their contract,
4 because I haven't read the contract. But in my general
5 understanding is they were in charge of overseeing some roof
6 installation.

7 Q. Okay. Do you know if that includes the deck
8 waterproofing?

9 A. I am sorry?

10 Q. Do you know if that includes the deck waterproofing?

11 A. I would have to go back and look. I don't remember
12 specifically.

13 Q. When you say roof installation, I am sure that assumes
14 starter strips?

15 A. Yes, I would expect that to be part of it.

16 Q. Shingles?

17 A. Yes.

18 Q. Flashing?

19 A. Yes, regarding the roof.

20 Q. So any time that there is an issue like this that you
21 have identified, we know that there has been a design
22 professional specifically assigned to look at that work;
23 correct?

24 A. There is evidence that there was some oversight, yes.

25 Q. Okay. Some oversight. Wouldn't you agree with me that

1 there was in addition to Curry, who was specifically supposed
2 to look at these issues, would you agree with me that there is
3 also other oversight at Palmetto Pointe during construction?

4 A. There is a general contractor on every project. I always
5 like to say the general contractor has two primary
6 responsibilities. One, they are there to make sure that the
7 equipment and materials are there and the people are there to
8 actually do the work. And the second component comes from
9 their ability to do quality control. They are there to ensure
10 coordination happens.

11 So there is always an overreaching umbrella that the
12 general contractor is to provide to all the subcontractors
13 that it hires to work on the project.

14 Q. So and let me ask one thing very quickly. I know we have
15 looked at a lot of photos so far that has been presented today
16 and yesterday. If I pull up Plaintiff's Exhibit 828 again, if
17 we are looking at Polly Creek Way I am assuming this would be
18 the front of a unit and that this here would be the back of a
19 unit; correct?

20 A. Yes, the fronts face the street.

21 Q. And so these decks with these post intersections, these
22 decks exist on the front of these units and the back; correct?

23 A. Yes.

24 Q. There are none on the side of the buildings, correct?

25 A. There are some on the corners but ---

1 ceiling joint problems, yes.

2 Q. Thank you, Mr. Mease. Those are all the questions I have
3 for you.

4 THE COURT: Questions? All right. Any -- how long will
5 your redirect to be about?

6 MR. EVANS: I just have a couple of quick questions, Your
7 Honor.

8 THE COURT: Okay. Go for it then.

9 **REDIRECT EXAMINATION BY MR. EVANS OF RUSSELL MEASE:**

10 Q. Mr. Mease, no one has shown you any Curry Engineering
11 materials here today, have they?

12 A. They have not.

13 Q. Without seeing these to refresh your memory are you
14 really aware of what Curry Engineering's role was?

15 A. As I said, I don't remember the specifics of it; no.

16 Q. You were asked some questions about some intersections
17 being complicated. Do you recall that?

18 A. I do.

19 Q. Those intersections were complicated at the time of
20 construction, right?

21 A. Yes.

22 Q. They didn't become complicated later, right?

23 A. No.

24 Q. Should those complicated intersections have been handled
25 at the time of construction?

1 MR. COLE: I have got something real quick, Your Honor.

2 THE COURT: All right.

3 **RECROSS-EXAMINATION BY MR. COLE OF RUSSELL MEASE:**

4 Q. Mr. Mease, in your capacity of being an expert retained
5 by attorneys in cases you have issued things called
6 affidavits; correct?

7 A. Yes.

8 Q. Okay. And an affidavit is a statement that you review
9 and then you are swearing that that is true, correct?

10 A. Yes.

11 Q. I am going to hand you an affidavit that was dated
12 September 27, 2017, that deals with the Palmetto Pointe
13 project; correct?

14 MR. EVANS: Objection, Your Honor. That is not part of
15 this case.

16 THE COURT: I also think it is outside of the scope of a
17 redirect so.

18 MR. COLE: Well, it is directly on the scope of a direct,
19 Your Honor.

20 THE COURT: All right. Are you getting to that? All
21 right.

22 All right. What was your objection?

23 MR. EVANS: One, that -- if this is what I think it is,
24 it is not part of this case here today. And two this is
25 outside of the scope of redirect.

1 THE COURT: Okay.

2 MR. COLE: And I will just say that the redirect was he
3 said he does not know what the scope of the work by Curry
4 Engineering is, and attached to his affidavit is a document
5 that he says in his affidavit is what the scope was.

6 THE COURT: I will allow you to ask him about that.

7 Q. All right. Would you flip to Exhibit A to your ---

8 THE COURT: He doesn't need to publish it to the jury
9 though obviously.

10 MR. COLE: I am not going to publish it.

11 THE COURT: Go ahead.

12 Q. Exhibit A to your affidavit, that again was filed on
13 September 27, 2017. It is not that many pages into it.

14 A. Okay.

15 Q. All right. And I am going to read this. Tell me if I
16 read it correctly. I will try to not go too fast. It says
17 proposed services is provide roofing and building envelope
18 quality assurances in coordination with the general
19 contractor, includes assistance with pre-installation
20 conferences, intermittent and final observation of roofing,
21 and/or wall system installation for quality assurance as
22 directed by the general contractor with written observation
23 reports and phone documentation for each job site visit, roof,
24 and exterior wall system. Quality requirements will be based
25 on construction documents such as drawings, specifications,

1 and submittals provided by the general contractor.

2 Did I read that correctly?

3 A. You did.

4 Q. Okay. Does that refresh your recollection that you know
5 generally what Curry Engineers' scope was on this project?

6 A. Yes, I just hadn't read it in a long time.

7 Q. All right. Thank you.

8 THE COURT: All right. Anything else? All right. Thank
9 you very much, Mr. Mease. You may step down from the witness
10 stand.

11 (WHEREUPON, witness steps down.)

12 THE COURT: All right. Given the hour I think we will
13 take our lunch break at this point in time. Ladies and
14 gentlemen, it is about 12:45 or so. I would ask that you be
15 back by 2:15, okay. See you at 2:15. Please do not discuss
16 the case.

17 (WHEREUPON, jury exits 5/8/19, 12:41 p.m.)

18 THE COURT: All right. We will be at ease until 2:15.

19 (WHEREUPON, recess for lunch break 5/8/19, 12:41 p.m.)

20 (WHEREUPON, resume following lunch, 5/8/19, 2:15 p.m.)

21 THE COURT: Is the jury all back?

22 THE BAILIFF: Yes, ma'am.

23 THE COURT: Okay. What would you like to tell me?

24 MR. BOYD: Your Honor, I have a brief evidentiary matter
25 to bring before the court.

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 114 Autumn Lane, Moncks Corner, South Carolina,
25 29461.

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 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 firewail 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 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 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 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