

IN THE CIRCUIT COURT
FOR WORCESTER COUNTY, MARYLAND
PINES POINT MARINA COUNCIL OF UNIT OWNERS, INC.
Plaintiff
v. : Civil Case No.
: 23-C-06-000988
JIM REHAK, et al.
Defendants :

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

December 16, 2010

Snow Hill, Maryland

BEFORE:

THE HONORABLE RICHARD R. BLOXOM, JUDGE

APPEARANCES:

On behalf of the Plaintiff:

BRUCE F. BRIGHT, ESQUIRE

On behalf of Topper Industries Inc.:

JEFFREY R. GANS, ESQUIRE

On behalf of the MV of Ocean Pines:

GLENN E. BUSHEL, ESQUIRE

KRISTEN P. HERBER, ESQUIRE

Reported by:
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EXHIBITS: Identification Received
Plaintiff's
No.8 Condominium Documents 4
No.9 Deposition Transcript of 4
Mr. Short

PROCEEDINGS

JUDGE BLOXOM: Be seated, please, folks. Good morning, folks. I think we have unresolved from yesterday your -- the evidentiary issue regarding the deposition; is that correct?

MR. BRIGHT: That's correct.

MS. HERBER: That's correct, Your Honor.

JUDGE BLOXOM: What was the individual's name again?

MR. BRIGHT: The individual's name is Robert J. Short, otherwise known as Jim Short.

JUDGE BLOXOM: Read me the part of the deposition again where he identifies himself and his status with respect to the MV of Ocean Pines.

MR. BRIGHT: Yes, Your Honor. This is on page ten of the deposition transcript, and he's asked the question, "What is your relationship to MV of Ocean Pines Limited Partnership?" He gives the answer, "I'm the president." And then there's a question, "Are you the general partner?" And the answer is, "No. The general partner is MV of Ocean Pines Chartered, Inc."

One bit to add to that, Your Honor, is the condo docs which I would -- as part of this proffer I would mark and make an exhibit, are signed by Mr. Short as --

JUDGE BLOXOM: Why don't you do that.

(Plaintiff's Exhibit 8 was marked for identification.)
MR. BRIGHT: While I'm at it, Your Honor, if I may I'm going to go ahead and mark the deposition transcript as part of the proffer as well.
(Plaintiff's Exhibit 9 was marked for identification.)
MR. BRIGHT: The condominium documents, which are Exhibit 8 -- Plaintiff's Exhibit 8, are signed by Mr. Short in his capacity as president of the corporate general partner of MV of Ocean Pines which, of course, is a limited partnership. So he's testified that he's the president of the limited partnership, whatever that may mean to him. It certainly implies that he considers him the managing agent of the limited partnership. He's also president of the corporate general partner, and by law the general partner is the managing agent of the -- or a managing agent at the very least of a limited partnership, and he's the president of that corporate entity.
He also testifies in his deposition that he's a 50 percent owner of the corporate general partner of MV of Ocean Pines. And he's also one of two -- an owner of one of two corporate limited partners. So in essence, he is MV of

<p style="text-align: center;">5</p> <p>1 Ocean Pines, Inc.</p> <p>2 The case, Your Honor, that I would point you to --</p> <p>3 MS. HERBER: Could we see the documents that you</p> <p>4 just referenced?</p> <p>5 MR. BRIGHT: The condo documents?</p> <p>6 MS. HERBER: Please. Thank you. Sorry to</p> <p>7 interrupt you.</p> <p>8 MR. BRIGHT: The case, Your Honor, that I would</p> <p>9 point you to would be in -- it's in the annotations for Rule</p> <p>10 2-419, and it is Mayor and City Council of Baltimore versus</p> <p>11 Austin. The citation is 392 A.2d. 1140, and it's also at 40</p> <p>12 Md. App. 557. And this is a case where the question arose</p> <p>13 whether the deposition transcript of a director of a city day</p> <p>14 camp could be read in. And what the Court did in that case is</p> <p>15 looked at the circumstances -- all of the circumstances and</p> <p>16 concluded that based on the fact that this director was</p> <p>17 running things with this city day camp, the Court deemed the</p> <p>18 director, even though he didn't have the title of managing</p> <p>19 agent, deemed the director to be the managing agent for</p> <p>20 purposes of that term as it's used in 2-419. So it was a</p> <p>21 qualitative analysis of what's the connection between this</p> <p>22 particular witness and the party. And the Court determined,</p> <p>23 based on all the facts and circumstances that that individual</p> <p>24 was de facto a managing agent and allowed the deposition</p> <p>25 transcript to be read.</p>	<p style="text-align: center;">6</p> <p>1 JUDGE BLOXOM: Thank you. Do you dispute any of</p> <p>2 the factual representations regarding the status of this</p> <p>3 individual?</p> <p>4 MS. HERBER: I dispute the characterization of</p> <p>5 Mr. Short's involvement as essentially MV of Ocean Pines. And</p> <p>6 I point out that --</p> <p>7 JUDGE BLOXOM: I understand that, but that's not</p> <p>8 what I'm talking about. What I'm talking about is, first of</p> <p>9 all, Mr. Bright read from the deposition as to what Mr. Short</p> <p>10 purportedly said in the deposition. Furthermore, he recited</p> <p>11 Mr. Short's characterization in the condominium documents.</p> <p>12 Furthermore -- well, that pretty well exhausted I guess except</p> <p>13 also he says that in the deposition Mr. Short identified</p> <p>14 himself as the president of the corporation which is the</p> <p>15 general partner of the limited partnership which is a party in</p> <p>16 this matter and also a 50 percent owner of one or more of the</p> <p>17 limited partners in this limited partnership which is a party</p> <p>18 to this matter. Do you dispute any of those?</p> <p>19 MS. HERBER: I simply want to add that there is</p> <p>20 another individual who is involved in this and that's</p> <p>21 Mr. Palmisano, Michael Palmisano, who is also a partner and</p> <p>22 has the same interest essentially in the corporate defendant.</p> <p>23 And I point out that Mr. Short was deposed in his individual</p> <p>24 capacity. I don't dispute Mr. Bright's reading of the</p> <p>25 transcript.</p>
<p style="text-align: center;">7</p> <p>1 JUDGE BLOXOM: Thank you. Is there anything else</p> <p>2 you want to say on the objection, ma'am?</p> <p>3 MS. HERBER: I just want to also add a layer of</p> <p>4 objection as to the relevance of this testimony, as to what</p> <p>5 relevance it is at all to the issue before the jury what</p> <p>6 Mr. Short knew. There's no --</p> <p>7 JUDGE BLOXOM: Since I don't know what's in the</p> <p>8 deposition it makes it difficult for me to rule on it in terms</p> <p>9 of relevance. Why don't you make an offer of proof. How long</p> <p>10 is this going to be?</p> <p>11 MR. BRIGHT: It's not going to be very long, Your</p> <p>12 Honor. There are -- let me see -- five excerpts that I'm</p> <p>13 reading. It's a total of maybe two pages of deposition -- I'm</p> <p>14 sorry -- a total of maybe eight pages of deposition testimony.</p> <p>15 I'm probably estimating on the high end. And I can certainly</p> <p>16 make a proffer right now as to what the excerpts are.</p> <p>17 JUDGE BLOXOM: Let's do that.</p> <p>18 MS. HERBER: That would be appreciated. Thank</p> <p>19 you.</p> <p>20 MR. BRIGHT: Would you like me to read or do you</p> <p>21 want to --</p> <p>22 JUDGE BLOXOM: Well, I would like to do it as</p> <p>23 economically as possible if you feel that you can accurately</p> <p>24 proffer what he says --</p> <p>25 MR. BRIGHT: I will do that, Your Honor.</p>	<p style="text-align: center;">8</p> <p>1 JUDGE BLOXOM: -- in summary form.</p> <p>2 MR. BRIGHT: I will do that. The first excerpt</p> <p>3 for reference purposes is -- and, Your Honor, I will hand you</p> <p>4 what's been marked as Plaintiff's Exhibit No. 9 which is a</p> <p>5 copy of the transcript.</p> <p>6 The first excerpt, Your Honor, is -- begins at the</p> <p>7 bottom of page 98 and goes to line 15 of page 99 -- I'm</p> <p>8 sorry -- goes to line 20 of page 99, and it is essentially</p> <p>9 where Mr. Short is testifying about the turnover and when that</p> <p>10 occurred, and the fact that it was developer control prior to</p> <p>11 the turnover and then board control after the turnover.</p> <p>12 JUDGE BLOXOM: Let's deal with it in segments. Is</p> <p>13 it your belief, ma'am, that that's irrelevant?</p> <p>14 MS. HERBER: No, Your Honor. We have no objection</p> <p>15 to that portion.</p> <p>16 JUDGE BLOXOM: Okay. No objection to that part</p> <p>17 other than your objection previously articulated.</p> <p>18 MS. HERBER: Correct. Thank you.</p> <p>19 MR. BRIGHT: The next excerpt, Your Honor, is on</p> <p>20 page 101 beginning at line 13 and ending at line two of page</p> <p>21 106. And it is where he says that the problems started</p> <p>22 showing up somewhere in the fall of 2003 with regard to the</p> <p>23 marina, and I'm summarizing.</p> <p>24 JUDGE BLOXOM: Okay. Is it your position that</p> <p>25 that's irrelevant?</p>

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<p>1 MS. HERBER: That's correct, Your Honor.</p> <p>2 JUDGE BLOXOM: Okay. What's the next one?</p> <p>3 MR. BRIGHT: The next one begins on line 14 of</p> <p>4 page 112 and goes until line four of page 113. And he's</p> <p>5 describing certain things that the dockmaster did before the</p> <p>6 transition to the board in March of 2003, certain repairs and</p> <p>7 maintenance. And in that excerpt he characterizes these</p> <p>8 issues as quote "normal wear and tear".</p> <p>9 JUDGE BLOXOM: And you object to that as</p> <p>10 irrelevant, ma'am?</p> <p>11 MS. HERBER: We object to that as irrelevant. And</p> <p>12 he also then says, "I don't know."</p> <p>13 "Would you characterize it?"</p> <p>14 "I don't know."</p> <p>15 MR. BRIGHT: No. Are you reading all the way to</p> <p>16 line four?</p> <p>17 MS. HERBER: "Normal wear and tear."</p> <p>18 MR. BRIGHT: He says, "I don't know. I mean,</p> <p>19 probably okay, normal wear and tear."</p> <p>20 MS. HERBER: Right. But he says, "I don't know."</p> <p>21 JUDGE BLOXOM: What's the next one?</p> <p>22 MR. BRIGHT: The next one is on page 116 beginning</p> <p>23 at line 18 and extending to line 11 of page 117. And he's</p> <p>24 talking about -- the question that was asked was, "How long</p> <p>25 did it take the board of directors to recognize that they had</p>	<p>1 a problem?" And he says, and the key part for my purposes,</p> <p>2 Your Honor, is that at the end of his answer, he says, "I</p> <p>3 think -- I think it was Isabel that created the recognition.</p> <p>4 Holy moley, we got a problem. I think that's when it all came</p> <p>5 to pass."</p> <p>6 JUDGE BLOXOM: Read it again.</p> <p>7 MR. BRIGHT: "I think -- I think it was Isabel</p> <p>8 that created the recognition, quote, 'holy moley', we got a</p> <p>9 problem," closed quote. "I think that's when it all came to</p> <p>10 pass."</p> <p>11 MS. HERBER: This is Mr. Short who's not a board</p> <p>12 member testifying as to how long it took for the board of</p> <p>13 directors to recognize they had a problem. I don't know how</p> <p>14 he can testify to that.</p> <p>15 And, you know, also he goes on -- so it's kind of</p> <p>16 an incomplete pass because he goes on to say, you know, that's</p> <p>17 -- "I can't say that these bolts were deteriorating over</p> <p>18 time." And it's kind of taken out of context. Like I said,</p> <p>19 he's testifying as to what the board of directors would have</p> <p>20 recognized which I don't know how he can do that.</p> <p>21 JUDGE BLOXOM: You had something to add, sir.</p> <p>22 MR. GANS: Just, Your Honor, for the purposes of</p> <p>23 the record, I just want to interpose my objection to that.</p> <p>24 JUDGE BLOXOM: You join in and second her</p> <p>25 objection?</p>
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<p>1 MR. GANS: To the extent that she's saying it's</p> <p>2 speculation, there's not any basis for him to be able to offer</p> <p>3 that testimony, it's objectionable.</p> <p>4 JUDGE BLOXOM: All right. What else?</p> <p>5 MR. BRIGHT: And the final one, Your Honor, is on</p> <p>6 page -- beginning on page 121 at line 17 and extending to page</p> <p>7 122 at line 18. And he's asked the question whether he saw a</p> <p>8 section of dock -- of D dock broken. And he answers yes. He</p> <p>9 then describes some other problems that were occurring at the</p> <p>10 D dock and in the marina.</p> <p>11 And then he's asked the question, "Now, had you</p> <p>12 seen any of these problems when you'd been down to the dock</p> <p>13 before the Isabel event?" And his answer is, "Some tires were</p> <p>14 loose. They had -- they had broken loose during other</p> <p>15 windstorms but nothing -- not enough to alert anybody to</p> <p>16 suspect a major failure, you know."</p> <p>17 JUDGE BLOXOM: Okay. You object to that, ma'am?</p> <p>18 MS. HERBER: Yes, Your Honor.</p> <p>19 JUDGE BLOXOM: Same basis?</p> <p>20 MS. HERBER: Same basis.</p> <p>21 MR. GANS: Us as well, Judge, at least to the part</p> <p>22 as to whether the character of the damage was hidden below</p> <p>23 alerting anyone other than Mr. Short to anything.</p> <p>24 JUDGE BLOXOM: Okay. All right. The objection is</p> <p>25 overruled with respect to the segments that were described by</p>	<p>1 Mr. Bright as the segment number one, segment number two,</p> <p>2 segment number three, and segment number five. The objection</p> <p>3 is sustained to the part that would be described as segment</p> <p>4 number four. Is that clear to everybody?</p> <p>5 MR. BRIGHT: That's the second to the last</p> <p>6 segment.</p> <p>7 JUDGE BLOXOM: Four is page 16, line 18 to page</p> <p>8 17, line 11.</p> <p>9 MR. GANS: Thank you, Your Honor.</p> <p>10 JUDGE BLOXOM: Let's bring the jury back in.</p> <p>11 MR. BRIGHT: Before that, Your Honor --</p> <p>12 JUDGE BLOXOM: Just a second, please.</p> <p>13 MR. BRIGHT: -- I may as well do this now before</p> <p>14 the jury comes back in. I would -- it's my intention to call</p> <p>15 Mr. Hillegas to testify, if I'm allowed to do so, and I'll go</p> <p>16 ahead and make a proffer at this point as to the conditions</p> <p>17 that are being complained of in the lawsuit. Ask him to</p> <p>18 describe, as he understands them, the conditions at the marina</p> <p>19 that are being complained of in the lawsuit. The reason why I</p> <p>20 would like to call him for that purpose, Your Honor, and I</p> <p>21 took another look at the proposed verdict sheet that was</p> <p>22 submitted by the other side, and the question that they've</p> <p>23 submitted to be answered by the jury, which I think -- well,</p> <p>24 the question that they've proposed is, "Prior to August 30,</p> <p>25 2003, were the plaintiffs on notice of circumstances which</p>

<p style="text-align: center;">13</p> <p>1 would have caused a reasonable person in their position to 2 undertake an investigation which, if pursued with reasonable 3 diligence, would have revealed the condition being complained 4 of in this case?" This kind of gets back to the debate that 5 we've already had with Mr. Bechtel's testimony. It continues 6 to be my contention that the jury needs to know what the 7 condition is that's being complained of in the case in order 8 to answer that question. In fact, there's a specific 9 reference to the condition being complained of in the case in 10 that question.</p> <p>11 If I'm not permitted to call Mr. Bechtel to 12 describe what that condition is, then I would proffer that 13 it's my intention to call Mr. Hillegas to describe what that 14 condition is.</p> <p>15 JUDGE BLOXOM: All right.</p> <p>16 MR. GANS: Your Honor, we maintain our objection 17 with regard to the time frame that we spoke about. It 18 depends, frankly, with regard to the specific testimony that 19 Mr. Hillegas would give, it would really depend on the 20 specific time frames he was going to describe whether it's 21 objectionable.</p> <p>22 JUDGE BLOXOM: Well, and that is a better point it 23 seems to me. Mr. Hillegas could certainly testify it seems, 24 and obviously I'm open to persuasion on this, as to the 25 conditions that existed when they filed the lawsuit on August</p>	<p style="text-align: center;">14</p> <p>1 the 30th of 2006. If there's been some other deterioration 2 since then, then I don't think he can testify to that. Go 3 ahead.</p> <p>4 MR. GANS: If I may. The allegations from the 5 plaintiffs, the plaintiff's point has always been that it was 6 the condition of the marina immediately following Isabel that 7 triggered their knowledge to move forward with the lawsuit. 8 They waited another nearly three years to file. But -- so 9 whatever happened in that intervening three years didn't form 10 their knowledge to act. What formed their knowledge to act, 11 and it's in their complaint, is the condition of the marina on 12 the day after -- the days after Isabel.</p> <p>13 JUDGE BLOXOM: I take your point.</p> <p>14 MR. BRIGHT: And I would just say in response, 15 that it's right there in the question they proposed the jury 16 to answer, "the condition being complained of in this case". 17 There needs to be some presentation -- I believe there needs 18 to be some presentation to the jury of what the condition 19 being complained of in the case is. It may have been 20 discovered --</p> <p>21 JUDGE BLOXOM: We've already been through that. 22 Anything else?</p> <p>23 MS. HERBER: I just join in Mr. Gans' objection.</p> <p>24 JUDGE BLOXOM: Well, you've focused my mind, I 25 think, on the proper time frame, and I think you're correct,</p>
<p style="text-align: center;">15</p> <p>1 that -- I think Mr. Gans is correct, that the testimony should 2 be limited to the time when the plaintiff says that the cause 3 of action accrued and not subsequent offenses after that which 4 goes back to the same ruling that I've made several times in 5 this case and for the same reasons.</p> <p>6 MR. GANS: Thank you, Your Honor.</p> <p>7 MR. BRIGHT: So I made the proffer I guess. 8 You're ruling is he's not going to be allowed to testify as to 9 those issues?</p> <p>10 JUDGE BLOXOM: That's correct.</p> <p>11 MR. BRIGHT: Okay. Thank you, Your Honor.</p> <p>12 JUDGE BLOXOM: Bring the jury back in.</p> <p>13 MR. BRIGHT: Just for planning purposes, the last 14 thing that we will do in our case is read the testimony.</p> <p>15 JUDGE BLOXOM: Okay. Bring the jury in. 16 (Whereupon, the jury entered the courtroom, and the following 17 occurred in open court:)</p> <p>18 JUDGE BLOXOM: Good morning, folks. The record 19 should reflect that the jurors are in the jury box. The 20 parties are at the counsel table. Mr. Bright.</p> <p>21 MR. BRIGHT: Thank you, Your Honor. For the 22 record, the next thing that the plaintiff will do is -- or 23 that I will do on behalf of the plaintiff is to read 24 deposition testimony of Robert J. Short, otherwise known as 25 Jim Short, who I'll state for the record is the principal or a</p>	<p style="text-align: center;">16</p> <p>1 principal of the defendant MV of Ocean Pines Limited 2 Partnership. And I will begin at page 98 of the deposition 3 transcript beginning at line 22 of page 98 and going over onto 4 page 99. Question, "At some certain time, MV transferred 5 ownership of the marina to the plaintiff in this case, the 6 condominium association." Answer, "Yes."</p> <p>7 Question, "Can you tell me about that, please?" 8 Answer, "The 12th of March, I think it was, 2003, we had a 9 meeting. I was at, quote, unquote, the annual meeting, okay. 10 Every year we had an annual meeting, presented" --</p> <p>11 MS. HERBER: Objection. It says -- you didn't 12 read the exact words of the passage.</p> <p>13 MR. BRIGHT: What words did I miss?</p> <p>14 MS. HERBER: You said "I was at". "It was".</p> <p>15 MR. BRIGHT: I'm sorry. "It was at, quote, 16 unquote, the annual meeting, okay. Every year we had an 17 annual meeting, presented the budget and did all of the things 18 that we had to as a condominium owners association. We were 19 under the developer control, period, and we had sold as many 20 of the slips as we were going to sell, and by law we had X 21 number of months to go through this turnover, so we did. At 22 the annual meeting we turned over control of the marina to a 23 board of directors that was elected during that meeting."</p> <p>24 Question, "Was that the first time that a board of 25 directors had been elected?" Answer, "Yeah. I mean, prior to</p>

<p style="text-align: center;">17</p> <p>1 that I guess I was the board of directors, you know, the</p> <p>2 developer was the board of directors."</p> <p>3 The next excerpt for the record is at page --</p> <p>4 begins at page 105, line 13. Question, "The board of</p> <p>5 directors and the dockmaster were inspecting the marina?"</p> <p>6 Answer, "Well, when you say inspecting, are they qualified to</p> <p>7 inspect? You know, you go out and observe and you look at the</p> <p>8 marina. Every time you walk out on the marina, every time you</p> <p>9 walk out on the dock, you know, all of the dock owners were</p> <p>10 looking at the marina every time they went to their boat. Was</p> <p>11 there a formal qualified inspector? Not until -- as far as I</p> <p>12 know, not until the problems started showing up."</p> <p>13 Question, "When was that?" Answer, "I think</p> <p>14 somewhere in the fall of 2003."</p> <p>15 Next excerpt, Your Honor, is at page -- it begins</p> <p>16 at page 112 beginning at line 14. Question, "Did the</p> <p>17 dockmaster ever undertake any repairs to the marina before</p> <p>18 transition to the board in March 2003?" Answer, "I'm sure he</p> <p>19 did. They weren't extensive repairs, but I'm sure he did. I</p> <p>20 know some rub rail had to be replaced and some cleats had to</p> <p>21 be refastened and that kind of thing. I believe there were</p> <p>22 some angle brackets that had attached fillets to the dock that</p> <p>23 had to be replaced. I remember that but nothing out of the</p> <p>24 ordinary."</p> <p>25 Question, "Normal wear and tear?" Answer, "Would</p>	<p style="text-align: center;">18</p> <p>1 I characterize it like that? I don't know. I mean, probably.</p> <p>2 Okay. Normal wear and tear."</p> <p>3 The last excerpt, Your Honor, to be read begins on</p> <p>4 page 121 at line 17 and extends onto page 122. Question,</p> <p>5 "You, yourself, saw a section of the D dock broken?" Answer,</p> <p>6 "Yes."</p> <p>7 Question, "You, yourself, saw the problems with</p> <p>8 the main beams that had separated?" Answer, "They had</p> <p>9 broken."</p> <p>10 Question, "And you, yourself, saw the dip in D</p> <p>11 dock?" Answer, "Yes."</p> <p>12 Question, "Is that different than the break in D</p> <p>13 dock?" Answer, "The same."</p> <p>14 Question, "So I have missing tires, D dock broken</p> <p>15 or just dipped. Is there an actual break in the" -- answer,</p> <p>16 "Yes." Question, -- "the wood members?" Answer, "Yes."</p> <p>17 Question, "And is the break in the wood members of</p> <p>18 D dock different or the same as the beams that had broken?"</p> <p>19 Answer, "They're the same."</p> <p>20 Question, "Now, had you seen any of these problems</p> <p>21 when you'd been down to the dock before the Isabel event?"</p> <p>22 Answer, "Some tires were loose. They had -- they had broken</p> <p>23 loose during other windstorms, but nothing -- not enough to</p> <p>24 alert anybody to suspect a major failure, you know."</p> <p>25 That's all, Your Honor. And that's -- that's our</p>
<p style="text-align: center;">19</p> <p>1 case, Your Honor.</p> <p>2 MS. HERBER: Your Honor, under Rule 2-419(b), MV</p> <p>3 would request that in fairness certain portions of the</p> <p>4 transcript be read into the record as well. Those should be</p> <p>5 considered in addition to the parts being offered by</p> <p>6 Mr. Bright.</p> <p>7 JUDGE BLOXOM: All right. Well, come up here,</p> <p>8 then.</p> <p>9 (Counsel approached the bench and the following occurred:)</p> <p>10 JUDGE BLOXOM: What rule did you recite?</p> <p>11 MS. HERBER: 2-419(b).</p> <p>12 JUDGE BLOXOM: Okay. What parts are you referring to?</p> <p>13 to?</p> <p>14 MS. HERBER: Okay. So picking up where the last</p> <p>15 colloquy left off, on page 122 at line 19, Mr. Bright left off</p> <p>16 at line 18. The next --</p> <p>17 JUDGE BLOXOM: Just a second, please. 122, line</p> <p>18 19.</p> <p>19 MS. HERBER: Yes, Your Honor. The next question</p> <p>20 is, "And so when did the major failure occur?" Answer, "I</p> <p>21 don't know."</p> <p>22 JUDGE BLOXOM: Okay. Do you have any objection to</p> <p>23 that?</p> <p>24 MR. BRIGHT: Yes, Your Honor, because then</p> <p>25 there's -- first of all, there's an objection interjected.</p>	<p style="text-align: center;">20</p> <p>1 JUDGE BLOXOM: I'm sorry.</p> <p>2 MR. BRIGHT: As that answer is being given,</p> <p>3 there's an objection interjected in the transcript.</p> <p>4 JUDGE BLOXOM: What was the objection?</p> <p>5 MR. BRIGHT: Objection to form. And then the rest</p> <p>6 of his answer is, "Yeah. I don't know. I would say it was</p> <p>7 recognized after Isabel that -- whatever storm that was." So</p> <p>8 if we -- if she is to read all the way to line one of page</p> <p>9 123, I don't have a problem with it.</p> <p>10 MS. HERBER: I mean, we can keep going, then, you</p> <p>11 know. The next question is, "Do you have any opinion as to</p> <p>12 what caused whatever the damage to the marina is at this</p> <p>13 point?"</p> <p>14 "Objection."</p> <p>15 "I've got lots of opinions, but they ain't worth a</p> <p>16 hoot. I mean, I'm not qualified." And he goes on and says --</p> <p>17 he basically is -- he's communicating that he doesn't know,</p> <p>18 and he's being pressed, and we should be able to read into the</p> <p>19 record he didn't know.</p> <p>20 MR. BRIGHT: He's asked --</p> <p>21 JUDGE BLOXOM: Just a moment. I'm going to allow</p> <p>22 you to read page 122, line 19 to page 123, line -- I believe</p> <p>23 it was 21.</p> <p>24 MR. BRIGHT: Line one?</p> <p>25 JUDGE BLOXOM: Was it line one? Read 123, line</p>

<p style="text-align: center;">21</p> <p>1 one if you would.</p> <p>2 MS. HERBER: It begins on page 122 at the bottom.</p> <p>3 "Yeah. I don't know. I would say it was recognized after</p> <p>4 Isabel that -- whatever storm that was." It doesn't -- so</p> <p>5 that's 123 to line one, Your Honor.</p> <p>6 JUDGE BLOXOM: Start at 122, line 19 again and</p> <p>7 read.</p> <p>8 MS. HERBER: Question, "And so when did the major</p> <p>9 failure occur?" Answer, "I don't know."</p> <p>10 "Objection to form."</p> <p>11 Answer, "Yeah. I don't know. I would say it was</p> <p>12 recognized after Isabel that -- whatever storm that was."</p> <p>13 JUDGE BLOXOM: Mr. Bright, do you want to be</p> <p>14 heard?</p> <p>15 MR. BRIGHT: I don't have a particular problem</p> <p>16 with that portion, Your Honor.</p> <p>17 JUDGE BLOXOM: Okay. Now read the next portion</p> <p>18 after line one that you want to read.</p> <p>19 MS. HERBER: The next question, Your Honor, begins</p> <p>20 at line two. "Do you have any opinion as to what has caused</p> <p>21 whatever the damage to the marina is at this point?"</p> <p>22 "Objection."</p> <p>23 Answer, "I've got lots of opinions, but they ain't</p> <p>24 worth a hoot. I mean, I'm not qualified."</p> <p>25 JUDGE BLOXOM: Okay. Again, I'm going to allow</p>	<p style="text-align: center;">22</p> <p>1 you to read page 122, line 19 to page 123, line one. All</p> <p>2 right. Thank you.</p> <p>3 MS. HERBER: And there's one more passage, Your</p> <p>4 Honor, while we're up here. On page 128, the question at line</p> <p>5 19 -- and this, Your Honor, goes to the issue of -- Mr. Bright</p> <p>6 read into the record testimony as to damage that occurred in</p> <p>7 1999. And the question is, again, at line 20 -- I'm sorry,</p> <p>8 19. "Did MV undertake to inspect the construction of the dock</p> <p>9 once Rehak had finished its work?" Answer, "Did we look at</p> <p>10 it? Yeah. I looked at it all the time. I'm not a dock</p> <p>11 builder. I don't know what I'm looking at." And that goes to</p> <p>12 129 of line one.</p> <p>13 JUDGE BLOXOM: Okay. You object to that?</p> <p>14 MR. BRIGHT: Yeah. I don't see how it forms the</p> <p>15 portions that I've read. It's in a completely different part</p> <p>16 of the Q and A, and it relates to a completely different part</p> <p>17 of the chronology as well.</p> <p>18 JUDGE BLOXOM: The objection is sustained as to</p> <p>19 that. Anything else?</p> <p>20 MS. HERBER: We plan to read it in rebuttal which</p> <p>21 we're happy to do --</p> <p>22 JUDGE BLOXOM: I understand that. Okay. Well,</p> <p>23 then just to recap. I understand -- now, do you object to</p> <p>24 page 122, line 19 to page 123, line one?</p> <p>25 MR. BRIGHT: No, Your Honor.</p>
<p style="text-align: center;">23</p> <p>1 JUDGE BLOXOM: Okay. There's no objection as to</p> <p>2 that. You did object to page 128, line 19, and I sustained</p> <p>3 the objection. We'll treat it as a motion in limine. You</p> <p>4 will not read that part into the record.</p> <p>5 MS. HERBER: During Mr. Bright's --</p> <p>6 JUDGE BLOXOM: During rebuttal.</p> <p>7 MS. HERBER: I will or I will not?</p> <p>8 JUDGE BLOXOM: You will not.</p> <p>9 MR. BRIGHT: In addition, Your Honor, there's the</p> <p>10 portion of page 123 that I think you ruled on, but I just want</p> <p>11 the record to be clear.</p> <p>12 JUDGE BLOXOM: I'm sorry?</p> <p>13 MR. BRIGHT: There's the rest of page 123 that I</p> <p>14 think she --</p> <p>15 JUDGE BLOXOM: My ruling is that she's not</p> <p>16 permitted to read that into the record.</p> <p>17 MR. GANS: I'm sorry. So you're saying that in</p> <p>18 the rebuttal portion that we cannot read in that he's not a</p> <p>19 dock builder, he doesn't know what he's looking at?</p> <p>20 JUDGE BLOXOM: That's correct. You cannot read</p> <p>21 that in. The only part I'm going to allow you to read in that</p> <p>22 you've requested is page 122, line 19 to page 123, line one.</p> <p>23 MR. BUSHEL: So we don't have to proffer that.</p> <p>24 JUDGE BLOXOM: No. You don't have to proffer it.</p> <p>25 We'll treat this as a motion in limine, and it's granted</p>	<p style="text-align: center;">24</p> <p>1 except for the portions that I -- the portion that I just</p> <p>2 referred to. No need to make any further objections or</p> <p>3 anything, folks.</p> <p>4 MR. GANS: I just want to make sure that the</p> <p>5 record is clear on this. Ms. Herber asked for portions of the</p> <p>6 transcript to be read in to give clarity to the testimony that</p> <p>7 Mr. Bright had read in.</p> <p>8 JUDGE BLOXOM: That's correct.</p> <p>9 MR. GANS: Then on rebuttal, the testimony that is</p> <p>10 now being excluded would be offered because it relates to</p> <p>11 evidence put on in plaintiff's case, that is, the plaintiff</p> <p>12 puts on Mr. Short to give opinions about the construction of</p> <p>13 the dock and damage to the dock. And what Mr. Short says, you</p> <p>14 know, "I'm not a dock builder. I don't know what I'm looking</p> <p>15 at." I think that's within the shadow, if you will, of the</p> <p>16 plaintiff's response case and would be appropriate rebuttal.</p> <p>17 I just want to put that --</p> <p>18 JUDGE BLOXOM: Well, your point is twofold. First</p> <p>19 of all, you want this read now, under -- to make what</p> <p>20 Mr. Bright read complete. And then you also would want other</p> <p>21 portions to be admissible either now -- read now or on</p> <p>22 rebuttal, and I'm denying it on both bases.</p> <p>23 MR. GANS: Thank you, Judge.</p> <p>24 JUDGE BLOXOM: Just so that's clear.</p> <p>25 MS. HERBER: Thank you, Judge.</p>

<p style="text-align: center;">25</p> <p>1 MR. BRIGHT: Thank you, Your Honor.</p> <p>2 (Whereupon, Counsel returned to trial tables, and the</p> <p>3 following occurred in open court:)</p> <p>4 JUDGE BLOXOM: Ma'am.</p> <p>5 MS. HERBER: Thank you, Your Honor. We will be</p> <p>6 reading on page 122 beginning on line 19 of the deposition of</p> <p>7 Robert J. Short.</p> <p>8 Question, "And so when did the major failure</p> <p>9 occur?" Answer, "I don't know."</p> <p>10 "Objection to form."</p> <p>11 Answer, "Yeah. I don't know. I would say it was</p> <p>12 recognized after Isabel that -- whatever storm that was."</p> <p>13 JUDGE BLOXOM: Okay.</p> <p>14 MS. HERBER: Thank you.</p> <p>15 JUDGE BLOXOM: All right. Any other evidence,</p> <p>16 sir?</p> <p>17 MR. BRIGHT: No, Your Honor.</p> <p>18 JUDGE BLOXOM: The plaintiff rests, then?</p> <p>19 MR. BRIGHT: Yes, Your Honor.</p> <p>20 JUDGE BLOXOM: Rebuttal?</p> <p>21 MR. BUSHEL: Nothing other than what was discussed</p> <p>22 at the bench, Your Honor.</p> <p>23 JUDGE BLOXOM: Rebuttal?</p> <p>24 MR. GANS: Nothing further for Topper, Your Honor.</p> <p>25 JUDGE BLOXOM: Sir.</p>	<p style="text-align: center;">26</p> <p>1 MR. BRIGHT: I renew my motion I made at the close</p> <p>2 of defendants' case on the same grounds that I made in the</p> <p>3 motion.</p> <p>4 JUDGE BLOXOM: Do you want to be heard on that?</p> <p>5 MR. BRIGHT: No.</p> <p>6 JUDGE BLOXOM: The motion is denied. Sir.</p> <p>7 MR. GANS: We'll have a motion at the close,</p> <p>8 but --</p> <p>9 JUDGE BLOXOM: Well, why don't you all come up</p> <p>10 here, then.</p> <p>11 (Whereupon, Counsel approached the bench and the following</p> <p>12 occurred out of the jury's hearing:)</p> <p>13 JUDGE BLOXOM: Since we have everybody up here</p> <p>14 now, Mr. Bright, why don't you make your motion. If you want</p> <p>15 to be heard any further on it, I'll hear from you.</p> <p>16 MR. BRIGHT: Renew the motion, Your Honor. The</p> <p>17 grounds for my motion are as follows: First of all, I renew</p> <p>18 the basis that I raised at the close of the defendants' case</p> <p>19 on the basis of the ruling that was I believe already made in</p> <p>20 the Court of Appeals decision. That's ground number one.</p> <p>21 Ground number two is, again, there is inadequate</p> <p>22 evidence to put this question of notice to the jury. All that</p> <p>23 there is in the record on their side is a reference in minutes</p> <p>24 from June 1 of 2003 to a couple of broken brackets. Ray</p> <p>25 Phillips who first testified vaguely about some tires and some</p>
<p style="text-align: center;">27</p> <p>1 brackets at unspecified times on cross-examination admitted</p> <p>2 that basically the problems manifested themselves after or</p> <p>3 during Hurricane Isabel. All of the other witnesses who have</p> <p>4 testified have testified to that effect.</p> <p>5 Jim Short has fairly, emphatically and repeatedly</p> <p>6 through his deposition transcript testified to that effect,</p> <p>7 and we don't believe that there is -- that they've generated</p> <p>8 an issue to be put to the jury on that question.</p> <p>9 JUDGE BLOXOM: Ma'am.</p> <p>10 MS. HERBER: We oppose that motion for the grounds</p> <p>11 stated yesterday. But also Mr. Phillips' testimony was clear.</p> <p>12 He was there from day one. He saw what was going on. The</p> <p>13 fact that Mr. Phillips was there from day one was repeated by</p> <p>14 MV's witnesses and the plaintiff's witnesses.</p> <p>15 The minutes clearly show what the plaintiff's</p> <p>16 witnesses could not testify to which is what was going on in</p> <p>17 the board of directors in June of 2003. They were aware that</p> <p>18 broken brackets were being noticed. They were aware that</p> <p>19 there were issues, C dock needed repairs, et cetera.</p> <p>20 Also plaintiff's witnesses support our position</p> <p>21 that there were brackets breaking before, brackets breaking</p> <p>22 after Isabel. Floats coming loose before, floats coming loose</p> <p>23 after Isabel. And so we believe that there's well enough</p> <p>24 evidence to submit this question to the jury.</p> <p>25 JUDGE BLOXOM: Sir.</p>	<p style="text-align: center;">28</p> <p>1 MR. GANS: I would just say, Your Honor, that the</p> <p>2 fact that one individual or another may not recall or may not</p> <p>3 have recognized a certain fact does nothing to undermine the</p> <p>4 testimony of other witnesses that they did recall or did</p> <p>5 notice certain facts, to wit, the damage from the brackets</p> <p>6 from the floats breaking free prior to Isabel that was</p> <p>7 testified to by Mr. Phillips and others. And every witness</p> <p>8 who can recall said that the character of the damage that they</p> <p>9 identified after Isabel was the same as they identified prior</p> <p>10 to Isabel with the exception of the fact that it was more</p> <p>11 widespread because the marina had been hit by a hurricane.</p> <p>12 Mr. Sorrentino said that the damage was as you</p> <p>13 would expect from a hurricane.</p> <p>14 So the damage before and after the hurricane the</p> <p>15 evidence shows is the same with the one factor that you have</p> <p>16 to adjust slightly for the fact that there was damage from a</p> <p>17 hurricane hitting the marina. There really is no issue of, do</p> <p>18 we have to imply knowledge or do we have to suppose what</p> <p>19 knowledge the plaintiff had.</p> <p>20 The plaintiff's witnesses and the people that work</p> <p>21 for the plaintiffs have testified that they knew about all the</p> <p>22 damage that -- that put the plaintiffs on notice of the</p> <p>23 problem -- that plaintiffs admit they put them on notice of</p> <p>24 the problem. For that reason I think actually a directed</p> <p>25 verdict is appropriate.</p>

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<p>1 JUDGE BLOXOM: Motion for judgment is denied. You 2 had a motion. 3 MS. HERBER: We were going to move for judgment 4 with regard to our case. 5 MR. GANS: I made the argument in my opposition, 6 Judge. I'll just rest on that. 7 MS. HERBER: We adopt the same arguments. I would 8 point out the additional fact that what Mr. Short testified to 9 is irrelevant. It's not what Mr. Short knew, it's what the 10 plaintiffs knew. And Mr. Short was not a board member. He's 11 a slip owner after the turnover. 12 JUDGE BLOXOM: The defendants' motion for judgment 13 is denied as well. All right. Thank you. 14 (Whereupon, Counsel returned to trial tables, and the 15 following occurred in open court:) 16 JUDGE BLOXOM: Ladies and gentlemen of the jury, 17 I'm going to ask that you go back to the jury room for a few 18 minutes. Counsel and I have some needs -- some things we need 19 to discuss out of your presence. 20 (Whereupon, the following proceedings were had in the 21 courtroom out of the hearing and presence of the jury.) 22 JUDGE BLOXOM: First of all, let's talk about 23 the -- 24 MR. BUSHEL: There were some witnesses in the 25 hall, Your Honor. I don't know if there's a reason to hold</p>	<p>them. 2 JUDGE BLOXOM: I'm sorry? 3 MR. BUSHEL: I understand that there are some 4 witnesses in the hall. I don't know if there's a reason to 5 hold them now that the evidence is closed. 6 JUDGE BLOXOM: We'll release them. Sheriff, you 7 can tell the witnesses that they're free to go about their 8 business or come in if they wish. 9 The verdict worksheet, the defendant submitted 10 one. Do you have any problem with that verdict worksheet? 11 MR. BRIGHT: Well, the problem that I have, Your 12 Honor, is that it asks the jury to consider the condition 13 being complained of in the case where I was I believe denied 14 an opportunity to present that matter to the jury. So that 15 part of the question I have an objection to. 16 JUDGE BLOXOM: Well, how would you phrase it? 17 MR. BRIGHT: Well, I would phrase it -- I would 18 include in the question a description of the problem or the 19 condition complained of. 20 JUDGE BLOXOM: All right. Well, I'm going to use 21 the verdict worksheet which the defendants have submitted 22 except for the words prior to. 23 When I was in law school, one of my professors 24 said never ever in dealing with laypeople use the words prior 25 to or subsequent to. He said always use the word before or</p>
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<p>1 the word after. So unless anybody has any strong objection, 2 I'm going to substitute the word before for the words prior 3 to. 4 MR. BRIGHT: This is a small point, but if it's to 5 be before -- 6 JUDGE BLOXOM: Does that mean something different 7 than prior to? 8 MR. BRIGHT: No, it doesn't. And it's just 9 occurring to me that if the lawsuit was filed in August 30th, 10 2006, shouldn't the date in that question be August 30th, 11 2003? 12 JUDGE BLOXOM: As opposed to. 13 MR. BRIGHT: August 29th. 14 JUDGE BLOXOM: August 29th, 2003. 15 MR. BRIGHT: Again, it's a small thing. I don't 16 think the case is going to turn on it, but for precision 17 purposes. 18 JUDGE BLOXOM: Well, counsel. 19 MR. BUSHEL: I feel I'm back in philosophy class 20 first semester. Maybe by. I think that the date has been 21 discussed and was mentioned to the jury in our opening charge 22 and remarks August the 29th. 23 JUDGE BLOXOM: Well, what date did the statute of 24 limitations -- 25 MR. BUSHEL: The 29th.</p>	<p>1 JUDGE BLOXOM: What was the last day that -- if 2 the statute of limitations expired on the 29th, then -- 3 MR. BUSHEL: They were out. 4 JUDGE BLOXOM: -- the suit on August the 30th -- 5 MR. BUSHEL: It was too late. 6 JUDGE BLOXOM: -- was too late. 7 MR. BUSHEL: That's why we picked it. 8 JUDGE BLOXOM: Then it should be on or before 9 rather than before. 10 MR. BUSHEL: That's acceptable to us. 11 MR. BRIGHT: That's fine. 12 JUDGE BLOXOM: On or before. 13 MR. BRIGHT: What I don't want to have happen, 14 Your Honor, is that this trigger is off by a day in this 15 question, and then it's to be basically exploited by the other 16 side is, even if there's a -- well, if there's a no answer -- 17 let me just think about it -- then it's just a no answer. I 18 mean, I guess that's -- 19 JUDGE BLOXOM: Well, presumably you all agree that 20 the date of August the 29th is the correct date for -- if 21 the plaintiff discovered the problem on August the 30th 22 of -- well, August the 30th of 2003 -- well, it begins -- 23 the statute of limitations -- the time period begins, does it 24 not, the day after the discovery of the -- 25 MR. BRIGHT: I believe that's right.</p>

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<p>1 JUDGE BLOXOM: That's what the -- the Maryland</p> <p>2 Rules provide that if a -- I'm freelancing here. But if</p> <p>3 the -- if the rule or statute provides for the filing of</p> <p>4 something within a certain period of time after an event, you</p> <p>5 start with the day after the event for counting the period.</p> <p>6 So if, for example, the discovery was on August the 29th,</p> <p>7 and -- I'm thinking out loud here, and if there's something</p> <p>8 wrong with my thinking I want somebody to jump in here. But</p> <p>9 if they discovered it on August the 29th, then the statute</p> <p>10 of limitations -- the three-year statute of limitations would</p> <p>11 begin, would it not, on August the 30th?</p> <p>12 MR. BRIGHT: The limitations period would begin to</p> <p>13 run.</p> <p>14 JUDGE BLOXOM: The limitations would begin to run</p> <p>15 on August the 30th.</p> <p>16 MR. BRIGHT: And would extend to August the 30th</p> <p>17 of 2006.</p> <p>18 JUDGE BLOXOM: Three years hence, August</p> <p>19 the 30th of 2006.</p> <p>20 MR. BRIGHT: Does opposing counsel agree with</p> <p>21 that?</p> <p>22 MR. GANS: I would say it seems right, Judge.</p> <p>23 I've had this discussion so many times.</p> <p>24 JUDGE BLOXOM: It's your case and not my case.</p> <p>25 MR. GANS: I really wish you'd write an opinion so</p>	<p>1 that I could have it settled and just use that from now on in</p> <p>2 my practice so I don't have to continue to struggle with this.</p> <p>3 But it sounds right to me, Your Honor.</p> <p>4 MR. BRIGHT: I just don't want to agree to a</p> <p>5 verdict form where we're off by a day essentially. And --</p> <p>6 JUDGE BLOXOM: You tell me what it ought to be,</p> <p>7 then.</p> <p>8 MR. BRIGHT: Well, I think to be safe, it would be</p> <p>9 before -- I want it to read before August 30th, 2003. And</p> <p>10 there's nothing in the facts that, you know, generates the</p> <p>11 need to distinguish between those two dates. It's more the</p> <p>12 issue of --</p> <p>13 JUDGE BLOXOM: I guess I would be surprised if the</p> <p>14 jury was off by a day in whatever decision they make in this,</p> <p>15 if a particular 24-hour period made any difference.</p> <p>16 MR. BRIGHT: It definitely is a finer point that I</p> <p>17 don't want to belabor, but I just want to be precise. And</p> <p>18 since there's a date in there, I want it to be -- to</p> <p>19 accurately reflect a timely filing if the answer is no on</p> <p>20 August 30th, 2006.</p> <p>21 JUDGE BLOXOM: Of course you all were happy with</p> <p>22 August 29th before I brought this up.</p> <p>23 MR. GANS: Your Honor, if you applied the</p> <p>24 reasoning just articulated by the Court, Topper would not</p> <p>25 object.</p>
35	36
<p>1 MR. BUSHEL: Your Honor, I'm freelancing what the</p> <p>2 Court is, and I think there's a case on this, but I don't</p> <p>3 remember which way it goes, in the Courts Article. But for</p> <p>4 sake, to take the issue away, we have enough issues in the</p> <p>5 case, MV will withdraw any objection and make it the 30th.</p> <p>6 I think the only thing the Court said I might disagree with</p> <p>7 was I think the cause of action would accrue the day you</p> <p>8 discover it, but I think the application of a statute --</p> <p>9 JUDGE BLOXOM: Begins.</p> <p>10 MR. BUSHEL: -- would start the next day.</p> <p>11 MR. BRIGHT: I agree with that.</p> <p>12 JUDGE BLOXOM: So what do you all want me to say?</p> <p>13 Tell me how you want it to read.</p> <p>14 MR. BRIGHT: I would say on or before</p> <p>15 August 30th.</p> <p>16 MR. BUSHEL: See, I would just say before</p> <p>17 August 30 because I think the cause of action would accrue on</p> <p>18 a certain day, and then the application of the statute would</p> <p>19 have the first day starting the next date. But the accrual is</p> <p>20 a different thing from when the statute starts.</p> <p>21 JUDGE BLOXOM: Well, that's true.</p> <p>22 MR. BUSHEL: I would keep what the Court's first</p> <p>23 amended proposal was before August 30 and then continue from</p> <p>24 there. For MV, we would oppose the on or aspect.</p> <p>25 JUDGE BLOXOM: Do you have any problem with that?</p>	<p>1 MR. BRIGHT: No, Your Honor.</p> <p>2 JUDGE BLOXOM: Before August 30th?</p> <p>3 MR. BRIGHT: No.</p> <p>4 JUDGE BLOXOM: That's what we'll use. I'll modify</p> <p>5 the proposed verdict worksheet to read before August</p> <p>6 the 30th of 2003. Now --</p> <p>7 MR. BRIGHT: Should I note the exception on the</p> <p>8 grounds that I did before, or is it already noted?</p> <p>9 JUDGE BLOXOM: It's already noted.</p> <p>10 MR. BRIGHT: Okay.</p> <p>11 JUDGE BLOXOM: Now, in terms of the instructions,</p> <p>12 everyone has asked for standard -- the pattern instructions</p> <p>13 with the exception of -- the plaintiff has asked for two</p> <p>14 special instructions dealing with the accrual of a cause of</p> <p>15 action, and the defendant -- I think defendants have asked for</p> <p>16 one. Am I correct?</p> <p>17 MR. BUSHEL: I think I drafted three, Your Honor.</p> <p>18 JUDGE BLOXOM: Maybe it was three. Folks, I'm not</p> <p>19 going to give any instructions unless you -- other than the</p> <p>20 pattern instruction on the accrual of cause of action, I'm not</p> <p>21 going to give any additional instructions unless all of you</p> <p>22 can get together on a particular instruction in which case</p> <p>23 I'll give it.</p> <p>24 It doesn't seem to me that there's any reason --</p> <p>25 all of the cases from which you've drawn your proposed</p>

<p style="text-align: center;">37</p> <p>1 instructions explicate the discovery rule. But for reasons 2 known to the Court of Appeals, none of that's ever been 3 incorporated into the pattern instruction for the accrual of a 4 cause of action. So my thinking is, why should the Court do 5 that. Does the jury need that information beyond what's in 6 the pattern instruction? It doesn't seem to me that they 7 necessarily do, but I'll hear from you, sir.</p> <p>8 MR. BUSHEL: Thank you, Your Honor. A couple 9 things. I think both sides submitted a pattern instruction on 10 experts, and I would propose that that be deleted because as 11 it turned out no experts testified.</p> <p>12 JUDGE BLOXOM: Okay.</p> <p>13 MR. BUSHEL: Otherwise, moving to the point the 14 Court just raised, one of the instructions we requested on 15 page 20 of our proposal was --</p> <p>16 JUDGE BLOXOM: Let me find it. Go ahead. Page 17 20.</p> <p>18 MR. BUSHEL: Okay. Your Honor, this was an 19 instruction we proposed on time. You instructed that a 20 condominium council of unit owners like the plaintiffs is 21 responsible for maintenance, repair and replacement of common 22 elements which includes all the common -- of the condominium 23 except for the units. You may recall we read into evidence 24 admission of fact as these were common elements. And I think 25 that this is the law. When the Court says it's not in the</p>	<p style="text-align: center;">38</p> <p>1 pattern instructions, I don't think that that's controlling. 2 There's so much law you can never fit it into one book. I 3 think this request is proper, and I'd submit on that, and then 4 I would move on to the other ones.</p> <p>5 JUDGE BLOXOM: Do you have any objection to that 6 one?</p> <p>7 MR. BRIGHT: Yes, Your Honor. That's an 8 instruction I believe that would be useful in -- potentially 9 proper in the merits phase of the case where we're talking 10 about liability. I don't think it has any relevance or 11 pertinence whatsoever to what's at issue in this case which is 12 just simply notice of problems.</p> <p>13 JUDGE BLOXOM: All right. Do you want to respond 14 to that, either one of you, both of you?</p> <p>15 MR. BUSHEL: I don't think that that response was 16 responsive to our concern. I think this is law. It fairly 17 explains it. It's come up in the case.</p> <p>18 The part of our position, Your Honor, before the 19 jury is that as soon as they had the takeover which was also 20 established by evidence plus admission in April of 2003, they 21 had this obligation and, in fact, they got on it as indicated 22 in defendants' Exhibits 1 and 2, the minutes, they started to 23 address it, certainly by June 1, '03.</p> <p>24 JUDGE BLOXOM: Sir.</p> <p>25 MR. GANS: I think, Your Honor, if the law</p>
<p style="text-align: center;">39</p> <p>1 requires the Council of Unit Owners to maintain, repair and 2 replace the common elements, that certainly as part of that it 3 imposes an obligation upon them to be informed about the 4 status and the condition of those common elements.</p> <p>5 JUDGE BLOXOM: Is that even an issue, though? 6 Does this address -- does this proposed instruction address 7 anything that's in dispute or at issue in this case?</p> <p>8 MR. BUSHEL: I don't think it's in dispute, Your 9 Honor, but I think that the Court's obliged to give an 10 instruction that fairly states the law that may be pertinent 11 to the case. And this is a component of the law that deals 12 with the condominium association, some of the evidence that 13 was put in. And it wasn't just that they decided, hey, let's 14 inspect the docks for the hell of it. There's a reason that 15 they did that. And I think to know that that is, in fact, the 16 law is important and that's why we requested it.</p> <p>17 JUDGE BLOXOM: Anything else from you?</p> <p>18 MR. BRIGHT: Again, Your Honor, whether or not the 19 association maintained or properly maintained or adequately 20 maintained is just simply not at issue in this case. It has 21 nothing to do with the case in fact, whether it's an accurate 22 statement of the law or not.</p> <p>23 JUDGE BLOXOM: All right. The Court will give 24 that instruction.</p> <p>25 MR. BUSHEL: Your Honor, now I would like to move</p>	<p style="text-align: center;">40</p> <p>1 then to the instructions proposed by MV on pages 21, 22 and 2 23. I'll deal with them collectively. I think these were the 3 sort of instructions the Court was alluding to.</p> <p>4 JUDGE BLOXOM: Right.</p> <p>5 MR. BUSHEL: The Maryland Rule on instructions. 6 2-520. Is obviously general. The Court shall give 7 instructions to the jury at the conclusion of the evidence, 8 may supplement them later. Written requests be -- the parties 9 may file written request for instructions at or before the 10 close of the evidence and shall do so at any time fixed by the 11 Court. While that certainly is the general rule, and that's 12 what we've done and that's what's been invited here.</p> <p>13 The general rule in Maryland, since there are 14 several cases in the annotations, having read some of them in 15 my career, I'll actually cite them. It's a dangerous thing to 16 do when you haven't read them. But in general, the law is a 17 litigant is entitled to have his theory of the case presented 18 to the jury only if the theory of the case is correct -- is a 19 correct exposition of the law and there's testimony in the 20 case to support it. I'm reading from the cite Shapiro versus 21 Massengill, 105 Md. App. 743, cert, denied, 1995.</p> <p>22 Under section B of the rule, which I allude to, 23 Your Honor, the Court must instruct a jury upon the law either 24 by giving particular instructions offered by the parties by 25 crafting its own or by combining elements of both. This is</p>

<p style="text-align: center;">41</p> <p>1 the part I want to get to. "A party is entitled to have his 2 or her theory of the case presented to the jury provided that 3 the theory is legally and factually supported." And in 4 furtherance of that, Your Honor, the three instructions I'm 5 referring to, and I apologize, I didn't number them on the 6 top. That's my fault. But by the page numbers, 21, 22, 23, 7 we prepared these right out of the cases cited. And I think 8 that the problem with just using the pattern instruction, it's 9 fine as far as it goes, but it stops short at telling the 10 listener who is a layperson what putting them on notice 11 means -- the beginning of my proposal on 21 I think is 12 essentially the pattern instruction. Was it sufficient to put 13 them on notice when they knew or should know that they had 14 been injured by a wrong.</p> <p>15 The remainder of our proposed instruction 16 represents the law of Maryland we submit, and we're entitled 17 to it, and the jury should know that a plaintiff is charged 18 with facts that would have been disclosed by a reasonable and 19 diligent investigation regardless of whether it was done or 20 was successful. And that the onset of notice isn't delayed 21 until the investigation is actually made. And the Court may 22 recall that Ms. Herber made reference to that in her opening, 23 and I think that was proper. There was no objection. And 24 that is accurate.</p> <p>25 Our page 22 instruction out of the O'Hara case, we</p>	<p style="text-align: center;">42</p> <p>1 tried to come up with an accurate instruction on what the law 2 is on what does on notice mean. And I put this one together, 3 Your Honor, and I'll stand by my cite to page approximate 302. 4 I think that is the law in Maryland. But I think it's 5 important because it explains something where the pattern 6 instruction leaves off.</p> <p>7 And so finally, Your Honor, on page 23, again, in 8 the Lumsden case in the Court of Appeals, I cited this 9 particular page, they went through a series of cases, and 10 notice to a plaintiff accrues upon the discovery of an injury 11 in its general cause, not the exact cause in fact, and the 12 specific party's reasonable. I think particularly in this 13 case that's particularly germane.</p> <p>14 So for those reasons, Your Honor, I don't believe 15 that the pattern instructions of as a matter of law are 16 necessarily the end of it. Very frequently they are 17 sufficient, but I think in this case, Your Honor, our 18 submissions are appropriate and we'd ask the Court to instruct 19 the jury as requested. Thank you.</p> <p>20 JUDGE BLOXOM: Sir, do you want to be heard? 21 MR. GANS: I'm just going to join Mr. Bushel, Your 22 Honor. 23 JUDGE BLOXOM: Mr. Bright. 24 MR. BRIGHT: I would object to these instructions, 25 Your Honor. They are not pattern instructions. They have</p>
<p style="text-align: center;">43</p> <p>1 been crafted by -- obviously by defendants. They are the 2 defendants' characterization of what the law is. I think in 3 some portions of these instructions they accurately state what 4 the law is, but in others I think they take some license and 5 they have not quoted these cases in these instructions.</p> <p>6 The instruction on page 22 is essentially what the 7 verdict form is going to read, so that to me would seem to be 8 superfluous.</p> <p>9 And question number -- or page number 21 and 23, 10 again, I think it goes too far afield from the pattern 11 instruction and provides almost a basis for argument for them 12 that I don't believe they should be entitled to have when I'm 13 not getting my nonpattern instructions as well.</p> <p>14 JUDGE BLOXOM: Well, I'm still open to argument on 15 your pattern instructions. All right. Do you want to be 16 heard on yours?</p> <p>17 MR. BRIGHT: Yeah. I would point Your Honor to 18 nonpattern instruction number two of mine. Now, nonpattern 19 instruction number one has been -- that sort of has been 20 dispensed with when Your Honor made the ruling at the 21 beginning of the case that there will be no mention of a 22 statute of limitations or the three-year period or anything to 23 that effect.</p> <p>24 Requested proposed nonpattern instruct number two, 25 in particular the part that begins -- well, from the beginning</p>	<p style="text-align: center;">44</p> <p>1 the discovery rule or judicially created rule controls in 2 Maryland as to the accrual of a cause of action.</p> <p>3 And then my summary of what the discovery rule 4 provides which is that the plaintiff's cause of action 5 accrued, and the limitation period began to run when the 6 plaintiff knew or reasonably should have known of the 7 allegedly defective condition at the Pines Point Marina and 8 leaves it at that rather than going on to pose the question 9 about, you know, wouldn't have lead to knowledge of the 10 condition being complained of. So I would prefer my number 11 two to the one on page 22 of the defendants' requested 12 instructions.</p> <p>13 JUDGE BLOXOM: And I take it you object to that, 14 gentlemen?</p> <p>15 MR. BUSHEL: Yes, Your Honor. I mean, look, there 16 are parts of this that are contained in ours. But in the 17 overall view, Your Honor, whether it's a judicially created 18 rule or which controls in Maryland is just a lot of 19 superfluous items in here and tries to restate it. And I 20 think that all of the germane law is contained in a tighter 21 fashion in other proposed instructions.</p> <p>22 By the way, Your Honor, if the Court would like, I 23 have the few opinions I've cited in our request right here in 24 the courtroom if you would like to take a look at them.</p> <p>25 MR. GANS: If I could just elaborate, I would</p>

<p style="text-align: center;">45</p> <p>1 agree with Mr. Bushel. I also think that the final sentence 2 of nonpattern instruction number two proposed by the plaintiff 3 actually is incorrect. It's not a question of purely inquiry 4 notice, it's on notice. It could be inquiry or otherwise. So 5 I think it limits it in an unnecessary way.</p> <p>6 JUDGE BLOXOM: All right. Gentlemen, thank you 7 for your argument. The Court intends to give the pattern 8 instruction accrual of cause of action. I think that 9 instruction is sufficient to inform the jury so that they can 10 make their decision in this case. That's not to say, and 11 obviously you're not allowed to quote cases in your argument 12 to the jury, but you can explain to the jury -- all of you can 13 explain to the jury what your belief is the meaning of that 14 pattern instruction, explaining in lay terms when a plaintiff 15 knows and when by reasonably diligent investigation they 16 should have known. And I think that's the way to deal with 17 the additional gloss, and gloss is probably not the right 18 word, that the Court of Appeals has laid upon the accrual of a 19 cause of action. The pattern instruction adequately covers 20 everything the jury needs to know in deciding that particular 21 issue, and the Court's not going to give any other 22 instructions on that.</p> <p>23 Someone asked for multiple parties. It doesn't 24 seem to me that would be appropriate in this case because 25 obviously we have multiple defendants, but the issues are the</p>	<p style="text-align: center;">46</p> <p>1 same as to the defendants. The multiple parties says, "Each 2 defendant is entitled to a fair and separate consideration of 3 that defendant's own defense and is not to be effected by your 4 decision with respect to any other defendant. These 5 instructions apply to each defendant unless otherwise 6 indicated." All that would do would be to confuse the jury I 7 think. They're being presented with a single question that 8 applies to both defendants, and there's no need to muddle 9 their minds with anything else related to that.</p> <p>10 On the instruction having to do with the burden of 11 proof, it seems to me that instruction doesn't make any sense 12 unless the jurors are informed that the defendants bear the 13 burden of proof on this issue. Otherwise they don't know who 14 bears the burden of proof on the issue, and the purpose of 15 that instruction is to tell them what the legal effect of 16 their being in equipoise with respect to the issue that they 17 have to decide. So the Court proposes to supplement that 18 instruction simply by pointing out to the jurors that the 19 defendants bear the burden of proof on the question which 20 they're required to answer. If somebody believes they have a 21 better way of saying that, I'll be happy to hear it.</p> <p>22 MR. BUSHEL: We included in our submission the 23 form instruction on page 18, and if the Court's proposing to 24 take that --</p> <p>25 JUDGE BLOXOM: Let me see what 18 says.</p>
<p style="text-align: center;">47</p> <p>1 MR. BUSHEL: And if the Court's proposing to take 2 out the generic party and put in appropriately the defendant 3 has the burden of proving, that's acceptable. But I just want 4 the Court to see we had it in here.</p> <p>5 JUDGE BLOXOM: That is what I thought about doing 6 The party who asserts a claim or affirmative defense has the 7 burden of proving it by what we call a preponderance of the 8 evidence. The defendants have the burden of proof in the 9 question which you must decide. And then go on with the 10 balance of the instruction. Do you have any problem with 11 that?</p> <p>12 MR. BUSHEL: No objection, Your Honor.</p> <p>13 JUDGE BLOXOM: Do you have any problem with that?</p> <p>14 MR. BRIGHT: No objection.</p> <p>15 JUDGE BLOXOM: All right. Anything else with 16 respect to the instructions, folks?</p> <p>17 MR. GANS: Judge, one thing that came to me last 18 evening. I think that the Court should give an instruction 19 regarding agent principal knowledge. We had a lot of 20 testimony from Mr. Phillips, he's acting on behalf of the 21 board. Up until the moment we came in the courtroom looking 22 for a pattern instruction that dealt with that issue, we 23 didn't find a pattern instruction that dealt with that issue, 24 so we put something together that I think addresses it, and I 25 would ask that the Court include that instruction as well.</p>	<p style="text-align: center;">48</p> <p>1 JUDGE BLOXOM: Okay. Have you seen it, sir?</p> <p>2 MR. BRIGHT: No, I haven't seen it.</p> <p>3 MR. GANS: You haven't seen it?</p> <p>4 MR. BRIGHT: Uhn-uhn.</p> <p>5 MR. GANS: Sorry.</p> <p>6 MR. BRIGHT: I would object to the instruction, 7 Your Honor. I think there's so much more that goes into 8 whether an agent's knowledge can be imputed to a principal 9 than what's stated in this instruction because I've personally 10 researched that question. I don't think it's appropriate in 11 this case.</p> <p>12 JUDGE BLOXOM: There's no pattern instruction on 13 that?</p> <p>14 MR. BRIGHT: There's a pattern instruction on 15 principal agent, but not -- I don't believe it touches upon 16 the issue of -- that's more to the effect of conduct of the 17 agent binds the principal. I don't think it's directed to the 18 issue of knowledge of an agent being imputed to the principal 19 which is a much more complicated question of law, and I don't 20 think it would be appropriate to instruct the jury on that in 21 this case.</p> <p>22 JUDGE BLOXOM: Let me look at it. Tell me again 23 how this instruction will help the jury decide this case.</p> <p>24 MR. GANS: Mr. Phillips gave testimony that said 25 it was his duty as part of his -- of the job that he was</p>

<p style="text-align: center;">49</p> <p>1 performing to report to the board the conditions of the dock</p> <p>2 when things needed to be reported. So Mr. Phillips, in the</p> <p>3 course of his employment or job obligations, learned knowledge</p> <p>4 that he then reported. So we have -- it's both within the</p> <p>5 course of his duties as their agent and employee that he's</p> <p>6 learning things, and he's also reporting it to them.</p> <p>7 There are times, I would concede Mr. Bright's</p> <p>8 point, where the agent principal relationship is complex, and</p> <p>9 the evidence comes in and there's a lot of conflicting</p> <p>10 information. But here there really isn't because the only</p> <p>11 testimony on the point is Mr. Phillips' testimony saying, "It</p> <p>12 was part of my job duties, my obligation."</p> <p>13 JUDGE BLOXOM: And his testimony was also that he</p> <p>14 reported it.</p> <p>15 MR. GANS: Yes, Judge. That's correct.</p> <p>16 JUDGE BLOXOM: So I don't recall that there was</p> <p>17 evidence that he came upon certain information in the conduct</p> <p>18 of his agency and he didn't report it. I thought I understood</p> <p>19 him to say that he reported everything to them.</p> <p>20 MR. GANS: I do think that's -- I do think that is</p> <p>21 right. I do think that is the evidence. So in terms of what</p> <p>22 the jury might actually have in front of it, that the</p> <p>23 instruction may or may not change.</p> <p>24 What concerns me is that the jury might be</p> <p>25 confused about the relationship -- the legal relationship</p>	<p style="text-align: center;">50</p> <p>1 between Mr. Phillips and the board. They could conclude that</p> <p>2 Mr. Phillips had a certain knowledge that the board didn't</p> <p>3 purely by virtue of the fact that the -- about this reporting</p> <p>4 requirement back and forth because if you remember, there was</p> <p>5 a lot of testimony about, well, what's in the minutes and what</p> <p>6 isn't in the minutes. Mr. Phillips, were you there? Did you</p> <p>7 say this? Did you say that? And so we have some documents</p> <p>8 that tell us what -- precisely what was reported. We have</p> <p>9 some testimony generally speaking I reported things. There's</p> <p>10 other testimony that says, this is what Mr. Phillips found</p> <p>11 upon his investigation of the conditions of the dock.</p> <p>12 JUDGE BLOXOM: Okay. Anything else from you?</p> <p>13 MR. BRIGHT: Your Honor, all of these things are</p> <p>14 fact questions I suppose to be argued and/or decided by the</p> <p>15 jury. The instruction they're asking for, they're essentially</p> <p>16 asking Your Honor to instruct the jury that anything</p> <p>17 Mr. Phillips knew, you can impute to the condominium</p> <p>18 association. And as a matter of law that's, number one, an</p> <p>19 oversimplification I believe.</p> <p>20 When -- instances when agent knowledge is</p> <p>21 imputable, not -- we're not talking about what he reported.</p> <p>22 I'm talking about that instruction goes to -- they will use it</p> <p>23 to argue that anything he said he knew equals knowledge of the</p> <p>24 association, and that's a much more -- it's a much more</p> <p>25 complicated sort of case by case analysis as to whether or not</p>
<p style="text-align: center;">51</p> <p>1 you can impute knowledge of an agent to a principal.</p> <p>2 In this case what is the evidence about the</p> <p>3 principal agent relationship? Well, it was basically an</p> <p>4 arrangement that was fashioned between Mr. Phillips and the</p> <p>5 developer that just kind of carried over after the turnover.</p> <p>6 It wasn't established between the association and</p> <p>7 Mr. Phillips. It was in place already for many years before</p> <p>8 the turnover occurred, and it just kind of carried over.</p> <p>9 JUDGE BLOXOM: All right. I don't think this</p> <p>10 instruction will assist the jury in discharging their duties.</p> <p>11 The Court declines to give this instruction. Let's make this</p> <p>12 a part of the record.</p> <p>13 MR. BRIGHT: Your Honor, the only other thing I</p> <p>14 was going to raise is that there was a proposed instruction</p> <p>15 regarding deposition testimony on page 13.</p> <p>16 JUDGE BLOXOM: Right.</p> <p>17 MR. BRIGHT: Do you intend to give that? It's --</p> <p>18 JUDGE BLOXOM: I have one on deposition testimony</p> <p>19 MR. BRIGHT: All right. It's the defendants' --</p> <p>20 part of their requested instruction, but it's a nonpattern</p> <p>21 instruction.</p> <p>22 JUDGE BLOXOM: The deposition instruction I intend</p> <p>23 to give them is basically the same instruction that I gave</p> <p>24 them at the time of the first deposition.</p> <p>25 Anything else from anybody?</p>	<p style="text-align: center;">52</p> <p>1 MR. GANS: May I just be excused for a moment when</p> <p>2 you call the jury in?</p> <p>3 JUDGE BLOXOM: I'm going to recess for a few</p> <p>4 minutes and try to get organized here. Yes, sir.</p> <p>5 MR. BUSHEL: Yes. Your Honor, a point of</p> <p>6 bookkeeping because I know the jury after closing --</p> <p>7 instructions will get the evidence. My understanding is that</p> <p>8 there were two exhibits marked today for ID only, 8 and 9,</p> <p>9 Short deposition and corporate documents. They were not moved</p> <p>10 in evidence. We would have objected if they were. I just</p> <p>11 want to make sure everybody agrees that that's the state of</p> <p>12 the record.</p> <p>13 JUDGE BLOXOM: This is my practice. I want --</p> <p>14 it's probably going to take me about 15 or 20 minutes. I want</p> <p>15 you all to go through the exhibits and make sure -- put the</p> <p>16 exhibits in a pile that are going back with the jury. And if</p> <p>17 there's any dispute as to what ought to go back with the jury,</p> <p>18 we'll take it up before we bring them in.</p> <p>19 MR. BUSHEL: The clerk and I've gone through them</p> <p>20 yesterday, so we'll take it up.</p> <p>21 THE CLERK: I've already done that, Judge.</p> <p>22 JUDGE BLOXOM: Okay. Court's in recess.</p> <p>23 (Whereupon, a recess was taken.)</p> <p>24 JUDGE BLOXOM: Be seated, please, folks.</p> <p>25 Mr. Bailiff, would you show this verdict worksheet</p>

<p style="text-align: center;">53</p> <p>1 to counsel? Gentlemen, that's the verdict -- that's the 2 verdict worksheet I propose to use. Any objection to this, 3 folks?</p> <p>4 MR. BUSHEL: That's what we agreed. No objection, 5 Your Honor.</p> <p>6 MR. BRIGHT: Just, Your Honor, the objection that 7 I noted about the last clause of that, the phrase, the 8 condition --</p> <p>9 JUDGE BLOXOM: Condition complained of. I 10 understand. Thank you.</p> <p>11 All right. Folks, the instructions I intend to 12 give in the following order are this. The introduction to the 13 closing instructions in the pattern book, questions of law 14 during trial, inferences from statements of the Court, direct 15 and circumstantial evidence, the part of the introductory 16 instruction that says any person who testifies including a 17 party as a witness, and I'm going to give the instruction on 18 the number of witnesses which was requested by the defendants, 19 witness testimony consideration from the pattern book, 20 depositions, same instruction as I gave earlier in the course 21 of the trial, case submission on issues, burden of proof, 22 preponderance of the evidence standards from the pattern 23 instructions with the addition of the defendants have the 24 burden of proof on the question which you must decide. Then 25 I'm going to give the pattern instruction on accrual of cause</p>	<p style="text-align: center;">54</p> <p>1 of action, and I'm going to give the defendants' requested 2 instruction which reads, "You're instructed that a condominium 3 council of unit owners like the plaintiffs is responsible for 4 maintenance, repair and replacement of common elements which 5 includes all of the condominium except for the units." And 6 then I'm going to give impartiality of consideration from the 7 pattern book, and then unanimous verdict from the pattern 8 book. I think that covers all the ones we discussed. Again, 9 the Court declines to give the additional instructions 10 requested by the parties. Have I missed anything, folks?</p> <p>11 MR. BRIGHT: No, Your Honor.</p> <p>12 JUDGE BLOXOM: Yes, sir.</p> <p>13 MR. BUSHEL: Your Honor, with respect to the last 14 instruction before the recess that Mr. Gans offered, you had 15 it marked, and I just want to make sure that the record is 16 clear that the three instructions we discussed that the 17 Court's declined to give on pages 21, 22 and 23 are similarly 18 noted in the record as having been requested.</p> <p>19 JUDGE BLOXOM: You submitted your requested 20 instructions, and they're a part of the file, are they not?</p> <p>21 MR. BUSHEL: They should be. That's what I --</p> <p>22 JUDGE BLOXOM: So our discussion on the record 23 should be sufficient to identify those. Same with 24 Mr. Bright's. Yours is in the file, is it not?</p> <p>25 MR. BRIGHT: It was with one point. When I</p>
<p style="text-align: center;">55</p> <p>1 checked the docket entries online, the requested nonpattern 2 instructions went on a separate docket item entered.</p> <p>3 JUDGE BLOXOM: They were all -- you submitted them 4 all in one packet, did you not?</p> <p>5 MR. BRIGHT: I did, but they separated out -- the 6 pretrial statement was one docket entry. The pattern jury 7 instructions was a docket entry, and I guess the requested 8 voir dire was a separate docket entry. But there was not a 9 separate docket entry for the nonpattern instructions, but I 10 confirmed that they were in fact in the case file.</p> <p>11 JUDGE BLOXOM: Well, as long as they're in the 12 case file, that will be clear.</p> <p>13 MR. BRIGHT: I don't know if now is the time to do 14 it or not, Your Honor, but I was just going to note my 15 objection once again to the instruction regarding the 16 responsibility for maintenance on the part of the condominium 17 council.</p> <p>18 JUDGE BLOXOM: Okay. After I give the 19 instructions, obviously I'll give you an opportunity to make 20 exception to any of the instructions I've given. All you have 21 to do is say none other than -- if you have none, none other 22 than previously noted and that ought to cover it.</p> <p>23 MR. BRIGHT: Yes, Your Honor.</p> <p>24 JUDGE BLOXOM: Let's bring the jury back in. 25 (Whereupon, the jury entered the courtroom, and the following</p>	<p style="text-align: center;">56</p> <p>1 occurred in open court:)</p> <p>2 JUDGE BLOXOM: The record should reflect that the 3 jurors are in the jury box, the counsel and the parties are at 4 the counsel table.</p> <p>5 Members of the jury, the time has come for the 6 Court to give you its instructions with respect to the law 7 which is applicable in this case. You must use the law as I 8 explain it to you. It's your function and responsibility, 9 however, to decide the facts. You must base your findings 10 only upon the testimony of witnesses and the exhibits 11 received, including any conclusions which may be fairly drawn 12 from that evidence.</p> <p>13 Opening statements and arguments of the lawyers 14 are not evidence in this case. If your memory of any of the 15 testimony is different from any statement that I might make 16 during the course of these instructions or that counsel might 17 make in argument, then you must rely upon your own memory.</p> <p>18 During the course of the trial it has been my duty 19 to rule on a number of questions of law such as objections to 20 admissibility of evidence, the form of questions and other 21 legal points. You should not draw any conclusions from these 22 rulings either as to the merits of the case or as to my views 23 regarding any witness, party or the case itself.</p> <p>24 It is the duty of a lawyer to make objections 25 which that lawyer believes are proper. You should not be</p>

<p style="text-align: center;">57</p> <p>1 influenced by the fact that these objections were made no 2 matter how the Court may have ruled on them. You must 3 disregard any evidence which I have ordered stricken. You 4 should not conclude from any conduct or words of mine that I 5 favor one party or another or believe or disbelieve the 6 testimony of any witness. You, not I, are the sole judges of 7 the believability of witnesses and the weight of the evidence, 8 and you must not be influenced in any way by my conduct during 9 the course of the trial.</p> <p>10 There are, generally speaking, two types of 11 evidence from which you may properly find the truth as to the 12 facts of the case. One type is direct evidence such as the 13 testimony of a witness. The other type of evidence is 14 indirect or circumstantial evidence. Circumstantial evidence 15 is the proof of a chain of circumstances pointing to the 16 existence or nonexistence of certain facts. As a general 17 rule, the law makes no distinction between direct and 18 circumstantial evidence but simply requires that the jury find 19 the facts in accordance with the preponderance of all the 20 evidence in the case, both from direct and circumstantial 21 evidence.</p> <p>22 Any person who testifies, including a party, is a 23 witness. The weight of the evidence is not determined by the 24 number of witnesses testifying to the existence or 25 nonexistence of any fact. You may conclude that the testimony</p>	<p style="text-align: center;">58</p> <p>1 of one witness is more believable than the testimony of a 2 larger number of witnesses who testify differently.</p> <p>3 You are the sole judges of whether a witness 4 should be believed. In making this decision, you may apply 5 your own common sense and everyday experiences. In 6 determining whether a witness should be believed, you should 7 carefully judge all the testimony and evidence and the 8 circumstances under which each witness has testified. You 9 should consider the following: The witness' behavior on the 10 stand and way of testifying, the witness' intelligence, did 11 the witness appear to be telling the truth, the witness' 12 opportunity to hear or see the things about which testimony 13 was given, the accuracy of the witness' memory, did the 14 witness have a motive not to tell the truth, does the witness 15 have an interest in the outcome of the case, was the witness' 16 testimony consistent, was the witness' testimony supported or 17 contradicted by other evidence, and whether and the extent to 18 which the witness' testimony in court may have differed from 19 statements that he or she might have made during -- in 20 pretrial deposition. You need not believe any witness even 21 though the testimony is uncontradicted. You may believe all, 22 part or none of the testimony of any witness.</p> <p>23 A deposition is the sworn testimony of a witness 24 taken before trial. The witness is placed under oath to tell 25 the truth and lawyers for each party may ask questions of the</p>
<p style="text-align: center;">59</p> <p>1 witness. Deposition testimony is entitled to the same 2 consideration and is to be judged insofar as possible in the 3 same way as if the witness had been present in court to 4 testify.</p> <p>5 In this case it will be your duty to return your 6 verdict in the form of a written answer to the written 7 question which is submitted to you by the Court. Your answer 8 will constitute your verdict. Your answer is to be written in 9 the space provided after the question. Before making the 10 answer, all of you must agree upon it. It is your duty to 11 answer this question in accordance with the evidence 12 in the case.</p> <p>13 You're instructed that a party who asserts a claim 14 or affirmative defense has the burden of proving it by what we 15 call the preponderance of the evidence. The defendants have 16 the burden of proof on the question which you must decide. In 17 order to prove something by a preponderance of the evidence, 18 the party must prove that it is more likely so than not so. 19 In other words, a preponderance of the evidence means such 20 evidence which, when considered and compared with the evidence 21 as opposed to it, has more convincing force and produces in 22 your minds a belief that it is more likely true than not true. 23 In determining whether a party has met the burden of proof, 24 you should consider the quality of all of the evidence 25 regardless of who called the witness or who introduced the</p>	<p style="text-align: center;">60</p> <p>1 exhibit and regardless of the number of witnesses which one 2 party or the other may have produced. If you believe that the 3 evidence is evenly balanced on the issue, then your finding on 4 that issue must be against the party who has the burden of 5 proving it.</p> <p>6 You're instructed that a cause of action accrues 7 when the plaintiff knows or by reasonably diligent 8 investigation should have known of the injury or damage.</p> <p>9 You're further instructed that a condominium 10 council of unit owners like the plaintiffs is responsible for 11 maintenance, repair and replacement of common elements which 12 includes all of the condominium except for the units.</p> <p>13 You must consider and decide this case fairly and 14 impartially. All persons, including corporations, stand equal 15 before the law and are entitled to the same treatment under 16 the law. You should not be prejudiced or for -- prejudiced 17 for or against a person because of that person's race, color, 18 religion, political or social views, wealth or poverty. You 19 should not even consider such matters. The same is true for 20 prejudice for or against or sympathy for any party.</p> <p>21 In order to reach a verdict in this case each of 22 you must agree upon it. In other words, it must be unanimous. 23 You're going to now hear the arguments of the lawyers who have 24 the right to discuss the evidence and the law with you. Your 25 verdict must be based entirely upon the evidence you have</p>

<p style="text-align: center;">61</p> <p>1 heard in the courtroom and the law as given in these</p> <p>2 instructions. It cannot be based on anything else.</p> <p>3 Counsel, do you have any exceptions to the</p> <p>4 instructions?</p> <p>5 MR. BRIGHT: Your Honor, none other than as</p> <p>6 previously noted.</p> <p>7 MR. GANS: None other than as previously noted,</p> <p>8 Your Honor.</p> <p>9 MR. BUSHEL: None than previously discussed, Your</p> <p>10 Honor.</p> <p>11 JUDGE BLOXOM: All right. Gentlemen, which one of</p> <p>12 you is going to make -- or ma'am --</p> <p>13 MR. BUSHEL: Ms. Herber.</p> <p>14 JUDGE BLOXOM: Ms. Herber, you may approach the</p> <p>15 jury in closing argument.</p> <p>16 MS. HERBER: Thank you, Your Honor.</p> <p>17 Hello again, ladies and gentlemen. I think you</p> <p>18 may remember, my name is Kristin Herber, and along with Glen</p> <p>19 Bushel, I represent MV of Ocean Pines Limited Partnership who</p> <p>20 is the developer of the Pines Point Marina which is the</p> <p>21 subject of this lawsuit.</p> <p>22 As I told you yesterday, your job today, over the</p> <p>23 trial yesterday and today, is to answer one question. That</p> <p>24 question is did the condo association know or should it have</p> <p>25 known before August 30th, 2003, of the conditions being</p>	<p style="text-align: center;">62</p> <p>1 complained of in this case.</p> <p>2 Now, you may remember that yesterday I told you</p> <p>3 that know or should have known includes facts that would have</p> <p>4 been discovered under a reasonably diligent investigation</p> <p>5 regardless of whether that investigation was actually</p> <p>6 performed or was successful.</p> <p>7 So what evidence have you heard in this case to</p> <p>8 help you answer that question? Well, in short, what you've</p> <p>9 heard over the past two days is that the board -- that the</p> <p>10 condo association was aware of the same problems in the spring</p> <p>11 of 2003 as those being complained of after Isabel in the fall</p> <p>12 of 2003. In fact, it was just a different scale. Brackets</p> <p>13 were breaking in the spring, brackets broke after Isabel.</p> <p>14 Floats came loose in the spring, floats came loose after</p> <p>15 Isabel. The same problems, different scale.</p> <p>16 You heard from Ray Phillips, the dockmaster at</p> <p>17 Pines Point Marina. You heard that after the marina was fully</p> <p>18 operational in the fall of 1999, Mr. Phillips was there every</p> <p>19 day inspecting the marina, performing more in-depth</p> <p>20 investigations and inspections in the spring before each</p> <p>21 boating season, and then again in the winter before the winter</p> <p>22 came.</p> <p>23 Mr. Phillips showed you the -- put into evidence</p> <p>24 this diagram. This is the dock that we've been talking about</p> <p>25 for the past two days, and you'll have the opportunity to look</p>
<p style="text-align: center;">63</p> <p>1 at these when you go back to the jury room to deliberate. And</p> <p>2 Mr. Phillips testified that this is the walkway right here</p> <p>3 that you're seeing, and that this is dock A. And he explained</p> <p>4 that these are the floats that we've been talking about.</p> <p>5 These are the floats that keep the dock floating. And that</p> <p>6 you're able to see those from the walkway which I just showed</p> <p>7 you.</p> <p>8 Mr. Phillips testified that after the marina was</p> <p>9 fully operational, that whenever there was a blow, floats</p> <p>10 could pop out and brackets would crack and break, and he</p> <p>11 testified that these blows occurred on an ongoing basis.</p> <p>12 Mr. Phillips testified that he was there day and night during</p> <p>13 the weather conditions. He testified that he stayed on as</p> <p>14 harbormaster after the turnover which you've heard about, the</p> <p>15 turnover of the marina from MV to the condo association which</p> <p>16 occurred in the spring of 2003, and that he attended the</p> <p>17 monthly board meetings. And he testified that he reported any</p> <p>18 problems to the board that he noticed in his inspections.</p> <p>19 Mr. Phillips testified that the damage to the</p> <p>20 marina caused by Isabel was the same damage caused by other</p> <p>21 blows, it was just a different scale. Again, same problems,</p> <p>22 different scale. The same problems in the spring of 2003 as</p> <p>23 those that occurred after Isabel in 2003.</p> <p>24 Now, this is supported by other evidence that you</p> <p>25 heard in this case. Mr. Sorrentino, one of the witnesses for</p>	<p style="text-align: center;">64</p> <p>1 the condo association, testified that Isabel wasn't unlike the</p> <p>2 damage the condo association had seen before, it was just</p> <p>3 exaggerated.</p> <p>4 You heard about the board meetings that the condo</p> <p>5 association conducted, and you heard that as of the</p> <p>6 June 1st, 2003, board meeting, the board was aware of the</p> <p>7 broken brackets. You heard Mr. Kershaw testify that if it was</p> <p>8 in the minutes, it must be true. And you'll have an</p> <p>9 opportunity to look at these minutes when you go back to the</p> <p>10 jury room.</p> <p>11 Mr. Kershaw and Mr. Phillips testified that there</p> <p>12 were broken brackets after Isabel. You heard that as of</p> <p>13 June 22nd, 2003 the board was aware that there was visible</p> <p>14 damage to the C dock. And Mr. Phillips testified that a</p> <p>15 majority of the broken brackets occurred on C dock. Again,</p> <p>16 the same problems before and after, just a different scale.</p> <p>17 Mr. Sorrentino testified that loose floats were</p> <p>18 collected and stored in a storage room at the marina, and that</p> <p>19 after Isabel loose floats were collected and stored in the</p> <p>20 marina.</p> <p>21 Now, in their opening statement, the plaintiffs</p> <p>22 have said that -- or characterized the problems of which the</p> <p>23 condo association was aware of in the spring of 2003 were</p> <p>24 minor. You heard Mr. Phillips testify that the brackets that</p> <p>25 were breaking are those brackets that attach the finger piers</p>

<p style="text-align: center;">65</p> <p>1 to the main piers, and that the tires keep the dock floating.</p> <p>2 Broken brackets and dislodging tires, both of which the board</p> <p>3 was aware of by the summer of 2003, are not minor problems.</p> <p>4 Now, you heard from Ms. McLaughlin, and in fact, a</p> <p>5 portion of her report is entered in evidence. You'll have the</p> <p>6 opportunity to look at this during deliberation, too.</p> <p>7 Ms. McLaughlin testified that she spent two to three hours at</p> <p>8 the marina when she inspected it in May of 2006. She spoke</p> <p>9 with Mr. Clarke and Mr. Sorrentino who were there, it was her</p> <p>10 understanding, representing the condo association, and that</p> <p>11 they told her flotation tires had been coming off, apparently</p> <p>12 at random, for approximately three years. In court</p> <p>13 Ms. McLaughlin testified that Isabel was, quote, "a nonevent"</p> <p>14 in regards to the problems with the dock.</p> <p>15 So you heard that the condo association management</p> <p>16 was turned over -- the marina management was turned over to</p> <p>17 the condo association in April of 2003. You heard that the</p> <p>18 condo association quickly took stock of the marina and the</p> <p>19 dock, divvied up the responsibility of inspecting each of the</p> <p>20 docks. In fact, as Judge Bloxom just instructed you, the</p> <p>21 condo association is responsible for maintenance and repair of</p> <p>22 all common areas. The evidence established that the marina is</p> <p>23 a common element. So the management -- the condo association</p> <p>24 quickly took over management, quickly learned of the problems</p> <p>25 with the dock. And for this reason we're asking you to answer</p>	<p style="text-align: center;">66</p> <p>1 the question that you're being asked to answer, yes, the condo</p> <p>2 association did know as of August -- before August 30th,</p> <p>3 2003, of the conditions of which they're complaining. Thank</p> <p>4 you.</p> <p>5 MR. GANS: May I?</p> <p>6 JUDGE BLOXOM: Yes, sir.</p> <p>7 MR. GANS: Thank you, Your Honor.</p> <p>8 Good morning. Again, my name is Jeff Gans. I</p> <p>9 represent Topper. Let me say thank you again for your service</p> <p>10 on my behalf, on behalf of Kris Herber and Mr. Lester, for</p> <p>11 your time and your sacrifice to help us get this solved.</p> <p>12 I said when this began that I thought that the</p> <p>13 issues were rather straightforward. It's what did they know</p> <p>14 and when did they know it? I think the evidence came in that</p> <p>15 way. You can, if you would like, get wrapped up in a lot of</p> <p>16 who knew what and he said this, but if you ask yourself who</p> <p>17 had a recollection that bears on the question that you're</p> <p>18 being asked, the answer to that question is Mr. Phillips.</p> <p>19 The most common answer you heard from the</p> <p>20 witnesses put on by the plaintiffs was, I don't really</p> <p>21 remember. I'm not really sure. It's not surprising. It's</p> <p>22 been seven years since the events in question, and it wasn't</p> <p>23 their job to keep track of these things. There's only one</p> <p>24 person that you heard from whose job it was to keep track of</p> <p>25 these things, and that's Mr. Phillips. It's how he earned his</p>
<p style="text-align: center;">67</p> <p>1 living. So common sense tells you, and the good news is</p> <p>2 you're perfectly appropriate to apply your common sense to</p> <p>3 this, that if it's his job to do it, he's going to be the one</p> <p>4 that's paying the most attention. Now, others of them did</p> <p>5 notice things, but it comes as no surprise that Mr. Phillips</p> <p>6 noticed and took record of more detailed information about the</p> <p>7 condition of the dock than did the nonemployees.</p> <p>8 You heard from Mr. Clarke, who is in the back of</p> <p>9 the courtroom today, he said, you know, I remembered some</p> <p>10 stuff, but my main focus was the ice in the cooler, was my</p> <p>11 boat floating. Makes perfect sense. The man's not there to</p> <p>12 work at the marina. He's there to enjoy the fruits of the</p> <p>13 marina, so he's not paying attention. Again, Mr. Phillips'</p> <p>14 job was to do that. And as Ms. Herber said, what Mr. Phillips</p> <p>15 said is, we had problems before Isabel, we had problems after</p> <p>16 Isabel. When there was a blow or a thunderstorm, there were</p> <p>17 broken brackets, there were floats that broke free. You can</p> <p>18 use your common sense and say, the marina was in use from --</p> <p>19 full use from September of 1999 until August 30th,</p> <p>20 August 29th of 2003. Does it make sense that throughout</p> <p>21 that entire time despite what Mr. Phillips' testimony is, that</p> <p>22 there wouldn't have been this same manifestation in damage in</p> <p>23 the storms happening during that period of time? It just</p> <p>24 doesn't make sense. So it's contrary to common sense, and</p> <p>25 it's backed up by what Mr. Phillips has to say.</p>	<p style="text-align: center;">68</p> <p>1 I don't really think that as the evidence comes in</p> <p>2 it showed this isn't a question of, oh, I'm not sure we have</p> <p>3 to imply. They said from the witness stand, we knew about</p> <p>4 damage that happened before Isabel. And that's the issue.</p> <p>5 That's the question that you have to ask yourself. And the</p> <p>6 evidence was -- frankly, it was uncontradicted. The fact that</p> <p>7 one person doesn't remember an event happening and another</p> <p>8 person does doesn't mean that the event didn't happen. Even</p> <p>9 Mr. Short, who you heard some deposition from, just the fact</p> <p>10 that he doesn't remember something occurring doesn't mean that</p> <p>11 Mr. Phillips' recollection is any less credible.</p> <p>12 Mr. Phillips was up there, probably sat up there</p> <p>13 for the longest time, he was very clear. There were records</p> <p>14 to back up his recollection. And if you apply your common</p> <p>15 sense, what he said makes sense. The damage showed itself</p> <p>16 whenever there was a storm. And there were plenty of</p> <p>17 opportunities for that to happen prior to the 29th of</p> <p>18 August 2003. I think that's what they knew. The evidence</p> <p>19 showed that's what they knew, and the evidence showed that's</p> <p>20 when they knew it. And the answer is, with respect to</p> <p>21 Mr. Bright and his clients, that's the answer. They knew in</p> <p>22 that time frame. Thank you again for your time.</p> <p>23 MR. BRIGHT: Good morning again, folks. Thank</p> <p>24 you. The other counsel thank you, I will thank you as well on</p> <p>25 behalf of my client, Pines Point Marina, for your patience,</p>

<p style="text-align: center;">69</p> <p>1 your attentiveness, being focused throughout the trial. We</p> <p>2 all appreciate that very much.</p> <p>3 What does the evidence demonstrate in this case?</p> <p>4 What was the evidence in this case? First of all, let's start</p> <p>5 short of where Mr. Gans left off with Mr. Phillips.</p> <p>6 Mr. Phillips was Jim Short's guy on the scene at that marina.</p> <p>7 Jim Short being the developer, the principal of MV of Ocean</p> <p>8 Pines. Phillips hatched the arrangement that he had at that</p> <p>9 marina with Jim Short way back at the beginning of time for</p> <p>10 this marina in 1999. Whatever Ray Phillips may have known</p> <p>11 from 1999 until 2003 in large part doesn't matter because at</p> <p>12 that point in time, he is the dockmaster essentially for the</p> <p>13 developer. He's the dockmaster for Jim Short. He's not the</p> <p>14 dockmaster for my client, the Pines Point Condominium</p> <p>15 Association, because it effectively didn't exist as a separate</p> <p>16 self-governed entity as we said until the turnover occurred in</p> <p>17 April of 2003. So whatever Mr. Phillips testified that he</p> <p>18 knew back in 1999 or 2000 or 2001, all the way up through</p> <p>19 April of 2003, is immaterial in this case unless he testified</p> <p>20 that all of that knowledge that he had, and it was his</p> <p>21 testimony, frankly, on those issues it was vague, it was not</p> <p>22 directed at any specific point in time or any specific problem</p> <p>23 or issue or any specific instance, but to the extent that he</p> <p>24 knew something, and that didn't come across from the witness</p> <p>25 stand, prior to April of 2003 or prior to the year 2003, there</p>	<p style="text-align: center;">70</p> <p>1 was no testimony that wherein he said, everything I knew, once</p> <p>2 the turnover occurred, I went to the board and reported it to</p> <p>3 the board. He testified that during that period of time he</p> <p>4 was reporting to Jim Short. Jim Short was, for all intents</p> <p>5 and purposes, his boss. Jim Short, Ray Phillips and Jim</p> <p>6 Short's partner were the three, quote, unquote, "board</p> <p>7 members" until the condominium association became a</p> <p>8 self-governed entity. So -- and I -- he was their only live</p> <p>9 witness was Mr. Phillips. And I'll get in a minute to what he</p> <p>10 admitted on cross-examination whereas their focus has been</p> <p>11 what he testified to on direct.</p> <p>12 But what did the evidence show with respect to</p> <p>13 prior to Isabel and after Isabel? First of all, prior to</p> <p>14 Isabel -- first of all, I want to make a point about, Ms.</p> <p>15 McLaughlin was asked questions about what was said to her when</p> <p>16 she was there in 2006 for an inspection of the marina. And it</p> <p>17 was through that questioning, it was suggested that the</p> <p>18 members of the board that were with him said, oh, this has</p> <p>19 been going on for three years. Well, no. If you conduct a</p> <p>20 closer examination of the document that the defendants put</p> <p>21 into evidence, Defendants' No. 8, the reference is to</p> <p>22 approximately three years. Remember this is in May of 2006.</p> <p>23 September of 2003 when Isabel occurred is approximately three</p> <p>24 years before that.</p> <p>25 And then she was unclear as to exactly what had</p>
<p style="text-align: center;">71</p> <p>1 been said. She went kind of back and forth a bit. Her</p> <p>2 testimony -- she repeatedly said throughout her testimony is,</p> <p>3 this was a long time ago. I don't really remember. I mean,</p> <p>4 that was from her mouth.</p> <p>5 Now, the other really, really big piece of</p> <p>6 evidence in the mind of the Defendants that they have really</p> <p>7 hung their hat on to a large degree are the minutes from the</p> <p>8 meetings. And you will have an opportunity to read these</p> <p>9 minutes from the meetings. But there are two sets of them; a</p> <p>10 June 1st, 2003, set of minutes for a June 1st, 2003, board</p> <p>11 meeting wherein there's a reference to, and I quote, "there</p> <p>12 are a couple" -- well, it's talking about broken brackets.</p> <p>13 And the reference is "there are a couple that are broken and</p> <p>14 need repair." A couple, that's two.</p> <p>15 In a 200 slip marina, and you can get some sense</p> <p>16 of the scale of this marina by looking at these photographs</p> <p>17 and how far out these docks extended. A, B, C and D dock,</p> <p>18 each of them having -- I don't know the number of slips -- but</p> <p>19 a few dozen -- a couple of dozen slips on each dock. This is</p> <p>20 the schematic drawing of A, B, C and D dock. This is a big</p> <p>21 marina, I mean, as marinas go. It is a large-scale floating</p> <p>22 dock. How many broken brackets as of June of 2003? Two. A</p> <p>23 couple.</p> <p>24 You get to the June 22nd minutes, and again,</p> <p>25 these are documents that are put in by the defendants as their</p>	<p style="text-align: center;">72</p> <p>1 proof of notice on the part of the condominium association</p> <p>2 which, by the way, at this point in time in June of 2003 has</p> <p>3 just been constituted, the new board and the self-governed</p> <p>4 association, as a group of volunteer boat owners that are</p> <p>5 sitting on this board. That's who you're dealing with as far</p> <p>6 as board members on the condominium board.</p> <p>7 In the second set of minutes, which is from a</p> <p>8 June 22nd, 2003, meeting, there's no reference to broken</p> <p>9 brackets in these minutes. There's no reference anywhere.</p> <p>10 There's no reference in either of these sets of minutes to</p> <p>11 floating tires. Maybe Ray Phillips knew about a couple of</p> <p>12 floating tires, but he didn't say he it at either one of those</p> <p>13 meetings. He said he attended all the meetings. He reported</p> <p>14 at all the meetings as to whether he had any concerns or any</p> <p>15 problems to report. No reference to that in these minutes.</p> <p>16 No mention in those minutes in June of 2003 of any floating</p> <p>17 tires.</p> <p>18 You have the testimony of the original -- or the</p> <p>19 first president of the board, the second president of the</p> <p>20 board, and the third and fourth presidents of the board were</p> <p>21 members -- a third president and a fourth member of the board,</p> <p>22 all testified on behalf of the association, they were called</p> <p>23 by us in our case, that the earliest point at which there was</p> <p>24 any concern, any real presentation or manifestation of</p> <p>25 problems was Hurricane Isabel. Even Mr. Phillips testified</p>

1 that the only storms he could remember by date or name
2 specifically were Isabel and Gustav. Gustav being later than
3 Isabel. Those were the ones that were in his mind as
4 significant in terms of the damage that they caused. That's
5 Mr. Phillips.

6 So what about after Isabel? First of all, you
7 heard testimony about the significance of this storm. Now,
8 Ms. Herber made reference to Catherine McLaughlin's
9 characterization of Isabel as a nonevent. I mean, you can
10 take that for -- I suppose for what it's worth. She wasn't
11 here when Isabel hit. She wasn't at the marina when Isabel
12 hit. She was at the marina three years later when she
13 conducted her inspection. So what she thinks about whether or
14 not Isabel was a nonevent at Pines Point Marina isn't
15 credible. It's not something that should be valued as a piece
16 of evidence.

17 So what happened when Hurricane Isabel rolled in?
18 Well, you don't have two broken brackets, you've got 42.
19 That's documented. That's from Ray Phillips' mouth.
20 Forty-two broken brackets. All of a sudden you've got a
21 widespread problem throughout this large marina. You have
22 tires -- racks -- not tires floating up, but racks of tires
23 breaking loose. You have such extensive problems presenting
24 themselves at that point in time, when Isabel hit, that this
25 is the first time since the Pines Point Condominium

1 Association took over that an outside contractor, Apple
2 Marine, had to come in and actually perform work on the
3 marina. The rest of it had been essentially maintenance by
4 Mr. Phillips because he's the -- he's essentially sort of like
5 the superintendent of the marina. And everything else that
6 had occurred prior to that, he can handle himself as the
7 superintendent of the marina. After Isabel, an outside
8 contractor has to be brought in.

9 The more the evidence is analyzed, the more it's
10 clear that Isabel is a bright line point in time where much
11 more presented itself and manifested itself. And it went from
12 being a maintenance issue in this marina to being something
13 much more significant than that, where the lightbulb goes on
14 and it's something more meaningful than that.

15 The last thing that I want to really -- in terms
16 of the evidence that I want to really emphasize is -- and
17 first of all, you were instructed by His Honor that deposition
18 testimony read into the record as opposed to testimony live
19 from a witness is to be essentially afforded the same weight
20 as testimony live from a witness and is to be considered by
21 the jury in the same manner. And what I want to close by
22 making reference to is a reiteration of what Jim Short, again,
23 Jim Short being the principal of MV of Ocean Pines which is
24 the developer of this marina. Jim Short in control of this
25 marina until April of 2003 when it was turned over to the

1 condominium association. Jim Short continuing to have
2 involvement in the marina after that. And he says, and I'm
3 quoting now, in talking about inspections at the marina, "Not
4 until -- as far as I know, not until the problems started
5 showing up." This is directly from the horse's mouth from one
6 of the defendants' key people.

7 "When was that?"

8 "I think somewhere in the fall of 2003." That's
9 not the spring, that's not 2002, that's not 2001. He says
10 problems started showing up in the fall of 2003.

11 Then he gets more specific. When he was asked a
12 question about whether the dockmaster ever undertook any
13 repairs to the marina before transition to the board in March
14 of 2003, he goes on to talk about the fact that they weren't
15 extensive, but, yeah, there were repairs, rub rail being
16 replaced, cleats being replaced. You know, this is minor
17 maintenance stuff in a marina.

18 And then he goes on to characterize that as normal
19 wear and tear. I call it maintenance, he calls it normal wear
20 and tear. That's what was going on prior to Hurricane Isabel,
21 normal wear and tear in this marina. That's all that was
22 manifest, that's all that was presented to this volunteer,
23 regular Joe board of directors that was in charge of this
24 marina.

25 And then he goes on to talk about he's -- in

1 another part of his testimony he's describing some of the
2 problems in particular to D dock which is the outermost dock
3 on this marina. And the question is asked of him, "Now, had
4 you seen any of these problems when you had been down to the
5 dock before the Isabel event?" And his answer is, "Some tires
6 were loose. They had -- they'd broken loose during other wind
7 storms, but nothing -- not enough to alert anybody -- not
8 enough to alert anybody to suspect a major failure, you know."

9 And then he goes on. The question is asked, "So
10 when did the major failure occur?" And he says -- first he
11 says, "Yeah. I don't know." And then he says, "I would say
12 it was recognized after Isabel." This is the defendant itself
13 through -- or in the person of Jim Short saying, this is all
14 ordinary wear and tear. This is all maintenance until you
15 have that hurricane hit, and then we've got a much bigger
16 problem. So that is the earliest point in time.

17 The question that you're going to be asked to
18 answer on the verdict form is whether the plaintiffs were on
19 notice before August 30 of 2003 of circumstances that would
20 have caused a reasonable person in their position to undertake
21 an investigation which if pursued with reasonable diligence
22 would have revealed the conditions being complained of in this
23 case.

24 Before August 30th. The answer is, no, no,
25 because it was in September of 2003. It wasn't in August, it

<p style="text-align: center;">77</p> <p>1 wasn't prior to that. Isabel is what created an awareness in 2 these volunteer board members. And the sequence of events 3 flowed from there.</p> <p>4 So we think, with due respect to the other side, 5 that the evidence couldn't be clearer on this question. We 6 think that the evidence compels a no answer on that verdict 7 sheet which is a finding in favor of the plaintiffs in this 8 case which is Pines Point Condominium Association. And again, 9 I thank you for your attentiveness and ask that you give close 10 consideration to the evidence that's -- that you take back to 11 the jury room and render a verdict in our favor. Thank you 12 very much.</p> <p>13 MR. GANS: Your Honor, can we approach on a 14 matter?</p> <p>15 JUDGE BLOXOM: Yes.</p> <p>16 (Whereupon, Counsel approached the bench and the following 17 occurred out of the jury's hearing:)</p> <p>18 MR. GANS: Your Honor, I want to renew my request 19 for the agency instruction. When we were dealing with that 20 instruction, Mr. Bright argued to Your Honor and Your Honor 21 accepted the fact that Mr. Phillips reported to the board what 22 he knew, and therefore, the instruction was unnecessary 23 because there was no evidence about him knowing and not 24 reporting.</p> <p>25 The first thing that Mr. Bright argued when he</p>	<p style="text-align: center;">78</p> <p>1 stood up is that there's a whole period of time where 2 Mr. Phillips is learning things that he's not reporting. So 3 now we have the situation where the jury believes that 4 Mr. Phillips' knowledge, while he was the employee of the 5 board, gained prior to April of 2003 is not imputed to them 6 when, in fact, it is.</p> <p>7 JUDGE BLOXOM: Okay.</p> <p>8 MR. BRIGHT: I think it's a matter of law. 9 There's no way that you can impute one employer's -- 10 employee's knowledge to a subsequent -- if that's what they 11 are, to a subsequent employer later on. In other words, what 12 Mr. Phillips may have known in 2001, you can, by operation of 13 law, impute to the board -- the association board --</p> <p>14 JUDGE BLOXOM: The question is --</p> <p>15 MR. BRIGHT: -- in April of 2003.</p> <p>16 JUDGE BLOXOM: The question is whether the Court 17 should give this instruction.</p> <p>18 MR. BRIGHT: No, I don't believe so.</p> <p>19 JUDGE BLOXOM: Anybody else want to be heard on 20 that?</p> <p>21 MS. HERBER: No.</p> <p>22 JUDGE BLOXOM: The request is denied.</p> <p>23 MR. GANS: Thank you.</p> <p>24 (Whereupon, Counsel returned to trial tables, and the 25 following occurred in open court:)</p>
<p style="text-align: center;">79</p> <p>1 MS. HERBER: Hello again. You just heard at great 2 length about Mr. Short's testimony that was read into the 3 evidence from his deposition. I want to focus you again on 4 the question you're being asked to answer and that is what the 5 condo association knew, not what Mr. Short knew. Mr. Short 6 was employed by and a partner of the MV of Ocean Pines which 7 is the developer. He was -- once the turnover occurred, he 8 was just a slip owner, and what he knew or his opinions as to 9 what was going on at the marina, they're nothing really on the 10 question that's before you. What you're being asked to answer 11 is what the condo association knew.</p> <p>12 Now, with regard to Mr. Bright's point that there 13 was no evidence or no testimony about floating tires. Well, 14 Mr. Sorrentino, who was -- who is a condo association member, 15 who was a board member, testified that there were floating 16 tires loose, that they stored them in the storage room at the 17 marina. There clearly was testimony that there were floating 18 tires.</p> <p>19 Now, when you go back to the jury room, I ask you 20 to take a good look at the minutes. Like I said, you'll have 21 the opportunity to look at it. Mr. Bright referenced that 22 there's mention of two brackets being broken. I submit to you 23 that there's no reference to two brackets being broken. 24 Several brackets being broken. And it's a clear statement in 25 the record, and as I stated before, Mr. Kershaw stated if it</p>	<p style="text-align: center;">80</p> <p>1 was in the minutes, it must be true.</p> <p>2 And I want to talk to you a little bit about 3 Ms. McLaughlin's testimony. Now, as you heard, Ms. McLaughlin 4 has been a marine surveyor for 25 years. It is her job to 5 inspect marinas. I think she knows a little bit about storms 6 and the damage they can cause. Isabel was a well-known event 7 in this area, and she clearly could testify as to whether 8 Isabel was, as she said, a nonevent with regard to the damage 9 to the dock.</p> <p>10 Now, when she was there in May of 2006, 11 Mr. Sorrentino testified that he spent three hours with her 12 and that he knew she was interested in what had occurred 13 before Isabel. He testified that he told her that there were 14 broken tires, and he showed her where they were stored. And 15 that he told her they had been stored there for quite some 16 time.</p> <p>17 Mr. Sorrentino also testified that he knew that 18 Mr. Phillips had been on-site for years, and that he knew that 19 it would be important for Ms. McLaughlin to talk to 20 Mr. Phillips, yet he never asked -- he never told 21 Ms. McLaughlin that she should speak with him.</p> <p>22 I just want to go back to what I said before, and 23 that is that nothing you've heard in Mr. Bright's closing 24 argument really will change it. That the damage that was 25 occurring in the spring of 2003 was the same as anything that</p>

<p style="text-align: center;">81</p> <p>1 happened after Isabel in the fall of 2003, it was just a 2 different scale. Broken brackets before, broken brackets 3 after. Floating tires before, and floating tires after. 4 Based on that evidence, we believe that you should 5 answer the question in the affirmative and find that the condo 6 association did know before August 30th, 2003, of the 7 conditions of which they're complaining about in this suit. 8 Thank you again for your time and patience. 9 MR. GANS: Let me just return briefly, I promise, 10 to this question of applying your own common sense. The 11 plaintiffs are hoping that Mr. Bright can convince you that 12 the operative event for them was the hurricane. Why is that? 13 Because the hurricane caused damage to the marina, so that 14 told us something was wrong. 15 Well, ask yourself this. What would you expect a 16 hurricane to do to a marina? What did Mr. Sorrentino say? He 17 said, it was damage as you would expect. There wasn't 18 anything that happened in Isabel that wasn't the same 19 character what happened before or that was out of the 20 ordinary. They knew a hurricane had hit the marina. They 21 expected damage. They found it. That has nothing to do with 22 what they knew prior to that. 23 And you saw the evidence straight out of 24 Mr. Phillips' mouth who, by the way, was also deferred to by 25 Mr. Clarke. You remember Kris got up and we read some</p>	<p style="text-align: center;">82</p> <p>1 testimony in front of Mr. Clarke who said, you know, board 2 members come and go. People have remembrances. They forget 3 things. But the one constant, Ray Phillips, he was there. So 4 they're deferring to Mr. Phillips. 5 Again, apply your common sense. Why does damage 6 from a hurricane put them on notice of anything that changes 7 what they already knew before? They knew about the damage, 8 they just didn't do anything about it. And then in September 9 the hurricane comes in, and now they want to figure out, how 10 do we pay for it, and they want to blame us. And the answer 11 is the hurricane did only one thing -- 12 MR. BRIGHT: Objection, Your Honor. May we 13 approach? 14 (Whereupon, Counsel approached the bench and the following 15 occurred out of the jury's hearing:) 16 MR. BRIGHT: "They want to blame us for the damage 17 and they want to make us pay for it," this is clearly beyond 18 the scope of what the jury was allowed to hear based on what 19 was decided as a pretrial matter, Your Honor. The jury was 20 not to hear anything about liability. It was not to hear 21 anything about claims being brought or who was responsible for 22 the claims. It was not to hear anything about the defenses' 23 special limitations to defense. If I had been allowed to 24 mention the damages, I would have mentioned the damages. 25 JUDGE BLOXOM: All right. What's your response,</p>
<p style="text-align: center;">83</p> <p>1 sir? 2 MR. GANS: Judge, the only issue is, what was the 3 significance of what happened on -- at Hurricane Isabel. 4 JUDGE BLOXOM: All right. 5 MR. GANS: That's the only thing I was saying. 6 JUDGE BLOXOM: Okay. Thank you. 7 (Whereupon, Counsel and Defendant returned to trial tables, 8 and the following occurred in open court:) 9 MR. GANS: Ladies and gentlemen -- 10 JUDGE BLOXOM: Just a minute. Before you 11 continue, sir. 12 Folks, this is final argument. You're directed to 13 disregard counsel's last remarks. Issues of liability and 14 damages are not before you. As I explained at the beginning 15 of the trial, your responsibility which will be to answer a 16 single question. Go ahead, sir. 17 MR. GANS: Thank you, Your Honor. My apologies. 18 Thank you again for the time. Apply your common 19 sense to the evidence and you'll come to the right decision. 20 Thank you very much. 21 JUDGE BLOXOM: Well, first of all, Ms. Mayhan, 22 your service as an alternate juror is no longer required 23 in the case. You're excused. Thank you very much for your 24 assistance, ma'am. 25 Ladies and gentlemen, in a moment you will retire</p>	<p style="text-align: center;">84</p> <p>1 to the jury room to deliberate. The bailiff is going to give 2 you the exhibits that have been received into evidence and 3 also the verdict worksheet. 4 It will be the responsibility of the jury foreman 5 to record your verdict on the verdict worksheet. When you've 6 reached a verdict and your foreman has recorded it on the 7 worksheet, you should knock on the door and inform the bailiff 8 that you have reached a verdict. 9 You will return to the courtroom to deliver your 10 verdict. The procedure we will follow for that is the clerk 11 will first call over the roll of the jury. The clerk will 12 then ask you, "Are you agreed on a verdict?" You should 13 answer that question collectively. Then the clerk will ask, 14 "Who shall say for you?" You should answer that question 15 collectively by responding, "Our foreman." Then the clerk 16 will question the foreman to ascertain your verdict. 17 Lastly, the clerk will harken you to your verdict 18 by asking you as a group such questions as are necessary to 19 determine if you agree with the verdict as reported by your 20 foreman. You should respond to those questions -- or question 21 collectively as well. 22 All right. You may retire to the jury 23 deliberation room for your deliberations. 24 (Whereupon, the jury retired to begin their deliberations at 25 11:50 a.m.)</p>

<p style="text-align: center;">85</p> <p>1 (Whereupon, the following proceedings were had in the 2 courtroom out of the hearing and presence of the jury:) 3 JUDGE BLOXOM: Counsel, have you looked over the 4 exhibits to make sure that those are only the exhibits that 5 have been received into evidence? 6 MR. BRIGHT: Yes, Your Honor. 7 MR. BUSHEL: Yes, Your Honor. 8 JUDGE BLOXOM: Okay. All right, folks. Thank 9 you. Court's in recess. 10 (Whereupon, a recess was taken.) 11 JUDGE BLOXOM: Be seated, please, folks. I'm told 12 we have a jury verdict; is that correct, sir? 13 MR. BAILIFF: Yes, Your Honor. 14 JUDGE BLOXOM: Bring the jury in, please. 15 (Whereupon, the jury returned to the courtroom at 12:30 p.m. 16 with their verdict.) 17 JUDGE BLOXOM: The record should reflect that the 18 jurors are in the jury box and counsel and parties are at the 19 counsel table. Madame Clerk. 20 THE CLERK: If you would please answer to your 21 names. 22 Matthew Redden. 23 Geon Davis. 24 Erin Swanson. 25 Andrea Dean.</p>	<p style="text-align: center;">86</p> <p>1 Joann Landon. 2 Mark Bradford. 3 Ladies and gentlemen, are you agreed on your 4 verdict? 5 THE JURORS: Yes. 6 THE CLERK: Who shall say for you? 7 THE JURORS: Our foreman. 8 THE CLERK: Mr. Foreperson, if you would please 9 stand up. What say you, before August 30th, 2003, were the 10 plaintiffs on notice of circumstances which would have caused 11 a reasonable person in their position to undertake an 12 investigation which if pursued with reasonable diligence would 13 have revealed the condition being complained of in this case? 14 Yes or no. 15 MR. FOREPERSON: Yes. 16 THE CLERK: Ladies and gentlemen of the jury, 17 harken to your verdict as the Court hath recorded it, your 18 answer is yes, and so say you all? 19 THE JURORS: Yes. 20 JUDGE BLOXOM: All right. Ladies and gentlemen of 21 the jury, thank you for your service. You're excused. 22 (Whereupon, the jury exited the courtroom, and the following 23 occurred in open court:) 24 JUDGE BLOXOM: All right. Counsel, my question 25 is, what do you want me to do next, folks? We have a jury</p>
<p style="text-align: center;">87</p> <p>1 verdict which obviously establishes a statute of limitations. 2 MR. GANS: Your Honor, we ask that you enter an 3 order directing -- or finding a verdict in favor of the 4 defendant and dismiss the case with prejudice. 5 MR. BUSHEL: That would be the same motion on 6 behalf of the defendant. I think that the establishment of 7 the affirmative defense is a complete bar, Your Honor, and 8 should warrant a judgment in favor of the defendants. 9 JUDGE BLOXOM: Sir. 10 MR. BRIGHT: Your Honor, for the record we would 11 oppose that motion. I believe that the affect of the ruling 12 should be something that should be taken up as a posttrial 13 memoranda. 14 JUDGE BLOXOM: Well, gentlemen, I freely concede 15 that a bifurcated trial of this nature is completely outside 16 the realm of my experience. Having made that concession, I 17 invite each of you to set forth your positions by posttrial 18 memoranda with a proposed order which you believe to be 19 warranted in light of the jury's decision and in light of the 20 law that you would bring to my attention. Thank you. 21 MR. BRIGHT: Thank you, Your Honor. 22 MR. BUSHEL: Is there a date that you set for 23 that? 24 JUDGE BLOXOM: Let's do it within 30 days. That 25 should be plenty of time. Well, we got the holidays. Is that</p>	<p style="text-align: center;">88</p> <p>1 enough time, gentlemen, and -- I don't want to put anybody 2 under -- if you have vacation plans or anything like that. 3 This matter has been going on for four years now, so it's not 4 that -- I'm not anxious to move it along, but having said -- 5 in light of the fact that it's been going on for four years, 6 and 30 or 45 days isn't going to make much difference. Is 30 7 days enough time for you, or do you require more time? 8 MR. BRIGHT: The only reason why that causes me a 9 little heartburn, Your Honor, is I've got an appellate brief 10 filing that falls right about at that time, so I would rather 11 go to 45 days. 12 JUDGE BLOXOM: Does that suit everybody else? 13 MR. GANS: It's fine for Topper, Judge. 14 MR. BUSHEL: Can we just have a firm date, like 15 February 4th? 16 JUDGE BLOXOM: Whenever is 45 days from today's 17 date. 18 MR. BUSHEL: It's little bit more. 19 JUDGE BLOXOM: The next working day. 20 MR. BUSHEL: How about January 31st? That would 21 be 45 days. That's a Monday. 22 MR. BRIGHT: That's fine with me. 23 JUDGE BLOXOM: All right. Again, I'd ask that 24 each of you address by way of posttrial memoranda the legal 25 effect of the jury's verdict here today in light of the</p>

1 pending claims against your respective clients and an order
2 which you believe will do what the law requires. Same thing
3 for you.

4 MR. BRIGHT: Thank you, Your Honor.

5 MR. BUSHEL: The clerk will not be entering a
6 judgment on this verdict?

7 JUDGE BLOXOM: She will not.

8 MR. BUSHEL: Thank you, Your Honor.

9 MR. GANS: Thank you, Your Honor.

10 (Whereupon, the proceedings concluded.)
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1
2 CERTIFICATE
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5 I, Kathy A. Zeve, a Notary Public and Registered
6 Professional Reporter in and for Worcester County,
7 Maryland, do hereby certify that I recorded verbatim by
8 stenotype the proceedings in the above-entitled cause
before the Honorable RICHARD R. BLOXOM, Judge of said
Court, Worcester County, Maryland, on the 16th day of
December, 2010.

9 I further certify that to the best of my knowledge and
10 belief, the foregoing transcript constitutes a true and
correct transcript of the said proceedings.

11 Given under my hand this 11th day of March, 2011, at Snow
12 Hill, Maryland.
13

14 _____
15 Kathy A. Zeve, RPR
16 Notary Public
17

18 My commission expires: January 1, 2012
19 Notary Public in and for
20 the State of Maryland
21
22
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