223 Va. 116

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RICHMOND, VIRGINIA

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IN THE

# Supreme Court of Virginia

AT RICHMOND

RECORD NO. 790~~184~~ 993

COLONEL HAROLD G. PIERCE
and BETTY R. PIERCE

Appellants

v.

MARSHALL E. PLOGGER

Appellee

JOINT APPENDIX

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Spencer, Crawford & Osborne
31 West Washington Street
Lexington, Virginia 24450

Counsel for Appellants

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WARRANT IN DEBT

No

COMMONWEALTH OF VIRGINIA
COUNTY OF ROCKBRIDGE

To wit: To the Sheriff of said County

Col. Harol
Pierce
VS.
Marshall E.

You are commanded to summons Marshall E. Plogger, c/o James Lees, Glasgow, Va. to appear in the Rockbridge County General District Court, Lexington, Virginia in said County, on the 4 day of August, 1976 at 2 o'clock P. M., before Joseph E. Hess, Judge of said Court, to answer the complaint of Col. Harold G. Pierce and Betty R. Pierce, Sheppherd Drive, Lexington, Va. upon a claim of money, for the sum of $ 4500.00, due Breach of warranty with interest from - day of , 197 and attorney's fee, and then and there make return on this warrant.

Date: August

This 14 day of July, 1976.

Thomas C. Spencer p.q.

Anne Miller Black
Clerk of the Court

Warrant . . . . 100
Trial 7/13/76
539417
Filing . . . . .
Sheriff's fee . . .
Witness . . . .
Other . . . . .
Total

JUDGMENT that the plaintiff recover of the defendant(s) $ 3,385.50 with interest from 26 day of Jan, 1978 till paid and Attorney's fee and $ 5.00 for his costs.

This 26 day of Jan, 1978.

Judge

9/27 - 2PM

int. 15 at 2:00

10/14

Filed in the Clerk's Office the 2

Writ Tax $ 5.00
Fee 15.00
Deposit
Total Paid $ 20.00

Teste:

No. C76-831

Col. Harold G. Pierce and Betty R. Pierce

VS. WARRANT IN DEBT

Marshall E. Plogger

Date: August 4, 1976

Costs

| | |
|---|---|
| Warrant | $ |
| Trial 7/13/76 539417 | 3.75 |
| Filing | 1.25 |
| Sheriff's fee | |
| Witness | |
| Other | |
| Total | $ |

P.Q.

P.D.

Clerk's Office the 2 day of Feb, 19 78

Teste:

002

[illegible] COUNTY GARNISHMENT

Plaintiff — Col. Harold L. Pierce
and Betty R. Pierce
Sheffield Dairy, Lex. Va

Vs

Defendant — Marshall E. Plogger
c/o James Lee

Amount of Claim $ 4500.00

Due by: Breach of Warranty

Interest from

Received 7/13/76

Attorney Thomas C. Spencer

Trial date 8-4-76

C76-831
5-39417

Signed ---- Thomas C. Spencer atty for Plaintiff
Plaintiff-

003

SPENCER & CRAWFORD
ATTORNEYS AT LAW
31 W. WASHINGTON STREET
LEXINGTON, VA. 24450

TELEPHONE 463-7139
AREA CODE 703

HOMAS C. SPENCER
ALCOLM G. CRAWFORD

October 11, 1977

Mrs. Pauline Jones, Deputy Clerk
General District Court of
Rockbridge County
Court House
Lexington, Virginia 24450

Re: Colonel and Mrs. Pierce v. Marshall Plogger

Dear Mrs. Jones:

Enclosed please find a statement from W. W. Coffey & Son, Inc., which I would appreciate your filing in the above-referenced matter. It is the intent of the Plaintiff by the filing of this statement from Mr. Coffey to amend his debt warrant to increase it by the amount of $225.50. Mr. Robey has agreed to this procedure for amending the debt warrant. I am forwarding a copy of the statement to him for his file.

This will also confirm that the above-referenced matter has been rescheduled for trial at 3:00 p.m. on Friday, December 2, 1977. Judge Hess had previously agreed that we could schedule this civil matter on a Friday afternoon. However, if this for any reason does not meet with the Court's approval, I would, of course, appreciate being advised.

Thank you very much for your consideration and assistance.

Yours truly,

Thomas C. Spencer

TCS/mwe

Enclosure

cc Colonel and Mrs. Pierce
W. T. Robey, III, Esquire

ed
10/12

Lexington, Virginia 24450 December 16 19 76

Col. Harold Pierce

R. F. D. #2
Lexington, Va. 24450

IN ACCOUNT WITH

# W. W. COFFEY & SON, INC.

## *Building Contractors*

P. O. BOX 792

TELEPHONE 463-3148

Oct. To removing rain conductor pipes from foundation drain and installing new storm drain line . . . . . $ 225.50

FINANCE CHARGE OF 1½% PER MONTH OR 18% PER ANNUM AFTER 30 DAYS.

005

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1 JAMES F. COFFEY
2 a witness called by and on behalf of the Plaintiffs, being
3 duly sworn, testified as follows:
4
5 COFFEY - DIRECT
6 By Mr. Spencer:
7
8 Q Please state your full name and your
9 address.
10 A My name is James Francis Coffey and
11 I live at 119 S. Jefferson.
12 Q What is your occupation, Mr. Coffey?
13 A President of Coffey and Son, building
14 contractors.
15 Q How long have you been engaged in the
16 construction business?
17 A Since 1939.
18 Q In the course of your business, do you
19 frequently work on residential type construction?
20 A Yes.
21 Q Is the type of work that you did, if
22 any, for Col. Pierce similar to the type of work you frequently
23 do?
24 A Yes sir.
25 Q I draw your attention Mr. Coffey to the



SHENANDOAH REPORTING SERVICE

P. O. BOX 161
GREENVILLE, VIRGINIA 24440

1 spring of 1976 and ask you if at that time you were asked to
2 come to Col. Pierce's home to do an estimate?
3 A Yes I was.
4 Q Where is that home located - is that
5 in Rockbridge County?
6 A It is.
7 Q Did you do an estimate?
8 A Yes.
9 Q Do you recall the amount of your esti-
10 mate?
11 A There were two parts to it. On the
12 front wall the estimate was $3,000 and the shower and the vent
13 and the trap was $400.
14 Q So your total estimate was approximately
15 $3,400 for doing that work?
16 A Approximately.
17 Q Did you subsequently enter into a con-
18 tract with Col. Pierce to do that work?
19 A Yes.
20 Q Before you started work, were you in-
21 structed by Mr. Ravenhorst as to what work you should do and
22 how you should perform it?
23 A Yes.
24 Q And is that the work that you did?
25 A Yes.

1 Q Explain to the jury exactly what work
2 you did do.
3 A The front wall was off about a foot and
4 we put a hole in the top of every block, cinder blocks, and
5 put steel rods in them and filled them with concrete to re-
6 inforce the front wall. We replaced the drain tile and gravel
7 in the ground trying to stop the water. The drain tile was
8 stopped up and could not operate. We replaced the drain tile
9 and put the gravel back in, we went inside and built some
10 cinder block walls, two walls, cross walls perpendicular to
11 the outside wall. In the center we put one wall in - 13 foot
12 4 inches and the other one was 10 foot. We drilled those and
13 filled them with concrete to support the front wall. Mr.
14 Robey mentioned some doors - I don't believe there were any
15 doors put on. We left openings soyou could pass through
16 from one room to the other. I don't believe there were any
17 doors, unless somebody put them on later. After that I pro-
18 ceeded to back fill the front wall, put the dirt back in. I
19 had to replace -- the water under it had ruined the stoop of
20 brick on concrete and I replaced that.
21 Q Mr. Coffey, what was the total of your
22 agreement with the Pierces to do the work? What was your
23 contract? Did you have a set price?
24 A On the basis of that estimate.
25 Q Did you submit a bill to Col. and Mrs.

1 Pierce for the work that you did?
2 A Yes.
3 Q Is this a copy of the two statements?
4 A Yes. That second one was for going back
5 and opening up -- we found later on that the drain tile pipe
6 and the storm drain - they were on the same line in the back
7 of the house and that caused the water to back up in the
8 drain pipe and cause water to come in the wall. We went
9 back and put in some extra drain line in the back there to--
10 Q What was the reason you had to put that
11 in there?
12 A The storm drain and the drain tile was
13 all in the same line and the water from the down fall was
14 backing up around the house and we run separate lines, one
15 out from the drain tile and one out from the storm drain.
16 Q How much was your bill to the Pierces
17 for the initial work that you described to the jury?
18 A $3,160.00
19 Q And how much was it for correcting the
20 drain tile problem?
21 A $225.50.
22 Q Has Col. Pierce paid those bills to you?
23 A Yes.
24 Q In your experience as a contractor in
25 the area, are the charges that you made for that work reason-

able and consistent with charges for similar work in this area?

A Yeah.

COFFEY - CROSS

By Mr. Robey:

Q Mr. Coffey, do you have any personal recollection of the problems that people in Rockbridge County were experiencing in the fall of 1975 with regard to basements because of excessive rainfall in the fall of 1975?

A No.

Q You don't have any recollection of that?

A No.

Q Do you have any personal knowledge of what is normal in regard to water in basements in Rockbridge County when we have excessive rainfall?

MR. SPENCER: If Your Honor please, I believe the question goes beyond the scope of direct examination. I think the jury should be told that if Mr. Robey wants to pursue the matter further that he does so at the risk of making Mr. Coffey his own witness.

1 MR. SPENCER: And being bound by his
2 testimony.
3 COURT: I will allow the question.
4
5 Q Do you have an experience factor in
6 Rockbridge County -- you said that this work was necessary,
7 or whatever and---
8 A I don't think I said that.
9 Q You didn't say it was necessary--
10 A I don't think anybody asked me that. It
11 was one of the architect's recommendations so he thought it
12 was necessary and the wall did have a crack in it and---
13 Q How wide was that crack?
14 A Well, it wasn't so wide but it was out
15 of plumb --
16 Q Would hair line ---
17 A It was a little more than hair line.
18 Q You said it was out of plumb, how far?
19 A About an inch from top to bottom.
20 Q That could be in there originally, right?
21 A It showed evidence of movement.
22 Q Well, the hair crack - there wasn't any
23 protrusion out from where the hair crack was, right?
24 A No protrusion but it showed evidence of
25 being pushed out though.

1 Q Well, it's in the same condition out
2 there now that it was in except --.
3 A It's got the two walls to hold it in the
4 front.
5 Q With the steel rods?
6 A Yes. It's got a lot of reinforcement.
7 Q Now how wide - how wide would you tell
8 this jury - you say the crack is out there the same right
9 now - how wide would you tell this jury that the crack is?
10 A At the time I looked at it as I remember
11 it was somewhere about an eighth of an inch.
12 Q About what?
13 A An eighth of an inch.
14 Q An eighth of an inch?
15 A Yes.
16 Q Now Mr. Coffey, it is correct to say
17 that practically every wall, every cinder block wall that you
18 put up in load bearing situations get cracks in them from
19 time to time, don't they?
20 A You might get some settling cracks, I
21 don't think you should get a pushing crack like that. Some
22 of them do.
23 Q Are you saying the majority of them don't?
24 A Right.
25 Q You have seen a lot of walls where the

1 basement walls, cinder block walls didn't have any cracks
2 in them?
3 A They didn't have cracks showing pressure
4 behind it, pushing it. You maybe get some hair line cracks
5 from expansion and contraction.
6 Q There was an extension of this basement
7 wall out from the house to provide around the house a re-
8 taining wall, to retain the yard so that there would be
9 patios and a driveway and that type of thing?
10 A Yes sir.
11 Q And that retaining wall was constructed
12 exactly the same as the wall that you went in there and were
13 endeavoring to repair according to the architect, wasn't it?
14 A I don't know where you are talking about.
15 That one cross wall where the garage was had a support at
16 one point---
17 Q But that wall was longer than the base-
18 ment wall?
19 A It might have been but I don't think so.
20 Q Did you see any evidence of those walls,
21 the extension walls, giving away?
22 A I really didn't notice any but that is
23 a different situation from inside.
24 Q Water can come down a hill, get to a
25 basement wall or a retaining wall and get behind it and

1 cause problems, can it not?
2 A Some walls are just pushed out.
3 Q From that happening?
4 A Yes.
5 Q And one way to correct that, is it not,
6 is to change the slope of the yard to let that water run
7 off, right?
8 A Right.
9 Q That's not very expensive is it?
10 A Well, to get it graded and sodded might
11 be a little expensive.
12 Q It certainly wouldn't cost $3,000 to
13 $4,000?
14 A No.
15 Q In fact, you all did that - or someone
16 has done it right now out there, haven't they?
17 A We raised it up some, to give a little
18 more fall to the back.
19 Q You put some fall in there and you put
20 a swale in so the water would run away from the house and
21 wouldn't come up against the house and put the pressure against
22 the basement wall, didn't you?
23 A Yes.
24 Q That is part of what you did in an
25 effort to correct the problem, isn't it?

1 A Yes.
2 Q How much did that cost?
3 A I don't know.
4 Q Sir?
5 A We done the rest of the work too, I
6 don't know what it cost.
7 Q You don't know what that cost to put
8 the swale in?
9 A It was just done along with the rest
10 of it.
11 Q Roughly what did it cost?
12 A I wouldn't make any figure on that.
13 Q Well, you made an estimate to start
14 with.
15 A I know but I had some information to go
16 on, measurements and things, and it was all done together.
17 Q You had to have some way to arrive at
18 your $3200 and something estimate.
19 A Yes, I said that.
20 Q Well, how much did you have in that for
21 building the swale?
22 A It was all part of the back fill, the
23 same operation.
24 Q All right, how much did you have in there
25 for the back fill?

1 A Back fill - it's all together, I don't
2 know.
3 Q Well, let me ask you this. You did
4 about four operations out there at the request of these
5 people. I realize you did what they asked you to do whether
6 it made sense or not. You did a steel rodding operation -
7 that would be one category would it not?
8 A Yes.
9 Q There has been testimony that one oper-
10 ation would have corrected the problem and it didn't need
11 all that other. How much did the steel rod operation cost?
12 How much have you got in there for that?
13 A I don't have it broke down that way. If
14 you give me an hour or two to figure it up -- I can't just
15 pick out a certain item like that. I think that's unreason-
16 able for you to ask me things like that.
17 Q Well, you did a wall operation didn't
18 you? You put in a wall that was designed to do the same
19 thing that the steel rod operation was supposed to do?
20 A Both of them do the same job, yes.
21 Q But instead of doing on, you did both.
22 Now tell the jury how much it cost to do the wall operation.
23 How much you got in there for that?
24 A $250.00.
25 Q $250 for the wall operation. And that

1 $250 spent for the wall operation was for the purpose of
2 bolstering up the basement wall so it wouldn't fall in?
3 A Well, reinforcing it so it would have
4 so support.
5 Q That was to reinforce it against the
6 pressure of the water that would come down the hill and get
7 in behind the basement wall and cause pressure there, wasn't
8 it?
9 A Well, you get some pressure - it's a
10 combination of water and - it's not just water, there is
11 some pressure besides the water.
12 Q And it's the same reason you went in
13 there and sloped the land away, back toward the swale so
14 you wouldn't have the water behind the basement, wouldn't
15 have a back problem at the same wall we are talking about.
16 A All the water don't necessarily come on
17 the top, there can be some water underneath. You get a wet
18 spell you get water on down underneath the top of it.
19 Q And it's during the wet spells that
20 you get an unusual situation, where you get water in base-
21 ments in Rockbridge County?
22 A You can.
23 Q Do you have a break down on labor and
24 materials?
25 A Yes.

1 Q How much you got in there for labor?
2 A You mean the whole thing?
3 Q Any part of it.
4 A (Long pause and no response)
5 Q Mr. Coffey, tell the jury how you can
6 make an estimate if you don't know how much the labor was.
7 A I'm figuring it up here. $1,200.00.
8 Q Labor and material $1,200 --
9 A No, just labor, not material.
10 Q How many man hours did you have on this
11 job?
12 A I don't have that here, this is an
13 estimate. I can give you that, I keep the man hours.
14 Q Do you have the invoices for the mater-
15 ials that you put in there?
16 A No.
17 Q You asked this man to pay for all this
18 stuff, and you don't have your invoices for your materials?
19 A Nobody asked me to bring all that.
20 Q And you don't know how many man hours
21 you had?
22 A I don't have it with me, no.
23 Q Do you have it broke down how many man
24 hours you have for the steel rod job, how many man hours for
25 the wall job, how many man hours for the drain tile job, how

1 many man hours for the back fill job - do you have that
2 broke down on a piece of paper anywhere?
3 A I got the total man hours but I don't
4 have it broke down. You'd have to have a time keeper up
5 there to keep it like that.
6 Q Then do you have the total man hours
7 on the whole thing?
8 A I do but I don't have it with me.
9
10
11 HAROLD G. PIERCE
12 the Plaintiff, being duly sworn, testified upon his oath
13 as follows:
14
15 PIERCE - DIRECT
16 By Mr. Spencer:
17
18 Q State your full name please.
19 A Harold George Pierce.
20 Q Are you the plaintiff in this action?
21 A Yes.
22 Q Please state your age and occupation.
23 A My age is forty-eight and my occupation
24 at present is Professor of Geology at Virginia Military
25 Institute.

Q Where do you live Col. Pierce?

A Redgrove Manor, west of town.

Q Is that in Rockbridge County?

A It is.

Q I draw your attention to 1975, the early part of that year, and ask you if at that time did you come to Rockbridge County area for the purpose of looking for a home?

A It was actually in December of 1974 I believe - or in January - I'm not sure which month, but I was here, yes.

Q At that time did you look at the home that you ultimately purchased?

A That is correct.

Q Did you talk to the realtor with which it was listed at that time?

A I did.

Q Did you inspect that home very closely?

A At that time, no.

Q At that time did you enter into a contract to purchase it?

A No.

Q Did you at a later time go back to the same realtor and express an interest in the same home?

A Yes I did.



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GREENVILLE, VIRGINIA 24440

1 Q Who owned that home?
2 A Mr. Marshall Plogger.
3 Q Do you know who had built that home?
4 A I believe Mr. Plogger built it also.
5 Q Did you then negotiate for a contract
6 to purchase the home?
7 A Yes.
8 Q Did you, prior to signing the contract,
9 look at the home? Did you inspect the home?
10 A Yes, under certain adverse conditions.
11 Q What were the conditions under which
12 you inspected the home?
13 A Well, one thing I was told that there
14 was no electricity to the house so I did make my inspection
15 in the basement with a flashlight. Subsequently I found
16 out that the electricity was just turned off at the main
17 switch box. That makes it a little bit difficult to give it
18 a thorough inspection.
19 Q At what time of the year was it when
20 you were doing this?
21 A Just after themiddle of July.
22 Q Was this in 1975?
23 A 1975, yes.
24 Q Had you looked at it before you signed
25 the contract?

1 A Yes, this was what I was talking about
2 before I signed the contract.
3 Q Do you remember the date you signed the
4 contract?
5 A No I do not.
6 Q Is this the contract that you signed?
7 A Apparently - the signature is the same.
8 July 12.
9 Q Do you know whether you signed it on
10 that date or not?
11 A I assume we did. I would certainly have
12 made an issue of it if it had been incorrectly dated.
13 Q Prior to July 12, 1975, you say you had
14 inspected the premises?
15 A Yes.
16 Q And was that the occasion when the
17 electricity was off?
18 A I was so told, yes.
19 Q At that time was it raining or had it
20 been raining?
21 A There had been some rain. I could deter-
22 mine the exact rainfall quite easily, but I don't recall any --
23 we arrived here on the 4th of July and subsequent to that it
24 had been drippy weather.
25 Q At that time did you observe the leak

1 in the basement?

2 A No I didn't.

3 Q Had you at that time had any conversa-

4 tion with Mr. Plogger regarding the basement?

5 A Up to the time I signed the contract I

6 had not even met Mr. Plogger.

7 Q After you signed the contract that day

8 did you subsequently discover the problems with the basement?

9 A Yes. I obtained a key in order to take

10 some measurements to plan on moving our furniture and so on

11 like that and I was out there -- again I can't recall the

12 exact date - on a day after a moderate to heavy rainfall.

13 The west and south sides of the basement were essentially

14 flooded across the basement entirely and the water was being

15 absorbed up a drywall that partitioned off a study area,

16 which was one reason I wanted to buy it, I needed the study.

17 Q Explain to the jury exactly the contour

18 of the lot on which your home was built.

19 A Basically, the road runs down the approx-

20 imate crest of the hill and I am on the low side of the road,

21 down a grade of about seven or ten percent - it is not a very

22 steep grade off the road into the yard and there is a grade

23 down, sloping gently around the house.

24 Q You heard Mr. Coffey's testimony about

25 the wall that he reinforced and the back fill. How high

1 up does the back fill come on the basement on the side where
2 that wall is?
3 A The total height of the basement there.
4 Q It comes all the way up to the ---
5 A Yes, it would be about -- from being
6 down in the cut after Mr. Coffey excavated - somewhere around
7 eight feet.
8 Q On the lower side of the house, away
9 from that wall he was working on, is there any fill?
10 A Where the short retaining wall is?
11 Q The opposite side of the house. In
12 other words, you say you have fill all the way up to the top
13 of the basement wall at the entrance to your house, now at
14 the back side of the house ---
15 A There is a basement level entrance
16 back there.
17 Q So the whole back yard is open and level
18 and no fill on that, is that right?
19 A There is fill out there but it is not
20 around the house. There is fill to level the yard up.
21 Q How does the yard to either side of the
22 house -- if you are standing in front of the house, say you
23 are looking at the front - the first thing is that long wall
24 that Mr. Coffey worked on - you say there is fill all the way
25 up that wall?

1 A Correct.
2 Q What happens to either side of the
3 house?
4 A To the right there is a good sloping
5 drainage around the house - to the left the slope is about
6 level as it goes around the house and to the west of the
7 house of course you have continuous slope past the house,
8 down the hill.
9 Q Now the wall that Mr. Robey referred to
10 and talked with Mr. Coffey about, the extension of the base-
11 ment wall, which direction does that go as you face the
12 house from the front?
13 A It goes to the right.
14 Q And is that where the slope goes down?
15 A Yes.
16 Q How long is that wall from the end of
17 the house to the end of that extension wall?
18 A It's less than twenty feet in length.
19 Q How high is that wall right at the point
20 where it is connected to the house?
21 A Less than seven feet.
22 Q How high is it at the end of the wall?
23 A Four to five feet.
24 Q Does it slope practically all the way
25 out?

1 A It steps.
2 Q And I believe you indicated that area
3 is graded off?
4 A Yes.
5 Q Is it exactly like the wall in the base-
6 ment, or is it brick or --
7 A On the driveway side of the block it is
8 faced with brick.
9 Q How about the basement wall, is it
10 brick faced?
11 A No, that's block only.
12 Q Now again, bringing your attention back
13 to after you had signed the contract. How long was it before
14 you went out -- I believe you indicated you got the key and
15 went out to look at the house again. How long was that, do
16 you recall?
17 A We were out there several times after
18 signing the contract.
19 Q You say on this occasion you observed
20 the leak. Would you describe to the jury where that leak was?
21 A On this one occasion after the rain, I
22 went out then and the primary leak was in the southwest cor-
23 ner of the basement, a very heavy leak in that area and
24 coming through relatively low on the block. Then there were
25

1 subsidiary leaks along the south wall of the basement about
2 half way across the house in the area of the switch box,
3 generally the center of the wall, there was relatively
4 quite a bit of leaking there too. It was by-passing the
5 floor drain and soaking up the dry wall.
6 Q Did you notice any other problems prior
7 to -- from the time you signed the contract until you closed?
8 A The air conditioning was not putting
9 out adequately, which was a relatively minor problem -- I
10 don't recall anything else during that time.
11 Q What was your understanding as far as
12 the obligation of Mr. Plogger under you contract with him?
13 What was your understanding of his obligation?
14 A Well, I didn't know exactly what Virginia
15 law is but I assumed that any builder had an obligation for
16 one thing - a warranty that the house had been built correctly.
17 Q After you discovered these defects did
18 you talk to Mr. Plogger about them?
19 A I talked to the realtor. I don't believe
20 I directly talked to Mr. Plogger at that time.
21 Q Now I draw your attention to the date
22 of closing, which I believe was July 25, is that correct?
23 A Yes.
24 Q Where was that closing conducted?
25 A It was in your office.

1 Q And at the time of closing did you talk
2 to Mr. Plogger about these defects?
3 A Yes we discussed them at that time. He
4 had been made aware of them earlier by the realtor.
5 Q So you had told the realtor about them,
6 and were you advised that Mr. Plogger had been told by
7 the realtor about them?
8 A That was my understanding.
9 Q Did he give any assurance about the
10 correction of those defects?
11 A My understanding at that time that such
12 items as this would become a part of the contract that we
13 would eventually sign.
14 Q Who made that representation to you?
15 A I got that impression, I don't know
16 whether it is correct or not, from the realtor.
17 Q Then at closing, did you point out these
18 particular defects to Mr. Plogger?
19 A Yes.
20 Q What was his response to that?
21 A Well, he pretty much acknowledged and
22 assured us he would take care of them.
23 Q Did he give you any oral expression as
24 to whether or not he would warrant the house, and if so, for
25 how long?

1 A Yes, and I think that specific termin-
2 ology was used on the specific items in question.
3 Q As well as you recall, what did he tell
4 you?
5 A It would have to be a pretty bad para-
6 phrase - I can't remember the exact words.
7 Q Was there any particular time for which
8 he said he would warrant it?
9 A One year was under active discussion.
10 Q Did he tell you what he warranted for
11 a period of a year?
12 A I assumed the entire house as I recall
13 what was said.
14 Q Were you willing to accept his oral
15 representation only on the defects of which you were aware?
16 A No, as you know, I was reluctant to do
17 that.
18 Q As a result of that, were you prepared
19 to go on to closing if he would not give you a written assur-
20 ance on the defects of which you were aware?
21 A No I was not prepared to go on to closing
22 unless there was some form of guarantee beyond verbal and I
23 think that was clearly understood as we went into this closing.
24 Q At that time then, was there a written
25 warranty prepared?

1 A There was.
2 Q Is this that written warranty?
3 A It so appears.
4 Q Was it signed by Mr. Plogger?
5 A That appears to be his signature.
6 Q I believe that is a photostatic copy.
7 Let me show you the original and ask you if that is the orig-
8 inal of that written warranty?
9 A It is.
10
11 MR. SPENCER: I tender this as an Exhibit
12 Your Honor.
13
14 Q At the time that he gave you the written
15 warranty, did he continue to tell you orally that he would
16 warrant the house against defects for a period of defects as
17 well?
18 A Yes.
19 Q Based on his promise to give you that
20 warranty, were you willing to go on with the closing?
21 A Under those conditions, yes, I agreed
22 to proceed.
23 Q So did you go on to closing and pay him
24 and take the deed?
25 A We did.

1 Q Did he then give you the written
2 warranty?
3 A That is correct.
4 Q At that time, did you fulfill all of
5 your obligations under the contract to purchase? Did you
6 pay him the purchase price according to the terms of the
7 contract?
8 A Yes.
9 Q And took the deed?
10 A Yes.
11 Q And subsequent to that I understand you
12 said you got the warranty from Mr. Plogger, based on his
13 promise that he would give you that warranty after you got
14 the deed, is that correct?
15 A Uh huh.
16 Q After that did Mr. Plogger proceed to do
17 anything to correct the defects which were specifically cover-
18 ed in the written warranty?
19 A Yes, the air conditioning was taken care
20 of. As for the basement, Mr. Plogger did get a contract with
21 this subsidiary firm called Sealtight and they did make an
22 initial application of something on it the day we moved into
23 the house.
24 Q Were you given a written contract to sign
25 in regard to this outfit out of Roanoke?

1 A There was a document, yes, that I did
2 sign.
3 Q Tell the jury what happened at the time
4 you signed that, why you signed it.
5 A I signed it under the understanding that
6 as the owner of the house I was authorizing the work to be
7 done.
8 Q Was it your understanding that you were
9 accepting that as a satisfaction by Mr. Plogger of his bar-
10 gain to you?
11 A No, I was accepting this as an attempt
12 to comply with the warranty.
13 Q Did you pay that contractor for the work
14 that they did?
15 A No.
16 Q Do you know who did?
17 A I assume Mr. Plogger did.
18 Q Did their work correct the problem?
19 A No, in fact it aggravated it.
20 Q Did you discover any other defects in
21 the house?
22 A Yes as time went by various other things
23 came up. Adjacent to the basement study area - which I was
24 using extremely heavy at that time, my first year as a pro-
25 fessor, the bath in there, the shower in there was not
trapped so as the septic tank came into use we were getting

1 some choice odors back there which made it rather difficult
2 to work in that part of the house. Then when we went into
3 the winter season and went into heating, it's an all electric
4 heater and we had trouble with heating unit and called the
5 installer over from Buena Vista . They repaired some burned
6 out relays and told me the reason it was burned out was that
7 the wiring was non-specification wiring. Those two things
8 come immediately to mind.
9 Q Did you point those problems out to Mr.
10 Plogger?
11 A I did.
12 Q What was his reaction?
13 A Mr. Plogger got an electrician to come
14 in and install the proper wiring to the furnace, which
15 allievated that problem. He had a plumber come in and in-
16 spect the problem in the bathroom, the basement bathroom but
17 apparently the estimate was rather high and I believe Mr.
18 Plogger rejected it.
19 Q Did he have the wiring corrected to the
20 furnace-air conditioning unit?
21 A Yes, that was corrected.
22 Q Do you recall when that was done?
23 A It would have to have been certainly no
24 later than November.
25 Q That would have been in 1975?

1 A Yes.
2 Q During that period of time, from July
3 up through November of 1975 could you have had these repairs
4 made if you had wanted to? Did you have the time to get
5 somebody to do it yourself if you had wanted to?
6 A Sure.
7 Q Why didn't you go ahead and get it done
8 yourself at that time?
9 A I assumed the warranty meant something.
10 Q Did you give Mr. Plogger an opportunity
11 every time you discovered a defect and reported it to him?
12 A Yes, over this period of time I tele-
13 phoned him frequently on this subject.
14 Q Did he ever deny to you that he had not
15 made a warranty?
16 A No I don't believe so.
17 Q How long did you wait for Mr. Plogger
18 to do something?
19 A Could I refresh my memory from the
20 letter you have in the file there?
21 Q Certainly, this letter? Let's back up
22 and forget that question for the moment. Let's go back to
23 the early part of the fall when you say you discovered the
24 leak -- or the basement continued after these people from
25 Roanoke had tried to fix it. Did you do anything to test

1 that wall or to try to find out where the leak was, and if
2 so, what did you do?
3 A First off, when the leaking continued
4 I contacted the people in Roanoke again and asked them to
5 return for another treatment. They were very reluctant to
6 do so but finally did. Secondly, the cracking on the wall
7 became obvious - not just separation cracking but the wall
8 was actually moving in this fashion here. So to determine
9 whether the movement was continuing I did take a glass slide
10 and epoxy it across the crack and on the next -- oh, in two
11 or three days the glass had broken indicating the movement
12 of the wall was continuing. That's when I became very con-
13 cerned that the wall was actually collapsing into the house.
14 Q How long is that wall?
15 A Seventy-one feet.
16 Q Is it filled all the way to the top of
17 the seventy-one feet, dirt on each side?
18 A Essentially. At the west end it starts
19 tapering down to perhaps five foot, maybe a little more.
20 Q You say this wall is seventy-one feet
21 long, in this direction. Were there any walls inside the
22 house to support it?
23 A Well, at each end of course, the wall
24 at the east and west end was supported there but down the
25 length of it there was a dry wall separating the garage from

1 wash room area.

2 Q A dry wall?

3 A Yes.

4 Q You mean it was constructed out of wood

5 and nailed to that wall?

6 A Well, it was nailed to wood above and

7 I feel quite sure it must have been -- must have had metal

8 studs into the floor although I never did check to see.

9 Q How far was that wall from the end of

10 the house?

11 A About a third from the west end.

12 Q And from that wall to the other end of

13 the house, were there any breaking walls?

14 A No, there was no support.

15 Q How big was this crack that you ob-

16 served?

17 A Well, the crack progressively got larg-

18 er. I think by the time Mr. Coffey started to work it had

19 increased to perhaps three-sixteenth of an inch, something

20 like that. That represents a significant displacement

21 obviously in order to get that much of a crack.

22 Q Do you know how much that was was ver-

23 tically out of plumb?

24 A I never actually put a straight edge up

25 to it, but in estimation it would be something like an inch

1 or two inches that it moved. It was not originally out of
2 plumb, but it had moved that far.
3 Q It moved that far during the time that
4 you lived there?
5 A Yes.
6 Q After you became concerned about that
7 movement, did you contact the architect about that?
8 A I did.
9 Q And who was the architect?
10 A Mr. Ed
11 Q And did you have him do a report for you
12 as to what defects there were as far as the basement of the
13 house was concerned?
14 A That is correct.
15 Q And did you have a copy of that report
16 furnished to Mr. Plogger?
17 A Yes I did.
18 Q Did Mr. Plogger ever respond to that or
19 come to do anything to correct those defects?
20 A No.
21 Q Do you recall when that was furnished
22 to Mr. Plogger through his attorney?
23 A I can look it up very quickly. That
24 would have been 30 December 1975.
25 Q At that time, were you still willing to

1 have Mr. Plogger come and correct the defects?
2 A I would have been delighted to have him
3 do it.
4 Q Did you continue to ask him to come and
5 correct them after that?
6 A Yes.
7 Q How long was it after that before you
8 made a contract with Mr. Coffey?
9 A I don't recall the exact date of the
10 contract but I can give you an approximation. It would have
11 been somewhere around the middle of March.
12 Q Of 1976?
13 A That's right.
14 Q What was your agreement with Mr. Coffey?
15 A That he was to perform the work in a
16 manner consistent with local -- with good practice and I
17 would pay him for his work plus a reasonable profit on his
18 part.
19 Q Do you recall what that reasonable profit
20 figure was?
21 A No.
22 Q Tell the jury what Mr. Coffey did to
23 your house.
24 A Well, to start off with Mr. Coffey ex-
25 cavated the front of the house along the wall, in the yard,

1 and that necessitated removing the stoop in front of the
2 house and luckily just by removing the fill in there the
3 wall then, by itself, reverted back to the normal position.
4 It went back to the normal position by removing the pressure
5 on it. While he was down there he discovered that the drain
6 tile had been laid upon a course of rock, rather than the
7 other way around which was normal practice and that the drain
8 tile had been plugged by the material that was used to put
9 a seal around the basement wall, this firm from Roanoke.
10 What they had done, in doing the job, they had run their
11 probe through the fill, actually into the tile, and had
12 pumped the tile full. As a result of that he continued the
13 excavation around the corner in order to remove all of this
14 tile and replace it with new drain tile which was properly
15 laid. Then when he went into the wall on the front of the
16 house, every other hole in the block, he knocked a hole in
17 the top and stuck a steel rod down in there and then poured
18 that full of concrete. That is not every channel, but every
19 other channel. He then went inside and built two small re-
20 taining walls, one of which replaced the existing dry wall
21 between the garage and the wash room, and the other one was
22 a wall that chopped up that section of the basement, These
23 were pinned to the concrete floor. Let's see, what else
24 did he do. The shower - that looked like a significant
25

1 problem but one of Mr. Coffey's men came up with a good idea
2 on that, he was able to remove that quite easily and rake
3 out the floor of the concrete underneath the house and
4 install a trap to alleviate the odor problem and re-install
5 the shower. I believe that is all that was done originally.
6 Q Then I believe he came back to do some
7 other work?
8 A Yes. That did not correct the leak
9 problem, particularly in the southwest corner of the basement.
10 It still leaked there, in fact so heavily that I remember
11 one night I built a dam across that area and I had a small
12 submersible pump and I used the pump to pump water into
13 buckets and I carried the buckets out back and dumped them
14 and we have something like -- between seventy and eighty
15 buckets out of that area alone.
16 Q You indicated there was a study---
17 A In the basement.
18 Q Where is that related in relationship
19 to the wall which he had to build?
20 A It would be on the opposite side of the
21 basement from the wall.
22 Q It would be on the side that opens out
23 into the level yard into the back?
24 A Yes, that's correct.
25 Q What was the function -- what were you

1 using that part of the basement for in the area where it
2 was leaking?
3 A Washing, storage, and of course the fur-
4 nace is there, the water heater is there. One bad leak was
5 right behind the electrical panel, and there was a workshop
6 over there too.
7 Q If the water continued to leak in the
8 area where it had been leaking could it get into the study
9 area? Did that have a dry wall?
10 A Yes it did.
11 Q Did water get into that at all?
12 A Yes it did. In fact the carpet became
13 damp and we had trouble with odors there for a while. It
14 would hit the dry wall and then soak up - it would be wet
15 as high as fourteen or fifteen inches up the wall.
16 Q Mr. Coffey I believe indicated in res-
17 ponse to Mr. Robey's questions, that he back filled that
18 wall after he dug out where the tile was and he piled dirt
19 up higher on the house so that the water would drain away
20 from it a little bit?
21 A Yes and no. The dirt was piled up as
22 you said but you have the problem of taking one cubic foot
23 of dirt out of a hole and breaking up the dirt and putting
24 it back in and it ends up being more than one cubic foot so
25 you automatically had a pile as a result of filling the trench

1 back up.
2 Q Did you yourself do anything to create
3 a swale there after Mr. Coffey had completed the work?
4 A Yes, recently I have.
5 Q What did you do?
6 A Well, I used a transit from school and
7 went out and surveyed the actual slope across the yard and
8 established the grade I wanted and then went in with a rotor
9 tiller and broke up the sod and the earth underneath it so I
10 could establish that grade and moved that material off to
11 another area on the side, just to get rid of it, and then
12 re-seeded.
13 Q Is that part of the price that you paid
14 Mr. Coffey or is that just work you did yourself?
15 A Right.
16 Q That is not a part of the damage you
17 are asking in this case?
18 A No.
19 Q Did you ever have any difficulty with
20 the well, or the water supply?
21 A Yes. That showed up rapidly too in this
22 damp weather period that Mr. Robey mentioned. The water
23 became cloudy and I did have it checked to see what condition
24 the water was in at the time and it was unsatisfactory.
25 Q You say you had the water tested and

1 it was unsatisfactory?

2 A Yes.

3 Q What did you do to correct that problem?

4

5 MR. ROBEY: Objection would be made to

6 that question. It was my understanding

7 at the pre-trial conference we are here

8 on express warranty in regard to water

9 in the basement. That was my under-

10 standing of the pre-trial rules.

11 MR. SPENCER: If Your Honor please, I

12 believe at the pre-trial conference, as

13 as result of the recent Supreme Court

14 case, Mr. Robey is correct, but that

15 case -- there was no implied warranty

16 as a result of that case -- but that

17 case specifically did not adress itself

18 to express warranty, whether oral or

19 written. The plaintiff's position, and

20 the testimony has been that there was a

21 written express warranty and there was

22 at the same time, cotemporaneously with

23 it an oral express warranty. The evi-

24 dence that is intended to be adduced

25 by the question to the witness is that

1 of the damages suffered as a result
2 of the breach of the oral express warr-
3 anty, which is not in conflict with the
4 written express warranty but is consis-
5 tent with and made cotemporaneously with
6 it.
7 COURT: I would ask the jury please to
8 step back in the jury room.
9
10 ----------
11
12 JURY OUT
13
14 COURT: Gentlemen, at the pre-trial conference
15 I believe the only thing that we finally decided was the
16 question on burden of proof and the test on the damages. The
17 case you refer to, it was agreed it addressed itself to the
18 implied warranty. It is my recollection that the discussion
19 and the oral statements could not be ruled on at that time
20 and also the question of exactly what was consideration.
21 MR. ROBEY: Well, I think we were-- I feel that
22 if it was not ruled on, if I am in error in my statement on that,
23 I don't think that precludes me from objecting --
24 COURT: Right, I think we were not able to reach
25 a conclusion on that, based on the ---

1 MR. ROBEY: There has been introduced at this
2 point a written warranty, warranting the basement, the water
3 problem and so forth. That is an express warranty but I
4 understood the opinion to state there was no implied warr-
5 anty in any warranties prior to closing, merged with the
6 deed, at least that was dictum. The only way we are trying
7 right now is that an express warranty given afterwards
8 might create another contract, but there is no testimony at
9 this time as to an express warranty on the -- after the
10 closing of the transaction and acceptance of the deed. Now
11 if he puts that on, where there is an express warranty after
12 closing which created a new transaction, with the consider-
13 ation, then I think it is admissible. Otherwise, the only
14 way he could be claiming this is that there was an implied
15 warranty prior to closing.
16 MR. SPENCER: Our position is that the oral
17 express warranty was made at closing. As Mr. Robey suggests,
18 that was made prior to receipt of the deed. So I think the
19 question that poses is whether or not that express warranty
20 is covered by merger as he suggests. The evidence goes
21 further in that Col. Pierce has testified that oral warranty
22 was ratified and confirmed after closing by the conduct and
23 word of Mr. Plogger in terms of trying to meet the terms of
24 the warranty. Now, the warranty, the express oral warranty,
25 on which the Plaintiff relies, is that the house would be

1 free from defects in workmanship and material, and that
2 warranty was to be for a period of a year. The express
3 written warranty of course speaks for itself.
4 I submit Your Honor that the law is clear, it
5 has been discussed on several of the pre-trial conferences,
6 that there is no merger applicable to the warranty, either
7 express or otherwise. In the case, the Court
8 said there was no merger to collateral promises that are
9 not addressed in the deed. Mr. Robey doesn't suggest that
10 the deed says that there isn't to be any warranty. In the
11 case, the Court said it is not to be sup-
12 posed that the whole contract between the parties is incor-
13 porated in the deed made by the grantor in pursuance of or
14 as cancellation of a contract for the sale of land. There
15 are many things pertaining to the contract which it is mani-
16 fest are never inserted in the deed. It goes on to say that
17 all the deed does it that it titles it. If there are other
18 elements which are not inconsistent with the deed, then they
19 survive merger.
20 Now, the other issue - and I think that this
21 was expressed by the Court - some concern as to whether or
22 not the written warranty which was given at the time of the
23 closing supercedes any contemporary oral warranty under the
24 law. I would submit to Your Honor that the law is clear
25 that you can have a contemporary oral agreement with a

1 written agreement, so long as the two are not inconsistent
2 or the written agreement doesn't purport to cover all of the
3 agreements between the parties.
4 The Supereme Court of Virginia, at 189 Va. 381
5 said " We think the ruling of the trial court was unquestion-
6 ably correct. While it is elementary that parole evidence
7 is not admissable to explain or undertake to qualify a
8 written agreement, but it constitutes a complete statement
9 of the problem. It is equally as elementary that the rule
10 does not apply where the warranty is ambiguous, vague and
11 indefinite, or does not embody the entire agreement. In
12 such a case that evidence is always admissable. Not to
13 contradict or vary the terms, but to establish the real con-
14 tract between the parties." And it goes on to say that you
15 can have an oral contemporaneous agreement with a written
16 agreement so long as they are not inconsistent.
17 And I submit to Your Honor that an oral express
18 warranty to warrant the whole house against any defects in
19 workmanship and material, some of which may have been unknown
20 at closing, is not inconsistent with a written express
21 warranty which does address itself to the defects which were
22 known at the time of closing and that both of those warran-
23 ties do survive merger.
24 COURT: Don't we have two points here? The one
25 that has been addressed is merger. Isn't the second question

1 that we are now talking about parole evidence?
2 MR. SPENCER: Yes Your Honor.
3 COURT: Now it is your position Mr. Spencer that
4 the warranty that has been introduced as Exhibit 4 is not
5 the complete agreement?
6 MR. SPENCER: Yes Your Honor. Col. Pierce's
7 testimony has been that at the same time that he agreed to
8 give the written express warranty that he also confirmed his
9 oral warranty that he would warrant the house for a period
10 of a year,against defects. That was not in the written
11 agreement but I submit that it is not inconsistent with the
12 written agreement.
13 Col. Pierce's testimony has been that just
14 initially there was an oral express warranty on the whole
15 bit and it was represented to him that covered these particular
16 things. He said that he was unwilling to go to closing with-
17 out having something in writing at least so far as the
18 known defects were concerned, and that it was agreed that he
19 would be given a written warranty on the known defects and
20 an oral warranty as to unknown defects.
21 I think the question for the Court becomes --
22 do the parties, by sitting down and putting the agreement in
23 writing, then abandon any oral agreement. The evidence says
24 that warranty was ratified after the closing, and confirmed.
25 The case at 191 Va. 372 addresses that point I believe.



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1 COURT: The Court is now prepared to rule on
2 this matter. I will sustain the objection, I think that
3 would be parole evidence, and therefore I will sustain the
4 objection.
5 MR. SPENCER: We respectfully note our exception
6 to the Court's ruling.
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1 Q Earlier, I believe in talking about the
2 size of the crack that after putting this material on the
3 crack it got larger and probably you testified it looked like
4 it bulged out as a result from pressure. You indicated that
5 after the wall came back into place, the crack closed up some-
6 what then?
7 A Well, essentially, that's true, that's
8 what you've been calling it, it's a hairline crack.
9 Q Is your basement now absolutly water-
10 proof?
11 A No.
12 Q You still experience what you have
13 learned is consistent with what you might expect a basement
14 to be in Rockbridge County considering the difficulty.....
15 A No, it's excessive as yet.
16 Q Pardon?
17 A No, it's excessive leakage as yet.
18 Q Still more leakage than most basements?
19 A Yes, considering the people I know, the
20 basements I've been in, yes. Relativly new houses and things
21 Q Now, have you paid Mr. Coffey's bills as
22 he testified amount to $3160.00 and the one amounting to
23 $225.50.
24 A I have, but may I make a comment?
25

Mr. Coffey's work there was primiarly directed on correcting the structural deficeancy in the basement that could have progressed to colaspe of the wall. It was not primarily working on correcting leakage at that time. He was hoping to get to it has he went along on the main problem.

Q Has Mr. Plogger paid you any part of -- has he reimbursed you for any cost in correcting the defect.

A No, not at these fees that we're discussing now.

PIERCE - CROSS

By Mr. Robey:

Q Col. Pierce you made a statement along your testimony somewhere that you thought signed documents ought to mean something. Is that what you said?

A Yes.

Q You started out this transaction with a signed document and it was a contract?

A Yes.

Q Between you and Mr. Plogger, was it not? And that contract that you signed and has got you and your wife's name on it, in paragraph nine says that you have made and inspection of this property satisfactory to yourself and

1 you accepted it in the condition it was in, did'nt you?
2 A Yes, it says that.
3 Q It says that and you signed it?
4 A And I signed it after protesting it to
5 the builder.
6 Q Oh, you protested it and she explained
7 to you that this is what it took to do a contract or else
8 there would'nt be any deals. So it was either that or nothing,
9 and you signed it.
10 A No, it was explained to me that this was
11 a very standardized contract used in the state of Va.
12 Q Right.
13 A Any such item as this would be subject
14 to.... would be brought up at closing to be recognized. And
15 of course at that time I had made an inspection which I
16 thought to be adquate, however there's no way I could find
17 concealed defects.
18 Q Well, you're saying there was something
19 outside the agreement which made you go ahead and sign it?
20 A I signed the agreement, yea. With the
21 understanding that it is merely a standardized contract used
22 throughout the state.
23 Q But the next paragraph says that this
24 contract constitutes the entire agreement by the parties and
25 may not be modified.

1 A Yes sir, that's what it says.
2 Q And you signed that, did'nt you?
3 A Un huh.
4 Q And you tell the jury that the document
5 surposed to mean something. But when you came to close, even
6 though you signed this document and put your name on it and
7 put your word to it, you refused to meet that obligation,
8 did'nt you? Unless you got something more than that obligation
9 called for?
10 A No, I only expected to get what I thought
11 was orginally.... In other words, I had detected after signing
12 that contract, a conceled defect, one that could not be
13 reasonably discovered at the time I made my inspection.
14 Q But this contract does'nt say that if
15 you find something later you can change the contract, does it?
16 A Does it speak of conceled defects in
17 there?
18 Q It says that you agree that you made an
19 inspection satisfactory to yourself?
20 A Under the conditions which I made the
21 inspection, yes it did.
22 Q And the defect you found was a crack in
23 the wall?
24 A And the defect that I found was a base-
25 ment full of water.

1 Q During a heavy rain?
2 A What is a heavy rain?
3 Q I was asking you, what is heavy rain?
4 A Okay, I can tell you what the rain was
5 that day.
6 Q What was it in November?
7 A Aaa... November was a drymonth that
8 year, September was a wet month.
9 Q Are you sure of that?
10 A Yes, I am, I have the -- data for the
11 city.
12 Q Where is that at?
13 A It's in my folder here.
14 Q Would you get it out please?
15 A I....I'm reluctant to, since this is
16 data I'm using on another research project which I do happen
17 to be using-- However I will be happy to give you....
18 Q Will you read that?
19 A What year was this? There's no date on
20 it.
21 Q 1975
22
23 Mr. Spencer: Your Honor, I am very
24 very---- here as to who wrote it or where it came from but it
25 is obvious some heresay source and I object to that.
Mr. Robey: What date is that?

1 Mr. Spencer: I have no objection to that
2 Go ahead with that, but it does'nt say
3 what year it is talking about and that
4 should be made clear.
5 Q You say September was the wettest month?
6 A Of that year, a unusually wet month.
7 Q What of October?
8 A October, November were relativly dry.
9 Q Do you have the data to substantiate
10 this?
11 A I can give you the data off this computer
12 printout for this official record for Lexington for the
13 Weather Bureau. 1975, August had 3.68 inches of rain, Sept.
14 had 7.43 inches of rain, October had 2.60 inches of rain, Nov.
15 has 1.76 inches of rain.
16 Q Is that 1975?
17 A That is in Lexington, Rockbridge County,
18 1975 dated precipatation in inches, U.S. Government Bureau of
19 Records.
20 Q What is the average for these months?
21 A The normal average for these months,
22 again I did go to the trouble of looking up such , and typically
23 here in Rockbridge County and I'm quoting from the Climatic
24 Atlas of the United States, the average range accurs from one
25 to nine inches for July, August, September and normally the
rain fall from March To September will exceed three inches

1 a month, and during July and August willnormally exceed 4
2 inches a month.
3 Q In what month was it you notices water
4 in the coiner of some places?
5 A The first time in July.
6 Q Then you had some in September?
7 A Yea, that's when I was doing a lot of the
8 bucketing.
9 Q In September, when you had 7.43 inches of
10 rain in one month? And after all this other has been done
11 you still have water when you have heavy rain?
12 A In one area, yes, only in one area, and
13 very much reduced.
14 Q But even that occurs in heavy precipitation
15 A As yet, they're still trying to correct
16 that problem.
17 Q Now, did you agreed to pay 63,000.00
18 for this house, did you not?
19 A Un huh
20 Q And when you got to close the transaction
21 you would'nt pay 63,000.00 until you got a deed and then you'
22 got an additional written documental warrenty, is that correct?
23 A Basically correct, sir.
24 Q Now you accepted the deed first, and then
25 you accepted this written document which you call warrent?

A That is correct.

Q So how much did you pay for the written warrenty? Over and above 63,000.00?

A Well, let's put it this way, we went ahead and closed the deal that day. Mr. Plogger got his money as he told you then. Whereas otherwise it would of certainly been delayed, to have the problem corrected before I would close or may of resulted in another case in court, in which there would of been the expense to Mr. Plogger.

Q Would you answer my question. You paid the $63,000.00 in accordance with the contract figure?

A Yes.

Q And performed on the contract like you were supposed to?

A Yes.

Q And you asked for a warranty, some sort of written document. How much did you pay for that in addition to the $63,000?

A Only that I paid promptly the 63,000.00.

Q Well, you were obligated to do that under this contract.

A Um.. That would be a subject of which we'ld have to decide in another court, for it to come to that.

Q Well, I assume the Judge decided it in this court. But you did not give up anything more or pay anything more than you orginally agreed to pay on this contract in addition to 63,000.00?

A Well, yes, I accepted a house that was defective to live in until such time until it was corrected and in so doing of course, I did make payment on the house with the understanding that it would be corrected.

Q And I understand that you sub... that you thought written document was surposed to mean something?

A Yes, I think that goes two ways.

Q And this document says that the house was alright and you had made an inspection acceptable to you? And the condition you found it, you would pay 63,000.00, did'nt you?

A Yes, but however may I again say, the defect was conceled at the time I inspected it.

Q Conceled?

A Yes, it was'nt raining.

Q Over what period of time did you look at this house?

A Over a period of a week or so.

Q Well, you started looking at it in January?

A Ah.. yes, but a very brief look and I'm not even sure if we entered the house at that time.

Q When did you enter the house for the first time?

A Sometime.. uh.. very early in July.

Q Sometime very early in July?

A Un huh.

1 Q I'll show you a letter dated April 1,
2 which bears your signature and ask you if you wrote that let-
3 ter?
4 A I did.
5 Q What does it say in the second quote
6 paragraph?
7 A It says that I still like everything
8 about that house in Red Manor subdivision.
9 Q You still like everything about the
10 house?
11 A Yes, that's right. That I saw.
12 Q You say written word is surposed to mean
13 something?
14 A Un huh. I agree, what I saw, I liked.
15 Q Mr. Robey: Introduce this into evidence
16 Judge.
17 A I still like what I saw at that time.
18 Q Col. Pierce, I'll show you a document
19 and ask whether that is your handwriting?
20 A Ah.. It is not.
21 Q It is not your handwriting?
22 A It is not my handwriting.
23 Q Would you read it and refer to the item
24 of complaint under there and ask if that will refreash your
25 memory...

1 Mr. Spencer: Objection, your Honor, The
2 witness said that was not his writing and I think we need to
3 know where it's coming from and whose it is.
4 Q Did you make a complaint to Mrs. Herring-
5 ton about the house?
6 A Ah.. What date is this?
7 Q Well, I don't know. Did you make compl-
8 iants prior to the closing of the house?
9 A Ah.. Yea.
10 Q Did you make those complaints?
11 A They look right, un.. yea, I'm not sure
12 which times these were made.
13 Q Well, you want to think about it? That
14 was mighty close to closing, was'nt it?
15 A Is What?
16 Q Right close to closing?
17 A Had to be very close to it, I would think
18 because at least by that time, I had determined that the
19 leak exsisted in the family room where the study carpet was
20 wet and soaked with water, yea.
21 Q You went with Mrs.Herring to that house
22 went into the basement before signing that contract and after-
23 wards ya'll looked at that little hairline crack up there and
24 you knew it before you signed it.
25 A WEll, there are certain hairline cracks

that you put on, some of them are lots more than hairline cracks.

Q And you saw them and knew they were there, didnt you?

A Well, what a minute, which cracks are you talking about? Are you talking about horizontal cracks or vertical cracks?

Q Both.

A I don't remember seeing any horizontal cracks. Vertical cracks, yes.

Q You mean she had some vertical cracks?

A These are vertical cracks due to the settling of the foundation which, I will not say are absolutly normal, they can be expected in most homes built with a block foundation.

Q And you signed this contract knowing that they were there?

A Those had nothing to do with what the problem was. These vertical cracks, they are there now, they are uncorrected. Those are mentioned by the architect and they are not subject to repair.

Q Well, what are we talking about Mr. Pierce I understood some of your last testimony to say that Mr. Coffey work was toward correcting the defects in walls and now your saying that your compaint now is about the water? Which is It?

Mr Spencer: Objection Your Honor. I'd like to have that question... Mr. Robey is very unfair. He asked this court to make a rule about the defective wall and what's to say, Judge that.....---

Q Did you say in your testimony awhile ago that just almost at the end of it, Now Mr. Coffey's work is toward correcting the wall?

A Yes, the structural defiency there, yea that's right.

Q Now the wall is what I was just asking you about and you said you saw the wall?

A Oh Yea, but that thing had not yet moved enough so it could be detected in the dark basement at the time I inspected it, if it had in fact, even started moving at that time.That occurred during this very wet month of September, when most of the moving occurred on that , that we discussed earlier.

Q In September?

A Yes. But that has nothing to do with the fact that the basement was leaking before that particular defect in the wall developed.

Q Did you take pictures of the wall in September?

A I have got some pictures at least showing

1 the extent inwhich leakage occurrs through the block and I
2 think...
3 Q Let's talk about this crack in the wall
4 which you make your complaint about .....
5 A But um.. it would probably show in this
6 photograph say from a distance from here to Mr. Mann across
7 the basement with the Polaroid camera is a 3/16inch crack
8 gonna show up here? I did'nt come up and try to take a close
9 up of the crack.
10 Q Why? Did'nt you think that would help?
11 A No, I did'nt, I thought the warrenty
12 would be honored. I did'nt think I would have any particular
13 problem getting them fixed.
14 Q Well you've got to have a problem first,
15 have'nt ya? And you've got to establish the problem exsisted?
16 A I think the fact the problem exsisted
17 will be established.
18 Q Did anyone tell you....---
19 A The size of the crack is inmaterial----
20 Q Where are your architectural plans for
21 doing the work that you ---
22 A Plans? Do you draw plans for every
23 little bit of work that is done on a house?
24 Q Well, you got an architect, didn't you?
25 A That's right.

1 Q Where are the architect's plans?
2 A Do you have to draw a picture to explain
3 a plan? We explained the problems and he ---
4 Q Do you have specifications for the job?
5 A I have speifications in the form of --
6 as for having pictures to explain the work, no, I don't.
7 Q Well, so you don't have plans?
8 A Not in the form you refer to.
9 Q No architectural drawings?
10 A No.
11 Q Do you have any specifications for the
12 job? What size brick - how long a wall - where it is to be
13 located, that type of thing. Can you show the jury any of
14 that?
15 A No, not -- you mean written specifica-
16 tions?
17 Q Sure, do you have any?
18 A Specifications as to what size brick
19 are not applicable, since there will be no brick used --
20 Q Well, that ---
21 A The fact that the cinder blocks would
22 be rodded and filled with concrete are in the architect's
23 recommendations - the interior walls of the basement to be
24 insulated --
25 Q OK, do you have a break down on the

1 cost of each of those individual jobs?
2 A I do not.
3 Q You don't?
4 A No, I received a bill in a specified
5 amount and I paid the bill.
6 Q Did you get more than one estimate on
7 the job?
8 A No.
9 Q Did you get any break down on what labor
10 would cost you?
11 A No.
12 Q Did you get any break down on what
13 materials would cost you?
14 A No.
15 Q Didn't that concern you at all?
16 A None whatsoever, I had trust in the man
17 who was doing the work.
18 Q Soyyou just took his price?
19 A I certainly did, I trusted him.
20 Q $3,000 or whatever it was, and never
21 found out anything about what the work was or ---
22 A I knew what the work was that would be
23 done. I observed it as it went along, what he agreed to do
24 and what he did. The amount of the bill was less than the
25 estimate.

1 Q Have you ever paid any more to Mr.
2 Plogger than $63,000?
3 A No.
4 Q I show you a document dated July, 1975.
5 Does it state your name at the top and have your signature
6 at the bottom?
7 A Yes.
8 Q Is that a contract you entered into?
9 A No, it's a contract I agreed to but---
10 Q So you didn't enter into it, it is a
11 contract you agreed to?
12 A Yes.
13 Q And that was the contract that Mr.
14 Plogger brought to you, after asking you some questions, was
15 it not? And giving you some alternatives?
16 A I don't recall exactly a discussion of
17 alternatives, this was brought to me.
18 Q And you accepted it.
19
20
21
22
23
24
25

A As what? I accepted that this work be done. And in effect I gave permission by so signing.

Q Well, it's makes you the beneficiary of the contract?

A Well, um.. it lists me as a purchaser and I did'nt purchase anything.

Q Well, you signed it as a purchaser?

A Yes, but I certainly did'nt give him money on this.

Q WEll, he paid for it. And you accepted his payments?

A Yea, well, this was an attempt to satisfy....

Q How many times does it say that they may have to come back and will come back? In case that contract poses a problem to you?

A Up to three times repeated over a period of one year after instillation.

Q One year, three times. Now you were a party to that agreement by your signature?

A In that I permitted.....

Q How many times did you get them back to there?

A I got them back one addition time.

Q And you did'nt get them back the two further times that were permitted?

1 A That's right.

2 Q And already paid for under the agreement,

3 did you?

4 A No, I did'nt.

5 Q And you did'nt do it because you wanted

6 to get some more holes down there in that basement and you

7 wanted to get some different stuff up front and you'd been

8 talking to an architect and you got some different fancier

9 ideas in that time, did'nt you?

10 A No

11 Q Why did'nt you fulfill the committents

12 of that agreement?

13 A Alright, I did get them back one time.

14 And it was like pulling teeth.

15 Q Why did you get them back the one time?

16 A Because the leak persisted, after their

17 work. They were very reluctant to return, but they did

18 come back and repump the area again. After the second visit

19 back the leak was not only no better but it was even worse.

20 So, it did'nt seem logical to call them back for a third time

21 and see if I could revert the basement into a swimming pool.

22 Q Well, you had a contract with them?

23 A As obvious...

24 Q They were responsible people or else

25 you wouldn't of accepted a contract with them?

1 A Oh yea.
2 Q Well, you accepted them didn't you?
3 A I accepted Mr. Ploggercontract with
4 them.
5 Q Well, why did you sign it unless it was
6 acceptable?
7 A Because he asked me to sign it with the
8 understanding that , of course this permitted the work to be
9 done on the house. Mr. Plogger no longer owned the house.
10
11 Q Well, if you weren't willing to accept
12 these people as good and reputable people than why did you
13 accept it at all?
14 A I didn't say I wasn't willing to accept
15 them as good and reputable people, this particular technique
16 of pumping -- around the foundation under certain situations
17 a good technique, if properly appiled. As we found out later
18 this was not even properly appiled.
19 Q You acknowledge accepting....
20 A I acknowledge signing this agreement.
21 Mr. Robey: I want to introduce it into
22 evidence, Judge.
23 q And you say you did not carry it through
24 on all three times?
25 A I just carried it through one time.

1 One adittional time. May I add that.... One additional
2 reason I did not, I should mention, was that of course by the
3 time I had gone through the one year -- -- the oral
4 warrenty of one year had expired too. Which also concerned
5 me at that time.
6 Q What was the representation from the
7 architect and from the contract at this time that this wasn't
8 surposed to do for the water in your basement? What did the
9 architect tell you?
10 A I don't believe he said specifically
11 what would completely eliminate the problem.
12 Q Then what did he do?
13 A At least he reduced the problem, of
14 course the work that was done was primarily to keep that
15 front wall from caving into the basement. If that caved in
16 then we'd have a real problem.
17 Q Well, there were lots of ways to do that
18 weren't there? You were given three or four differnt ways
19 to do that?
20 A By whom?
21 A By Mr. Plogger, using the -- this
22 obviously didn't work, in fact it aggravated the problem.
23 Q Geting the -- one things getting the
24 wall, the other things getting the--.
25 A What are you talking about?

1 Q I'm talking about what the contract was
2 with Coffey? What was he going to correct?
3 A Primarily he was going to restore struct-
4 ural integrity to that wall and at the same time try to correct
5 what he could with the water problem.
6 Q This wall was acceptable to you at the
7 date of closing was it not?
8 A In the inspection I was able to make, yes.
9 Q And it had been standing there for nineteen
10 months prior to that time?
11 A Yes, and if you'll check the record had
12 been relativly dry months.
13 Q And then it continued I assume to be
14 acceptable to you because in July of 1976 you went ahead with
15 the project with Mr. Plogger not to do anything about the wall
16 but to do something about the water, didn't you?
17 A 1976? July 1976?
18 Q Well, that date of the waterproofing con-
19 tract.
20 A Oh, that was 1975. That was much previous
21 to discovering the crack in the wall.
22 Q Alright, you closed on what day?
23 A 25th of JUly, 1975
24 Q And immediatly you brought --
25 When did they come back?

A The first day that we moved in and I'd have to look at my records to see way day that was, but it was early August I believe .

Q Okay, and when did you call them back? The second time?

A I have no record of thatexcept they objected very much to coming back but they considered it to be less than 90 days at that time.

Q When do you claim.. ah.. say you saw movement in the wall?

A It became very rapid movement during the month of September.

Q When did the architect first come out?

A I talked to Mr. Ravenshorst first I believe the end of October , I tried to work through Mr. Plogger first. Mr. Ravenshorst was probably out there the first week of November.

Q And you say he did no measuring whatsoever?

A Well, he measured the lenght of the house, things like this.

Q He didn't measure the slope of the wall?

A As to whether or not is was pumped? No, he didn't have a -- to use at the tiem.

Q And you say no one ever did measure it? That you know of?

a Measure what? The height of the walls?

Q THe plumb?

A Nothing more than putting your head up beside the walls to see whats normal ..

Q Do I understand you to say you have no pictures here today that will show it?

A That will show the amount of displacement at all? NO.

Q Do you have any pictures here at all?

A No

Q You've got pictures here at home but didn't bring them?

A I've got some pictures that show how wet the wall got under conditions of leakage...

Q Why didn't you bring them today?

A It didn't seem awlful material where water had stood on the floor.

Q Don't you think the jury might be interested?

A Possibly

Q Why didn't you bring them?

q A It just didn't occur to me

Q You've got no plans and no drawings?

A No.

Q And no specs?

A No, I don't have.....

PIERCE - DIRECT

Q Col. Pierce, I want to clear up one question and that is about what happened at closing. In answer to Mr. Robey's question you responded that you'd seen the wall before closing and after being given the deed. Now my question is before you agreed to accept the deed did you require that he promise.....

Mr Robey: Objection, Your HOnor. Objection to the question, just ask him what happened.

Q What happened before the deed was given to you and what happened after the deed was given to you so far as the water was concerned? I want to know what rule was made before you accepted the deed?

A You acted as my attorney and I insisted the written warranty be provided for the house. Mr. Robey, I believeworded the warranty, dicated the way it be worded and I believe it was typed up, it was signed prior to signing the deed, with the expressed understanding that it would be delivered after the deed was signed.

Q Did you furnish Mr. Plogger through his attorney a copy of the report made by the architect?

1 A Yes sir.

2 Q Did you furnish Mr. Plogger through his
3 attorney the estimate made by Mr. Coffey for the work, be-
4 fore you actually contracted with Mr. Coffey to do it?

5 A Yes.

6 Q On any of those occasions, did Mr.
7 Plogger come forward and agree to do the work?

8 A There was a interchange of letters in
9 which it was indicated that Mr. Plogger stood ready to do
10 the work, if said work - said requirement was fairly explain-
11 ed to him - something to that effect.

12 Q Had you at that time explained to him
13 the nature of the work?

14 A Bit by bit, over the preceeding months
15 as I talked to him on the telephone I believe almost all of
16 this was discussed with him. And then of course it was ex-
17 plained in the copy of Mr. Ravenhorst's report that was for-
18 warded to him.

19 Q In response to the questions that Mr.
20 Robey asked you -- he said you were just trying to get some-
21 thing that you didn't want to pay for-- did you have any
22 other problems with this house that you haven't brought to the
23 attention of Mr. Plogger?

24 A Yes, there's a few that ---

25 Q Tell the jury some of the problems you

1 haven't bothered to bring up.
2
3 MR. ROBEY: I object to this Your Honor.
4 We're here about a basement, Judge, I
5 thought the suit was on the basement
6 and I object to this.
7 MR. SPENCER: If Your Honor please, I
8 would like to comment on that if I may.
9 Mr. Robey is objecting to my asking a
10 question - as I understand the Court's
11 ruling - on the grounds that it is not
12 relevant and I agree that is not relev-
13 ant to the damage, but in an effort to
14 impeach this witness Mr. Robey suggested
15 that he is trying to get something he
16 has not paid for and he is nit-picking
17 about it. I would submit the witness
18 is entitled to rebut that effort to im-
19 peach him by showing that he isn't doing
20 that at all - that there are a lot of
21 problems that he has not tried to collect
22 for.
23 MR. ROBEY: I made reference to that in
24 the opening statement as a conclusion
25 that the jury would draw after hearing

all of this, but I never asked him anything about that at all. I never asked him one question about getting something he hadn't paid for.

MR. SPENCER: I submit he did Your Honor.

COURT: I will sustain the objection. I think the question had to do with the question of consideration and at this point it is not allowed, and I will sustain the objection.

HENRY R. RAVENHORST

a witness called by and on behalf of the Plaintiff, being duly sworn, testified upon his oath as follows:

RAVENHORST - DIRECT

By Mr. Spencer:

Q Please state your name and adress.

A Henry R. Ravenhorst, and my home address is 202 Johnstone Street, Lexington.

Q What is your profession?

A I am an architect.

1 Q How long have you been an architect?
2 A For over thirty years.
3 Q How long have you been an architect in
4 Lexington?
5 A Over thirty years.
6 Q What credentials do you have as an
7 architect?
8 A I have been practicing in conjunction
9 with partners for about ten years and I have been in practice
10 for myself for possibly twenty years. I was trained as an
11 engineer and an architect and I have been practicing ever
12 since World War II.
13 Q What organizations do you belong to?
14 A I belong to the American Institute of
15 Architects, the Virginia Society of Architects, which is a
16 sub-division of that, and the Shenandoah Valley Association
17 of Architects.
18 Q What degrees do you hold?
19 A I have a Bachelor's Degree, graduate
20 work in engineering and architecture.
21 Q At the request of Col. Pierce, did you
22 go to view his home in the fall of 1975?
23 A That is correct.
24 Q Do you recall when you went?
25 A According to my records I think it was

1 about the first week of November, 1975.
2 Q Did you make an examination for the pur-
3 pose of determining whether or not there were any defects in
4 the basement of the house?
5 A That is correct.
6 Q Would you tell the jury what defects,
7 if any, you found on that occasion?
8 A Yes. When I examined the basement the
9 front wall, which was dug in the side of a hill - I found
10 that this wall had quite a noticeable bulge in it. I also
11 noticed it had a horizontal crack, a separation in the
12 masonry - the cinder block - this ran almost the length of
13 the wall. I noticed that the wall was a long wall which
14 was dug in at the side of a hill. I found that this wall
15 had quite a noticeable bulge in it . I also noted that it
16 had a horizontal crack, a separation in the masonry. I
17 noticed that the wall was a long wall, almost seventy feet,
18 without any lateral support - a long, continuous wall, and
19 the crack occurred about three courses down, that would be
20 roughly about two feet down from the top of the block, where
21 the block had separated, and just by aligning this up by eye
22 and just with a straight edge, I could tell it was bulged
23 more or less in the center of the wall and then tapered out
24 to a less noticeable bulge at the extremities of the wall.
25 I think it has been mentioned here before, that the only

1 support was the two end walls, but there was about a seventy
2 foot length of wall that was not supported in a transverse
3 manner in any way. I also noticed that on the side of the
4 wall where the girder - which ran through the middle of the
5 building approximately, was bearing on the side wall there
6 was no additional support, it was bearing just on the side
7 wall and there was quite a noticeable structural crack in
8 that wall, which was due to the fact as far as I could tell,
9 that the load was being transmitted to that wall and it
10 didn't have enough area to transmit it adequately. I also
11 detected some cracks over the windows in the basement in
12 the masonry work. I detected a considerable amount of damp-
13 ness and evidence of previous leaks as well as current
14 leaks at that time. There was an area of floor that was
15 very wet and an area where the walls - especially the west
16 end of the house - were very damp - and evidence of a lot
17 of water standing. I also detected in the bath room in the
18 basement the odor eminating from that - from the bath room -
19 indicated there was apparently some malfunction of the plumb-
20 ing system. About the best I could determine - I did not
21 make any exhaustive test because I didn't want to dig up
22 anything - I felt at that time that there was not a trap
23 under the shower and that the odor from the sewage system
24 was backing up through the pipe there in the shower area,
25 since there was no trap there. That was my observation -

1 -- or my estimate. As I say, I did not actually explore that
2 by digging into the ground to find out what was there. I
3 think those were the general facts that I observed at that
4 time. I do have a report on this and I could refer to that
5 to see if I have covered everything, but these are the prin-
6 cipal items. The front wall had a very noticeable bulge.
7 By putting a straight edge up to the wall, although I did
8 not take measurements because it is very difficult to take
9 accurate measurements because the wall was bulging, a consid-
10 erable portion of the wall itself, and it appeared to me to
11 be possibly an inch, or possibly a little bit more and the
12 joint itself had opened up in the block. This is the sort
13 of thing that you would expect to find on a long wall,
14 especially when the house was built on the side of a hill
15 and there is nothing else there to resist the pressure from
16 the earth piled against it and the water that might run down
17 against it. To me the situation looked as if it should re-
18 quire immediate correction. That was my recommendation.
19 Q What did you recommend be done to correct
20 the problems?
21 A I recommended on the front wall - well,
22 I recommended all of these - I read my cover note here - I
23 recommended to Col. Pierce that all of these things that I
24 have mentioned were the items that would normally be the
25 responsibility of the builder and from my experience, the

builder would make these corrections.

MR. ROBEY: Objection would be made to that statement and it should be stricken because the law in Virginia is that there isn't any implied warranty. That's a matter of law and he's an architect. In fact, the law is to the contrary.

COURT: I believe he is testifying to what his understanding was and what was said at the time. I would tell the jury that his statements do not indicate what is in fact the law.

A All right, in my memorandum to Col. Pierce then, I made the suggestion of varioud things I felt could be done to correct the noticeable flaws, and one was to -- which we have recommended before in other situations -- one was that the front wall be reinforced by filling a certain number of voids in the blocks with concrete, and putting in those reinforcement rods so that the stress would be transmitted uniformly over more of the wall surface. Then I further recommended that some lateral buttress be provided, and the simplest thing that I felt under the situation there would be to make this of masonry or cinderblock and anchoring

1 this in the floor with dowels to effect a buttress so that
2 the load being transmitted against the wall after it had
3 been reinforced with the concrete, that this would help
4 keep the whole wall from tumbling down. I also recommended
5 that a pilaster if necessary could be built.underneath the
6 girder to give a greater -- so that the load from the girder
7 itself would be concentrated on a very narrow area of the
8 wall, which is the customary procedure. I commented I think
9 about the cracks over the windows - that this was not an
10 unusual thing to happen in masonry construction, sometimes
11 this occurs due to some slight settlement, some shrinkage,
12 and that I would advise him to simply keep on the alert to
13 see that these did not progress to a more serious condition.
14 I believe that was the extent of my -- well, on the plumbing
15 I simply pointed out that should be investigated or corrected,
16 because the plumbing code very accurately indicates what is
17 required, or what is permitted in the installation of plumb-
18 ing fixtures, that they be properly vented and properly
19 trapped. I simply suggested that he contact the builder and
20 see if that were done.
21 Q Do you know who did the work?
22 A The original work?
23 Q No, the corrective work?
24 A Yes, Mr. Coffey, W. W. Coffey and Son.
25 Q How long have you known Mr. Coffey and
his work?

1 A I have known Mr. Coffey just about all
2 of my life I would say - his firm for about a period of
3 thirty years - and I have known Francis Coffey for at least
4 thirty years.
5 Q What is his reputation in the business?
6
7 MR. ROBEY: I object to that. I can
8 bring a hundred people in here to tell
9 you Mr. Plogger's reputation but that
10 is not admissible either. Unless you
11 permit me to bring in all the people
12 who have had experience with Mr. Plogger's
13 work ---
14 MR. SPENCER: I will withdraw the ques-
15 tion, Your Honor.
16
17 Q Mr. Ravenhorst, are you aware of the
18 charges that Mr. Coffey made for the work that he did?
19 A Generally, yes.
20 Q What is your understanding of those
21 charges?
22 A The charges that I received a call
23 on, it would be roughly $3,100 to make these repairs.
24 Q If Mr. Coffey charged about $3,100 to
25 doing the basement work you recommended and if he had to

1 come back later to correct the connection of the flow from
2 the drain tile to make it a separate over flow from the out
3 flow from the storm drain, and he charged $225.00 for that,
4 in your opinion are those reasonable charges for the work
5 that Mr. Coffey did?
6 A Certainly.
7 Q Are they consistent with the charges
8 for doing that kind of work in this area?
9 A Yes sir.
10
11
12 RAVENHORST - CROSS
13 By Mr. Robey:
14
15 Q Mr. Ravenhorst, you submitted some sort
16 of report dated November 14. Would you refer to that report
17 please?
18 A All right.
19 Q The page that says " the following
20 conditions.." do you see that?
21 A Yes.
22 Q Would you read to the jury that first
23 paragraph?
24 A Yes sir. " The following conditions
25 that will probably require correction were noted on my recent

1 inspection of your residence---

2 Q Would you stop there just a moment --

3 you said the following conditions which "probably" would

4 require correction - that's a very definite qualification -

5 you said probably?

6 A Yes sir.

7 Q Why did you say probably?

8 A Well, I have one item in here that I

9 was not sure would need correction.

10 Q You didn't single out any one condition -

11 you said " the following conditions" and you have all five

12 of them listed. " The following conditions will probably

13 require correction..." There was some question in your

14 mind, wasn't there?

15 A No there was not.

16 Q Then why did you put probably in there?

17 A I don't know. The intent here was

18 simply to indicate that - with the probable exception of

19 the cracks over the windows - that everything else would be

20 corrected.

21 Q But the word probable has a very def-

22 inite meaning.

23 A It does.

24 Q It means maybe it will and maybe it

25 won't. Isn't that what it means to you?

1 A Virtually, yes.
2 Q And when you use it, that's what you
3 mean?
4 A I used that in a different sense here.
5 I used that to refer to the fact that in the listing of these
6 items there may be one item that would not be required.
7 Q You made reference to the fact that you
8 told Mr. Pierce that the problems that he was complaining
9 about, or what you saw out there, would normally -- or would
10 be the responsibility of the contractor. Have you since
11 learned that your advice to him was in error and that the
12 Supreme Court has ruled that there are not any warranties if
13 you buy a house just like it sits?
14
15 MR. SPENCER: Objection, Your Honor.
16 OOURT: I believe this question calls
17 for the witness to give a legal opinion.
18 I believe that was the objection that
19 you previously made. I think it is
20 calling for him to give instructions
21 as to the law in this matter.
22 MR. ROBEY: I will withdraw the question.
23
24 Q Do you acknowledge that you were not in
25 a position to give that type of advice because you didn't
know?

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1 A No sir. I will say Mr. Robey, that from
2 experience in this area, in dealings with builders and con-
3 tractors, it is an accepted principle that the contractors
4 and builders will do good work.
5 Q If you are familiar with the standards
6 in the area I assume you are familiar with the standard ap-
7 proved state contract that the Virginia Association of Real-
8 tors has, and so forth?
9 A I have seen it.
10 Q You have seen it?
11 A Yes.
12 Q Then I am sure you are familiar with
13 the fact that it's got two paragraphs in there , the first
14 of which - paragraph 9 - says that " I"( in this case Mr.
15 Pierce) has examined the property and he accepts it just
16 like it is and he doesn't look for anything any more. Do
17 you know ---
18 MR. SPENCER: If Your Honor please, I
19 don't think - the purpose of his quest-
20 ion is - if it has a purpose - is to
21 ask him to state an opinion as to the
22 legality of the contract.
23 COURT: I will allow the question.
24
25 Q Are you familiar with that?

1 A Yes, I am. And I might also if I may
2 indicate that the contract for the purchaser of official pro-
3 perty , the purchaser is not a technician he is not required
4 to know everything thats right or wrong with the house and
5 I think that this has been pointed out in many many incidents
6 certainly in the past few years where people have unsuspectedly
7 bought a piece of property where defects were there but they
8 were not visible and not inherited and I think the contract
9 here that you mentioned uh.. has special reference to what
10 you'd likly expect a purchaser or buyer to observe, not a
11 technician.
12 Q Of course, what I'm asking you wanted to
13 testify to what the custom of agreements are in this area
14 and this agreement is customary in the area, is it not?
15 A I think so, yes.
16 Q And does it fall within your knowledge
17 that this agreement was first reviewed by the attorneys
18 before it was signed?
19 A No, na.....
20 MR SPENCER: Now objection your Honor,
21 there's no evidence to that and it is
22 not truly fact and I ask that that
23 question be struck.
24 Q I was just asking him if he knows or
25 not?

A No, I was not aware of anything that transpired prior to the time that I arrived at the house to look at it.

Q Mr. Pierce did not have your architecture drawings of course what had to be done in order for the contract not to be ...

A It was not a architectural building and this type of work does not require drawings and detailed specifications. THis is repair work and this is what is normally expected that a builder would be able to do so...

Q You put in two walls , supporting walls, did you not?

A That's correct.

Q And those walls if in fact they are required which may or may not be true if in fact they were required they have to be designed in order to do the job , don't they?

A Building a wall is not really, well, the gauge of design, the builder can construct the wall , what design a architect put into that is very minimumal if any, the wall itself is standard procedure and a builder will understand how to build a wall.

Q How much weight will the wall in that Mr. Plogger, er I maen Coffey put in withstand, from an engineers standpoint, how much would it withstand? Or do you know, if you don't know, tell me.

A Well, I can't tell you exactly, I can tell you what the strength of the materials would be, about 742 pounds per inch woulds be the accepted strength, probably of the cinder block....

Q That's the cinder block, I want you to tell me about the wall?

A Just depends on the masontry used on the wall and mortar and so forth, if the cement mortar is put in properly will have the same strength or greater strength than the cinder block.

Q What length of wall did you recommend?

A I recommended, well.... at the time, I recommended that we should have 12 feet from back there in order to get enough of the -- to carry the full height of the wall.

Q How did you arrive at 12 feet?

A Well, at a 45 degree angle you would have roughly 8 or 9 feet, that would at a 45 which would be the minimum. If you went a little bit further, the greater the angle the greater the resistance to your stress.

Q How did you go about recommending 12 feet?

A I don't recall that I specificly recommended it but I recommended the -- and this would be what I suggest as being satisfactory.

1 Q Did you report it?
2 A No.
3 Q Well, how did the contractor know.....
4 A Because I talked tp him on the site, we
5 discussed it on the site.
6 Q Did you go and supervise the construction?
7 A No, I didn't.
8 Q Well, did you make any drawings at all?
9 A No drawings were necessary, we were...
10 Q Did you give any specifications?
11 A No specifications. I didn't involve
12 specifications.
13 Q Well, what is an architect for when you
14 hire him? What does a man go out and pay money for an arch-
15 itect for if he doesn't get a set of drawings so his contract-
16 or knows what to do and he doesn't get a set of specifications
17 so that the contractor buys the right kind of this and the
18 right kind of that and the right kind of the other thing, what
19 are you for?
20 A We were not to architect this house.....
21 Q You were not the architects....
22 A The architect designed this house as
23 built by the contractors.
24 Q Were you the architects for this job?
25 A I was not the.....



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1 Q For Mr. Coffey...
2 A Yes, for the work Mr. Coffey did I was
3 consulting architect.
4 Q Alright, being the consulting architect
5 I assume you were supervising and only desgin, structural,
6 and so forth to make sure he got a fair price.
7 A That's right, he wanted to make sure.
8 Q Now what did you compute the materials
9 should cost.
10 A For a similar type of correction that
11 we have made before and we've done this uh... several other
12 times un... about 5000.00.
13 Q I'm talking about this job, what did
14 you compute... of course when you arrived ..... I'm interested
15 in you telling Mr. Spencer that the charges for 3,100.00
16 were reasonable.
17 A That's right.
18 Q I assume that in order to determine it
19 was reasonable you have to amke a few consultations, what
20 did you determine the materials should cost for this job?
21 A I did not make that determination, break
22 it down , I base it on past experience where we have had
23 several other houses where this has occurred and the cost, the
24 average cost for reparing it was 5,000.00. Very similar
25 situations.

1 Q Do I understand you to say you made no
2 determinations whatsoever on what the amount of materials
3 should be?
4 A Not only the amount of materials but ---
5 Q Did you make any determination on how
6 much cinder block would be required?
7 A No I did not.
8 Q Did you make any determination on how
9 much drain tile would be required?
10 A This is all ---
11 Q Would you answer my question?
12 A No I did not. It is not necessary.
13 Q Did you make any determination of the
14 amount of anything, material that would be required?
15 A No. It was not necessary.
16 Q Now, not having done anything on mater-
17 ial, I guess the only other thing would be labor and time,
18 is that correct?
19 A Yes.
20 Q How much time did you determine it
21 would take to put the walls in?
22 A I made no determination. This was not
23 a part of our responsibility.
24 Q How much determination did you make as
25 to how much time it would take to put the drain tile in?

1 A That was not necessary.
2 Q Not necessary?
3 A Not necessary for me to make that deter-
4 mination.
5 Q If you don't know how much drain tile is
6 going to be put in, I guess you don't know how much it is
7 going to cost, do you? And if you don't have specifications
8 you don't know how much tile is going in, do you?
9 A Yes I do.
10 Q How much tile was it?
11 A I don't have the figures on it but I
12 could tell from the length of that house, the measurements of
13 that house, what tile was necessary, the amount of cinder
14 block that would be necessary to restore the wall and this
15 was well within the estimates of what we have used before on
16 other jobs.
17 Q How many estimates did you suggest -- as
18 consulting architect, how many estimates did you suggest that
19 Col. Pierce obtain to get this job done?
20 A After being advised that Mr. Coffey was
21 supposed to do this I did not suggest that he get any addit-
22 ional estimates.
23 Q Is that the custom -- the way you deal --
24 you only get one estimate?
25 A When dealing with someone that I have

1 the greatest of confidence in, yes. Repair work is very
2 difficult to estimate. You get three contractors to estimate
3 it and ---
4 Q You would get different prices wouldn't
5 you?
6 A You could accept the low one and you
7 might end up paying twice as much. I know this from exper-
8 ience.
9 Q If you got a contract for the job, to
10 get it done right, one man might give you one price and
11 another might give you another and another give you another
12 one, isn't that right?
13 A That's right.
14 Q And if you had gotten two or three bids,
15 one might have been below this one and one might have been
16 above it?
17 A That's right but that could have been a
18 bid that was from someone that I had no information about or
19 no knowledge of and I know that Mr. Coffey's records are
20 kept accurately, I know he is a man of great honesty and I
21 felt that this was the wise thing to do. I wasn't excluding
22 anyone else -- I just figured that was best.
23 Q Are you saying that Mr. Coffey is the
24 only honest, available contractor in Rockbridge County?
25 A No, of course not.

1 Q Then why would it not be wise to avail
2 yourself of more than one reasonable, honest contractor?
3 A Because of the nature of this work and
4 the amount involved here, I just didn't think it was -- it
5 would be worth that much additional effort.
6 Q It's worth an effort to save money, isn't
7 it?
8 A Yes, I guess so.
9 Q Do you still stick to your statement
10 that it isn't worth the effort if it might save money?
11 A Well, a small job like this, the amount
12 of difference you would be talking about would be very limit-
13 ed. It would involve an awful lot of time and effort on the
14 part of several people to get other prices involved in this,
15 to go over the work, to ---
16 Q It doesn't cost anything to get a bid,
17 does it?
18 A Not from the contractor but it costs
19 an awful lot of time and effort of the people who are in-
20 volved in it.
21 Q But that would be a benefit to Mr. Pierce
22 and it certainly wouldn't hurt anything, would it?
23 A That's right.
24 Q But that was not utilized?
25 A No, we were lucky to get the one we did.

1 Q But you only asked one --
2 A Well, I don't know how many Mr. Pierce
3 asked.
4 Q How many did you recommend he ask?
5 A After he had mentioned that Mr. Coffey
6 was willing to do the work and had given him a price, I told
7 him I thought this was a very fair price and he should stick
8 with it.
9 Q In talking about the reasonableness of
10 the price, did you get from Mr. Coffey what he was charging
11 for materials?
12 A No. I got no break down from Mr. Coffey
13 on anything.
14 Q No break down on anything?
15 A No. He would have furnished it to us
16 if we had required it, but we did not require it.
17 Q Do I understand your explanation of this
18 to be because $3,100 is a small job? Is that your reason?
19 A That is one factor, yes. A contractor
20 does not like to be involved in too many small jobs.
21 Q So $3,100 is a small amount of money?
22 A Relatively small, but in proportion to
23 what goes into the cost of a building, it could be a very
24 appreciable amount but to correct flaws that could have
25 caused damage in many, many times that amount, it is a
small amount.

1 Q Do you have any research notes or doc-
2 umentation that would be of any help other than what you have
3 just told me? Any pictures?
4 A No.
5 Q Any diagrams?
6 A No.
7 Q Any records of measurements?
8 A No. Nothing other than this, the rec-
9 ommendations that I made.
10 Q How much are you being paid by Col.
11 Pierce here ---
12 A I have not rendered a bill to Mr. Pierce.
13 I have been doing this type of work in several instances
14 where contractors have been involved where I have not made a
15 charge to either the owner or the contractor. Since Mr.
16 Pierce was a friend of mine I did not send him a bill. I
17 have no bill in for anything at this time, I have received
18 no compensation for my services.
19 Q You are working for free?
20 A At the moment, yes.
21 Q Can you tell the jury why you would come
22 in and take your professional time and do this for free?
23 A Yes, I would be glad to.
24 Q Why?
25 A We have in this area -- or up to very

1 recently I was the only architect in this area. I have been
2 called upon by builders at various times to make recommenda-
3 tions - I have done this without charging them and I felt
4 this was very similar to other situations I had and I simply
5 figured this was a service to both the owner and the builder
6 in hoping that they could resolve their problems amicably.
7 Q Would this explanation be a little more
8 accurate -- that you and Col. Pierce are close friends?
9 A Not really - I would not say intimate
10 friends.
11 Q Close friends?
12 A We are close friends - not social friends.
13 We belong to the same church. He is a member of a neighbor-
14 ing Institution and I work with faculty members of V.M.I.
15 and so ---
16 Q You made the statement before that you
17 had done this for free because he was a friend.
18 A Yes, he is a friend of mine.
19
20
21 HAROLD G. PIERCE
22 the plaintiff, recalled upon his previous oath, testified
23 as follows:
24
25

1 PIERCE - ReDIRECT

2 By Mr. Spencer:

3

4 Q Col. Pierce, this morning in response

5 to a question from Mr. Robey, you indicated that you had

6 taken photographs of the basement. Are these the photographs?

7 A They are.

8 Q Did you go home and get those at lunch

9 time?

10 A I did.

11 Q When were those photographs taken?

12 A I can't tell you exactly, but it was

13 during one of the storms we seem to have so often around here.

14 I couldn't tell you which one it was.

15 Q Was it before the improvements were made

16 by Mr. Coffey to the basement?

17 A I could not say one way or the other on

18 that.

19 Q What do these photographs actually show?

20 A This one shows water running down the

21 wall and across the basement floor and this one shows again

22 water running across the basement floor.

23 Q But you don't recall exactly when they

24 were taken?

25 A No, and neither one of them are far

1 enough up the wall to show the crack in question.
2.
3
4 PIERCE - ReCROSS
5 By Mr. Robey:
6
7 Q Col. Pierce I thought I understood you
8 to say this morning that you had some pictures of the crack?
9 A No, I said I had some pictures of the
10 wall and I said I doubted that the crack would show in them
11 at the distance at which they were taken. These do not go
12 far enough up the wall to show the crack at all.
13 Q You said there were cracks all the way
14 up and down.
15 A That's on another wall. That's on the
16 west wall, if you will read Mr. Ravenhorst's report it says
17 that.
18 Q Do you have any pictures of that wall?
19 A No.
20 Q You didn't bother to take any pictures
21 of any cracks?
22 A They are not exactly photogenic, no.
23 Q Well, the answer is no?
24 A Thats what I said, no.
25 Q How much water does this depict?

1 A I don't know which storm that was but
2 it shows on one there, water running down the wall, and then
3 on the other one it accumulating on the floor of the base-
4 ment as it moves across the basement floor toward the drain.
5 I suppose in neither of those, there would be over a quarter
6 or three-eights of an inch of water as it moved across the
7 floor.
8 Q And on which wall is this?
9 A That is the wall that was repaired.
10 That is the south wall of the house.
11 Q And you don't know whether this picture
12 was taken before or after Mr. Coffey came out there and did
13 his work?
14 A Not for sure, no.
15 Q I thought I understood you to say this
16 morning that you had taken some pictures of the situation
17 before Mr. Coffey did his work?
18 A I don't recall saying that for sure. I
19 said I had taken pictures and I doubted that the crack showed.
20
21 MR. SPENCER: We offer these in evidence
22 Your Honor.
23 COURT: They will be Exhibits 5 and 6.
24
25 Plaintiff Rests

JURY OUT

Motion by Defendant's counsel to strick the evidence of Plaintiff over-ruled by the Court and excepted to by Defendant.

---

RUTH AGNOR HERRING

a witness called by and on behalf of the defendant, being duly sworn, testified upon her oath as follows:

HERRING - DIRECT

By Mr. Robey:

Q For the record, please state your name.

A Ruth Agnor Herring.

Q And your occupation?

A Real estate broker.

Q And were you so working in 1975?

A Yes sir.

Q Were you the realtor who handled the transaction between Mr. Plogger and Col. and Mrs. Pierce?

1 A Yes I was.

2 Q Tell the jury when you first came in -

3 contact with these people, what the circumstances were , when

4 you first showed the house, the method and the manner and

5 how these people went through that house, just what they did.

6 A Col. Pierce came into my office the

7 first day or so of January of 1975. Mrs. Pierce was in

8 Texas, she was not with him. I showed him around some - I

9 did show him this house. It was late afternoon, a lot of

10 snow on the ground and a dark day. I remember wanting to

11 take a picture - or he did - but the house was too dark to

12 do that. We used a flashlight, especially to come down the

13 stairway from the main floor to the basement because there

14 are no windows in that stairwell itself. I do not remember

15 the electricity being on at that time. The next time I saw

16 Col. Pierce was in July. In January - he did not have a

17 contract with V.M.I. at the time and his wife was not with

18 him either. He could not enter into a contract until of

19 course he was employed.

20 Q In July what happened?

21 A I believe it was July 4th. My office

22 was closed but I was working and the back door was open and

23 they came in and he asked me if the house was on the market

24 and I told him I wasn't sure. I didn't actually have a list-

25 ing on it at that time. There was a contract through another

1 realtor that particular day so we looked around some more.
2 They were camping here and it must have been July 11 or 12,
3 early in the morning that Marshall Plogger called me and told
4 me that the contract I previously mentioned had fallen through
5 so I called the Pierces and got them where they were camping
6 and they came in and we of course entered into the contract.
7 Q All right. I'm talking about going out
8 to the house and inspecting it.
9 A Yes, we went out when they first came
10 in on July 4th.
11 Q Tell us how he went through that house
12 and inspected it.
13 A Well, I was surprised at the mention of
14 no electricity because I remember finding out that the inter-
15 com in the front bedroom wasn't working. Mrs. Pierce and I
16 were in the room and ---
17 Q I am not talking about electricity, I
18 am talking about how he went through the house. Tell the
19 jury about that.
20 A In January and in July both, I was
21 really impressed with the meticulous way that Col. Pierce
22 looked through the house. He is a very intelligent person
23 and I would say that 95% of the people who buy houses do
24 not look at them in any way at all like Col. Pierce did.
25 Q How about the basement?

1 A Well, he was very particular about the
2 whole house -- the windows -- I remember he looked around all
3 the windows -- we looked at the crack -- it was there in
4 January.
5 Q In the basement?
6 A Yeah. He described the heat pump to me
7 in great detail because I had not seen one. There are double
8 windows in the basement from the double garage doors, there
9 is another door to the other side. You can get light thru
10 the study that he mentioned and thru the bath room and util-
11 ity room. There is enough to see. Now, if you want to be
12 inspecting minutely - yes, you do use a flashlight.
13 Q Can you tell me whether or not he used
14 a flashlight?
15 A In January, yes. I do not remember that
16 we did in July because I thought the electricity was on. I
17 remember because of the intercom.
18 Q You said that he saw the crack and you
19 saw the crack, what did you all say about it? What did you
20 say about it?
21 A Well, it was there and I told him that
22 the house had been in existence for some time - of course
23 by the time of the closing it was almost two years. There
24 was water in the basement in July, but the word warranty
25 was never mentioned and the crack didn't seem to be a real

1 problem, the water was the problem.
2 Q And the word warranty was never mentioned?
3
4 A No sir, not in my presence at all.
5 Q He has made some indication here that
6 you indicated to him that there would be a warranty even though
7 this contract said there wasn't one.
8 A I don't remember that at all, Mr. Robey.
9 A warranty for a house in our area is fairly new for real
10 estate and three and a half years ago I do not think any one
11 in this area gave them. To my knowledge right now there is
12 only one contractor that does and that is Nationwide Homes,
13 who I happen to represent.
14 Q And he never asked for one from you?
15 A I do not remember if he did and I do
16 not ev er remember the word ever being used because that is
17 a pretty important consideration to give in a contract.
18 Q There was no warranty mentioned in the
19 written contract at all?
20 A No sir. And if it was such a problem
21 I do not know why there was no stipulation in the contract
22 about the water being fixed or the crack being fixed, or
23 something like that, if it was a problem with him. The con-
24 tract is silent on all of those things.
25 Q Are you telling the jury that he saw

1 some water in this basement before he signed this contract?
2 A Yes sir and it was damp enough that the
3 water was coming up the cinder block. Now I have not been
4 there since the last time I was there with him which was be-
5 fore we signed the contract, and I don't know what it looks
6 like now, but I remember that there was enough dampness that
7 it was coming up the wall, particularly the wall where the
8 crack was.
9 Q What was the size of that crack?
10 A It was not enough to disturb me and I
11 see a lot of basements with a lot of bad things. It was a
12 minor - it was a minute crack.
13 Q What if anything did he say to you about
14 this water he saw in the basement?
15 A All I can remember is I called Marshall
16 about the water and the Acme Waterproofing name was given
17 and they were going to be called to fix it. Thats all I
18 remember.
19 Q I am not talking about who you called.
20 I am talking about what, if anything, he said to you.
21 A If it had been a major problem we would
22 have put it in the contract. That's what you do when you
23 write up contracts, you stipulate anything you want to be
24 fixed, or left or added, etc.
25 Q Did he ever furnish you with a list

1 of what he wanted fixed?
2 A I have a list here of these items and
3 attached to it is the name of the waterproofing company.
4 Q Did he furnish you with a list of things
5 he wanted fixed that in any way included the crack in the
6 wall or the water in the basement?
7 A He mentions a few spots - family room
8 carpet - water in basement - screening for patio doors not
9 there - intercom was not working in one room - the basement
10 family room door didn't close - they have the name of where
11 the screens for the patio doors were supposed to be.
12 Q Did he ever ask you for any sort of
13 warranty?
14 A No sir, I don't remember it being men-
15 tioned in any way, shape or form, not even any conversation
16 about a warranty.
17 Q One last question. You said he was
18 meticulous in his inspection of the house. What do you mean
19 by that?
20 A He was very careful to look at every
21 thing in the house. As I said, I remember him looking around
22 the windows, at the tile, the quality of the work that was
23 done in any tile work, the kitchen cabinets - did they work -
24 what type they were, the windows, what were they. A lot of
25 people can go through a house and spend an hour and buy it,

1 but in January we spent - and there was no heat in the house
2 in January I well remember - we were there probably a good
3 part of an hour and when they were back in July we spent
4 quite a lot of time in the house.
5
6
7 HERRING - CROSS
8 By Mr. Spencer:
9
10 Q Mrs. Herring, the crack that you are
11 talking about, that's on the short wall?
12 A No, I'm talking about the seventy some
13 foot long wall.
14 Q Where on that wall?
15 A Right near the meter box.
16 Q A crack coming down --
17 A No, I remember a horizontal crack, I
18 don't remember anything vertical.
19 Q How long was the crack?
20 A I never measured it. I never thought
21 about it because it wasn't an issue. It wasn't anything
22 that concerned him enough I think, or he would have measured
23 it or would have asked me to measure it because I had a tape
24 with me.
25 Q You said that was about the middle of

1 that seventy foot wall?
2 A Right.
3 Q There aren't any windows in that seventy
4 foot wall are there?
5 A No, they are in the garage doors, the
6 double garage doors. But the water wasn't coming thru there.
7 Q The windows that we are referring to are
8 also at the end of the basement?
9 A That's right.
10 Q So there isn't any light right at that
11 point?
12 A Well, opposite this area would be another
13 door to the outside and the bath room, the study and the
14 laundry room and when you open the doors you get light thru
15 there. You don't need a flashlight except if you want to
16 inspect minutely.
17 Q At that time could you tell that the
18 wall was bulging in?
19 A No. I did not sight down the wall
20 because it didn't look -- when you look at something you can
21 tell. You know Mr. Spencer when you do this a lot you see
22 these things. You can walk in a house and instantly see if
23 the walls wave but it didn't impress me as being that way and
24 I never thought about sighting down it.
25 Q You indicated that he had mentioned to

1 you - I assume after the contract was signed, but before
2 closing, some problems he had with the house, is that
3 correct?
4 A No sir. We were out there and looked
5 before he signed the contract.
6 Q Did he ever give to you a list of any
7 objections he had to the house, after the contract was sign-
8 ed but before closing?
9 A I don't really remember. He did not
10 himself give me any list. These things were things that
11 I was writing as we walked around the house. It was evi-
12 dent the screens were not there on the patio doors and
13 the intercom didn't work.
14 Q You say he agreed to get this outfit
15 out of Roanoke to fix the basement before the contract was
16 signed?
17 A No, I am not sure when that was made.
18 I called Marshall Plogger to ask him about fixing the water-
19 Q The water problem in the basement?
20 A Yes - but I do not know when the Acme
21 Waterproofing Company was contacted or anything like that.
22 But my point is, if there had been a major problem in this,
23 Col. Pierce is a very intelligent, very meticulous person
24 and it would have been so stated in the contract. Every
25 person purchasing a house sees to it that everything is in
the contract.

1 Q But these things were mentioned?
2 A No. It was not a problem with them Mr.
3 Spencer or I would have put it in the contract, because I
4 do represent the owner of the house.
5 Q I am trying to direct your attention to
6 what happened after the contract was signed.
7 A I was not there. I'm sorry, I did not
8 have time to look thru all of my records but I was away at
9 closing and I was away a day or two before that and I do
10 not know what happened. I did not know of any of this until
11 some time later and I was very surprised.
12 Q Did Col. Pierce contact you after the
13 contract had been signed and advise you of any problems he---
14 A I told you, I don't remember that he
15 did. I was away though. If something came up right toward
16 the end of that ten day period I wasn't here ---
17 Q Well, didn't you---
18 A ---and I don't remember that he did.
19 Q Didn't you report back to Col. Pierce
20 that Mr. Plogger was going to take care of the water in the
21 basement?
22 A Sure but that was done the day the
23 contract was signed or immediately thereafter, and then I
24 was away and I do not know if we were contacted or anything
25 like that.

1 Q You said after the contract was signed
2 Col. Pierce mentioned these problems and you checked with
3 Mr. Plogger and ---
4 A No sir.
5 Q ---and Mr. Plogger said he would take
6 care of it, is that correct?
7 A The water was there when we went ---
8 Q I am not asking you about the water, I---
9 A Let me finish. And Marshall Plogger
10 came to the office and we signed the contract. If it had
11 been a major problem with Col. Pierce it would have been
12 put into the contract, but it was not a problem.
13 Q Well, it was problem enough that you
14 went to Mr. Plogger and he agreed to fix it, isn't that
15 right.
16 A Yes, but Col. Pierce was not that upset
17 about it or he would have so stipulated that it be put in
18 the contract.
19 Q Well, didn't Mr. Plogger assure him
20 that he would fix that problem?
21 A I suppose he did, but I told you I went
22 away, I do not know ---
23 Q Didn't you tell Col. Pierce that Mr.
24 Plogger said he was going to fix it?
25 A I got the information from Mr. Plogger

1 over the telephone and---

2 Q In other words, you did go back to Col.

3 Pierce and say those things would be taken care of, Mr.

4 Plogger said he would take care of them?

5 A All right, all of us talked together,

6 we talked on the phone, yes, but if it had been a major prob-

7 lem we would have put it in the contract Mr. Spencer. I

8 represent the owner of the house but I also represent the

9 purchasers, and it is my obligation to take care of both.

10 Q You don't deny that Mr. Plogger author-

11 ized you to tell Col. Pierce that he would take care of those

12 problems, isn't that true?

13 A I do not ---

14 Q Isn't it ---

15

16 MR. ROBEY: Let her explain herself

17 without interruption please.

18 MR. SPENCER: She is volunteering infor-

19 mation that I am not asking and I don't

20 think I have got to accept as my evi-

21 dence an answer that is not responsive

22 to the question I asked.

23

24 A But Mr. Spencer, I went away, I do not

25 know if they talked ---

COURT: Just a minute. I am going to let the witness finish her answer to the last question.

A I do not know if there was any conversation between the two after I left. The water was in the basement when we looked at the house, it was there when we signed the contract, it was not a major problem or it would have been put in the contract.

DAVID LAWHEAD

a witness called by and on behalf of the defendant, being duly sworn, testified upon his oath as follows:

LAWHEAD - DIRECT

By Mr. Robey:

Q State your name please.

A David Lawhead.

Q And your occupation?

A Building contractor and retail building supply owner.

Q How long have you been engaged in or associated with a business of that kind?

A About fourteen years.

1 Q At my request did you examine and deter-
2 mine -- and as you have heard from the testimony here, the
3 work that was done on the Pierce house that was sold to Mr.
4 and Mrs. Pierce by Mr. Plogger?
5 A Yes.
6 Q And you determined the work that Mr.
7 Coffey did on that house?
8 A I observed the family room.
9 Q Have you heard the testimony here today
10 in regard to what was done?
11
12 MR. SPENCER: Now wait a minute, when ---
13
14 Q When did you examine the Pierce home
15 approximately?
16 A I really don't know Mr. Robey. I went
17 with you and Mr. Spencer and Mr. Plogger and I don't know the
18 date.
19 Q Just approximately how long ago was it?
20 A It was recently.
21 Q In regard to the wall in the basement
22 which runs the whole length of the house did you look at
23 and examine that wall?
24 A Yes sir.
25 Q If you assume that wall was constructed

1 and then a small hair line crack came in it right after and
2 then remained there for nineteen months do you have an opin-
3 ion as to whether or not that wall would move and adjust any
4 further than it had adjusted at the end of nineteen months?
5
6 MR. SPENCER: Now I object to that ques-
7 tion Your Honor. I don't think that is
8 a complete hypothetical, first of all.
9 Second, I think he should ask the wit-
10 ness all of the facts about that wall
11 that are in evidence, including the
12 fact there was a lack of support and there
13 was no reinforcement.
14 MR. ROBEY: I agree if we were talking
15 about a hypothetical wall, or a wall
16 that he had not seen. What I am asking
17 him about now is a wall that he has seen
18 and observed its condition and I am ask-
19 ing him is whether or not in his opinion--
20 if the wall stays there nineteen months,
21 is that pretty much proof it is going to
22 stay there? If anything is going to go
23 wrong, is it going to go wrong in nine-
24 teen months? I am not talking about the
25 wall in my house - if I did I would have

1 to describe the wall in detail. I'm
2 talking about the wall he saw, so that
3 includes all of the necessary facts for
4 him to base his opinion on.
5 COURT: I will sustain the objection.
6 MR. ROBEY: We take exception to the
7 Court's ruling.
8
9 Q Mr. Lawhead, do you have an opinion
10 about this wall that you observed as to whether or not it
11 would move if it had not moved in nineteen months.
12
13 MR. SPENCER: Again I object Your Honor.
14 The witness has testified he only had an
15 opportunity to observe this wall some time
16 in the recent past. That was after the
17 wall was repaired and changed substan-
18 tially and he cannot testify about what
19 would have happened some year or a year
20 and a half before he saw it.
21 MR. ROBEY: He saw the wall Judge, it
22 is the same wall that was there earlier
23 and the same wall that was there nineteen
24 months later and if he can't express an
25 opinion on it I don't see how anybody else

could. They brought their experts in here and they expressed an opinion on the wall.

COURT: The court will sustain Mr. Spencer's objection.

MR. ROBEY: We take exception to the Court's ruling.

Q Mr. Lawhead, did you make an inspection of the entire premises and come up with some solutions to the problems that Mr. Pierce has complained of? If so, what solutions did you come up with? In regard to the problem of the cracked wall or of water leaking into the basement?

A Well, Mr. Robey, I observed that the crack was still in the wall. I t appears to be about an eighth of an inch crack, it does not run continuously along the front of the house but I observed this in the basement. You get into a touchy area when you do this, because it's just like talking to a doctor - every doctor has a different opinion - what I said was that the third step may have been necessary but it could have been delayed until a later date to see if that wall was going to move. The necessary action was taken on the outside in backhoeing the dirt and in rodding the concrete. Probably the best action was what Col. Pierce did himself with the transit, taking the slope away from the

1 house. The third step may have been necessary but it may not
2 have been necessary. Two frame walls were taken out and two
3 block walls were installed.
4 Q You made the statement that the best
5 action was done with the transit that Mr. Pierce did himself.
6 What did you mean by that?
7 A Well, the grade as Mr. Pierce described
8 his house, slopes away from the road and he does get a lot
9 of surface water there, and surface water is a problem. The
10 water was coming right to the foundation and now he has a
11 slope around the house about ten or fifteen feet out into
12 the yard. It appeared to me he changed the side wall the
13 same way.
14 Q It has been testified to here that not
15 one course of action was taken , but that three or four
16 courses of action were taken. One was the wall, another was
17 the steel rods, one was changing the pipe at the bottom,
18 another was changing the slope of the land and putting the
19 swale in. Which of those four is the cheapest?
20 A Mr. Robey, that's hard for me to say
21 which is the cheapest because I figure a job different from
22 Mr. Coffey or any other contractor.
23 Q Why do you figure it different?
24 A Well, at best - and it's like playing
25 roulette when you remodel an old house or tear down an

1 existing new construction, it's entirely different. This
2 was an existing house and the problem you couldn't see from
3 the surface. The problem to me was on the outside and I'm
4 not sure but that he doesn't still have water, from my obser-
5 vation. It appeared dry to me when we were there but it
6 appeared to me he may still have water in the basement, I
7 don't know. I would say that my solution would be to back-
8 hoe the front yard up first and replace the drain tile, if
9 it was as it was said this morning - that whatever solution
10 was put in there went into the pipe and the pipe was full of
11 this solution and the water couldn't drain.
12 Q What does changing the slope of the land
13 involve in labor and materials?
14 A I have no way of knowing. I don't have
15 a backhoe, I contract that out just like Mr. Coffey did. A
16 backhoe is about $18 an hour and I would assume it would take
17 a good day to do that front yard, not counting the front of
18 the stoop.
19 Q Well, would it cost $3,200?
20 A I don't know, I can't answer that. It
21 could cost that much, it could cost less and it could cost
22 more, it depends on the contractor and I'm not one to second
23 guess Mr. Coffey. I don't know honestly. The whole thing -
24 I think that one step could have been averted - it might
25 have been necessary later - and that's those two abutment

1 walls in the basement.

2 Q You say you think one step could have

3 been ---

4 A Possibly. It might have been needed

5 later but I say the first two steps should have remedied

6 that problem, along with what the Colonel done for himself

7 with the transit in the front yard.

8 Q Tell the jury about those steel rods

9 that were put in there, how they are supposed to be put in

10 and whether or not specifications are important along those

11 lines.

12 A I don't know what method they used. I

13 assume they inserted the steel rods from the outside of the

14 house by removing brick and pushing the rods thru the block

15 webs to the foot.

16 Q Let me stop you at that point. You

17 take the steel rods and put them down thru the block, all

18 the way down to the foot - is that enough?

19 A If they are not doweled into the floor

20 which I don't know whether they were or not - they had to

21 remove blocks at the base of that foundation to do this and

22 drill and push the rods into it. If that was not done con-

23 crete would have done as much as the rods. These rods are

24 not very expensive but if they are not inserted into the

25 footer they do nothing about the pressure pushing in, they

1 are just laying in there with the block and if the block
2 goes the rods go right with it.
3 Q Are you saying then that specifications
4 for doing that are necessary?
5 A I have to agree with Mr. Ravenhorst -
6 I don't think specifications are necessary for a job of that
7 kind but it depends on how it was done at the base as to
8 whether this man has got his money's worth or not right now.
9 If the footer was not doweled then the rods in them blocks
10 are not doing him one iota of good - the concrete is holding
11 it. What Mr. Coffey testified and Mr. Ravenhorst, they took
12 intervals of four to five foot and put a rod in and poured
13 concrete in the wall to reinforce it. He did state that
14 they doweled the floor for the two abutment walls. The
15 importance of that structure is the dowel in the concrete
16 and I don't know whether he did that on the outside or not.
17 It's not my house - but it's a rough job to do. If it was
18 done I don't think he made any money at $3,000.00. If it
19 wasn't done then the job of putting the steel in doesn't
20 amount to a hill of beans.
21 Q Why?
22 A There is nothing there. You could pour
23 concrete and hold the wall, you got the weight of the house
24 setting on the wall.
25

LAWHEAD - CROSS

By Mr. Spencer:

Q The cost of adding the steel rods like you indicated they did, putting the rods down and then pouring concrete in - the only difference in the cost we are talking about is just sticking the steel rod down in there?

A Well to install the steel rod properly you need a compressor and a jack hammer to drill that footing and there would be more labor involved - an eight foot steel rod is approximately $2.00.

Q And you just stick it down in the hole, is that right?

A That's right.

Q Would it not add some stability to this overall surface of the wall? For instance, if the wall did try to buckle in any part of the area, and you had, every four or five feet, concrete with a rod through it, would it not tend to support the whole wall?

A Well, the type rod -- it is pretty much accepted in the industry -- and it was probably a half inch rod and it has very little strength in that position. It has a tendency just to bend.

1 MARSHALL E. PLOGGER
2 a witness called by the defense, being duly sworn, testified
3 upon his oath as follows:
4
5 PLOGGER - DIRECT
6 By Mr. Robey:
7
8 Q For the record Mr. Plogger, state your
9 name.
10 A Marshall Edward Plogger.
11 Q And your occupation?
12 A I am a contractor.
13 Q When did you start construction of this
14 house that we are talking about here?
15 A November of '73.
16 Q When was this basement wall in question
17 installed?
18 A November of '73.
19 Q And at that time did you notice anything
20 about the wall in regard to cracks after it was put up?
21 A The day that we filled it in, which was
22 early December, the crack was in the wall.
23 Q Did the wall move any?
24 A It did not move. We had braces in it
25 and it cracked like all walls do.



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1 Q It cracked I guess when you back-filled
2 the dirt up against it?
3 A Yes.
4 Q How long did that house sit there
5 before you ended up selling it to Col. Pierce?
6 A That house set there nineteen months
7 prior to signing the lease.
8 Q Did you examine the wall in July of 1975?
9 A Yes sir.
10 Q When you sold him the house?
11 A Yes sir.
12 Q What was the condition of the wall as
13 compared to how it was the day you put it in?
14 A The crack was the same.
15 Q Was there any movement of the wall?
16 A No sir.
17 Q Any movement at all?
18 A No sir.
19 Q Did he make any complaint to you that
20 there was any movement of the wall?
21 A No sir.
22 Q What if anything did he complain to you
23 about?
24 A The first complaint I ever got from him
25 was in November when he had some trouble with the electrical



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1 system and I sent out an electrician who done the work on it
2 and it cost me $112.00 for work on the furnace. Later on -
3 in December I got a call from him or a letter, I done forget
4 which now, that he wanted something else done. And I said -
5 hey - I have done this work as a favor to you but what's
6 going on and he said the house was guaranteed for a year.
7 I asked where did he get that the house was guaranteed for
8 a year for I didn't know nothing about that, it's nothing in
9 writing and I never told him it was guaranteed for no year.
10 Then I got the letter from the architect - $4,800.00 and I
11 was out to the subdivision and I saw Mr. Pierce and I stopped
12 and talked to him. I said - Mr. Pierce what's going on and
13 he said the basement had a crack and I said - well, the crack
14 was there when you bought it, you knew it was there and he
15 said - yes I did. I said - you better not have no contractor
16 come in here and do any work because I have no intention of
17 paying that kind of money to have that work done.
18 Q Did you go in and look at the crack?
19 A He didn't ask me in to look.
20 Q After the house was sold to him did you
21 look at the crack at all?
22 A Yes sir I did.
23 Q When did you look at it?
24 A I was in it in November when I first
25 got the complaint about the back.

1 Q Did you look at the wall then?
2 A The crack was the very same.
3 Q Had it moved?
4 A No sir.
5 Q None at all?
6 A No sir. The crack is still there today.
7 I was out there a month ago and the crack is in the same
8 place, right at the meter base and it's still cracked.
9 Q Is there any difference in the crack
10 today than what it was when you sold it to him?
11 A No sir.
12 Q And what it was when you built it?
13 A It's the very same crack, it's about
14 an eighth of an inch. Just like the architect said, it was
15 an eighth of an inch when he inspected it and it's an eighth
16 of an inch today. It can be inspected again if they will
17 let you in.
18 Q It could be looked at right now, couldn't
19 it?
20 A Yes, if they want to go look at it, its'
21 there, the same crack.
22 Q From a structural standpoint, does the
23 crack create any problem?
24 A It does not create any problem. If he
25 would have let me, I would have gone in and put a few "L"

1 walls which would have not hurt anything and would have
2 corrected the whole problem. I know of walls in Rockbridge
3 County that had "L's" put in - the walls has been cracked
4 and they are still there today.
5 Q What would that cost?
6 A $200 or $300.00, just masonry and the
7 price of block.
8 Q Did you ever warrant or guarantee any-
9 thing to him at all until you got to closing down there at
10 Mr. Spencer's office?
11 A No sir. The only extra thing I signed
12 was that the house would not leak under normal weather con-
13 ditions which it never did do. It leaked just before he
14 signed the contract and Mrs. Herring called me and I said I
15 would check into it and have it fixed. I talked to B. B.
16 Ayer, which is a contractor and he told me he would charge
17 me $250 to dig up the foundation and see what the trouble
18 was. The day of closing I told Mr. Pierce this was available
19 or Sealtight was available for $300 or $350 and I would do
20 either of the two that he wanted.
21 Q Let me stop you there now. You say you
22 warranted to him in regard to leaks during normal weather.
23 Why did you limit it to normal weather.
24 A Because it had never leaked before until
25 we had that heavy rain prior to him buying it, in nineteen
months.

1 Q In nineteen months you had no ---
2 A No water whatsoever in that basement,
3 until prior to him buying it when we had the heavy rain.
4 Q That's the water they are talking about
5 when Ruth Ann took him out there and he saw it?
6 A Yes sir.
7 Q After promising to take care of the
8 situation from the standpoint of normal weather conditions,
9 you say you went to him and offered him several alternatives?
10 A Two, yes sir.
11 Q Did you give him his choice?
12 A I give him his choice and he accepted
13 the Sealtight. He said he was very familiar with it and that
14 would be satisfactory.
15 Q Didn't he accept that as ---
16 A He accepted the contract in his name
17 which I thought that released me of it - of the responsibil-
18 ity. It should have released me of responsibility. Why
19 would he sign a contract unless it meant releasing me of the
20 responsibility.
21 Q What two alternatives did you offer the
22 man?
23 A I offered to have a contractor come in
24 and dig the foundation up and see what the leaking problem
25 was, which was $250 and I told Mr. Pierce that.

1 Q For $250 you could have dug it up and
2 saw what the problem was?
3 A And straighten it out.
4 Q Who did you get that price from?
5 A B. B. Ayers. He's the man that dug the
6 foundation to start with, and Sealtight said they would do it --
7 I don't remember what that figure was -- $350 or whatever is
8 on that contract and I told Mr. Pierce that.
9 Q Are you talking about digging it up
10 like they went and dug it up?
11 A At the two corners.
12 Q And that was $250?
13 A $250.00 is exactly what he told me.
14 Q What did Col. Pierce say to that?
15 A He said he was very familiar with the
16 Sealtight and he would accept that contract.
17 Q What was the intentions of you all be-
18 tween you paid that $350 for the leaking?
19 A I thought my responsibilities were
20 through.
21 Q What did he say about your responsibil-
22 ities being through?
23 A He never said one way or another. He
24 never followed through on his responsibility.
25 Q How is that?

1 A He signed a contract with me saying he
2 was going to pay Sealtight to do it three times and he didn't
3 do it. Now is that my fault that he didn't follow through?
4 When I didn't know nothing about it how can I go up and
5 say - hey, you know, it's two more times yet. He didn't
6 follow through.
7 Q Did he ever make any complaint to you
8 that they had ---
9 A He has never called me saying that Seal-
10 tight had been once or twice or three times. I knew they
11 were one time because I was there the day they did it.
12 Q Did he ever come to you and say they
13 didn't get the job done? That he didn't like them, or ---
14 A He never said anything to me about it,
15 no sir.
16 Q Did he ever ask you to try to get them
17 back down there?
18 A No sir.
19 Q Have you inspected what they went in
20 there and did - those walls running through there? What if
21 anything extra did they add and get the benefit out of by
22 doing all of that?
23 A They got two cinder block walls that
24 they didn't need at all. I've seen cracks like that many
25 times and all it takes is about a three foor "L" which will

1 stop any movement - if there was any movement to start with.
2 Q What was the effect of those walls in
3 the basement? Did it subdivide the basement to make rooms
4 or what?
5 A It's two walls now that subdivided --
6 I had a wall in between the garage and the laundry room, a
7 partition wall and why they took that down I have no idea.
8 Now Mr. Ravenhorst - he may be a respectable man and he said
9 take it down. Well, all you got to do is run another wall
10 if another wall was necessary. That thing was bolted to
11 the floor, and I know because I helped to put it in there.
12 And they run another wall between the laundry room and the
13 work shop and what that wall was for, I don't know. And
14 about the trap. The trap I agree was my responsibility.
15 Q And how much was that?
16 A I sent a plumber out to do the trap
17 work which was $125.00, his price to me. However, Col.
18 Pierce would not let my contractor do the work.
19 Q He refused to let you do the work?
20 A He refused to let my plumber do the
21 work?
22 Q What explanation did he give to you
23 for refusing to let you fix what he now claims you should
24 have fixed?
25 A He wanted secure that the method he was

1 going to use was going to do it, which was approved by the
2 county inspector, that this would take care of it.
3 Q Mr. Plogger, can you tell the jury
4 whether or not, prior to backfilling that wall, and prior to
5 putting in the drain pipe and after putting in the drain
6 pipe, that property was inspected by anybody?
7 A This house was inspected three times by
8 the county inspector and approved by the county inspector
9 before anything was done, waterproofing, drain tile and all
10 situations.
11 Q Who would get the building inspector
12 there to approve this type of stuff?
13 A You couldn't even sell the house until
14 it had been approved. VEPCO wouldn't even put the current
15 in until it had been approved by the county inspector.
16 Q What standards does the county inspector
17 go by in approving construction?
18 A He has to give you a sticker before each---
19 Q What does he use for a standard of con-
20 struction?
21 A He has a method to go by, whatever the
22 restrictions are.
23 Q Is there anything else you want to tell
24 the jury about this law suit against you and what happened?
25 A The only thing I would like to say is

1 the only reason that I did the electrical work was trying to
2 be a gentleman, not because I was obligated to do it, because
3 my contract says I don't have to do anything.
4 Q What contract you talking about now?
5 A The contract that he signed for
6 $63,000 which I took a loss on too but that doesn't matter
7 about that. But the only reason I did spend the hundred
8 and some dollars was to pamper him was the only thing that
9 I did because I knew what kind of individual he was.
10
11
12 PLOGGER - CROSS
13 By Mr. Spencer:
14
15 Q Mr. Plogger, this written warranty that
16 has been --- do you deny you signed that?
17 A No sir, I do not.
18 Q And I'm sure you are a man of your word
19 and when you signed it you intended to live up to it?
20 A Exactly what it said.
21 Q Your attorney was present and helped
22 draft this document, isn't that correct?
23 A Yes sir.
24 Q And on his advice and after he explained
25 to you what it did you signed it, isn't that right?

1 A Yes sir.

2 Q So there was no question in your mind

3 when you signed that - you wanted to do what was right and

4 A Just exactly like it said, yes sir.

5 Q You indicated the wall had never leaked

6 before the contract with Col. Pierce was signed, is that

7 correct?

8 A I don't think I listed that because Ruth

9 Ann Herring called me prior to closing and---

10 Q I am talking about before the initial

11 sales contract with Col. Pierce was signed. Did you have

12 any knowledge that the basement leaked before that?

13 A Yes, it had leaked right there in the

14 corner,

15 Q After it was brought to your attention,

16 after the contract had been signed, you told Ruth Ann to tell

17 Col. Pierce that you would take care of that, didn't you?

18 A I certainly did.

19 Q The plumber that you were going to bring

20 out to fix the trap - you say that was your responsibility?

21 A Yes sir.

22 Q What was he going to do, do you know?

23 A He was going to put a running trap in,

24 which was acceptable to the county and which had been done

25 many times before and was successful.

1 Q Are you familiar with this Sealtight,
2 whatever it was, are you familiar with how that is done?
3 A I am generally familiar, yes.
4 Q You are aware that it is not uncommon
5 that when they pump that stuff in, it can fill up the drain
6 tile, isn't that right?
7 A Well, now does that become my respon-
8 sibility?
9 Q I am not asking if it is your respon-
10 sibility, I am just asking you if you are aware that it can
11 happen?
12 A No sir.
13 Q You don't know that can happen?
14 A No.
15
16 Defense Rests
17
18 HAROLD PIERCE
19 the plaintiff, recalled, upon his continuing oath testified
20 as follows:
21 PIERCE - ReDIRECT
22 By Mr. Spencer:
23 Q You heard Mrs. Herring testify about
24 the list of defects that she had written down. Do you know
25 when that list was made?

1 A Yes, now I do. That was the item Mr.
2 Robey handed me this morning and asked if it was my hand-
3 writing and I denied it was. I didn't realize what it was.
4 Prior to signing this contract, Mrs. Herring and I and my wife
5 went over the house that day and we noted down things that
6 we considered to be undesirable. Such things as no screens
7 on the patio doors. We also did notice then - thinking back
8 three years ago it is hard to remember exactly what happened--
9 we noticed the two damp spots on the wall of the basement.
10 There was no water on the floor of the basement but the wall
11 of the basement was a darker color due to wetness, behind
12 the switch box and also down in the corner. Also at that
13 time I noted that the carpet in this basement study was wet
14 along the west edge of it. I suppose I should have looked
15 into that further but I think I probably wrote it off in my
16 mind that rain had blown up underneath the patio doors or
17 something like that, I didn't realize that it was from inter-
18 ior leakage. Those items listed onthere were items we dis-
19 cussed as we went around and Mrs. Herring took notes on them.
20 Q Did she subsequently tell you that she
21 had checked with Mr. Plogger and that he would take care of
22 those items?
23 A I am trying to think if there was any
24 exception to that. They did find out where to get the screen
25 doors for the patio doors that were put in - of course the

1 dampness - not much was done about that as I recall, the damp-
2 ness as noted on basement walls as being seepage verse visa
3 leakage.
4 Q Regarding the crack in the wall that she
5 says you saw on that day. Is that the same crack in the
6 wall that Mr. Ravenhorst testified to, or was that another
7 wall?
8 A That could be. I don't recall exactly
9 whether it was that crack or -- there is a very prominent
10 crack down the west wall that is vertical and I do remember
11 standing and discussing that one with Mrs. Herring. This
12 other wall is actually around the corner from any door or
13 any light and it is very difficult to see without other light.
14 We may have discussed that one, or not. But as she indicated
15 a fine line crack on a mortar joint between blocks, like
16 that, is insignificant at that point.
17 Q Regarding the trap. Mr. Plogger says
18 you refused to let his plumber come and fix the trap. Tell
19 the jury what happened about that.
20 A There were apparently two different
21 estimates given to Mr. Plogger, thinking back. One was a
22 more expensive estimate which involved removing the shower
23 stall and installing a trap and a vent as required by the
24 county building code and this was an alternative way that
25 was proposed to Mr. Plogger. I discussed this with the

1 county engineer - I can't recall his name but he has since I
2 believe left here - and also Mr. Ravenhorst, and my under-
3 standing was from the county engineer that such a device was
4 not approved and Mr. Ravenhorst strongly recommended against
5 it in that his experience with this type devise is continuing
6 trouble once you get it installed - digging it out, cleaning
7 it out very frequently. It is installed outside the house,
8 in the line from the house to the septic tank. As such, it
9 really would not have solved the problem because you would
10 still have the odor within the line within the house, it
11 would still be coming through the shower.
12
13 PIERCE - ReCROSS
14 By Mr. Robey:
15
16 Q I understand that you are saying that
17 there were items that you wanted taken care of before you
18 signed this contract, is that right?
19 A Before we closed on the house.
20 Q Did termites have anything to do with
21 it?
22 A That was a requirement, yes.
23 Q You wanted a termite inspection, didn't
24 you?
25 A Actually I was not so much worried about

1 that, but at that time we were contemplating a VA loan and
2 that was required for a VA loan, so it was ---
3 Q It was something you wanted?
4 A Not really, you could see there were no
5 termites in a house like that.
6 Q But you asked for it?
7 A Because VA required it and we were in-
8 tending to apply for a VA loan.
9 Q Well, it was significantly important to
10 you to ask for it?
11 A Certainly, without it I couldnot have
12 gotten the loan.
13 Q So, knowing that your contract constituted
14 the entire agreement between you, you had that put in the
15 contract, didn't you?
16 A Well, I --
17 Q Look at the contract and see if you
18 didn't have the termites put in there.
19 A Let's see - all taxes shall be pro-
20 rated ...that's in, yes.
21 Q And it is right in there, before that,
22 that you say that everything else in regard to the house
23 has been inspected and unless you have provided above here,
24 everything else is OK.
25 A That's the way it is written.

Q And that's the way you signed it?

A Yes, that's the way I signed it

---

MR. ROBEY: Counsel for defendant renews the motion to strike the evidence for reasons stated.

COURT: The motion will be over-ruled.

MR. ROBEY: Exception will be made.

---

MR. ROBEY: Attorney for the defendant objects to the giving of Instruction 3 upon the grounds that it contains a statement that forebearance to pursue a claim is consideration. Objection is based upon the fact that there is no evidence before the jury that Col. Pierce did forebear any claim because he had no claim as a matter of law.

MR. SPENCER: We object to the giving of Instruction B on the grounds that the Instruction states that the mere fact of a promise he carries through would put an obligation which he has already obligated to carry through does not constitute valid consideration and that therefore he failed to give up something of value which he was not already obligated to give up and there was no consideration



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1 is not supported by the evidence. The evidence is clear
2 that Col. Pierce did give up something for value and the
3 Court essentially ruled on that when the Court over-ruled
4 the defendant's motion to strike on the grounds that there
5 was no consideration.
6 Instruction C was objected to by the plaintiff
7 on the grounds that it is contrary to the law and the evi-
8 dence, and in particular that the jury was instructed to
9 find whether or not it was a legal obligation of Pierce
10 to close the transaction and we submit that the legal de-
11 cisions are for the Court to make and that instruction is
12 asking the jury to make a legal decision. Further, it is
13 not supported by the evidence that has been introduced. The
14 evidence is clear that Col. Pierce did not have a legal
15 obligation to go forward with the closing at the time it
16 was scheduled on July 25, 1975.
17 Plaintiff objects to the giving of Instruction
18 E because there is no evidence at all that the plaintiff
19 had in any way attempted to enhance his damages .
20 Likewise, on Instruction G, there is no evidence
21 on which the jury could properly find that Pierce accepted
22 the agreement with Acme Weatherproofing Company in satis-
23 faction of the alleged warranty. The defendan't own
24 testimony was that he felt he was meeting his obligation
25 but that he didn't know how Col. Pierce felt about it, that



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1 all he did was ask him to sign it, and Col. Pierce signed it.
2 There is no evidence before the jury on which Instruction G
3 could be based.
4 Further, plaintiff objected to the refusal of
5 the Court to grant an instruction at the request of the
6 plaintiff, directing the jury that there was consideration
7 in this case as a matter of law and that it should be their
8 duty to find for the plaintiff if if the jury found that
9 the warranty had been breached and that damaged had occurred
10 as a proximate result of the breach of the warranty.
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JURY INSTRUCTION NO. 1

In considering the weight to be given to the testimony of expert witnesses, whose opinions differ, you may consider the ability and character of the witnesses, their actions upon the witness stand, the weight and process of the reasoning by which they support their opinion, their possible bias in favor of the side for which they testify, their relative opportunities for study or observation of the matters about which they testify, and any other matters which serve to illuminate their statements.

Given NB



3

JURY INSTRUCTION NO. 2

The Plaintiffs have the burden of proving all of the elements of their case by a preponderance of the evidence. If you believe that the Plaintiffs have proven by a preponderance of the evidence that the Defendant, Marshall Plogger, gave a warranty to the Plaintiffs for valuable consideration, as defined in another instruction of the Court, and that he breached that warranty, then you shall find for the Plaintiffs, Col. and Mrs. Harold G. Pierce and against the Defendant, Marshall Plogger in an amount equal to the reasonable cost, as proved by a preponderance of the evidence, of curing the defect or defects which constitute the breach of warranty.

Given RB

8

JURY INSTRUCTION NO. 3

Consideration is the cause, motive, price or impelling influence which induces a contracting party to enter into a contract; the reason or material cause of a contract.

Consideration can be anything of value, however small, received by the person making the promise or any detriment to the person to whom the promise is made. Forbearance, or the promise of forbearance, to prosecute a well-founded or doubtful claim is a sufficient consideration for a contract.

The forbearance to prosecute an invalid, worthless or unfounded claim is not a consideration recognized by law as valuable, but whether or not the claim is doubtful must be measured by the state of the knowledge of the person who at the time has to judge and make the concessions and not by the state of the law as it is ultimately discovered to be.

JURY INSTRUCTION NO. 4

When a party has the burden of proof on an issue, then he must prove that issue by the greater weight of the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

JURY INSTRUCTIONS NO. 5

The Court instructs the Jury that:

The burden on the plaintiff to prove his damages by a preponderance of the evidence or with reasonable certainty does not require that he prove with mathematical precision the exact sum of his damage, but only that he furnish evidence of sufficient facts and circumstances to permit an intelligent and probable estimate thereof.

INSTRUCTION A

The Court instructs the jury that there is no burden upon Plogger to prove that he does not owe money to Pierce. The burden is upon Pierce to prove by a preponderance of the evidence that he was damaged by any warranty by Plogger. And if Pierce fails to prove with reasonable certainty the damages sustained by him as the result of any alleged breach of warranty by Plogger, then you shall find your verdict in favor of Plogger.

Jury RD

INSTRUCTION B

A valid contract or commitment can not be established unless it is based upon valuable consideration. That is to say, there must be some benefit to the promisor (Plogger) or detriment to the promisee (Pierce). The mere fact that a promisee carries through upon an obligation which he has already obligated to carry through does not constitute valuable consideration.

Therefore, if you fail to find that Pierce gave up something of value to Plogger which he was not already obligated to give up, then there was no consideration for the alleged warranty and you shall find your verdict in favor of Plogger.

Given AB

INSTRUCTION C

The Court instructs the Jury that if you believe from the evidence that at the time the transaction was to be closed between Pierce and Plogger it was the legal obligation of Pierce to close the transaction, his agreement to do so can not constitute valuable consideration as referred to in other Instructions of the Court.

Given RB

INSTRUCTION D

Damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is upon the Plaintiff to prove by a preponderance of the evidence or with reasonable certainty any item or element of damage claimed and that is properly attributable to the alleged breach of contract; unless such item or element of damage is thus proven by a preponderance of the evidence or with reasonable certainty, then the Plaintiff can not recover for such item or element.

Gen NB

INSTRUCTION E

The Court instructs the Jury that it is the duty of one who claims to have suffered damages by way of a breach of contract to use reasonable care and diligence to avoid loss and to minimize or lessen the resulting damage, if any.

A Plaintiff cannot recover for damages which are the result of his active and unreasonable enhancement thereof or which are due to his failure to exercise such care and diligence as required.

Given MB

9

INSTRUCTION G

The Court instructs the jury that if you believe from the evidence that Pierce was furnished the service agreement by Plogger with Acme Weatherproofing Company with an intent to comply with the alleged warranty and if you further believe that Pierce accepted the agreement in satisfaction of the alleged warranty then you shall find your verdict in favor of Plogger and against Pierce.

45

Verdict for the Defendant

We, the jury, on the issue joined, find in favor of the defendant.

Clayton H. Goodlow
Foreman

VIRGINIA

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

| | | |
|---|---|---|
| COLONEL HAROLD G. PIERCE and BETTY R. PIERCE, Plaintiffs, | ) | |
| v. | ) | FINAL ORDER |
| MARSHALL E. PLOGGER, Defendant. | ) | |

THIS CAUSE CAME on this day to be heard on Motion of the Plaintiff for the entry of a Final Order herein;

This cause having come before this Court on appeal by the Defendant, Marshall E. Plogger, from a Judgment rendered in the General District Court of Rockbridge County in favor of the Plaintiffs and against the Defendant in the amount of THREE THOUSAND THREE HUNDRED EIGHTY-FIVE AND 50/100 ($3,385.50) DOLLARS on the 26th day of June, 1978, plus Court costs of FIVE AND NO/100 ($5.00) DOLLARS; this matter having been tried before a jury impaneled on November 2, 1978, in the Circuit Court of Rockbridge County, the evidence introduced at the trial thereof including Exhibits marked one (1) through six (6) and Exhibits A and B, and the oral testimony having been recorded and transcribed by Marjorie O'Roark, the Court reporter, and the transcript thereof having been filed in the Clerk's Office of the Circuit Court of Rockbridge County on the 27th day of December, 1978, and identified on its cover page by the style of this cause, and bearing the certificate of the said Court reporter, and containing one hundred forty (140) pages; it is hereby ORDERED that the foregoing documents and transcript are hereby made part of the record;

Upon conclusion of the trial on November 2, 1978, the jury having returned its verdict in favor of the Defendant, the Plaintiffs made a Motion to set aside the jury's verdict on the grounds that the jury's finding was not supported by the law or the evidence applicable to the case, and on the grounds set forth in the Plaintiffs' objections to the instructions to the jury, which Motion was overruled by the Court and to which ruling the Plaintiffs, by counsel, excepted.

Thereafter, the Court having entered an Order dated January 8, 1979, making the transcript of the trial, as aforesaid, a part of the record and overruling Plaintiffs' Motion to make Exhibits B through J of its Motion part of the record, which Order is hereby ratified and confirmed by the Court and to which the Plaintiffs objected to the exclusion of the said Exhibits B through J from the record.

The Plaintiffs having heretofore filed its Notice of Appeal to the Supreme Court herein, and the Petition for Appeal having been returned by the Supreme Court of Virginia by its Order dated April 10, 1979, in Record No. 790184 and Circuit Court No. 3907 on the grounds that a final judgment had not been entered herein and the Plaintiffs coming this day, by counsel, and making Motion for the entry of a final judgment herein;

UPON CONSIDERATION WHEREOF, the Court doth hereby enter its Final Order herein, overruling the Plaintiffs' Motion to set aside the verdict of the jury, and does affirm the finding of the jury and enters by this Order a final judgment in favor of the Defendant herein, to which ruling the Plaintiffs timely excepted. This Order is final.

ENTER: 161

DATE: 6/11/79 (S), Judge



ES
WFORD
NE
STON ST.
NIA 24450

SEEN:

W. T. Robey, III, Esquire, p.d.
Post Office Box 669
Buena Vista, Virginia 24416
Counsel of Record for Defendant

BY: /S/

SEEN AND OBJECTED AND EXCEPTED TO:

Spencer, Crawford & Osborne, p.q.
31 West Washington Street
Lexington, Virginia 24450
Counsel of Record for Plaintiffs

BY: /S/

FORD

ON ST.

24450

VIRGINIA

IN THE CIRCUIT COURT OF ROCKBRIDGE COUNTY

| | | |
|---|---|---|
| COLONEL HAROLD G. PIERCE and BETTY R. PIERCE, Plaintiffs, | ) | NOTICE |
| v. | ) | OF |
| MARSHALL E. PLOGGER, Defendant. | ) | APPEAL |

COME NOW, the Plaintiffs, Colonel Harold G. Pierce and Betty R. Pierce, and pursuant to Rule 5:6 of the Rules of the Supreme Court of Virginia, give this, their Notice of Appeal, to that certain Order of Final Judgment heretofore entered herein on June 11, 1979, confirming the verdict of the jury heretofore impaneled herein for the hearing of evidence in the trial of this cause on November 2, 1978.

A transcript of the testimony, exhibits and other incidents of the case have already been filed and made part of the record.

Respectfully,

COLONEL HAROLD G. PIERCE and
BETTY R. PIERCE

By Counsel

Spencer, Crawford & Osborne, p.q.
31 West Washington Street
Lexington, Virginia 24450

BY:
Thomas C. Spencer
Counsel of Record for Plaintiffs, Appellants

FFICES
CRAWFORD
ORNE
HINGTON ST.
RGINIA 24450

## ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to allow the plaintiffs to introduce evidence of the breach of the express oral warranty and the damages suffered as a result of that breach, and Defendant's attorney's letter of March 26, 1976.

2. The trial court erred in granting instructions B, C, E and G.

3. The trial court erred in refusing to instruct the jury, as requested by the plaintiffs, that there was consideration in this case as a matter of law, and to find for the plaintiffs if the jury found that the warranty had been breached and that damages had occurred as a proximate result of the breach of the warranty.

4. The court erred in overruling the plaintiffs' motion to set aside the verdict of the jury as contrary to the law and the evidence.

Lexington, Virginia June 2 19 76
24450

Col. Harold Pierce

R. F. D. #2

Lexington, Va. 24450

IN ACCOUNT WITH

# W. W. COFFEY & SON, INC.

*Building Contractors*

O. Box 792

Telephone 463-3148

Work to reinforce front foundation wall including excavation; removing & replacing brick stoop; new masonry walls in basement to support front wall, etc. (estimate $ 3,000.00) - - - - - - - $ 2,870.00

Removing & replacing shower stall to install trap (estimate 400.00) 290.00

$ 3,160.00

11/2/78 NB

608

Lexington, Virginia 24450 December 16 19 76

Col. Harold Pierce
R. F. D. #2
Lexington, Va. 24450

IN ACCOUNT WITH

W. W. COFFEY & SON, INC.

*Building Contractors*

TELEPHONE 463-3148

BOX 792

To removing rain conductor pipes from foundation drain and installing new storm drain line . . . . . $ 225.50

2 11/2/78 RB

36

IRGINIA ASSOCIATION OF RI LTORS

# REAL ESTATE PURCHASE CONTRACT

*(This is a legally binding contract; if not understood, seek competent advice)*

REALTOR

CONTRACT OF PURCHASE made in triplicate as of July 12, 19 75,
ng Harold G. Pierce and Betty R. Pierce, husband and wife (herein called "Purchaser"),
Marshall E. Plogger (single) (herein called "Seller"),
Ruth Agnor Herring (herein called "Realtor"),
vides that Purchaser agrees to buy through Realtor, as agent for Seller, and Seller agrees to sell the following described real estate, and all rovements thereon, located in the County XXXX of Rockbridge, Virginia (all herein called "the property"):
that certain house and lot of land situate in the Red Hill Manor Subdivision of Rockbridge County, Virginia, on Lot No. 2, as recorded in Deed Book____, Page____, and in Plat Book 5, Page 106 in the Clerk's Office of Rockbridge County, Virginia.

, and more commonly known as Sheperd Drive
(street address).

1. The purchase price of the property is ----sixty-three thousand dollars and xx/100--------
ollars ($ 63,000.00), and such purchase price shall be paid as follows:

| | |
|---|---|
| $22,000.00 | cash at settlement |
| 40,000.00 | financing from Seller |
| 1,000.00 | with this contract |
| $63,000.00 | total sales price |

See attached sheet.

2. If either F.H.A. or V.A. financing is involved in this transaction, one of the paragraphs on the reverse hereof shall be a part of this Con-ract of Purchase if such paragraph has been executed by both Purchaser and Seller.

3. Purchaser has made a deposit of ---one thousand dollars and xx/100----Dollars ($ 1,000.00 ) ith Realtor, receipt of which is hereby acknowledged, and such deposit shall be held by Realtor in escrow until the date of settlement and hen applied to the purchase price, or returned to Purchaser if the title to the property is not marketable.

4. Seller agrees to convey the property to Purchaser by General Warranty Deed with the usual English covenants of title and free and clear rom all encumbrances, tenancies, liens (for taxes or otherwise), except as may be otherwise provided above, but subject to applicable restrictive ovenants of record. Seller further agrees to deliver possession of the property to Purchaser on the date of settlement and to pay the expense of reparing the deed of bargain and sale and the recordation tax applicable to grantors.

5. Settlement shall be made at the offices of Realtor or at Attorney's Office on or before July 25, 1975, or as soon thereafter as title can be examined and necessary documents prepared, with allow-nce of a reasonable time for Seller to correct any defects reported by the title examiner.

6. All taxes, interest, rent, and F.H.A. or similar escrow deposits, if any, shall be prorated as of the date of settlement.

7. All risk of loss or damage to the property by fire, windstorm, casualty, or other cause is assumed by Seller until the date of settlement.

8. Purchaser and Seller agree that Realtor was the sole procuring cause of this Contract of Purchase, and Seller agrees to pay Realtor for vices rendered a cash fee of 5% per cent of the purchase price. If either Purchaser or Seller defaults under this Contract of le, such defaulting party shall be liable for the cash fee of Realtor and any expenses incurred by the non-defaulting party, including orneys' fees, in connection with this transaction and the enforcement of such Contract.

All taxes shall be pro-rated as of date of sale. All costs of inspection and treatment for termites and powder post beetles shall be borne by the Seller and a certificate of guarantee issued by the exterminating company.

9. Purchaser represents that an inspection satisfactory to Purchaser has been made of the property, and Purchaser agrees to accept the operty in its present condition except as may be otherwise provided in the description of the property above.

10. This Contract of Purchase constitutes the entire agreement among the parties and may not be modified or changed except by written strument executed by all of the parties, including Realtor.

11. This Contract of Purchase shall be construed, interpreted, and applied according to the law of the State of Virginia and shall be nding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

WITNESS the following signatures and seals:

167

Marshall E. Plogger (SEAL) Seller — Harold G. Pierce (SEAL) Purchaser

property in its present condition except [illegible]

10. This Contract of Purchase constitutes the entire agreement among the parties and may not be modified or changed except by written instrument executed by all of the parties, including Realtor.

11. This Contract of Purchase shall be construed, interpreted, and applied according to the law of the State of Virginia and shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

WITNESS the following signatures and seals:

Marshall E. Cloyger (SEAL) Seller — Harold L. Pence (SEAL) Purchaser

(SEAL) Seller — Betty R. Pence (SEAL) Purchaser

(SEAL) Realtor

Deposit Rec'd $1,000.00

Check Cash

Sales Agent:

The foregoing form may only be used by members in good standing of the Virginia Association of Realtors. Expressly prohibited are the duplication or reproduction of such form, or the use of the name "Virginia Association of Realtors" in connection with any written form, without the written consent of the Virginia Association of Realtors.

37 Form VAR-600 Rev. Ex 3 11/2/78 RB

July 12, 1975

The following points of agreement between the parties are hereby made a part of the Real Estate Purchase Contract between Harold G. Pierce and Betty R. Pierce, husband and wife, and Marshall E. Plogger (Single):

The purchasers shall make a total down payment of $23,000.00 (this includes the $1,000 deposit with the contract), and the balance of the purchase price shall be financed by the Seller. Such purchase price shall be amortized monthly over a period of twenty years from and after the date of closing at the rate of 8½% interest, the monthly payment being in the amount of $347.13, secured by a Deed of Trust in the amount of $40,000, which shall be a first mortgage upon such property. The said Deed of Trust shall reserve to the purchasers the right of partial or total prepayment of the amount due, with any such partial or total prepayment to be without penalty.

Harold G. Pierce

Harold G. Pierce

Betty R. Pierce

Betty R. Pierce

Marshall E. Plogger

Marshall E. Plogger

FOR VALUE RECEIVED, I hereby warrant the basement in the home on Lot 2, Red Hill Manor, Unit 2, sold by me to Mr. and Mrs. Harold G. Pierce, to be free of defects in workmanship and materials and promise to take such measures immediately to correct water leakage so that the basement will not leak as the result of normal precipitation experienced in the geographical area. Also, the air conditioner will be corrected to acceptable cooling performance.

Marshall E. Plogger
MARSHALL E. PLOGGER

Ef 4 11/2/78
NB

Exhibits # 5 and 6

exhibits 6

exhibits 5

2014 52nd Street
Lubbock, Texas 79412
April 1, 1975

(Mrs.) Ruth Agnor Herring
16 West Washington Street
Lexington, Virginia 24450

Dear Mrs. Herring,

This is just a short note to inform you that I have accepted a position at Virginia Military Institute. It is my intention to arrive in Lexington on or about 15 July 1975.

I still like everything about that house in Red Hill Manor Subdivision; however, I do not feel that I will be in a position to make a decision prior to my arrival.

Sincerely,

Harold G. Pierce

Harold G. Pierce
LtCol, USAF (Ret)

1/2/75 MB

CME WEATHERPROOFING CO.
O BOX 7161 24019
DANOKE VA
HONE 362 4731

Survey 14
9-13-
Dan-Bat

ame Harold Pierce

Date 7-26-75

dress VMI (work)

Phone ~~261-2449~~
463-9612

ty Lexington Va.

IS AGREEMENT ENTERED INTO BY THE ABOVE HEREIN REFERRED TO AS THE PURCHASER AND ACME ATHERPROOFING COMPANY HEREIN REFERRED TO AS COMPANY CONSISTS OF THE FOLLOWING TERMS D CONDITIONS AND NO OTHER UNLESS WRITTEN HEREIN.

MPANY to furnish all labor, materials and equipment needed to pump into the exterior il surrounding the basement wall bentonite a expandable mineral in the contract area tlined below from the footing up to grade level at intervals of 12 to 18 inchs, water d electric power needed for installation to be furnished by the purchaser

PANY does not assume any responsibilty for water entering premises from chimneys or eps, floor, over windows above masonry walls or for any damage to the walls, paneling aster, carpeting, interior construction or any external damage whether or not damage incurred during the preformance of this agreement or as a result thereof, due tothe y varying types and methods of construction and pre-existing conditions companydoes represent this process to be 100% effective against all leaks and seepage.

SERVICE WARRANTY

PANY agrees that in the event of any leaks or seepage in the contract area outlined ow to (without charge to the purchaser) repump the point of leaks or seepage again at day intervals up to 3 times if needed over a period of 1 year from installation.

Cash Price $ 3500

Deposit $ —

Balance $ 3000
Payable on completion

ce to purchaser, you are entitled to and should recieve a copy of this agreement at time you sign it. You have the right under Federal law to cancel this agreement by fying company by certified mail within 3 business days after signing and any leins ages, security interest on your property are automatically void and you areentitled recieve a refund of any down payment or other consideration.

ATHERPROOFING Co.
Dan P. Manuel

e

Purchaser Marshall E. Phogan

Purchaser: Harold L. Pierce

Ex B 11/2/75 NB

WILLIAM T. ROBEY, III
ATTORNEY AT LAW
BUENA VISTA, VIRGINIA 24416
P.O. BOX 669
AREA CODE 703
TELEPHONE 261-2575

March 26, 1976

Mr. Thomas C. Spencer
Spencer and Crawford
Attorneys at Law
31 West Washington Street
Lexington, Virginia 24450

Re: Pierce v Plogger

Dear Tommy:

You are advised that Mr. Plogger stands ready, willing and able to repair any defects, if any, that are his responsibility in the sale of the house to Colonel and Mrs. Pierce. We will consider your hiring another contractor to do this as a refusal to have Mr. Plogger do the work.

We have no detailed knowledge of any existing problem and find it very difficult to fix or repair something that we do not know about. Therefore, if you have any complaint then furnish us in writing the details of same so that Mr. Plogger can make the repairs.

Of course, Mr. Plogger would not do any work which related to maintenance and upkeep of the existing property or would he be willing to do any work which would amount to an improvement of the existing property.

Sincerely yours,

W. T. Robey, III

syj
CC: Mr. Marshall E. Plogger

Entered by
Refused 11/2/78
NB